OFFICE OF **RAIL REGULATION**

Decision on Grand Central Railway Company Limited's Notice of Appeal against the decision of the Timetabling Panel made on 4 October 2006

Introduction

1. This is the determination by the Office of Rail Regulation (ORR) of the reference to it received on 10 October 2006 by Grand Central Railway Company Limited (GC) under Condition D5.2 of the Network Code, in connection with the interlocutory decision of the Timetabling Panel (the Panel) made on 4 October 2006.

2. By that interlocutory decision, the Panel decided that GC was not entitled to be treated as a party to Great North Eastern Railway Limited (GNER)'s appeal to the Panel against Network Rail Infrastructure Limited (NR)'s decision in respect of the proposed timetable for services on the East Coast Mainline from December 2006. It therefore decided that GC was not entitled to make submissions before it at the substantive hearing of that appeal, scheduled to be heard on 26 October 2006, unless GNER and NR did not object. Nonetheless the Panel did afford GC the opportunity to comment on the facts and matters relevant to the dispute in written representations. GC's appeal is brought on the basis that it is entitled to appear before the Panel at the hearing as a matter of right, not of concession.

3. The procedural history is as follows. GC appealed against the decision of the Panel on 10 October 2006. On 10 October 2006, the Panel also wrote to ORR questioning whether GC had any right to appeal and indicating its intention to make written observations on this issue. On 11 October 2006, GC wrote a submission objecting to this.

4. On 13 October 2006, ORR wrote to GC, GNER and NR setting out its proposed timetable for dealing with the appeal. Responses were received from GNER and NR on 16 October 2006 indicating that they did not oppose the appeal. GC wrote a response submission on 16 October 2006. We are grateful to all parties for the speed with which they have acted, which has enabled us to reach a decision in time to enable the scheduled hearing date for the substantive hearing before the Panel on 26 October 2006 to go ahead as planned.

Preliminary issues

Application of Condition M4.1 of the Network Code

5. We invited GNER and NR to make any observations which they might have as to the application, if any, of Condition M4.1 of the Network Code to this application by GC in their written submissions to us. No such observations were received. We considered each of the grounds in Condition M4.1 and have concluded that none of the grounds for deciding not to proceed with the appeal (lack of sufficient importance to the industry; reference being frivolous or vexatious; conduct of the party making the reference being such as to preclude its being proceeded with; or more appropriate for determination by the High Court) are made out. We considered that this appeal raised issues of importance to the industry in connection with the operation of the dispute resolution procedure. We have therefore proceeded to consider the substantive grounds of appeal.

Observations by the Panel

6. We indicated in our letter of 13 October 2006 that we would consider the issue of the admissibility and relevance of the Panel's proposed observations if, and when, such an intervention was received. In the event, none was received.

7. We agree that is unusual, though by no means unheard of, for bodies such as the Panel to make observations to assist an appellate body in considering an appeal against its decision. (For example, coroners and special needs tribunals rarely, but occasionally, make submissions to higher courts which are considering appeals against their judgment). We do not consider that there is, as GC seeks to suggest, any absolute bar to a Panel making such observations as it considers may assist ORR in considering an appeal against a decision which it has made, though we would, for instance, be very cautious about considering 'post-decision reasons'. Whether to consider such observations is a matter for case-by-case consideration. In the circumstances of this case, the Panel has not made any observations, so the issue does not arise.

GC's standing to appeal to ORR

8. The third preliminary issue is whether GC, having been treated by the Panel as a non-party to the appeal, has any standing to appeal to ORR against that decision. We are quite satisfied that it does. Condition D5.2 of the Network Code permits "any Bidder" which is dissatisfied with "any decision" of the relevant panel in relation to "any matter referred to it under Condition D5.1" to refer that decision to ORR for determination under Part M of the Network Code. GC is a Bidder as defined by Condition D1.2 of the Network Code. It is both a body which proposes in good faith to enter into an Access Agreement (the relevant section 17 application for access rights having been made on 25 February 2005) and it has given an undertaking to NR to be bound by the Network Code on 13 October 2000. We are satisfied that the language of Condition D5.2 gives a Bidder, as so defined, the right to refer *any* decision of a relevant panel to ORR for determination, not simply a decision which has been determined by such a panel at its request. (Vexatious references in connection with matters where the Bidder has no

legitimate interest in appealing can be dealt with under Condition M4.1 of the Network Code). We are also satisfied that the directions made by the Panel on 4 October 2006 are a decision for these purposes because it made a determination in respect of GC's legal entitlement to participate in the dispute as a dispute party.

