Mr State Secretary,

I have the honour to refer you to Case no. 216.101 of 27 October 2011 from the Council of State – IX Chamber and also to draw your attention to paragraph 2, pursuant to which this case which be published in the same manner as the now-quashed decision.

In accordance with Article 39 of the Royal Decree of 23 August 1948 regulating procedures for the legal administrative department of the Council of State, I ask you, via your department, to enforce said paragraph 2.

I have enclosed the administrative dossier.

Yours faithfully,

On behalf of the Head Registrar,

Wim Geurts

Registrar

COUNCIL OF STATE, ADMINISTRATIVE SECTION

IX CHAMBER

JUDGEMENT

no. 216.101 of 27 October 2011
in the case A. 194.169/IX-6539

In case: PLC INFRABEL
assisted and represented by
lawyer Pierre Louis
office situated in 1170 Brussels
Terhulpsesteenweg 177, box 7
Having chosen as residence

against:

the Belgian STATE, represented by the State Secretary for Mobility
assisted and represented by
Emmanuel Jacubowitz
office in 1160 Brussels
Tedescolaan 7
Having chosen as residence

I. Subject of the appeal

1. The appeal, filed on 2 October 2009, deals with the overturning of the Decision of 4 August 2009 by the Regulatory Service for Railway Transport and Brussels Airport Operation, whereby the complaint introduced by the railway undertaking Crossrail Benelux nv concerning discrimination and unequal treatment following the unavailability of railway infrastructure due to the strike by B-Cargo on 9 and 10 April 2009 is justified and the public limited company Infrabel is ordered to pay the administrative fine of EUR 12,500.

II. Course of the judicial procedure

2. The defendant submitted a response and the applicant submitted a statement of rebuttal.

Assistant auditor Ines Martens prepared a report.

The defendant has requested a continuance of proceedings and filed a final statement.

The parties were summoned to the hearing, which took place on 6 June 2011 at 14:00.

State Councillor Daniël Moons prepared a report.

Lawyer Pierre Louis, who appeared for the applicant, and lawyer Emmanuel Jacubowitz, who appears for the defendant, were heard.

Auditor Ines Martens made recommendations for a ruling.

The provisions on language use found in title VI, chapter II, of the laws of the Council of State, coordinated on 12 January 1973 were applied.

III. Facts

3.1. The applicant is pursuant to Article 199 of the Law of 21 March 1991 on the reform of certain public commercial undertakings entrusted with the management of the railway infrastructure on the Belgian network and with the allocation of available capacity to railway undertakings.

On 5 July 2006 the applicant concluded an agreement with Crossrail Benelux nv, a railway undertaking for freight transport, whereby access

and use was granted to Crossrail for the train path on line 24 (German border-Montzen-Y Glons).

3.2. On 27 March 2009 the trade union of the SNCB/NMBS freight division (B-Cargo) submitted a strike notice to SNCB/NMBS-Holding. Acceptance was indicated on 10 April 2009.

On 3 April 2009, the applicant informed railway undertakings of this strike.

3.3. The strike commenced on 9 April 2009 at 22:00. On line 24 where the present dispute was located, mobile stop signals were placed on the tracks at Visé at 23:05 on 9 April 2009.

On 10 April 2009 at 10:00, Leige rail transport police reported that protesters were blocking the trains of private undertakings at Montzen station. A team of transport police were sent to the area, but reported that there were only red flags on the track, which according to the stationmaster indicated where works were being carried out.

On 10 April 2009 in the morning, several telephone calls by the Traffic Control of the applicant to Crossrail indicated that traffic in Montzen was not possible, as strikers were threatening to block passenger traffic at Liège-Guillemins.

On 10 April 2009 at 13:34, the applicant's Traffic Control sent Crossrail a fax in which they wrote: "I hereby inform you that in the interests of all traffic, movement to and from Montzen is suspended until further notice".

On 10 April 2009 at 22:00, the first B-Cargo train passed through Montzen. By fax on 10 April 2009 at 22:12 the applicant's Traffic

Control informed Crossrail: "I hereby inform you that traffic to and from Montzen is once again possible".

