
ACCESS DISPUTES COMMITTEE

To:	From: Committee Secretary
Abellio Scotrail Ltd	Floor 8
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First Greater Western Ltd	London NW1 2DN
Transport for London	
GB Railfreight Ltd	Tel: 020 7554 0601
East Coast Main Line Company Ltd	Fax: 020 7554 0603
XC Trains Ltd	e-mail: sec.adc@btconnect.com
Arriva Rail North Ltd	
Network Rail Infrastructure Ltd ("Network Rail")	Ref: ADC/TTP
	Date: 11 April 2017

Dear Sirs

Timetabling Disputes TTP1064, TTP1065, TTP1066, TTP1068, TTP1069, TTP1071, TTP1073 and TTP1075

Firstly, may I advise you that Serco Caledonian Sleepers Ltd has decided not to pursue its dispute (reference TTP1070) any further and is no longer a Dispute Party. Also, Stagecoach South Western Trains Ltd has settled its issues with Network Rail and has withdrawn its dispute (reference TTP1072) but will remain an interested party in the Timetabling Panel proceedings.

Moving on, the Hearing Chair has reviewed the letter of 7 April 2017 from Eversheds Sutherland (International) Ltd ("Eversheds"), acting for Network Rail. He welcomes the fact that Network Rail is not raising any procedural points, but considers nonetheless that it is necessary to respond to a number of Eversheds' comments. He has instructed me that this note is to be circulated to all the Dispute Parties and also placed on this Committee's website along with Eversheds' letter.

Notice of Dispute from DB Cargo (UK) Ltd

Eversheds point out that DB Cargo's Notice of Dispute does not comply with the Access Dispute Resolution Rules, which was the point made by the Hearing Chair in his Directions Letter of 4 April 2017. Dispute Parties should obviously comply with the Rules.

The Hearing Chair accepts that he has not yet heard Network Rail's submissions, but nonetheless he thought it helpful to point out at an earlier stage that Notices of Dispute are only served when Access Beneficiaries and Network Rail recognise that the point(s) at issue cannot be resolved in discussion within the time permitted by the contract (in the case of Timetabling disputes, this being Part D of the Network Code) – discussions which frequently continue after the dispute has formally commenced.

The Hearing Chair also pointed out that DB Cargo's two issues are being pursued in these Timetabling Disputes by other Dispute Parties. It is for this reason that his initial view was that Network Rail would not be prejudiced by any inadequacy in DB Cargo's Notice of Dispute. Under the Rules, DB Cargo would, of course, have been able to join as a Dispute Party at any later stage in the dispute process after becoming aware of the issues before the Panel.

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Procedural irregularities, etc

The Hearing Chair finds any suggestion that procedural irregularities should be waived or allowed "in circumstances where unfairness results or may result" surprising, as it appears completely to misunderstand what was said on this point in the Directions Letter of 4 April 2017. In fact the Hearing Chair has no experience of procedural irregularities being waived in this jurisdiction, not least because in the disputes which he has chaired (including those which did not reach a hearing) no Party has previously raised any procedural issues needing to be determined. These Disputes are already exceptional in relation to this issue.

The Hearing Chair does not understand why points are being raised suggesting that any Party might seek to obtain relief beyond the remedies requested in its Sole Reference Document. Rather to the contrary, the Hearing Chair has queried whether some of the relief sought should be granted, as in some cases Parties are in effect requesting an order re-stating existing rules or principles. The Panel will clearly consider carefully any submission that relief sought is beyond the powers of a Timetabling Panel.

It is not clear why the integrity and impartiality of the Hearing Chair is being impugned by the suggestion that he has reached conclusions on any substantive matters at this stage. This point appears in paragraph 8.1 of Eversheds' letter and is effectively repeated in paragraph 10. How can the Hearing Chair have done so without seeing Network Rail's Response statement and heard the Parties? The Hearing Chair sees no reason to recuse himself in response to a vague allegation of this kind, for which he does not believe there is a shred of evidence.

