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## **ACCESS DISPUTES COMMITTEE**

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### **MINUTES of MEETING No. 14** held in London on 20 September 2007

#### **Present:**

Sir Tony Holland, Chairman  
John Czyrko (Central Trains)  
Bill Davidson (Network Rail)  
Tony Deighan (Eurostar (U.K.))  
Lindsay Durham (Freightliner)  
Gabrielle Ormandy (Network Rail)  
Nigel Oatway (English Welsh & Scottish Railway)  
Mike Price (First ScotRail)

#### **In attendance:**

Tony Skilton (Secretary)  
Martin Shrubsole (Member of Secretariat – "Clerk")

#### **Apologies:**

John Beer (First Capital Connect)

#### **14/1 Approval of Minutes of Meeting no.13**

The Minutes of Meeting no.13, held on 21 June 2007, were approved without modification. The Chairman signed a copy of the Minutes as a true record of the proceedings.

#### **14/2 Matters arising from the Minutes of the previous Meeting**

##### **13/2 Process of appointing a new Secretary**

The Secretary reported that transfer of all powers, authorities and assignments from his predecessor had been progressed but not all matters had yet been fully finalised due to delays by the landlord and in the bank.

#### **14/3 Financial matters**

Members noted a report from the Secretary regarding the current financial position, which was regarded as being satisfactory.

Tony Deighan suggested that in view of the arrangements which applied for funding its activities, the Committee should review its stewardship of the money it received. It was agreed that the Secretary should provide the next meeting with a high level review covering the past 4/5 years.

## 14/4 Update on references

Members noted the current position regarding the references on hand.

M Price expressed concern that there had been delay in communicating a determination to the parties involved in ADP23, the Panel hearing having taken place on 7 August and the determination being issued on 29 August: the Committee was asked to consider whether any measures might be taken to expedite the issue of determinations.

L Durham reminded colleagues that there was a need to recognise the frustration that a delayed determination caused to parties who needed a position on which to move their businesses forward.

J Czyrko indicated that whilst not personally involved with ADP23, he appreciated that the Panel had been called upon to examine a complex matter: bearing in mind that the hearing had taken place during the holiday month of August and the determination was nevertheless issued during the same month, he considered the speed to be satisfactory. Further, this had not been the slowest issue of a determination.

The Chairman observed that the legal environment within which the Committee and its Panels operated had changed significantly during his period as Disputes Chairman and notwithstanding the intention of providing a fair and reasonable method for disposing of disputed issues in a quick and pragmatic manner, there was nevertheless a necessity that the Panels have regard for the law. The associated expectations, coupled with increasing recourse to appealing Panels' determinations to the Office of Rail Regulation ("ORR"), made it necessary for determinations to be more legally precise than hitherto and Panel's findings would, as a natural consequence, take more time to announce. With dispute issues becoming increasingly complex, the Chairman envisaged that Access Dispute Panel hearings in particular might also increasingly develop into lengthy legal discussions but with the process hindered by Panels not having the capability to demand legal discovery of information.

The Chairman reminded the Committee that the word "resolution" had been removed from the name whilst also restructuring the activities of the former Access Disputes Resolution Committee because it was the view of a former Rail Regulator that "resolution" contained an element of discretion which the Regulator did not consider should be part of the process.

For the Chairman, the issues had been brought into focus during the appeal of reference ADP21, with solicitors for one party complaining that the process was not satisfactory as well as having regard to the constitution of Panels. The Chairman accepted that it was most unusual and of potential legal concern for the industry process to involve Panels containing individuals who were employed by one or more of the parties to the dispute (or within their owning group) or, in the case of freight matters, by an employee of a competitor or potential competitor. The Chairman suggested that any change in the arrangements aimed at providing greater comfort regarding the impartiality of those hearing a dispute as well as having regard to the increasing complexity would inevitably lead to hearings taking longer.

Continued....

### **Update on references (Continued)**

During discussion, the Committee recognised that matters referred to Access Dispute Panels were increasingly related to commercial issues and that appeals therefore often resulted from dissatisfied parties seeking to exercise their fiduciary duties. In other situations, appeals arise where law, regulations or rules (or an interpretation of them) was considered to be flawed: recent appeals to ORR were concerned with changed areas of the Network Code, where unsatisfactory drafting caused difficulties for Panels. Regarding ADP21, ORR's published findings had not criticised the Dispute Panel process but had instead dealt with interpretation of the Network Code: it was anticipated that the appeal of ADP23 might have similar outcome.

Following extensive discussion, it was agreed that, as already the usual procedure with Timetabling Panels, the aim should be that Access Dispute Panel members will remain available at the conclusion of a hearing with a view to recording the key elements of the Panel's determination to the extent considered necessary by the nature of the issues; in doing this, the logic used to arrive at conclusions also needed to be recorded as Panel members could well have arrived at the same conclusion through differing individual thought processes. It was recognised that Access Dispute Panel determinations would normally require longer to draft in this manner than Timetabling Panel determinations.

It was agreed that in making the arrangements for hearings, the Panel Chairman and the Secretariat should endeavour to anticipate the likely complexity of the issues to be addressed in drafting of the determination and plan for attendance of Panel members over more than one day. It was further agreed that if it subsequently emerges during finalisation of the drafting of a determination that there are issues which warrant reconsideration, the Panel should normally be reconvened to discuss the items rather than seek to address complex matters in correspondence.

### **14/5 Update on the website**

The Committee noted that the revised website had been launched on 14 July 2007, with routine updating and some adjustments taking place subsequently.

