

**SUBMISSION BY ENGLISH, WELSH AND SCOTTISH RAILWAY LIMITED TO THE
TIMETABLING PANEL (TTP195)**

**DISRUPTIVE POSSESSION: Extension of the existing Christmas possession of an all
line block at Rugby for an additional 24 hours.**

1. DETAILS OF PARTIES TO THE DISPUTE

<p>Network Rail Infrastructure Limited</p>	<p>English Welsh and Scottish Railway Ltd Lakeside Business Park Carolina Way Doncaster South Yorkshire DN4 5PN</p> <p>Contact: Nick Gibbons National Planning Manager Tel: 0870 140 5129 Fax: 0870 140 5020 Mobile: 07801 905617</p>
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2 EWS RIGHT TO BRING THIS REFERENCE

- 2.1** This matter is referred to a Timetabling Panel for determination in accordance with Condition D5.1 of the Network Code and pursuant to section 3.5.4 of the National Rules of the Plan (see Appendix H).

English Welsh & Scottish Railway Limited ('EWS') is in dispute with Network Rail over the short notice advice and imposition of an extension to a pre-planned disruptive possession taking place at Rugby over Christmas/New Year 2007/08. The pre-planned possession, along with its extension, is listed below.

LNW (S) Draft WON Week 40 item 4, amended to read:

PPS Ref: P2007/933798

Week 40 Monday 24th December 2007 to Tuesday 1st January 2008

At/Between: Rugby South Jn and Trent Valley Jn

Lines: All BLOCKED

and

At/Between: Hanslope Jn and Rugby South Jn (via Weedon)

Lines: Down and Up Main BLOCKED

and

At/Between: Rugby Trent Valley Jn and Brandon

Lines: Down and Up Coventry BLOCKED

and

At/Between: Rugby Trent Valley Jn and Shilton

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0520 Tue 1/1

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0300 Fri 28/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED
Times: 0300 Fri 28/12 to 0140 Sun 30/12
and
At/Between: Hanslope Jn and Rugby South Jn (via Northampton)
Lines: All BLOCKED
Times: 0140 Sun 30/12 to 0915 Sun 30/12
and
At/Between: Althorpe Park and Rugby South Jn
Lines: Down and Up Northampton BLOCKED
Times: 0915 Sun 30/12 to 0300 Mon 31/12
and
At/Between: Daventry South Jn and Rugby South Jn
Lines: Down and Up Northampton BLOCKED
Times: 0300 Mon 31/12 to 0520 Tue 1/1
Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN.
2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS
NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH
DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 MON 31/12 NO
ACCESS DAVENTRY IRFT. 0300 FRI 28/12 – 0520 TUE 1/1 TRAINS TO/FROM
THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE
WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY
OR BIRMINGHAM INTERNATIONAL, RAIL REPLACEMENT ROAD SERVICE TO
OPERATE. 0300 MON 31/12 TO 0520 TUE 1/1 ACCESS DIRFT FROM THE
NORTHAMPTON DIRECTION ONLY.

3 CONTENTS OF THE REFERENCE

The proposals for the extension were issued in an e-mail from Network Rail dated 12 December 2007 (see Appendix A). EWS responded in an e-mail dated 13 December 2007 (see Appendix B) questioning the short response timescale allowed by Network Rail. This prompted a further e-mail from Network Rail dated 14 December 2007 (see Appendix C) indicating that Network Rail would allow the required 10 days response period contained in section 3.4.1 of the National Rules of the Plan, but would nevertheless be proceeding with the proposed extension in any event once that response period had expired. This was subsequently confirmed in an e-mail from Network Rail dated 28 December 2007 (see Appendix F) despite EWS advising its objections to the proposed extension in an e-mail dated 20 December 2007 (see Appendix E). EWS referred the matter to the Secretary of the Access Disputes Committee in e-mails dated 14 and 28 December 2007 (see Appendices D and G).

4 SUBJECT MATTER OF DISPUTE

- 4.1 This dispute is in relation to possession proposals made by Network Rail for the extension of a pre-planned disruptive 'all-line' possession at Rugby published in version 3 of the 2008 Rules of the Route and taking place during the Christmas/New Year 2007/08 period (Weeks 39 and 40). The pre-planned possession already agreed by EWS was due to commence 2330 Monday 24 December 2007 and finish at 0300 Monday 31 December 2007. Network Rail's proposal would extend the possession by 26 hours until 0520 Tuesday 1 January 2008.

4.3.1 Copied and annexed to this reference are:

- Appendix A: An e-mail dated 12 December 2007 from the Network Rail to affected Train Operators advising of its proposal to extend the pre-planned possession at Rugby over the Christmas/New Year 2007/08 period.
- Appendix B: An e-mail response dated 13 December 2007 from EWS to Network Rail setting out its reasons for declining the 2-day response period to the proposal.
- Appendix C: An e-mail dated 14 December 2007 from Network Rail to affected Train Operators advising its revision to the formal 10-day response period as well as indicating that it would be proceeding with the extension once that timescale had expired.
- Appendix D: An e-mail dated 14 December 2007 from EWS to the Access Disputes Committee Secretary detailing its objection to the accelerated timescales for the possession proposal.
- Appendix E: An e-mail dated 20 December 2007 from EWS to Network Rail objecting to the proposed extension to the possession on the grounds that it would significantly affect the businesses of EWS and its customers
- Appendix F: An e-mail dated 28 December 2007 from Network Rail to affected Train Operators advising of its decision to proceed with the proposed extension to the possession at Rugby.
- Appendix G: An e-mail dated 28 December 2007 from EWS to the Access Disputes Committee Secretary referring Network Rail's decision to proceed with the proposed extension to the Access Disputes Panel.
- Appendix H: Section 3 of the National Rules of the Plan for the 2008 Timetable
- Appendix I: Timetable Determination reference TTP102
- Appendix J ORR's determination document of the appeals against the Panel's determination TTP102

5 SUMMARY OF DISPUTE

- 5.1 This dispute is in relation to possession proposals originally advised by Network Rail on 12 December 2007 (subsequently confirmed on 28 December 2007) extending a

pre-planned all-line possession at Rugby by approx 26 hours. Network Rail's original proposals (as advised to affected Train Operators on 12 December 2007) allowed consultees only a 2-day response period. Given the disruptive effect the proposed extension would have on its business, EWS insisted on being allowed the normal 10-day response period as laid down in section 3.4.1 of the National Rules of the Plan. This would allow more time for EWS to consult its customers over the proposals and consider any alternative arrangements that would not be possible to undertake within Network Rail's reduced 2-day response timescale.

- 5.2 Network Rail advised on 14 December 2007 that it would now allow the full 10-day consultation period and, therefore, requested comments from consultees by Friday 28 December 2007. However, Network Rail also stated at the same time *"by this letter we informally give you advance warning that once the 10 working days have elapsed we will be formally notifying you of our decision to go ahead with the extension of the blockade to 0520 Tuesday 1st January 2008"* (Appendix C). Therefore, in the view of EWS, Network Rail in making this statement had effectively already decided to proceed with the proposed extension before it had received responses from consultees. EWS submits that, in advance of responses from consultees, Network Rail cannot be in a position to take account of the full range of Decision Criteria in Condition D6 of the Network Code and, therefore, meet the requirements of sections 3.5.1 and 3.5.2 of the National Rules of the Plan. In effect, EWS considered that Network Rail's e-mail dated 14 December 2007 was signifying its intention to impose the proposed extension irrespective of any comments or objections received from consultees.
- 5.3. After analysing the effect on its businesses and after consulting its customers who had by that time already planned to operate services during the period covered by the proposed extension, EWS responded to Network Rail on 20 December 2007 stating that it could not accept the proposed extension due to the disruptive effect this would have on its business and its customers' business.
- 5.4. Despite EWS's representations, Network Rail decided to proceed with the proposed extension as it had indicated that it would in its earlier e-mail dated 14 December 2007.
- 5.5. EWS then referred the matter for determination to the relevant ADRR Panel in accordance with Condition D5.1 of the Network Code and pursuant to section 3.5.4 of the National Rules of the Plan, notwithstanding that EWS notes that that section refers to a non-existent condition of the code (i.e. Condition D2.4.6).

6 DETAILED EXPLANATION OF DISPUTE

- 6.1.1 It should be noted that the possession, as originally proposed by Network Rail and, although agreed by EWS, was still extremely disruptive to EWS and its customers whose trains would either be significantly delayed or, in some cases, unable to operate at all. Despite this, given the advanced notice of the possession, EWS was able to work with its customers to enable the possession to take place. EWS and its customers understand for the reasonable need for the railway to be shut, sometimes as in this case for extended periods, so that the railway can be maintained, renewed or improved.
- 6.1.2 However, for Network Rail to request an extension to this possession less than 3 weeks before it was due to commence and expect EWS and its customers to put up with yet more severe disruption is not reasonable. As already mentioned above, the original pre-planned possession already had severe impacts on EWS and its customers and they were counting upon the railway being reopened on 31 December 2007 so that their trains could recommence as planned. From the statement made by Network Rail in its 14 December 2007 and referred to above, it was clear that consultation was only in effect a smokescreen as Network Rail had already decided that the proposed extension would go ahead in any event.
- 6.1.2 EWS submits that the imposition of the possession extension by Network Rail not only disrupts EWS and its customers but also contravenes the laid down contractual processes set out in both section 3 of the National Rules of the Plan and Part D of the Network Code. Before making its decision, Network Rail is obliged under section 3 of the National Rules of the Plan to properly consult all affected Train Operators, consider responses received and take account of the Decision Criteria set out in Condition D6 of the Network Code. In this case, Network Rail had already made its decision before consulting affected Train Operators and this, EWS submits, is contrary to the contractual processes referred to above and if countenanced would permit Network Rail to continue to impose possessions across its network despite the effects on Train Operators and their customers.
- 6.1.3 EWS would also like to highlight certain conclusions of a previous determination of the Timetabling Panel (TTP102) and the associated appeal decision of the ORR (see Appendices I and J) which also concerned the imposition of a possession by Network Rail outside of the laid down contractual processes.

