

NATIONAL EXPRESS GROUP PLC

Central Trains Limited

Gatwick Express Limited

Midland Main Line Limited

Scotrail Railways Limited

Silverlink Train Services Limited

Response to the Rail Regulator's Consultation
(July 2000)

Regarding - Model Clauses for Track Access Agreements

1. INTRODUCTION

This document contains a response on behalf of National Express Group plc and the following train operating companies which are members of the National Express Group, namely, Central Trains Limited, Gatwick Express Limited, Midland Main Line Limited, Scotrail Railways Limited and Silverlink Train Services Limited. It contains a response to the Rail Regulator's document ("**the Provisional Conclusions document**") dated July 2000 containing his provisional conclusions as to the possible use of certain model clauses for track access agreements.

We very much welcome this opportunity to participate in the Regulator's consultation process and continue to support the Regulator in his efforts to set the basis for track access agreements which will be fit for their purpose.

The above train operating companies are also members of ATOC, and we have seen ATOC's initial response document in relation to the Provisional Conclusions document. We wish to support the statements made in that response in relation to the Regulator's provisional conclusions, subject to any variations or supplemental points contained in this document.

2. PROCESS

- 2.1 The consultation process regarding model clauses coincides with the Regulator's periodic review of Railtrack's access charges and with the commencement of a major re-franchising programme.
- 2.2 As the Regulator has himself observed, an assessment of the overall balance of the provisions in an access agreement can only properly be made having regard to the contents of the whole agreement. In the context of a track access agreement, this would include the track access conditions, which form an integral part of the access agreement itself. Having regard to the potential changes to Schedules 4 and 8 which are likely to emerge from the periodic review process and the amount of development work which remains to be done in relation to the model clauses process itself, it will be appreciated that our definitive views on the issues addressed in this document may need to change when we are in a position to make an assessment of the global impact of the new form of track access agreement, once each of those processes is close to finalisation. However, we appreciate that each process must continue to progress, and the comments offered in this document are offered in that spirit.
- 2.3 We do have a major concern as to the relationship between the track access agreements, as it will emerge from the model clause process and the franchise agreement as it is beginning to emerge in the course of the re-franchising programme. In particular, we perceive a significant risk that there may be imbalances in the nature and extent of franchise commitments which train operators are expected to enter into and their ability to secure compliance with those commitments, either at all or on acceptable terms, insofar as such fulfilment depends upon certain actions and behaviours on the part of Railtrack. Accordingly, we strongly advocate that in carrying out his review of model clauses the Regulator pays full regard to the terms of the template franchise agreement and the resulting obligations, risks and liabilities which franchisees are increasingly being expected to assume in the course of the re-franchising programme, and as to the question whether the interface between the track access agreement and the franchise agreement creates the most appropriate allocation of risks and benefits.

3. COMMERCIAL PURPOSE

- 3.1 In our view a commercial purpose clause should only be used as an aid to interpretation in the event of ambiguity. It should not therefore be used for "filling in the gaps" as envisaged in paragraph 4.1.2 (a) of the draft model clauses. In view of that, we would prefer to see the

commercial purpose dealt with in the usual way by way of a recital to the agreement, rather than as an operative provision.

- 3.2 We would also prefer that it be left to the parties to negotiate their own commercial purpose provisions so that they are tailor-made to the particular circumstances of each case. A higher level of specificity may thereby be achieved, thus truly reflecting the commercial intentions of the parties. We feel that the provisions of clause 4.2 largely mirror the provisions of clause 6.1, and therefore, even as an aid to interpretation, are probably not adding very much in terms of achieving that objective.
- 3.3 We do of course share the Regulator's concerns as to the issue of addressing the need for, and consequences of, change over the lifetime of a long-term contract. Nevertheless we feel that this issue is better tackled through robust and transparent change procedures, with appropriate checks and balances and rights of appeal built in, rather than reliance upon commercial purpose clauses.
- 3.4 We have referred earlier in this document to the issue of the interface between the track access agreement and the franchise agreement. We support the Regulator's provisional conclusion to the effect that a commercial purpose clause should not be used for the purpose of passing through to Railtrack in a generalised manner, obligations, risks and liabilities assumed by a train operator under its franchise agreement.
- 3.5 As to whether a commercial purpose clause would be of value in relation to major enhancement projects, we remain dubious for similar reasons as given above. We would anticipate that the combination of model clauses on network enhancement and amendments to Part G would adequately cover the ground.

