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## ***An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE***

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### **Determination in respect of reference ADP40**

*(following a Hearing held at 1 Eversholt Street, London on 14<sup>th</sup> October 2009)*

#### **The Panel**

**John Beer:** (First Capital Connect): elected representative for Franchised Passenger Class, Band 3

**Nigel Oatway:** (DB Schenker): elected representative for Non-Passenger Class, Band 1

**Bill Davidson:** appointed representative of Network Rail

**Tony Deighan:** (Eurostar) : elected representative for non-Franchised Passenger Class,

Panel Chairman: **George Renwick**

#### **The Parties**

##### **for First ScotRail Ltd ("FSR")**

**Bil McGregor**                      Contracts Advisor (Acting)

**Dave Smith**                      Short Term Timetable Manager

##### **for Network Rail Infrastructure Ltd ("Network Rail")**

**Matt Allen**                      NAU Manager

**Chris Hassall**                      Acting Customer Relationship Executive (FSR)

#### **Brief Summary of the Dispute**

1. This dispute arises out of the proposal by Network Rail Infrastructure Limited ("Network Rail"), following the conclusion of the West Coast Route Modernisation Project, for a changed pattern of possessions for the purpose of maintaining the West Coast Main Line ("the WCML") to apply during the Timetable commencing December 2009. The proposal requires all sleeper services operated by First ScotRail Ltd ("FSR") to be diverted via the East Coast Main Line ("ECML") over 14 weekends during the year. FSR says it involves a Network Change within Part G of the Network Code. Network Rail says that it involves no change of maintenance policy and does not constitute a Network Change. It says that FSR's concerns and objections concern questions of access which ought properly to be addressed through the Rules of the Route and the dispute provisions of Part D of the Network Code.

### **The Panel's jurisdiction**

2. The dispute was referred to the Panel by a decision of the Disputes Chairman in exercise of his discretion under Rule A1.13.

### **Access Dispute Resolution Rules**

3. The Panel had regard in particular to the following Rules –

*A1.17 In reaching its determination, the Panel shall:*

- (a) take note of its prior determinations (and those of any predecessor body) and of any other relevant tribunal other than a superior tribunal, as persuasive authority but need not be bound by the same;*
- (b) be bound by any relevant decision of any superior tribunal..."*

*A1.18 The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis"*

### **The definition of Network Change**

4. The parties agreed that the applicable definition was that set out in Part G of the Network Code (28 May 2009 edition), which reads as follows -

*"Network Change"*

*"means, in relation to an Access Beneficiary:*

- (a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:*
  - (i) the Network; or*
  - (ii) trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; or*
- (b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:*
  - (i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; and*
  - (ii) has lasted or is likely to last for more than six months,*

*including*

  - (x) a temporary speed restriction;*
  - (y) a material change to the location of any of the specified points referred to in Condition B1.1 (a); or*
  - (z) a change to the method of delivery of any operational documentation (other than Railway Group Standards) owned or used by an Access Party; or*

(c) *any material variation to an established Network Change, other than an authorised variation,*  
*but does not include a closure (as defined in the Railways Act 2005) or a change made under the Systems Code;"*

### **The evidence produced**

5. The Panel was provided with –
  - 5.1. A joint submission by the parties.
  - 5.2. A document on Efficient Engineering Access which had appeared as a supporting document to the Network Rail October 2007 Strategic Business Plan.
  - 5.3. An e-mail from Matt Allen of Network Rail to the Committee Secretary identifying Network Rail's current maintenance standards and confirming that they had been in force prior to modernisation of the WCML.

