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## **ACCESS DISPUTE ADJUDICATION**

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### **Addendum to Determination in respect of dispute reference ADA27**

#### **1. Introduction**

- 1.1 Following my substantive decision in relation to dispute ADA 27, West Coast Trains Limited ("WCTL") has made an application for costs pursuant to paragraph 5.8.3 of the Determination, together with supporting written reasons. A redacted version of the application is appended to this decision. Network Rail Infrastructure Limited ("NR") has elected not to respond, leaving to me as Hearing Chair to determine whether the application for costs meets what was described in that paragraph as 'a bar set at a high level'.
- 1.2 Access Dispute Resolution Rules G53-55 provide the jurisdiction for orders for costs. By Rule G54 'An order for costs should only be made where the Hearing Chair is satisfied that either (a) the case of the relevant dispute party shall have been so lacking in merit that the reference should not been made (or defended); or (b) the conduct of the relevant dispute party before or during the reference were such as to justify an award of costs are being made against it (or them)'.
- 1.3 Accordingly the proper approach – as envisaged in WCTL's application – is simply to apply the words of Rule G54. (There is different wording used in some other court and tribunal jurisdictions where costs do not follow the event but where there is a power to award costs in limited, defined circumstances, often by reference to behaviour that is described as 'unreasonable'.)

#### **2. Merits**

- 2.1 NR had in my judgment two serious and respectable arguments on the merits. First that if the agreement did not constitute a Track Access contract ("TAC") or variation thereof, then the Agreement was separate and outside the TAC. Therefore the contractual provisions relied on by WCTL would not apply. WCTL's argument (albeit successful) that the agreement was collateral to the TAC relied on limited legal authority (see paragraph 2.5.1 of the Determination). It was reasonable for NR to argue this point.
- 2.2 Secondly, NR contended that WCTL was obliged by the TAC and the Franchise Agreement to run the services it did; this turned on obligations worded by reference to effort/endeavours rather than outcomes. The resolution of that issue was therefore very much fact dependent. NR's case had an evidential basis that included that another operator had run a full (or nearly full) service on the basis of existing obligations. NR's case therefore, although it had evidential gaps (which contributed to the outcome of ADA 27), was not without an evidential foundation. This too was an argument that was not unreasonable to run.
- 2.3 Accordingly I conclude that NR's case was not one 'so lacking in merit' as to justify a costs order.

#### **3. Conduct**

- 3.1 In paragraph 5.7 of the Determination it was concluded that NR failed to observe reasonable commercial standards of fair dealing, resulting in NR being in breach of its obligation of good faith under the TAC. This was not simply because NR had lost on legal issues about enforceability, but more particularly for the reasons set out in paragraph 5.7.7. Plainly this conclusion is an important and serious matter which might well justify an order for costs.

- 3.2 There is some mitigation in relation to the conclusion in paragraph 5.7.7. NR took 'points in the ADA that could (and should) have been mentioned before the contract was entered into'. However it is accepted and contended on all sides that NR was under considerable pressure (including time pressure) when entering into the Agreement. Moreover the outcome produced was beneficial (removal of the Watford blockade and reinstatement of nearly full services on both the West Midlands route and the West Coast Main Line). That outcome was very much in the interests both of passengers and the network as a whole.
- 3.3 Pressure at the time does not however excuse failure by NR to tell WCTL that it had changed its mind about the Agreement until six months later. Whilst this behaviour was disappointing, it did not in itself cause any additional or wasted costs. Even if NR had notified WCTL at some stage after March 2015, this dispute was inevitable and (as is concluded above) NR had serious arguable points about the Agreement to take at an ADA.
- 3.4 Finally, conduct during as well as before the reference. The parties conducted their respective cases fairly, openly and in a straightforward manner. The hearing was conducted without rancour despite the emotions involved. All parties deserve credit for that, including NR. NR also complied fully and promptly with all procedural requirements.
- 3.5 NR withdrew the unattractive and weakest argument (about authority) in advance of the hearing. Although criticised by WCTL for this, it seems to me that that decision was welcome and is to some degree to NR's credit. It showed that NR had actively reconsidered the viability of its arguments as opposed to taking every conceivable argument available at the ADA.
- 3.6 Does NR's conduct justify an award of costs? After weighing all the considerations (including all points made by WCTL in its application) and on a fine balance, I am not satisfied that NR's conduct justifies an award of costs.