- In TTP102 the Panel considered that:

'Section 3.1.3 of PARTP did not directly empower Network Rail to take specific action'
(TTP determination paragraph 18)

'It [section 3.1.3] does not create any right, for Network Rail or the Train Operator, to circumvent the need to reach agreement through a process of consultation or to impose one point of view' (TTP determination paragraph 19)

- From the ORR's appeal decision, ORR concluded that:

'The Panel failed to take proper account of its own findings that Network Rail was not entitled to impose the possessions and had acted unreasonably.' (ORR appeal decision paragraph 10 (b) (i))

- and went on to say that:

'.....Further, the Panel does not appear to have considered whether Network Rail took due account of EWS or FHH business concerns. Section 3.1.3, which operators so as only to accelerate the timescales involved in the consultation process, does not remove the requirement for Network Rail to take all these considerations into account'' (ORR appeal document paragraph 25)

It is the contention of EWS that Network Rail has not taken account of these determinations in making its decision to impose the proposed extension.

7 FURTHER ISSUES

7.1. The explanation for the request for additional access was *'as a result of issues with*

- *the late approval of Overhead Line design,*
- *adverse weather conditions preventing crane work in recent weekends,*
- *failure of infrastructure at Rugby North Jn.*

The project at Rugby is a 'multi-million pound' project and there are a number of industry forums and working groups where Network Rail and Train Operators can discuss various aspects of the project. EWS would have expected such fundamental issues as those mentioned above to be raised at those forums, albeit informally allowing itself and other Train Operators to understand the exact issues being faced by Network Rail. For proposals such as this to come 'out of the blue' does not show Network Rail specifically, or the railway industry generally in a good light.

8 DECISION SOUGHT FROM THE PANEL

- 8.1 The Panel is requested to determine that Network Rail, in imposing the proposed extension of the pre-planned possession at Rugby, did so unilaterally and contrary to process set out in section 3 of the National Rules of the Plan and Part D of the Network Code and, therefore, acted without legal entitlement.

9 Signatures

Signed

N. J. Gibbons

Print Name: *N. J. GIBBONS*

Position: *NATIONAL PLANNING MANAGER, EWS RAILWAY LTD*

Date: *14/02/08*

APPENDIX A:

An e-mail from the NAU to affected operators of the Network Rail Informal Decision Document dated 12th December 2007'.

From: Allen, Matthew (Network Rail)

Sent: 12 December 2007 09:32

To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); Ian.Kapur@gbrailfreight.com; david.stubbs@drsl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk; michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim

Cc: Schwartz Eddy; Jones Jacqueline (NAU Leeds); Walgate David; Alebon J (Network Rail)

Subject: Week 40 - MD101 - Rugby (Proposal)

Week 40 – MD101 – Rugby (Proposal)

Dear All,

I have been approached by colleagues in the WCRM project for an extension of 24hrs to the Rugby Christmas all lines BLOCKADE. The late request is due to late completions with overhead line design and approval, and loss of critical work in weeks 35 & 36 due to adverse weather conditions and failure of vital infrastructure at Rugby North Jn.

Please could I seek your support for the following short notice possession amendment (proposed alterations marked in bold) ?

LNW (S) Draft WON Week 40 item 4, amended to read:

PPS Ref: P2007/933798

Week 40 Monday 24th December 2007 to Tuesday 1st January 2008

At/Between: Rugby South Jn and Trent Valley Jn

Lines: All BLOCKED

and

At/Between: Hanslope Jn and Rugby South Jn (via Weedon)

Lines: Down and Up Main BLOCKED

and

At/Between: Rugby Trent Valley Jn and Brandon

Lines: Down and Up Coventry BLOCKED

and

At/Between: Rugby Trent Valley Jn and Shilton

Lines: All BLOCKED

Times: 2330 Mon 24/12 to **0520 Tue 1/1**

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0300 Fri 28/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0300 Fri 28/12 to 0140 Sun 30/12

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

TTP195

Times: 0140 Sun 30/12 to 0915 Sun 30/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0915 Sun 30/12 to **0520 Tue 1/1**

Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN. 2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 TUE 1/1 NO ACCESS DAVENTRY IRFT. **0300 FRI 28/12 – 0520 TUE 1/1 TRAINS TO/FROM THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY OR BIRMINGHAM INTERNATIONAL, RAIL REPLACEMENT ROAD SERVICE TO OPERATE.**

Please note that due to the very late notice of this request the period of industry consultation has been reduced to two days.

This email is in accordance with Access Condition D2.1.10 and relates to Section 3.1 of National Rules of the Plan being the Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change. I look forward to receiving your support for the above proposal by Friday 14th December 2007.

Regards

Matt

Network Access Unit

TTP195

APPENDIX B:

An e-mail response from EWS to the NAU setting out the reasons for the declination of the 2 day response period (part).

From: Wileman, Tim

Sent: 13 December 2007 14:07

To: Allen, Matthew (Network Rail)

Cc: Adrian Thear (Network Rail); 'Andrew.Bliss@networkrail.co.uk'; Gibbons, Nick

Subject: RE: Week 40 - MD101 - Rugby (Proposal)

Importance: High

Matt,

EWS will not respond to this proposal by tomorrow as it is only a two day response period. We need to have sufficient time to consult with our individual Business Units before we can respond.

EWS will respond within the Industry agreed deadline of 10 working days as laid out in In the National Rules of the Plan section 3.4.1

Regards,

Tim

Tim Wileman
Engineering Planning
EWS

Tel: 0870 140 5095

APPENDIX C:

An e-mail from the NAU to affected operators of the Network Rail Informal Decision Document dated 14th December 2007' detailing Network Rail's revision to the response period but also the intention to impose the possession extension.

From: Allen, Matthew (Network Rail)

Sent: 14 December 2007 14:55

To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); Ian.Kapur@gbrailfreight.com; david.stubbs@drsl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk; michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim; Gibbons, Nick; tony.sadler@virgintrains.co.uk

Cc: Schwartz Eddy; Jones Jacqueline (NAU Leeds); Walgate David; Alebon J (Network Rail); Dunster Jonathan; Adrian Thear (Network Rail); McDowell Les; Maple Simon

Subject: Week 40 - MD101 - Rugby (Informal Decision)

Week 40 – MD101 – Rugby (Informal Decision)

Dear All,

Further to my e-mail dated Wednesday 12th December an operator has asked for the full 10 working days to respond to this request. Therefore in accordance with this proposal you have until Friday 28th December to respond to Network Rail.

Network Rail is grateful for the feedback received so far from operators and the information on how this late notice request affects operators' timetabling arrangements over the Christmas period. The Rugby Project have sought the 26hr extension as a result of issues with:

- the late approval of Overhead Line design,
- adverse weather conditions preventing crane work in recent weekends,
- failure of infrastructure at Rugby North Jn.

The work planned in the extension is critical to the completion of the infrastructure necessary to run train services after the signalling commissioning. The Rugby Project seeks to deliver the delayed overhead line works within the existing Christmas block, but will use the extension to allow the 'wheels free' Signalling Commissioning to be successfully completed.

Given the particular circumstances of this situation we consider that there is an overwhelming case to proceed with the extended possession on the basis that it is in the longer term interests of passengers, freight users and the industry (even taking into account the realistic worst possible impact on any operator that has yet to respond). In that case we feel that it is desirable to provide information as soon as possible. Therefore, by this letter we informally give you advance warning that once the 10 working days have elapsed we will be formally notifying you of our decision to go ahead with the extension of the blockade to 0520 Tuesday 1st January 2008.

Taking this into account and the impact this proposal has to operators, Network Rail believes that the right thing is therefore to start the timetable re-planning works and inform the public and freight customers of this disruption.

LNW (S) Draft WON Week 40 item 4, amended to read:

PPS Ref: P2007/933798

Week 40 Monday 24th December 2007 to Tuesday 1st January 2008

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Lines: All BLOCKED

and

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Lines: Down and Up Main BLOCKED

and

At/Between: Rugby Trent Valley Jn and Brandon

Lines: Down and Up Coventry BLOCKED

and

At/Between: Rugby Trent Valley Jn and Shilton

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0520 Tue 1/1

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0300 Fri 28/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0300 Fri 28/12 to 0140 Sun 30/12

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 0140 Sun 30/12 to 0915 Sun 30/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0915 Sun 30/12 to 0520 Tue 1/1

Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN. 2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 TUE 1/1 NO ACCESS DAVENTRY IRFT. 0300 FRI 28/12 – 0520 TUE 1/1 TRAINS TO/FROM THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY OR BIRMINGHAM INTERNATIONAL, RAIL REPLACEMENT ROAD SERVICE TO OPERATE.

If you require further information or if I can help further, please give me a call.

Regards

Matt

Network Access Unit

APPENDIX D:

An e-mail from EWS to the Access Disputes Committee Secretary detailing the objections to the possession proposal dated 14th December 2007 (part).

From: Gibbons, Nick

Sent: 14 December 2007 16:02

To: Tony Skilton

Cc: Allen, Matthew (Network Rail); Adrian Thear (Network Rail); Andy Bliss; Oatway, Nigel; Smith, Graham; les.mcdowell@networkrail.co.uk; Lewis, Richard; White, Graham(1); Wileman, Tim

Subject: FW: Week 40 - MD101 - Rugby (Informal Decision)

Tony,

In accordance with Network Code Condition D2.1.10 and National Rules of the Plan Section 3, EWS wish to refer the decisions made by Network Rail to implement those possessions shown below. This referral falls within the parameters set out in Network Code Condition D.5.1.2 for appeals to the Timetable Disputes Panel.

It should be noted that the operator who asked for the full 10 days to respond was EWS as we have traffic that will be operating through the affected area. It should also be noted from the content of the email that whatever our response eventually is – and it will be to decline the proposal – Network Rail have already made the decision that they are going to take the possession anyway. I would remind both yourself and Network Rail of the Regulator's decision in respect to EWS and Freightliner's appeal to the determination of hearing under reference TTP102.

From the Panel's determination

'Section 3.1.3 of PARTP did not directly empower Network Rail to take specific action nor did it create any right, for Network Rail or EWS or FHH, to circumvent the need to reach agreement through a process of consultation or to impose one point of view (Determination paragraphs 18 to 19)'

From the grounds and conduct of the appeals before ORR

'The Panel failed to take proper account of its own findings that Network Rail was not entitled to impose the possessions and had acted unreasonably.'

