



Neutral Citation [2018] CAT 17

Case No: 1298/5/7/18

IN THE COMPETITION
APPEAL TRIBUNAL

B E T W E E N:

ACHILLES INFORMATION LIMITED

Claimant

- v -

NETWORK RAIL INFRASTRUCTURE LIMITED

Defendant

REASONED ORDER

UPON the Claimant filing its claim form on 2 October 2018 (the “Claim Form”)

AND UPON considering the Tribunal’s Order dated 22 October 2018 (the “Directions Order”)

AND UPON the Defendant filing its Defence on 5 November 2018

AND UPON the application made by the Claimant by letter from its solicitors dated 22 November 2018 for a direction from the Tribunal that the Defendant provide further particulars of its Defence (the “Application”)

AND UPON reading the letter from the Defendant dated 26 November 2018 opposing the Application

AND UPON reading the letter from the Claimant in reply dated 28 November 2018

AND HAVING REGARD TO the Tribunal’s case management powers under rule 53 of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648 of 2015) (the “Tribunal Rules”)

IT IS ORDERED THAT:

1. The Defendant must provide the further information about its Defence sought in the following requests by 4pm on Friday 14 December 2018.

Under paragraph 32(a):

Of "...a single supplier assurance scheme is necessary and proportionate to attaining safety benefits"

- (1) Please identify any and all safety benefits said to be attained by Network Rail.
- (2) Please explain why mandating a single supplier assurance scheme is necessary and proportionate to attaining those benefits.
- (3) Please confirm if it is alleged that allowing suppliers and buyers in the relevant supply chain to obtain supplier assurance from the Achilles 'Link Up TransQ' scheme (as defined in the Claim Form) would negate any such "*safety benefits*", and if so, why.

Of "...the Defendant contends that needing to interact with and rely on multiple supplier assurance schemes (including the need to interact with suppliers on the basis of different assurance schemes) would give rise to material safety risks on the rail network in Great Britain"

- (4) Please identify the safety risks referred to.
- (5) Please explain by what measure the alleged safety risks are said to be material.
- (6) Please confirm if it is alleged that recognising the Achilles 'Link Up TransQ' scheme (as defined in the Claim Form) would give rise to material safety risks on the rail network in Great Britain, and if so, why.

Under paragraph 32(b):

Of "...to use only a single supplier assurance scheme generates costs benefits and efficiencies that outweigh any alleged restrictive effects on competition caused by the alleged abuse and is necessary and proportionate to realising these costs benefits and efficiencies".

(7) Please identify the costs benefits and efficiencies referred to.

(8) Please confirm if it is alleged that recognising the Achilles 'Link Up TransQ' scheme (as defined in the Claim Form) would reduce those costs benefits and efficiencies, and if so, how.

2. The parties shall seek to agree the scope of expert evidence (if any) by no later than 4pm on Friday 21 December 2018. Paragraph 8 of the Directions Order is varied accordingly.

REASONS:

1. In its Claim Form, the Claimant claims that the Defendant has breached the Chapter I and Chapter II prohibitions (as defined by section 59(1) of the Act) by imposing a requirement, in particular through the Network Rail Schemes, that the Railway Industry Supplier Qualification Scheme (“RISQS”) be the mandatory supplier assurance scheme in the GB rail industry, to the exclusion of other potentially competing schemes.
2. In its Defence, the Defendant denies the alleged breaches and contends, to the extent that it is necessary to do so, that its conduct in mandating the use of RISQS is objectively justified “for safety, cost and efficiency reasons”. At paragraph 32(a) and (b) of its Defence, it gives some details of this averment, including the following:

“... needing to interact with and rely on multiple supplier assurance schemes (including the need to interact with suppliers on the basis of different assurance schemes) would give rise to material safety risks on the rail network in Great Britain.”

“... to use only a single supplier assurance scheme generates costs benefits and efficiencies that outweigh any alleged restrictive effects on competition caused by the alleged abuse and is necessary and proportionate to realising these costs benefits and efficiencies”.

3. The Claimant submits that, without the further information sought in its application, it is unable to understand the basis of the Defendant’s case on objective justification and is therefore prevented from preparing its expert and factual witness evidence. In response, the Defendant submits that its Defence contains sufficient detail of its case, as required by Rule 35(1) of the Tribunal Rules, enabling the Claimant to respond to that case, particularly bearing in mind the Claimant’s familiarity with the supplier assurance market. The Defendant further contends that a requirement for it to identify any and all safety benefits, costs benefits and efficiencies prior to having had the opportunity of fully evaluating the factual and/or expert evidence to be adduced, and to which the Claimant will have a chance to respond, would create a real risk of prejudice to it in defending the proceedings.
4. In considering this application, I bear in mind that the proceedings have been expedited and are subject to a tight timetable. In normal, unexpedited proceedings it might well be appropriate for a defendant to set out its case on objective justification in fairly general terms, as the Defendant has done here, to be amplified through its expert and factual

evidence, leaving the claimant with the opportunity to reply to that detailed evidence in due course. In these proceedings, the timetable only allows one week between the exchange of evidence and the service of reply witness statements, with the trial to follow less than three weeks later. In other words, the timetable leaves very little time for the Claimant to respond to the Defendant's detailed case on objective justification.

5. Against that background, I consider that it would be proportionate and consistent with the governing principles contained in Rule 4 of the Tribunal Rules for the Defendant to be required to spell out its pleaded case on objective justification in greater detail by the provision of the information sought by the Claimant at this stage rather than waiting until the exchange of evidence before the Claimant finds out what specific facts are relied on by the Defendant beyond the general averments set out above. This should enable the parties to agree the scope of any expert evidence and ensure that the evidence is directed at the same issues.
6. I take into account the fact that the proceedings were only started a little over eight weeks ago and that the Defendant has therefore had relatively little time to consider its case on objective justification. I am concerned to avoid any risk of prejudice to the Defendant from the requirement that it provides the information sought before it has finalised its evidence. I consider that the two weeks from today which my directions allow for the provision of the further information is sufficient and is fair to both parties. The further case management conference provided for in paragraph 9 of the Directions Order, if it is needed, will take place as early as possible in 2019.

Andrew Lenon QC
Chairman of the Competition Appeal Tribunal

Made: 30 November 2018
Drawn: 30 November 2018