



Merseyrail Electrics

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Dear Mr Gupta,

Model clauses for track access agreements

I am writing with regard to the Office of the Rail Regulator's consultation document dated January 2000.

Firstly, on a point of administration, I would kindly ask that the Regulator's office check to ensure Merseyrail Electrics (at the address listed above) are shown on the distribution list for consultation documents. There appears to have been a problem with receipt of this document. Indeed we were unaware of its existence until alerted by correspondence from ATOC. The distribution problem delayed our receipt until 19th January 2000.

As a general comment Merseyrail Electrics (MEL) in principle welcome the establishment of model clauses and the incorporation of these into the Track Access Agreement.

MEL's specific comments to the questions raised are listed below. For ease of reference we have used the ORR question paragraph numbers as points of reference throughout our response

2.11

i) Is it desirable that standard access contracts contain commercial purpose provisions ? Should they be in standard form.

MEL believe the addition of a commercial purpose would be useful. The particular advantage would seem to be to provide a better context for interpretation of the remaining terms and conditions within the contract.

MEL consider it unlikely that the fundamental commercial purpose of Train Operators viz Railtrack will in the broad context, differ to a significant degree. Thus MEL believe, with the exception of specific projects such as the West Coast contract, it would be beneficial to have a standard form commercial purpose.

ii) If so what should the standard provision contain ?

MEL consider that the broad format as outlined in the example shown in Appendix 1 relating to West Coast is a helpful starting point for the industry i.e. one that specifies the deliverable outputs of both infrastructure and rolling stock.

MEL from its perspective would wish to link the infrastructure output to agreed Customer Reasonable Requirements. This would provide an output specification for the infrastructure which will ensure that Railtrack funds are not (perhaps entirely) diverted to other parts of the network where Railtrack have the potential to earn the greatest returns e.g. in favour of TOC's offering revenue sharing deals.

MEL would also wish to incorporate a link between Railtrack and the Train Operators Franchise (Plan) obligations (e.g. delivery of a PSR compliant train plan, performance call-in etc thresholds). Currently Railtrack's liability for poor performance in Schedule 8 is (realistically) restricted to monetary flows. Train Operators run both a financial and loss of Franchise risk for the poor Schedule 8 performance of either or both parties.

iii) Are commercial purpose provisions appropriate only in contracts which provide for carrying out of major investment in the network or in rolling stock ?

No, see ii) above.

2.14

i) Is it appropriate that, in carrying out the obligations under the contract, one or both of the parties should be expressly required to meet certain minimum standards of competence ?

MEL believes that competence standards must apply to both parties. MEL considers it important that such a requirement should be competence rather than level of input based else management decision making ability would be undermined.

ii) Are the standards implied by the Supply of Goods & Services Act 1982 sufficient or is more needed ?

The provisions of the Act appear not to be much more prescriptive than those contained within the current Track Access Agreement (TAA). The example shown in paragraph 2.13 is more akin to the provisions provided within MEL's more commercially driven contracts and as such MEL would wish to see the inclusion of similar in the TAA.

One of MEL's concerns is the length of time Railtrack take to respond to issues. Thus if the 2.13 example were to be strengthened MEL would suggest a definition of timely (perhaps within 28 days ?) could be usefully included both within the standards and throughout the TAA.

Also in setting standards the Franchise Agreement has a number already determined, some of which can be prescriptive. Reference to and linking such applicable standards that affect both parties would, in our view, assist in removing the potential for some of the conflict of aims between TOC's, Railtrack, SSRA and PTEs that arise from time to time (e.g. in timetable planning).

iii) **Should the standards be the same ? If not what should the standards for (a) Railtrack and (b) the Train Operator ?**

MEL consider equal standards should apply.