From compliance with PARTP requirements

'.....Further, the Panel does not appear to have considered whether Network Rail took due account of EWS or FHH business concerns. Section 3.1.3, which operators only so as to accelerate the timescales involved in the consultation process, does not remove the requirement for Network Rail to take all these considerations into account'

From compliance with the ADRR

'.....to the effect that Network Rail had no legal entitlement to impose the possessions unilaterally and without regard for the requirements of PARTP.'

For the avoidance of doubt EWS has planned the operation of a number of services on the proposed day of disruption and informed its customers. The proposal to extend the possession by a further 24 hours would preclude the operation of these trains and therefore cause EWS to fail its customers having assured them of services.

Nick Gibbons

National Planning Manager

EWS

0870 140 5129 (Office) 07801 905617 (Mobile)

TTP195

APPENDIX E:

An e-mail response from EWS to the NAU setting out the reasons for the declination of the proposed possession extension

From: Wileman, Tim
Sent: 20 December 2007 09:45
To: Allen, Matthew (Network Rail)
Cc: Wileman, Tim
Subject: RE: Week 40 - MD101 - Rugby (Proposal)

Matt,

EWS declines this amended proposal as being detrimental to its business. Our customers have already planned to run the following four WTT services to Daventry on Monday 31st December:-

6G56 0348 MO Wembley – Daventry – Bescot
6B61 0915 MO Bescot – Daventry
6G62 1126 MO Daventry – Bescot
6A42 1233 MO Arpley – Bescot – Wembley

Regards,

Tim

Tim Wileman
Engineering Planning
EWS

Tel: 0870 140 5095

APPENDIX F:

An e-mail from the NAU to affected operators of the Network Rail Decision Document dated 28th December 2007 detailing Network Rail's final proposal for the possession extension.

From: Allen, Matthew (Network Rail)

Sent: 28 December 2007 11:35

To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); Ian.Kapur@gbrailfreight.com; david.stubbs@drsl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk; michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim; Gibbons, Nick

Cc: Smith Ian (PLAN MGR); Thompson Paul (Train Plan B'ham); McDowell Les; Partridge C (Network Rail); Alebon J (Network Rail)

Subject: Week 40 - MD101 - Rugby (Decision)

Week 40 – MD101 – Rugby (Informal Decision)

Dear All,

Further to my e-mail dated Friday 14th December outlined below are the confirmed details for the extension to the Rugby all lines Christmas/New Year BLOCKADE.

LNW (S) Draft WON Week 40 item 4, amended to read:

PPS Ref: P2007/933798

Week 40 Monday 24th December 2007 to Tuesday 1st January 2008

At/Between: Rugby South Jn and Trent Valley Jn

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and

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Times: 0300 Mon 31/12 to 0520 Tue 1/1

Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN.
2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS
NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH
DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 MON 31/12 NO
ACCESS DAVENTRY IRFT. 0300 FRI 28/12 – 0520 TUE 1/1 TRAINS TO/FROM
THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE
WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY
OR BIRMINGHAM INTERNATIONAL, RAIL REPLACEMENT ROAD SERVICE TO
OPERATE. 0300 MON 31/12 TO 0520 TUE 1/1 ACCESS DIRFT FROM THE
NORTHAMPTON DIRECTION ONLY.

If you require further information or if I can help further, please give me a call.

Regards

Matt

Network Access Unit

TTP195

APPENDIX G:

An e-mail from EWS referring the proposed possession to Access Disputes Committee for decision dated 28th December 2007 (part).

From: Gibbons, Nick

Sent: 28 December 2007 11:49

To: 'Tony Skilton'

Cc: Allen, Matthew (Network Rail); Adrian Thear (Network Rail); 'Andy Bliss'; Oatway, Nigel; Smith, Graham; 'les.mcdowell@networkrail.co.uk'; Lewis, Richard; White, Graham(1); Wileman, Tim; Paul Thomas

Subject: RE: Week 40 - MD101 - Rugby (Informal Decision)

Tony,

Further to my email of 14th December below, I have now received confirmation of Network Rail's formal decision to take the proposed possession extension as described in the attached email.

In accordance with Network Code Condition D2.1.10 and National Rules of the Plan Section 3, EWS wish to refer the decisions made by Network Rail to implement the extended possessions as shown in the attached. This referral falls within the parameters set out in Network Code Condition D.5.1.2 for appeals to the Timetable Disputes Panel.

This confirms EWS's intent to formally refer this possession extension following Network Rail's 'Informal Decision' of December 14th 2007.

Nick Gibbons

National Planning Manager

EWS

0870 140 5129 (Office)

07801 905617 (Mobile)

TTP195

**APPENDIX H:
Procedure for Altering Rules of the Route or Rules of the Plan other than through the
Twice-Yearly Process Having Effect from a Passenger Change Date**

This is available electronically, but has been submitted in hard copy

TTP195

**APPENDIX I:
Timetabling Panel of the Access Disputes Committee, Determination in respect of
reference TTP102**

This is available electronically, but has been submitted in hard copy

TTP195

**APPENDIX J:
The Office of Rail Regulation's determination of appeals by English, Welsh & Scottish
Railway and Freightliner Heavy Haul Limited against Determination TTP102 of the
Timetabling Panel of the Access Disputes Committee under the Network Code**

This is available electronically, but has been submitted in hard copy.

APPENDIX 'A'

Wileman, Tim

From: Allen, Matthew (Network Rail)
Sent: 12 December 2007 09:32
To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); Ian.Kapur@gbraillfreight.com; david.stubbs@drsl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk; michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim
Cc: Schwartz Eddy; Jones Jacqueline (NAU Leeds); Walgate David; Alebon J (Network Rail)
Subject: Week 40 - MD101 - Rugby (Proposal)

Week 40 – MD101 – Rugby (Proposal)

Dear All,

I have been approached by colleagues in the WCRM project for an extension of 24hrs to the Rugby Christmas all lines BLOCKADE. The late request is due to late completions with overhead line design and approval, and loss of critical work in weeks 35 & 36 due to adverse weather conditions and failure of vital infrastructure at Rugby North Jn.

Please could I seek your support for the following short notice possession amendment (proposed alterations marked in bold) ?

LNW (S) Draft WON Week 40 item 4, amended to read:

PPS Ref: P2007/933798

Week 40 Monday 24th December 2007 to Tuesday 1st January 2008

At/Between: Rugby South Jn and Trent Valley Jn

Lines: All BLOCKED

and

At/Between: Hanslope Jn and Rugby South Jn (via Weedon)

Lines: Down and Up Main BLOCKED

and

At/Between: Rugby Trent Valley Jn and Brandon

Lines: Down and Up Coventry BLOCKED

and

At/Between: Rugby Trent Valley Jn and Shilton

Lines: All BLOCKED

Times: 2330 Mon 24/12 to **0520 Tue 1/1**

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0300 Fri 28/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0300 Fri 28/12 to 0140 Sun 30/12

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 0140 Sun 30/12 to 0915 Sun 30/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0915 Sun 30/12 to **0520 Tue 1/1**

Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN. 2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 TUE 1/1 NO ACCESS DAVENTRY IRFT. **0300 FRI 28/12 – 0520 TUE 1/1 TRAINS TO/FROM THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY OR BIRMINGHAM INTERNATONAL, RAIL REPLACEMENT ROAD SERVICE TO OPERATE.**

Please note that due to the very late notice of this request the period of industry consultation has been reduced to two days.

This email is in accordance with Access Condition D2.1.10 and relates to Section 3.1 of National Rules of the Plan being the Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change. I look forward to receiving your support for the above proposal by Friday 14th December 2007.

Regards

Matt
Network Access Unit

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Network Rail Infrastructure Limited registered in England and Wales No. 2904587,

APPENDIX 'B'

Gibbons, Nick

From: Wileman, Tim
Sent: 13 December 2007 14:07
To: Allen, Matthew (Network Rail)
Cc: Adrian Thear (Network Rail); 'Andrew.Bliss@networkrail.co.uk'; Gibbons, Nick
Subject: RE: Week 40 - MD101 - Rugby (Proposal)
Importance: High

Matt,

EWS will not respond to this proposal by tomorrow as it is only a two day response period. We need to have sufficient time to consult with our individual Business Units before we can respond.

EWS will respond within the Industry agreed deadline of 10 working days as laid out in In the National Rules of the Plan section 3.4.1

Regards,

Tim

Tim Wileman
 Engineering Planning
 EWS

Tel: 0870 140 5095

From: Allen, Matthew (Network Rail)
Sent: 12 December 2007 09:32
To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); Ian.Kapur@gbrailfreight.com; david.stubbs@drsl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk; michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim
Cc: Schwartz Eddy; Jones Jacqueline (NAU Leeds); Walgate David; Alebon J (Network Rail)
Subject: Week 40 - MD101 - Rugby (Proposal)

Week 40 – MD101 – Rugby (Proposal)

Dear All,

I have been approached by colleagues in the WCRM project for an extension of 24hrs to the Rugby Christmas all lines BLOCKADE. The late request is due to late completions with overhead line design and approval, and loss of critical work in weeks 35 & 36 due to adverse weather conditions and failure of vital infrastructure at Rugby North Jn.

Please could I seek your support for the following short notice possession amendment (proposed alterations marked in bold) ?

LNW (S) Draft WON Week 40 item 4, amended to read:

PPS Ref: P2007/933798

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and

At/Between: Rugby Trent Valley Jn and Brandon

Lines: Down and Up Coventry BLOCKED

and

At/Between: Rugby Trent Valley Jn and Shilton

Lines: All BLOCKED

Times: 2330 Mon 24/12 to **0520 Tue 1/1**

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0300 Fri 28/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0300 Fri 28/12 to 0140 Sun 30/12

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 0140 Sun 30/12 to 0915 Sun 30/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0915 Sun 30/12 to **0520 Tue 1/1**

Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN. 2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 TUE 1/1 NO ACCESS DAVENTRY IRFT. **0300 FRI 28/12 – 0520 TUE 1/1 TRAINS TO/FROM THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY OR BIRMINGHAM INTERNATIONAL, RAIL REPLACEMENT ROAD SERVICE TO OPERATE.**

Please note that due to the very late notice of this request the period of industry consultation has been reduced to two days.

