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Strategic Considerations for Handling Disputes

Ron Nobbs, Partner and Amy Steenson, Managing Associate at Stephenson Harwood examine Disputes under the Access Dispute Resolution Rules

While the Williams-Shapps Plan for Rail envisages a – perhaps optimistic – future where there are fewer disputes between industry parties, it is a reality of the operational railway that there will sometimes be disagreements. Where this happens, train operators and Network Rail pre-agree – such as in track access agreements, station access agreements and depot access agreements (Access Agreements) – the process by which those disputes will be resolved. With a few exceptions, this will be the Access Dispute Resolution Rules, or ADRR.

With the process being agreed in advance, it sometimes comes as a surprise that there are still a number of key strategic decisions to be taken when a dispute does actually arise. What are those considerations and what factors might be taken into account in considering the best way forward?

What are the ADRR?

Before considering strategy, it's worth first taking a step back and taking a look at the ADRR. These are a set of rail industry dispute procedural rules annexed to Network Rail's Network Code. Of course, other infrastructure managers have emerged in the industry in recent years – such as HS1 and Rail for London (Infrastructure).

Where the infrastructure manager is not Network Rail, there is usually a similar set of dispute resolution arrangements bespoke to that infrastructure manager which forms part of the Access Agreements. While there will be similar strategic considerations, it goes without saying that it is essential for dispute parties to consider the relevant dispute resolution arrangements, as they may vary from Network Rail's.

The Access Disputes Committee (ADC) administers the ADRR and appoints the following two key individuals who are integral to the dispute resolution process:

- The Secretary, who supports the parties when the dispute is initiated and allocated to a particular dispute resolution process. The Secretary is also responsible for managing the delivery of the dispute resolution process to which a dispute is eventually allocated.
- The Allocation Chair, who oversees the overall case management of disputes and will determine any disputes which arise in the initiation and allocation stages.

The ADRR include rules which apply to all disputes, such as the ADRR Principles, as well as the rules in relation to commencing proceedings. There are also rules which apply only to the individual dispute resolution processes which are available under the ADRR:

- Mediation.
- Early Neutral Evaluation.
- Arbitration.
- Access Dispute Adjudication (ADA).
- Timetabling Panel.
- Expert Determination.

There are pros and cons to using each of these processes which parties to a dispute will need to consider carefully with their advisors as this will be an important strategic decision to make early on in the dispute process. Sometimes, there will not be much, if any, choice about the route that will be followed.

ADRR Principles

Under the ADRR, all parties – including the Allocation Chair, the Secretary, and

NEWS IN BRIEF

GREATER ANGLIA HIGHLIGHTS RAIL TRAVEL CARBON SAVINGS

To mark Car Free Day on 22 September, Greater Anglia put five of its most popular routes through a carbon calculator to demonstrate the enormous carbon savings that can be made by choosing to travel sustainably.

62.7 MILLION KILOGRAMS OF CO2E

It reveals that over 8.5 million people travelled on the five routes between 1 January and 31 August 2022 and together saved over a whopping 62.7 million kilograms of CO₂e from being emitted into the atmosphere. That is equivalent to over ten million tree seedlings growing for ten years.

OVER THREE MILLION PEOPLE AT RISK OF TRANSPORT-RELATED SOCIAL EXCLUSION

New research by Transport for the North (TfN) reveals that 3.3 million people from across the North of England live in areas where there is a significant risk of transport-related social exclusion (TRSE). This study, the

3.3 MILLION PEOPLE

first of its kind in the UK, estimates that 21.3 per cent of the population of the North of England live in areas in which there is a relatively high risk of social exclusion because of issues with the transport system. These areas are widely distributed across the North but are particularly concentrated in former manufacturing and mining communities, in coastal areas, and in smaller towns and cities.

NEWS IN BRIEF

AMBITION FOR STEP-FREE STATIONS ACROSS LIVERPOOL

Plans to make the Liverpool City Region rail network the most accessible in the UK remain on track as a bid to make ten more stations step free is confirmed. And as part of plans to upgrade the remaining 21 stations, the Combined Authority is nominating 10 of them to be considered by the Department for Transport (DfT) for funding under the next round of its Access for All scheme.

