



Escalating serious disputes to ORR under ROGS duty of cooperation

(including RIS-8270-RST)

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Forward

Purpose of this document

1. This document outlines the process we will follow when a serious dispute regarding ROGS duty of cooperation requirements is escalated to us, including disputes arising from the Rail Industry Standard RIS-8270-RST. We will keep this process under review. A flowchart to illustrate the process can be found at Annex A.

Introduction

2. The Railways and Other Guided Transport System (Safety) Regulations 2006 (ROGS) create a “level playing field” on which infrastructure managers and transport undertakings need to cooperate to ensure the safety of the railway system. When there are serious disputes with significant implications we have agreed with the industry that we may need to help resolve them. However, we will only become involved after all efforts to resolve the dispute using the industry’s own agreed processes have been exhausted. These include the process described in the Rail Safety and Standards Board (RSSB) [Duty of Cooperation Guide Part 1](#) and [Part 2](#). This process will include senior management meetings and “reasonable request” letters between the parties. Standards Committees may also become involved in resolving disputes that develop under the Rail Industry Standard RIS-8270-RST.

Basis for this process

3. ORR is the enforcing authority for the Regulations and our consideration of a dispute referred to us under this process may also be the subject of action in accordance with our [health and safety enforcement policy](#), or [economic enforcement policy](#). This may involve using our powers under the Health and Safety at Work etc. Act 1974 (HSWA), or the Railways Act 1993 (“RA”). In any event, we will expect dispute parties to regard our involvement under this process as the final step in resolving the bilateral dispute referred to ORR. Criteria for the final determination under this process are attached at Annex B.

The dispute process

Timescales

4. We will carry out our responsibilities and make a determination within four months from the date the dispute is received by us. Our consideration of a submission will usually depend on factors including the size and complexity of the submission and whether we need to seek representations from interested parties. We recognise that in some RIS-8270-RST disputes the involved parties may feel a commercial need for urgent resolution, and we will endeavour to accommodate this where we can. If we need to request further information then the four-month timescale will start from when all the requested information is received.

Inspector involvement

5. In many cases our inspectors will be involved and play a role in advising on the safety risks underlying a dispute at a relatively early stage. They may handle safety issues as a formal complaint and where appropriate may refer matters back to accepted industry processes to reconsider a solution or take enforcement action under HSWA. Only in the most serious cases will the process outlined below be used. In some such cases, especially those with a significant commercial component, when our inspectors know that the parties are planning to escalate to ORR, or when HSWA enforcement does not seem appropriate, our inspectors may decide not to give anything except urgent safety advice so as to remain impartial. They may decide to call a preliminary meeting of the parties to facilitate a solution before any formal escalation is considered. They will notify appropriate colleagues and may involve them in a preliminary meeting.

Deciding to escalate

6. In situations where all other means of resolution have been exhausted, both parties should agree to escalate the dispute together and send a joint submission using [the 'Escalation of disputes to ORR' template](#), clearly marked as a dispute under the ROGS Duty of Cooperation. As set out in the template, where a dispute has arisen from the RIS-8270-RST process, we will usually require a compatibility review forum to have taken place and will expect a full report of this to be sent as part of the submission. We will acknowledge receipt, review these dispute papers at senior level and appoint a case team including one of our senior management team, a case officer, and appropriate inspector, technical, economic and legal staff.
7. If it is not possible to escalate a dispute jointly, single parties should also use the template and include details of other interested parties. We will acknowledge receipt

and make it clear that we will not usually use the formal procedure below until we have consulted relevant inspectors, requested representations from the other interested parties and given them a reasonable time to respond. It is unlikely that we would proceed without such representations.

8. Any documents submitted by a single party will usually be shared with other relevant parties and we may decide to publish the documents we receive on our website, subject to statutory constraints for example under RA or HSWA. We will allow the dispute parties to make representations to us about confidentiality.

