

The Network Rail (Suffolk Level Crossing Reduction) Order (“the Order”)

Network Rail’s response to
“Application for an award of appeal costs on behalf of Mr David Caldwell in respect of S03
Buxton Wood”
received on 21 May 2018 (the application)

1. The application is made by Sarah Caldwell on behalf of David Caldwell, the owner of the land which is affected by the proposals in the draft Order (“the claimant”).
2. The application is made in accordance with paragraph 4.123 of the Guide to TWA Procedures 2006 (the TWA Guide), and the Department of Transport Circular 3/94 (“the Circular”).
3. The claimant seeks costs relating to the matters set out in paragraph 4.1 of the application (“costs”).
4. At the heart of the application is the claimant’s assertion in paragraph 5.2 that Network Rail has acted unreasonably, which, it is alleged, has caused “unnecessary and wasted expense” in respect of the Order.
5. Annex 2 to the Circular¹ sets out examples of what may be regarded as unreasonable behaviour in inquiry, resulting in an award of costs if abortive expense is incurred:
 - failing to provide an adequate pre-inquiry [] statement of case, for example, unclear presentation of facts or arguments []
 - causing an inquiry [] to be adjourned or unnecessarily prolonged by the late submission without good reason of a statement of case, [] or of a proof of evidence []
 - causing an objector to call a professional witness to attend unnecessarily – for example where a technical issue could have been resolved satisfactorily by prior discussion.
6. Network Rail submits that its conduct at inquiry does not fall within any of the examples given in Annex 2 to the Circular.
7. The claimant refers to paragraph 4.124 of the TWA Guide which states that “*it should be borne in mind [] that behaviour before an inquiry is as relevant in this regard as behaviour at the inquiry itself*” and “*procedure rules are designed to secure maximum disclosure and exchange of information before the inquiry or hearing takes place*”.
8. Network Rail has complied with the procedural requirements set out in The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (the 2006 Rules), including the requirement in rule 10(d) to provide “*a report summarising the consultations that have been undertaken, []*”.
9. Network Rail has submitted with the application documents the Statement of Consultation (NR05) setting out the consultation approach, scope and methodology, as well as feedback from two rounds of consultation. Mr Caldwell’s comments from round 2 consultation and responses from the project team are noted on pages 94 and 95 of the Statement of Consultation.

¹ General Procedural Requirements in Proceedings in Respect of Applications for Orders Under Section 6 of the Act: Unreasonable Behaviour: Awards Against Applicants or Objectors

10. Network Rail has complied with the requirements of The Transport and Works (Inquiries Procedure) Rules 2004 (the 2004 Rules) to provide the Statement of Case and Proofs of Evidence. It set out its case in detail at inquiry through the submissions of its legal counsel and in evidence given by its witnesses.
11. The claimant's reasons for the application and 'circumstances in support' are stated in paragraphs 6 and 7 respectively.
12. Paragraphs 6.1 to 6.15 deal mainly with the claimant's allegations relating to the process of consultation carried out by Network Rail. These points had been raised in the original objection letter to the Order to which Network Rail responded in detail in the attached letter dated 12 January 2018.
13. It was clear that there was frustration that the landowner had not been consulted by Network Rail earlier in the process. Mr Kenning acknowledged that Mr Caldwell (an unregistered landowner) had not been identified at the round 1 consultation stage. He noted, however, that a response had been provided on Mr Caldwell's behalf during the round 2 consultation. The claimant accepted, very fairly, (on behalf of Mr Caldwell) in cross-examination that Network Rail had clearly been aware of the issues relating to the landholding before it lodged the application in March 2017.
14. In summary:
 - Network Rail does not agree that it did not carry out meaningful consultations in accordance with the Gunning Principles (referred to in paragraph 6.7 of the application). It is evident from the claimant's own submission that the landowner (Mr Caldwell) participated in the consultation process and gave feedback.
 - Network Rail's witness, Mr Kenning gave evidence at inquiry explaining why the landowner's two proposed alternative routes could not be implemented (ref to allegation at para 6.10 of the application).
 - Ms Tilbrook confirmed, in her evidence (at cross-examination, Day 10 of inquiry) her concerns with the proposed alternative resulting from the lack of certainty as to the cause of the issue; that it was thus unknown what solution might be satisfactory; and the consequent uncertainty of delivering the solution. She explained why, absent evidence of what was causing the issue, she could not be confident that measures proposed by Les Cotton Contractors Ltd (page 6 of Mr Caldwell's Appendices) (specifically, using a geotextile membrane patch) would solve the issues which were impacting on the suitability of the Alternative B route (of Mr Caldwell's proposals).
 - Ms Tilbrook gave evidence at inquiry as to the suitability and convenience of Network Rail's proposed alternative route (ref to allegations at paras 6.12 and 6.13 of the application).
 - Network Rail also explained in correspondence with the landowner and in evidence at inquiry the reasons why the alternative route could not be provided on its land. It was clear, from the claimant's evidence (on behalf of Mr Caldwell), that the landowner's frustrations stemmed, at least in part, from a long-held belief that the wet patches on its land were as a result of drainage problems which had been caused when the railway was electrified during the early 1980s. There is an indication in the evidence submitted by Mr Caldwell that this is the subject of ongoing (or pending) litigation. It is clearly a long-standing issue from which it is submitted it may be inferred that there is not a simple solution. (ref to allegations at para 6.14 of the application).

15. The 'circumstances in support' set out in paragraph 7 of the application detail the communication between the landowner and Network Rail and its agents during the consultation period, and following the formal objection to the Order by Mr Caldwell.
16. Network Rail responded in detail to the allegations made in paragraph 7 in previous correspondence (attached).
17. Network Rail strongly rejects the assertions of the claimant in paragraphs 8.1 to 8.5 of the application. Network Rail has acknowledged in correspondence and explained the reasons why it did not identify the landowner at the start of the period of consultations. However, the landowner has not been prejudiced by this omission and has been able to submit its objection to the Order and evidence to the inquiry.
18. Whilst the wish to have been consulted earlier is clearly understandable, this is not a case where there can be any certainty that earlier engagement would have resulted in either of the alternatives proposed by Mr Cladwell having been promoted by Network Rail (ref allegation in para 6.10 of the application). As the claimant (on behalf of Mr Caldwell) acknowledged in cross-examination, the drainage issues on this land are clearly of long-standing duration. She also acknowledged that even with earlier engagement, the parties might not have been any further along with the cause of the problem.
19. As stated above, Network Rail has considered carefully Mr Caldwell's objection and gave reasons in correspondence, in its proofs of evidence and in evidence at inquiry why the proposals put forward by the landowner could not be implemented.
20. Therefore, the assertion that, but for the alleged unreasonable behaviour of Network Rail costs have been incurred which could otherwise have been avoided, is without foundation.
21. For the reasons set out above, Network Rail does not consider that the application is justified and requests that the Secretary of State refuses the application.

Winckworth Sherwood
24 May 2018