

James Osborn
Executive, Access and Licensing
Telephone 020 7282 3834
Email StationsandDepots@orr.gov.uk



BY EMAIL ONLY

29 April 2021

Andrew Rogers
Head of Projects & Contracts East
Hitachi Rail Limited
7th Floor
One New Ludgate
60 Ludgate Hill
London
EC4M 7AW

Simon Kelly
Head of Procurement
Abellio East Midlands Limited
1 Prospect Place
Millennium Way
Pride Park
Derby
DE24 8HG

Dear Andrew and Simon,

Section 17 Railways Act 1993: Proposed Depot Access Agreement between Abellio East Midlands Limited (Depot Facility Owner) and Hitachi Rail Limited (Beneficiary) for Leeds Neville Hill depot where Abellio East Midlands Limited is the Depot Facility Owner

Application

1. On 21 February 2020, Hitachi Rail Limited (“Hitachi”) applied to the Office of Rail and Road (“ORR”) under section 17 of the Railways Act 1993 (“the Act”). In its application, it asked us to give directions to Abellio East Midlands Limited (“AEM”) to enter into a Depot Access Agreement (“DAA”) in respect of Leeds Neville Hill depot (“the depot”), where Abellio East Midlands Limited is the Depot Facility Owner (“DFO”).

Decision

2. After careful consideration of the facts of this case, we have decided to issue directions to AEM under section 17 of the Act to enter into a DAA with Hitachi for Leeds Neville Hill depot, incorporating the charges for the Beneficiary Depot Services proposed by AEM. Our directions are set out in a separate notice,



which accompanies this letter. The reasons for our decision, and the process we followed to reach it, are set out below.

The Railways Act 1993

3. Under the Act, anyone seeking access to a light maintenance depot for the purposes of obtaining light maintenance services must enter into an agreement approved or directed by us. An access contract that we do not approve or direct will be void. Where an applicant for access cannot agree the terms of access with the facility owner, the applicant is entitled to apply to us under section 17 for a direction that the facility owner enters into the access agreement on specified terms.
4. When we exercise our functions under the Act, we are governed by our statutory duties, most of which are set out in section 4 of the Act. There is no statutory order of priority amongst these duties, and it is for us to balance them and give each appropriate weight in the circumstances of an individual case. In considering the application and in reaching our decision as to appropriate directions in this case, we have had regard to our duties under section 4 of the Act and adhered to the process and timescales set out in Schedule 4 to the Act.
5. In relation to this case, we have given particular weight to the following duties:
 - otherwise to protect the interests of users of railway services;
 - to promote the use of the railway network in Great Britain for the carriage of passengers and goods and the development of that network, to the greatest extent that we consider economically practicable;
 - to promote efficiency and economy on the part of persons providing railway services;
 - to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance; and
 - to protect the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of the prices charged for such use.

Grounds for disagreement

6. Hitachi has made an application under section 17 of the Act because the two parties could not agree the terms of access to the depot. In particular, the parties

have been unable to agree the charges in respect of the beneficiary depot services set out in the proposed DAA.

7. Hitachi is required to procure access to the depot for the purposes of securing light maintenance services as maintainer of the class 800/801 Azuma fleet on behalf of London and North Eastern Railway Limited (LNER). LNER will operate the fleet under its operating licence.
8. The parties entered into an agreed DAA directed by ORR under Section 18 of the Act on 16 August 2019 whilst commercial discussions over access charging were ongoing. That DAA, which has been extended several times, contains no charging information. Charging is currently dealt with via a separate commercial agreement between the parties.
9. The proposed DAA is a new DAA for the purposes of securing ongoing access and light maintenance servicing of the newly introduced Class 800/801 fleet which will replace the existing DAA referenced above.
10. In Hitachi's view, the proposed charges in respect of the Minimum Level of Beneficiary Depot Services exceed the access charges for equivalent services provided at Neville Hill and similar services at similar facilities within the same region of the United Kingdom (with the exception of train moves).
11. Hitachi also considers that the proposed charges may exceed the cost to the Depot Facility Owner of providing access to its service facilities and/or the supply of services within those facilities (plus a reasonable profit) and has not been able to satisfy itself that the charges are offered on a non-discriminatory basis, based on the information provided to it by AEM.