#### **4. Conclusion**

- 4.1 I determine that there will be no order for costs.
- 4.2 This Addendum shall be published on the access disputes website.



**Andrew Long**  
Hearing Chair

**21 April 2016**

## APPENDIX

### WCTL's application for costs

#### Introduction

1. This Application for Costs is served by WCTL in accordance with section 5.8 of the Hearing Chair's Determination dated 10 March 2016 (the "**Determination**") and Rules G53 to G55 of Chapter G ("*Determinative Process Rules – Access Dispute Adjudicator*") of the Access Dispute Resolution Rules. As will be explained below, West Coast Trains Limited ("**WCTL**") requests that the Hearing Chair order Network Rail ("**NR**") to pay the costs borne by WCTL in this determination, including solicitors' fees, direct costs and all other costs, expenses and fees of any kind whatsoever ("**WCTL's Costs**").
2. At this stage and in accordance with the Hearing Chair's direction, this Application addresses the principle of costs only. If the Hearing Chair orders that WCTL's Costs are to be awarded, then WCTL shall submit a statement of costs.
3. Capitalised terms shall have the meaning assigned to them in the Determination.

#### The Hearing Chair's power to award WCTL's Costs

4. Rule G53 provides, in relevant part, that the Hearing Chair shall have the power to "*order one or more Dispute Party to meet part or all of the Costs or expenses of the ADA and of any other Dispute Party assessed by such means as the Hearing Chair shall determine*".
5. The provisions regarding orders for costs are then set out in Rule G54, which states that "[a]n order for costs shall only be made where the Hearing Chair is satisfied that either: (a) the case of the relevant Dispute Party shall have been so lacking in merit that the reference should not have been made (or defended); or (b) the conduct of the relevant Dispute Party before or during the references was such as to justify an award of costs being made against it (or them)". Consequently, if either of these two alternative provisions is satisfied, the Hearing Chair may make an order for WCTL's costs. While WCTL needs only demonstrate that one of these bases for awarding costs has been satisfied, WCTL submits that both requirements are met in this case and that NR should accordingly be held liable for costs on both grounds.

#### Rule G54(a): NR's case is unmeritorious and should not have been made

6. First, in the light of the witness evidence presented by WCTL both before and during the hearing (which evidence went wholly unanswered by the Defendant), and the Hearing Chair's findings in WCTL's favour, it is clear that NR's case was so lacking in merit that the reference should not have been defended. Moreover, the matter should have never reached the point of WCTL having to refer it to the ADA.
7. On both of the key issues in dispute – i.e. whether there was a binding and enforceable agreement between WCTL and NR as evidenced by the Letter and whether NR had breached its obligation of good faith under the TAC – the Hearing Chair found overwhelmingly in WCTL's favour, and in terms which make it clear that NR's defence was unmeritorious and should never have been made.
8. As regards the first issue, the Hearing Chair considered and then rejected all of NR's challenges to the existence of the agreement. NR should not have run the case that it did because the case was irredeemably set up to fail in the absence of any factual witness evidence.
9. At paragraph 4.5.1 of the Determination, the failure by NR to support its case by any witness evidence resulted in there being "*a serious gap in NR's case*", which meant that NR's advocate was forced to "*in some respects [try] to make bricks without straw*"<sup>1</sup>. NR's failure to provide any witness evidence was also highlighted in the context of its serious allegation of economic

duress, the evidence for which was said to "[fall] very far short of establishing [economic duress]".<sup>2</sup>