2.18

i) **Are there circumstances in which access rights should be absolute and not expressed to be subject to the Rules of the Route and the Rules of the Plan?**

MEL's experience with the Rules of the Route/Plan (ROTR/P) process has been varied. Being a sole operator, the ROTR/P are generally only altered to facilitate PSR compliance or to accommodate Railtrack's needs. We have on a few occasions found Railtrack altering the ROTR/P for their own requirements, effecting MEL's operations, without reference to MEL i.e. change by stealth. While these problems were eventually resolved amicably such occurrences suggest to MEL that access rights, particularly those relating to PSR compliance, should be absolute.

ii) **If access rights are to continue to be subject to these rules, is there a need for additional protections for train operators against their amendment without the agreement of the affected parties ?**

Yes - in recognition that changes can have a significant impact on the operations/business of the train operator including Franchise compliance.

iii) **Are there specific circumstances in which elements of access rights should be subject to review or "use it or lose it" provisions ?**

MEL believe there is some justification for the "use it or lose it" approach, particularly where the non-use is simply a commercial or protectionism type decision. However access rights relating to PSR compliance should remain protected.

- iv) **Are there elements of access rights which should be subject to more general review over the life of the contract and, if so, how often and in what circumstances ?**

MEL from its perspective as a sole operator with a PSR based timetable is content for those rights not related to PSR compliance to be reviewed at appropriate and regular intervals.

- v) **If access rights are to be reviewed, what should be the nature of the review ? For example, should change only be in cases where the parties have agreed on it ? Or should there be cases where a change is possible without all concerned being in agreement and, if so, what are they ?**

MEL would not wish to see those access rights allowing it to be PSR complaint to be varied without its express consent.

Financial compensation should be payable by Railtrack to Train Operators if Railtrack wish to remove rights without negotiation.

- vi) **Should the journey times to which a train operator is entitled be subject to any entitlement of Railtrack to add pathing time or allowances ?**

Only where the maximum journey time is not exceeded and if it can be shown to be in the wider interests of the passenger. MEL as sole operator cannot envisage such circumstances.

- vii) **Is it appropriate for Schedule 5 to provide rights over and above quantum and frequency which would constrain what other operators can do on the network, or should train operators rely on Access Condition D and the associated rights of appeal for their protection ?**

MEL have no issues with the content of Schedule 5.

2.22

- i) **Does Clause 6 provide the train operator with sufficient specification of the obligations of Railtrack in relation to the operation, maintenance and development of the network insofar as the train operator is affected ?**

MEL considers that Clause 6 is inadequate in that it should reflect Railtrack's Condition 7 obligations as it is compliance of this Condition that the Track Charges are based.

If not, in what respects should Clause 6 be improved ? For example, should it include explicit track and ride quality parameters ?

MEL agree that both track and ride quality parameters should be included and in addition key for operators with electric trains a measure relating to the electrification system. Such measures must be output based, some examples for a 3rd rail electrification system: no gapping areas, % of rail renewed in modern equivalent form per annum, vertical and horizontal alignment, over/under voltage, system power ratings, regeneration capability etc.

On a general point the specification could be linked into the agreed Customer Reasonable Requirements (CRR). MEL's CRR contains similar specific output measures.

iii) If more clearly defined specifications are to be established, should they be universal or route specific ?

MEL would prefer defined specifications that should be route specific by linking them to a train operator's CRRs.

iv) Are train operators satisfied with the annual five-year network plans provided for in Clause 6 ? Do they meet the contractual standard laid down for them ? Does Railtrack believe that the five-year plans provide sufficient information to train operators ?

MEL consider that the value of the Clause 6 statement is devalued through lack of an asset register. Until a comprehensive register is available it is unlikely that the Clause 6 information will represent an accurate statement of the required plan of works to maintain and develop the condition of the Network.

v) Is Part G of the TAC a sufficiently detailed and effective process for ensuring network change operates in the interests of all users of the railway ? Does it enable a proper balance to be struck between strategic considerations and those relevant to a specific case ? If not, how could it be improved ?

MEL do not consider that network change has been an effective process as our experience is generally that Railtrack as an organisation lack knowledge and understanding of their obligations with respect to Part G.

On a number of occasions MEL have had to retrospectively draw Railtrack's attention to Part G changes they have made that were undertaken without first going through the change process. Rather than these being wilful breaches of the TAC MEL suspect that ignorance is the main cause. On occasions the retrospective Part G has led to substantial compensatory payments to MEL. Despite this Railtrack have continued to breach Part G.