This email is in accordance with Access Condition D2.1.10 and relates to Section 3.1 of National Rules of the Plan being the Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change. I look forward to receiving your support for the above proposal by Friday 14th December 2007.

Regards

Matt
Network Access Unit

14/02/2008

Appendix 'C'

Gibbons, Nick

From: Allen, Matthew (Network Rail)
Sent: 14 December 2007 14:55
To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); lan.Kapur@gbraifreight.com; david.stubbs@drsl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk; michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim; Gibbons, Nick; tony.sadler@virgintrains.co.uk
Cc: Schwartz Eddy; Jones Jacqueline (NAU Leeds); Walgate David; Alebon J (Network Rail); Dunster Jonathan; Adrian Thear (Network Rail); McDowell Les; Maple Simon
Subject: Week 40 - MD101 - Rugby (Informal Decision)

Week 40 – MD101 – Rugby (Informal Decision)

Dear All,

Further to my e-mail dated Wednesday 12th December an operator has asked for the full 10 working days to respond to this request. Therefore in accordance with this proposal you have until Friday 28th December to respond to Network Rail.

Network Rail is grateful for the feedback received so far from operators and the information on how this late notice request affects operators' timetabling arrangements over the Christmas period. The Rugby Project have sought the 26hr extension as a result of issues with:

- the late approval of Overhead Line design,
- adverse weather conditions preventing crane work in recent weekends,
- failure of infrastructure at Rugby North Jn.

The work planned in the extension is critical to the completion of the infrastructure necessary to run train services after the signalling commissioning. The Rugby Project seeks to deliver the delayed overhead line works within the existing Christmas block, but will use the extension to allow the 'wheels free' Signalling Commissioning to be successfully completed.

Given the particular circumstances of this situation we consider that there is an overwhelming case to proceed with the extended possession on the basis that it is in the longer term interests of passengers, freight users and the industry (even taking into account the realistic worst possible impact on any operator that has yet to respond). In that case we feel that it is desirable to provide information as soon as possible. Therefore, by this letter we informally give you advance warning that once the 10 working days have elapsed we will be formally notifying you of our decision to go ahead with the extension of the blockade to 0520 Tuesday 1st January 2008.

Taking this into account and the impact this proposal has to operators, Network Rail believes that the right thing is therefore to start the timetable re-planning works and inform the public and freight customers of this disruption.

LNW (S) Draft WON Week 40 item 4, amended to read:

PPS Ref: P2007/933798

Week 40 Monday 24th December 2007 to Tuesday 1st January 2008

14/02/2008

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Lines: All BLOCKED

and

At/Between: Hanslope Jn and Rugby South Jn (via Weedon)

Lines: Down and Up Main BLOCKED

and

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At/Between: Rugby Trent Valley Jn and Shilton

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0520 Tue 1/1

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0300 Fri 28/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0300 Fri 28/12 to 0140 Sun 30/12

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 0140 Sun 30/12 to 0915 Sun 30/12

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Times: 0915 Sun 30/12 to 0520 Tue 1/1

Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN. 2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 TUE 1/1 NO ACCESS DAVENTRY IRFT. 0300 FRI 28/12 – 0520 TUE 1/1 TRAINS TO/FROM THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY OR BIRMINGHAM INTERNATONAL, RAIL REPLACEMENT ROAD SERVICE TO OPERATE.

If you require further information or if I can help further, please give me a call.

Regards

Matt
Network Access Unit

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14/02/2008

Appendix 'D'

Gibbons, Nick

From: Gibbons, Nick
Sent: 14 December 2007 16:02
To: Tony Skilton
Cc: Matt Allen; Adrian Thear; Andy Bliss; Nigel Oatway; Graham Smith; les.mcdowell@networkrail.co.uk; Lewis, Richard; White, Graham(1); Wileman, Tim
Subject: FW: Week 40 - MD101 - Rugby (Informal Decision)

Tony,

In accordance with Network Code Condition D2.1.10 and National Rules of the Plan Section 3, EWS wish to refer the decisions made by Network Rail to implement those possessions shown below. This referral falls within the parameters set out in Network Code Condition D.5.1.2 for appeals to the Timetable Disputes Panel.

It should be noted that the operator who asked for the full 10 days to respond was EWS as we have traffic that will be operating through the affected area. It should also be noted from the content of the email that whatever our response eventually is – and it will be to decline the proposal – Network Rail have already made the decision that they are going to take the possession anyway. I would remind both yourself and Network Rail of the Regulator's decision in respect to EWS and Freightliner's appeal to the determination of hearing under reference TTP102.

From the Panel's determination

'Section 3.1.3 of PARTP did not directly empower Network Rail to take specific action nor did it create any right, for Network Rail or EWS or FHH, to circumvent the need to reach agreement through a process of consultation or to impose one point of view (Determination paragraphs 18 to 19)'

From the grounds and conduct of the appeals before ORR

'The Panel failed to take proper account of its own findings that Network Rail was not entitled to impose the possessions and had acted unreasonably.'

From compliance with PARTP requirements

'.....Further, the Panel does not appear to have considered whether Network Rail took due account of EWS or FHH business concerns. Section 3.1.3, which operators only so as to accelerate the timescales involved in the consultation process, does not remove the requirement for Network Rail to take all these considerations into account'

From compliance with the ADRR

'.....to the effect that Network Rail had no legal entitlement to impose the possessions unilaterally and without regard for the requirements of PARTP.'

For the avoidance of doubt EWS has planned the operation of a number of services on the proposed day of disruption and informed its customers. The proposal to extend the possession by a further 24 hours would preclude the operation of these trains and therefore cause EWS to fail its customers having assured them of services.

Nick Gibbons
 National Planning Manager
 EWS
 0870 140 5129 (Office)
 07801 905617 (Mobile)

From: Allen, Matthew (Network Rail)
Sent: 14 December 2007 14:55
To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); Ian.Kapur@gbraillfreight.com; david.stubbs@drrl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk;

14/02/2008

michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim; Gibbons, Nick; tony.sadler@virgintrains.co.uk
Cc: Schwartz Eddy; Jones Jacqueline (NAU Leeds); Walgate David; Alebon J (Network Rail); Dunster Jonathan; Adrian Thear (Network Rail); McDowell Les; Maple Simon
Subject: Week 40 - MD101 - Rugby (Informal Decision)

Week 40 – MD101 – Rugby (Informal Decision)

Dear All,

Further to my e-mail dated Wednesday 12th December an operator has asked for the full 10 working days to respond to this request. Therefore in accordance with this proposal you have until Friday 28th December to respond to Network Rail.

Network Rail is grateful for the feedback received so far from operators and the information on how this late notice request affects operators' timetabling arrangements over the Christmas period. The Rugby Project have sought the 26hr extension as a result of issues with:

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The work planned in the extension is critical to the completion of the infrastructure necessary to run train services after the signalling commissioning. The Rugby Project seeks to deliver the delayed overhead line works within the existing Christmas block, but will use the extension to allow the 'wheels free' Signalling Commissioning to be successfully completed.

Given the particular circumstances of this situation we consider that there is an overwhelming case to proceed with the extended possession on the basis that it is in the longer term interests of passengers, freight users and the industry (even taking into account the realistic worst possible impact on any operator that has yet to respond). In that case we feel that it is desirable to provide information as soon as possible. Therefore, by this letter we informally give you advance warning that once the 10 working days have elapsed we will be formally notifying you of our decision to go ahead with the extension of the blockade to 0520 Tuesday 1st January 2008.

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and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0300 Fri 28/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0300 Fri 28/12 to 0140 Sun 30/12

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 0140 Sun 30/12 to 0915 Sun 30/12

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At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0915 Sun 30/12 to 0520 Tue 1/1

Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN. 2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 TUE 1/1 NO ACCESS DAVENTRY IRFT. 0300 FRI 28/12 – 0520 TUE 1/1 TRAINS TO/FROM THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY OR BIRMINGHAM INTERNATIONAL, RAIL REPLACEMENT ROAD SERVICE TO OPERATE.

If you require further information or if I can help further, please give me a call.

Regards

Matt

Network Access Unit

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APPENDIX 'E'

Wileman, Tim

From: Wileman, Tim
Sent: 20 December 2007 09:45
To: Allen, Matthew (Network Rail)
Cc: Wileman, Tim
Subject: RE: Week 40 - MD101 - Rugby (Proposal)

Tracking:	Recipient	Delivery	Read
	Allen, Matthew (Network Rail)		
	Wileman, Tim	Delivered: 20/12/07 09:45	Read: 20/12/07 11:17

Matt,

EWS declines this amended proposal as being detrimental to its business. Our customers have already planned to run the following four WTT services to Daventry on Monday 31st December:-

6G56 0348 MO Wembley – Daventry – Bescot
 6B61 0915 MO Bescot – Daventry
 6G62 1126 MO Daventry – Bescot
 6A42 1233 MO Arpley – Bescot – Wembley

Regards,

Tim

Tim Wileman
 Engineering Planning
 EWS

Tel: 0870 140 5095

From: Allen, Matthew (Network Rail)
Sent: 12 December 2007 09:32
To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); Ian.Kapur@gbrailfreight.com; david.stubbs@drsl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk; michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim
Cc: Schwartz Eddy; Jones Jacqueline (NAU Leeds); Walgate David; Alebon J (Network Rail)
Subject: Week 40 - MD101 - Rugby (Proposal)

Week 40 – MD101 – Rugby (Proposal)

Dear All,

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Please could I seek your support for the following short notice possession amendment (proposed alterations marked in bold) ?

LNW (S) Draft WON Week 40 item 4, amended to read:

14/02/08

PPS Ref: P2007/933798

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and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0300 Fri 28/12 to 0140 Sun 30/12

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

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Please note that due to the very late notice of this request the period of industry consultation has been reduced to two days.