Process

12. In considering this application, we have followed the section 17 process as set out in Schedule 4 to the Act. We have been conscious of the need to give the parties the opportunity to make representations to us and to provide us with relevant information. We have given careful consideration to the representations and information which has been provided by the parties.
13. Following receipt of the application on 21 February 2020, on 9 March 2020 AEM requested an extension to the deadlines for making written representations on the application from Hitachi and to furnishing ORR with the names and addresses of interested persons. Subsequently AEM requested a pause on the section 17 process or, at the very least an extended delay. With the agreement of Hitachi, ORR agreed on 7 May 2020 to AEM's request for an extension, and between that date and 18 August 2020 proceedings were on hold. The reasons

for this and the process we have followed in considering this application are summarised in Annex A.

Economic and Operational Assessment

Legislation

14. In undertaking our assessment of the charges proposed by each party for depot access at Neville Hill, we have considered the requirements for charging set out in The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the Regulations). Regulation 14(7)(1) requires a service provider to “charge fees for the use of a service facility for which the service provider is responsible” and “utilise such fees as are received to fund the service provider’s business”. Paragraph 1(6) of Schedule 3 to the Regulations provides that “[t]he charge imposed for track access within service facilities referred to in paragraph 2 of Schedule 2 and the supply of services in such service facilities must not exceed the cost of providing it, plus a reasonable profit.”. Where a service provider supplies services to a railway undertaking, it must do so in a non-discriminatory manner.
15. Regulation 13(3) of the Regulations requires a service provider to provide the infrastructure manager of the railway infrastructure to which the relevant service facility is connected with such information as is necessary to enable that infrastructure manager to include information on access to and charges for the supply of service facilities in the network statement. Such information is not currently included in Network Rail’s network statement in relation to Neville Hill. We consider that many of the issues we have considered in relation to this section 17 application would have been addressed by such information on charging for Neville Hill being publicly available.
16. Transparency of access arrangements and access procedures is key to ensuring the basis for non-discriminatory access to service facilities for all railway undertakings. This is already a requirement under the Regulations. *The Implementing Regulation on access to service facilities and rail-related services* (the Implementing Regulation) came into force in June 2019. The Implementing Regulation sets out further details on the information that is required to be made available by operators of service facilities (in the form of a Service Facility Description (SFD)), and on the requirements to make this information publicly available. In short, the Implementing Regulation anticipates that operators of service facilities will publish a SFD, which should contain, among other things, information on charges for getting access to service facilities and charges for the use of each rail-related service supplied within the service facility.
17. The Implementing Regulation requires such charging information to be publicly available either on the service facility operator’s website or by providing the

infrastructure manager with the information to be included in its network statement. Notwithstanding this requirement, we expect this information to be shared with a prospective access beneficiary upon request. Whilst in this case this information was provided to us as part of the section 17 process, we consider that it should already have been available to Hitachi and to other access beneficiaries at Neville Hill depot. Going forward, we expect AEM to comply with the requirements of the Implementing Regulation by publishing a SFD. In turn, this will increase the transparency of its charges for Neville Hill.

Information received

18. AEM supplied ORR with the cost model it used to determine the depot access charges it intends to levy on Hitachi for cleaning and light maintenance services¹ at the depot. As Hitachi is a beneficiary at other depots, as well as a facility owner in its own right, ORR received a similar cost model from Hitachi on request. This enabled us to establish Hitachi's view of what it considered to be a reasonable charge for the depot services.

19. These cost models were supplied to us by each party on the understanding that the information contained within them is commercially sensitive. In addition, each party requested that this information should not be shared more widely than ORR without their express consent.

ORR assessment

20. ORR conducted a two-stage assessment. Firstly, we compared AEM's proposed cost of providing the services² with the costs proposed by Hitachi in its cost model. We found that depot moves and fuel point exams were where the parties differed the most. We then examined the drivers of these differences, finding that both parties held a different view of the time taken for a one-day exam and AEM supplied a noticeably higher overhead cost across all charges³. We also reviewed the cost categories within the total overhead costs and the method of apportioning those costs to operators using the depot.

