

**THE TRANSPORT AND WORKS ACT 1992
PROPOSED THE TRANSPORT AND WORKS (INQUIRIES AND PROCEDURE)
RULES 2004
THE FELIXSTOWE BRANCH LINE AND IPSWICH YARD IMPROVEMENT ORDER**

ENGLISH WELSH & SCOTTISH RAILWAY LIMITED

**PROOF OF EVIDENCE
OF
NIGEL JAMES OATWAY**

1. I am Nigel James Oatway and I am employed by English Welsh & Scottish Railway Limited ('EWS') as Access Manager and have held that post for 10 years. I have worked in the rail industry for over 26 years. My responsibilities within EWS include managing the Company's access contracts with both Network Rail Infrastructure Limited ('Network Rail') and other relevant rail facility owners as well as advising upon and administering its access and licensing relationship with the Office of Rail Regulation ('ORR'). This requires me to have a thorough knowledge of the rail industry contractual and regulatory structure, which includes the access and licensing provisions of the Railways Act 1993.
2. My evidence is in support of EWS's objections to the application of the Felixstowe Branch Line and Ipswich Yard Improvement Order ('the proposed Order') made on behalf of the Felixstowe Dock and Railway Company ('FDRC').

EWS

3. EWS is the dedicated rail freight operator in Britain and Mainland Europe, running in the region of 5,500 rail freight services per week across all parts of Britain and into Europe, transporting materials such as coal, aggregates, steel and white goods. EWS leases both Ipswich Upper Yard and Ipswich Lower Yard from Railtrack Plc, now Network Rail, on two 125-year lease agreements.

4. EWS also operates a large number of other rail freight yards throughout the country on similar leasehold arrangements with Network Rail.

Objections

5. The works contemplated by the proposed Order will have a significant impact both on the Felixstowe Branch Line and on EWS's leased sites at Ipswich Upper and Lower Yards. EWS, as a rail freight operator, is not opposed to the principle of the enhancements proposed to be undertaken to the Felixstowe Branch Line and Ipswich Upper Yard under the proposed Order. Notwithstanding, EWS has a number of serious concerns that the proposed Order will adversely impact on its use of the Felixstowe Branch Line and on its sites at Ipswich Upper and Lower Yards, and will do so unnecessarily. I am able to comment upon certain of those objections. These are set out below. EWS's further objections are dealt with by EWS's General Manager Commercial, Mr Tim Robinson, in his statement.

Objection 1

Failure to establish requirement for CPO

6. The proposed Order seeks the compulsory acquisition of a large area of Ipswich Upper Yard. EWS does not accept that FDRC have made out a case that the compulsory purchase of Ipswich Upper Yard is necessary for the scheme to proceed for the following reasons:

Ipswich Upper Yard

Joint Study Group 12 November 2004

7. At paragraph 11 of its Statement of Case, FDRC quote directly from the Report of the Joint Study Group "*Impacts on the National Rail Network*" produced by Hutchison Ports (UK) Limited and the Strategic Rail Authority dated 12 November 2004 as follows:

"At Ipswich Yard it is feasible to construct three new sidings of sufficient length to accommodate 24 wagon trains clear of the existing tracks. This scheme

*would be wholly on railway operational land that is at present under-utilised. It is estimated that these new works plus the existing sidings will provide the necessary capability. **Implementation of this proposal is dependent on resolving some operational and siding lease issues between rail companies.*** [emphasis added]

8. It is apparent from this extract that the Study Group, set up by FDRC and tasked with reviewing the potential impact of the proposed Order, is of the view that matters to be resolved prior to the commencement of the works to Ipswich Upper Yard are limited to operational and siding lease issues resolvable between rail companies. In the context of the structure and operation of the modern railway industry, EWS submits that these are not matters which it is necessary, or appropriate, to deal with by means of a compulsory purchase order. EWS remains willing to co-operate with FDRC and other rail companies to resolve any operational and sidings lease issues by agreement in the interests of giving effect to the proposed works.

