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organisation and management of the TOC's response to the RoU.

- Where a Type 3 RoU has occurred, either party can require that both revenue losses and costs be calculated as 'RoU Liability'. This includes any costs, direct losses and expenses (including revenue loss) reasonably incurred or reasonably expected to be incurred by the TOC as a consequence of the RoU.

In either case, NR or the TOC needs to reasonably believe there will be a difference of more than £10,000 between the formulaic compensation and RoU Direct Costs/RoU Liability. Together, these are referred to as 'RoU Losses'.

Schedule 4 is not prescriptive about how to value RoU Losses so a dispute could easily arise, especially as costs and losses will obviously vary greatly between possessions, depending on the duration and knock-on effects. Costs might range from rail replacement buses – which might be relatively straightforward to demonstrate – to management time and business planning being diverted from business-as-usual activities. This might be more difficult to justify and quantify.

In our experience, disputes about quantifying RoU Losses tend to be more common than disputes about NR's liability to pay compensation. This is not surprising as it is typically straightforward to show that a RoU has occurred, especially as RoUs must be notified to the TOC in advance, and to classify it as Type 1, 2 or 3.

RoU Claim Notices

If either party wishes to use a non-formulaic approach, a specific notice must be served on the other party within the prescribed time period. If the RoU Claim Notice is issued by a TOC, it needs to include an estimate of the RoU Direct Costs or RoU Liability.

The service of the Notice kicks off a process set out in the TAC in which the parties must negotiate the amount of compensation. If agreement is not reached within 28 days, either party can refer the dispute for formal resolution under the Access Dispute Resolution Rules (ADRR) appended to the NR Network Code. It is important not to confuse the RoU Claim Notice with a Notice of Dispute, which may well still be needed to satisfy ADRR requirements.

Taking Possession of Restriction of Use Claims

Ron Nobbs, Partner and Charlotte Thomas, Associate at law firm Stephenson Harwood LLP with some tips for making and managing claims

Engineering work is a necessary consequence of operating a railway, to ensure services can run safely and reliably; sometimes these will interrupt the access rights of train operating companies (TOCs). Since the pandemic, and with shifting travel patterns, there has been industry-wide discussion about whether engineering work should be switched away from weekends, where leisure travel has seen the most recovery. But this is a question of 'when' and not 'if' the engineering work is undertaken: the need for 'possessions' of the railway, or 'Restrictions of Use' (RoU), is accepted.

Network Rail's (NR) entitlement to take pre-planned possessions is contained in the engineering access statement under NR's Network Code. Of course, if the railway is not available, TOCs cannot operate services, may not be able to generate as much revenue, and may incur extra costs. The financial implications of a possession are set out in Schedule 4 of the Track Access Contracts (TACs), which establishes a mechanism where the TOC will receive compensation calculated in accordance with a formula. In many instances, NR and the TOC will be satisfied or agree that formulaic compensation is sufficient for the TOC's costs and losses – however, there is scope for a dispute about whether this is actually the case, especially where a possession is significant in duration and/or impact.

Formulaic Compensation v 'RoU Losses'

Possessions are inherently disruptive and therefore tend to result in TOCs incurring costs and suffering losses. How long a possession lasts will influence the nature and extent of costs and losses.

Recognising this, Schedule 4 establishes

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a hierarchy to determine entitlement to compensation:

- A 'Type 1' RoU is one of less than 60 consecutive hours.
- A 'Type 2' RoU is one of between 60 and 120 consecutive hours.
- A 'Type 3' RoU is one of more than 120 consecutive hours.

The starting point is that compensation will be calculated using the TAC formulae. However:

- Where a Type 2 RoU has occurred, revenue losses will be calculated using the formula but either party can require that costs be calculated as 'RoU Direct Costs'. This includes bus and taxi hire, publicity, train planning and diagramming, and other costs directly related to the

NEWS IN BRIEF

SUCCESSFUL LAUNCH OF UK'S FIRST SUSTAINABLE TRAVEL EDUCATION TOOLKIT

Community Rail Education Network and CrossCountry have launched the UK's first Sustainable Travel Educational Toolkit. Over the last six months, the partnership (with support from Community Rail Network and the Decarbon8 Network) have developed and produced a series of ground-breaking materials that will support the national curriculum in teaching Key Stage Two students about sustainable travel.