This email is in accordance with Access Condition D2.1.10 and relates to Section 3.1 of National Rules of the Plan being the Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change. I look forward to receiving your support for the above proposal by Friday 14th December 2007.

Regards

14/02/08

Matt
Network Access Unit

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Network Rail Infrastructure Limited registered in England and Wales No. 2904587,

APPENDIX 'F'

Gibbons, Nick

From: Allen, Matthew (Network Rail)
Sent: 28 December 2007 11:35
To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); Ian.Kapur@gbraillfreight.com; david.stubbs@drsl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk; michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim; Gibbons, Nick
Cc: Smith Ian (PLAN MGR); Thompson Paul (Train Plan B'ham); McDowell Les; Partridge C (Network Rail); Alebon J (Network Rail)
Subject: Week 40 - MD101 - Rugby (Decision)

Week 40 – MD101 – Rugby (Informal Decision)

Dear All,

Further to my e-mail dated Friday 14th December outlined below are the confirmed details for the extension to the Rugby all lines Christmas/New Year BLOCKADE.

LNW (S) Draft WON Week 40 item 4, amended to read:

PPS Ref: P2007/933798

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Times: 2330 Mon 24/12 to 0300 Fri 28/12

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Times: 0140 Sun 30/12 to 0915 Sun 30/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0915 Sun 30/12 to 0300 Mon 31/12

14/02/2008

and

At/Between: Daventry South Jn and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0300 Mon 31/12 to 0520 Tue 1/1

Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN. 2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 MON 31/12 NO ACCESS DAVENTRY IRFT. 0300 FRI 28/12 – 0520 TUE 1/1 TRAINS TO/FROM THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY OR BIRMINGHAM INTERNATIONAL, RAIL REPLACEMENT ROAD SERVICE TO OPERATE. 0300 MON 31/12 TO 0520 TUE 1/1 ACCESS DIRFT FROM THE NORTHAMPTON DIRECTION ONLY.

If you require further information or if I can help further, please give me a call.

Regards

Matt
Network Access Unit

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Network Rail Infrastructure Limited registered in England and Wales No. 2904587,

APPENDIX 'G'

Gibbons, Nick

From: Gibbons, Nick
Sent: 28 December 2007 11:49
To: 'Tony Skilton'
Cc: 'Matt Allen'; 'Adrian Thear'; 'Andy Bliss'; Oatway, Nigel; Smith, Graham; 'les.mcdowell@networkrail.co.uk'; Lewis, Richard; White, Graham(1); Wileman, Tim; Paul Thomas
Subject: RE: Week 40 - MD101 - Rugby (Informal Decision)
Attachments: Week 40 - MD101 - Rugby (Decision)

Tony,

Further to my email of 14th December below, I have now received confirmation of Network Rail's formal decision to take the proposed possession extension as described in the attached email.

In accordance with Network Code Condition D2.1.10 and National Rules of the Plan Section 3, EWS wish to refer the decisions made by Network Rail to implement the extended possessions as shown in the attached. This referral falls within the parameters set out in Network Code Condition D.5.1.2 for appeals to the Timetable Disputes Panel.

This confirms EWS's intent to formally refer this possession extension following Network Rail's 'Informal Decision' of December 14th 2007.

Nick Gibbons
National Planning Manager
EWS
0870 140 5129 (Office)
07801 905617 (Mobile)

From: Gibbons, Nick
Sent: 14 December 2007 16:02
To: Tony Skilton
Cc: Matt Allen; Adrian Thear; Andy Bliss; Nigel Oatway; Graham Smith; les.mcdowell@networkrail.co.uk; Lewis, Richard; White, Graham(1); Wileman, Tim
Subject: FW: Week 40 - MD101 - Rugby (Informal Decision)

Tony,

In accordance with Network Code Condition D2.1.10 and National Rules of the Plan Section 3, EWS wish to refer the decisions made by Network Rail to implement those possessions shown below. This referral falls within the parameters set out in Network Code Condition D.5.1.2 for appeals to the Timetable Disputes Panel.

It should be noted that the operator who asked for the full 10 days to respond was EWS as we have traffic that will be operating through the affected area. It should also be noted from the content of the email that whatever our response eventually is – and it will be to decline the proposal – Network Rail have already made the decision that they are going to take the possession anyway. I would remind both yourself and Network Rail of the Regulator's decision in respect to EWS and Freightliner's appeal to the determination of hearing under reference TTP102.

From the Panel's determination

'Section 3.1.3 of PARTP did not directly empower Network Rail to take specific action nor did it create any right, for Network Rail or EWS or FHH, to circumvent the need to reach agreement through a process of consultation or to impose one point of view (Determination paragraphs 18 to 19)'

From the grounds and conduct of the appeals before ORR

'The Panel failed to take proper account of its own findings that Network Rail was not entitled to impose the possessions and had acted unreasonably.'

14/02/2008

From compliance with PARTP requirements

'.....Further, the Panel does not appear to have considered whether Network Rail took due account of EWS or FHH business concerns. Section 3.1.3, which operators only so as to accelerate the timescales involved in the consultation process, does not remove the requirement for Network Rail to take all these considerations into account'

From compliance with the ADRR

'.....to the effect that Network Rail had no legal entitlement to impose the possessions unilaterally and without regard for the requirements of PARTP.'

For the avoidance of doubt EWS has planned the operation of a number of services on the proposed day of disruption and informed its customers. The proposal to extend the possession by a further 24 hours would preclude the operation of these trains and therefore cause EWS to fail its customers having assured them of services.

Nick Gibbons
National Planning Manager
EWS
0870 140 5129 (Office)
07801 905617 (Mobile)

From: Allen, Matthew (Network Rail)

Sent: 14 December 2007 14:55

To: barretts@freightliner.co.uk; Susan.Nichol@virgintrains.co.uk; Janet Jones; Mark Haslam (E-mail); Ian.Kapur@gbrailfreight.com; david.stubbs@drsl.co.uk; barretts@freightliner.co.uk; paul.orchard@fastline-uk.com; HassallC@freightliner.co.uk; Bevis.Thomas@chilternrailways.co.uk; michael.webb@eastmidlandstrains.co.uk; stuart.morris@firstgroup.com; Lawton, Andy; Wileman, Tim; Gibbons, Nick; tony.sadler@virgintrains.co.uk

Cc: Schwartz Eddy; Jones Jacqueline (NAU Leeds); Walgate David; Alebon J (Network Rail); Dunster Jonathan; Adrian Thear (Network Rail); McDowell Les; Maple Simon

Subject: Week 40 - MD101 - Rugby (Informal Decision)

Week 40 – MD101 – Rugby (Informal Decision)

Dear All,

Further to my e-mail dated Wednesday 12th December an operator has asked for the full 10 working days to respond to this request. Therefore in accordance with this proposal you have until Friday 28th December to respond to Network Rail.

Network Rail is grateful for the feedback received so far from operators and the information on how this late notice request affects operators' timetabling arrangements over the Christmas period. The Rugby Project have sought the 26hr extension as a result of issues with:

- the late approval of Overhead Line design,
- adverse weather conditions preventing crane work in recent weekends,
- failure of infrastructure at Rugby North Jn.

The work planned in the extension is critical to the completion of the infrastructure necessary to run train services after the signalling commissioning. The Rugby Project seeks to deliver the delayed overhead line works within the existing Christmas block, but will use the extension to allow the 'wheels free' Signalling Commissioning to be successfully completed.

Given the particular circumstances of this situation we consider that there is an overwhelming case to proceed with the extended possession on the basis that it is in the

14/02/2008

longer term interests of passengers, freight users and the industry (even taking into account the realistic worst possible impact on any operator that has yet to respond). In that case we feel that it is desirable to provide information as soon as possible. Therefore, by this letter we informally give you advance warning that once the 10 working days have elapsed we will be formally notifying you of our decision to go ahead with the extension of the blockade to 0520 Tuesday 1st January 2008.

Taking this into account and the impact this proposal has to operators, Network Rail believes that the right thing is therefore to start the timetable re-planning works and inform the public and freight customers of this disruption.

LNW (S) Draft WON Week 40 item 4, amended to read:

PPS Ref: P2007/933798

Week 40 Monday 24th December 2007 to Tuesday 1st January 2008

At/Between: Rugby South Jn and Trent Valley Jn

Lines: All BLOCKED

and

At/Between: Hanslope Jn and Rugby South Jn (via Weedon)

Lines: Down and Up Main BLOCKED

and

At/Between: Rugby Trent Valley Jn and Brandon

Lines: Down and Up Coventry BLOCKED

and

At/Between: Rugby Trent Valley Jn and Shilton

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0520 Tue 1/1

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 2330 Mon 24/12 to 0300 Fri 28/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0300 Fri 28/12 to 0140 Sun 30/12

and

At/Between: Hanslope Jn and Rugby South Jn (via Northampton)

Lines: All BLOCKED

Times: 0140 Sun 30/12 to 0915 Sun 30/12

and

At/Between: Althorpe Park and Rugby South Jn

Lines: Down and Up Northampton BLOCKED

Times: 0915 Sun 30/12 to 0520 Tue 1/1

Work: Remodelling works, signal and OLE commissioning

Traffic Remarks: 2330 MON 24/12 - 0600 THU 27/12 CHRISTMAS SHUTDOWN. 2330 MON 24/12 - 0300 FRI 28/12 AND 0140 SUN - 0915 SUN 30/12 NO ACCESS NORTHAMPTON STATION, NORTHAMPTON RIVER SIDINGS, KINGS HEATH DEPOT, NORTHAMPTON CASTLE YARD. 2330 MON 24/12 - 0300 TUE 1/1 NO ACCESS DAVENTRY IRFT. 0300 FRI 28/12 - 0520 TUE 1/1 TRAINS TO/FROM THE TO START/TERMINATE AT NORTHAMPTON AND TRAINS TO/FROM THE WEST MIDLANDS AND THE NORTH WEST TO START/TERMINATE COVENTRY OR BIRMINGHAM INTERNATIONAL, RAIL REPLACEMENT ROAD SERVICE TO OPERATE.

If you require further information or if I can help further, please give me a call.