### **The Panel's findings of fact**

6. FSR operates sleeper services between London Euston and destinations in Scotland via the WCML. The established pattern of services (two trains nightly (Saturdays excepted) in each direction) also serves passengers joining or alighting at Watford Junction, Crewe, Preston and Carlisle stations. This pattern of services has not changed as a result of the modernisation of the WCML, which FSR say has been of no benefit to it.
7. Prior to modernisation, FSR operated these sleeper services with, at most, only rare use of diversionary routes. Modernisation involved a Network Change. FSR agreed to these services being diverted, mainly via the ECML, while modernisation was in progress and received compensation under Part G both for the loss of revenue from passengers to and from Watford, Crewe, Preston and Carlisle and for the outpayments for the hiring in of haulage and other extra costs which it thereby incurred. It expected that when modernisation was complete the need for diversions, other than for extraordinary reasons, would cease. When it agreed to the diversions to facilitate the modernisation works it had no means of knowing what the pattern of possessions for maintenance might be once those works had been completed.
8. To facilitate diversions during modernisation, a number of diversionary routes (including the ECML) were agreed which were incorporated into FSR's Track Access Agreement. It was agreed that these would remain in place after modernisation; but there was no agreement as to how frequently, if at all, they would then be used.
9. The Network Rail October 2007 Strategic Business Plan, agreed between Network Rail and the Department for Transport, proposed a new "access regime" for the WCML which "requires the implementation of new methodologies for renewals activities and changes to the delivery of the maintenance regime." An annex to the Plan states
  - 9.1 *"This document summarises the agreed position between Network Rail and the Department for Transport with respect to the possession regime applying on the WCML. This regime is known as EEA (Efficient Engineering Access). All Network Rail departments must plan engineering work on the WCML in accordance with this."*
  - 9.2 *"The rationale for introducing this regime is that passenger revenue which our industry will earn from running the extra trains made possible by shorter possession hours will more than compensate for the extra costs arising from carrying out engineering work within the constraints of EEA"*

The document does not record the agreement of Transport for Scotland.

10. This access regime provided for a new pattern of possessions to take effect south of Crewe from December 2008 and from Crewe-Liverpool, Preston-Law Junction and Wolverhampton- Stafford from December 2009. The parties agree that the Plan has no contractual force in relation to FSR. NR's implementation of it between Preston and Carlisle, to take effect from December 2009, will mean that instead of one line being blocked mid-week for a total of 1248 hours per annum, with single line working during that time, both lines will be blocked over the night of Sunday/Monday for a total of 84 hours per annum.
11. NR's proposed new pattern of weekend possessions, with both lines blocked, will require FSR's sleeper services that operate Sunday night/Monday morning to be diverted onto the ECML on fourteen weekends in the year. This is expected to cost FSR some £224,000 p.a. in payments to subcontractors. It will also mean that, for those services, FSR will be unable to pick up or set down passengers at Watford, Crewe, Preston and Carlisle. Most or all of the possessions will take place in July, August and September, the months when the demand for the weekend service is greatest. FSR understand, and NR does not deny, that this situation, with the same or a similar number of Sunday night/Monday morning diversions, will continue throughout 2010-11 and 2011-12 and possibly through 2012-13.

#### **FSR's argument**

12. In summary, FSR argues that

- 12.1. *"...prior to the commencement of the West Coast Route Modernisation programme ScotRail had never been requested to divert via the East Coast Main Line to facilitate Engineering Possessions"* [Joint Submission 6.1]
- 12.2. The content of the Network Change documentation issued for WCRM was such that *"...FSR was only in a position to advise Network Rail of the material effects of the Change as they related to the emerging possession strategy to effect the change, but had no visibility of the ongoing material effects. Given the contents of the Change documentation FSR had every reason to expect routes to be available on the WCML such that it could operate the quanta specified within it's Track Access Contract, at the same level as had existed prior to the change."* [Joint Submission 6.9]
- 12.3 It had agreed to the incorporation of diversionary routes enabling the use of the ECML in its Track Access Agreement to facilitate the Engineering Possessions necessary to implement the WCML modernisation, and had received appropriate compensation for the additional costs incurred under Part G while modernisation was being carried out.
- 12.4 It had agreed that the additional diversionary routes should remain in the Track Access Agreement after modernisation was complete, but says *"that the presence of a Diversionary Route is not a licence for Network Rail to change it's possession strategy to the extent that the quanta of diversions is such that it has a material effect on the provision of Firm Contractual Rights over the Main Routes"*.
- 12.5 It referred to the Timetabling Committee's Determination No. 256 where the Committee concluded that *"It cannot be right for new track layouts to be designed and installed without prior confirmation that the maintenance and upkeep of the new installation is compatible with existing Firm Rights unless appropriate changes to such rights are agreed and approved by the Office of Rail Regulation"* (ttc 256 Paragraph 14.1).
- 12.6 The changed pattern of Restrictions of Use that Network Rail seek to impose on FSR, and their consequent material impact upon the operation of its trains, are a change of policy

falling within the definition of Network Change. FSR should have the benefit of the protection (including compensation) afforded by Part G of the Network Code.

### Network Rail's arguments

13. Network Rail advance three main arguments:

13.1. First and principally, there has been no change in its maintenance policy or standards and therefore no Network Change. The relevant standards currently in force, which Matt Allen of Network Rail listed in an e-mail to the Committee Secretary, have all been in place since before the WCML modernisation started. The disputed Sunday/Monday possessions will be used for normal maintenance activities (tamping, stoneblowing, etc). What has been altered *"is the footprint of the disruptive engineering access taken to deliver the required maintenance activities."* That is a matter of access, not one of policy, and should be dealt with through the Rules of the Route.