Examples of similar infrastructural/operational railway agreements

9. As stated at paragraph 4 above, EWS operates a large number of freight yards on the same, or similar, leasehold arrangements as those which exist at Ipswich Upper Yard. From time to time EWS has been approached to undertake enhancements to those freight yards and has, in consultation with Network Rail and other third parties, entered into agreements to enable those enhancements to take place.
10. By way of example, during 2005/06 EWS worked with Network Rail and the developers of the Birmingham International Freight Terminal and the Birch Coppice Branch with regard to the implementation of a scheme to develop the EWS sidings at Kingsbury Yard. The purpose of the scheme was to ensure that the enhanced facilities at Kingsbury Yard could be utilised by longer trains passing to and from the new rail freight development mentioned above, which can only be accessed through Kingsbury Yard.
11. This development was undertaken by agreement between the relevant parties using the normal rail industry arrangements for dealing with such developments (e.g. Network Change and ORR's Policy Framework for Investments) without

the need to resort to the acquisition of interests in land by compulsory purchase. It is therefore unnecessary and inappropriate to use compulsory purchase powers to effect the works under the proposed Order at Ipswich Upper Yard. Work No.1 of the Scheduled Works in Schedule 1 of the proposed Order is, no different to the many schemes that are carried out across the country by agreement under the normal rail industry arrangements such as the one mentioned at paragraph 10 above and the further examples listed at exhibit NJO 1.

12. Furthermore, it is not necessary for FDRC to hold compulsory powers in reserve in the unlikely event that should agreement not be reached, since the Railways Act 1993 (as amended by the Transport Act 2000) ('the 1993 Act') now provides powers to deal with such an eventuality as explained below.

Negotiations

13. As indicated at paragraph 9 above, EWS is prepared to enter into discussions with FDRC and other relevant parties in relation to the enhancements in the proposed Order at Ipswich Upper Yard. I am aware that EWS has approached FDRC with a view to undertaking the enhancements to Ipswich Upper Yard on FDRC's behalf. I was not involved in the negotiations and therefore the matter is dealt with by my colleague Mr Tim Robinson, in his statement.

S16A of the 1993 Act (as amended)

14. Notwithstanding the offers made by EWS mentioned at paragraph 13 above, FDRC are able to rely upon existing legislation contained in sections 16A to 16I of the 1993 Act. These powers allow for ORR to direct a facility owner (in this case EWS) to make enhancements to its facility on the application and at the cost of a relevant third party.
15. Sections 16A to 16I of the 1993 Act were brought into force in October 2005. The statutory mechanism contained within these sections allows an applicant, with the consent of the Secretary of State (or Scottish Ministers in Scotland), to apply to ORR to direct the improvement of an existing railway facility or the construction of a new railway facility. The Department for Transport (see ORR's Code of Practice dated November 2006) considers that the power is intended

for use where “*an individual railway operator may have no commercial incentive to make an improvement to a railway facility, but where it is clearly in the interests of the railway for an improvement to be made.*” (paragraph. 1.5). In the Executive Summary the ORR makes clear its view that section 16A-I “*will be used in exceptional circumstances, given the other mechanisms and remedies put in place under the investments framework to facilitate investment in railway infrastructure.*” This comment reiterates and reinforces what is the well tried policy of the modern railway industry namely that works such as those set out in Work No.1 of the Scheduled Works in Schedule 1 of the proposed Order are normally to be undertaken by agreement between interested railway parties and are not to be imposed by divesting those parties of their interests by the grant and exercise of compulsory purchase powers.

16. EWS considers that this new power under Sections 16A to 16I is specifically designed to enable worthwhile and beneficial schemes for the improvement of the railway to be undertaken by removing the ability for any individual railway operator to continue to block such schemes unreasonably, for example by refusing to cooperate and or by claiming a property right over the relevant land. This statutory process, even where it is necessary to implement it, allows such schemes to proceed without the need for the requisite land and railway facility to be removed from the current owner or operator through the use of compulsory purchase powers and reliance on the compensation code.
17. It follows that there is no justification for making a compulsory purchase order to facilitate the carrying out and operation of the proposed works in Ipswich Upper Yard. If the proposed Order is confirmed FDRC can enter into commonplace railway agreements with EWS and other interested railway parties to carry out and operate the works. FDRC does not need to apply for the Secretary of State's approval through the Transport & Works Act Order process to compulsory purchase Ipswich Upper Yard. In the unlikely event that any difficulty should arise in achieving agreement, FDRC can rely on the purpose made sections 16A to 16I of the 1993 Act (as amended).
18. It is unlikely in the extreme that the Secretary of State would refuse to give his consent for sections 16A to 16I of the 1993 Act to be used if it was in the furtherance and achievement of a scheme he had already approved as being in the public interest by granting the proposed Order.

