Neutral citation: [2003] RR 1

Case No: 2003/01

ON APPEAL FROM
THE TIMETABLING SUB-COMMITTEE
OF THE ACCESS DISPUTE RESOLUTION COMMITTEE

Office of the Rail Regulator
138-142 Holborn, London EC1N 2TQ

Date: 6 March 2003

Before :

THE RAIL REGULATOR

Between :

NETWORK RAIL INFRASTRUCTURE LIMITED **Appellants**

- and -

EUROSTAR (UK) LIMITED **Respondents**

Mr Alain Choo-Choy
(instructed by **Simmons & Simmons**) for the appellants

Mr Javan Herberg
(instructed by **Senior Legal Counsel, Eurostar (UK) Limited**) for the respondents

Hearing date : 11 October 2002

JUDGMENT

The Rail Regulator:

INTRODUCTION

1. This is an appeal by Network Rail Infrastructure Limited (formerly called Railtrack PLC) against a decision (No. 132) of the Timetabling Sub-Committee of the Access Dispute Resolution Committee published on 10 December 2001. The respondent is Eurostar (UK) Limited (formerly called European Passenger Services Limited).

2. The appeal is on a point of law. It concerns the interpretation of an access contract and of the network code which forms part of it. It raises no issues of regulatory policy.

LEGAL BASIS OF THE APPEAL

3. The contract in question incorporates by reference the document called the "Railtrack Track Access Conditions 1995 (as amended)" which is now known as the network code and is referred to as such in this judgment. Condition D5 of the network code provides for certain types of dispute between Network Rail and train operators (of which Eurostar is one) to be referred first to an industry dispute resolution body known as the Timetabling Sub-Committee of the Access Dispute Resolution Committee. If either party is dissatisfied with the decision of that body, there is a right of appeal to the Rail Regulator. This appeal is brought under those provisions.

4. The statutory duties of the Regulator are not engaged in this appeal. Although the appeal is taken by virtue of provisions in the network code which itself forms part of the contract in question, it would be contrary to the principles of fairness for the determination of a question of law to be done on any basis other than the proper application of legal principles and rules. A bias in favour of one outcome over another by reference to the wishes or financial position of any person, whether a party to the appeal or not, would be unlawful. In any case, it is not in the interests of users of railway services or of railway industry participants, and would be contrary to the other objectives of section 4 of the Railways Act 1993, for the Regulator to take any other approach.

THE FACTS

Nature of track access contracts

5. A track access contract provides the legal basis for a complex interface between infrastructure provider (Network Rail) and infrastructure user. It establishes the rights and obligations of both parties in a commercial relationship of considerable interdependence.

6. A track access contract is also the means by which track capacity is consumed. In the case of Network Rail's network, it provides for Network Rail to grant to another person (usually but not necessarily the operator of passenger or freight trains) permission to use its network. Under the contract, that person is the access beneficiary. The permission to use Network Rail's network is the principal commodity which the access beneficiary obtains under the contract, and for which it pays track access charges to Network Rail. However, track access contracts are complex commercial contracts and they do much more than that. The conditions under which the access beneficiary is entitled to use Network Rail's network are specified in some detail, as are Network Rail's obligations in delivering the capacity which it has sold.

The 1994 contract

7. On 1 April 1994, Network Rail and Eurostar entered into a long-term track access contract. In that contract, Network Rail granted to Eurostar access rights to large parts of its network for the purpose of operating passenger services. The contract runs until 29 July 2052, although, as explained in paragraph 14 below, it may come to an end earlier when it is replaced by a later, longer contract. The services in question are permitted to run on the West Coast main line, the East Coast main line, the Great Western main line, to Swansea and Plymouth and between London and the Channel Tunnel, as well as other places. Provision is also made for the use of diversionary routes. The contract therefore covers a large geographical part of Network Rail's network although in overall capacity consumption (that is, as a proportion of all train services operated on Network Rail's network) its impact is relatively small. Nevertheless, in the capacity-constrained parts of a network, individual train paths or groups of train paths can be significant.

8. Under Clause 1.2.1 of the contract, the permission to use Network Rail's network which is conferred on Eurostar is expressed to be permission "to use the track comprised in the Routes for the provision of the Services using the Specified Equipment in accordance with the Working Timetable". The "Services" are defined as the railway passenger services which have the characteristics set out in Schedule 5 to the contract. The "Routes" are the parts of Railtrack's domestic network specified in Schedule 2. The services contemplated by Schedule 5 of the contract include night services between London and Glasgow, Plymouth and Swansea.

9. The "Specified Equipment" is set out in Part II of Schedule 5 to the contract. The table in Annex C to Schedule 5 establishes that the Specified Equipment for the night services is limited to Class 92 and Class 37/5 locomotives, ENS Coaches and Generator Vans. Eurostar may only use rolling stock which falls within the definition of Specified Equipment and it is not permitted to operate any other rolling stock in exercise of its rights under Schedule 5.

10. It is the night services using the Specified Equipment with which this appeal is concerned.

Regulated status of the 1994 contract

11. The Network Rail-Eurostar access contract is an unregulated one. In this context, there are two classes of unregulated contract.

12. The first is the larger class in terms of numbers of contracts. It comprises access contracts to which sections 17-22A of the Railways Act 1993 do not apply by virtue of sections 17(2) and (3) and 18(2), (3) and (4) of that Act. The Network Rail-Eurostar contract does not fall into this class.