21. In order to understand the differences highlighted above in more detail, the second stage of our assessment involved a site visit to Neville Hill depot by ORR Operations Advisors to understand the nature of the depot, its working methods and any constraints. This site visit, which took place on 16 March 2021, enabled

¹ Consisting of a fuel point exam, work arising, interior clean, wash plant, nose end clean, DOO cameras clean, CET, tanking water and depot moves.

² As both parties applied different profit margins, we removed this from the analysis and focused only on the proposed and expected costs. Our main focus was the cost reflectivity of the charges.

³ All charges are calculated on a per train basis for all operators, then multiplied by the number of Class 80x trains worked on, giving an appropriate weighting to all charges.

us to take account of any unique features that could at least partly explain the discrepancy between the costs proposed by AEM and those expected by Hitachi.

Conclusions

22. Our findings show that AEM's total overhead costs, which feed into all charges, are higher than expected by Hitachi, making it the primary source of the discrepancy in AEM's and Hitachi's cost assessments. We have reviewed the cost categories⁴ that form AEM's overhead costs and consider them to be reasonable. In addition, we consider that the methodology employed by AEM to apportion its central overhead costs to the depot is reasonable.
23. Furthermore, on comparing the proposed charges for the provision of depot services supplied by both AEM and Hitachi, we have found that the proposed charges for cleaning (both interior and exterior) and CET are broadly equivalent. However, our analysis showed that AEM's depot moves charge is significantly higher than Hitachi expected.
24. As part of our site visit, we were keen to observe factors that could explain these higher costs. The site visit demonstrated that Neville Hill is space and capacity constrained. The depot hosts a variety of rolling stock and is not purpose built for Class 80x trains. The physical layout and size of the depot imposes further constraints. For instance, we found that, whilst in many depots a train would arrive to stable overnight in a shed or siding, trains at Neville Hill travel in a 'loop' around the depot from the West to the East and back again. These constraints have resulted in atypical ways of working, designed to maximise the depot's efficiency. Most noticeably, the depot uses a sophisticated depot protection system to manage throughput and safety. The cost of such a system could partly explain the discrepancy in overhead costs between AEM and Hitachi.
25. In terms of depot move costs, our Operations Advisors observed that the physical constraints of the depot mean that some additional staff roles are necessary for the safe coordination of complex movements around the depot and control of operational risk. Additionally, we were informed that AEM's safety validation of the un/coupling of trains specifies the use of two drivers for the Class 80x fleet at the depot. This is deemed necessary by AEM to minimise operational risk. We note that Hitachi's cost model implicitly assumes the use of one driver for depot moves.
26. Based on the site visit, we consider there is evidence to indicate that Neville Hill's operational constraints make it more expensive to operate than a typical depot. Our site visit also gave no indication that the depot is operationally

⁴ We have not audited the figures provided by AEM.



inefficient. We also note that AEM's profit margin is not excessive and is, in fact, lower than Hitachi expects. Taking all of the available information into account, ORR is satisfied that AEM's proposed charge reflects the costs it incurs in providing depot services at Neville Hill.

Next Steps following ORR's Directions

27. Please note that until the access agreement is entered into none of the provisions contained within it are applicable. The directions state that the DAA should be entered into not later than 2 June 2021.
28. The ORR unique reference number given in our directions should be inserted in the top right hand corner of the cover sheet of each document before signature to ensure all parties have a uniform referencing system.
29. The facility owner must send us a copy of the signed access agreement no later than 14 days after the date upon which it is entered into. It is an offence under section 72(6) of the Act to fail to comply with this duty.
30. When we receive a copy of the signed access agreement we will retain it on our public register. No exclusions will be made prior to it being placed on the public register, unless a request for redaction is made to us. If you wish to request an exclusion of all or part of the agreement, or have any other questions, please contact me as soon as possible.
31. Following the provision of the signed access agreement, we will discuss with the parties individually the publication on our website of documentation related to the application.

