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## ACCESS DISPUTES COMMITTEE

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| <b>To:</b><br>Abellio Scotrail Ltd<br>DB Cargo (UK) Ltd<br>First Greater Western Ltd<br>Transport for London<br>GB Railfreight Ltd<br>East Coast Main Line Company Ltd<br>XC Trains Ltd<br>Arriva Rail North Ltd<br>Network Rail Infrastructure Ltd ("Network Rail") | <b>From:</b> Committee Secretary<br>Floor 8<br>1 Evershoft Street<br>London NW1 2DN<br><br><b>Tel:</b> 020 7554 0601<br><b>Fax:</b> 020 7554 0603<br><b>e-mail:</b> sec.adc@btconnect.com<br><br><b>Ref:</b> ADC/TTP<br><b>Date:</b> 24 April 2017 |
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Dear Sirs

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

In his opening remarks at the first day's hearing (of the four listed hearing days), the Hearing Chair explained that his remarks would be made at greater length than is usual, primarily because of the way in which Network Rail's solicitors had conducted the case prior to the first hearing day. In his Directions of 4 April 2017 the Hearing Chair had thought it necessary to remind Network Rail's solicitors of the duties placed on Dispute Parties set out in Access Dispute Resolution Rule A9. As a reminder, these include the duties of Parties to, *...conduct themselves in good faith with the objective of resolving the dispute.....* and *'...avoid antagonistic or unduly adversarial behaviour...'*. It is not usual to have to remind Parties of these duties. Although the rules on awards of costs (see especially Rule H60(c)) do not require any advance warning to a Party, the Hearing Chair came very close to giving a warning of the possibility of an adverse costs award at least twice during the pre-hearing period.

The Hearing Chair also explained in his opening remarks that he had reminded the Panel (although doubting that they needed reminding) that the Panel's decisions were to be reached solely on the basis of the Parties' legal entitlements, without any consideration of the way in which Network Rail had conducted itself during these Disputes.

Against this background the Panel very much welcomed the entirely constructive and collegiate way in which Network Rail's case was conducted at the first hearing day.

That said, by the end of the first day it was clear that major differences between the Parties, and indeed between the Panel and Network Rail, on the extent of a Panel's powers had not been resolved and therefore remained open. It was of course possible (and remains possible) that decisions reached by the Panel might involve an interpretation by the Panel of its powers which is not accepted by Network Rail. That would create an opportunity for Network Rail to appeal any such decision, which would provide an authoritative interpretation of the scope of the power(s) in dispute.

The two Parties involved in the only Dispute which was determined on the first hearing day (TTP1064) had set out their respective interpretations of some of these questions, in particular by responding to the note of issues of law issued by the Hearing Chair pursuant to Rule H18(c).

The Hearing Chair is grateful for these submissions, although in the event they did not need to be tested at the first hearing day because the oral announcement of the Panel's decision was that Abellio Scotrail's principal claim did not succeed. As a result the Panel felt that it was not appropriate to grant any of the declarations sought by Abellio Scotrail, although it made it clear that in those areas in which the Panel did support points made by Abellio Scotrail they would appear in the written Determination as guidance and observations (see Rule H51(j)(iii)).

If the Panel had decided to reach a decision which in Network Rail's submission would be beyond its powers then it would have thought it necessary to include a discussion of the contending submissions of the Dispute Parties before doing so.

The Hearing Chair had expected that discussions on these or any other related issues would be conducted within the forum of the hearing days. It was, therefore, a surprising development that Network Rail's solicitors despatched at 1740 on a Friday (21 April 2017) a letter which they have asked to be placed on this Committee's website.

The Hearing Chair hopes that it is not unfair to describe the letter as being one 'for the record'. It states that Network Rail's solicitors '*have no desire to prolong any debate on the matters set out [in earlier letters]*' (paragraph 2, repeated in similar words in paragraph 4). Paragraph 4 states that Network Rail's solicitors do not intend to '*create any antagonisms*', although it appears that those aims would be more likely to be successful by not following the procedure of launching letters outside the forum in which the Disputes are now being conducted.

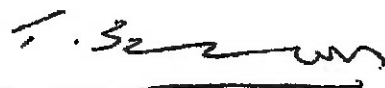
The Hearing Chair regards himself as having much higher priorities, both in relation to these Disputes and his other commitments (as Hearing Chairs are not appointed on a full time basis), than to deal with Network Rail's points in detail. He does nonetheless think it worth wondering why it was thought necessary to return to the question of common issues of principle, when Network Rail's Counsel himself accepted that, '*....there is....some commonality between the sorts of complaints advanced by individual Claimants....*' (paragraph 35 of Network Rail's Opening Submission, with the double negative removed for clarity), and given that the individual Claims are being heard separately.

The Hearing Chair notes the protestation now that neither Network Rail nor its solicitors have expressly or implicitly questioned his integrity, which appears to seek to circumvent the direct challenge to the Hearing Chair's impartiality – and thus integrity – which appears for example in paragraphs 8.1 of the letter of 7 April 2017 from Network Rail's solicitors.

The Hearing Chair wishes to ensure that all the extant Disputes are determined within the hearings days currently listed and regards that as the priority task for the Panel, for which he requires co-operation from Network Rail and its representatives.

The letter of 21 April 2017 from Network Rail's will be placed on the Committee's website, attached to this Note. Any other points of this kind must, however, be raised by Network Rail's Counsel within the hearing process.