19. It is important, in this context, to be aware that the 1993 Act was designed to further and promote the interests of railway users and the use of the railway network. The 1993 Act fosters cooperation between those with an interest in the Railways and its framework encourages agreement. It is entirely inappropriate in the circumstances, to seek to utilise the draconian powers of compulsory purchase when the purposes of the proposed Order, so far as they affect EWS property interests in Ipswich Upper Yard, can be achieved by agreement or direction under the 1993 Act.
20. I note in this connection that Network Rail is not an objector to the proposed Order which is suggestive of the fact that agreement has been reached between it and FDRC in accordance with these principles.
21. Furthermore, I note that Article 37 of the proposed Order entitled '*Agreements with Network Rail*' provides a mechanism which is a model for the type of agreement that FDRC should be seeking to enter into with EWS in respect of the works to Ipswich Upper Yard.

No need for permanent acquisition

22. Notwithstanding that EWS does not accept that there is any justification for the proposed Order to include compulsory purchase powers in respect of EWS's interest in Ipswich Upper Yard, the proposed works do not require that EWS's leasehold interest be acquired permanently.
23. The Environmental Statement accompanying the proposed Order states at paragraph 1.6.19 that the construction period is assumed to be 11 months. Even if this is exceeded by a considerable margin it is no justification for acquiring EWS's leasehold interests at Ipswich Upper Yard in perpetuity. At most FDRC should be entitled only to rights of temporary occupation. Even then, such powers of compulsion need only be exercised in reserve, should EWS fail to allow FDRC suitable temporary occupation of the site.
24. Compulsory powers should not be used as a means to effect changes in ownership of railway leases from existing owners to third parties following the carrying out of the works. Such a purpose is not within the scope of the

Transport and Works Act 1992. It is also unnecessary, because as I explain below, EWS must operate its facilities in Ipswich Upper and Lower Yards in an open manner and potential users of its facilities can appeal to ORR if they believe that they have been treated unfairly.

25. Article 24 of the Order – 'Temporary use of land for construction of works' – would allow FDRC to enter upon and take temporary possession of land specified in Schedule 9 for purposes including highway improvements. I consider that that is all that is necessary in respect of the proposed works at Ipswich Upper Yard. The proposed Order should be amended accordingly.
26. Furthermore, the plan at exhibit NJO 2 provided to EWS by FDRC following the pre-inquiry meeting appears to refer to an area which is smaller than that provided on the deposited plans. This suggests that FDRC do not require the whole of Ipswich Upper Yard for the works and so it is not necessary to acquire the entire area set out on the deposited plans. The plan also details three areas marked '*to be brought into Freightliner sublease*'. This lends weight to the suggestion that the compulsory powers in the proposed Order are being used to alter lease areas between different rail freight operators.
27. To conclude, in relation to this head of objection, the opportunity for negotiation and agreement under well tried railway industry procedures backed up by the powers in sections 16A to 16I of the 1993 Act means that there is no justification for including powers in the proposed Order for the compulsory purchase of EWS's leasehold interests in Ipswich Upper Yard. If, contrary to EWS's objection, such powers were to be retained they should be limited to temporary occupation only to carry out the Work No.1 of the Scheduled Works in Schedule 1 of the proposed Order.

Objection 2

CPO – Felixstowe Branch Line

28. The compulsory purchase of various parts of the Felixstowe Branch Line, both on a permanent and temporary basis as set out in the proposed Order, will have the effect of preventing EWS from operating its existing and future rail freight services along the Felixstowe Branch Line under its long term track

access agreement with Network Rail. Details of the services that will be affected can be found at exhibit NJO 3.

29. Further examples of the practical effect of the proposed works are set out in EWS' Statement of Case. Plots 19 and 81, for example, contemplate the acquisition of land to carry out modifications to the level crossings at Westfield and Trimley on the Felixstowe Branch Line. These modifications may require the imposition of speed restrictions over these level crossings adversely affecting EWS's freight operations.
30. Plot 64 requires the acquisition of 22,691 square metres of land, which includes operational railway on the Felixstowe Branch Line to carry out railway works. These works will require restrictions of use to be imposed on the railway preventing trains from passing the site of the works. If such restrictions of use are planned for times when EWS' services operate along the Felixstowe Branch Line then this could prevent such services from operating.
31. In addition, the acquisition of any land containing railway infrastructure will effectively close the Felixstowe Branch Line and Ipswich Upper Yard unless FDRRC either obtains the necessary operating licence and safety authorisation required to operate a railway network, or alternatively obtains these permissions by sub-contracting the obligations to a competent third party.
32. EWS also contends that the powers in the 1993 Act referred to at paragraphs 14-16 above, reinforced by Network Rail's obligations under Conditions 7 and 26 of its Network licence may also be used, if necessary, to enable FDRRC to apply for directions from ORR to effect modification to Network Rail's Felixstowe Branch Line. There is, accordingly, no justification for the proposed Order to include powers for the compulsory purchase of Network Rail's operational land also.