13.2. Secondly, the new access possessions are on only fourteen nights of the year and do not satisfy the six month test in paragraph (b)(ii) of the definition of a Network Change.

13.3. Thirdly, there has been nothing to indicate that the diversionary routes agreed with FSR could not be used after the end of modernisation and *"FSR is not being asked to do anything it is not contracted to do"*. [Network Rail Opening Statement]. The "materiality" requirement in paragraph (b)(i) of the definition of Network Change is not satisfied.

14. In support of these arguments, Network Rail point out that the changes to engineering access were formally consulted with the industry through the annual Rules of the Route process. *"In line with panel determinate TTP271, (paragraph 23.4), Network Rail considers that the principles set out in the EEA statement are to inform the deliberations for the ROTR consultation process."* [Network Rail Opening Statement]. It claims that FSR's contention threatens to undermine the Rules of the Route process. It emphasises that *"The change in access is a large financial burden on Network Rail; however it is less disruptive in terms of its impact on timetabled trains"*. [Network Rail Opening Statement]

### The Panel's findings in respect of entitlements

15. The Panel was asked to determine:

15.1 *Whether the change to the maintenance policy for the West Coast Main Line requiring FSR to regularly divert over the East Coast Main Line constitutes Network Change.*

15.2 *Network Rail asks the [Panel] to confirm that the disruptive engineering access taken between Preston and Carlisle does not constitute a Network Change and the Rules of the Route, coupled with the compensation available through Schedule 4 of the Track Access contract, are the appropriate mechanisms for dealing with this issue.*

In addition:

15.3 *Should the Panel determine that the change to the maintenance policy does constitute Network Change then Network Rail should issue the appropriate Network Change notice with retrospective effect from the date of the change of policy, to enable those Access Beneficiaries materially affected by the change in policy to respond in accordance with Network Code Condition G2.*

16. The Panel noted that the WCML modernisation project involved a Network Change. Each Train Operator affected had had the opportunity to respond to Network Change notices and protect itself from being asked to bear costs/dis-benefits that might fall upon it as a result either of the process of delivering the change, or of the state of affairs resulting from the change. The process should

ensure that the benefit accruing to any one Train Operator, or to Network Rail, is not achieved at the expense of another Train Operator's ability to operate its services in exercise of its Firm Rights.

17. FSR's Firm Rights to operate sleeper services over the WCML have remained substantially unchanged since privatisation. Prior to the WCML modernisation FSR rarely, if ever, had to divert its sleeper services over the ECML and as a result the ECML was not included in Schedule 2 of FSR's Track Access Agreement. There has been no suggestion that it was other than reasonable for FSR to expect the need to divert over the ECML to end once modernisation was complete. The Diversionary routes (ao) to (au) included in FSR's Track Access Agreement are specifically glossed as "*without prejudice to the Train Operator's rights under Condition G*". Furthermore, the Panel considered that the primary function of diversionary routes is to enable Network Rail to discharge its obligations to Train Operators, in circumstances where the normal routes are unavoidably unavailable: their inclusion is not a tacit acceptance by the Train Operator that these routes can be used in any particular circumstances by Network Rail without consultation or without first resolving any disputes by the Train Operator over their use.
18. The disputed proposal for Preston to Carlisle blockages necessary to sustain the additional traffic made possible by the WCML modernisation, may well, as Network Rail assert, benefit 35 services, and only affect 4 of FSR's services. However, without the disputed proposal none of FSR's services would have been affected. To require FSR to divert its services over the ECML at its own cost (and without having had the opportunity to make a claim under G2.1), is in effect to make FSR subsidise those other Train Operators, and Network Rail, which benefit from the WCML modernisation and the maintenance regime to support it.
19. The Panel members were agreed that the question is whether the changes of which FSR complain fall within paragraph (b) of the definition of Network Change. They do, and therefore amount to a Network Change if, but only if, three conditions are satisfied –
  - 19.1 they must involve a "change in the operation of the Network", being a change not falling within paragraph (a);
  - 19.2 they must be "likely materially to affect the operation of trains operated by" FSR on the Network; and
  - 19.3 they must have lasted or be likely to last for more than six months.
20. The Panel noted that in *Network Rail Infrastructure Limited v. Great North Eastern Railway Limited* the Rail Regulator determined that "The alleged changes in Railtrack's policies and/or practices for maintaining, renewing, monitoring and inspecting the infrastructure were both individually and in combination capable of amounting to "changes to the operation of the Network ... or a series of such changes".