3.4. On 4 June 2009 Crossrail Benelux nv lodged a complaint with the Regulatory Service for Railway Transport and Brussels Airport Operation, for discrimination and unequal treatment due to the B-Cargo employee strike on 9 and 10 April 2009.

3.5. On 12 June 2009 the Regulatory Service for Railway Transport and Brussels Airport Operation sent a registered letter to the applicant notifying them of the complaint filed by Crossrail Benelux nv. Due to a clerical error, a copy of the letter is unavailable.

In this letter the Regulatory Service asked the applicant to provide detailed information on the circumstances of the partial disruption of train traffic and stated that each party concerned had the opportunity to make its first submissions to the Regulatory Service. The letter set a timetable in which the applicant was given a deadline of 30 June 2009 to submit a description of the facts and potentially an initial statement. It was further stated that from 1 July 2009 the Regulatory Service would compare the statements and documents of the parties concerned, that parties would have until 17 July 2009 to submit their final statements and then finally on 6 August 2009 a decision would be made. It was to be noted that the late submission of claims would render them inadmissible and that during the procedure, the Regulatory Service investigation activities would allow for the persons directly or indirectly involved in the matter to potentially be interviewed.

3.6. On 25 June 2009 the applicant informed the Regulatory Service that a copy of the complaint lodged by Crossrail Benelux nv had not been received. The applicant described in this letter the events of 9 and 10 April 2009 and added a number of enclosures, including those with respect to the measures

taken on 9 and 10 April 2009, the communications that were had with railway undertakings and the impact on different trains and train paths.

3.7. On 30 June 2009 the Regulatory Service submitted a copy of the complaint made by Crossrail Benelux nv to the applicant.

3.8. On 2 July 2009 the applicant informed the Regulatory Service that no copy had been received of the complaint by Crossrail Benelux nv and that they could therefore not make any statement without knowledge of the complaint.

The letters of 30 June 2009 and 2 July 2009 were distributed (see sections 3.7 and 3.8) so that the applicant was in possession of the said complaint.

3.9. On 9 July 2009 the Regulatory Service requested information from local police services about the strike action of 9 and 10 April 2009.

3.10. Via the email messages of 16 and 17 July 2009 Crossrail Benelux nv submitted its remarks and documents to the Regulatory Service.

3.11. On 17 July 2009 the applicant made its statement to the Regulatory Service.

3.12. On 24 July 2009, the applicant made its final statement via its Chief Executive Luc Lallemand to the Regulatory Service in which he gave his reactions to the complaint and to the statement made by Crossrail Benelux nv. He emphasised his request for a hearing in the following terms:

> "We remind you that should Infrabel be given a sanction, we ask in advance to be given a hearing".

3.13. On 16, 17, 29 and 31 July 2009 the Regulatory Service saw a number of witnesses. The following persons were heard: Eddy Clement,

Director-General Network of the applicant, Ronny Dillen and Tessa Horemans, Managing Director and Traffic Manager respectively from Crossrail, Jos Decelle, departmental head of Traffic control from the applicant, Enjo Meeus, Account Manager from the applicant. There was also a telephone interview with Jean Warnants, the applicant's head stationmaster.

3.14. On 4 August 2009, the Regulatory Service decided that the applicant should pay an administrative fine of EUR 12,500. The decision was as follows:

> "Concerning the limited company Crossrail Benelux n. v., with company number 0471.783.353 and with headquarters in 2100 Antwerp (Deurne), Luchthavenlei 7A, hereafter Crossrail, acting as complainant,
>
> Against the public limited company Infrabel, with company number 0869.763.267 and with headquarters in 1070 Anderlecht, Barastraat 110, defendant,
>
> Having regard to Article 17 of the Law of 18 July 1966 on the use of languages in administrative affairs;
>
> Having regard to the Royal Decree of 25 October 2004 on the creation of the Regulatory Service for Railway Transport and Brussels Airport Operation, on establishment of its structure and the administrative and financial statute that applies to its members. This Royal Decree was amended by the Royal Decree of 1 February 2006.
>
> Having regard to Articles 5, 6, 10, 62, 63, 64 and 65 of the Law of 4 December 2006 on the use of the railway infrastructure;
>
> Having regard to reception, on 5 June 2009, by the Regulatory Service, of a complaint lodged by the railway undertaking Crossrail;
>
> Having regard to the other file documents, and in particular
>
> -The response and initial submission from Infrabel, d. d. 25 June 2009 (received on 29 June 2009
>
> -The response and initial submission from Crossrail, d. d. 15 July 2009 (received on 16 July 2009)
>
> -The response and submission from Infrabel, d. d. 17 July 2009 (received on 17 July 2009)
>
> -The response and final submission from Infrabel, d. d. 24 July 2009 (received on 24 July 2009)
>
> -The record of the interview with Mr Eddy Lenient d. d. 16 July 2009 (PV-2009-04-S)

- -The record of the interview with Mr Ronny Dillen and Ms Tessa Horemans d. d. 16 July 2009 (PV-2009-05-S)
- -The record of the interview with Mr Jos (Jozef) Decelle d. d. 17 July 2009 (PV-2009-06-S)
- -The record of the interview with Mr Enjo Meeus d. d. 29 July 2009 (PV-2009-09-S)
- -The record of a telephone interview with Mr Jean Warnants, d. d. 31 July 2009 (PV-2009-11-S)
- -The explanation via fax from the rail transport police in Liege, d. d. 29 July 2009

The Regulatory Service for Railway Transport and Brussels Airport Operation hereafter "Regulatory Service", made the final decision.

I. Procedure

Considering the procedure determined by Article 65 of the law of 4 December 2006 on the use of the railway infrastructure requiring that the concerned parties be heard, the Regulatory Service decided that the concerned parties be heard by means of written submissions. Consequently a timetable was established by the Regulatory Service forseeing inter-partes proceedings giving Infrabel the possibility to be heard last. This timetable was not contested by the parties.

Given that it was helpful to conduct an administrative investigation, the Regulatory Service decided on:

- a series of hearings with witnesses directly or indirectly concerned by the disturbances to railway traffic on 9 and 10 April 2009;
- to gather information from the police services regarding possible interventions during the disturbances to railway traffic on 9 and 10 April 2009.

II. Facts and content

By registered letter of 04 June 2009 (received on 5 June 2009) Crossrail lodged a complaint with the Regulatory Service citing discrimination and unequal treatment having regard to the unavailability of the railway infrastructure due to the B-Cargo strike on 9 and 10 April 2009. The freight transport division of the NMBS/SNCB (B-Cargo) submitted a notice of strike by the NMBS/SNCB-Holding trade unions, by letter on 27 March 2009. This strike notice was also mentioned in the following days in the national press.

By letter of 3 April 2009, Infrabel (Management Access to the Network) announced the union action by B-Cargo to the railway undertakings. In this letter, Infrabel stated that "this strike will normally not involve any disturbances to the Belgian railway network. But we will certainly do everything possible to keep any eventual discomfort to an absolute minimum”. On 9 April 2009 at 22:00 the strike by B-Cargo commenced. This led to problems in different areas on the network.

- From 22:00 the junction at Schijn was obstructed by a picket line resulting in access to and from the port of Antwerp being blocked. This blockade was lifted at around 00:50. Limited disruption (light delays) to the train traffic.
- From 22:00 picket lines were in place at Block 1 in Gent-Zeehaven. According to the information from Infrabel there was no train traffic possible until 10 April, after 14:00.
- On 10 April at around 08:30 a mobile red signal was placed at the points 37B and points 8 was blocked on route A to Zeebrugge-Vorming. It is not clear how long this situation continued.
- In the Charleroi region track invasions were reported in Roux on line 124a of 9 April at 22:00 until 10 April at 05:55, at La Louvière Sud from 04: 40 to 05: 40, at La Louvière Industrielle from 06: 05 to 06: 40 (line 116); firecrackers were reported on line 118.

