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## ***ACCESS DISPUTES COMMITTEE***

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### **MINUTES of MEETING No. 48** held in London on 14 December 2017

#### **Present:**

Nigel Oatway (DB Cargo (UK)) (Committee Chair)  
Raj Patel (Govia Thameslink Railway)  
Andy Wylie (Hull Trains)  
Ian Kapur (GB Railfreight)  
Peter Craig (Network Rail)  
Richard Parsons (Network Rail)

#### **In attendance:**

Professor Richard Butler (Allocation Chair)  
Tony Skilton (Secretary)

#### **Apologies for absence:**

Dean Warner (Abellio East Anglia)  
Helen Cavanagh (Arriva Rail North)

It was noted that the meeting was quorate and Raj Patel was welcomed to her first meeting since being elected, replacing John Czyrko.

#### **48/1 Approval of Minutes of Meeting no.47**

The Minutes of Meeting no.47, held on 16 March 2017, were approved. The Chair signed a copy of the Minutes as a true record of the proceedings.

#### **48/2 Matters arising from the Minutes of the previous Meeting**

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

##### 47/2, 46/4 Constitution of Timetabling Panels

It was noted that a proposal to reduce the size of a Timetabling Panel to become the Hearing Chair plus three members selected from the Timetabling Pool had been adopted by the Class Representative Committee and the Access Dispute Resolution Rules amended accordingly with effect from 12 July 2017.

##### 47/2, 46/6 Website costs

The Committee noted that action to change the website maintenance contractor was not yet necessary.

#### 47/8 Levy charging arrangements

A review of the charging rules remained to be undertaken.

#### **48/3 Matters determined in correspondence**

No matters had been determined in correspondence since Meeting no. 46, but on 25 September 2017 the Committee members had been provided with a note concerning the General Data Protection Regulation ("GDPR") taking effect from 25 May 2018 and explaining that the CAHA Registrar was expecting to incur additional, unbudgeted expenditure in the current Year whilst examining its data protection position and that the Committee itself might also incur unbudgeted expenditure in relation to GDPR.

The Secretary reported that the Registrar was continuing to give attention to the matter, whilst legal advice had recently been obtained for the Committee - and for Access Disputes Resolution (GB) Ltd – and which would be followed up.

#### **48/4 Position on references**

The Committee noted a report from the Secretary setting out the current position regarding dispute references.

A high number of Timetabling Disputes continued to be registered but few proceeded to a Timetabling Panel hearing. A major Panel commitment did, however, arise in relation to Version 2 of Network Rail's decisions regarding the Timetable Planning Rules for 2018 and it was noted that the determination of Dispute TTP1064, which covered various procedural aspects, had been upheld by ORR on appeal. Several of the recent disputes notified arose out of the evolving effects of Network Rail's "TRIP" (Timetable Rules Improvement Programme) initiative which had underpinned Version 2.

The Committee noted increased propensity for non-timetabling issues to be referred direct to arbitration rather than to first be considered by an Access Dispute Adjudication. Whilst appreciating that many such cases would tend to be heavy in terms of documentation and legal argument and so not entirely suited for the ADA process, it was disappointing that under the ADR Rules the arbitrators' awards would be confidential to the parties involved and not provide any persuasive precedent or learning for the industry in general.

#### **48/5 Review of dispute resolution process**

ADR Rule J3(h) requires the Committee to satisfy itself that the Principles (as set out in Rules A5 to A10) are being observed in the way in which disputes are being managed and determined.

Based on personal observation during the past year and feedback canvassed from the Hearing Chairs, Prof Butler explained that, with certain reservations, he was content to advise from a professional perspective that the Principles were being observed overall and that the Committee could be satisfied with the way in which the ADR Rules were being applied.

More lawyers than customary - whether solicitors or barristers - had been involved in dispute proceedings over the past year and this included particularly a Timetabling Panel hearing of issues relating to the Timetable Planning Rules. This apparent trend was giving rise to

concern that the dispute resolution process was becoming rather legalistic and certainly that behaviours were changing in that some parties were not altogether avoiding antagonistic or unduly adversarial behaviour as expected by ADR Rule A9(c).

Some difficulties had been encountered because of parties wishing to withhold commercially sensitive information and the associated evidence; it was sometimes necessary to exercise a measure of good faith in relation to certain categories of information, including where there had been late submission of relevant material.

Regarding precedent (ADR Rule A7), some difficulty had been experienced by a Timetabling Panel in making a decision mindful of the timeframe for Working Timetable development whilst still waiting for a related appeal decision to be published by ORR.

Finally, the year had witnessed outcomes being varied by Hearing Chairs to the extent of demurring from the persuasive precedent in published determinations concerning related issues. It was appreciated that members of the legal profession would not always agree in matters of contract interpretation but had to be recognised that such situations create ammunition for making an appeal.

The Committee noted this advice and took the view that there was no requirement for the Allocation Chair to be asked to take any corrective action. The topics would, however, be appropriate for discussion at the next seminar for Hearing Chairs.

#### **48/6 Recommendations arising from determinations**

The point had been made by a Hearing Chair that recommendations occasionally contained in Timetabling Panel and Access Dispute Adjudication determinations – and any associated appeal – did not seem to have a formal tracking mechanism to ensure that they are given due consideration and it was not clear where responsibility might lie for such initiative.

