

To all those listed in Annex 1

5 October 2004

DISPUTE RESOLUTION AND PERFORMANCE ORDERS

1. This letter explains why ORR¹, subject to the views of copy recipients, does not believe that it is necessary to publish guidance notes on how it envisages arbitral tribunals would deal with performance orders. The production of such guidance notes was first raised in ORR's template passenger track access contract final conclusions document².

Background

2. Both the passenger and freight model contracts provide for an innocent party to seek a performance order in circumstances where there has been a breach of contract, or, where there is likely to be a breach (in order to prevent any breach or mitigate its effects).

3. ORR had considered that it might be helpful to tribunals dealing with performance orders, as well as the industry itself, if it were to prepare a voluntary guide setting out best practice for performance orders for the use of all parties and the arbitral tribunal. It recognised that such guidance notes would be illustrative only, in order not to fetter the powers of the arbitral tribunal. In its final conclusions document, ORR said that it would publish guidance notes following consultation with the industry.

ORR's reasoning

4. ORR has recently reviewed the position and there are a number of reasons why it no longer considers that guidance notes are necessary, as follows:

- (a) When a party seeks a performance order, the relief required from the arbitral tribunal is in effect the relief of specific performance of the contract. This relief is awarded at the discretion of the tribunal, having considered all the facts and having acted fairly and impartially. There are, of course, a number of possible scenarios where one could imagine a

¹ The Office of Rail Regulation (ORR) replaced the Rail Regulator and the Office of the Rail Regulator on 5 July 2004. For convenience, the abbreviation ORR is used throughout in this note.

² See paragraphs 3.32 and 3.33 of *Model clauses: the template passenger track access contract, Regulator's final conclusions*, Office of the Rail Regulator, London, June 2003, available at <http://www.rail-reg.gov.uk/upload/pdf/171.pdf>.

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performance order might be sought, but each scenario will present the arbitral tribunal with a different set of facts from which it would have to decide whether to exercise its discretion to order the relief sought. As such, guidelines would have to be very broad and it is not clear that such guidelines would therefore be particularly useful.

- (b) an arbitral tribunal would also be a single legally qualified person (or perhaps three people in future, but certainly with one or more having legal expertise) who would be well aware of the rules and standards expected of an arbitral tribunal.
- (c) the parties in a dispute going to an arbitral tribunal are likely to be legally represented and as part of their submissions to the arbitral tribunal, they will set out the issues that the arbitral tribunal should have in mind when deciding whether to exercise its discretion to give a performance order. The issues will of course differ depending on the circumstances of each individual case.

ORR's conclusion

5. For the reasons set out above, and given ORR's other priorities over the coming months as set out in its recent document about its role and proposed work programme³, ORR has concluded that non-binding guidance would not be very useful in this particular case and is minded not to publish guidance notes.

6. A copy of this letter will be made available on the ORR website at <http://www.rail-reg.gov.uk/server/show/nav.00100b002001005001>. If you have any questions, or consider that ORR *should* produce non-binding guidance notes, please contact:

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³ *Implementing the future of rail: ORR's role and proposed work programme*, Office of Rail Regulation, London, September 2004, available at <http://www.rail-reg.gov.uk/upload/pdf/211.pdf>.