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Dear Sunil

Model Clauses for Track Access Agreements

We all found the industry seminar last week extremely productive and would like to add a few supplementary points touching on the areas where Tom Winsor indicated a wish for further input. As you know, we did not respond independently to the original consultation, relying instead on the ATOC response.

Commercial purpose clauses

Having heard all the arguments, we think that these may be a lower priority compared to the importance of incorporating much greater clarity and detail regarding matters such as standard of performance and so on. It may well be that commercial purpose clauses are more appropriate to access agreements which are tailor made for a particular project, eg WCT. In those cases, of course, it is relatively easy to be more specific. However, it seems to us that, where there is no such specific project, the wording of a commercial purpose clause becomes more difficult and risks degeneration into generalised statements of objective which are, as Railtrack suggest, perhaps better covered in the recitals to the agreement.

Part G

I think it is common ground that the processes involved in operating Part G at present are far too cumbersome and uncertain to encourage its use on the part of operators. Apart from, the more detailed comments which have already been made, our own objectives regarding Part G would be:

- (1) To ensure that it provides a speedy and cost effective means of bringing about changes and, in particular, that there are specific tight time limits for responses and an obligation on the part of Railtrack to react promptly and efficiently. In the past, prevarication has cost our group a good deal of wasted opportunity. This essentially means a decent code of conduct as a minimum.
- (2) The facility afforded by Part G should be wide enough to cater for all the areas of network change that are likely to be involved in the new franchise regime. Specifically, the latest instructions to interested bidders for new franchises - issued by the SSRA at the end of January - talks in some detail about the role of special purpose vehicles in bridging the investment gap. It also talks about the fact that special purpose vehicles will need to enter into access/user agreements and contemplates that facilities provided by an SPV would need to be regulated. Part G will therefore certainly need to be drafted so as to enable these arrangements and it cannot allow Railtrack to block the introduction of SPV investment.

Although we appreciate that it is not part of this particular consultation, the same comments apply to Part F where (in the case of (2) above) we already have interested and affected parties who cannot operate the processes - i.e. manufacturers and ROSCOs.

Remedies

There was considerable discussion in the afternoon session last week about the best way of enforcing Track Access Agreements. We remain of the view that a large part of the difficulty associated with remedies arises because the contractual framework is not sufficiently detailed and succinct. In addition, where (as is the case in the current Track Access Agreements) remedies that would otherwise be available are excluded or restricted, the incentive to comply with obligations will be correspondingly diminished. Where there are clear specific enforceable obligations, our own experience suggests that these will be performed because, even where remedies are left to common law contractual principles, the fact that loss can be demonstrated and is in theory recoverable will usually be sufficient incentive to ensure compliance or, at the very least, an extremely active discussion on problem solving and keeping the customer fully and properly informed.

I have not personally managed to get hold of Clause 13 of the West Coast Trains Access Agreement (to which Tom Winsor referred) but it may well be that an express provision facilitating specific performance would be beneficial in certain cases. Obviously, depending on the extent to which the Regulator limits or restricts the ability of operators to pursue financial redress against Railtrack, the remedy of specific performance will become much more important because damages may well not be adequate compensation in a larger number of cases.

One other way of looking at the question of remedies is to move away from the rather emotive subject of breaches, which are an essential pre-requisite to a **contractual claim for damages**. It may be that there are some areas where Railtrack would be loath to give absolute assurances but where they would be happy to accept that, whilst non-performance in those areas would not give rise to a breach as such, it would nevertheless entitle the operator to some form of financial redress. This, if you like, is perhaps an extension of the performance

regime concept, but I rather suspect that Railtrack are primarily concerned with having to accept a Track Access Agreement that is littered with absolute obligations, and then risk falling into breach of contract with all the ramifications that that may have in the context of default clauses in borrowing facilities and other funding documentation. As an example, there may be situations where it is unfair to impose absolute obligations on Railtrack, but where a "reasonable endeavours" commitment is incorporated as an alternative. Failure to deliver, despite reasonable endeavours, would not give rise to a breach, but it may well entitle the operator to some form of financial compensation.

Finally, the Regulator was naturally concerned about any suggestion that he should become the enforcer of Track Access Agreements. This is clearly undesirable but, at the same time, operators still need the comfort of regulatory support. One way of dealing with this might be to keep Track Access Agreements as bipartite agreements between Railtrack and the operator, with appropriate mechanisms for industry dispute resolution, but at the same time incorporate an additional provision into Railtrack's network licence to the effect that it must comply with the provisions of Track Access Agreements. In this way, Railtrack would in effect be compelled to honour its obligations to operators for fear of a licence breach, but in practice the Regulator would not be troubled on a day-to-day basis. There are parallels within the Franchise Agreements whereby, although the SSRA does not get involved in things like access agreements, breaches on the part of operators would give rise to potential remedies on the part of the SSRA, and so in practice they do not happen.

Other points

It is perhaps also worth reiterating the point that not all operators have the same needs and some are better able to provide Railtrack with commercial incentives to perform than others. Our Wales & West subsidiary, as a regional railway, is not a rapidly expanding railway in need of major network enhancements. It is largely looking for quiet and enjoyment and better network performance. It has been extremely difficult under the current regime to achieve this.

I hope that the following additional comments are helpful.

Yours sincerely

Jeremy Simon
Corporate Services Director