13. The second class of unregulated access contract is much narrower. It is made up of those very few access contracts which were entered into before section 18 of the Railways Act 1993 was brought into force on 2 April 1994. The Network Rail-Eurostar contract is one of them, and is probably the most significant of them.

14. Certain international access contracts are regulated not under the Railways Act 1993 but under Part III of the Railways Regulations 1998. That regime is quite different

from the domestic regime under the Railways Act 1993 and, in cases where an applicant for access is aggrieved by Network Rail's decision in relation to the allocation of capacity or the charging of fees, it may appeal the matter to the International Rail Regulator. The Network Rail-Eurostar contract of 1994 is not in this category, although in 1998 those parties entered into such a contract which, after the satisfaction of certain conditions with which this appeal is not concerned, will cause the 1994 contract to come to an end. The 1998 contract is also a long-term access contract; it ends on 29 July 2086.

15. An unregulated access contract neither requires nor receives the approval of the Regulator. However, like virtually all other access contracts (whether regulated or unregulated), by Clause 5 the Network Rail-Eurostar access contract incorporates by reference the network code. If it were otherwise, Eurostar's ability to exercise its access rights under the contract and Network Rail's ability to honour them would be compromised. The timetable development procedure in the network code therefore applies to Eurostar's rights with the same force as it does in the case of regulated contracts.

Timetable development process

16. The network code is the central commercial code concerning the consumption of the capacity of Network Rail's network and the development of that network. The code's change over time is subject to the jurisdiction of the Regulator, and the unregulated status of the 1994 Network Rail-Eurostar contract makes no difference to that fact.

17. The network code contains - in Part D - the timetable development procedure, the interpretation and application of which is in issue in this appeal.

18. In general terms, under Part D of the network code, Network Rail is in charge of the establishment of the working timetable. The working timetable shows all train movements on its network, not merely published scheduled services. It shows empty stock movements, test trains, movements of Network Rail's own specialised rolling stock for the maintenance and renewal of its network, trains which move materials for the carrying out of network services and of course freight services, including those put into the timetable at very short notice. It is the working

document which informs train planners, users and others of exactly what is supposed to happen on the network hour-by-hour and day-by-day.

19. In carrying out the task of establishing the working timetable, Network Rail must honour the access contracts which provide for access beneficiaries to use its network. Twice a year, access beneficiaries must submit bids to Network Rail for particular train slots corresponding to their rights under their access contracts. Network Rail is required to assess and reconcile the bids it receives. If there is conflict and the train slots in two or more valid bids cannot be granted in the terms sought, Network Rail has a margin of discretion. It must make a decision on what train slots are to be allocated to the bidders. The slots allocated may not be the ones bid for. Network Rail does this by applying certain criteria - known as the Decision Criteria - set out in Condition D4 of the network code. Broadly speaking, those criteria are the Regulator's statutory duties under section 4 of the Railways Act 1993 put into the context of the development of a working timetable. This is so because (subject to the exceptions described in paragraphs 12 and 13 above) the Regulator has the statutory role of determining the consumption of capacity of the network. It would be anomalous if Network Rail were required by the network code to apply, in the timetable development process, criteria which were inconsistent with the criteria which the statute requires the Regulator himself to apply when determining the consumption of capacity when exercising his statutory functions concerning access contracts. They are both concerned with the same thing.

20. As explained in paragraph 3 above, if an access beneficiary is dissatisfied with a decision made by Network Rail in the timetable development process, it has the right to refer that decision for review first to the relevant sub-committee of the Access Dispute Resolution Committee and then, on appeal, to the Regulator.

The summer 2002 timetable

21. On 26 June 2001, at the timetable conference for the summer 2002 timetable, Eurostar made a declaration under Condition D2.1.2(a) of the network code to the effect that it intended to run the night services provided for in its access contract during the period of the summer 2002 timetable. Eurostar has made such declarations in respect of previous timetables. On those earlier occasions, Network

Rail included in the draft timetable and in the working timetable train slots corresponding to Eurostar's declarations. However, Eurostar has never operated the night services, and has admitted that in 1997 it took a decision not to run them. Nevertheless, Eurostar continued to make Condition D2.1.2(a) declarations after that date, and, until June 2001, Network Rail continued to accept them.

22. In respect of the summer 2002 timetable, on 2 August 2001, Network Rail wrote to Eurostar to explain that it would not (with certain exceptions with which this appeal is not concerned) include the night services in the draft timetable. It told Eurostar that this was because it had by then become aware that Eurostar neither owned nor had access to the permitted rolling stock - that is, the "Specified Equipment" in Schedule 5 of the contract - necessary to run those services since Eurostar had sold the necessary rolling stock to an Canadian purchaser.

23. Network Rail explained that it believed that since the services could not be run, it would be unreasonable to put the paths into the draft timetable and that it was not prepared to waste capacity in this way. Network Rail was then of the opinion that the inclusion of the night services slots would be contrary to its obligations in relation to the application of the Decision Criteria in Condition D4 of the network code when the time came to prioritise bids under Condition D3. It therefore appeared to Network Rail to be pointless putting the night services into the draft timetable only inevitably to exclude them when the working timetable came to be drawn up. Network Rail asked Eurostar to provide evidence of its ability to operate the trains in the night services slots, but Eurostar failed to do so. Instead, Eurostar insisted on its declaration of intention to operate the night services in question under Condition D2.1.2(a). Accordingly, Network Rail excluded the night services slots in question from the draft timetable for summer 2002.