4 ACCESS RIGHTS

- 4.1 We support in principle the standardisation of the description of access rights in schedule 5 in order to achieve consistency of expression across the industry and look forward to reviewing the table which the Regulator intends publishing.
- 4.2 However, we do not support such standardisation to the extent that it would detract from the ability of any train operator to seek to negotiate the contents of schedule 5 in such manner as meets its own specific, business requirements and circumstances. We are concerned that the degree of such bespoke, which may be required, may be too constrained by any standardised format. In particular, we would be reluctant to sacrifice any existing rights, which a train operator enjoys under its schedule 5, and which it finds very valuable in day-to-day operational terms, for the sake of standardisation.
- 4.3 An example of where bespoke may be useful would be in overcoming Railtrack's express concerns as regards overall journey time protection. This is an issue of vital importance across the industry as a whole, but, as the Regulator recognises, a balance needs to be struck with Railtrack's need for flexibility in network operation. Our concern is that attempts to template the issue of overall journey time protection may restrict the train operators in extracting the maximum level of commitment from Railtrack on these matters which it may feel able to give in any particular case, yet which leaves Railtrack in a position to manage network operations for maximum efficiency. As the Regulator recognises in paragraph 3.8 of the Provisional Conclusions document there may be several ways of approaching this subject – we are fearful that the model clauses approach risks achieving standardisation at the cost of reducing the flexibility to negotiate bespoke arrangements.
- 4.4 As regards the Regulator's proposal that amendments to sectional running times should be covered by the provisions of Part G and the Rules of the Plan process, we support his view and look

forward to reviewing the detail as to which elements of sectional running times fall to be dealt with under which process.

- 4.5 However, we also believe that overall journey time protection and improvement, given its vital importance to the railway industry, needs to be the subject of local output statements so as to provide train operators with enforceable, bilateral remedies in the event of unacceptable performance. We would also suggest that the Regulator's model clauses for enhancement projects should also make provision for enforceable contractual rights in relation to overall journey time where a specified output of the project is journey time improvement. Of the alternatives canvassed by the Regulator in paragraph 3.8 as to the means of capping pathing time we believe that the combination of absolute and average journey times appears to be the most promising and would welcome further development of this concept.
- 4.6 We support the Regulator's provisional conclusion as to the elements of a better procedure for changes to the Rules of the Route/Plan. In addition, we would wish the Regulator to clarify whether it is his view that compensation should flow to a train operator in the event that there is a material degradation in network capability as a result of any such changes, and of course we would favour a provision that such compensation should be payable. This is an important point where a train operator's back-to-back obligations under its franchise agreement need to be taken fully into account.
- We would also welcome a specific recognition in such change procedure that the Rules should be changed to take account of any capacity improvements resulting from major enhancement projects.
- 4.7 We reiterate our concerns expressed in earlier submissions that changes to the Rules should not be permitted pending any determination by the Timetabling Committee of a referral in respect of a Railtrack decision.
- 4.8 We note the Regulator's provisional conclusion that a "use it or lose it" clause should be introduced. We would wish to see a mechanism whereby if a particular right has not been exercised for at least two years, then it may not be extinguished unless Railtrack has given not less than six months notice of its wish to do so prior to the next relevant Timetabling Conference. Furthermore, Railtrack must establish that another operator wishes to use the right in question or that some other significant, capacity improvement is gained. There should also be provision for adjustment in the fixed access charge to reflect the commercial value of the path(s).
- 4.9 We support the Regulator's provisional conclusion that the "**use it or lose it**" provisions would not apply to any rights secured as part of an enhancement project to which a train operator has contributed.
- 4.10 We would not wish to see a mechanism for the compulsory, permanent acquisition of a train operator's access rights unless it is necessary for the implementation of a Major Project and such Major Project is one approved by the Franchising Director so that it falls within the scope of clause 12.14 of the template franchise agreement. Amongst other benefits this would then trigger the "No Net Loss or Gain" provisions of the franchise agreement (presumably taking into account any compensation payable by Railtrack). As such, any procedure for the compulsory acquisition of rights should be integrated into the Network Change procedure, with its provisions as regards compensation. Amongst all other relevant factors, such compensation should specifically take account of any repercussions under the train operator's franchise agreement to the extent they are not taken care of under the "No Net Loss or Gains" provisions.