The Panel's decision

9. The Panel took the view that Part D of the Network Code, which applies to the preparation of timetables and any disputes relating to timetabling, permitted any Bidder to participate in the timetable development process, but that Paragraph N of the explanatory notes to Part D gives Bidders standing only in terms of commencing their *own* disputes with NR under Part D. It considered that this interpretation was supported by Paragraph D1.2, and that nothing in Part D permitted an intervention in an existing dispute between NR and another Train Operating Company.

10. Further, the Panel read the Access Dispute Resolution Rules (the Rules) (which, as the Panel observed, do not appear to correlate with Part D) as meaning that only an industry party as defined in the Rules could be a party to a dispute, since Paragraph A1.35 of the Rules presupposed that any dispute party (as defined in the Rules) was an industry party which, the Panel said "GC is not at this point".

Determination of the reference

11. Our starting point is the language of the Rules. "Dispute party" is defined in the Rules as "*a person*" who:

(a) has made a claim in the dispute;

(b) has had a claim made against him; or

(c) *a party* that is likely to be materially affected by the outcome of the reference and has notified the Secretary in accordance with rule A1.35 of its wish to participate as a dispute party. (emphasis added).

GC does not seek to suggest that it falls within limb (a) or (b) of the definition.

12. We consider that GC is a party that is likely to be materially affected by the outcome of the reference and note that the Panel's decision accepted that GC had an interest in the outcome of the dispute. However, the issue is whether GC can, consistently with the language of the Rules, be regarded as a party which has "notified the Secretary *in accordance with rule A1.35* of its wish to participate as a dispute party".

13. Rule A1.35 sets out the mechanism by which a party which does not fall within limb (a) or (b) of the definition of dispute party may become one. It provides that:

"An industry party can by notification to the Secretary at any stage become a dispute party if it fulfils the definition of a dispute party, provided that the prior consent of the Panel Chairman is obtained in order for an industry party to become a disputes party if such notification is made after any directions hearing pursuant to rule A1.45".

14. An industry party is defined as:

"a facility owner or a beneficiary which in either case is a party to an Access Agreement".

15. In other words, on one reading of the language of the Rules, that which the Panel adopted, a dispute party is either a person who has made a claim in the dispute, OR a person who has had a claim made against him, OR a person likely to be materially affected by the dispute, which is a party to an Access Agreement and, as such, has notified the Secretary of its intention.

16. However, the language of the Rules is not entirely clear, and the correctness of this reading is not beyond doubt. In our view there are two particular concerns with such a reading. If a "dispute party" was intended to be confined to a person affected which was *also* an industry party as defined in the Rules, one would expect this restriction also to apply to those who can apply to the Panel at all. This would conflict with Condition D5.1.
The definition of dispute party is not qualified in this way; instead it provides that a dispute party is "a *person* who..." (emphasis added). Second, if the intention was that a party not covered by the definition of industry party in the Rules, but with rights under Condition D5.1, was not entitled to be joined in a dispute where it was likely to be materially affected by the outcome of the reference, we would also expect that restriction to appear in the primary definition of relevant person affected (i.e. dispute party). However, paragraph (c) refers to "a party". The limitation is an assumption in the provision which sets out the procedure by which the dispute party can notify the Panel of its intention to participate.

17. We consider that in light of the ambiguities set out above another reading of the Rules is that a dispute party can be a person materially affected who notifies the Panel in the way set out in Rule A1.35 regardless of whether they are an industry party.

18. In view of the existence of two alternative constructions of the Rules, we have considered which of them appears to accord most with the purpose of Part D and the Rules.

19. We note in particular, that, under Rule A1.2, where there is an apparent conflict between the language of the relevant Access Conditions (here, the Network Code) and the Rules, the Access Conditions take precedence. Thus, in seeking to determine what the Rules mean in deciding who may participate in timetabling disputes, we consider that the Rules should be read so far as is possible so as to give effect to the objectives and intentions of Part D of the Network Code. In this context, unlike the remainder of the Network Code and certain provisions in the Rules, Part D generally uses the broader term Bidder (which includes persons who are not party to an Access Agreement) instead of the term industry party and provides for persons who are not party to an Access Agreement to participate in the timetabling process substantially as if they were party to an Access Agreement.