Regards

Matt
Network Access Unit

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Network Rail Infrastructure Limited registered in England and Wales No. 2904587,

Section 3 Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change Date

3.1. Introduction

- 3.1.1. This Procedure has been devised in accordance with Network Code Condition D 2.1.10 to provide a means of altering Rules of the Route and/or Rules of the Plan other than through the twice-yearly process having effect from the Passenger Change Dates. It supersedes the interim arrangements included within certain Train Operators' Track Access Agreements and within certain Regional Rules of the Route and Rules of the Plan documents.
- 3.1.2. This procedure will be used by Network Rail to add, substitute or delete engineering access opportunities contained within Rules of the Route. All possessions so agreed will be regarded as being within Rules of the Route. Network Rail is committed to the achievement of the Informed Traveller deadlines resulting in details of amended train services being available 12 weeks before the date of operation, consequently, wherever possible, Network Rail will consult with Train Operators regarding possessions and other capacity restrictions which are disruptive to agreed train paths in sufficient time to allow details of those disruptive possessions to be included in a Confirmed Period Possessions Plan which will be published 26 weeks prior to the start of each 4-week period.
- 3.1.3. Where a need arises to amend Rules of the Route/Plan to cater for urgent safety requirements or other emergency situations, all parties concerned will co-operate in accelerating the normal timescales in this Procedure commensurate with the urgency of the circumstances.

3.2. Changes Initiated by Train Operators

- 3.2.1. A Train Operator may propose changes to any part of ROTR/P affecting or likely to affect that Train Operator.
- 3.2.2. The Train Operator shall submit a written statement of the proposed change and a concise explanation of the reasons for that change:
- 3.2.2.1. for ROTP, to its Network Rail lead Train Planning Manager who will acknowledge receipt and immediately copy the proposal to the Network Rail Train Planning Manager responsible for the relevant section of ROTP if not the lead TPM.
 - 3.2.2.2. for ROTR, to the Network Access Unit Manager, who will acknowledge receipt.
- 3.2.3. Within 5 working days of receipt of the proposed change, Network Rail shall notify to all Train Operators affected details of the proposed change and Network Rail's comments including concise reasons for the change and a statement as to whether Network Rail supports the proposal.

3.3. Changes Initiated by Network Rail

- 3.3.1. Network Rail may propose changes to any part of ROTR/P.
- 3.3.2. Network Rail shall notify to all Train Operators affected details of the proposed change including a concise explanation of its reasons. Proposed changes to ROTR arising before publication of the Draft Period Possessions Plan shall be notified by Network Rail in a single coordinated document to be issued each 4 weeks.

3.4. Response by Train Operators

- 3.4.1. Each Train Operator receiving notification of a proposed change in accordance with paragraphs 2.3 or 3.2 above will consider that proposal and respond to Network Rail within 10 working days from receipt of the notification, indicating:
- 3.4.1.1. its agreement to the proposed change or
 - 3.4.1.2. details of a counter-proposal and an explanation of its reasons or
 - 3.4.1.3. in the case of ROP items such as section running times, a request that a joint investigation is carried out.
- 3.4.2. Any Train Operator whose response is not received by Network Rail within 10 working days will be deemed to have agreed to the proposed change and will forfeit any right of Appeal.

3.5. Decision by Network Rail

- 3.5.1. Network Rail shall give due consideration to responses received from Train Operators in accordance with paragraphs 4.1 and 4.2 above and shall decide which changes, if any, should be made to ROR/P.
- 3.5.2. In reaching its decision, Network Rail shall have due regard to the Decision Criteria in Network Code Condition D6.
- 3.5.3. Network Rail will notify its decision to each affected Train Operator within 5 working days of the last date for receipt of responses under paragraph 4.1 above.
- 3.5.4. Any Train Operator, if it disputes Network Rail's decision, may Appeal to a Timetabling Panel and any such Appeal will be dealt with as though it had been made in accordance with Network Code Condition D2.4.6. Any Appeal must be referred to the Access Disputes Secretary in accordance with the timescales shown in Condition D5.1.2 (i.e. within 7 calendar days of notification by Network Rail of its decision except at Christmas when the period is increased to 14 days).

TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP102

(following a hearing held at Central House, Euston on 6th September 2006)

The Panel

Steve Carter: elected representative for Non-Franchised Passenger Class

Robin Nelson: elected representative for Non-Passenger Class, Band 2

Simon Taylor: elected representative for Franchised Passenger Class, Band 3

Adrian Thear: appointed representative of Network Rail

Panel Chairman: **Bryan Driver**

The nature of the dispute, the Parties, and the jurisdiction of the Panel

1. The Panel was asked jointly by English Welsh and Scottish Railway Ltd (EWS) and Freightliner Heavy Haul Ltd (FHH) to rule that Network Rail Infrastructure Ltd (Network Rail) was not entitled to impose upon the Train Operators two late notice possessions. Network Rail in turn sought a ruling that it was entitled to take the possessions, and to withdraw the offers associated with the trains that would be affected, as the possessions related to works of an urgent safety of the line nature.
2. The disputed possessions proposed are
 - 2.1. 2200 to 0300 on Wednesday/Thursday 6th/7th September, T3 Block of Single Line, Dinnington Junction to Maltby Colliery, and
 - 2.2. 2200 to 0200 on Thursday/ Friday 7th/8th September, T3 Block of both Up and Down lines between Brancliffe East Junction and Dinnington Junction.
3. In each case the possession is required for the purposes of off-loading long welded rails (14 on the first night and 6 on the second) in preparation for the installation of CWR, to replace defective track, over the course of the standard weekend maintenance possession (1530 Saturday to 14:00 Sunday, Sat. 9th/Sun. 10th September 2006).
4. The dispute was brought under Condition D5 of the Network Code, and falls properly to be determined, on the basis of the legal entitlements of the parties, by a Timetabling Panel. It reflected the concern of the Train Operators that the two weeknight possessions were not of themselves justified on safety grounds, given that they were only preparatory work, and that Network Rail had elected to carry out the rail drops at times that suited its convenience, and without any cognisance of the extent of the interruption of traffic, and loss of revenue, to both EWS and FLHH. It was the contention of the Train Operators that Network Rail had acted in a way in which it was not entitled to act.

10. On Friday 25th August, Network Rail, in an e-mail, formally asked the Train Operators for their agreement to the two disputed possessions. EWS replied to this e-mail on 29th August (to the original sender who, by this stage, was on leave) declining agreement to the proposal. On Wednesday 30th August, Network Rail, in a second e-mail repeated the request. In neither instance did the request make reference to possible safety of the line considerations, or to the relationship of the possessions to the possibility that the line was under risk of closure. In addition the application was referenced incorrectly to Condition D2.1.8 of the Network Code, a provision which had been superseded by Condition D2.1.10 of the "yellow pages" (effective since the preparation of the December 2005 timetable).
11. The Train Operators both advised, by return, that they were not prepared to agree to the two proposed disruptive possessions. EWS elaborated reasons why the possessions would be unduly disruptive, and focussed on the difficulties associated with the diversionary route proposed. Critically, these possessions were not of a status that required that they be taken into account in the formulation of either the bids, or the offers, for services using the South Yorkshire Joint Line during week commencing Sunday 3rd September.
12. On 1st September, a further e-mail from Network Rail advised the Train Operators that the two possessions had been *"IMPOSED by Network Rail"*, and including, for the first time, references to *"the safety of the line"*, and *"The track engineer has given dispensation for these rail replacements until 10/09/2006. However, if the work is not completed by then the line will need to be red flagged."* This led to further exchanges, at more senior managerial levels, and a decision on Monday 4th September to seek a determination by a Timetabling Panel.
13. *"EWS and FHH seek a direction from the committee to direct Network Rail to rearrange the CWR train to be available at the beginning of the possession scheduled for Saturday 9th September and to withdraw the two scheduled possessions as listed in Section 2 of this Joint Submission. EWS and FHH are willing to consider an extension of this possession in order to accommodate this change."* The program governing the distribution and un-loading of long rails is defined by the availability of primary CWR wagons. Although, it was stated, Network Rail have a number of such units, only 2 are currently operational, and the others are moth-balled. These two units are programmed far ahead, as is confirmed by the evidence that the dates of the disputed possessions were identified in the report of 4th August. Network Rail stated that any attempt to re-program the CWR train to drop the rails at the beginning of the standard weekend possession would cause disruption of other works planned for the weekend. The Panel were not put in a position to test the reasonableness of that assertion.
14. The Train Operators do not dispute the need, and the urgency, of works sufficient to ensure that the CWR is installed and the line can safely be kept open.

The Panel's findings of entitlement in respect of the Dispute

15. The services affected by the proposed possessions are the subject of Level 2 rights, which confer rights to quantum, but not timings. That said, once these rights have been affirmed through bidding, and once a Train Slot has been offered by Network Rail, and accepted by the Bidder, both parties are deemed *"subject to Conditions D3.4.2, D4.4.2 and D4.7.2, to be bound by that decision"* (Condition D4.7.1).
16. Condition D4.7.2 provides that *"A Train Slot scheduled in the Working Timetable may be varied by Network Rail ;*
 - a) *in accordance with the procedures provided for in Condition D2.1.10...or*

might reasonably be expected to have been shared in fulfilment of the obligations for co-operation in PARTP 3.1.3;

- 22.2. the fact that information known within Network Rail from 4th August could not be proven to have been shared with the Train Operators until Friday 1st September, the date by which the programme of Train Slots for the days in question had been finalised, did not appear to satisfy a test of reasonableness in respect of "*Where a need arises ...to cater for urgent safety requirements or other emergency situations;*"
- 22.3. there had been no opportunity found for timely dialogue aimed at mitigating the degree of hurt to the Train Operators deriving from the proposed possessions, and that therefore
- 22.4. the Panel's "*scope for discretion*" had been unreasonably narrowed.