24. Network Rail made it clear to Eurostar that it would only refuse to put the declared rights into the timetable on a timetable-by-timetable basis, and that as soon as Eurostar was able to make a valid declaration under Condition D2.1.2(a), it would, as provided for in the network code, go back to the top of the priorities in the establishment of the draft timetable by virtue of the nature of its rights under the contract.

25. On 19 September 2001, Network Rail wrote to Eurostar again. On this occasion, Network Rail offered to include the night services paths in the draft timetable "without validating them". Eurostar complained to Network Rail about that lack of validation of the train slots in the draft timetable. By lack of validation, I understand that Network Rail meant that the train slots would appear in the draft timetable but Eurostar should not expect them to be carried forward into the working timetable.

26. Eurostar were not satisfied with this action on the part of Network Rail and referred the matter to the Timetabling Sub-Committee for determination under Condition D5.1.1 of the network code.

THE RELEVANT PROVISIONS

27. Under Part D of the network code, Network Rail is required first to prepare a draft timetable, and then a final one. Condition D2 is concerned with the draft timetable. Condition D3 is concerned with the final one.

28. Condition D1.5 of the network code contains the basic obligation of Network Rail in this respect. It provides as follows:

> "[Network Rail] shall draw up a timetable showing, so far as reasonably practicable, every train movement on the Network, including:
>
> (a) every service for the carriage of passengers by railway, every service for the carriage of goods by railway, every Ancillary Movement [*][1] and every other Service [*];
>
> (b) the times of arrival and departure of trains at origin and destination, at every intermediate stopping point and at appropriate passing points; and
>
> (c) all relevant timing allowances,

[1] The notation [*] indicates that the relevant term is defined in the network code but it is not necessary for it to be explained for the purposes of this appeal.

as they shall have been amended pursuant to Part H and including goods train planning publications and documents detailing platforming arrangements."

29. The rights which access beneficiaries have under their access contracts vary in quality. Higher quality access rights have a higher priority in the timetable development process. The highest quality of access right is (curiously[2]) called a "Firm Contractual Right". So far as relevant to this appeal, Condition D provides that a Firm Contractual Right is:

> "(a) in the case of a Bidder [*], a right under its Access Agreement [*] in respect of the quantum, timing or any other characteristic of a train movement; ...
>
> (b) ...
>
> which is not expressed to be subject to any contingency outside the control of the holder of the right, except, in the case of paragraph (a) above, the applicable Rules of the Plan or the applicable Rules of the Route [*]".

30. The process for establishing the working timetable begins with Network Rail, under Condition D1.4, giving information to persons entitled to bid for train slots about certain dates and periods in the process. Network Rail is then required to proceed with drawing up a draft timetable under Condition D2. That work involves consultation by and of relevant persons as to what users' requirements for train slots are expected to be.

31. The next step involves bidders notifying Network Rail of the Firm Contractual Rights which they do and do not intend to exercise in the timetable development process. So far as relevant to this appeal, Condition D2.1.2(a) provides:

> "Bidders shall, on or before the Priority Date [*], notify [Network Rail] in respect of the Timetable Development Periods [*] ending on the next following Summer Change Date [*] and the next two following Winter Change Dates [*]:
>
> (a) those Firm Contractual Rights that they intend to exercise;

[2] It is curious because the right is obviously conferred by contract.

(b) those Firm Contractual Rights that they do not intend to exercise;

(c) ...

(i) in the case of paragraphs (a) and (c) above, shall give an indication of the Train Slots that will be bid for in exercising those rights; ...

(ii) ... ".

32. A "Train Slot" is defined in Part D as:

"a train movement or series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement".

33. Condition D2.1.3 of the network code concerns Network Rail's drawing up of a draft timetable. It provides that:

"[Network Rail] after consultation with Bidders will compile a Draft Timetable [*] which is in accordance with Condition D2.1.4 and which:

(a) in [Network Rail]'s opinion is capable of being brought into operation; and

(b) takes account of the need to achieve optimal balance between the declared aspirations of each Bidder and the aspirations of [Network Rail] as expressed in the applicable Rules of the Route [*] and the applicable Rules of the Plan [*]."

34. Condition D2.1.4 is concerned with the priorities which are to inform Network Rail's compilation of the draft timetable. It gives the highest priority to Firm Contractual Rights which have been timeously declared under Condition D2.1.2(a) as ones intended to be exercised. The rights in question may not be Firm Contractual Rights at the time of declaration, but they are required to have that status on the dates on which the relevant train movements are to take place. So far as relevant to this appeal, Condition D2.1.4 provides:

" ... [Network Rail] shall, in determining the order of priority for inclusion of Train Slots in the Draft Timetable [*], accord priority:

(a) first, to the satisfaction of any Firm Contractual Rights which

(i) are declared by the Bidder [*] on or prior to the Priority Date [*] in accordance with Condition D2.1.2(a) and which constitute Firm Contractual Rights on the intended dates of the operation of those Train Slots; or

(ii) [Network Rail] may have taking into account any changes to either or both of the applicable Rules of the Route and the applicable Rules of the Plan under Condition D2.4;

each of paragraphs (i) and (ii) above having equal priority;

(b) second, to the satisfaction of any rights or expectations of rights which:

(i) are declared by a Bidder on or prior to the Priority Date in accordance with Condition D2.1.2(c) ... ".

35. The Condition D2 draft timetable process is therefore a preliminary step to enable Network Rail and access beneficiaries to establish in advance how the bidding process for train slots in the working timetable may turn out and, if possible, reconcile conflicts or resolve difficulties at that earlier stage. It does not involve the making of bids for train slots. Formal bids only come into play in the Condition D3 working timetable process.