Objection 3

Article 35 – power to charge fares

33. EWS is concerned that Article 35 of the proposed Order allows FDRC to demand, take and recover or waive such charges for carrying passengers or goods on the Felixstowe Branch Line or in Ipswich Yard as it sees fit.
34. Felixstowe Branch Line currently forms part of Network Rail's national railway network, and as such, is governed by the rules and criteria on levying access charges that are laid down in the 1993 Act and in EU Directive 2001/14/EC which has been transposed into UK law by means of the Railways Infrastructure (Access and Management) Regulations 2005. Access to Ipswich Upper and Lower Yards is also governed by this legislation.
35. I understand that the proposed compulsory purchase of the Felixstowe Branch Line and Ipswich Yard will not exempt these railway assets from the legislation mentioned in paragraph 35 above. Therefore any such charges for use of these railway assets will continue to be subject to the approval of ORR within the charging principles laid down in its Periodic Charging Reviews and the Railways Infrastructure (Access and Management) Regulations 2005.
36. EWS submits, therefore, that FDRC cannot levy charges '*as it thinks fit*' as such charges are subject to UK and EU legislation that would not be disapplied by the granting of the proposed Order.
37. Should it be found that the level of charges that FDRC '*thinks fit*' cannot be charged in practice, this may lead to issues surrounding the underlying funding for the scheme, particularly if the scheme has been financed on the basis of FDRC relying upon recovering a specific level of charges over time that cannot be realised.
38. Article 35 has, accordingly, no proper purpose and should be deleted.

Objection 4

Compensation

39. EWS is concerned that the works required to undertake the detailed developments under the proposed Order will not be progressed through the normal railway industry procedures thereby denying operators, such as EWS,

the opportunity to make representations and seek compensation for any adverse effects on their business. While I accept that the assessment of the level of compensation is outside the scope of this Inquiry, I believe that the Inquiry will wish to consider which compensation regime should apply in each case, and if necessary recommend suitable amendments to the proposed Order to reflect this.

40. Train Operators, including EWS, have a contractual right to certain compensation for disruption and so on suffered as a consequence of particular projects (known as Network Changes) undertaken on the network. These rights are set out in Part G of the Network Code, which is incorporated by reference in EWS's track access agreements with Network Rail.
41. EWS is concerned that the works on the Felixstowe Branch Line and Ipswich Upper Yard comprised in the proposed Order will not give rise to entitlement to compensation pursuant to the provisions of Part G of the Network Code.
42. Since the railway industry's privatisation in 1994, it has become accepted practice to include in instruments of local legislation (i.e. local Acts and TWA Orders) proposing third party works affecting the national railway network, provision for Train Operators to receive full compensation for losses suffered by them during, or as the result of, the construction, maintenance or failure of the works authorised. Exhibit NJO 4 (including attached precedents) illustrates this; in that a provision for the protection of railway interests has usually been included in the Order for the scheme in question.
43. I wish to highlight one scheme in particular, which EWS considers is similar in many respects to the proposed Order. The (London Gateway Logistics and Commercial Centre) Transport and Works Act Order 2002, which EWS understands the Secretary of State is minded to confirm, also concerns the development of a Port (in this case Shell Haven in Essex) and its associated railway Branch Line. This Order contains, at Schedule 4, a provision for the protection of railway interests.
44. Unlike the Order mentioned in paragraph 43 above, it is evident from the content of the proposed Order that such a protective provision has been omitted. EWS submits, therefore, that the proposed Order fails to make

provision for compensation to be paid for any disruption to EWS' services caused by the works both during the implementation phase and thereafter once the scheme has been completed.

45. Accordingly, EWS contends that the proposed Order is defective as it omits to provide the usual proper protection for train operators for assessing and receiving compensation as a result of interruptions to the normal operation of the railway.
46. EWS submits that the proposed Order should, therefore include a protective provision for railway interests, similar to previous precedents such as the one mentioned in paragraph 43 above and the others listed in exhibit NJO 4 to this Statement. Such a provision would provide for FDRC agreeing to reimburse monies which Network Rail may reasonably incur, either on its own account or as a consequence of claims from train operators, arising from the works contained within the proposed Order. This should also include the usual mechanism which allows train operators (including EWS) to enforce the protective provision to recover relevant losses directly in the event that Network Rail fails to submit the necessary claim. Examples of a standard protective provision can be found at exhibit NJO 4.