The Panel's Determination

23. The Panel concluded that its determination should be dominated by
 - 23.1. the applicability of the provisions of PARTP, and
 - 23.2. the circumstances applying as at the date of the hearing.
24. In respect of the circumstances of the case, the Panel finds as decisive that
 - 24.1. the nature of the defects on the South Yorkshire Joint Line are such that, if they are not addressed, the line will require to be closed for all traffic with effect from 10th September 2006;
 - 24.2. the remedy for the defects requires that some 400 yards of track be replaced by CWR;
 - 24.3. the scheduling by Network Rail of the limited number of primary CWR wagons means that there are no available alternatives to two possessions on the nights of Wednesday or Thursday; and that
 - 24.4. the Train Operators have been offered paths some of which will require to be amended or withdrawn (under Condition D4.7) to accommodate these possessions.
25. The Panel is not satisfied that these circumstances, which apply on the day of the hearing (and of the first possession), were inevitable consequences of the identification of the defects in question on 2nd August (i.e. could not have been modified or handled differently), but concludes that there is little practical benefit to re-visiting with hindsight those actions that might otherwise reasonably have been expected to have been done.
26. In respect of the applicability of PARTP, the Panel finds that
 - 26.1. the rail drop possessions are *de facto* "*safety requirements*", but only because the other circumstances now, make it impossible otherwise to carry out the re-railing scheduled for 9/10th September, and which is unquestionably a "*safety requirement*";
 - 26.2. in such circumstances, the obligation on both parties set out in PARTP 3.1.3 "*to cater for urgent safety requirements or other emergency situations*"... "*by co-operating in accelerating the normal timescales in this Procedure commensurate with the urgency of*

Appendix 'J'



OFFICE OF RAIL REGULATION

THE OFFICE OF RAIL REGULATION'S DETERMINATION OF APPEALS BY ENGLISH WELSH AND SCOTTISH RAILWAY LIMITED AND FREIGHTLINER HEAVY HAUL LIMITED AGAINST DETERMINATION TTP102 OF THE TIMETABLING PANEL OF THE ACCESS DISPUTES COMMITTEE UNDER THE NETWORK CODE

DETERMINATION: The Office of Rail Regulation determines that English Welsh and Scottish Railway Limited and Freightliner Heavy Haul Limited's appeals in respect of determination number TTP102 of the Timetabling Panel of the Access Disputes Committee are upheld for the reasons given below.

Introduction

1. This is the determination of the Office of Rail Regulation ("ORR") of the appeals, brought by English Welsh and Scottish Railway Limited ("EWS") and Freightliner Heavy Haul Limited ("FHH") on 20 September 2006. The notices of appeal challenge the determination reached on 6 September 2006 by the Timetabling Panel ("the Panel") of the Access Disputes Committee ("ADC") under Condition D5 of the Network Code in respect of reference TTP102 ("the Determination").

Factual Background

2. On 2 August 2006, Network Rail Infrastructure Limited ("Network Rail") became aware of serious track defects on the South Yorkshire Joint Line between Brancliffe East Junction and Kirk Sandall Junction. The severity of the flaws, classified as Category 1A defects, required them to be rectified within 36 hours, but a dispensation was authorised until 10 September 2006. According to an internal report, produced by Network Rail on 4 August 2006, the defects could only be addressed by replacing the track with Continuous Welded Rail ("CWR") during the standard weekend maintenance possession on Saturday and Sunday 9 and 10 September 2006 (1530 on Saturday to 1400 on Sunday).

3. In an email dated 25 August 2006 and repeated on 30 August 2006, Network Rail formally asked EWS and FHH for their agreement to the following two possessions for the purposes of off-loading the replacement track in preparation for the installation of the CWR over the maintenance weekend:



INVENTOR IN PEOPLE

(a) 2200 to 0300 on Wednesday/Thursday 6/7 September 2006, T3 Block of Single Line, Dinnington Junction to Maltby Colliery; and

(b) 2200 to 0200 on Thursday/Friday 7/8 September, T3 Block of both up and down lines between Brancliffe East Junction and Dinnington Junction.

4. Following EWS and FHH's refusal to agree to the proposal, Network Rail notified them, by email dated 1 September 2006, that it had "imposed" the possessions on grounds related to the "safety of the line". On 4 September 2006, EWS and FHH referred the matter to the Panel, disputing the fact that the possessions were necessary for critical safety work and seeking a direction for the withdrawal of the possessions.

Relevant provisions

5. The possessions were proposed pursuant to Section 3 of the National Rules of the Plan, which provides the '*Procedure for Altering the Rules of the Route/Rules of the Plan*' ("PARTP")¹. Section 3.1.3. of PARTP provides that "*where a need arises to amend the Rules of the Route/Plan to cater for urgent safety requirements or other emergency situations, all parties concerned will co-operate in accelerating the normal timescales in this Procedure commensurate with the urgency of the circumstances*".

6. According to the PARTP, where changes are initiated by Network Rail, it shall (amongst other things):

(a) notify to all Train Operators affected details of the proposed change including a concise explanation of its reasons (Section 3.3.2.);

(b) give due consideration to responses received by Train Operators... and shall decide which changes, if any, should be made (Section 3.5.1.); and

(c) in reaching its decision, have regard to the Decision Criteria in Network Code Condition D6 (Section 3.5.2.).

7. Condition D6 of the Network Code sets out the "Decision Criteria" which consist of the necessity or desirability of thirteen considerations (none of which have priority over the other). The following criteria (taken from the version of Part D of the Network Code published on 16 October 2005 and in

¹ PARTP provides a means of altering the Rules of the Route and/or Rules of Plan other than through the twice - yearly process having effect from the Passenger Change Dates. Available at [http://www.networkrail.co.uk/browse/documents/rules of the route/outrotp7/nrop07p.pdf](http://www.networkrail.co.uk/browse/documents/rules%20of%20the%20route/outrotp7/nrop07p.pdf)



force at the time of the Determination²) could have been relevant to the facts of the present case:

“(a) sharing the capacity, and securing the development, of the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services having regard, in particular, to safety, the effect on the environment of the provision of railway services and the proper maintenance, improvement and enlargement of the Network;

“(c) maintaining and improving the levels of service reliability;

“(d) maintaining, renewing and carrying out other necessary work on or in relation to the Network;

“(f) avoiding material deterioration of the service patterns of operators of trains (namely the train departure and arrival frequencies, stopping patterns, intervals between departures and journey times) which those operators possess at the time of the application of these criteria;

“(n) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing.”

The Panel's determination

8. Following a hearing held on 6 September 2006, the Panel made various findings of fact and law before making its final determination. In particular, the Panel made the following findings.

(a) Section 3.1.3. of PARTP did not directly empower Network Rail to take any specific action nor did it create any right, for Network Rail or EWS and FHH, to circumvent the need to reach agreement through a process of consultation or to impose one point of view (Determination, paragraphs 18 to 19).

(b) Even in event of urgent safety requirements or other emergency situations, a standard of reasonableness applied. The Panel held that “the fact that information known within Network Rail from 4th August could not be proven to have been shared with the Train Operators [EWS and FHH] until 1st September, the date by which the programme of Train Slots for the days in question had been finalised, did not appear to satisfy the requirement of reasonableness in respect of

² Available at http://www.networkrail.co.uk/browse_documents/network_code/network_code_and_incorporated_documents/network_code_and_access_dispute_resolution_rules_archive/network_code_archive/nc_v007_161005.pdf

"Where a need arises ...to cater for urgent safety requirements or other emergency situations" (Determination, paragraphs 20 to 22.2).

(c) The Panel's scope for discretion had been unreasonably narrowed as there was no opportunity for dialogue aimed at mitigating the hurt to EWS and FHH (Determination, paragraphs 22.3 to 22.4).

(d) The possessions were de facto "safety requirements" for the purposes of Section 3.1.3., if only because other circumstances made it impossible to otherwise carry out the maintenance on 9/10 September, which was in itself a safety requirement (Determination, paragraph 26.1).

(e) By virtue of Section 3.1.3., both Network Rail and EWS and FHH were entitled to reciprocal cooperation (Determination, paragraph 26.2).

9. Accordingly, the Panel determined, that Network Rail was entitled, within the framework of PARTP, to decide which of the reasonable available options for possessions it should adopt. Taking account of the circumstances applying as at the date of the hearing, the Panel determined that the least unreasonable option was for Network Rail to take the possessions on 6 and 7 September 2006 in order to preserve the safety of the line.

The grounds and conduct of the appeals before ORR

10. In the notices of appeal dated 20 September 2006, EWS (supported by FHH) raised the following three grounds of appeal.

(a) The Panel erred in reaching its determination as it failed, contrary to Rule 1.18 of the Access Dispute Resolution Rules (the "ADRR"), to adequately consider the legal entitlements of the parties to the dispute.

(b) The Panel failed to correctly apply the provisions of PARTP and Conditions D2.1.10 and D6 on the following grounds.

(i) The Panel failed to take proper account of its own findings that Network Rail was not entitled to impose the possessions and had acted unreasonably. Instead, the Panel based its determination on the fact that Network Rail had narrowed its scope for discretion by unreasonable withholding of information.

(ii) The Panel failed to test whether Network Rail had take account of the Decision Criteria in Condition D6.



(c) The Panel failed to carry out a full investigation of the factual circumstances before it reached its determination, for example regarding available alternatives to the possessions or to the closure of the line.

(d) The Panel had established an adverse precedent enabling Network Rail to withhold information from Train Operators when proposing disruptive possessions in future.

11. On 26 September 2006, ORR indicated to the parties that it was provisionally minded to hear the appeals. In response, Network Rail wrote to ORR on 3 October 2006 stating, in particular, that it did not consider that the matters in question were of sufficient importance to the industry to merit ORR hearing the appeals.

12. ORR concluded that EWS and FHH's notices of appeal highlighted a number of issues (see paragraph 10 above) that were of potential importance to the parties and industry and, as such, required further consideration. Accordingly, ORR notified the parties, by letter, on 10 October 2006 that it had decided to hear the appeals.

13. In its Respondent's notice ^{dated} 30 October 2006, ^{Network Rail} acknowledged that the serious nature of the track defects should ^{have} been communicated earlier to EWS and FHH, and stated that it would address its communication failure by issuing internal guidance on this matter. However, ~~ORR~~ ^{Network Rail} reiterated that it still opposed the appeals, because:

*

(a) it considered that the Determination was consistent with PARTP, based on the circumstances at the time of the hearing; and

(b) it did not consider that the Determination condoned Network Rail withholding information from the parties or set a precedent for how Network Rail could deal with late notice possessions in the future.