- 4.11 We would favour the concept of certain access rights being declared Protected Rights so that they be immune from any such compulsory acquisition procedure. This would of course apply to key elements of a train operator's product offering.
- 4.12 We are not sure of the justification for including the compulsory acquisition of rights as part of the track access conditions as opposed to being incorporated in the main body of the track access agreement. We would welcome some further explanation on this point
- 4.13 We welcome the Regulator's provisional conclusion that Railtrack should be obliged to give a capacity warranty. However, we would propose alternative wording: -

“represents and warrants to the Train Operator that there is sufficient capacity on each part of the Routes, having regard, amongst all other relevant factors, to all or any other access rights granted by Railtrack from time to time to any other person or persons and to the applicable local output statement, to enable Railtrack to give effect in full in the applicable Working Timetable to the access rights contained in Schedule 5;”

Our proposed wording seeks to make clear that available capacity must be assessed against the aggregate of access rights over the relevant part of the network granted to all other train operators, and not just any particular train operator. It also seeks to recognise that the amount of available capacity is likely to change over time as reflected in the applicable local output statement.

We have a concern that Railtrack sometimes sell freight operators paths which do not properly exist, and which will interfere with the operation of contracted passenger rights. So we would also see some benefit to passenger operators from any requirement, which may be placed on Railtrack, to make capacity warranties in respect of freight rights; whilst we might not be a direct legal beneficiary of such warranties, the additional disciplines imposed on Railtrack would alleviate the problem and produce a “second hand” benefit to passenger operators. So we suggest that ORR might further consider the idea of warranties in the context of freight rights.

- 4.14 We note the reference at the beginning of clause 5.5 to “by way of separate contract”. Perhaps it would be worth clarifying that this separate contract incorporates relevant provisions from the main track access agreement itself, e.g. limitation of liability provisions, performance order procedure and dispute resolution. We would suggest however that compliance with the performance order procedure should not be a pre-condition to a claim for damages resulting from a breach of the capacity warranty.

5. OUTPUT STATEMENTS

- 5.1 We believe it is entirely appropriate that the local output statement should be operator-based, thereby enabling a particular train operator to press hard for inclusion in its own statement of those outputs which form part of its franchise commitments. Indeed, we think the concept of the local output statement provides a suitable opportunity for achieving some level of pass-through of franchise commitments to Railtrack, at the very least where these are proposed to be funded by the train operator. We would suggest therefore that there should be express recognition of this element in a description of the pro-forma content of a local output statement.
- 5.2 Similarly, an express reference to the criteria document referred to at paragraph 4.5 of the Provisional Conclusions document could also usefully be included. The criteria may include some or all of the various elements, and perhaps others, suggested by ATOC and as referred to in paragraph 4.15 of the April consultation document.