TEACHING KEY STAGE TWO STUDENTS ABOUT SUSTAINABLE TRAVEL

With greener transport recognised as a fundamental part of the solution to the climate emergency, sustainability is a topic that we all need to be more aware of. These resources focus on the Key Stage Two age group, with an aim to encourage conversations around sustainability at home and influence the wider group of family and friends to choose sustainable travel.

TOP AWARD FOR DIRECT RAIL SERVICES

Direct Rail Services (DRS) has won a prestigious award for its innovative refrigerated rail service with supermarket giant Tesco. DRS and Tesco won the Freight and Logistics Achievement of the Year award at this year's National Rail Awards.

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We spoke about the ADRR dispute resolution procedures in the first article in this series. In any dispute resolution procedure, the TOC will need to be able to prove that it incurred costs and/or losses as a direct result of the RoU.

Top Tips for Making and Managing Claims

For TOCs who have experienced a Type 2 or 3 RoU and are looking to make a claim over and above formulaic compensation, here are our top tips.

General Tips

Ensure the costs and losses fall within the definitions in the TAC that can be claimed. Do not lose sight of what needs to be demonstrated to succeed. For example, losses claimed in respect of a Type 3 RoU must be 'direct losses ... reasonably incurred or reasonably expected to be incurred ... as a consequence of [the possession]'.

Keep relevant contemporaneous records and do so in 'original' format. This might include planning documents, meeting minutes, business records, or stakeholder briefings.

Records should be clearly referable to particular possessions – this will be especially important where a TOC has more than one possession occurring at a time or in quick succession.

Tips for Costs Claims

Remember that it might be possible to claim certain planning and management costs. Records should be kept from as early as possible.

Once a dispute has escalated via a RoU Claim Notice, the TOC may find itself in a dispute resolution procedure under the ADRR. It could be required to prove its entire claim rather than just discrete elements. This could mean that routinely accepted and paid claims, such as rail replacement costs, are challenged. This will require the TOC to prove that the costs were reasonably incurred as a consequence of the RoU.

It may be useful to set up a cost recording system to record costs arising from the possession separately to business-as-usual costs, as this will make collating and evidencing the claim more straightforward. Any system should be established as early as possible, clearly explained to staff, and used consistently across the business.

It may also be useful to keep NR informed before/during/after the possession about the type and amount of costs being incurred. However, this is not a substitute for proving your claim and you may still be 'put to proof', even if no objections were raised by NR at the time.

To succeed in a claim, you must be able to show that costs were reasonably incurred. This will be informed by the commercial judgment of those planning and managing the RoU, and those individuals may need to explain why decisions were taken.

Tips for Revenue Loss Claims

A TOC can make a claim for (direct) loss of revenue reasonably incurred or reasonably expected to be incurred as a consequence of a Type 3 RoU. This will likely include revenue loss as a result of passengers not able to travel during the possession. It could also include revenue losses after the core period of the possession where passengers were temporarily or permanently driven away from the network.

Revenue loss can be complex to calculate and will inevitably involve some form of financial modelling to demonstrate the difference between (1) the revenue the TOC could reasonably have expected but for the possession and (2) the revenue actually collected. It may be useful to agree a methodology to calculate losses at an early stage – although this may not prevent the other side from taking issue with the methodology if the dispute escalates.

A TOC making a claim for revenue loss should consider as early as possible how it will prove the link between the possession and the lost revenue. It might be worth considering how to show the impact on customer behaviour before, during and after the possession.

Conclusion

Possessions, whilst often needed, can be incredibly disruptive and result in TOCs incurring costs and losses over and above the formulaic compensation provided for in TACs. In these instances, it is important to consider the alternative mechanism of calculating compensation and the hurdles to make good a claim.

Our top tips should help TOCs take ownership of such 'possession' claims. Of course, the way in which disputes arise and are dealt with may differ following the implementation of the Williams-Shapps Plan for Rail. In the future railway, if Great British Railways (GBR) takes cost and revenue risk and is also responsible for maintaining the track and needing possessions, there is an argument that Schedule 4 is not needed for GBR TOCs. However, if there is any element of cost risk for GBR TOCs, and for both revenue and cost for non-GBR TOCs, a regime will be needed to deal with the consequence of the track not being available for trains to operate. It remains to be seen what this might look like. **RP**