14. During ORR's consideration of the appeal, it sought additional information from the parties to aid its understanding of the matters under appeal, including clarification on what evidence the Panel took into account at the hearing. On 20 and 21 November 2006, respectively, Network Rail and EWS responded to ORR's request for further information.

15. On 22 January 2007, ORR wrote to the parties informing them that it did not consider it necessary to hold a formal hearing as part of the appeal process and inviting their comments on that proposal. On 24 January 2007, EWS and FHH, and on 31 January 2007, Network Rail confirmed that they were content with this approach.

* The amendments in paragraph 13 have been made, in agreement with EWS, FHH and Network Rail, to correct typographical errors.

ORR's consideration of the appeal

16. ORR does not consider that it is necessary for the interests of justice to hold a re-hearing. In response to ORR's enquiries, the parties were unable to pinpoint any recent examples of disruptive possessions that have been imposed at late notice in similar fashion to those subject to the appeal. Given that the disputed possessions in this case have taken place, the proceedings are to a certain extent academic and the issues can be determined by review of the Determination.

17. The central issues for this appeal are whether the Panel:

- (a) was correct in its assessment of the legal entitlements of the parties;
- (b) undertook a proper assessment of the evidence; and
- (c) correctly complied with the formalities imposed by the ADRR.

ORR will deal with each of these issues in turn.

The Panel's assessment of the legal entitlements of the parties under the PARTP

Application of Section 3.1.3.

18. The material question for the Panel was, first, whether the disputed possessions were urgent safety requirements for the purpose of Section 3.1.3. and, secondly, whether the application of this provision entitled Network Rail to adopt its proposal.

19. ORR finds that the Panel erred in its assessment of the application of Section 3.1.3., as it focused on the circumstances prevailing *at the time of the hearing*, namely the imminence of the "red flag deadline" (closure of the line on safety grounds) and the apparent lack of available alternatives within that timeframe. Those elements were irrelevant to determining whether the proposed possessions constituted urgent safety requirements. ORR, therefore, concluded that the Panel took account of irrelevant considerations, which distorted its determination.

20. The Panel found that Section 3.1.3. did not empower Network Rail to take any specific action but merely created a facility to dispense, through consultation, with the normal time periods. ORR has no objections to this finding nor to the Panel's reasonableness test.



21. However, ORR concludes that the Panel went too far in determining that Network Rail was entitled to decide which of the options to adopt. First, Network Rail may only do so in co-operation with the Train Operators; secondly, it may only do so within the framework of the PARTP. For the reasons set out below, ORR concludes that the Panel failed to consider whether Network Rail had complied with those requirements.

Compliance with the PARTP requirements

22. The material question for the Panel was whether Network Rail had complied with its PARTP requirements when proposing the possessions, namely:

- (a) explained its reasons for the proposal at the time of notification;
- (b) gave due consideration to responses received by Train Operators; and
- (c) had regard to the Decision Criteria in Condition D6.

23. ORR finds that the Panel did not appear to have given the correct emphasis to these requirements. Instead, it focused solely on the application of Section 3.1.3. despite the fact that it had already ruled that that provision did not entitle Network Rail to impose the possessions unilaterally. In addition, it took account of the circumstances prevailing at the time of the hearing rather than those at the time when the possessions were imposed.

24. The Panel found that there was no evidence that Network Rail had explained the reasons for the possessions to EWS and FHH at the time of the notification. It was only on 1 September 2006, that Network Rail gave the safety of the line and the risk of closure by way of justification. However, the Panel did not take those findings into account in determining the application of Section 3 of PARTP.

25. Although the Panel appears to have considered the safety of the line, which is listed as one element in Criterion D6(a) of the Decision Criteria (see paragraph 7 above), it appears to have concentrated on that element exclusively without reference to the other pertinent criteria. None of the Decision Criteria has priority over the others. Further, the Panel does not appear to have considered whether Network Rail took due account of EWS and FHH's business concerns. Section 3.1.3., which operates only so as to accelerate the timescales involved in the consultation process, does not remove the requirement for Network Rail to take all of these considerations into account.

The Panel's assessment of the evidence

26. In its Determination, the Panel found that certain factual circumstances, pertaining as at the time of the hearing, were "decisive". However, in reaching those findings, it is not clear what evidence the Panel took into account nor the manner in which such evidence was evaluated.

27. In particular, it is not clear from its Determination whether the Panel simply accepted Network Rail's factual contentions at face value or put them to rigorous proof. For example, there is no analysis of evidence or other discussion in the Determination regarding whether:

- (a) it was possible to order an extension to the dispensation beyond 10 September;
- (b) closure of the line was inevitable after that date; and
- (c) there were any alternative measures to the proposed possessions or whether they could be carried out in a more efficient and less disruptive manner.

28. Following questions put to the parties by ORR in its letters of 7 November 2006, it appears that the Panel did ask questions about alternatives to the possessions and the availability of the delivery train which was the factor constraining the time of the possessions. The Panel also questioned a Network Rail engineer about ordering an extension to the dispensation but does not appear to have asked for any up-to-date and supporting documentary evidence.

29. In the light of these responses, it is clear that the Panel did undertake some investigation of the factual circumstances before reaching its conclusions. However, there is no record in the Panel's Determination of this additional evidence nor the weight attributed to it by the Panel in reaching its factual findings. The Panel has summarised its findings in a single paragraph (paragraph 27 of the Determination) without giving any detailed reasons of the factors that led it to conclude that there was no viable alternative to carrying out the possessions.

Compliance with the ADRR

30. The ADRR state that the Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and no other basis (Rule A1.18). The written determination must comply with certain formalities, set out in Rule A1.72, including the requirements to summarise the evidence presented, provide reasons and distinguish clearly between decisions on legal entitlement, decisions on remedy and guidance or non-binding observations.



31. In granting any remedy, the Panel must grant a specific remedy required by the Access Condition or Access Agreement. Where no such specific remedy is mandated but, instead, remains within the Panel's discretion, it should impose a remedy in accordance with the requirements and criteria set out in the Access Conditions and Agreements after due consideration of all remedies and orders that could be made (Rule A1.19).

32. ORR finds that the Determination departs from the formal requirements imposed by the ADRR in the following respects.

(a) The Determination does not distinguish clearly between the decisions on legal entitlement and remedy. Although the Panel gave reasons for its findings on entitlement under Section 3.1.3. of PARTP (paragraphs 15 to 22 of the Determination), it then proceeded, without adequate explanation of its reasoning, to reach the opposite conclusion in its final determination, which blended issues of entitlement with remedy.

(b) It is clear from paragraphs 22 to 27 of the Determination that the Panel took account of matters other than the legal entitlements of the parties. Most importantly, in determining the application of Section 3.1.3. PARTP, it took account of the circumstances applying *as at the date of the hearing*, notably the imminence of the "red-flag" deadline of 10 September and the lack of available alternatives to the disputed possessions. In so doing, it sought to reach a pragmatic result but one which overrode the legal entitlements of the parties.

(c) In reaching its conclusion, the Panel did not appear to give any consideration to the range of possible remedies and orders that could have been made.

(d) The Determination provides no clear or correct identification of all the various elements listed in Rule A1.72 of the ADRR. For example, the Panel summarises the history of the dispute as part of its "findings of fact". That is a misnomer. In reality, its material findings of fact are contained in a separate section at paragraph 24 of the Determination yet, as explained above, there is no summary of the evidence presented before the Panel or the considerations that the Panel took into account in reaching those conclusions.

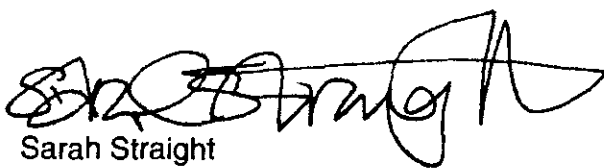
33. ORR shares the concerns of the Panel regarding the manner in which Network Rail sought to implement the possessions. Network Rail has acknowledged that it should have communicated the serious nature of the defects and the constraints on its ability to repair the line to EWS and FHH in a much clearer and timelier manner. By the time Network Rail had explained its reasons for the possessions on 1 September 2006, it was too late and the

situation had assumed even more urgency. There was no time to consider practical alternatives that might have met EWS and FHH's concerns. This left the Panel in a position where it felt that it had no option but to allow the possessions to proceed.

34. ORR has some sympathy for the predicament in which the Panel was placed and the pressure it evidently felt under to find a pragmatic solution in advance of the expiry of the dispensation, four days later. However, it is unfortunate that Network Rail's communication failures were permitted to dictate the outcome of the dispute in the circumstances of this case. The Panel could have avoided creating the impression that Network Rail was allowed to disregard the PARTP with impunity. The Panel should have clearly segregated its Determination into separate sections with distinct reasons dealing with legal entitlement and remedy respectively. It could then have made a declaratory ruling, taking account of the circumstances as at the material time, to the effect that Network Rail had no legal entitlement to impose the possessions unilaterally and without regard for the requirements of the PARTP. The Panel could have given guidance as to the correct process that should be followed by Network Rail in similar cases to ensure that such a situation would not be repeated in future. Then, in a separate section, the Panel could have proceeded to consider the appropriate remedy in the light of the circumstances pertaining at the time of the hearing. Such an approach would not only have fulfilled the requirements of the ADRR, but would also have potentially avoided creating an adverse precedent for future cases.

Conclusion

35. For the reasons given above, ORR upholds the appeal by EWS and FHH in so far as the Panel reached an incorrect determination of the legal entitlements of the parties under Section 3 of PARTP and failed to comply with the formalities imposed by the ADRR. In particular, the Panel should have dealt with the issues of legal entitlement and remedy separately so that it could issue a declaratory ruling criticising the flaws in the process adopted by Network Rail independently of the remedy that it considered appropriate in the circumstances. As to the remaining ground of appeal, it appears that the Panel did evaluate the evidence but did not record its assessment in the Determination. ORR has provided guidance (paragraph 34 above) as to the assessment of evidence and the extent of the reasoning that should be provided in future cases of this kind.



Sarah Straight
Duly Authorised by the Office of Rail Regulation

2 February 2007