While Network Rail is clearly unhappy with virtually every case management decision made to date, those decisions are made to assist in identifying the issues to be determined and these powers are exercised impartially and solely in the interests of achieving a timely – but over-ridingly fair – determination. The Disputes have been linked because some of the points are unarguably common between Access Beneficiaries, three Parties dealing with Route LN100 is one example, two Parties raising the same points concerning Stratford being another. From the early stages there has been a perception that there are shared concerns about the Timetable Planning Rules in dispute, but that has never been more than a perception and if Network Rail shows that the perception is incorrect the Hearing Chair does not doubt that the Panel will be so persuaded.

Other matters

To the extent that Network Rail is unhappy with the processes currently adopted under the Access Dispute Resolution Rules which have been approved by the Office of Rail and Road it is reminded once more that there are proper procedures for seeking to have these amended.

The argument about case management powers set out in paragraph 14 of Eversheds' letter is now redundant, but regrettably seems once again to be based on a misunderstanding. It may be helpful to remind all Parties of the duty of any Timetabling Panel to, '...take the initiative [where appropriate] in ascertaining the facts and law...'. A Panel sometimes explores an otherwise unanticipated line of questioning which might affect the scope of a claim, or provide an alternative ground of defence.

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Any substantive matter relating to a hearing raised with the Secretary is automatically passed on to the Hearing Chair and is circulated to Parties as a matter of course, and to meet the obvious requirement of fairness. Minor procedural queries do not fall into this category. The Hearing Chair is giving no direction to the Secretary in relation to these Disputes on the lines requested by Eversheds in its letter of 7 April 2017, as once again the objections now being raised – for the first time in a history of 1,099 Timetabling Dispute references, 53 Access Dispute Panel references (from 2005 - 2010) and 31 Access Dispute Adjudication references (since 2010) – are those which should be raised to the Class Representative Committee with supporting proposals to amend the Access Dispute Resolution Rules.

Yours faithfully



Tony Skilton
Committee Secretary

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By Email

Dear Sir,

Part D Claims Ref: TTP1064; TTP1065; TTP1066; TTP1069; TTP1070; TTP1071; TTP1072; TTP1073; TTP1075 (each of the Claimants in each of these claims, "a Claimant", together "the Claimants")

1. We refer to your letters dated 4 April 2017 and 5 April 2017 and the Directions contained therein.

Procedural Objections

2. You have directed that Network Rail is to confirm by 12 noon today whether it is pursuing any procedural objection to hearing the substance of the Claimants' claims and, if so, to particularise them sufficiently to allow them to be addressed.
3. As indicated in our 29 March 2017 letter, we have reflected on the adequacy of the Claimants' Notices of Dispute in the context of our analysis of the Sole Reference Documents ("**SRD**") now received.
4. The DB Cargo Notice of Dispute fails to comply with the express requirements of ADRR Chapter B paragraph 3(c) in that it does not "*summarise the basis of the claim including a brief list of issues*". This is the breach to which we refer.
5. The provision exists to ensure there is clarity as to the basis of any claim and the issues which are being appealed to the Timetable Panel ("**TTP**"), and which must be determined. Such clarity is necessary in any efficient dispute resolution procedure. It is particularly relevant in the TTP procedure where the procedural timetable is tight. A lack of clarity as to a Claimant's case in circumstances where the dispute resolution procedure is tight, risks prejudicing the procedure.
6. In your letter you set out your views that the point lacks merit, albeit Network Rail has not as yet formally made its submissions on the issue. Further, you: (i) require Network Rail to particularise the issues prior to noon today, at a time when Network Rail is preparing an unprecedented number of Responses in relation to Heads A and B claims in an extremely short period of time; and (ii) require the point to be heard pre-20 April 2017 in circumstances where: timetabling a hearing will be difficult because of the Easter holidays; Network Rail must address the Heads C and D claims; and prepare for the 20 April 2017 hearing. Consequently, and without prejudice to the merits of the point that the DB Cargo Notice is deficient, for these reasons, Network Rail has decided not to pursue the point.

