



Michael Dawson
Office of the Rail Regulator
1 Waterhouse Square
138-142 Holborn
London EC1N 2TQ

Floor 6
Friars Bridge Court
41-45 Blackfriars Road
London SE1 8NZ

Telephone: 020-7620 5663
Facsimile: 020-7620 5177
Email: RBoyd@swtrains.co.uk

13 February 2003

Dear Mr Dawson

Model Clauses for Passenger Track Access Contracts – Final Policy Conclusions

The following represents a submission by South West Trains to the consultation document sent out in December 2002. We have no requirement for confidentiality of this submission.

We endorse generally, and particularly as regards issues concerning liabilities, the views of ATOC both as expressed in its formal response to ORR's consultation and as recorded in the minutes of a meeting with ORR on 6 February 2003 at which we were represented. Our comments below should be taken as supporting and supplementing the ATOC comments and proposed drafting changes except where specifically indicated otherwise.

Main Agreement

Clause 4 – Standard of Performance

We understand from discussions with ORR that this clause is intended as an additional obligation, and not as a qualification of the standard of performance of all the other obligations under the TAA. We support the presence of the clause with the former interpretation. However we are concerned that as the clause is drafted the latter interpretation is possible, allowing either party to use this clause to seek to dilute their other absolute obligations under this Agreement. Therefore we propose that the clause should be renamed "Standard of Behaviour" and the beginning of the clause should be redrafted as follows in order to clarify the intended effect:

"Without prejudice and in addition to all other express and implied obligations of the parties under this contract, the parties, in their dealings with each other for the purposes and in the course of performing their respective such obligations, shall behave and act with due efficiency and economy and..." etc

Clause 5 - Permission to Use

We believe it would be helpful to add text to cover the overhang between the commencement of a new track access agreement, when the 'services' being run are still as bid for under schedule 5 of the previous agreement, and the first timetable change date under the new agreement, when the services run will become the 'Services' already bid for under schedule 5 of the new agreement. There will often be enough differences between the old and new schedules 5 to warrant this. We would be happy to propose detailed drafting, which in fact we developed in connection with our Section 17 application last year.

Clause 6.1 – Operation and Maintenance, General

We support ATOC's comments on clause 6 in general. If it is retained, however, we suggest there is a further drafting point to be addressed.

As presently drafted, 6.1(a)(ii) and its corollary in (b)(ii) can be interpreted as imposing an absolute obligation to 'ensure' that the respective costs shall be ALARP by keeping the Specified Equipment/Network in the required condition. Obviously the commercial intention must be that the obligation applies (each way) not absolutely but only to the extent that the condition of the Specified Equipment/Network actually affects, or is capable of affecting, in a material way the level of the other party's relevant costs – there being any number of other factors which could affect such costs. We suggest that this be clarified by redrafting such as follows:

“...is kept in a condition which does not cause the maintenance and other costs of or connected with the maintenance of the [Network/Specified Equipment] to be materially higher than would otherwise be the case disregarding any effect of such condition;”

Clauses 8 – 10 Liabilities

Under Clause 8.1 We envisage a situation following a significant incident whereby a possession is taken to restore the Network (eg Scenario Two as discussed at the ATOC meeting with ORR on 6 February 2003: the collapse of a major bridge outside Waterloo caused by a TOC's failure to maintain equipment). We believe with ATOC that Clause 8.1 needs to make reference to Schedule 4 to cater for the change from operational delay compensation (Schedule 8) to longer term compensation through Schedule 4.

With regard to Clause 8.2 we will be responding more fully to the draft conclusions on Local Output Commitments dated December 2002 elsewhere. However we would note that while the Model Clauses are being fine-tuned the Local Output Commitments are rather less well developed. The fact that the Model Clauses rely on Local Output Commitments to give teeth to the Liabilities Regime does mean that we feel exposed to the risk of substantial changes to the policy. As drafted, Performance Orders and Local Output Commitments are the only mechanism for TOCs to claim compensation following a “post-Hatfield” style scenario.

Clause 8.3: We share the concern of other TOCs that we are exposed to the risk of compensation money flows coming on stream only after a non-compliance with a performance order, whereas the financial effects of the breach can be felt immediately. In an extreme example this could mean a TOC ceasing to be able to trade before the remedy is granted.

Clauses 9 and 10: As noted by ATOC, since the definition of 'non-operational breach' allows for a non-operational liability to have an operational component of uncertain extent, we predict considerable scope for argument and dispute. We also believe it is still unclear how clause 10 interacts with, or becomes a carve-out from, clauses 8 and 9. For example, a train accident caused by a failure to comply with safety obligations could it seems cause compensation to apply under any of clauses 8, 9 or 10 in their present form. We hope all these issues will be addressed in a restructuring of the liability provisions and removal of the distinction between 'operational failure' and 'non-operational breach' as proposed by ATOC.

As a drafting point on clause 10, we question the reason for the distinction between the TOC's indemnity to Network Rail regarding simply 'any Environmental Damage' under 10.1(b) and Network Rail's reciprocal indemnity regarding only 'any Environmental Damage to the Network' under 10.2(b).

Clause 11.3.2, line 2: We suggest this should be amended to apply to the 'exercise' rather than the 'giving' of any right or remedy etc.

Clauses 13.2.1, 13.5.4, 13.5.6: We are unconvinced by the case for the need to apply to the Regulator to rule on the appropriate route for dispute resolution. There is no standard of urgency to rule on such applications thereby reducing the value of some of the mechanisms proposed. If the increased flexibility of the new remedies toolkit proposed by ORR, which we welcome, is to have real value to an applicant for a remedy, then it must lie with the applicant to choose the forum and timing, which are most apt for its circumstances.