The Committee recognised that it was not its responsibility to follow up such recommendations yet it was appropriate that suitably knowledgeable people should take the time to review outputs from determination documents. Accordingly, as a reasonable step in connection with its management and oversight role for the ADR process, the Committee decided that an “ADC Determinations Working Group” should meet from time to time to note recommendations which had been put forward and to develop proposals as considered necessary: such proposals would be discussed informally with ORR before finding a sponsor to put the matter to the Class Representative Committee.

It was agreed that the Working Group would meet as might be convenient for as many Committee members as could be available, with Chairs being involved as thought desirable for gaining their professional legal advice. To commence the process, the Secretary was asked to draw out recommendations made in determinations over the past two years.

#### **48/7 Update on the website**

The Secretary reported that the website listing of disputes was up to date. The Directory was also up to date except for elements reflecting determinations which had been appealed.

## **48/8 Internal check arrangements**

Nigel Oatway had tabled a report regarding internal check activity which he had carried out since the 16 March 2017 meeting (and also since the external audit in May 2017) and this was noted.

It was agreed that Peter Craig would undertake internal check until the next meeting. Subject to availability, Peter agreed to take the opportunity to give some introduction to internal check processes to Richard Parsons, who had not previously had experience in the activity.

## **49/9 Financial matters**

### **49/9.1 Accounts for 2016/17**

Very delayed due to extended staff sickness in its audit team following a site visit in May, the auditors, Mazars LLP, had recently indicated satisfaction with the accounts for 2016/17 and the Committee accordingly gave approval to the Chair formally signing the Income & Expenditure Statement. The Balance Sheet as at 31 March 2017 was also approved and signed.

### **49/9.2 Outturn for 2017/18 and preliminary budget for 2018/19**

The Committee noted a report from the Secretary setting out the final outturn projections against the current year budget, together with the final budget proposal for 2017/18. It was anticipated that 2017/18 income would slightly exceed expenditure.

Two levy contributions for 2017/18 had yet to be received.

The preliminary expenditure budget proposal for 2018/19 was approved, with uncertainties currently remaining regarding uplift in business rates and services charge and also whether Heathrow Airport Ltd would be participating in the dispute resolution arrangements.

The Committee considered that, as with recent Years, existing reserves together with surplus expected to be available out of current Year income should enable the 2018/19 finances to be constructed to produce a slightly lower overall levy requirement than for 2017/18.

### **49/9.3 CAHA Registrar's Accounts for 2016/17**

As required by paragraph 7 of Schedule 2 to the Claims Allocation and Handling Agreement, the Registrar had provided a certificate from its auditors as to the costs and expenses incurred by the Registrar during 2016/17 and properly recoverable through the levy arrangements. These documents the Committee noted. 2016/17 expenditure slightly exceeded income and this shortfall fell to be recovered through the 2017/18 levy process.

## **49/10 Annual Report for 2017**

The Committee considered the preliminary draft for the 2017 Annual Report and noted that revision would be required to reflect discussions at this meeting in addition to any appropriate adjustments to reflect factual changes arising in the remainder of the month. It was hoped that the necessary further drafting could be followed up in correspondence to enable the Report to be issued early in 2018.

#### **49/11 Code of Practice ("CoP") for disputes relating to Confirmed Period Possession Plans ("CPPPs")**

The Committee welcomed the draft for a CoP proposed by a Wording Group which met to consider the number of Timetabling Disputes being notified in relation to Network Rail's 4-weekly CPPP decision notices.

It was noted that Network Rail was supportive of the proposed CoP and that it had been discussed with operators at the informally constituted Operations Planning Steering Group ("OPSG"), where there had not been disagreement with the principles set out and it had been agreed that three operators would trial the arrangements. Unfortunately the trialling was not being reported as successful and OPSG was still waiting to assess the practical application of the proposed document, given its voluntary nature.

The Committee noted that whilst it was to be hoped that adoption of the CoP would lead to improved behaviours in the associated planning process and fewer disputes being notified, it had to be recognised that there would be resource and cost implications if perhaps being called upon to hold several CPPP-related Timetabling Panel hearings for each 4-week Period.

The Committee expressed appreciation for the work of the Working Group and thought it worthwhile to encourage continued use of the draft CoP by Network Rail with the three volunteer operators in order to test its practical application. Richard Parsons undertook to take matters forward and provide the Committee with periodic updates regarding practitioners' assessment of the suitability of the suggested CoP for general adoption.

#### **49/12 Meetings in 2018**

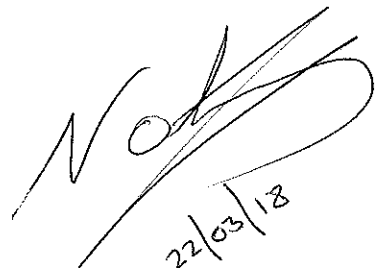
The Committee agreed dates for routine meetings in 2018 and also noted that a date had been selected for a gathering of the Chairs in May 2018.

#### **49/13 Membership of the Committee and Timetabling Pool**

The Committee noted the results of recent elections which had filled a casual vacancy in the Timetabling Pool in addition to the routine filling of posts with effect from 1 April 2018.

#### **49/14 Election of Committee Chair**

ADR Rule J19 required election of a Committee Chair at the first meeting after 1 April in each year. The members present decided unanimously to elect Nigel Oatway as Committee Chair for the coming year.



A handwritten signature, likely of Nigel Oatway, is written in black ink. Below the signature, the date "22/03/18" is written in a similar handwritten style.