Initial review

9. Our main task at this stage is to ensure that all possible industry avenues have been exhausted and that the dispute is sufficiently serious to warrant significant resources being allocated to it. We will usually use the following criteria, which are non-exhaustive, to help in any decision to hear the dispute:
 - (a) all industry processes have been exhausted;
 - (b) the matter in question is of sufficient importance to the interested parties and the industry;
 - (c) the reference is not frivolous or vexatious; and
 - (d) it is not appropriate or convenient for the matter to be disposed of by an alternative forum or under a different process.
10. It is equally important at this stage to identify the issues at the heart of the dispute, e.g. safety, technical, commercial etc. as this will usually determine who is involved in the process. We may request further information, and we may decide that the dispute should be considered using a different and more applicable ORR process. We will decide whether to hear a dispute once we have had a reasonable time to consider the dispute papers, including any representations by interested parties.
11. If our preliminary view is that ORR should not hear the dispute, we will usually issue a "minded to" decision not to hear it, based on the above criteria. The case officer will write to the parties asking for their views on the "minded to" decision within a reasonable time. The case team will consider any views received from the parties on our "minded to" decision, and may decide to hear the dispute.
12. When we have decided whether or not we will hear the dispute, the case officer will write to the parties with this decision.

Substantive consideration (including optional meeting)

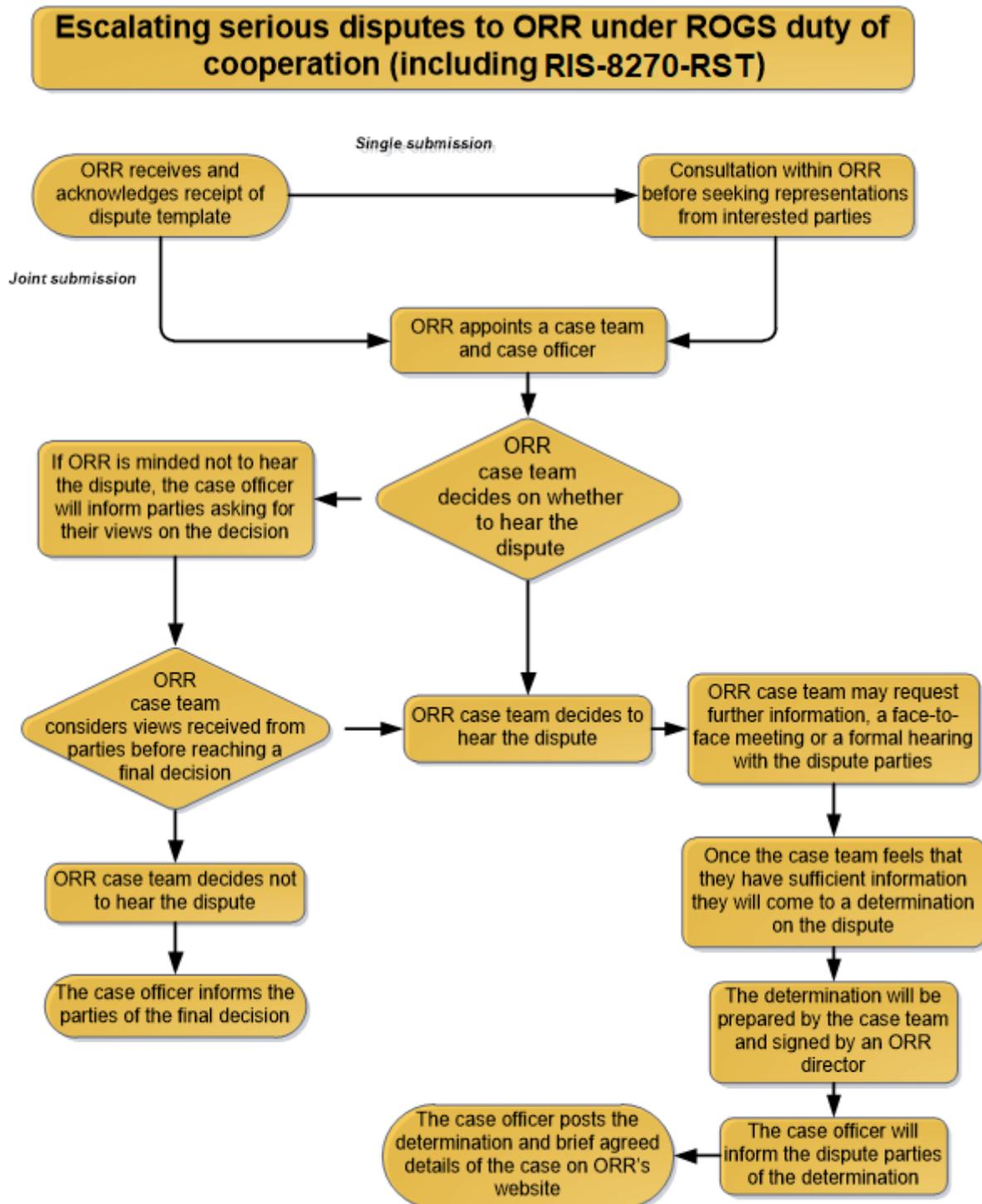
13. We may request further information while the dispute is under consideration. The case officer will keep the parties informed of our progress in considering the dispute.
14. In some instances the case team will decide if a face-to-face meeting or a formal hearing is necessary. In other instances, one or both of the parties will request a face-to-face meeting and we will give serious consideration to such requests. The case officer will inform the parties and agree a date for the meeting or hearing. A formal hearing will follow the established process for Track Access Appeals.
15. The case team will usually prepare meeting papers that:
 - (e) set out the issues and questions that ORR wishes to discuss;
 - (f) ask any preliminary questions in respect of those questions; and
 - (g) give the parties the opportunity to suggest questions and issues that they may wish to see discussed at the meeting.
16. To keep the process manageable and efficient there will usually be a limit on the number of industry representatives involved directly in the meeting. The case team will develop a proposed agenda in advance and provide this to the parties. The case officer will take a note of the meeting and will send this to the parties for comment.
17. The case team will continue to request information from the parties and discuss the issues until it feels the parties have made sufficient representation for ORR to come to a determination on the dispute. Criteria for the final determination are attached at Annex B.

