

David Robertson
Head of Track Access
Telephone 020 7282 3852
Fax 020 7282 2043
E-mail david.robertson@orr.gsi.gov.uk

19 July 2007

Dear colleague

Significant Restrictions of Use: amendment of provisions in the Passenger Model Contract

1. ORR is today incorporating revised provisions relating to Significant Restrictions of Use (“SROU”) in Schedule 4, Part 3 of the updated model passenger track access contract (“model contract”). These provisions have been drafted in collaboration with Network Rail and ATOC.

Background

2. On 27 February 2007, I wrote explaining why it was felt that the existing drafting required revision and invited comments on our proposed revised SROU provisions. This letter explains the main comments made and our views on them. These, as well as the final SROU provisions have been agreed with Network Rail and ATOC.

Consultation responses

Virgin Trains

3. Virgin was concerned that it would be up to Network Rail to issue notification of an SROU and that this would not give an operator sufficient time to prepare their bids and for cost estimates to be prepared by the parties.

4. Network Rail explained that under the new process it is in fact the operator that identifies an SROU. The operator is considered to have been notified of a Restriction of Use (“RoU”) when it has been reflected in the working timetable and then has 28 days to identify it as an SROU as defined in the provisions. The operator then has additional time to prepare its estimate of the cost of the SROU.

5. Of course, operators will often first hear about a planned SROU in the Confirmed Period Possession Plan, but it is when the impact of the RoU on the timetable is clear that the operator is best placed to make a judgement on its likely impact. This approach was formulated with regard to input from train operators during the process. Network Rail has

said: “we believe that by using the timetable ... as a trigger point, sufficient protection is built into the process to allow parties to manage the handling of claims within appropriate timescales”. ORR supports this view.

6. Virgin also pointed out that the procedure to be followed under the new provisions is in many respects followed by them already. The parties to the redrafting of the provision had in mind precisely that the new process would replicate as far as possible existing best practise within the industry.

South Eastern Trains

7. South Eastern Trains (“SET”) felt that the proposed modifications did not serve to simplify the SROU process. It gave two reasons for this view. The first was that it should be Network Rail that identifies a potential SROU and then the TOC that identifies whether a claim can be brought. However, as discussed above, this is indeed what will occur under the new provision, where it will be for the TOC to say when it believes that an RoU of which it has been notified should be classed as an SROU. This is because the TOC is best placed to say when the cost of an RoU will impact upon it beyond a certain level.

8. SET’s second reason, supported by Southern Railway, was that compensation based on estimates was, in its view, difficult to calculate and was more likely to be the case the further in advance of the actual works the estimate was provided. SET’s preference was for claims to be calculated on an emerging cost basis. It accepted that using estimates encouraged TOCs to control costs, but suggested that other methods could be employed to assess those costs meaningfully and to avoid excessive use of resources in calculating estimates, particularly when numerous changes were subsequently made to the plans before being implemented.

9. We appreciate that estimating operator costs in advance of SROUs is not an exact science. However, in arriving at the final SROU drafting we have had to weigh and consider a number of factors. These include ORR’s section 4 duties to “promote efficiency and economy on the part of persons providing railway services” (Section 4(1)(c)) and “to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance” (Section 4(1)(g)). Using estimates as opposed to emerging costs will not only incentivise the TOC to keep costs down, but also give Network Rail some degree of certainty over the costs it will incur in advance of the works being carried out. We consider that this is consistent with our statutory duties.

10. To strike the appropriate balance, we have aimed to ensure that the final estimate is to be arrived at, not so early as to make it too difficult for the operator to calculate it meaningfully, but not so late as to deprive Network Rail of the ability to understand the costs it will incur in advance of the works it carries out. Any compromise of this kind will of course be imperfect. But we believe the balance struck is the right one, and in terms of clarity of process and responsibility, is a clear improvement on the previous regime.

Southern Railway

11. As well as its comments on the issue of costs estimates (see above), Southern Railway (“Southern”) made some points on the drafting of the provisions.

12. Southern asked why paragraph 2.7(a) specified two different dates for the operator to produce its estimate of the likely costs of an SROU. This is because there are two ways in which an operator can be notified of a potential SROU, as set out in paragraph 2.6(d): through the working timetable or through the timetable revision process. In the first instance the TOC will have a minimum of 56 days (until T-20) to provide the estimate. But if this same requirement applied to RoUs notified via the revision process, the operator could have as little as two weeks to prepare an estimate (if notified at T-22). The deadline of T-16 for estimates provided in these latter instances is a compromise between allowing the operator sufficient time to prepare that estimate and giving Network Rail notice of the cost implications reasonably in advance of T-12.

13. Southern queried the use of the words “detailed and transparent” in paragraph 2.7(c)(i) to describe the operator’s estimate of the direct costs it expected to incur. Recognising that such estimates will be imperfect at an early stage of the process, this wording will be amended to read “as detailed and transparent estimate as is reasonable in all the circumstances”.

14. Southern noted that, under paragraph 2.7(c)(ii), actual costs would be payable to the operator by Network Rail if the estimate could not be agreed. Southern’s view was that this rendered the nature of the original estimate as described in 2.7(c)(i) academic, and asked why compensation based on actual costs was not acceptable for all SROUs if it was acceptable in these instances.

15. Paragraph 2.7(c) establishes a clear preference for compensation to be paid on the basis of an estimate, whilst recognising that this will not always be possible in practice. As discussed above, we consider that this approach is consistent with ORR’s statutory duties as it will incentivise operators to keep their costs down and give Network Rail some degree of advance certainty regarding cost implications in advance of any works being carried out.

Amendments from the draft provision

16. In the final version of the SROU provisions, ORR has made some minor amendments from the draft provision. These are as follows:

- (a) As mentioned above in paragraph 14, the wording of paragraph 2.7(c)(i) of the provision has been amended to better describe the criteria under which the operator will produce the estimate of the direct costs it expected to incur under the SROU;
- (b) In paragraphs 2.6(d)(i) and 2.8(b)(i), the words “by being included in a version of the working timetable” have been amended to read “by being reflected in a version of the working timetable”. This is because RoUs are not included in the timetable but rather the timetable is built around them; and

- (c) Southern suggested that in paragraph 2.7(h) the words “three months” be replaced with “60 working days”. We agree and this amendment has been made.

Next Steps and Timescales

17. The new drafting has now been incorporated into the updated model contract and we will expect all applications for new track access contracts to include it. In the case of existing track access contracts, any proposed supplemental agreements that introduce the new provisions will be covered by the general approval, issued today, which deals with updates to the model contract (see the separate letter of today’s date on that subject). This will ensure that Network Rail and passenger train operators will be able to benefit from the new SROU drafting as soon as possible.

Yours sincerely

David Robertson