Lack of clarity had been identified in the Access Dispute Resolution Rules in relation to requirement to publish Expert Determinations on the Committee's website and, if so, what confidentiality provisions applied and to what extent such Determinations might create precedent applicable to future dispute situations. The Committee concluded that in view of apparent shortcomings in the drafting of the associated Rules, the Secretary should not seek to publish Expert Determinations at the present time and that opportunity should be sought to bring clarity to the relevant Rules at a future review.

The Committee considered whether there was continuing requirement to produce any form of annual report, given the format of the revised website. Following discussion, it was concluded that a short report should be compiled each year to highlight the issues dealt with by the Committee and to provide an opportunity to invite feedback from the industry (including ORR). It was considered appropriate that the report be based on the calendar year rather than the Committee's financial year.

#### **14/6 Procedural issues arising out of appeal of reference ADP21**

The Committee noted a paper summarising procedural issues for the Access Disputes process which had emerged from ORR's hearing of the appeal of reference ADP21.

It was noted that in declining to become involved in an element of the dispute which was in essence bi-lateral (and directing it to Arbitration), ORR had reiterated previous indications that it wished the industry to maintain a process which could deal effectively with disputed matters which would otherwise bring forward appeals which would touch upon ORR's regulatory responsibilities.

ORR had now provided general guidance on the treatment of new information presented to a Panel during the course of a hearing instead of during the written submission stage. It was noted that this potential problem had to an extent been obviated by new Secretariat arrangements giving better effect to the right of the Disputes Chairman to issue directions regarding information to be provided to a Panel in advance of a hearing and giving adequate time for it to be scrutinised (and any supplementary questions issued). It was recognised that the Rules provided for the Panel to make enquiries and the arrangements did not prevent this once the Panel had been appointed and the submissions circulated.

The Committee welcomed the efforts being made by the Disputes Chairman and Secretariat to deliver quality improvement and encouraged the trying of different ways to secure improved delivery of the disputes process. The Committee recognised that it would not be convenient for Panel members to be involved in preliminary exploration of issues as this would extend the time over which a Panel member would be involved and increase risk of non-availability. Nevertheless, the Committee considered that every effort should be made to appoint a Panel at the earliest opportunity when the need for a hearing had been confirmed and suggestion was made that the Panel Chairman and Secretariat should consider in each case whether it would be of assistance to convene a preliminary meeting of the Panel in order to explore issues and issue further directions or questions to the parties.

In dealing with this appeal, ORR had also provided some helpful clarification regarding the definition of a project.

In view of issues surrounding ADP23 and this appeal, the Committee considered it appropriate that the Disputes Chairman meet with ORR to seek assurance that the appeal body continues to have confidence in the dispute process below it and also to secure appreciation of the legal environment within which Panel hearings take place.

#### **14/7 Secretariat staffing**

The Secretary reported that there would be a change in the PA contracted by the RIDR Committee during October; the Secretary had been involved in the selection process.

The Clerk then withdrew.

After a brief discussion, the Committee agreed that it wished to roll forward its contract with the Clerk for a further two-year period from the date of expiry in February 2008. The Secretary was given authority, within prescribed parameters, to negotiate any minor amendments to the contract and to put the contract variation in place.

#### **14/8 Review of Committee's contracts with the Chairman, Vice-Chairman and Timetabling Panel Chairman**

The Chairman withdrew. Tony Deighan was unanimously elected by the members of the Committee as Deputy Chairman to deal with this item.

After a brief discussion the Committee agreed that it wished to roll forward its arrangements with each of the Chairman, the Vice-Chairman and the Timetabling Panel Chairman for a further two-year period from the respective dates of expiry in November 2007 or March 2008. The Secretary was given authority, within prescribed parameters, to negotiate any minor amendments to the contracts and to put the contract variations in place.

#### **14/9 Formation of a Company Limited by Guarantee ("CLG")**

The Committee considered recommendations regarding the structuring of arrangements for a CLG with the purpose of facilitating the business of the Committee. It was agreed that proposals should be developed on the basis that:-

- the Committee remains in place but its activities are serviced by a CLG which has the individual Committee members as its members;
- the name of the CLG be proposed as "Access Disputes Resolution (GB) Limited";
- the CLG be guaranteed by its members to the sum of £100;
- the Articles of Association of the CLG provide for the Disputes Chairman and the Committee Secretary to be the directors, along with any further person(s) appointed from amongst the members;
- the Articles of the CLG stipulate that the Disputes Chairman shall be Chairman of the company;
- the Articles of the CLG stipulate a quorum of 2 directors as being required to transact business of the directors; and
- the Articles of the CLG stipulate that a Company Secretary shall be appointed and that this shall be the Committee Secretary.

The proposed arrangements were expected to necessitate minimal alterations to the Access Dispute Resolution Rules; such alterations would have the purpose of recognising that the Committee will operate its activities through the nominated CLG, of indicating how the two bodies will be linked and of providing awareness to future candidates for Committee membership regarding the requirement to become an individual member of the CLG.

The Secretary was asked to progress development of the CLG proposal further on the basis discussed, with a view to presenting a paper to the Industry Steering Group for consideration.

#### **14/10 Refranchising**

The Committee noted that a number of structural changes would be taking place amongst the passenger train franchises over the coming months, potentially leading to movements of TOCs between the Bands of the Franchised Passenger Class and affecting Committee and Panel membership. In view of uncertainty regarding the Central Trains situation and his future availability, the Committee expressed appreciation to John Czyrko for his contribution to the proceedings of the Committee and as a member of the Access Disputes Pool.

**14/11 Date of next Meeting**

The next quarterly meeting will take place on Wednesday 19 December 2007 commencing at 15 00.

A handwritten signature in black ink, appearing to read "Anthony Hura", with a long horizontal line extending from the end of the signature.