
ACCESS DISPUTES COMMITTEE

MINUTES of MEETING No. 29 held in London on 14 July 2011

Present:

John Beer (First Capital Connect) (Committee Chair)
Richard Dean (London & South Eastern Railway)
Lindsay Durham (Freightliner Heavy Haul)
Nigel Oatway (DB Schenker Rail (UK))
Gabrielle Ormandy (Network Rail)
Andy Wylie (Hull Trains)

In attendance:

Tony Skilton (Secretary)

Apologies:

Bill Davidson (Network Rail)
Mike Price (First ScotRail)

29/1 Approval of Minutes of Meeting no.28

The Minutes of Meeting no.28, held on 17 March 2011, were approved. The Chair signed a copy of the Minutes as a true record of the proceedings.

29/2 Matters arising from the Minutes of the previous Meeting

All matters arising from the Minutes were listed as agenda items except:-

28/2 Implementation of the new Access Disputes Resolution Rules – Contract changes

The industry was still waiting for action by ORR to amend Access contracts which prescribed the forum for the hearing of any dispute instead of providing for the parties to choose from the range offered in the new ADR Rules. Indication had been received that ORR anticipated initiating consultation in the coming week.

28/2 Appointment of Assistant Secretary

It was noted that Mrs Kathy Couldridge had been appointed as Assistant Secretary.

28/11 Promoting the ADR Rules and the role of the Committee

The Committee Chair indicated that he would shortly circulate for members' comments a draft for an update to ATOC regarding activities since implementation of the new ADR Rules:

this would reflect the positive feelings which seemed to have developed towards the new dispute resolution process.

Suggestion was made that consideration should be given to also submitting occasional briefs to the Rail Freight Operators' Association.

29/3 Matters determined in correspondence

No matters had been determined in correspondence since Meeting no. 28.

29/4 Financial matters

29/4.1 Accounts for 2010/11

The auditors had indicated satisfaction with the accounts for 2010/11 and the Committee accordingly gave approval to the Chairman formally signing the Income & Expenditure Statement. The Balance Sheet as at 31 March 2011 was also approved.

29/4.2 Current financial position

The Committee noted report from the Secretary regarding the current financial position. The sole 2010/11 levy payment outstanding at Year End had since been received and only three Resolution Service Parties were yet to pay their levy for 2011/12.

Serco Rail Operations had ceased relevant activity during 2010/11. The Committee authorised waiving of the small amount of interest which accrued for late payment of Serco's levy for that Year.

29/5 Internal check arrangements

Bill Davidson's report regarding the internal check activity which he had carried out since the last meeting was discussed. The process for invoicing the Committee's levy had been examined in detail and found satisfactory; Bill additionally indicated that he proposed in due course to make a sample check upon receipt into the bank account of the amounts invoiced for 2011/12. In the circumstances, the Committee nominated Bill Davidson as its member who would undertake internal check until the next meeting.

29/6 Position on references

The Committee noted a report on recent determinations and appeal decisions, together with the current position regarding references on hand.

ORR had yet to determine an appeal submitted by Network Rail against the Timetabling Panel's determination issued on 19 May 2008 in respect of dispute reference TTP210, which concerned West Coast Route Modernisation decision document NAUM-30. The Committee recognised that the delay in issue of an appeal decision, thereby setting down binding precedent, could in the meantime lead to uncertainty for any Timetabling Panel called upon to determine a similar scenario.

29/7 Update on the website

The Secretary reported that the website was up to date as at 4 July 2011, with subsequent changes expected to be uploaded over the coming weekend.

The task of annotating the previous Network Code Part D material to the new Part D (issued October 2010 and amended April 2011) remained to be completed.

29/8 Appointment of Timetabling Panels

The Committee considered a recent correspondence between Southern Railway and the Secretary regarding concern felt by Southern in respect of the constitution of a recent Timetabling Panel (for the hearing of reference TTP384). The circumstances had been such that due to non-availability of other relevant members of the Timetabling Pool within the time period desirable for holding the hearing, two of the Panel members were employed by the same owning group as the party which had brought the dispute against Network Rail, Southern Railway having subsequently decided to become a Dispute Party.

In a letter to Southern Railway in which the situation was explained fully, the Secretary had undertaken to put the correspondence before this meeting of the Committee so that it could formally provide guidance to the Secretary if considered appropriate. To ensure that its points were properly represented to the Committee, Southern Railway had also been reminded of the possibility of speaking in advance of the meeting to Richard Dean, the elected Committee member for Franchised Passenger Band 2: no approach had been made.

The Committee recognised that with certain owning groups having become major players in the industry and their employees being elected to the Timetabling Pool across the Classes, there was every possibility of a company in one of the groups bringing a dispute and the Panel being constituted within the Rules to include two or even three members from the same owning group. In this case under notice, only two members of the Panel were from the same owning group as the TOC which brought the dispute, whilst one member was from Network Rail (a Dispute Party) but the other was "independent" and, as it happened, a very experienced Panel member and fully capable of raising objection if any bias was identified.