36. Condition D2.2 permits Network Rail to carry out an even earlier consultation process - that is, before the establishment of the draft timetable - if it considers that "major timetable changes may be required". The purpose of such a consultation process is stated in that Condition to be "ensuring that the timetable changes are implemented in a co-ordinated fashion". Condition D2.4.5 enables Network Rail to make further modifications to the applicable Rules of the Route and the applicable Rules of the Plan "to facilitate optimisation of the Draft Timetable".

37. Once the draft timetable has been drawn up, Condition D3.1 requires Network Rail to issue Bidding Information to potential bidders. Bidding Information is defined in Part D as:

"the applicable Rules of the Route and the applicable Rules of the Plan and the Draft Timetable to be issued by [Network Rail] pursuant to Condition D3.1".

38. Condition D3.1 requires Network Rail to include in the Bidding Information:

"(a) the applicable Rules of the Route and the applicable Rules of the Plan; and

(b) the relevant parts of the Draft Timetable which as a result of notifications made to [Network Rail] under Condition D2.1.2 and the operation of Conditions D2.1.3 and D2.1.4 shall show:

(i) in respect of the Summer Change Date [*], those Train Slots which [Network Rail] expects to include in the Working Timetable [*] commencing on that Summer Change Date;

(ii) [substantially similar provisions relating to the winter timetables]".

39. Condition D3.3 deals with what must go into a bid to make it valid. It provides:

"A Bidder shall, in making a Bid, indicate, in respect of the Train Slots for which the Bid has been made, the extent of its requirements (if any) as to:

(a) dates on which the Train Slots are intended to be used;

(b) start and end points of the train movement;

(c) intermediate calling points;

(d) the times of arrival and departure from any point specified under paragraphs (a) and (c) above;

(e) railway vehicles to be used;

(f) train connections with other railway passenger services;

(g) the route to be followed;

(h) any Ancillary Movements; and

(i) platforming at any points specified pursuant to paragraphs (a) and (c) above."

40. Once bids have been made to it, Network Rail must then consider them in accordance with a specified heirarchy. So far as relevant to this appeal, Condition D3.4 provides:

" ... [Network Rail] shall, in determining the order of priority for accepting Bids, apply the following procedure:

3.4.1 in relation to all Bids other than Spot Bids [*], by according priority:

(a) first, to the satisfaction of any Firm Contractual Rights which:

(i) a Bidder may have, provided that

(A) the rights have been notified to [Network Rail] on or prior to the Priority Date[*] in accordance with Condition D2.1.2(a); ... ".

41. The hierarchy in Condition D3.4 is substantially the same as that in Condition D2.1.4, albeit that the process is being carried out at a necessarily later date, with the draft timetable having gone before and formed an important element in the bidding process under Condition D3.

42. After certain further procedures with which this appeal is not concerned, Network Rail makes its decision and notifies the affected persons. Rights of challenge then come into play. Condition D5 of the network code provides that a Bidder which is dissatisfied with any decision of Network Rail under Condition D1.4, D2 or D3 may refer the matter to the Timetabling Sub-Committee of the Access Dispute

Resolution Committee for determination. Condition D5.2 provides for a right of appeal to the Regulator against the decision of that body.

43. Condition A1.5 of the network code provides:

"The Access Parties [*] shall, in exercising their respective rights and complying with their respective obligations under these Access Conditions (including when conducting any discussions or negotiations arising out of the application of these Access Conditions or exercising any discretion under them) at all times act in good faith."

THE DECISION APPEALED AGAINST

44. The case came before the Timetabling Sub-Committee of the Access Dispute Resolution Committee and was heard on 30 November 2001.

45. In its determination, the Timetabling Sub-Committee declared that the root of the dispute between Network Rail and Eurostar was the value of Eurostar's access rights and that therefore "the determination should focus the attention of the parties in that direction".

46. It declared (at paragraph 6.1) that Eurostar was 'entitled to expect that Train Slots, corresponding with any declaration (made under Condition D2.1.2(a)) of "those Firm Contractual Rights that they intend to exercise" will be included in the Draft Timetable'.

47. It went on to determine (at paragraph 6.2) that "it is reasonable and responsible that [Network Rail] should wish to challenge the inclusion of such Train Slots where[,] for whatever reason, it considers that there is a high probability that the Train Operator will not be in a position to run the trains". It said: "[I]t is reasonable ... that [Network Rail] should expect a Train Operator who is seeking to exercise rights under Condition D2.1.2(a), in the knowledge that the trains are unlikely to run, to consider declaring that they "do not intend to exercise" those rights, as required by Condition D2.1.2(b)".

48. The Timetabling Sub-Committee then directed itself to the commercial motives and incentives which led to the dispute, and said:

> "6.4 in this particular case of an unregulated Track Access Agreement with a fixed Access Charge, it is unreasonable to expect that the Train Operator should be prepared to relinquish the exercise of Firm Contractual Rights, by declaring under Condition D2.1.2(b), unless the Track Access Agreement (or some negotiated variation to the Track Access Agreement (negotiated in accordance with due process)) provides for the abatement of Access Charges that would otherwise be payable;
>
> "6.5 if [Network Rail] wishes to avoid, for reasons of practicality or economy, including in a future Draft Timetable Train Slots corresponding to the Firm Contractual Rights for [Eurostar]'s Night Sleeper services, then this reasonable aspiration should be addressed by seeking to negotiate terms such that [Eurostar] has an incentive to have recourse to a declaration made in accordance with Condition D2.1.2(b).
>
> "7. If, having engaged in the above process, the parties cannot agree on matters of value, whether in relation to the 2002/3 timetable or future timetables, then it is the view of this Committee that the parties should first consider their options for resolving this difference in accordance with paragraphs 11.1 to 11.3 of the Track Access Agreement, or failing that ... by seeking the guidance of the Access Dispute Resolution Committee."