Determination

18. The determination is prepared by the case team and signed by the appropriate Director. The case officer provides the determination to the parties.
19. The case officer arranges for the determination and brief details of the case to be posted on the ORR website. Posting should occur at least 48 hours after the determination has been provided to the parties.

ANNEX A

Process flow chart



* Where the dispute has arisen from the **RIS-8270-RST** process a report of the compatibility review forum should accompany the submission

ANNEX B

Criteria for final determinations on disputes referred to ORR which arise from ROGS

Process

1. We will publish, and from time to time revise in the light of experience, our process and criteria for coming to a decision on disputes arising from the Railways and Other Guided Transport Systems (Safety) Regulations 2006.
2. We will, as a matter of general principle give independent, objective and fair consideration to the submissions and evidence of each party to the dispute in accordance with the principles of natural justice.
3. We will deliver a decision that is consistent with the parties' legal obligations and any contracts in place between them.
4. We will make our decisions based on the submissions and evidence placed before us and other relevant information available to us.

Decision criteria

5. Where the dispute is primarily about whether or not an appropriate level of safety has been delivered we will usually have regard to the following non-exhaustive list of factors. Whether the parties have:
 - complied with any specific legal obligations;
 - carried out suitable and sufficient risk assessments;
 - identified and complied with relevant published specifications, standards, codes of practice etc.;
 - identified and followed accepted industry good practice;
 - taken sufficient actions to ensure that all identified risks are controlled so far as is reasonably practicable (SFAIRP).
6. In coming to a view as to whether the parties have taken sufficient actions to ensure that all identified risks are controlled SFAIRP, we will usually have regard to the following non-exhaustive list of factors. Whether, based on the facts available to us:

- our Enforcement Management Model would support a decision to take enforcement action against any of the parties or in relation to the subject matter of the dispute; and
 - any proposed change to railway infrastructure and rolling stock, its construction, testing, operation and maintenance would significantly increase risk or reduce the current level of safety.
7. Where the dispute is primarily about what is the most economically advantageous situation for the industry as a whole, we may also seek to ensure that the method best balances our duties under section 4 of HSWA or the Railways Act 1993 (as amended). In particular, we will usually have regard to our duties to:
- promote improvements in railway service performance;
 - protect the interests of users of railway services;
 - promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent which it considers economically practicable;
 - promote efficiency and economy on the part of persons providing railway services;
 - enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance; and
 - take into account the need to protect all persons from dangers arising from the operation of railways.