UNIVERSITY OF BIRMINGHAM TO COLLABORATE WITH GLOBAL CENTRE FOR RAIL EXCELLENCE

A new agreement will see railway expertise from academia, government and industry driving forward rail innovation at a world class rail testing centre in Wales. The University of Birmingham's Centre for Railway Research and Education (BCRRE) and the Global Centre for Rail Excellence (GCRE) have signed an agreement to partner on R&D and innovation activities on the site of the Welsh test centre which is due to open in 2024. The Global Centre for Rail Excellence

6.9 KILOMETRE TEST TRACK

was set up by the Welsh Government to establish the facility, in Neath Port Talbot. It aims to offer a 'one stop shop' for railway innovation from R&D, through testing and verification, to applied innovation on the mainline passenger and freight rail systems. BCRRE is the largest specialist railway research, education and innovation centre in Europe and was selected by the Welsh Government to lead the development of a Centre of Excellence for Railway Testing and Validation. This Centre will sit alongside the new 6.9 kilometre test track that is being built at the head of the Dulais and Tawe valleys.

decision-makers such as Hearing Chairs and arbitrators – are required to apply certain principles. These include that:

- Dispute parties must conduct themselves with the objective of resolving the dispute. They must also cooperate with reasonable requests made by the other party to the dispute.
- Every decision-maker must reach their determination with regard to other, relevant, published decisions, and in a timely manner consistent with the nature and complexity of the dispute.

The Allocation Chair and other decision-makers are required to consider compliance with the ADRR Principles when making any decision in relation to costs, which is intended to make sure dispute parties behave appropriately.

Initiating a Dispute

The first step in the ADRR process is for the party wishing to refer a dispute to serve a Notice of Dispute on the other parties to the dispute and the ADC Secretary.

Importantly, the ADRR Notice of Dispute is in addition to any other notice requirements that exist under the Access Agreement between the parties. The parties must comply with all such requirements. For example, under track access contracts, parties are generally required to notify the other as soon as reasonably practicable, and in any event within a year of first becoming aware of the circumstances giving rise to an indemnity claim. A party which has not issued such a notice may face an argument from the other party that the claim cannot be brought because the contractual notice has not been given, even if an ADRR Notice of Dispute has been given. It is vital to ensure all relevant notices are given.

There is no express requirement under the ADRR for parties to engage in pre-action discussions before issuing a Notice of Dispute. However, before issuing a Notice of Dispute, parties should be comfortable that:

- A dispute has crystallised between the parties.
- Any other requirements in the underlying Access Agreement – such as entering into negotiations in relation to the claim – have been satisfied.

Allocation Process

An unusual feature of the ADRR is the Allocation Process, where the dispute resolution process is determined:

- Following issue of a Notice of Dispute, the parties have an opportunity and will, impartially, be encouraged by the Secretary to agree which of the dispute resolution processes will apply. If agreement is reached by the parties to the dispute, this is formalised in a Procedure Agreement.
- If the parties do not agree a Procedure Agreement within 28 days of the Notice of Dispute, an Allocation Hearing will be convened. The Allocation Chair will

seek to facilitate agreement between the parties, provide any view the Allocation Chair has on the most appropriate determination procedure and in some cases determine that the parties have no choice as to the process.

- If there is still no agreement within seven days of the Allocation Hearing, and the Allocation Chair has not determined that there is no choice on the process, the Allocation Chair will determine that the dispute is referred to the default dispute resolution process. This is ADA under the latest version of Network Rail's ADRR, but was previously arbitration.

Strategic considerations

A failure to agree the dispute resolution process could ultimately lead to the default process being adopted – so this should be at the forefront of minds during the Allocation Process. If the default ADA process is adopted:

- After the ADA determination is delivered, key documents from the proceedings will generally be made public, whereas in arbitration or mediation, documents would generally be confidential.
- An ADA determination is binding subject to appeal to arbitration. Unless agreed otherwise in a Procedure Agreement, parties have an automatic right to appeal an ADA determination, whereas in a mediation the outcome would be a non-binding view as to the likely outcome of the dispute. An arbitration award would be final and binding and subject to appeal in the courts only in very limited circumstances.
- A Hearing Chair in an ADA will normally be supported by two independent railway Industry Advisors, which may be beneficial where the dispute is technically complex in an industry-specific way.
- An ADA process may be more informal and the timetable more compressed than if the parties had agreed to arbitration.
- Commencement of an ADA may not stop limitation – which is the time period within which a party must bring its claim – running, whereas commencing an arbitration would.

While some parties may prefer ADA for its flexibility, there is clearly a wide range of factors to take into account when considering the approach to take to dispute resolution. So, while the ADRR sets out a process by which disputes will ultimately be resolved, there are plenty of strategic decisions which still need to be made. Disputes are rarely an easy period for industry parties and while the ADRR provide a framework within which the dispute will be dealt, there is still plenty for parties to consider. **RP**

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