General comment - provision of information

32. Finally, we reiterate our earlier point that operators of service facilities must comply with the requirements of the Implementing Regulation by producing a Service Facility Description (SFD), which should be publicly available. This should include information on charges for getting access to service facilities and charges for the use of each rail-related service supplied within the service facility.

Yours sincerely

A handwritten signature in black ink that reads 'James Osborn'.

James Osborn

Annex A – Section 17 process

- On 21 February 2020 we received an application from Hitachi asking us to direct AEM to enter into an agreement for access to Leeds Neville Hill depot.
- On 25 February 2020 we invited AEM to make written representations on the application from Hitachi and directed it to furnish us with the names and addresses of every interested person as required by paragraphs 3(1) and 4(1) of Schedule 4 to the Act.
- On 28 February 2020 the parties amended the expiry date of their DAA to 30 May 2020, also amending a number of Schedules.
- On 9 March 2020 we received a request from AEM for an extension to the deadline for making written representations on the application from Hitachi and furnishing us with the names and addresses of interested person. AEM cited the delays and difficulties it (and the rail industry generally) was experiencing as a result of Covid-19. On 11 March 2020 we agreed to an extension.
- On 30 March 2020, given ongoing difficulties caused by Covid-19, AEM requested a pause on the Section 17 process or, at the very least an extended delay.
- On 2 April 2020 we invited Hitachi's representation on AEM's request.
- On 7 May 2020, following exchanges with the parties on the length of any possible delay/extension, we agreed to an extension to 27 July 2020 for AEM to provide details of any interested persons and/or to set out any matters it considered should be excluded from any ORR consultation; and 3 August 2020 for AEM to provide its representations on Hitachi's application.
- On 29 May 2020 the parties further amended the expiry date of their DAA to 17 October 2020.
- On 28 July 2020 AEM confirmed that there were no interested persons and notified us of matters it considered should be excluded from any consultation.
- On 4 August 2020 AEM advised us that it was in further negotiations with Hitachi and that the parties were actively pursuing an agreement to terms of the DAA for Hitachi's access to Neville Hill depot. On 6 August 2020 AEM and Hitachi requested a short extension to 18 August 2020 for AEM to provide its representations on Hitachi's application.

- On 18 August 2020 AEM advised us that the parties had not reached agreement and submitted its representations on Hitachi's application.
- On 20 August 2020 we sent AEM's representations to Hitachi and invited Hitachi to make further representations. We received Hitachi's response on 27 August 2020.
- On 16 October 2020 the parties further amended the expiry date of their DAA to 6 February 2021.
- On 23 October 2020 following correspondence with AEM during September and October 2020, we received a draft DAA populated with AEM's proposed charges along with supporting documentation. On 30 October 2020 we requested further clarification from AEM on a number of points concerning the presentation of charges within the draft DAA, as well as the calculation and apportionment of overhead costs. We received a response from AEM on 9 November 2020 which included an updated draft DAA and accompanying spreadsheets.
- On 12 November 2020 we invited Hitachi's comments on the draft DAA and supporting documentation provided by AEM. Hitachi provided its response on 24 November 2020 which contained four requests for clarification on the calculations of specific charges and the calculation of AEM overheads and depot overheads and how these are apportioned.
- We requested clarification by AEM on these points on 1 December 2020, and received a response on 8 December 2020.
- On 17 December 2020, we wrote to Hitachi, inviting it to set out its proposal for the charges for the Beneficiary Depot Services. We wrote to AEM on the same date, advising it that we had invited Hitachi's views on the proposed charges and inviting it to submit any further documentation.
- On 7 January 2021, AEM submitted an updated version of its response of 8 December 2020.
- On 8 January 2021, Hitachi submitted a response to our letter of 17 December 2020 including a spreadsheet detailing its proposed charges and its methodology for the calculation of those proposed charges.
- We requested further clarification from both parties in respect of their submissions during January and February 2021.
- On 5 February 2021 the parties further amended the expiry date of their DAA to 31 March 2021.



- On 16 March 2021, ORR Operations Advisors visited Neville Hill to help our understanding of operations at the depot, including the time taken for various tasks.
- On 30 March 2021 the parties further amended the expiry date of their DAA to 29 May 2021.