- on 9 April at 23: 05, (German border-Montzen-Y Glons) mobile stop signals were placed on line 24 on the tracks at block 5 (Visé); these signals were removed by a member of the Visé staff on 10 April, at about 21: 30. According to a statement by Infrabel, there was no point in removing these signals earlier due to the decision by Traffic Control (TC) to suspend traffic on line 24 (see further). According to data provided by Crossrail, on 10 April, at about 08:30 TC indicated that the tracks were no longer obstructed at Visé.

On 10 April 2009, at 10:00 the Commander of the Liege railway police (Cmdt SPC) reported that strikers were obstructing trains from private railway undertakings at Montzen station. A team was sent to the area but confirmed that there was no blockade on the tracks. The only visible presence was of several red flags. Head stationmaster Warnants explained that these flags had been placed there due to works and were not to be found on the main tracks of line 24, therefore the tracks were free.

On 10 April 2009 in the morning there were various telephone reports from TC to Crossrail the traffic in Montzen could not continue as strikers were threatening to obstruct passenger transport (at Liège-Guillemins).

On 10 April 2009 at 11: 30 Infrabel nevertheless allowed train 41530 (Crossrail) from Aachen-West in the direction of Hasselt. At 11: 52, during a telephone conversation with Mr Eddy Clement (Director-general Infrabel-Network) the strikers threatened to occupy Liège-Guillemins if railway traffic continued on line 24.

After consultation between Mr Eddy Clement and Mr Jozef Decelle (management Infrabel Traffic Control Service), and after consultation with Mr Luc Lallemand (CEO Infrabel) and Mr Luc Vansteenkiste (Director-general Infrabel-Access to the Network) who were all in agreement, it was decided to temporarily suspend traffic on line 24.

On 10 April 2009 at 13: 34 TC sent the following fax to Crossrail: "I hereby inform you that in the interests of all traffic, movement to and from Montzen is suspended until further notice".

In an e-mail of 10 April 2009, at 14: 41 Mr De Brauwer of Infrabel confirmed to Mr Oyen of Crossrail that no further goods traffic was permitted at Montzen due to the threat by B-Cargo union members to paralyse rail traffic around Liège.

By fax of 10 April 2009 (no indication of time), Crossrail contested the reasons given by Infrabel for suspending traffic on line 24 and considered this decision to be one-sided and discriminatory.

On 10 April 2009 at around 15:00 TC reported to Crossrail that their trains would be given priority for allocation of train paths after the end of the

strike at 22:00. Crossrail began to plan how to deal with of all their obstructed trains.

According to data by Infrabel (TrackIn system) it seems that the first B-Cargo train (no. 46404) passed through Montzen at 22:00 on 10 April 2009.

By fax of 10 April 2009 at 22:12 TC reported to Crossrail: "I hereby inform you that traffic to and from Montzen is once again possible".

III. Admissibility

Considering that the complainant has the right to be a railway undertaking under Article 5 of the Law of 4 December 2006 on the use of the railway infrastructure, having regard to the fact that the complainant is holder of the licence L-002-4 of 18 August 2008.

Considering that the notification of the complaint was done according to Article 62(5), of the Law of 4 December 2006 on the use of the railway infrastructure,

The Regulatory Service considers the complaint to be admissible.

IV. Competence

On the basis of Article 62(5) of the Law of 4 December 2006 on the use of the railway infrastructure, the Regulatory Service shall be competent to deal with complaints filed by railway undertakings, candidates and railway infrastructure managers if they consider themselves to be victims of unfair treatment, discrimination or any other disadvantage relating to:
-the Network Statement or the criteria contained within it;
-the procedure for allocation of infrastructure capacity and its results;
-the tariff system, the level or structure of railway infrastructure charges;
-The provisions in terms of access to the railway infrastructure in the first chapter.