20. In this context, we bear in mind that GC is undoubtedly within the definition of a "Bidder" as defined in the Network Code and the Panel's decision does not dispute this. That gives it the rights to raise its own complaint before the Panel, even in the context of the acceptance or rejection of a bid to NR from GNER (because Condition D5.1(b) of the Network Code

permits any Bidder to refer "the acceptance or rejection by Network Rail of *any* Bid" to the Panel (emphasis added) – not just its own). As noted above, it also gives it the right to appeal to ORR in the event of dissatisfaction with "any decision" of the relevant Panel, even if the decision did not relate to its own Bid (D5.2 of the Network Code). The Panel's determination referred to Paragraph N of the Explanatory notes to Part D as giving Bidders locus. As Paragraph O makes clear the notes do not form part of the Network Code and have no legal status.

21. It would be very strange if such a Bidder, whilst being permitted to bring its own complaints to a Panel in connection with a matter which is the subject of an existing reference, or to complain to ORR about decisions of the Panel in relation to a third party complaint, could not be joined as a dispute party, even in circumstances where it would plainly be materially affected by the outcome of the reference, simply because, by an accident of timing, it is not yet defined as an industry party, and so is prevented from a procedural rule from deploying the relevant mechanism for joining the dispute. We consider that we should, where there is an ambiguity of the type set out above, if possible, avoid an interpretation of the Rules which has such an effect.

22. In our view, it is possible in the present circumstances to read the Rules in a way which avoids such a conflict between the intention of the Network Code and the Rules. The intention of the Network Code is that Bidders may participate in the timetabling process, including appealing against decisions of NR, even before they have an access agreement. The Rules can be read to give effect to that, if the definition of dispute party is read to mean that a party may be treated as a dispute party if (as here) it is "likely to materially affected by the outcome of the reference" and "has notified the Secretary in the manner set out in Rule A1.35 of its wish to participate as a dispute party".

23. In reaching this conclusion, we have also borne in mind the requirements, under Rule A1.3(b) and (d) and A1.4(b), that the Panel and its Chairman must act to achieve fairness and efficiency. Under Rule A1.3(b), the Access Panel must reach "fair, rapid and inexpensive determinations of disputes ...", and under rule A1.3(d), it must "balance the formality required to achieve a fair and efficient process with the accessibility required to ensure that the process is quick and easy to use". Under A1.4(b), the Chairman must ensure that all procedures of the Panel are implemented "fairly and effectively" in respect of each dispute.

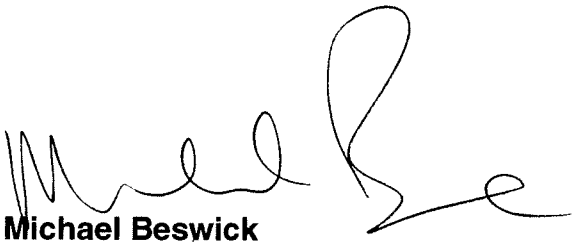
24. Since GC, as a Bidder, would be entitled to launch its own appeal to the Panel against NR's decision, and balancing the need for sufficient formality to achieve fairness, and the need to ensure that the process is quick and easy to use, we consider that it would be faster, more efficient, and no less fair, to interpret the Rules so as to enable it to participate, as a party, in the appeal brought by GNER against that decision. This would enable the entire issue to be determined at once, with all materially affected parties entitled to be heard.

25. We have, therefore, determined:

(a) that GC is entitled to appear before the Panel as a party at the substantive hearing of TTP96 on 26 October 2006, on the same footing as the other parties; and

(b) that direction 5(e) in the Panel's decision of 4 October 2006 should not stand, and should be replaced instead with a direction that Grand Central is allowed to appear at the hearing and make oral representations and otherwise participate fully in the proceedings as a dispute party.

26. GC also addressed arguments to us in respect of Directive 2001/14 and the Railways Infrastructure (Access and Management) Regulations 2005 and Article 6 of the European Convention of Human Rights. In view of our determination on the proper interpretation of the Rules, we do not find it necessary to reach a determination on the further arguments raised by GC in support of its appeal.



Michael Beswick

Director, Rail Policy

Duly authorised by the Office of Rail Regulation

24 October 2006