49. The Timetabling Sub-Committee therefore decided that Eurostar was - and is - not required to make a declaration under Condition D2.1.2(b) and may instead declare under Condition D2.1.2(a) that it intends to run services which in reality it does not intend to run. Furthermore, the Timetabling Sub-Committee decided that Network Rail was not entitled to make an assessment of the validity of a declaration under Condition D2.1.2(a) and had to accept at face value whatever the access beneficiary in question asserted irrespective of its knowledge or suspicions to the contrary.

THE ISSUES

50. The differences between the parties require the answering of two principal questions of law, namely:

(1) what is the nature of the rights which Eurostar has under its access contract with Network Rail; and

(2) is Network Rail entitled to make a judgment about the validity of a declaration by an access beneficiary under Condition D2.1.2(a) of the network code?

51. In relation to each question, I first summarise the arguments of the parties and then give my analysis and conclusions.

52. In this appeal, the parties were asked to submit a single list of questions of law for me to answer. They failed to do so, instead submitting two lists which overlapped significantly in substance but were expressed in somewhat different terms. Some of their questions were framed in terms which tended to suggest the answers. I have reformulated the questions in neutral terms and amalgamated them into the following single list:

(a) was Network Rail entitled to refuse to include Eurostar's night services trains in the draft timetable for summer 2002?

(b) did Network Rail's refusal amount to a suspension of Eurostar's Firm Contractual Rights, and, if so, did that suspension require Eurostar's consent?

(c) is an access beneficiary entitled to make a declaration under Condition D2.1.2(a) that it intends to exercise its Firm Contractual Rights to run trains when it has no such intention?

(d) in what circumstances and to what extent may Network Rail refuse to accept a declaration under Condition D2.1.2(a)?

(e) was the Timetabling Sub-Committee right to determine that "... it is unreasonable to expect that a train operator should be prepared to relinquish the exercise of Firm Contractual Rights, by declaring under Condition D2.1.2(b), unless the track access agreement (or some negotiated variation to the track access agreement (negotiated in accordance with due process)) provides for the abatement of access charges that would otherwise be payable"?

(f) was the Timetabling Sub-Committee right to suggest that Eurostar and Network Rail should hold commercial negotiations in relation to the surrender of Eurostar's access rights and the giving of financial compensation by Network Rail?

Issue 1 - The nature of Eurostar's access rights

Issue 1 - arguments

53. It is not in issue that Network Rail refused to accept the declaration which Eurostar purported to make under Condition D2.1.2(a) of the network code. Its ground for refusing was that the declaration was not valid because Eurostar had no intention of running the trains in question. It had sold the necessary rolling stock to an overseas buyer and it had no alternative rolling stock which met the requirements of the contract. Counsel for Eurostar admitted that the company had no such intention and that its declaration was, as he put it, "artificial".

54. Network Rail's case is that, in those circumstances, Eurostar should have made a declaration under Condition D2.1.2(b) to the effect that, in that timetable period, it did not intend to exercise its rights to operate trains in train slots corresponding to its Firm Contractual Rights. Since Eurostar's declaration under Condition D2.1.2(a) was a false one, Network Rail say they were entitled to disregard it.

55. In answer, Eurostar argued that:

(a) its Firm Contractual Rights under the contract entitle it to have train slots allocated to it as long as they make a declaration under Condition D2.1.2(a), even if it is an artificial one;

(b) Network Rail had no right to make a judgment about the validity of its declaration.

56. It argued that declarations under Condition D2.1.2(a) are only a trigger to enable an access beneficiary to have train slots corresponding to his access rights put into the draft timetable and, from there, into the Bidding Information which is used in the establishment of the working timetable. It argued that there is no requirement for the declaration to be accurate.

57. Eurostar therefore alleges breach of contract on the part of Network Rail.

58. In its submission to the Timetabling Sub-Committee and to some extent before me, Eurostar stated that its motives in insisting Network Rail include the night services paths in the draft timetable were twofold: 'visibility' and buy back. It said that these motives - or rather the consequences of their possible frustration - were relevant to the issue of construction of the contract.

59. Eurostar's first motive in making a Condition D2.1.2(a) declaration was to demonstrate to other users of Network Rail's network that the Firm Contractual Rights in question exist. It argued that, if train slots corresponding to those access rights are not put into the draft timetable, its rights under its access contract will "lose visibility" to other users of Network Rail's network and that their quality will thereby be diminished. Eurostar said that, by its refusal and the consequent exclusion of train slots allocated to Eurostar, Network Rail has in some fashion secured a form of relinquishment of Eurostar's rights, and has unjustifiably suspended, ignored or overridden them. Eurostar admitted that Network Rail's refusal did not prevent Eurostar running any trains in those slots because it could not have run the trains whatever happened.

