

Netzwerk Privatbahnen

Vereinigung Europäischer Eisenbahngüterverkehrsunternehmen e.V.
'Network Private Rail' – Association of European Rail Freight Operators

Am Weidendamm 1a
D-10117 Berlin
Secretary General:
Arthur-Iren Martini
T: + 49 (0)30 – 59 00 99 – 626
X: + 49 (0)30 – 59 00 99 – 628
martini@netzwerk-privatbahnen.de
www.netzwerk-privatbahnen.de

NP Newsletter 3/2006

5 December 2006

1. IPO off the agenda? - Interim decision by the coalition	1
2. Judgements on traction current - Death-blow to competition on the railways	2
3. Unbundling - DB's own lawyers not allowed to represent DB Netz	2
4. Knowledge is power - EBA intends to monitor network capacity.....	3
5. DB Netz's incentive system - Good approach, lousy implementation	3
6. Private operators team up - Unity is strength	4
7. Joint forces in Brussels too - A counterweight to CER	4
8. The last straw	4

1. IPO off the agenda?

Yes, at least that's our impression. In early November, the governing coalition decided to privatise DB without including the infrastructure. Nobody's talking about an IPO any more. But, as always, the devil is in the details, for according to the wording of the resolution¹ the ownership of all rail infrastructure is to be transferred (from DB) to the federal government. This would entail a clear separation between the network itself and actual rail operation. However, DB will supposedly remain both the infrastructure manager and the beneficial owner and also enter the assets of the infrastructure in its accounts. This, in turn, would mean *no* separation, effectively leaving DB to continue as an integrated rail group. Netzwerk Privatbahnen's impression is that the government has agreed on the 'highest' common denominator, but definitely not solved the problems². A very recent and highly illuminating legal assessment of the government's decision by the FDP's Transport Working Group³ concludes that under German law the political compromise cannot be implemented. So it would seem certain that the Federal Ministry of Transport (BMVerkehr), which has been assigned by the federal government to draft and submit an appropriate bill by March, will be unable to square the circle.

¹ http://www.netzwerk-privatbahnen.de/pdf/061121_BT_Entschliessungsantrag.pdf

² Press release 08/06 by Netzwerk Privatbahnen: http://www.netzwerk-privatbahnen.de/pdf/PM06_8.pdf

³ http://www.netzwerk-privatbahnen.de/pdf/061201_FDPArbGrVerk_Qadratur_des_Kreises.pdf

2. Judgements on traction current by the Higher Regional Court of Frankfurt

In two judgements⁴, the OLG ruled that since Germany's state-owned railway is an integrated concern, it is also free to set its own prices for traction current. Consequently, DB Energie would *not* be contravening German competition law by charging lower prices to transport companies within the DB group than to external rail operators. DB Energie could even refrain completely from charging companies within the same group for traction current!

Approximately 15% of the costs incurred by rail freight operators go on traction current. So it's patently obvious that such case law will make it impossible for private railways to survive in the medium term, and the judgements therefore have existential significance. Hopefully, both shippers and politicians will finally wake up to the potential impact of the judgements, providing a further argument in favour of separating infrastructure from actual operations. A neutral traction-current supplier would endeavour to sell as much power as possible. It would do all it could to supply a large number of customers that travel long distances by rail and use considerable quantities of energy. A neutral traction-current supplier would not allow itself to be used as a tool for eliminating competition between rail operators, and it would act that way for reasons inherent in the system, i.e. without regulation.

The judgements were based on the assumption that the Federal Railway Act (AEG) does not cover the provision of electricity. The rail operator is now appealing to the Federal Supreme Court (BGH). Irrespective of the outcome of that appeal, surely the legislator must immediately eliminate the potential for discrimination.

3. Unbundling

Although the amendment of the AEG in 2005 is gradually 'biting', the German Federal Railway Authority (EBA) has now ruled that, with immediate effect, lawyers from the legal department of the DB group may no longer represent the interests of DB Netz in matters pertaining to network access and charges⁵.