Clause 13.4: We support ATOC's comments as to the need to limit the scope of this provision. However we would go further and question its appropriateness and the need for it at all, even if it were limited to apparently correct invoices for track charges. Clause 17.1.2, provided it is similarly limited, covers the point sufficiently.

Dropping clause 13.4.1 altogether would also avoid the need to try to make work the rather unsatisfactory retrenchment in clause 13.4.2 – the right to claim recovery of an over-invoiced payment after the event could be of little comfort to an invoicee who has meanwhile had a winding-up petition for it presented on basis of a statutory demand for an unpaid 'debt due and owing'.

Clause 15.3: Given that most industry relationships are long term, but access contracts short term, we do not see the purpose or value of this clause. We propose that Confidential Information only be returned at the request of either party at the expiry date.

Clause 16.1: It would be usual for any contracting party to have a say in the assignment of any rights or obligations under contract. We would therefore want some objective assurance that this is an absolute requirement of Network Rail's on going viability before being required to consent to this.

Clause 17.1.2. See our comment above on clause 13.4. Clause 17.1.2 should be similarly limited.

Clause 18. Network Rail will have a number of Force Majeure items in its delay minutes calculation that will form the basis for its performance prediction. We therefore support ATOC's contention that Force Majeure should not qualify the indemnities sought under the provisions of clause 8.3. Alternatively we would need a process for ensuring that Force Majeure is stripped out of the calculation of the projected performance and the performance floor. We do not underestimate the difficulty of achieving this task.

If Force Majeure is to remain in the Contract, we believe that the following should be removed from the list in 18.1: demonstration, acts of vandalism, accidental damage or destruction, because their occurrence and effects are inherently controllable.

Further we propose that 'extreme weather or environmental conditions', in order to count as force majeure, should be defined within known parameters agreed in advance. For example, see the way in which the ICE NEC/ECC form of contract defines 'weather' as a compensation event by reference to agreed measurements and data which demonstrate a less than 1 in 10 year occurrence.

We propose that 18.1(g) be reworded as 'strike or other industrial action in which employees other than or in addition to those of the Affected Party participate'.

Clause 19.7.2 We believe that the Regulator is not granted any 'rights' under the agreement which are susceptible of enforcement by him against either of the parties. Rather, the parties by agreement (albeit dictated by the Regulator) invest the Regulator with various powers to alter and in some cases to determine *ab initio* their contractual rights as between themselves. None of these powers require the parties to act or refrain from acting with regard to the Regulator in such a way that a failure to do so would be meaningfully enforceable by him by an action for damages or specific performance. We therefore propose that this provision should be removed.

Schedule 5

Whilst the introduction of the terms "Contingent Rights" and "Firm Rights" in Schedule 5 helps to make a clear distinction between the rights being granted, the definition of Firm Rights states that they are subject amongst other things to Network Rail's right to "flex any Bid." This is circular, because the definition of 'flexing right' in the Network Code is expressed as the right to vary a bid, in effect, subject to the bidder's Firm Rights.

Table 2.1. We understand that Network Rail gain comfort from the Columns headed Description and TSC (Train Service Code). These headings need recognition if not definition in the Contract.

Table 3.1 Service Intervals. It is important to our TOC that we can offer a regular interval advertised service. We are unhappy with cumulative flex being applied over successive departures and we acknowledge that the drafting stops "cumulative" flex but it does not stop a high degree of variability and variation around the original service pattern. In order to ensure that we can advertise a regular interval service we are quite happy for trains to be flexed by a small positive flex. This objective cannot be achieved by applying a negative flex so we want it clearly understood that flex could also be one way only. This is clearly incompatible with the averaging methodology as a negative flex will eventually be required to correct the application of any positive flex. Recognising that this may be a concern of ours we would propose bespoke drafting for us in any submission.

Table 3.1a: We welcome the drafting on Peak Service Intervals however there is the high prospect of the train operator bidding a service in a different Period of 60 Minutes or of Network Rail flexing a service to a different Period of 60 Minutes. We would not wish the rights to fall because of that. Recognising that this may be a concern of ours we would propose bespoke drafting for us in any submission.

Table 3.3. We understand that the purpose of this table is on the one hand to preserve Network Rail's right to undertake engineering work and on the other to grant to the TOC the right to operate services late at night and early in the morning. On a complex network like ours, there are occasions

where there is only one train fitting the description in the left hand columns. In our view, this requires a default minimum First and Last range to apply over a specific route section. If this is not included Train times become hard wired for the life of the contract. Recognising that this may be a concern of ours we would propose bespoke drafting for us in any submission.

Table 8.2. With a complex network it would be difficult to make Table 8 work in its current format. Instead it is easier to express the requirement for connections as being a requirement for connections between each of the specified services. We would propose bespoke drafting to achieve this.

Schedule 9

We support ATOC's requirement to restructure the capping arrangements and understand this is being discussed in parallel with the insurers. In particular we shall be looking to agree asymmetrical caps. However, though we are content with the cap on Network Rail's liability being set by reference to a multiple of the variable charges, we believe that this should **include** EC4T, because this is a significant component of our variable charges and part of the correlation with our business size.

Should you wish to discuss this any further please give me a call or contact me at the above address.

Yours sincerely

Rufus Boyd
Commercial Director