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Mr Paul Carey
Office of the Rail Regulator
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12 May 2000

Dear Mr Carey

Model Clauses For Track Access Agreements Consultation Response

I am writing to respond to the above consultation following the two day seminar held last week. Please take this response as made on behalf of ourselves and each of our four train operating companies; West Anglia Great Northern Railway Limited, LTS Rail Limited, Wales & West Passenger Trains Limited and Cardiff Railway Company Limited. Tony Crabtree at Wales & West will also respond separately to you elaborating on one or two areas of particular relevance to that business.

In addition, we have contributed to the wider ATOC response to the consultation, which we support, and have concentrated here on specific issues and questions.

Using the same sequence as the consultation document itself, our comments are as follows:

Introduction and Process

We have no particular comments on the revised timetable, other than to make the obvious point that, particularly given the reality of the franchise replacement process, publication of initial draft model clauses would be appreciated as early as possible.

On the question of implementation, we believe that the use of the revised model clauses in track access agreements should be mandatory in the manner that the Regulator is suggesting. We also believe that the "Big Bang" approach to implementation would be preferable and, given the fact that Railtrack appear to support this, we would hope that sufficient numbers of train operators would also support it to the extent that implementation by consensus was possible.

Commercial Purpose

We have already expressed the view in previous responses that we see great difficulties in the incorporation of meaningful commercial purpose clauses and would therefore only lend somewhat cautious support to the provisional conclusion that this should be taken forward in a limited way. If its primary purpose is to deal with ambiguities or omissions which create ambiguity, then we would certainly be happy for some draft wording to be produced.

However, we would expect the new model clauses to have sufficient clarity and certainty in themselves so as not to create ambiguity. In this context, our feeling is that the use of a general commercial purpose clause would only be helpful for later periods of new long term franchise agreements where it will not be possible to legislate for every eventuality in advance. Certainly the SSRA has recognised this in principle in drafting the new forms of franchise agreement. Since these have just been made available it will also now be possible to analyse in a little more depth whether the fears of Railtrack about passing on risk are valid.

Access Rights and Capacity Consumption

Standardisation

We are supportive of the principle that standardised templates for access rights should be drawn up and that there should be different forms of template for different types of train operation. We support the Regulator's proposition for the rights to be covered in a template schedule 5 but would particularly emphasise the need for journey time protection. We do believe that Railtrack should have the flexibility to "Flight" trains so that pathing can be as efficient as possible, but journey times are fundamental as far as the passenger is concerned. We also need to be certain that any template which is adopted for schedule 5 can accommodate the rigours of the new style passenger service requirement in franchise agreements.

Tiered Rights

In principle the suggestion that access rights are "tiered" seems sensible. We are not, however, entirely clear what the "B" and "C" rights actually add, given that under the present regime they would be subject to the application of the decision criteria in condition D4. In addition, care will need to be taken to ensure that "A" rights are ones which are genuinely needed.

Rules of the Route and Plan

We would support the Regulator's observations regarding the Rules of the Route and the Rules of the Plan because, certainly over the long term, they could be used to dilute access rights, particularly in areas of severe capacity constraints. A review of these Rules is therefore entirely appropriate. In particular, we see the need for limits on the extent to which the Rules can be used to dilute access rights and a much more robust procedure for the ability of Railtrack to make changes unilaterally.

Where changes are proposed, there must be an obligation to give operators a clear understanding of the impact on access rights (i.e. expressed in terms of outputs) and, where relevant, there should be an explanation as to how changes impact across the network and not just in the local area immediately affected. Finally, we do believe that the Rules should contain obligations to strive for continuous improvements so that, for example, things like temporary speed restrictions have to be raised or removed as quickly as possible.

Changes to Access Rights

We do not have a concern with the proposal for "Use it or Lose it" rights if there is a two year waiting period. However, in calculating this period, any delays on the ability to use the rights because of Railtrack's acts, omissions or programmes would have to be ignored. In addition, there must be an obligation on Railtrack to preserve sufficient white space in timetables to secure performance. In this context, on the operator front, a distinction needs to be drawn between having a sensible commercial headroom for operational expansion on the one hand, and taking access rights purely to prevent competition.

Whilst we support the ability to review access rights from time to time, we are opposed in principle to the concept of redeemable access rights. Anything which moves towards the compulsory purchase of access rights is something that should be resisted. We therefore believe that these concerns can be better met by a multi-lateral trading mechanism and the "Use it or Lose it" proposal.

Capacity Warranty

We would expect model clauses to include a warranty on the part of Railtrack to meet the capacity obligations inherent in the access rights granted.

Output statements

We support the concept of local output statements and would refer to the ATOC proposals as to content, which we fully endorse. With regard to the basing of the statements, i.e. whether they should be route or operator based, we would not have any particular view if the outputs themselves are right. Accordingly, we would support an operator based approach if the Regulator wishes to promote that.

Network enhancement

Where an operator pays for an enhancement providing additional capacity, it should have corresponding rights over that capacity in the short to medium term. However, where longterm unused capacity is created, consideration needs to be given as to how firm these rights should be, particularly if the effect would otherwise be to stifle growth

We also entirely endorse the need for greater clarity on timing and provision of information, as well as certainty about the timing of implementation of changes. It appears to be common ground, following last week's seminar, that there is general support for involving all operators affected at a very early stage of the formulation of any enhancement schemes.

The initial detail also needs to explain clearly to operators what the impact of an enhancement scheme will be on both inputs and outputs. At the moment, it is often the case that the operator is told what the physical works will involve, but might have no means of understanding what that is likely to result in at the other end. In particular, we need to ensure that it should not be possible for enhancements (so called) to be made where they do not have a favourable impact on journey times or line speeds. The suggestion that a minimum consultation period of 4 weeks for most network changes is probably satisfactory.

We have much more difficulty with the concept of a compulsory contribution mechanism and, if this is to be introduced, it will have to incorporate sufficient protection. In our view, compulsory contributions should only be possible where:

- (a) there is a clearly ascertainable benefit to the operator brought about by the enhancement;
- (b) the operator is de facto able to take advantage of and enjoy that benefit; and
- (c) such advantage and enjoyment should generate financial reward.

It is only where these three ingredients are present (possibly only where an operator purchases new rights into the additional capacity) that a genuine case for contribution can be supported. There are many examples of so called benefits which operators are not physically able to use, or which are non financial or cannot bring any financial benefits (or not within any reasonably acceptable timescale), or which only serve to restore timetable quality to an operator which has suffered from congestion caused by other operators' expansion.

Liability and remedies

In general terms, we support the conclusions and reviews of the Regulator throughout this section. However, we would prefer a far greater availability of specific performance as a remedy. The Regulator has recognised that the establishment of a liquidated damages regime will be difficult and an indemnity against costs and losses is less certain and risks going too far the other way, particularly from Railtrack's point of view. If the concept of liquidated damages has to be pursued, certainly a tariff-based approach seems the only realistic route.

Other issues

Again, we support all the other areas and proposals which the Regulator is considering under this heading.

I hope these comments are helpful.

Yours sincerely

Jeremy Simon
Corporate Services Director