60. Eurostar's second - and connected - motive was stated to be to provide a "vehicle for ... a future commercial arrangement to suspend or remove [the rights in question]." The latter is explained by reference to Eurostar's complaint that its access contract requires it to pay high fixed track access charges to Network Rail for track capacity whether or not it runs any trains. Having given up the prospect of running night services in those slots in the foreseeable future - at least until it acquires new rolling stock meeting the requirements of its contract - Eurostar is aggrieved that it must nevertheless continue to pay fixed charges for that capacity. Eurostar therefore wishes to use its asserted rights under Part D of the network code and Schedule 5 of its contract as a bargaining counter to put pressure on Network Rail to reduce the amounts Eurostar pays it under the contract in return for Eurostar giving up rights which it cannot presently use and has never used.

61. By not buying back Eurostar's rights and continuing to demand the fixed charges provided for in the contract, Eurostar complains that Network Rail derives a double benefit or windfall from the capacity because it can sell the same capacity a second time, allocate more time to itself for engineering work, or do anything else it wishes

with the capacity "without having to pay for the privilege". Because that state of affairs appears to Eurostar to be inequitable, it argued that the correct construction of Condition D2.1.2 of the network code must be that it can make any declaration it wishes under Condition D2. In that, Eurostar has the support of the Timetabling Sub-Committee.

62. Connecting the buy back motive to its visibility point, Eurostar said that if its rights were not visible - that is, included in the timetable as a blockage or sterilization of capacity which Network Rail may otherwise wish to use - it feared that it would be deprived of its bargaining position in its attempts to sell its access rights back to Network Rail. Eurostar also argued that Network Rail's refusal to include its rights in the timetable would be reasonable as long as there were an abatement of the access charges under the contract. It pointed to the absence in the contract of provisions which entitle it to a rebate of access charges if the services in question do not run, or which enable it to surrender the access rights in question for value. It argued that the question of interpretation of Condition D2.1.2 should be answered against the background of the nature of the rights which Eurostar holds and which they are not able to use.

63. In order to strengthen its negotiating position with Network Rail in its attempts to sell its access rights, Eurostar also argued that the rights in question have the quality which is known in the railway industry as 'hardwired'. In establishing a timetable, in most cases the Firm Contractual Rights which Network Rail has to accommodate contain degrees of what is known as 'flex'. When a contract has flex in it, Network Rail is given freedom to allocate to the access beneficiary in question train slots which do not exactly reflect his bid. The extent of the freedom is a direct function of the amount of flex in the contract. This gives Network Rail the ability to allocate and use capacity efficiently, within the constraints of the access contracts which it has with access beneficiaries. The converse of an access right with flex is one which is hardwired. A completely hardwired access right would be a right to a particular trainpath with no flex whatsoever. If a bid is timeously and properly made, and is in exercise of a completely hardwired Firm Contractual Right, Network Rail has no discretion; it is obliged to allocate to the access beneficiary in question the trainpath for which he has bid. Hardwiring comes in degrees. The less the flex in the right, the greater the right is hardwired. Hardwiring is therefore the most expensive use of capacity of all since the slots in question are fixed and Network Rail must allocate other train slots around hardwired slots and may never move them. Eurostar argues that its rights under its

access contract are completely hardwired and contain no flex at all. If Eurostar is right about both the hardwired nature of its access rights and its entitlement to have the rights put into the timetable simply by making a declaration which may be artificial, it follows that its bargaining position with Network Rail in any attempted resale of the rights is strongest. Eurostar argued that the hardwired status of its access rights is a relevant factor in an assessment of the factual matrix of its contract and so must inform the construction of the contract.

64. Eurostar further argued that, on a strict textual analysis of its definition, a Firm Contractual Right is wider than the right to run a train. It said that a right to take part in the timetable development process is as much a Firm Contractual Right as a right to run a train, and in making a declaration under Condition D2.1.2(a) it was both exercising such a right - namely a right to make a declaration - and, at the same time, declaring an intention to take further part in the timetable development process.

65. Its basis for that argument on the definition of "Firm Contractual Right" was as follows. The right to take part in the timetable development process is a right under its access contract. It is a right "in respect of the quantum, timing or any other characteristic of a train movement" because everything in Part D of the network code is concerned with these things. And it is a right "which is not expressed to be subject to any contingency outside the control of the holder of the right". Having passed these three tests, Eurostar say it must be a Firm Contractual Right.

66. Eurostar argued that if it is right that the making of the declaration and the election to take part in the timetable development process in the future is a Firm Contractual Right, Network Rail must therefore accept whatever declaration Eurostar may choose to make under Condition D2, and a refusal to give effect to a declaration under Condition D2.1.2(a) is a variation or an attempt to disregard its Firm Contractual Rights.

Issue 1 - analysis and conclusions

General

67. The timetabling process in Part D of the network code is designed to enable Network Rail to honour its contracts with access beneficiaries and, within those contractual constraints and subject to the rights of access beneficiaries to object to Network Rail's

decisions and to seek relief, to manage the six-monthly timetabling process so as to ensure the fairest and most efficient allocation and therefore use of capacity.

68. The working timetable is a timetable of real train movements, not fictitious ones. This is apparent from its purpose and the provisions of the network code which say how the timetable is made up.

69. Condition D1.5 provides that the draft timetable must "show[...], so far as reasonably practicable, every train movement on [Network Rail's network]". Condition D2.4.5 speaks of the "optimisation of the Draft Timetable".

