



[2013] CAT 31

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No: 1173/5/7/10

BETWEEN:

- 1) DEUTSCHE BAHN AG
- 2) DB NETZ AG
- 3) DB ENERGIE GMBH
- 4) DB REGIO AG
- 5) S-BAHN BERLIN GMBH
- 6) S-BAHN HAMBURG GMBH
- 7) DB REGIO NRW GMBH
- 8) DB KOMMUNIKATIONSTECHNIK GMBH
- 9) DB SCHENKER RAIL DEUTSCHLAND AG
- 10) DB BAHNBAU GRUPPE GMBH
- 11) DB FAHRZEUGINSTANDHALTUNG GMBH
- 12) DB FERNVERKEHR AG
- 13) DB SCHENKER RAIL (UK) LTD
- 14) LOADHAUL LIMITED
- 15) MAINLINE FREIGHT LIMITED
- 16) RAIL EXPRESS SYSTEMS LIMITED
- 17) ENGLISH WELSH & SCOTTISH RAILWAY INTERNATIONAL LIMITED
- 18) EMEF - EMPRESA DE MANUTENÇÃO DE EQUIPAMENTO FERROVIÁRIO SA
- 19) CP - COMBOIOS DE PORTUGAL E.P.E.
- 20) METRO DE MADRID, S.A.
- 21) NV NEDERLANDSE SPOORWEGEN
- 22) NEDTRAIN B.V.
- 23) NEDTRAIN EMATECH B.V.
- 24) NS REIZIGERS B.V.
- 25) DB SCHENKER RAIL NEDERLAND N.V.
- 26) TRENITALIA, S.P.A.
- 27) RETE FERROVIARIA ITALIANA, S.P.A.
- 28) NORGES STATSBANER AS
- 29) EUROMAINT RAIL AB
- 30) GÖTEBORGS SPÅRVÄGAR AB

Claimants

-v-

- 1) MORGAN ADVANCED MATERIALS PLC (formerly MORGAN CRUCIBLE COMPANY PLC)
- 2) SCHUNK GMBH
- 3) SCHUNK KOHLENSTOFFTECHNIK GMBH
- 4) SGL CARBON SE (formerly SGL CARBON AG)
- 5) MERSEN SA (formerly LE CARBONE-LORRAINE SA)
- 6) HOFFMANN & CO ELEKTROKOHLE AG

Defendants

ORDER OF THE CHAIRMAN (UK CLAIMS CMC)

UPON considering the Order of 25 November 2013 ([2013] CAT 28), paragraph 4 of which ordered that a case management conference (“CMC”) be listed on the first available date on or after 17 January 2014 to consider the necessary directions and timetable for the further conduct of the Thirteenth to Seventeenth Claimants’ (the “UK Claimants”) claims (the “UK Claims”) against the Second to Sixth Defendants (the “Defendants”)

AND UPON considering the indications of the UK Claimants and the Defendants, filed on 3 December 2013, as to the dates upon which their counsel would be available to attend a CMC on or after 17 January 2014

IT IS ORDERED THAT:

1. A CMC be listed for 10.30am on 20 January 2014 with a time estimate of one day
2. There be liberty to apply

REASONS

The covering letter enclosing the Tribunal’s Order of 25 November 2013 directed the parties to liaise as to their counsel’s availability. The letter also indicated that the Tribunal was of the view that UK Claims should now be progressed expeditiously. It was indicated that it was, therefore, the Tribunal’s strong preference that the CMC be listed on a date between 17 January and 7 February 2014 but that it would seek, so far as possible, to accommodate the parties’ availability in that window.

Whilst the Defendants were able to propose several dates on which their various counsel were available, the UK Claimants have indicated that the only date in that three-week window on which their leading counsel, Mr Jon Turner QC, is available is 7 February 2014. It is not clear whether only some of the Defendants’ counsel are unavailable on that date but it is not, in any event, a possible date for the Tribunal. The Tribunal of course understands that coordinating the availability of leading counsel in complex, multi-party litigation of this type poses difficulties and it is certainly unfortunate that Mr Turner is unavailable on any other date in the window indicated by the Tribunal.

I am conscious that, as the UK Claimants indicate, Mr Turner has been instructed by them since the claims were first commenced, over three years ago. The UK Claimants state that, in their view, Mr Turner’s knowledge of the claims will be extremely important at this CMC. Whilst I have no doubt that Mr Turner’s knowledge and experience would of benefit to his clients, as the UK Claimants themselves note, this CMC will be the first time that the “substance” of these cases will move forward. With that in mind, it does seem to me that, if the Claimants consider it essential that leading counsel appears for them at the CMC, new leading counsel could be instructed and have time to familiarise him- or herself with the matter in the approximately seven weeks before 20 January 2014. In the alternative, the UK Claimants have at their disposal very able and experienced junior counsel, Mr Rob Williams, who has certainly been involved in these claims for some time, though I do not know if his involvement goes back as far as Mr Turner’s.

One of the factors relied upon by the UK Claimants in their application to partially lift the stay over the proceedings and progress the UK Claims was that the Supreme Court granted the First Defendant, Morgan, permission to appeal in December 2012 but listed the hearing of that appeal for March 2014. In deciding to exercise its case management discretion and lift the stay on the UK Claims, the Tribunal was clearly motivated by the need to move the claims forward expeditiously (see, for example, paragraphs 70, 76 and 93 of the Tribunal's Ruling of 15 August 2013 ([2013] CAT 18)). The Tribunal's decision to lift the stay was taken on 15 August 2013. Due to the Defendants' unsuccessful exercise of their right to seek permission to appeal (which I do not criticise; it was their right to do so) the schedule set out in my Order of 29 August 2013 ([2013] CAT 20) has already been pushed back with the result that it was, in my view, neither desirable nor possible to maintain the original CMC date of 17 December 2013 (see the reasons in my Order of 25 November 2013 ([2013] CAT 28)).

If I now accede to the UK Claimants' request to only list the CMC for a date upon which Mr Turner is available, then the earliest possible date on which the CMC could be listed is 26 February 2014. Even if the members of the Tribunal are available on that date, which is not known at this point, I consider that it would be undesirable to defer the CMC until then. By that stage the Supreme Court hearing of Morgan's appeal will only be some three weeks away, and much of the benefit of progressing the UK Claims will have been eroded.

For these reasons, I consider it appropriate to list the CMC for 20 January 2014, and progress the UK Claims as expeditiously as possible in the given circumstances.

Marcus Smith QC
Chairman of the Competition Appeal Tribunal

Made: 4 December 2013
Drawn: 4 December 2013