<sup>1</sup> See para 4.5 of the Determination

<sup>2</sup> See para 5.6.4 of the Determination

10. NR's argument on consideration was also hopeless and at odds with the reality of the contemporaneous factual record. As noted at paragraph 5.3.18 of the Determination, NR's contemporaneous statement thanking WCTL for its *"positive response"* and its efforts in re-introducing services was *"a strange response by NR, compared to its position in these proceedings"*.
11. Finally, it will be recalled that only one week before the hearing, NR sought to resile completely from its arguments on authority. This was only after the issue of authority had been raised in defence by NR and ventilated in both parties' subsequent legal submissions (in total, incurring wasted costs on both sides in five separate written papers). Although the issue of authority was ultimately not a point for the Hearing Chair's determination given NR's late purported concession of the point, as stated at paragraph 5.4.3 of the Determination, the parties, *"and Network Rail in particular"*, were urged *"to be clear, open and fair with others when there are internal restrictions on authority levels which may (or may not) be known by others."* NR relied on a plainly hopeless point for much of these proceedings.
12. As to the second issue of whether NR breached its obligation of good faith under the Track Access Contract ("**TAC**"), the Hearing Chair found that NR did so by failing to observe reasonable commercial standards of fair dealing. In particular, paragraph 5.7.4 of the Determination finds that *"NR has sought to go back on and deny the validity of the agreement on grounds (principally consideration) that have failed and which **could and should have been mentioned before the agreement was entered into... [t]hat point was not taken until some 6 months later when WCTL submitted its claim**" (emphasis added).*
13. In summary, and in the light of the foregoing and the reasons made clear in the Determination, NR's case lacked merit to the extent that it should not have been made.

#### **Rule G54(b): NR's conduct justifies an award for WCTL's Costs**

14. Second, this Application is supported by NR's conduct before and during these proceedings, which conduct justifies an award of costs to WCTL by reference to Rule G54(b). In particular, the Hearing Chair has found that NR acted in breach of its obligation of good faith under the TAC and that breach has led to this reference. Further, throughout this arbitration, NR has caused both sides to incur wasted costs.
15. Paragraph 5.7.7 of the Determination records that NR was found to be *"in breach of the obligation of good faith in Clause 4.2 of the TAC"*. This, clearly, constitutes *"conduct before the reference"* within the meaning of Rule G54(b), thus justifying an award on costs. If NR had acted in good faith, then WCTL would have never been required to make this reference at all. Instead, NR chose (wrongly) to deny the existence of a legally binding agreement which it freely entered into and enjoyed the benefit of.
16. WCTL submits that the breach of an obligation of good faith is behaviour which should be discouraged and sanctioned where the power is available to do so. Rule G54(b) confers that power upon the Hearing Chair. The breach of an obligation of good faith is an exceptional matter and a very serious one. It is precisely the form of conduct which justifies the invocation of the exceptional power under Rule G54(b).
17. Moreover, NR alleged a breach by WCTL of its obligation to act in good faith. That allegation failed (paragraph 5.7.8 of the determination). That was a serious allegation to make and on the facts it stood no prospect of success. It appeared that NR ran that argument simply as a 'tit-for-tat' response to WCTL's claim of breach of good faith, which argument by WCTL was well-founded, evidenced by documentary and witness evidence and carefully considered before it was pleaded. None of those points can be made in favour of NR's claim and of course NR's serious allegation failed comprehensively. This was, again, an argument that should never have been made.

18. Further, NR's late decision to abandon a central aspect of its defence (on authority) and to add other late and desperate arguments (including a defence based on a very serious allegation of economic duress, unsupported by any witness evidence whatsoever) meant that wasted costs were incurred on both sides. WCTL should not have been forced to incur costs addressing NR's allegations. NR should bear the consequences of such conduct in this reference.
19. Finally, but importantly, it bears emphasis that NR proceeded in this case on the basis that if successful, it should be awarded its costs. NR proceeded on the basis that the issues in question were such that that success or failure would justify the exercise of the Hearing Chair's jurisdiction on costs. Having taken the position that if it won, then costs were appropriate, NR cannot credibly adopt the position now that having lost, costs are not appropriate.
20. In summary, NR's conduct both before and during this reference justifies an award of costs in WCTL's favour.

#### **Request**

21. WCTL incurred costs of £xxx (excluding VAT). WCTL was most concerned regarding the principle involved in this particular case and its importance in the wider rail industry. Therefore, WCTL accordingly engaged representation appropriate for ensuring best presentation of its case. WCTL recognises that the representation of costs may have been more costly than previous cases.
22. In the light of all of the above, WCTL requests that the Hearing Chair order that NR pay xx per cent of the costs borne by WCTL in this determination, namely WCTL's Costs.
23. In view of the importance of the matter for the industry, WCTL would not advocate that ADC should also seek to recover its costs.

#### **Reservation**

24. WCTL reserves the right to make further submission as to the quantum of its costs in due course, in accordance with paragraph 5.8.3 of the Determination.

**Served by xxxxxx  
for and on behalf of West Coast Trains Limited  
30 March 2016**