However it is worth noting that on a few occasions Railtrack have tried to argue that what MEL consider to be a Part G they do not and thus is not. MEL have in these circumstances drawn Railtrack's attention to the relevant ADRC determination (number 1) which states that no party can unilaterally decide on whether Part G applies and if disputed the relevant Committee would rule. The process of educating Railtrack continues.

MEL note that while we have established a forum for Part F changes for Railtrack, Railtrack have failed to reciprocate with respect to Part G. Such a formalised forum may help to ensure Part G process is enacted prior to change taking place (excepting the provisions relating to urgent safety requirements).

- vi) Does Part G provide adequate protections for Railtrack, affected train operators and other stake holders when proposals to change the network are made and pursued ? Are the rights to object to and block a proposal for change correctly structured, or are they too strict or weak ? Do they promote or inhibit improvement and the use and development of the network ? Are the rights to financial compensation (both in terms of the costs of feasibility studies and compensation for the changes themselves) appropriate and adequate ?**

As stated in v), MEL's problems with Part G has been Railtrack making changes that fall within the terms of the Clause without initiating the Part G process. Generally once this has been advised to Railtrack they have responded with a Change Proposal (albeit slowly and of course retrospectively). MEL consider that contractual reinforcement is required in order to force Railtrack to initiate Part G before Part G changes are made.

We have not found the Part G requirements an inhabitant and tongue in cheek we suspect our Railtrack Zone haven't either (as they make changes first and then if we notice only then will they comply).

There is a lack of clarity as to how long the compensation should be paid for (e.g. length of Franchise term, length of time the change will have an effect etc.). Indeed MEL would note that one effect of a Part G change may be to shift the balance of costs between parties beyond the term of a Franchise. It is likely, accepting that the majority of Part G changes have been carried out by Railtrack, that this shift of costs will be in Railtrack's favour.

However, when compensation payments have been made by Railtrack they have been adequate.

- vii) Is Part G operated well by train operators and Railtrack ? If not, in what respects.**

See previous comments but also as a train operator with considerable experience of Railtrack failing to initiate Part G we are naturally alert to the issue and now tend to act proactively i.e. if we know of an approaching issue that is likely to fall within Part G we will initiate the discussion with Railtrack.

2.28

- i) Is it desirable that contractual "local output statements" reflecting the points discussed above are established ?**

Yes. MEL consider that such statements will assist in ensuring that a "fair" proportion of its Track access Charges are invested in its network (sole operator) rather than Railtrack being incentivised (through the single till) into diverting these sums to projects where the potential for return is greater (e.g. because the train operator is able to offer a revenue sharing deal).

ii) What should be the balance between enforcement of contracts and via Railtrack's network license ?

MEL would welcome the opportunity to have contractual remedies available to enforce agreed specific local outputs. It will be both in the interests of the operator to ensure compliance and easier for him to understand progress against compliance than it will be for the Regulator to take action under License Condition 7.

iii) What should be the nature of any such arrangements, and how should they be enforced ? What remedies should there be if they are complied with ?

MEL consider that Railtrack understand and are motivated by items that effect their financial bottom line. Thus given appropriate contractual remedies which must include financial penalties (perhaps off-setting relevant periods Access Charges) for non-compliance, the train operator should be able to ensure action without recourse to the Regulator. However for continued noncompliance the ultimate recourse must be Regulatory action.

iv) If such arrangements are to be put in place, are the provisions of Part G sufficient to deal with the failure of Railtrack and an affected train operator to agree ? If not, how should they be improved ?

Providing the rights both to refer dissatisfaction to Network or Vehicle Change Committee (Clause 6.1) and ultimately the Regulator (Clause 6.2) are maintained then it seems to MEL that the appropriate mechanisms for failures to agree are already in place.

2.29

i) What categories of information does a train operator need from Railtrack in order to make the best use of the network ?

MEL (as sole operator) would suggest the following information is required; current capacity constraints (e.g. junctions, signalling type and headways), potential capacity of the network, potential for journey time improvements, accurate engineering strategy (particularly important is that this is adhered too), gauging data, traction supply (see 2.22) and cost of development opportunities.

ii) How should this information be supplied ? What standards should it meet? Should there be different standards for different categories of information

A prerequisite must be that the information provide is accurate. Also that the information is timely (i.e. given the request is reasonable it must be provided within a reasonable period of request) and understandable (i.e. suitable for the train operator to make business decisions on).