70. Condition D2.1.2(i) requires an access beneficiary making a declaration under Condition D2.1.2(a) to indicate the Train Slots - which are actual train movements according to the contractual definition - for which it will bid when exercising its declared rights. It deals with declarations which have been made either under Condition D2.1.2(a) or (c). It naturally disregards declarations under Condition D2.1.2(b) because those access rights are to be left out of account in compiling the draft timetable. Under Condition D2.1.3 Network Rail must compile a draft timetable which respects the priorities specified in Condition D2.1.4 and which, in its opinion, "is capable of being brought into operation". This again is concerned with real train movements, not imaginary ones. Condition D2.1.3 also speaks of achieving an optimal balance of the aspirations of bidders on the one hand and Network Rail on the other, again with a view to arriving at a sound allocation of capacity.

71. Condition D2.1.4 sets out the hierarchy of rights - the order in which they are to be given effect in compiling the draft timetable. Highest of these are rights which have been both declared under Condition D2.1.2(a) and constitute or will, "on the intended dates of the operation of those Train Slots", constitute Firm Contractual Rights. Again, it speaks of real train movements.

72. Having received declarations under Condition D2.1.2(a) and (c), Condition D2.1.3 requires Network Rail to draw up a draft timetable which then forms part of the Bidding Information - which includes the draft timetable - used in the establishment of the working timetable under Condition D3. The process is thereby moving towards a working timetable showing real train movements.

73. Condition D3.4.1(a) is concerned with the priority to be given to bids in the establishment of the working timetable. It begins with using rights declared under Condition D2.1.2(a), and then moves onto rights notified to Network Rail under Condition D2.1.2(c). As I have said, rights which have been subject to declarations under Condition D2.1.2(b) are left out of account because there has, in effect, been a statement by the holder that he does not intend to run trains in exercise of those rights in that timetable. This does not mean that an access beneficiary who makes a declaration under Condition D2.1.2(b) has lost his rights. It merely means that, for that timetable period, he does not intend to exercise them. He may exercise them in a later timetable period, but for the instant timetable he has decided to leave them dormant. That too is information which Network Rail needs in order to be able to draw up a sound timetable.

74. In its reliance on Condition D2.1.2(a) declarations in the compilation of the working timetable, Condition D3 shows the importance of those declarations. A Condition D2.1.2(a) declaration is crucial at the draft timetable stage, when priorities are being established and respected. It is also important at the later stage, when the working timetable is being drawn up, because it determines the priority of consideration of bids. Again, Network Rail and others need to know which Firm Contractual Rights will turn into actual train movements in the working timetable, to ensure the fair and efficient allocation of capacity and which will not.

75. Under Condition D3.3, Bids must state the dates on which train movements are intended to take place; the start and end points of the train movements in question; the times of departure and arrival at the point of departure, intermediate calling points and the train's ultimate destination; the rolling stock to be used, and other matters of that nature. Condition D3.4 contains a hierarchy for the establishment of the working timetable which is substantially the same as the one which informs the establishment of the draft timetable. It too is concerned with actual train movements. It proceeds from the Bidding Information which in turn has been compiled from the draft timetable which is based on the declarations under Condition D2.1.2(a) and (c).

76. Finally, when all the procedures have been completed, Condition D3.7.4 requires Network Rail to enter the train movements in question into the working timetable.

77. In my opinion, these provisions clearly show that what is being devised is a timetable of real train movements which represent the fairest and most efficient allocation of

capacity for that timetable period. It would be extraordinary if, with such a careful and elaborate scheme, an access beneficiary were able to disrupt the process and drive into it train slots which cannot be used and whose purpose is to make life difficult for Network Rail in the establishment of the draft and working timetables. And it would make no sense for Network Rail to be required to put train slots into the draft timetable only to have to take them out at the working timetable stage when the decision criteria in Condition D4 come to be applied. The Condition D4 decision criteria could not, in my opinion, allow Network Rail to give priority of any nature in the timetable to a train which could not and would not run.

78. I now turn to the parties' particular arguments.

Inherent qualification

79. The rights which Eurostar has under its access contract to run trains on Network Rail's network are Firm Contractual Rights. They are within the contractual definition of that term because they are in respect of the quantum, timing and other characteristics of train movements, and they are not expressed to be subject to any contingency outside Eurostar's control. However, the rights are not unlimited. They have a number of inherent qualifications. First, they are rights only to run trains on the Routes specified in the contract, albeit that those routes comprise large parts of Network Rail's network. Secondly, they are rights to run trains using only the Specified Equipment; Eurostar may not run trains using different rolling stock unless and until it goes through the vehicle change procedure in Part F of the network code or secures an appropriate amendment to its access contract permitting it to run different types of rolling stock. Thirdly, Eurostar may only run trains in the slots provided for them in Schedule 5 of its contract; it does not have rights to run trains whenever it chooses. And fourthly, to have the trains put into the working timetable and so enabled to run at all, Eurostar must comply with the necessary procedures in that respect in Part D of the network code.

80. That fourth requirement is a function of Clause 1.2.1 of the contract, which provides that the permission to use conferred on Eurostar by the contract is permission "to use the track comprised in the Routes for the provision of the Services using the Specified Equipment in accordance with the Working Timetable". It is these last words which impose the qualification which matters so much in this appeal, because no train may run if it is not in the working timetable. To get into the working timetable, the Part

D procedure must be operated, and the access beneficiary must do what Part D requires of it.

81. These qualifications form part of Eurostar's right to run trains. They are not things which appear later to cut the right down or hold it back. The right is - and never was - any greater than Clause 1.2.1 provides. For this reason, the requirement to comply with the Part D timetable development process is not a "contingency outside the control of the holder of the right", which wording describes a case which denies a right the status of a Firm Contractual Right. If it were such a contingency, no access right could have the status of Firm Contractual Right because every access right, to be useful and meet its commercial purpose, must be capable of being translated into at least one train slot in the working timetable. The right begins life with these qualifications; they are not imposed on it afterwards.