Facility Owner

47. EWS is currently facility owner at both Ipswich Upper and Lower Yards. Its operations are regulated by ORR and accordingly EWS is required to operate within strict controls and guidelines set down by ORR in EWS's network licence. EWS considers that it should continue in this role thus ensuring continuity for both itself and for other railway users whilst limiting the disruption to EWS's existing and future business.
48. In common with the majority of EWS's Yards, both Ipswich Upper and Lower Yards are an open access facilities and therefore EWS has obligations to ensure that all users of these facilities are treated on a fair and non-discriminatory basis. ORR ensures that these obligations are met through its approval role of all access contracts pursuant to sections 17 to 22 of the 1993 Act. Whilst the vast majority of access contracts are entered into willingly between a facility owner and a beneficiary and are therefore jointly submitted to

ORR for approval under section 18 of the 1993 Act, as I have indicated in paragraph 24 above, potential users have a right under section 17 of the 1993 Act to apply to ORR for directions if they feel they have been unfairly treated in any way. These provisions of the 1993 Act apply equally to both Ipswich Upper and Lower Yards.

49. To illustrate the way the system works, I have set out below details of the typical agreements that a facility owner of a yard is commonly required to enter into.

Connection Agreement

50. The facility owner is required to enter into a Connection Agreement with Network Rail to ensure the yard remains connected to the national railway network. Connection Agreements are access agreements and are therefore subject to the approval of ORR. This type of agreement governs the ongoing respective obligations of the facility owner and Network Rail for operating and maintaining the connection between the facility concerned and the national railway network.
51. These obligations include that the facility owner (in the case of Ipswich Upper and Lower Yards, EWS) shall not sever the connection to the national railway network nor otherwise take action which impedes access for trains to/from the facility without Network Rail's prior written permission. This obligation ensures that disruption is not caused to the national railway network by trains waiting on the mainline to gain access to the facility. Accordingly, at Ipswich Upper and Lower Yards there is an obligation upon EWS to deal expeditiously with trains entering and exiting the facility

Facility Access Agreement (FAA)

52. In addition, EWS is required to enter into FAAs with any other train operator that requires the use of Ipswich Upper or Lower Yards. FAAs are again subject to the approval of ORR and set out details of access requirements and the level of services which the facility owner is contracted to provide.

53. In accordance with normal rail industry practice EWS's FAAs incorporate standard Facility Access Conditions (FACs) which contain provisions for making changes to a facility at the behest of any User, such User not necessarily having to be a train operator.

Conclusion

54. In conclusion, I summarise my evidence and what action EWS requests that the Inspector recommends in his report.
55. First, plots 5, 6, 8 and 9 in the Borough of Ipswich should be removed from the scope of the compulsory acquisition powers in Article 19 of the proposed Order. This is because there is no justification for the making of these compulsory purchase powers. The works can be undertaken by agreement with EWS, failing which the powers of sections 16A to 16I of the 1993 Act can be used.
56. Secondly, without prejudice to paragraph 55 above, the four plots (nos. 5, 6, 8 and 9) should continue to be removed from the scope of Article 19, and should be subject only to temporary occupation under Article 24, because there is no justification for FDRC's continued occupation of the land once the works are completed, which are estimated to take less than a year.
57. Thirdly, compulsory powers should not be used in respect of the Felixstowe Branch Line (plots 13 and 15 in the Borough of Ipswich and 19, 23, 24, 25, 46, 51, 61, 64, 81, 83, 89, 93, 94, 118, 120, 122 and 124 in Suffolk Coastal District) as again the works can be carried out by agreement with Network Rail under ORR's Policy Framework for Investments, failing which, licence enforcement action or the powers of sections 16A to 16I of the 1993 Act can be used instead.
58. Fourthly, the standard compensation regime should be made available by inserting provisions similar to those exhibited at NJO 4 so that EWS is indemnified against failure to provide its relevant freight services and its incurring additional costs due to interruptions to the Felixstowe Branch Line and Ipswich Yard both during the implementation of the works and any ongoing adverse effects.

59. Fifthly, Article 35 should be deleted or, if not, amended to make it clear that it is subject to any relevant provisions of the 1993 Act and the Railways Infrastructure (Access and Management) Regulations 2005 in respect of levying charges for access.