Yours faithfully



Tony Skilton  
Committee Secretary

Eversheds Sutherland  
(International) LLP  
One Wood Street  
London  
EC2V 7WS  
United Kingdom

T: +44 20 7497 5700  
F: +44 20 7919 4919  
DX 159280 Cheapside

eversheds-sutherland.com

Clive Fletcher-Wood Esq  
c/o The Secretary  
Access Disputes Committee  
Floor 8  
1 Eversholt Street  
London  
NW1 2DN

Date: 21 April 2017

Your ref: Tony Skilton

Our ref: SHACKL/PIRESC/161318.000968

Direct: [REDACTED]

Email: [REDACTED]  
[REDACTED]

Email: sec.adc@btconnect.com

By Email

Dear Sir,

**Part D Claims Ref: TTP1064; TTP1065; TTP1066; TTP1069; TTP1071; TTP1073;**

1. As noted at yesterday's hearing by Counsel for Network Rail, there remain some issues in your 11 April 2017 letter in response to our 7 April 2017 letter which, for completeness, require our response.
2. The starting point is that we have no desire to prolong any debate on the matters set out in these letters, in particular since we have confirmed that Network Rail does not intend to pursue any objection to DB Cargo's Notice of Dispute.
3. However, as the letter of 11 April 2017 has been made public, we are concerned that the wider industry may take the view that Network Rail accepted the observations in your 11 April letter as to the scope of the powers of the Timetabling Panel and the Hearing Chair and how these appeals are properly to be approached. We welcome your constructive observations during yesterday's hearing encouraging the ongoing debate and clarification on these matters.
4. Our intention by writing this letter is most certainly not to create any antagonisms, nor to prolong unnecessarily any further debate. However, we consider it appropriate to make it clear for future purposes that Network Rail does not accept the observations made in your 11 April 2017 letter and reserves the right to challenge any and all such matters in future proceedings (or, if necessary, by way of appeal in these proceedings).
5. In particular:
  - 5.1 Network Rail does not agree that Notices of Dispute are only served when a Timetable Participant and Network Rail understand the points in issue and that they cannot be resolved by discussion within the time permitted by Part D. Notices of Dispute are often served when the issues are not clear, hence the reason why Network Rail must insist on full compliance with the rules as set out in both Part D paragraph 2.2.8 and ADRR Chapter B paragraph 3 (including paragraph (c));
  - 5.2 As Counsel for Network Rail outlined in yesterday's Hearing, Network Rail does not agree that, on a detailed analysis, there are many common issues of principle. Specifically, in relation to DB Cargo, Network Rail does not agree that the DB Cargo issues are being pursued in identical terms by another Claimant, nor that it is

possible to set out the extent of any prejudice to Network Rail of the deficient DB Cargo Notice of Dispute prior to Network Rail having put its case on the point;

- 5.3 More generally, whilst Network Rail acknowledges the duty of the Timetable Panel ("TTP") to take the initiative where appropriate, Network Rail does not accept that it is either necessary or appropriate to express views as to commonality of principle or how claims might be conducted, until such time as Network Rail's Response has been considered;
- 5.4 The specific challenge to the validity of the current DB Cargo appeal is, of course, now closed as per our 7 April 2017 letter. However, in future appeals, it is Network Rail's position that the Hearing Chair and/or TTP should avoid expressing a view on the merits of a challenge without having given Network Rail the opportunity to put its case;
- 5.5 In your 4 April 2017 letter you say "*In general terms my experience of chairing Timetable Panels and Access Dispute Adjudications suggests that procedural irregularities which do not create any real unfairness are likely to be waived, so long as the Dispute(s) can still be determined fairly*" (emphasis added). It is this we sought to address in paragraph 7 of our 7 April 2017 letter where we said "*...Network Rail does not agree that procedural irregularities should be routinely waived, particularly in circumstances where unfairness results or may result*". If we have misunderstood you, we apologise. However, it seems you were suggesting that in certain circumstances, where there is no "real unfairness", procedural irregularities were "waived" and this was a view based on personal experience. We wished to ensure that the industry understood that Network Rail does not and was not consenting, either expressly or implicitly, to a general waiver of procedural irregularities; and
- 5.6 Network Rail accepts that ADRR Chapter H paragraph 14(c) gives the TTP, where appropriate, power to ascertain the facts and law. Network Rail does not accept:
- 5.6.1 That the power of the TTP and the power of the Hearing Chair are one and the same, the Hearing Chair's powers being expressly set out in paragraph 18; or
- 5.6.2 That the power to ascertain the facts and law extends to the matters addressed in paragraph 14 of our 7 April 2017 letter which concerns the extent to which you, exercising the case management powers of the Hearing Chair, can extend the scope of a Claimant's claim.
6. As Counsel for Network Rail made clear in the Hearing yesterday, Network Rail does not wish you to recuse yourself from this matter. Neither we nor Network Rail have expressly or implicitly questioned your integrity nor at any point requested that you be recused in respect of your current appointment. Our concern has always been, and remains, to ensure that these proceedings are conducted and determined in accordance with provisions of the ADRR.
7. We should be grateful if you could please confirm that this letter will also be posted on the website so that a complete picture of the situation is presented.

Yours faithfully,

*Gareth Sutherland (Checked) LLP*

EVERSHEDS  
SUTHERLAND

Date: 21 April 2017  
Your ref: Tony Skilton  
Our ref: SHACKL/PIRESC/161318.0009  
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