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Transport: On the Right Tracks

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Mr Justice Sullivan's decision in Great North Eastern Railway Limited v. the Office of Rail Regulation and others on 27 July 2006 is a landmark for the British and European railway industries. Had GNER's judicial review been successful, it would have affected all train operators in the UK, both passenger and freight, and would have required retrospectively revising the charging regime they have followed since April 2001. The case is the first reported in the UK and, among the first in Europe, on Directive 2001/14/EC ("the Directive"). The analysis of the application of the Directive to the UK charging framework will be widely read across Europe.

On 29 March 2006, ORR, the independent statutory body that regulates Britain's railways, granted Grand Central Railway Company Limited the right to run passenger services on the east coast main line between Sunderland and London's Kings Cross, calling at York. It also permitted Hull Trains Company Limited to add an additional daily service between Hull and London's Kings Cross. These new services will compete with GNER's franchised passenger services. Grand Central and Hull Trains are open access operators (OAOs). Unlike franchisees, OAOs do not have a contract with the State. They receive no subsidy and pay no premiums; they stand or fall on the strength of their consumer proposition.

Passenger service operators pay Network Rail for their rights to use the national track network. OAOs pay variable usage charges to allow Network Rail to recoup wear and tear costs, and capacity charges to reflect the performance costs additional services may cause. Franchised operators pay the variable charge and also a fixed charge, which is a contribution to Network Rail's revenue requirement. As the evidence showed, this contribution was "*an artificial construct*" which did not reflect the actual costs incurred by Network Rail in maintaining the east coast main line.

GNER's claim was that the differential charging regime for OAOs was unfair because OAOs and franchisees compete in the same market and should consequently be subject to the same charges. The argument was put in a number of ways, but, in essence, two allegations were made, namely that (i) the charging regime operated by the ORR was unlawful because it was discriminatory, contrary to the UK Railways Infrastructure (Access and Management) Regulations 2005 and the Directive (which the Regulation implemented); and (ii) it was unlawful state aid contrary to Article 87 of the EC Treaty. A fundamental question for the Court was to identify which market was the relevant market; the upstream market for access to railway infrastructure or the downstream market for passenger services. The Court determined that for both the discrimination and state aid arguments the critical market is the upstream market. In that market, the Court noted that a franchisee is typically taking over an established business, has significant protection against variation in access charges through state indemnities in its franchise and also benefits from other protections such as force majeure and revenue protection – cap and collar - clauses.

OAOs have none of these protections and must create a new business in competition with the incumbent franchised operator. Further, ORR's policy on new services requires OAOs to pass a tougher test than franchisees when applying for access rights. OAOs must show that their new services are not primarily abstractive of the revenue from established franchised operators: they should not predominantly "cherry pick" existing passengers from other operators. Consequently, OAOs generally look to provide new services to large under-served communities. Having considered the differences between OAOs and franchisees, the Court decided that a different charging regime was not only justified, "*the charging regime simply treats [franchisees and OAOs] differently because …they are different…*", but positively required under EU and domestic law. Accordingly, GNER's allegations of discrimination and state aid were bound to fail. As the Court noted, "*GNER's case has focussed attention on the fixed charge in isolation, but it is only one element of a wider, and much more complex picture. Imposing the fixed charge on open access operators, while holding all the other parts of the picture constant, would not result in a non-discriminatory charging regime … but in a regime that was manifestly unfair to open access operators*".

Judicial review challenges must be made promptly, normally within three months of the decision complained of. However, although GNER had challenged ORR's decision within three months, its substantive challenge was to the charging policy which ORR established in October 2000. GNER had consistently complained to ORR about the alleged unfairness of the open access charging regime between 2002 and 2006, with its objections consistently rejected, but it waited until the 2006 decision in the Grand Central application before making its challenge. The Court accepted that "*the mere fact that a policy has been in force and applied to the rail industry for some years without legal challenge … would not be a reason for refusing to grant GNER any relief whatsoever on delay grounds if the policy was found to be unlawful*". However, any relief would be prospective not retrospective. Mr Justice Sullivan noted that Grand Central and Hull Trains had been engaged in their applications for track access rights since 24 February 2005 and had spent substantial sums in the process. Accordingly, even if the Court had found for GNER on its substantive challenge, it would not have quashed the decision and thereby deprived Hull Trains and Grand Central of their rights.

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