- 5.3 We would also welcome clarification of the necessary mechanisms under the track access agreement whereby any enhancements to the network or improvements in quality, capability and performance feed through as variations in the operational performance parameters contained in Schedule 8. We would regard such a mechanism as a more direct means (without resort to performance orders and claims for compensation) of incentivising Railtrack to deliver on the targeted outputs.
- 5.4 We are unsure as to the inter relationship of the local output statement process with the Part G process. It seems to be envisaged that the output statement only becomes finalised once the network change procedure has been successfully completed. Rather, we would prefer to see a process by which the local output statement can be used to kick-start a network change project with suitable “best endeavours” commitments on the parties to implement the network change procedures with a view to achieving the target output. In this way Railtrack’s obligations to deliver such outputs can be made conditional on successful completion of the network change procedure and any other relevant pre-conditions.
- 5.5 We are also uncertain as to the sequencing of the output statement establishment process as compared with the network change procedure. This is of particular concern having regard to Condition I 4.2(a)(ii). Surely this requires that a certain level of costing information is available to a train operator early on in the establishment process otherwise how could Railtrack decide on a rational basis that its implementation costs will not be met.
- 5.6 We are opposed to the suggestion that a local output statement could impose obligations on a train operator for which it would not receive compensation. At the very least it should be made clear that any change in the measure of performance of any Specified Equipment or its operation is subject to the vehicle change provisions of the track access conditions, and that compensation should be payable by Railtrack. There should also be clarification as to the nature and extent of any vehicle change, which could be required in a local output statement.
- 5.7 Whilst we recognise the multilateral nature of the procedure for establishing and/or consultation with regard to local output statements, we would wish for greater clarity in the drafting to the effect that each individual train operator has its own right of enforcement both as regards the process for establishing the output statement and as to delivery of the stated outputs.
- 5.8 Whilst we welcome the Regulator’s provisional conclusion as regards the rights of third party funders in relation to the local output statement procedure, we would wish for the identity of such third parties to be easily identifiable. We would propose a mechanism, therefore, whereby the right to be consulted extends only to such third parties, as are expressly nominated by Railtrack or any train operator involved in the establishment process.

6. NETWORK CHANGE

- 6.1 We note the Regulator’s proposal to publish his provisional conclusions on the framework for enhancement, including model clauses and changes to Part G. Given the fundamental importance of improvements to and investment in the network over the next 10 years or so, we would suggest that a longer period of consultation than that envisaged in paragraph 5.10 of the July document is desirable.
- 6.2 Whilst in general we support the principle that enhancement provisions ought to focus upon outputs, nevertheless there may be occasions when it is appropriate for inputs to be specified. This is particularly the case where a train operator has a franchise commitment to procure a particular

type of infrastructure upgrade. Furthermore, whilst a framework of model clauses may provide a useful starting point for negotiations between the parties, we would nevertheless prefer flexibility in terms of the freedom of the parties to negotiate, subject always to regulatory intervention in the event of failure to agree.

- 6.3 When the Regulator publishes his proposal on the framework for enhancement, we would welcome a very clear exposition of the inter-relationships between the use of the model clauses, the network change provisions and the local output statements. We would also wish to see this exposition before commenting further on the hierarchy of enforcement as described in paragraph 5.6 of the Provisional Conclusions document. However, given the cheek-by-jowl nature of relationships within the railway industry and the consequent imperative to maintain good working relationships between the parties, we believe there is a continuing requirement for strong regulatory intervention to enforce licence and other legal obligations, rather than leaving enforcement wholly or mainly up to the parties themselves.
- 6.4 As regards project development costs, we wish to make the following suggestions. First, Railtrack should not seek contributions from train operators until either the project is abandoned or is successfully completed. Second, in the case of abandonment, the train operator should not be required to make a contribution where there is a material change in order of magnitude of costs as compared with earlier estimates during the course of the development process. Third, in the case of successful projects the split of costs between the sponsoring train operator and Railtrack should be determined by negotiation between them, with fixed caps on the train operator's contribution so as to incentivise Railtrack to control efficiently its project management costs.
- 6.5 We would welcome the opportunity for market testing the scope and/or specification of schemes proposed by Railtrack with the resulting impact on the overall cost of development schemes. Whilst Railtrack itself invites competitive bids, nevertheless it is Railtrack, which has worked up the specification against which such bids are made. Enabling third party, design and build contractors to compete against Railtrack in certain circumstances would inject a healthy note of competition with resulting efficiencies.
- 6.6 We are very concerned at the issue of who conducts negotiations with the non-sponsor train operators affected by a major project and who has the final say over levels of compensation, particularly where it is the sponsor who will be picking up the cost of such compensation. We suggest that there needs to be robust mechanisms introduced into the procedure to ensure that the sponsor has a central role to play in this process.
- 6.7 We note that the question of a tariff for compensation for the disruptive effects of the carrying out of work is covered in the April 2000 periodic review document and we will therefore be responding separately on that matter.
- 6.8 At the same time as changes are proposed to Part G, we would also have welcomed a similar review as regards the vehicle change provisions of Part F. In our view, too much is covered by Railway Group Standards and there is a need for a comprehensive vehicle change procedure which stands comparison with its network change equivalent.