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7. However, Network Rail records its clear expectation that in the future, Timetable Participants wishing to appeal a timetabling decision are expected to properly comply with both Part D paragraph 2.2.8 and ADRR Chapter B paragraph 3 (including paragraph (c)) fully. We do not consider this to be "*procedural quibbling*" but necessary to ensure that an appeal and the ADRR operate in a manner which ensures proper process is adhered to and to ensure Network Rail is able to address claims it receives in the most comprehensive manner possible. In particular, Network Rail does not agree that procedural irregularities should be routinely waived, particularly in circumstances where unfairness results or may result.
8. Network Rail has a number of other concerns which might be described as jurisdictional matters. These are not procedural objections as such and so are not covered by your letter of 4 April 2017, but in light of the Direction in that letter and its general approach, we take the opportunity to inform you of them:
 - 8.1 Network Rail has a number of concerns about: the extent to which there are truly common issues of principle between the Claimants; the extent to which the TTP is properly able to treat the disputes together; any suggestion (if it is to be made, which is unclear) that any Claimant may seek or obtain relief other than that specifically asked for by that Claimant and/or may rely on any matter not specifically set out in its own SRD; and whether you have reached conclusions in respect of any of these matters without having had the benefit of Network Rail's Response and the hearing; and
 - 8.2 Network Rail also considers that much, if not all, of the relief sought by the Claimants goes well beyond that which the TTP has power to order.
9. These points will be set out in Network Rail's Response. We do not believe that they can be resolved in isolation, they can only be properly addressed as part of the 20 April 2017 hearing. These are points on which the TTP will need to deliberate and determine only after having had the benefit of Network Rail's Response and the hearing.
10. We note in this regard your letter of 5 April 2017 in which you refer to your "*assessment that so many of the claims on the substantive issue of non-consultation are so closely aligned*". For reasons that we will set out in Network Rail's Response, we do not accept that assessment and we would ask the TTP to refrain from reaching any concluded views on such matters until such time as Network Rail has served its Response.

Other Matters

11. We refer to your point that Network Rail should have raised any objection to the DB Cargo Notice of Dispute within 5 days of the ADC Secretary's letter notifying of registration of the dispute. We presume you are referring to the Secretary's responsibilities under ADRR Chapter H paragraph 11 and the 15 March 2017 (16:17 hrs) email. For the record, the point is not accepted and in particular it is not accepted that either paragraph 11 requires Network Rail to make such a disclosure or that the Secretary requested Network Rail to make such a disclosure.
12. We note your confirmation and correction as to the designation of the various claims and in particular:
 - 12.1 GBRf Part 3 is Head C and will not be addressed in the Network Rail Response to be served on 12 April 2017; and
 - 12.2 East Coast is Head A/B (not specified) and is to be addressed in the Network Rail response to be served on 12 April 2017.

13. We note and thank you for your acknowledgement that the template is guidance only and deviation within the spirit of the rules is acceptable. For the avoidance of doubt, we assume this extends to the lifting of the 10 page limit referred to in ADRR Chapter H paragraph 23.
14. We are instructed to confirm that Network Rail does not accept that your case management powers entitle you to extend a Claimant's claim irrespective of any subsequent consequential extension to the timetable that you might grant. In the particular circumstances, the matter appears closed because we understand FGW, East Coast, XC and ARN have all confirmed that they do not wish to extend their claims.
15. As to paragraph 9 of your letter dated 4 April 2017, we note your observation that the Secretary is "*constantly in procedural discussions with Network Rail and Access Beneficiaries to assist in preparing for and managing the process under the Rules*". As we have explained in previous letters, Network Rail is of the view that such discussions should be shared in the interests of transparency. We would be grateful therefore if you could confirm that from now on all such discussions are conducted in writing, with copies to all affected parties and that, in the event that it is necessary for any discussions to take place orally, all interested parties are informed of the gist of such discussions in writing as soon as practicable.
16. With regard to the final paragraph of your letter dated 4 April 2017, we can assure you that Network Rail's priority is resolving the substance of the claims brought and that it has no desire to engage in "*procedural skirmishing*". However, it is obviously essential that the proceedings are conducted fairly and in accordance with all applicable rules and law. This includes Network Rail having a fair opportunity to develop and present its arguments and for them to be considered by the TTP.
17. Network Rail continues to reserve all its rights.

Yours faithfully,



Eversheds Sutherland (International) LLP

cc.

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