In this particular case it should be noted that:

1. concerning the Network Statement or the criteria within it, the Regulatory Service's competences encompass unfair treatment, discrimination or prejudice resulting from the elaboration of the Network Statement and the criteria involved in its practical application of;

2. concerning the procedure for the allocation of infrastructure capacity and its results, the Regulatory Service's competence applies not only to the whole infrastructure capacity allocation procedure but also to the decision itself and its practical and effective results at the level of train traffic.

3. Concerning the provisions in the area of access to railway infrastructure; Article 10 of the above-mentioned law of 4 December 2006 outlines the services to be delivered to railway undertakings. Paragraph 2 of this article specifies that railway undertakings have the right, on a non-discriminatory basis, to the minimum services under point 1 of annex I, and more precisely to the right to use the allocated capacity.

On these grounds, the Regulatory Service is competent to deal with Crossrail's complaint.

V. Grounds

Considering that point 4.8 of the 2009 Network Statement deals with the specific measures for disruption:

"The IM makes every effort to limit the frequency, magnitude and duration of the disruptions that influence the traffic. The assigned capacities may be altered by the IM

- Either as a result of necessary repair works following a disruption to train traffic caused by a technical failure or an accident on the railway infrastructure
- Or as a result of an emergency, absolute necessity or circumstances beyond control

The IM informs the holder of the capacities concerned as soon as possible. When the train traffic deviates from the traffic that corresponds to the allocated capacities, the IM modifies capacity allocation so as to return as quickly as possible to a usage that corresponds to the capacities allocated.

They work out as far as possible the most suitable alternative solution. They keep the holder of the train path concerned up-to-date.

Should the capacity allocated be completely unusable, and when no alternative solution can be worked out, the IM may, without prior notice, remove the train paths concerned for the amount of time needed to repair the infrastructure. They keep the holder of the train path concerned up-to-date.

Without prejudice to the provisions in the usage contract for railway infrastructure, the disruptions that affect circulation do not give the holder of the capacity the right to claim compensation from the IM. The charge is

payable for the capacity initially allocated except in case of removal of traffic".

Considering that here work is clearly not necessary as a result of a technical fault or an accident;

Considering that the account of the facts, confirmed by all parties, including the rail transport police, it can be confirmed that from the morning of 10 April no use of the tracks was made on line 24;

Considering that Infrabel, at no point asked the rail transport police to assess the situation, let alone to clear the tracks when they were occupied, and what is more considered such an intervention to be pointless and even counter-productive;

Considering that TC-Infrabel, by fax on 10 April 2009 at 13:35, suspended traffic on line 24 arguing it was in the general interest;

Considering that this provision is not a part of the above-mentioned law of 4 December 2006, and not the 2009 Network Statement either, this does not provide a suitable argument for suspending traffic;

Considering that Infrabel itself decided to suspend the traffic on line 24 due to threats made by B-Cargo strikers;

Considering that this has not been demonstrated to be an emergency, absolute necessity or circumstances beyond control;

The Regulatory Service is of the opinion that Infrabel was in the wrong to cite the Law of 4 December 2006 and point 4.8 of the Network Statement for the suspension of traffic on line 24 and removal of allocated capacities, and that it has not satisfied the conditions for suspension or removal cited in the other sub-sections of chapter 4 of the 2009 Network Statement; and as a consequence, it was decided that the capacity allocated could not be removed and that Crossrail had the right to use the said capacity.

Whereas both the statement of 17 July 2009 from Infrabel and the evidence given by Mr Clement (hearing of 17 July 2009) and Mr Decelle (hearing of 17 July 2009) show that the decision to suspend train traffic on line 24 was taken to prevent an escalation and disruption to the busy Easter weekend traffic;

The Regulatory Service is of the opinion that the decision by Infrabel on 10 April 2009 to suspend train traffic on line 24 signified a discrimination against rail freight transport and in particular against Crossrail, for the benefit of rail passenger transport and in particular the National Rail Company of Belgium.

