

TRANSPORT AND WORKS ACT 1992

**APPLICATION FOR THE PROPOSED NETWORK RAIL
(SUFFOLK LEVEL CROSSING REDUCTION) ORDER**

Ref: TWA/17/APP/04/OBJ/60

Submissions

on behalf of Mr David Caldwell

Objector in respect of S03

1. INTRODUCTION

- 1.1 These closing submissions draw the Inspector's attention to the fact that David Caldwell has been placed in such a position by Network Rail (NR) that he had no alternative but to make formal objection to the order, participate in the public inquiry process and arrange for me, his daughter, to present his Proof of Evidence in person on 27 February.
- 1.2 There are three aspects to be considered. First that NR failed to carry out appropriate and meaningful consultations with my father. Second that it has failed to show that it has given fair and proper consideration to the alternative routes suggested by him. Had NR not failed on both of these issues, an alternative route acceptable to my father (and other parties) could have been found and there would have been no need for his participation in the determination of the application for the order in respect of S03. Thirdly, to determine that an alternative route is required to enable the closure of S03 and, if so, which is the appropriate alternative route.
- 1.3 As well as driving these submissions, these first two issues have driven my father's application for costs against NR, made on the grounds that NR has behaved unreasonably, thereby causing him to incur unnecessary expense.

2. LACK OF CONSULTATION

- 2.1 NR, through its contractors, was negligent in failing to identify the owner of the land affected by the NR proposals, Eleven Acre Field.
- 2.2 NR's failure to consult and engage with my father, the owner of Eleven Acre Field, was contrary to the statement in paragraph 2.1 of the NR Statement of Consultation that they took into account the guidance and procedures in the publication 'A Guide to TWA Procedures'. Those procedures specifically advise in 2.2 that '...the carrying out of wide and thorough consultations in advance of an application is a crucial part

of the whole authorisation process..' and advise in 2.4 that 'Engaging in constructive dialogue during the formative stages of a project, and being seen to be listening to objections, can significantly reduce the size and strength of opposition'.

- 2.3 Nigel Billingsley, in his Proof of Evidence document reference NR/29/1, page 16, 5.11, states that 'consultation activity (between April and July/August 2016) was undertaken with landowners directly affected by the proposals'. This is simply untrue in respect of my father.
- 2.4 Nigel Billingsley argued, when asked why NR did not make effort to contact Mr Caldwell, that this stage was a 'non-contact' consultation. In fact the consultation was only 'non-contact' if land was not registered. No attempts whatsoever were made to make contact. A visit to the area, asking other landowners, contacting the Parish Council - these would all have been responsible and easy ways to proceed.
- 2.5 My father was clearly disadvantaged as a result: his neighbours negotiated with NR during the 1st round of consultations to their advantage as the consultation summary makes clear.
- 2.6 Nigel Billingsley also claims that NR '..considered all feedback received during the two rounds of consultation before the final decision on the diversionary route was made.', (Proof of Evidence page 26, 8.3.2.1). Yet even after my father took the initiative and contacted NR, they did not engage with him: it was left to us to try and establish contact with NR's agents, Ardent and Bruton Knowles. No meaningful meeting with any member of the Caldwell family took place until December 2017. By this time, of course, the Order route option had been determined and the time for negotiation and influencing the Order application was long gone for my father.
- 2.7 It is appropriate to consider how the NR consultation with my father fits with the Gunning Principles. The Gunning Principles are common law principles that apply to all public consultations and established in R v London Borough of Brent ex parte Gunning [R v Brent London Borough Council, ex p Gunning (1985) 84 LGR 168]. They include:
- 2.7.1 **Consultation must take place when the proposal is still at a formative stage:** This principle does not mean that the decision-maker has to consult on all possible options of achieving a particular objective. A decision-maker can consult on a 'preferred option', and even a 'decision in principle', so long as its mind is genuinely open - 'to have an open mind does not mean an empty mind.'
- 2.7.2 **The product of consultation must be conscientiously taken into account:** If the decision-maker does not properly consider the material

produced by the consultation, then it can be accused of having made up its mind; or of failing to take into account a relevant consideration.