The Committee reflected that the recent revision of the Rules had set out to address concerns regarding "fair trial compliance" and that the Hearing Chair now made the determination rather than the Panel members, whose role was now to provide expertise to assist the Hearing Chair in establishing the facts of a case, to provide advice to help understanding of industry practice and to help with the interpretation and application of industry contracts and documents. The Committee expected that a Hearing Chair, being an experienced legal practitioner, would recognise the display of any bias within the Panel, whilst a Secretary might also provide an alert if thought appropriate.

The Committee accordingly endorsed the response provided to Southern Railway by the Secretary and concluded that whilst operating under the current Rules, then except in the case of Network Rail and subject to expediency of holding a hearing and the availability of Pool members, the Secretary should continue the existing practice of endeavouring to avoid appointing Pool members from an owning group to a Timetabling Panel when a dispute from within the same owning group is to be heard.

The Committee considered that the way to reduce the possibility of the situation recurring would be for the size of the Timetabling Pool to be increased but such action would not necessarily avoid the problem if the major owning groups continued to provide the Pool membership; the solution lay in the hands of the operators when nominating new Pool members and casting their votes.

Richard Dean undertook to report back to Southern Railway regarding the Committee's deliberations and remind Southern Railway that it could propose a change to widen the scope of the relevant Rules if thought desirable.

29/9 Management of the Committee's property interests

As intended by the Committee, a Company Limited by Guarantee – Access Disputes Resolution (GB) Ltd, company no. 7582601 (the "Company") – had now been incorporated for the purpose of managing the Committee's property interests, in particular to hold the lease of the Committee's offices at Floor 8, 1 Eversholt Street, Camden, London NW1 2DN (the "Premises") as nominee and managing agent for the Committee and also to hold the Committee's interests in the associated Rent Deposit.

The Committee recalled that the lease and the Rent Deposit were currently in the name of the Committee Secretary, Tony Skilton. Subject to Committee supporting the measures now under discussion, the landlord of the Premises would be asked to give its consent for the assignment of the lease and Rent Deposit to the Company.

In order to complete the arrangements for the establishment of the Company as the Committee's nominee and managing agent in relation to the Premises, the following steps had been identified as necessary:-

- (a) configuring the Company with appropriate members and officers;
- (b) approving and directing the assignment of the Premises (and the benefit of the associated rent deposit) to the Company;
- (c) approving and executing a property management agreement between the Committee and the Company; and
- (d) authorising consequential steps in relation to the operation of the Company as the Committee's managing agent in relation to the Premises.

The Committee noted that under the articles of association of the Company,

- (a) the Committee Secretary is a director of the Company;
- (b) the Committee has the power to appoint and remove any Committee Members as directors; and
- (c) the Committee Secretary is Secretary of the Company ex officio.

The Company had been incorporated with Tony Skilton as a director and as Secretary, with John Beer as a further director. In the interests of convenience whilst the envisaged transactions were being pursued, it was recommended to the Committee that no further directors yet be appointed.

The Committee RESOLVED that the appointment of John Beer as a director of Access Disputes Resolution (GB) Ltd be confirmed.

The Committee also decided that no further appointments of directors of the Company would be made for the time being.

It was envisaged that the landlord will produce the documents necessary for assignment of the lease and for assignment of the rent deposit, also a form of licence to assign the lease and rent deposit, and the Committee noted that it would be for the Company and Tony Skilton to examine these documents and be comfortable with their content before proceeding to execute them.

As for the necessary relationship between the Committee and the Company, a proposed Property Management Agreement had been circulated with the papers for this meeting and the Committee noted that

- (a) it would be necessary for the Property Management Agreement to be executed by every member of the Committee in order to ensure that it is binding on the Committee (as an unincorporated association);
- (b) it was anticipated that each current member of the Committee would have become a member of the Company before the Property Management Agreement is executed; and
- (c) it was anticipated that each future new member of the Committee would become a member of the Company and agree to be bound by the provisions of the Property Management Agreement and by all contracts entered into by the Company as agent for the Committee prior to the date of his/her admission.

Following discussion of the terms of the proposed Property Management Agreement, further consideration was deferred to enable the Secretary to obtain clarification from the Committee's solicitors regarding certain aspects of the drafting.

29/10 Election of Committee Chair

The Committee noted that new ADR Rule J19 required election of a Committee Chair at the first meeting after 1 April in each year and endorsed the placing of the election at the end of the meeting agenda to provide continuity of attention to the business of the meeting by the outgoing Chair.

John Beer remarked that he had very much enjoyed leading the Committee through the period of introduction of the new dispute resolution arrangements and he was willing to stand for re-election.

The members present decided unanimously to elect John Beer as Committee Chair for the coming year.



22nd. Sep 2011