- iii) Are there circumstances in which it is reasonable for a train operator to make additional payments to Railtrack for certain information? If so, what categories of information and what criteria should be used to assess the charges?**

Perhaps the only criteria for which additional payment should be made is where the operators request is considered unreasonable e.g. perhaps beyond the scope of the agreed CRR's. In such circumstances it would be reasonable for Railtrack to recover their costs of providing plus a nominal management charge.

- iv) What information should a train operator provide to Railtrack, in particular having regard to the interests of other operators.**

A train operator should provide details of its Franchise PSR requirements in order that Railtrack can assist the operator to achieve PSR compliance.

2.34

- i) Is it appropriate that track access contracts continue to contain no express assurances from Railtrack in relation to capacity which has been sold under the contract?**

While MEL has not experienced these problems it does not think it appropriate that Railtrack should carry no financial or other risk if it indulges in overselling.

- ii) If not what should be the nature of the assurances, and what remedies should be available if they are not honoured?**

MEL consider Railtrack should be liable for the costs of the operators reasonably loss of expected profit plus a compensation factor.

3.2

- i) Should Schedule 8 be the only remedy for the cancellation or delay of services?**

No - MEL considers that Railtrack should run a similar risk to that of train operators. Train operators can through the Franchise Agreement, perhaps through no fault of their own, either have the Franchise terminated early for poor performance (by exceeding the Call-in thresholds etc) or at Franchise renewal be excluded from re-tendering. Also persistent call-in (3 within 39 periods) can lead to SSRA imposing a financial penalty/commitments. If Railtrack are the root cause of the call-ins or a major contributory factor then either all or fair proportion of the SSRA penalty should as a minimum flow through to Railtrack.

Railtrack's risk for persistent non-performance must extend beyond financial penalties to its licences to operator.

- ii) Are there circumstances in which Schedule 8 should be suspended, and other remedies take over? If so, what are they and what are the appropriate remedies?**

MEL's experience to date is that the SSRA (and formerly OPRAF) are extremely reluctant to suspend Schedule 7 (and other operable clauses) in any circumstance. Thus suspension of Schedule 8, particularly where Railtrack caused the suspension, could only operate effectively if the comparable Franchise Clauses (such as Schedule 7, Call-in thresholds etc) were also suspended. If they were not the train operator would not be receiving Schedule 8 monies from Railtrack despite paying out the full sum, and potentially suffering other consequences such as Call-in etc, to SSRA and PTE.

In short, suspension of Schedule 8 in isolation is likely to be a substantial disbenefit to Train Operators. Even when performance is very poor, MEL would suggest that Schedule 8 should continue to operate but in conjunction with other contractual (e.g. self-help, costs, compensation etc) or Regulatory remedies (e.g. fines).

3.4

i) What liability should there be if a party fails to comply with its obligation under, for example, the Track Access Conditions or the dispute resolution arrangements? What liability should there be for breach of maintenance and network enhancement obligations, environmental obligations, obligations concerning the provision of information or its confidentiality? What should the contract say about other types of breach of the contract?

The train operator, should it breach its Franchise Agreement, is liable, in order to discharge the breach, to a financial penalty. A corresponding arrangement could be established with respect to the TAC and TAA.

MEL consider that in certain circumstances of non-compliance by Railtrack of the TAC and/or TAA for the train operator to be able to instigate self-help remedies. In such cases Railtrack should be fully liable for all costs.

With regard to the extent of liabilities these should in all circumstances cover direct as well as indirect losses. In order to widen the extent of liabilities, MEL would like to see the Claims and Allocation Handling Agreement (CAHA) reviewed. Two elements in particular; firstly, the £10K excess currently imposed and perhaps most importantly, the clause pertaining to "a single event or circumstance" has been used creatively by Railtrack to try to restrict the number of claims.

There is an argument that all breaches of contract have equal status. MEL consider that a degree of common sense should apply and clearly some breaches are more material than others.

