
ACCESS DISPUTES COMMITTEE

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Dear Sirs

Consultation on proposed changes to the Station Access Conditions and to the Independent Station Access Conditions

Whilst not invited to be a consultee, the Committee has reviewed the consultation material and would like to make some comments on matters relating to the areas of potential disputes and the process for dealing with them. We are not putting forward any views regarding policy aspects raised in the consultation as such matters are properly the domain of the potential contracting parties.

We turn first to the proposals as described in the consultation document.

Paras. 3.7 – 3.9

The Committee certainly agrees that the defined responsibilities for Maintenance and Repair, along with the concept of “renewal”, require attention. These matters have received quite some consideration in the dispute arena over recent years, although no reference has yet been determined.

Paras. 6.9, 6.10 and 6.21

It would seem probable that the bodies interested in becoming Strategic Contributors are likely to seek to pursue their interests robustly, which will include deploying legal advocacy/support at a senior level (whether in-house or otherwise) in the event of determinative dispute proceedings. Equally, having incurred costs in working up a scheme, developers – “Specific Contributors” – will probably employ senior legal resource for any dispute proceedings in order to have the best available expertise deployed towards avoiding abandonment of the project. The industry parties to such disputes will no doubt feel the need to respond with “equivalence of muscle” as regards their representation in the dispute forum, and this will lead to increased costs for all industry parties involved. If the matter is being heard by an Access Dispute Adjudication, the proceedings are likely to call for use of transcription services and possibly the engagement of specialist assessors, leading to significantly increased costs for this Committee; such costs will fall to be met from the levy upon all Resolution Service Parties. It is assumed that by entering into a Co-operation Agreement, Specific Contributors and Strategic Contributors will understand that they become liable to contribute to the Committee’s funding under Access Dispute Resolution Rule J45.

Continued...

It is not unknown for developers to cease trading at short notice. The only financial undertaking is contained in what will presumably be bilateral agreements between the proposer and each Material Change Consultee. The consultation does not seem to indicate whether there will be any form of bond in place to give assurance that industry costs will be met by Specific Contributors or, indeed, Strategic Contributors. The existing Resolution Service Parties need to understand that, as currently set out, any shortfall in funding for this Committee's costs which arise through proceedings caused by third party developers will fall to them. [The Committee also notes that no form of bond seems to be required to protect against financial consequences of a Contributor causing a Material Change to be left incomplete.]

Para. 6.11

With there not necessarily being an end timescale to a Strategic Contributor's interest in a scheme, we will expect to raise a levy upon such bodies annually until informed that their interest has come to an end. They should understand this.

We now turn to the draft National Station Access Conditions ("SACs") and draft Independent Station Access Conditions ("ISACs")

SAC Condition B5 and ISAC Condition 5

This Condition exists in the current SACs (Condition B8) and the current ISACs (Condition 9), but it is not clear why there should be requirement to establish the entitlement of Network Rail – the landlord of the premises – to exercise its veto.

Regarding practicability, proposed SAC Condition B5.2.1 and proposed ISAC Condition 5 call for the Access Dispute Resolution process establishing entitlement to have been completed within 35 days so that a Relevant Operator can issue a notice of appeal to ORR, etc. Whilst a determination might have been forthcoming through an urgently convened Access Disputes Panel under the former Access Dispute Resolution Rules, the timescales set out for arriving at any determinative outcome under the new Rules would not realistically give sufficient time for a Relevant Operator to submit an appeal to ORR. We suggest that proposed SAC Condition B5.3 and ISAC Condition 5.3 could be removed.

SAC Condition F11.3.7 and ISAC Condition 42.3.7

The relevant Access Dispute Resolution Rule provision was removed in April 2005 but the SACs and ISACs were not updated accordingly. There is need for a re-think as to what is now intended.

SAC Condition G7.7 - G7.9 and ISAC Condition 49.7 – 49.9

We suggest that consideration be given as to whether it remains appropriate to allow an appeal to ORR against the award made by an arbitrator under the Arbitration Act. Would it not be more satisfactory to now require referral to an Access Dispute Adjudication in the first instance, with ORR prescribed as the second stage? Associated timescales would, of course, also require attention.

Continued....

SAC Condition H5.2 and ISAC Condition 53.2

As the new Access Dispute Resolution Rules allow the parties to choose the forum to determine their dispute, there is not an actual "relevant dispute resolution forum". We suggest that this SAC Condition be re-worded to read "... Condition H5.1) for determination in accordance with" and the ISAC Condition be re-worded to read "... Condition 53.1) for determination in accordance with"

Co-operation Agreement between Railway Industry Parties, Clause 13.2 (SAC and ISAC)

Again, as the new Access Dispute Resolution Rules allow the parties to choose the forum to determine their dispute, there is not an actual "relevant dispute resolution forum". We suggest that this clause be re-worded to read "... clause 13.1) for determination in accordance with"

Co-operation Agreement where Proposer is a Specific Contributor or a Strategic Contributor, Clause 15.2 (SAC and ISAC)

Again, as the new Access Dispute Resolution Rules allow the parties to choose the forum to determine their dispute, there is not an actual "relevant dispute resolution forum". We suggest that this Condition be re-worded to read "... clause 15.1) for determination in accordance with"

Other comments

If we might be permitted to comment on one aspect of drafting of the proposed new SACs observed during our review, some of the Agreements listed in proposed SAC Condition G7.1.2 and proposed ISAC Condition 49.1(B) are surely no longer in effect.

We trust that these few observations are of assistance.

Yours faithfully



Tony Skilton
Secretary
On behalf of the Access Disputes Committee