#### **The conclusions of the Panel Members**

21. The Panel members were agreed that there had been no change within paragraph (a) of the definition of Network Change, but were unable to reach unanimity on whether the requirements of paragraph (b) were satisfied.
22. The majority concluded as follows –
  - 22.1 Network Rail's maintenance of the network is part of its operation of the network. Although maintenance of the WCML may well be complying with the same technical standards since the completion of modernisation as applied before, the prescriptive benchmarks for the number and duration of Restrictions of Use set out in the EEA place a heavy emphasis on the use of two line blocks to maximise the use of high-output maintenance techniques. When compared

with previous arrangements for deriving the Rules of the Route for the WCML, this is a material change in Network Rail's operation of the network.

22.2 Network Rail is right to take note of the findings of TTP271, but the paragraph quoted should be considered in its entirety: *"the principles set out in an EEA statement will inform the deliberations prescribed in Condition D2 **"Consultation Process to establish the Rules of the Route/Plan"** but will not override, or substitute for them."* (TTP271 paragraph 23.4).

22.3 Similar arguments had been advanced by Network Rail in a dispute about its proposals to extend the operation of its "2 Track Railway timetable" on the Great Western Main Line to facilitate a change in the pattern of engineering access. In that case, the Network and Vehicle Change Committee determined that such a change should be made the subject of a formal proposition tabled by Network Rail in accordance with the provisions of Track Access Condition G (NV55).

22.4 The requirement that on certain days FSR should divert trains from the WCML to the ECML is not only likely to, but will, "affect materially the operation of trains operated by" FSR because

22.4.1 FSR will need to retime departure and arrival times at Glasgow, to move the combining point for the Edinburgh/Glasgow train from Carstairs to Edinburgh, to acquire the use of suitably competent train-crew for the ECML, and to make special arrangements necessary at Euston to ensure Southbound services are appropriately re-marshalled for the following night's departures;

22.4.2 as a result of the diversion, FSR will be unable to pick up and set down passengers at Watford Junction, Crewe, Preston and Carlisle; and

22.4.3 FSR will incur additional costs of the order of £4,000 per service, or £224,000 for the 14 Sunday/Monday blocks (affecting 56 trains) proposed for the Timetable year commencing December 2009.

22.5 The proposed 14 blockages requiring ECML diversions are in contrast to the arrangements in force prior to modernisation. FSR has been given to understand that the EEA regime will continue for the foreseeable future. Network Rail has not disputed this. The change is proposed to last for several Timetables (and therefore for more than six months).

22.6 The three conditions mentioned in paragraph 19 above are satisfied. In terms of its impact upon FSR, the proposal in respect of Preston/Carlisle all line blockages would, if implemented, be a Network Change.

## 23. Bill Davidson dissented.

23.1 He considered that it was up to FSR to make its case. In doing so, it should have specified which of paragraphs (a) and (b) in the definition of Network Code its claim was based on. It had not done so. During questioning, it had implied that it was relying on both. The Panel debate had revolved around paragraph (b), which he considered the relevant paragraph.

23.2 The Panel was asked whether there was a change in maintenance policy that required FSR to divert over the ECML and whether this would constitute Network Change. Network Rail confirmed that there was no change in maintenance policy, but rather a change in maintenance access arrangements. In his view, that was not the same as a change in the operation of the Network, particularly as the ECML was an agreed diversionary route under FSR's contract. He considered that changes in access arrangements should be handled under Part D. Otherwise, one could question the whole purpose of Part D. A different view could imply that all changes to the timetable and changes in maintenance access arrangements could constitute Network Change.

23.3 In his view, the use of an agreed diversionary route for 14 nights of the 312 operated during the year "is not that material". If it constituted a change, it was not a change which "materially affected the operation of trains on the Network."

23.4 As 14 nights are less than six months, and the timetable arrangements are consulted on, and agreed or not, every year, he considered that the change in the operation of the Network, if there was one, was not one likely to last for more than six months.

His conclusion was that none of the three tests specified in paragraph 19 above was satisfied and that the changed access arrangements do not constitute a Network Change.