2.8 It is hard to see how NR's lack of effort during the consultation complied with these principles in respect of my father. Instead its 'non-contact' approach to consultation with an owner of non-registered land has led it to promote a route which, of the identified options for an alternative route, causes the maximum adverse impact on the landowner.

2.9 This is deplorable and NR should be castigated for its lack of effort and lack of sense of responsibility in respect of the consultation process.

3. LEGAL ISSUES

3.1 Purpose of the Order

3.1.1 The purpose of the order is to close level crossings and provide alternative public rights of way, if the Secretary of State deems an alternative is required.

3.1.2 The Secretary of State has the power to make the order with or without modification to the draft submitted. Those changes could be substantial, but would not be appropriate if they were fundamentally different proposals from the ones applied for. It is submitted that in this instance amending the order to propose either of the alternative routes suggested by my father to the order route would not be a substantial change in that:-

3.1.2.1 the purpose of the order is maintained, enabling S03 to be closed

3.1.2.2 only land within the ownership of the parties already involved is affected.

3.2 Suitable and Convenient Alternative Routes

3.2.1 'A Guide to TWA procedures', page 105, sets out that, if an alternative is to be provided, it is to be a convenient and suitable replacement for existing users. Suitable and convenient is not a term of art. The words should be given their natural meaning. The submitted paper NR-INQ-26 (Note on definition of 'Suitable and convenient') seeks to give some guidance on how the term 'suitable and convenient' should be interpreted. At paragraph 8 of that paper a number of factors are identified as 'being particularly relevant' ("the factors"). My father agrees that, with the exception of the enjoyment of the walk, the factors are

relevant and should be applied to any suggested alternative route for S03.

- 3.2.2 The factors do not include any reference to the impact of the proposed route on the land over which it would pass. However, NR has been at pains to emphasise that they recognise that in formulating an alternative route they should have regard to the impact of the route on the affected land and that they wish, wherever possible, to minimise that impact. In consequence the impact on the affected land is a further matter to be taken into account when identifying a suitable and convenient alternative route.
- 3.2.3 Suitability and convenience is also to be judged on the assumption that any required works have been completed satisfactorily. To this end my father has submitted evidence of feasibility for the creation of both of his proposed alternatives to a satisfactory standard. NR has not produced any evidence that contradicts this.
- 3.2.4 It also has not produced any evidence of its own that the Order route can be provided following less works than the alternatives he has suggested.
- 3.2.5 Ms Tilbrook agreed when asked if it is possible that more than one route would qualify as 'suitable and convenient', and this is indeed the case with S03 thus:
 - 3.2.5.1 **Alternative Route A:** This route provides a direct connection between S03 and Falstaff crossing. It would have a consolidated and free draining surface comprised of ballast chippings, providing a good walking surface in all seasons.
 - 3.2.5.2 In addition, such a route would have no impact on the land of anyone other than NR. There is clearly and obviously sufficient land for the creation of such a route along the line of the waste ballast. It cannot be said that the land in question is currently used for the running of the railway in any operational sense; it is merely a neglected repository for surplus ballast.
 - 3.2.5.3 The cost of the work is greater than for the other routes, but no compensation would be payable to my father, and the fact that no detriment is caused to any other landowner should be taken into account.