It was Netzwerk Privatbahnen that set the ball rolling by complaining to EBA⁶. The decision reached by EBA is of fundamental importance and will have wide-reaching implications. Indirectly, all decisions about investments for refurbishment, new construction and strategic planning are also *decisions on network access*. The combined effect of all measures must be to ensure that tracks remain freely accessible not only to the transport companies within the DB group, but also to its growing number of competitors. Consequently, the next thing to do is ascertain *who within DB* develops these decisions. "*Core activities of DB Netz, like infrastructure maintenance, planning and construction (DB ProjektBau) will be transferred to group level, whereas technical development has been handed over to the group's Chief Technical Officer (CTO)*".⁷ If this

⁴ OLG Frankfurt am Main 11 U 44/05 (Kart) of 19 September 2006 (a so-called 'minor judgement') and OLG Frankfurt am Main 11 U 3/05 (Kart) of 10 October 2006 (a so-called 'major judgement')

⁵ EBA press release dated 27 November 2006: http://www.netzwerk-privatbahnen.de/pdf/061127_EBA_Presseerklaerung_Konzernjuristen.pdf

⁶ Complaint by Netzwerk Privatbahnen dated 21 October 2005: http://www.netzwerk-privatbahnen.de/pdf/Abschrift_DBNetzAG.pdf

⁷ Gottfried Ilgmann in Bahn Report volume 3/2003: <http://www.g-ilmann.de/pdf/zielverfehlt.pdf>

is true, the second phase of the rail reform (1 January 1999), i.e. the creation of divisions under the umbrella of a holding company, would be undone step by step and *contra legem* in full view of both the federal government and parliament.

4. Knowledge is power

Over the past few months, systematic research by Netzwerk Privatbahnen has ascertained that in Germany no state authority is responsible for ensuring the general condition of the rail network⁸. In fact, only the infrastructure manager itself knows the true condition of the rail infrastructure and, to crown it all, under the German Stock Corporation Act (AktG) such knowledge is classified as confidential! Indeed, for years now, parliament has tried in vain to elicit meaningful information about the infrastructure's actual condition.

Clearly, EBA has now also recognised this loophole. At least, it intends to gain legal empowerment and the organisation and staff it needs to enable it to ascertain, evaluate and monitor the quality of rail infrastructure. In the past, EBA has been dependent on information and calculations provided by DB Netz, for example within the framework of procedures associated with closures and enquiries (see para 11 and 18 of the AEG). Were this plan implemented, EBA would be able to judge whether the quality, capacity and accessibility of the network are improving in proportion to the budget provided and, if not, how to ensure that this is the case. The fact that this is not yet possible today is pretty shameful and totally ludicrous.

In this context, Netzwerk Privatbahnen is wondering how the federal government intends to conclude a long-term service and financing agreement with DB when neither the government, nor any independent third party has previously assessed the state of the network in either qualitative or quantitative terms. The government would be better off not relying on the details provided by DB. This, at least, is Netzwerk Privatbahnen's recommendation. One wicked rumour is that the reason why DB's punctuality statistics are so poor right now is that this will enable it to easily smash one punctuality record after another once such an agreement has been concluded.

5. DB Netz's Incentive system

Required by the EU for years already, though Germany only incorporated it into the AEG in 2005, a charging scheme designed to urge stakeholders to *curb disruptions* and *enhance the efficiency* of the rail network (Article 21 of the ordinance on the use of rail infrastructure (EIBV)). Netzwerk Privatbahnen finds the scheme of bonuses and penalties come up with so far totally impractical, incredibly pedantic, tremendously elaborate and ineffective⁹. As expected, quality failings such as avoidable and/or 'unexpected' construction work, sections of track subject to substantial speed restrictions for lengthy periods, and continuing delays at well-known bottlenecks on the network all go unpenalised: all these problems could be to the disadvantage of the infrastructure manager, namely the very same DB Netz that is also the author of the Network Statement (SNB)!. One wonders how *disruptions are to be curbed* and the network's

⁸ <http://www.netzwerk-privatbahnen.de/pdf/Tiefensee.pdf>;
http://www.netzwerk-privatbahnen.de/pdf/Zustand_Schiene_mit_Anlagen.pdf

⁹ See the Network Statement (SNB) submitted by DB Netz Ag, Chapter 7 (DB website)

performance enhanced, if quality shortcomings are not punished.

