

Karl Holden
Track Access Executive
Office of Rail Regulation
One Kemble Street
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WC2B 4AN

8 May 2006

By Post and e-mail to karl.holden@orr.gsi.gov.uk

Dear Mr Holden,

Part F Compensation Payable on Introduction of Class 185 Units – Appeal of Determination of ADP14 under the Network Code

Thank you for your letter of 3 May concerning Network Rail's appeal of the above Determination. I can confirm that TransPennine Express is in receipt of Network Rail's Notice of Appeal.

TransPennine Express notes that ORR is currently minded to hear the appeal and is grateful for the opportunity to make representations on this decision at this stage. TransPennine Express' representations on this question are set out in this letter, which is copied to Michael Lee of ORR and Neil Roberts of Network Rail. In the event that ORR decides to hear the appeal, TransPennine Express will provide its substantive response under Condition M5 by Wednesday 7 June 2006 in accordance with the requirements of the Network Code.

1 AGREEMENT REACHED

1.1 The appropriate correspondence between the parties is attached for reference to this letter. This includes: -

- (a) Letter from Network Rail to TransPennine Express dated 17 November 2005 setting out preconditions to the acceptance of vehicle change in Appendix A;
- (b) Letter from TransPennine Express to Network Rail dated 8 December 2005;

- (c) Letter from Network Rail to TransPennine Express dated 13 December 2005;
 - (d) Letter from Network Rail to TransPennine Express dated 20 December 2005; and
 - (e) Letter from TransPennine Express to Network Rail dated 21 December 2005.
- 1.2 In the final letter of the above sequence, agreement on the subject matter of the Appeal was reached in relation to payments for special examinations of the route in the following terms: -

"TransPennine Express accepts, in principle, Network Rail's entitlement to recover the costs of special examinations of the route at monthly intervals for six months after introduction of the new fleet, but requires an understanding of the quantum of costs before it is prepared to accept these as legitimate assessment costs as defined in Condition F2.5 of the Network Code."

- 1.3 This agreement was a commercial agreement between the parties on the particular facts of the introduction of the new vehicles in this case. It disposed of a peripheral issue as between the parties at the time.
- 1.4 As such the question of special examinations of the route as described above according to Group Standard GC/RT5022 was not before the Panel. It did not form part of the joint reference to the Panel and was not therefore argued before the Panel. The Panel should not have determined upon it and to this extent TransPennine Express agrees that paragraph 26.8.2 of the Determination was not correctly for the Panel to decide.
- 1.5 TransPennine Express believes that the agreement reached between it and Network Rail as set out above continues to bind the parties. TransPennine Express notes however that this agreement is limited to an agreement by TransPennine Express to pay costs under Condition F2.5 of the Network Code where the costs of special examinations are legitimately incurred and provided to it for acceptance. TransPennine Express will therefore pay such costs properly invoiced to it representing reasonable incremental costs of such examinations.

2 THE APPEAL

- 2.1 TransPennine Express makes the following comments about the Appeal:
- (a) The Appeal is on a point of process limited to a specific finding in the Determination. It does not therefore affect the underlying arguments or rationale of the Determination and these continue to govern the relationship between the parties subject to other agreements.

- (b) TransPennine Express accepts that the Panel should not have made the finding in paragraph 26.8.2 in this case as the question was not referred to it. TransPennine Express does not accept however that the Determination in this respect was wrong. The question was simply not referred and not argued. Therefore neither Network Rail nor TransPennine Express is able to appeal the substance of the finding on this occasion. TransPennine Express reserves the right to argue this point in relation to future vehicle introductions should the circumstances arise.
- (c) The Appeal is not properly made as Network Rail has not correctly or fully identified the relevant evidence in support of the appeal as required by Condition M3.1 of the Network Code. The relevant evidence in relation to the agreement between the parties is cited above.
- (d) Network Rail has not sought to recover any costs for special examinations as set out above. Until it does so TransPennine Express cannot accept such costs as being legitimate costs under F2.5 and is therefore unable to assess whether they are payable according to its commercial agreement with Network Rail.
- (e) The relief and directions sought by Network Rail at paragraph 6.1 are not the proper relief in respect of the summary of the Appeal at paragraph 3.4. This is discussed further in the paragraphs below.

2.2 According to clause 6.1 of the Appeal, Network Rail requests a determination that: -

- (a) The costs of special examinations of the route required under Railway Group Standard GC/RT5022 is a cost which can properly be recovered under Part F. As noted by Network Rail in paragraph 3.4(a) and agreed by TransPennine Express above, this is not a question which was before the Panel. As such it cannot be appealed to ORR.

TransPennine Express respectfully submits that the correct direction is that the agreement reached between the parties is honoured by the parties and the finding in paragraph 26.8.2 of the Determination be struck out for procedural reasons. TransPennine Express will argue strongly that as this point was not argued before the Panel it is not for ORR to decide it upon appeal. The points in paragraph 3.4(b) of the Notice of Appeal are not therefore open to Network Rail to argue before the ORR.

- (b) A direction that TransPennine Express pay Network Rail for examinations required by the Railway Group Standard. Again, this issue was not before the Panel and cannot therefore be appealed to ORR. TransPennine Express respectfully submits that the correct direction is as above that the agreement between

the parties is honoured in respect of such examination costs without reference to the Determination.

2.3 In summary therefore, TransPennine Express respectfully request that ORR direct that: -

- (a) The finding of the Panel in paragraph 26.8.2 of the Determination was not in relation to a matter referred to or argued before the Panel and should therefore be struck out;
- (b) The agreement between the parties in respect of the costs of special examinations under Line Standard RT/CE/S/103 as set out in the above correspondence bind the parties without reference to the terms of the Determination; and
- (c) The Appeal in all other respect is improperly made.

TransPennine Express reserves the right to argue further or alternatively on any issue. In particular, if Network Rail provides any further commentary or evidence in response to this letter TransPennine Express reserves the right to respond to it.

If I can be of any further assistance please do not hesitate to contact me. TransPennine Express looks forward to ORR's decision on whether to hear this appeal.

Yours sincerely,

Philip Hassall
Track Access Manager