

ACCESS DISPUTES COMMITTEE

The Hearing Chair has asked me to send you the following Note:-

“I am grateful to Network Rail (‘NR’) for its Sole Reference Document (‘SRD’), including the well-judged concession that it did not comply with the provisions of Part D in imposing the RoUs which are the subject of these Disputes. NR did not specifically refer to 1.5.1.3 of the extract from the Engineering Access Statement (‘EAS’) circulated by First Greater Western, but I assume that the concession applies equally to the document.

NR invites the Panel to provide guidance to it and Operators in respect of timings for late notice possession requests. As I have already commented that any late notice request will be fact specific, I do not imagine that NR is seeking general guidance on all possibilities from this Panel. What might provide useful guidance for the industry is for the Panel to express its opinion on whether these particular circumstances amounted to an ‘emergency situation’ as envisaged in the EAS.

To achieve this the Panel will need to go further than the helpful background information provided in NR’s SRD. The inference which I draw is that the requirements were passed to the Great Western Route at the times set out in the SRD. We shall need to understand who or which body made the requests, at whose behest, and why the overall project planning for both Crossrail and GW electrification needed such late notice possessions.

This can be met by an explanatory statement at the hearing and/or the circulation of any existing documents to the Panel and the other Parties. I am not seeking to impose a heavy workload or to require the creation of copious documents, so long as the Panel can reach an understanding of how and why the possessions were required at such short notice. If anything can be circulated in advance this will save time at the hearing.

The Panel’s decision on whether these circumstances (in each case) amounted to an emergency may assist in dealing with any future short-notice possessions, as it will lead into the discussion of remedies already discussed.

From the position now agreed between the Parties it is clear that in such circumstances Operators have no effective remedy by raising a dispute. Should an effective remedy be available? My start point is that as NR is required to apply the Decision Criteria in all such cases, it is safe to assume that the whole purpose of the ADR Rules should always be to provide an effective remedy, but I shall obviously consider any submissions to the contrary.

The Panel will then move on to hearing submissions on whether the power of a Hearing Chair to amend the procedure of a TTP could provide an effective remedy; if so whether this of its own would be sufficient, or whether creating a specific short-notice procedure would be preferable even if the powers of a Hearing Chair could be used as an interim measure. If it is concluded that it is beyond the powers of a Hearing Chair to amend procedure to this extent then the issue of Observation and Guidance would provide the only possible solution to resolving disputes over short-notice possessions.”

END