Netzwerk Privatbahnen assigned a law firm to examine the incentive system and then forwarded the findings to the federal network regulator (BNA) and DB Netz¹⁰. The regulator recently issued a decision giving DB Netz until 10 December 2006 (!) to revise the proposed SNB and, more specifically, re-draft extensive sections of the incentive system¹¹. That decision took on board many of Netzwerk Privatbahnen's core demands.

6. Private operators team up

On 16 November the main non-DB rail infrastructure users met up for the first time: Mofair (an association representing passenger rail operators), the association of *Länder* principals for regional traffic (BAG SPNV), and the rail freight association Netzwerk Privatbahnen. These partners announced and outlined their joint declaration on the privatisation of DB at a press conference¹², where the three heads of these organisations made it abundantly clear that only fair competition can boost the appeal of rail transport and generate more rail traffic. Their central demand was that rail infrastructure must be neutral, which can be achieved by clearly separating networks from transport.

7. Joint forces in Brussels too

At European level, too, a joint platform has been created following the recent merger into the *House of Rail* of the European associations for freight rail, rail-freight customers, private wagons and logistics leaders (ERFA¹³, ERFCEP, UIP and F&L). These partners signed a Memorandum of Understanding¹⁴ pledge a steadfast commitment to ensure that the rail freight transport market in Europe is fully liberalised, ensuring free access to all rail infrastructure and services as a prerequisite for enhanced competition. The *House of Rail* is designed to act as a counterweight to the hugely influential lobbying organisations representing European state railway companies that have been active in Brussels for decades and interpret the term "competition" very differently to private operators.

8. The last straw

In one of the two cases involving traction current, DB Energie advanced the argument that diesel and electric locomotives are interchangeable, meaning that rival operators aren't at all dependent for traction current on DB Energie.

In the other case, DB Energie said that it operates 60 diesel fuel facilities across Germany and that private operators are free to build their own.

These are really great suggestions: DB's competitors would have to replace every single high-performance electric locomotive with up to four (!) diesel locomotives and set up diesel fuel facilities throughout the country whilst DB continues to run on potentially 'free'

¹⁰ <http://www.netzwerk-privatbahnen.de/pdf/AnschreibenEntgeltgrunds2008.pdf>
<http://www.netzwerk-privatbahnen.de/pdf/StellungnEntgeltGrds.pdf>

¹¹ Press release by the Federal Network Agency (BNA) on 23 November 2006
<http://www.netzwerk-privatbahnen.de/pdf/061123WiderspruchSNBundNBS.pdf>

¹² http://www.netzwerk-privatbahnen.de/pdf/061115_Positionspapier_final.pdf

¹³ Netzwerk Privatbahnen is a member of ERFA (European Rail Freight Association).

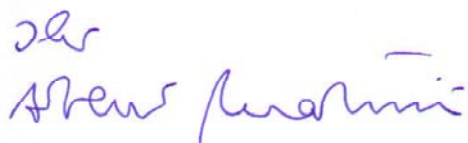
¹⁴ <http://www.netzwerk-privatbahnen.de/pdf/PR-ERFA-ERFCP-FL-UIP-MoU-14-11-06-EN.pdf>

traction current. That would leave DB Energie with just one customer, and the state-owned rail company would no longer be bothered by rival operators at all. In our view such a submission is simply embarrassing: we could understand it coming from some insignificant quarter, but not from an organisation of the stature of the German state railway.

THE END

The Netzwerk Privatbahnen team wishes you a wonderful, restful festive season and hopes to see you all duly refreshed and back in action in 2007.

The next newsletter will be published in the New Year.



Handwritten signature in blue ink, appearing to read "Stefan..."

P.S.

Newsletter 1/06 dated 13 September: http://www.netzwerk-privatbahnen.de/pdf/Infobrief1_06.pdf

Newsletter 2/06 dated 19 October 2006: http://www.netzwerk-privatbahnen.de/pdf/Infobrief2_06.pdf.