### **The Determination of the Chairman**

24. As the Panel has been unable to reach a unanimous decision, I am required by Rule A1.70 to make a determination of the dispute in accordance with Rule A1.72.
25. The issue is whether the proposed introduction by Network Rail with effect from December 2009 of the new pattern of maintenance possessions described earlier will amount to a Network Change as defined in Part G of the Network Code. I agree with the Panel's conclusion in paragraph 19 above that this turns on whether the three conditions mentioned in that paragraph are satisfied.
26. I respectfully agree with the Rail Regulator's conclusion that maintenance forms part of Network Rail's "operation" of the network and his reasons for reaching it. It may be that Network Rail "operates" the network in a more obvious sense through, for example, the provision of signalling systems and signallers. But its fundamental business is to provide a railway infrastructure which is fit for purpose and to manage it so that it continues to be fit for purpose. To say that maintenance of the network was not part of Network Rail's operation of it would, in my view, be to give "operation" an unrealistically narrow meaning.
27. Whilst I agree with Bill Davidson that it was for FSR to make its case, and that it failed to identify paragraph (b) in the definition of Network Code as the relevant paragraph, I do not consider (and I am not sure that he does) that that is a ground on which it would be proper for me to determine the dispute in Network Rail's favour.
28. The parties' rival submissions imply that the dispute turns in the first instance on whether Network Rail's proposed new pattern of maintenance possessions is a change of policy, FSR saying that it is and Network Rail saying that it is not. However, the word "policy" does not appear in the definition of Network Change. The question is not whether there has been a change of policy, but whether there has been "any change to the operation of the Network". The change of which FSR complains flows from the Network Rail October 2007 Strategic Business Plan which refers to a "proposed access regime" in the context of "changes to the delivery of the maintenance regime." In my view, a change to how the maintenance regime is "delivered" is just as capable of being a change to the operation of the network as a change to the maintenance regime itself. In the present case, the change is from single line closures, which do not necessitate any diversion of FSR's services, to double line blocks, which do. I agree with the majority of the Panel that it is a change to the operation of the Network. It follows that I do not accept Bill Davidson's view that changes in the arrangements for access to the network for maintenance purposes are not Network Changes. Many will not be, but some may. In my view, the condition in paragraph 19.1 above is satisfied.
29. The next question is whether this change in the operation of the network "is likely materially to affect the operation of trains" by FSR. On each of the week-ends on which Network Rail requires possession of the WCML, four FSR trains, two in either direction, are diverted onto the ECML. They are required to travel by an altogether different route, requiring different route knowledge, and are unable to serve passengers from or to Watford Junction, Crewe, Preston and



Carlisle. On any commonsense view, the operation of those trains is materially affected. The fact that they are diverted onto a pre-agreed route is irrelevant if there is no agreement about the use of that route. The fact that over the course of a year FSR's sleeper service will be affected on only 14 out of 312 nights would be a relevant consideration if the test was whether the change was likely materially to affect "the operation of FSR's service" or "a material number" of trains operated by it. But the test is whether it "is likely materially to affect the operation of trains operated by" FSR: "trains" in the plural. In my view it does, and the condition in paragraph 20.2 is satisfied. I leave open the question of whether the financial implications for FSR would also justify the same conclusion.

30. FSR's understanding that the new possession regime will remain in place for the foreseeable future, and certainly for more than six months, has not been disputed by Network Rail. I therefore conclude that the condition in paragraph 19.3 is also satisfied. The counter-argument, that it is not satisfied because only 14 days in any year are likely to be affected, leads to the conclusion that the third condition is satisfied only if a change affects an Access Party on not less than 183 days in the year. If that was what the draftsman of the Network Code had intended, he would surely have said so.
31. Network Rail expressed concern that a decision in favour of FSR would *"ignore the Rules of the Route process and open the door to all operators to claim that every proposal for timetable revision through the established Rules of the Route process could be deemed to be [a proposal for] Network Change."* Bill Davidson commented on the application of Parts G and D of the Network Code that in his view: *"Changes in access arrangements should be handled under Part D otherwise one could question the whole purpose of Part D."* The majority on the Panel did not share this concern. It seems to me to overlook the fact that, to be a Network Change, a change in access arrangements has to be one which is likely both materially to affect the operation of trains and also to continue for more than six months.
32. I therefore determine that what the parties have described as "the change to the maintenance policy for the West Coast Main Line requiring FSR to regularly divert over the East Coast Main Line" constitutes Network Change.
33. I further determine that Network Rail should issue the appropriate Network Change notice with effect from the date on which the new possessions regime was introduced.
34. The Panel has complied with the requirements of the ADR Rules. I am satisfied that this determination, given in accordance with Rules A1.70 and A1.72, is legally sound and appropriate in form.



George Renwick  
Panel Chairman

19.11.09