7 LIABILITIES/OTHER ISSUES

- 7.1 We would welcome clarification that the limitation on liability for delayed/cancelled trains by reference to Schedule 8 compensation is without prejudice to any claim for compensation for non-compliance with a performance order (Schedule 8 itself does not create any performance obligations, merely payment obligations by reference to certain benchmarks). This would particularly apply to any failure in delivery of any performance output forming part of a local

output statement, which may in some circumstances result in delayed/cancelled trains. Given that failure to comply with a performance order, once any right of appeal against an arbitrator's decision is exhausted, would probably amount to an intentional breach of an obligation to deliver a particular output (with potentially negative long term effects), we believe that an award of damages at large would be appropriate. With the best will in the world, it will always be very difficult to calibrate in advance Schedule 8 compensation by reference to a genuine pre-estimate of the train operator's potential, long-term losses in those circumstances.

- 7.2 We would prefer to see an exclusion of liability for any consequential losses. This is particularly so given the breadth of the definition of "Relevant Losses" as used for the purposes of the indemnities in clause 9. We also believe that an exclusion of consequential loss may somewhat ease the task of negotiating any caps on non-consequential liabilities.
- 7.3 There is of course very little science that can be applied in terms of deciding at the outset what particular level of cap ought to be applied to a particular class of loss. Depending on the circumstances of each case, minor breaches may have major consequences and vice versa. For this reason we believe that to try and develop a matrix of caps for most, if not all, particular heads of claim will make the process of negotiating track access agreements a tortuous and fractious one. Nevertheless, we accept that in some circumstances, and where this can be negotiated between the parties, a cap on individual heads of liability may be appropriate, but there should not be a presumption that there will be a matrix containing individual caps on all possible heads of liability. Where a matrix is to apply, then very clear and full guidance from the Regulator will be required as to the mechanisms and principles for establishing caps.
- 7.4 One of our major concerns in this area again relates to the interface between the track access agreement and a train operator's obligations under its franchise agreement. It may be that a series of cumulative breaches of its obligations by Railtrack (perhaps involving different types of breaches), over which the train operator has little control, may nevertheless result in the Franchising Director taking enforcement action against the train operator. In those circumstances, we believe it is wholly appropriate that full compensation is payable by Railtrack to the train operator without any caps.
- 7.5 We would welcome clarification as to the time periods to which the aggregate caps in paragraphs 2.2. and 3.2 of draft Schedule 9 apply. We would suggest that aggregate caps should apply by reference to a rolling period of years, say three. Furthermore, in respect of those risks and liabilities, which are covered by insurance, then any limitation on a party's liability should be by reference to the available insurance cover.
- 7.6 We very much welcome the Regulator's provisional conclusion to establish "performance order" clauses. Whilst it is probably true that in many cases train operators would prefer to secure compliance by Railtrack with its obligations under the agreement rather than to seek compensation, that may not always be appropriate. We would not wish to see exhaustion of the performance order process therefore as a pre-condition for any claim for compensation. We would like to canvas an alternative suggestion, which is that the grant of a performance order creates a bar to a claim for compensation, but that the right to compensation revives, and indeed may be increased, as a result of non-compliance with a performance order. Such a bar to compensation should of course only apply where it is the aggrieved party who seeks such an order. Indeed we regard it as questionable whether the defaulting party should be entitled to seek a performance order as seems to be contemplated in clause 11.2.2(c)
- 7.7 We would also wish to see non-compliance with a performance order being included within the indemnities set out in clause 9.