For those material breaches of contract, which should include : maintenance, network enhancement and environmental obligations, Railtrack should be liable for financial penalties (i.e. withholding of access payments, compensation, train operator costs and losses - direct and indirect) and remedies should be available that allow the affected party(s) to use self-help.

For other less serious "technical or minor" breaches of contract, rectification within a reasonable period should be the key requirement. Should the remedy not be enacted within a reasonable time frame (e.g. 28 days) then the matter should escalate to a material breach and the remedies applicable to this would then apply.

ii) Should the parties be exposed to unlimited liability in any circumstances?

No.

iii) If not, what should the liabilities of the parties be?

All industry parties would find it extremely expensive (and difficult) to insure against unlimited liability. The insurance policy of most organisations places a cap on the liability sum insured. However for material breaches the liability exposure could be set suitably high (e.g. for Railtrack the annual train operator's track access charge payment ?).

iv) Should there be different limits on liability depending on the nature, time and severity of the breach in question?

Yes - see iii) above.

v) Should wilful misconduct be an exception to any general rule? If so, what should be the definition of wilful misconduct and what liability should attach in such a case?

No - see i) above, a breach is a breach whether this is done wilfully or not. If it is material then the range of measures proposed for a material breach should be sufficient to act as an effective incentive to avoid wilful behaviour.

If minor, then failure to rectify within a reasonable period would escalate the matter to material.

3.8

i) Are there circumstances in which parties to access contracts should be able to apply for remedies other than the payment of money?

Yes.

ii) If so, what are they, and what remedies should be available? Are there any circumstances in which a train operator should be entitled to 'self help' remedies (similar to the self-help remedies in station and depot access contracts)?

See also 3.4 (i) above, MEL would propose the availability of a self-help remedy for material breaches of contract. However MEL can foresee that the use of such measures may be problematic. For example the self-help may refer to the replacement/renewal of infrastructure which requires a possession or series of possessions. Not only may this be difficult to arrange (as Railtrack control the booking of possessions) but other Train Operators would require compensation and Schedule 7 TCIP charges would also still apply. Thus should self-help be allowed consideration must be given to contractual clauses that would facilitate this arrangement and such must not be in isolation to Schedule 7 et al.

3.10

i) Are the events of default specified in the standard track access contract appropriate? Are there any missing? Are any of them inadequately defined?

The current breach remedy is unlikely to be used. Rather than applying the remedy open to it (i.e. suspend its services) MEL would prefer a situation whereby Railtrack quickly remedied the problem and covered all the direct and indirect costs and losses (including Franchise Agreement penalties), of the train operator.

Railtrack is currently divorced from the Franchise Agreement. This leads to the potential for conflict of interests. Thus a default event could be added that relates Railtrack controlled/influenced elements (e.g. Train service and Train plan) to the Franchise.

ii) What should be the rights of the parties in the case of an event of default on the part of the other party? Should they be the same for Railtrack and the train operator or do the different circumstances of these parties warrant different remedies?

If Railtrack are prepared to adopt a degree of risk similar to that of the train operator (e.g. through back-to-back Franchise obligations) then it would be appropriate if the remedies available to the parties were similar (see also 3.4 (i)). If Railtrack, as now, retain a much lower level degree of risk than the operator then the remedies open to the parties should be skewed accordingly.

iii) Should the remedies available to the party not in breach vary according to the nature of the breach which he faces? If so, in what ways? Should there be the possibility of a response which is more graduated than the existing position?

Yes - see 3.4 (i) above.

iv) Are there any circumstances in which the train operator should be entitled to withhold payment of access charges? If so, what are they and what conditions should apply?

MEL consider that it is extremely important that the train operator should be able to withhold part or all of a period(s) access charge payment for material breaches of the TAA and/or TAC.

MEL considers that the contractual inability of train operators to withhold payments has created a particular mind-set within the corporate Railtrack that regards contractual compliance as unimportant.

Provided train operators only use the remedy only for material breaches and then in proportion to the loss incurred (e.g. with holding a ;Elm payment for a £1 Ok breach would not be reasonable), the availability of such a remedy should see a higher degree of corporate Railtrack contractual compliance.

We trust these thoughts have been of use. If you have any questions please do not hesitate to contact me at the above address.

Yours sincerely,

Ian Bullock