Considerg that Crossrail, as railway undertaking under Article 6(4) of the Law of 4 December 2006 on the use of the railway infrastructure, had the right to access the infrastructure;

Considering that according to Article 10(2) of the Law of 4 December 2006 on the use of the railway infrastructure, railway undertakings, on a non-discriminatory basis, have the right to a minimum access package referred to in point 1 of Annex I of this Law, and in particular the right to use the allocated capacity;

The Regulatory Service is of the opinion that Crossrail's right to make use of its allocated capacity has been violated.

VI. Decision

On these grounds

The Regulatory Service considers that the complaint is justified;

The Regulatory Service orders Infrabel as defendant, under Article 64 of the Law of 4 December 2006 on the use of the railway infrastructure, to pay a fine of EUR 12,500.

Brussels, 4 August 2009,
For the Regulatory Service for Railway Transport
and Brussels Airport Operation:
L. DE RYCK
Director.

3.15. This is the decision currently being contested. The decision was sent to the applicant by registered letter on 5 August 2009.

3.16. On 6 August 2009 the Regulatory Service informed the applicant of their possibility to appeal.

On 31 August 2009 the contested decision was published in the Belgian Bulletin of Acts and Decrees.

IV. Consideration of the pleas

A. The first and fourth part of the first plea

In this plea, the applicant alleges infringement of Article 6 of the ECHR, the right to defence, the right to a fair trial, the principle of rebuttal and impartiality, and Article 65 of the Law of 4 December 2006 on the use of the railway infrastructure.

4. The applicant argues more specifically in the first part of this plea, the violation of these provisions in that the Regulatory Service took the contested decision without having heard from applicant, while Article 65 of the Law of 4 December 2006 expressly provides that the Regulatory Service decide after having heard the parties concerned. The Regulatory Service adopted a specific procedure to protect the rights of the applicant from being harmed. Thus the applicant is obliged to submit its written position and in a short time scale to avoid inadmissibility. The applicant could not have knowledge of Crossrail's complaint prior to the filing of its first written submissions. The applicant could also not be the last to respond. The applicant was given a hearing despite asking on numerous occasions.

5. The defendant contends in its response to the first part on its right to defence being violated that this was not relevant as despite the submission deadline being short and under penalty of inadmissibility, they were able to produce their submission in time and the Regulatory Service responded to the aforementioned submission. The brief period was not unreasonable given the legal requirement for the Regulatory Service to give a decision within two months. Concerning the right to be heard, the defendant pointed out that Article 65 of the said Law of 4 December 2006 does not provide that parties must be heard orally. This also applies for the obligation to be heard as a general principle of proper administration. The concerned parties must be at least offered the opportunity to justify themselves in writing but not necessarily orally. A hearing can be a useful way of bringing out the different positions. The applicant presented its position in written form and in last place. Moreover, three employees of the applicant were heard as witnesses.

6. In its statement of rebuttal the applicant contests the first component, that the public authorities, as part of the obligation to conduct a hearing may choose how those being heard are to present their positions, in common law administrative procedures that lead to the imposition of a penalty, in the form of an administrative fine. This means that the obligation to hold a hearing stipulated in Article 65 of the Law of 4 December 2006 includes the right to be heard verbally and personally as a party.

The obligation to hold a hearing is broader than that which the defendant holds to in the sense that it involves not only the right to explain the facts, but to the broader right to defend their interests.

7. In its final statement, the defendant holds that for the exercise of the right to defence, it is not required that the person be able to defend themselves verbally.

8. The applicant alleges in the fourth part of the first plea the infringement of the right to equal treatment so that Crossrail Benelux nv as a concerned party, after submitting its comments has been heard, while the applicant, despite repeated requests was not heard.

9. Concerning the fourth part, the defendant responded that the applicant could make their position clear via the written procedure and that three persons employed by the applicant were heard as direct witnesses of the strike which took place on 9 and 10 April 2009. The fact that the Chief Executive of Crossrail Benelux nv was heard is due to the fact that he was best acquainted with the facts. Also from the applicant, the persons heard were those with knowledge of the facts.

10. The fourth part concerns the applicant's statement that Luc Lallemand was not heard in his capacity as Chief Executive, whereas the Chief

Executive of Crossrail Benelux nv was interviewed as a witness and not as a party.