- 7.8 We would welcome amplification of the powers of an arbitrator as to the making of a performance order. Given that there is a breach of the agreement, there may be several choices as to the appropriate means of rectification. Either party should be entitled to make submissions as to what they regard as the most appropriate steps to be taken by way of rectification and the arbitrator should have some measure of discretion on this point. The question of timescales is also relevant and again the powers of the arbitrator in this respect should be amplified. It may also be that the favoured means of rectification requires certain steps to be taken by the aggrieved party applying for the performance order in the first place. An order should therefore be capable of being issued on conditional terms.
- 7.9 We would welcome clarification that failure to implement a performance order constitutes an intentional breach of the agreement for the purposes of any relevant cap. If this is the case, then it is another reason why requiring the performance order procedure to be pursued as a pre-condition to any claim for compensation may be undesirable since, in those circumstances, any further non-compliance will usually end up being treated as an intentional breach.
- 7.10 We welcome the Regulator's provisional conclusions as regards standards of performance. Touching upon this, we would propose that Railtrack's obligations under clause 6.1(b) should be extended to include the timely and efficient repair of the network. This issue does of course relate to the periodic review in terms of Schedule 4 payments, but again there is a risk that prolonged disruption of the network as a result of failure to carry out repairs properly may not be adequately compensated on a tariff basis.
- 7.11 With regard to the impact of the Regulator's proposals on liabilities and remedies on the risk faced by train operators, we have previously referred to the need for a greater integration between a train operator's rights and remedies under the track access agreement so as to reflect its franchise commitments.
- 7.12 With regard to the impact upon Railtrack's risk profile, we are of the view that the Regulator's proposals are merely redressing inadequacies from the past in terms of enforcement mechanisms. The obligations of Railtrack are not being materially increased as a result of the Regulator's proposals, they are merely being clarified so as to align more closely with the existing expectations of the industry and the public as to the outputs which Railtrack should be delivering in terms of the revenue it receives. It goes without saying that there is not much point in having obligations unless effective remedies are available for non-compliance. It would be somewhat perverse to say that Railtrack's risk profile is being raised merely because it would no longer be less costly for it to avoid compliance with a relatively unchanged set of obligations.

8 IMPLEMENTATION/NETWORK CODE

- 8.1 There is of course a balance to be struck between standardisation of track access agreements across the industry as against the desirability for flexibility in terms of the freedom of the parties to negotiate customised solutions to particular circumstances. We would therefore favour a mix of mandatory clauses (particularly relating to the "front end" of the Agreement) but with model clauses being on a recommended basis only as regards populating the various schedules (particularly Schedule 5). Even in the case of mandatory model clauses, whilst of course questions of public interest would be a material factor in terms of consideration of any derogation, we would suggest that the public interest should not be the sole criterion. Risk allocation issues, particularly in the light of franchise commitments, ought also to be a relevant factor. Issues concerning practicability under local operating conditions ought also to be considered.

- 8.2 We would prefer that any changes to the track access conditions are implemented through the Condition C5 procedure.
- 8.3 Depending on the view, which the Regulator's takes as regards matters raised in paragraph 8.1 above, we would be in favour of a "Big Bang" approach once the whole of the periodic review and model clauses exercise is concluded. However, if as a result of the model clauses review train operators risk losing some of the existing features of their track access agreements which they regard as being business critical, then they may be reluctant to lose those benefits through the "Big Bang" approach. This will particularly be the case where franchise commitments have been given on the footing that such business critical elements will exist in the train access agreement going forward.
- 8.4 We would not support any departure from the Star Model in terms of creating contractual rights and obligations as between train operators. Whilst in theory, and in very limited circumstances, there may be some justification for the creation of multilateral rights, we believe that the practical difficulties of implementing such arrangements far outweigh any perceived benefits. For one thing, the whole limitation of liability debate and other issues over remedies and enforcement procedures would be thrown into the melting pot.
- 8.5 We would support in principle the Regulator's provisional conclusions as regards third party rights as set out in paragraph 7.18 of the Provisional Conclusions document. However, such third parties should not be included in any access conditions change procedures so that amendments can be made which are binding upon such third parties through existing mechanisms. As previously mentioned, it is essential that there is a clear methodology whereby the relevant third parties can be identified so as to avoid inadvertent breach of a third party's rights.