- 3.2.5.4 **The Alternative Route B: (Round 1 Consultation Green Route):** This is one of three alternatives put forward by NR during the first round of public consultation.
- 3.2.5.5 It had, by a significant margin, the greatest public support (58%). It was supported by the County Council and no objection was made by the Ramblers Association. The County Council would have raised concerns and objections if they did not think it was a suitable and convenient alternative and if there were maintenance concerns no doubt they would have objected.
- 3.2.5.6 This route is direct, and, subject to the issue of flooding dealt with below, it is submitted that it is eminently suitable and convenient when the factors are applied.
- 3.2.5.7 It also has limited impact on my father's land. The only reason this route was not promoted in the Order is because a section was found to be waterlogged. It is my father's case that the waterlogging is caused by damaged drains, on NR land, and that the damage to the drains was caused by NR during electrification of the line in the 1980's and should be repaired by NR.
- 3.2.5.8 NR has failed to consider the explanation for the waterlogging put forward by my father, or to investigate the waterlogging and determine the cause independently, or to assess remedial work themselves. It is my father's case that the remedy lies within NR's hands, but regardless of the cause of the problem, the cost of remedial work is modest, circa £5,000 in the submitted quotation provided by Mr Cotton.
- 3.2.5.9 It is relevant to note that, in relation to another route (S01) NR has promoted a route where the level of waterlogging is significantly worse than along this alternative route. NR has dismissed this as an issue when giving evidence, stating confidently that it is merely a matter to be dealt with by appropriate works. It is submitted that exactly the same is true of S03: waterlogging can be resolved by appropriate drainage works.
- 3.2.5.10 **The Order Route**

3.2.5.11 The Order route is not direct at all and is less suitable and convenient for the public than the two other alternatives as:

- (a) It is significantly longer
- (b) It reflects no 'desire line' and requires walking counter-intuitively.
- (c) It may well be prone to flooding, especially as the location of the route next to a watercourse will require a traffic regulation order to temporarily close the route, discouraging frequent future dredging. No assessment of its propensity to flood has been undertaken by NR.

3.2.5.12 It would also render unproductive a significant area of agricultural land. It is therefore also the least cost effective route given the compensation payable to the landowner.

3.3 Impact on the Landowner

3.4 The Order route, it is established, has the most adverse impact on my father. NR's approach is that this is a matter for compensation. However, it is not the case that every impact can be 'bought'. Financial compensation not only fails to provide a fair and just solution in respect of S03, it will also not be able to provide for future impacts, which, by definition, cannot be assessed at the current time. A public right of way is in perpetuity a burden upon a landowner. Imposing the length of the order route upon my father's land would have an impact beyond the amount of compensation to which he would be entitled. It should only be done after very careful consideration and evaluation of the alternatives: work that NR has not undertaken.

4. Conclusions

4.1 NR's claim to wish to work with landowners on agreeing alternative routes is entirely hollow in the context of S03. Their consultation initiative with my father was non-existent.

4.2 Thereafter NR did not given proper consideration to the alternative routes he put forward. They have failed to substantiate that his evidence of the work to be done to bring the alternatives to an appropriate standard is unreliable.

4.3 There are no legitimate grounds on which it can be concluded that, after works, the two alternatives are not suitable and convenient for users.

- 4.4 Instead NR has, literally, opted for the easy way – an alternative that has nil impact on its own property and requires the least works or effort on its part.
- 4.5 It is submitted that the correct approach is to apply the factors, including the impact on the land, to determine which is the appropriate alternative route. If more than one of the alternative options available are deemed to be – after works - ‘suitable and convenient’ then the impact on the land and the landowner’s business should be the deciding factor.
- 4.6 Finally as we were not given the opportunity to respond to proposals and engage in meaningful discussion with Network Rail or their contractors, we had no choice but to object to the draft Order. This resulted in the need to appoint Birketts LLP, Clarke & Simpson and Mr Les Cotton to advise and act on my father’s behalf, which has meant incurring unnecessary costs.
- 4.7 My father is therefore making a cost application against Network Rail for the fees incurred.
- 4.8 The Secretary of State has the power to modify the Order and delete the proposed alternative route and substitute an alternative one. It is requested therefore, that, given that the closure of S03 is found to be justified and that an alternative route is required, the Secretary of State modifies the draft order to require the provision of my father’s submitted Alternative Route A or, as a second alternative, the provision of his submitted Alternative Route B.