11. In its final statement, the defendant presented that the applicant, through the statements made by its staff who were personally involved in the facts, were reliable witnesses and that the applicant did not demonstrate the utility of its own staff being interviewed and hence present their position on the facts.

B. Criticism of the first and the fourth part of the first plea

12. In the first and fourth part the applicant conveyed that its right to defence had been violated, as they had not been heard orally by the defendant.

The right to defence applies in criminal and disciplinary matters.

To this the defendant is obliged from the contested decision of 4 August 2009, to pay an administrative fine of EUR12,500 to the applicant, as a consequence of the unavailability of the railway infrastructure due to the B-Cargo strike on 9 and 10 April 2009, in which the railway undertaking Crossrail Benelux nv was the victim.

The fine must be qualified as a criminal sanction under Article 6 of the ECHR, as Article 64 of the Law of 4 December 2006 on the use of the railway infrastructure, defines the minimum and maximum amount of fines for a criminal case. The fine is separate to the damage that the violation has caused and is no reimbursement of expenses, created by the public authorities. The fine concerns the contravening party and their wrongful conduct.

Having regard to the punitive nature of the fine the right to defence has been observed. The right to defence involves the person concerned, unless otherwise expressly provided, to able to express themselves verbally.

Article 65 of the aforementioned law of 4 December 2006 provides that:

> "The supervisory body decides in the case provided for in Article 63(3), by means of a reasoned decision, after hearing the parties concerned, within two months of the referral, unless the law provides otherwise."

By virtue of this definition, the concerned parties have the right to an oral defence.

Considering that Article 65 of the said Law of December 4 2006 therefore requires that the parties be heard, cannot be understood then that the person is given an administrative penalty, should have the opportunity to use knowledge of the competent authority to speak to and for them on all aspects of the case to defend, which means they are called upon by the competent authority, by means of the responsible person(s), to respond to all data in the file be brought to replicate the arguments of the other parties.

In this respect, the Council of State noted that the applicant, despite expressly requesting to be heard orally, was not given an opportunity, had their right to defence thus ignored. That Crossrail Benelux nv had been given this opportunity reinforces this failure.

The defendant's argument that certain employees of the applicant were heard as witnessed does not alter that finding, since the testimony was a part of the fact finding, which is independent of the exercise of the right to defence.

Consequently Article 65 of the Law of December 2006 and the rights therein were not respected.

13. To this extent the first and fourth sections of the first plea are founded.

DECISION

1. The Council of State overturns the Decision of 4 August 2009 by the Regulatory Service for Railway Transport and Brussels Airport Operation, by which the complaints submitted by the railway undertaking Crossrail Benelux nv concerning discrimination and unequal treatment as a consequence of the unavailability of the railway infrastructure due to the B-Cargo strike of 9 and 10 April 2009, is justified and the public limited company Infrabel is ordered to pay an administrative fine of EUR 12,500.

2. This judgement must be published in the same manner as the overturned decision.

3. The defendant is to pay costs for the action of quashing the decision, estimated at EUR 175.

This judgement was given in Brussels, at the public hearing of 27 October 2011, by the Council of State, Chamber IX, assembled by:

André Vandendriessche, speaker of the house
Daniël Moons, state councillor
Roars Thys, state councillor

assisted by

Wim Geurts, Registrar .

Registraar	**Chairman**
Wim Geurts	**André Vandendriessche**

For notification to The State Secretary for Mobility

Deputy to the Prime Minister
Residence chosen

Mr E Jacubwitz
Tedescolaan 7
1160 Brussels

Brussels, 4 November 2011
On behalf of the Head Registrar

Wim Geurts
Registrar

The ministers and administrative authorities, who are concerned by the affair, are obliged to ensure the implementation of this Decision. Should it be required, the Bailiffs are obliged at cooperate with regard to respect of this legal requirement.

Brussels, 4 November 2011
On behalf of the Head Registrar

Wim Geurts
Registrar