82. The first step towards inclusion in the working timetable for rights of the kind held by Eurostar is a declaration under Condition D2.1.2(a). In my opinion, that must be a valid one. A Condition D2.1.2(a) declaration tells Network Rail that the access beneficiary intends to exercise his Firm Contractual Rights. A Condition D2.1.2(b) declaration tells Network Rail that he does not. As I have explained in paragraph 74 above, both kinds of information are things which Network Rail needs to know in order to draw up a sound timetable. There would be no point to Condition D2.1.2(b) if, under Condition D2.1.2(a), an access beneficiary could declare that he intends to exercise rights when he does not have that intention. Condition D2.1.2(b) is there as an alternative to Condition D2.1.2(a) precisely so as to enable Network Rail to know which rights are to be exercised - and therefore translated into train slots - and which are not.

Visibility and buy back

83. Eurostar invited me to conclude that the issues of visibility and the apparent unfairness of its having to pay Network Rail for access rights which it could not use were parts of the factual matrix of the contract to which I am entitled to look in construing the contract.

84. The notion that it was necessary or even important that Eurostar's access rights be made visible in the timetable development process is, in my view, misconceived. So is the argument that, by Network Rail's actions, it had in some way secured the

relinquishment of Eurostar's rights, or that it had overridden , suspended or ignored them. Network Rail's actions achieved none of these things, and I do not believe it had any intention of doing so.

85. Eurostar's access rights are in its contract with Network Rail. Although the contract is not in any of the classes of contract which the Regulator is required to place on his public register under section 72 of the Railways Act 1993 (because it is not within the categories specified in section 72(2)(b)), it contains no confidentiality restrictions on the parties and either Eurostar or Network Rail is free to publish the contract at any time and as widely as it wishes. Eurostar has not done this. Moreover, the contract could be published by the Regulator under section 71 of the Railways Act 1993 as information which he considers it expedient to give to users or potential users of railway services in Great Britain (subject to the considerations specified in section 71(2)). Given Eurostar's intensity of use of the network and the close liaison which access beneficiaries have with one another and with Network Rail generally in relation to capacity consumption, I consider it almost unimaginable that if Eurostar wished to give publicity to its rights under its contract it could not do so.

86. However, Eurostar has no need for its access rights to be any more visible than they already are. This is because, whether the contract is published or secret, the rights under it cannot degrade over time. Eurostar's rights are whatever the contract makes them. They will not diminish in quality through non-use, or through other users or potential users of the network being in ignorance of them. Whenever Eurostar is in a position to make a valid and timeous declaration as to their use under Part D of the network code, Network Rail must respect and give effect to that declaration. That is so whether the rights are validly declared every six months or only once in sixty years.

87. Network Rail has no power to effect a relinquishment of Eurostar's rights. It cannot, even if it wished to do so, override them. And if it wrongly ignores them, in the sense of failing to give effect to a valid declaration under Condition D2.1.2(a) when it should do so, Eurostar has remedies which it can invoke under the contract to restrain that breach and, in appropriate circumstances, obtain other relief. As far as suspension of rights is concerned, this is only available to Network Rail if Eurostar has committed a breach of its contract and that breach is one of the kinds specified in Clause 9 of the contract. No such breach has been alleged in this case.

Relinquishment

88. The Timetabling Sub-Committee applied the wrong test when it concluded that:

> "it is unreasonable to expect that the Train Operator should be prepared to relinquish the exercise of Firm Contractual Rights, by declaring under Condition D2.1.2(b) ...".

89. First, for the reasons I have given, there has been no relinquishment of rights. Secondly, a declaration under Condition D2.1.2(b) must be given if the rights are not to be exercised, and "exercise" in this context means trains are intended to be run; it is not in the access beneficiary's option to declare that it intends to do something it does not intend to do or *vice versa*. Thirdly, the question of whether it is reasonable to expect a party to honour its contract plays no part in the question of the interpretation of the contract.

90. In that latter respect, it appears the Timetabling Sub-Committee has approached the question on the basis that it has the power to tell the parties what contract they should have made and then, having done that, how they should behave under it. This is not a permissible course of action. There are no provisions in the contract entitling an access beneficiary to insist on Network Rail giving effect to a declaration because it is reasonable to do so. The contract requires a declaration which is valid. It does not sanction an invalid declaration on the grounds that it would be unreasonable to expect an access beneficiary to make a valid one. Moreover, it is quite beyond the proper role of a legal tribunal to arrive at a construction on the basis of what it thinks should have been put into the contract but was not.

91. In *Charter Reinsurance Co Ltd -v- Fagan* [1996] 3 All ER 46, Lord Mustill said (at page 54):

> "There comes a point at which the court should remind itself that the task [of construction of a contract] is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for the court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms."

92. And in *The Peonia* [1991] 1 Lloyd's Rep 100, Saville J said:

> "The starting point [in a case of construction of a contract] must be to examine in context the words and phrases used in the case under consideration. If this is not done, then there exists the risk that the law will start dictating to the parties what their bargain should be, the antithesis of the philosophy and principles of English common law on this subject."

93. The real issue is what is the nature of Eurostar's access rights under the contract. For the reasons given in paragraphs 79 - 82 above, I have determined that they are inherently qualified. That is the test which the Timetabling Sub-Committee should have applied.

Selling capacity more than once

94. Having correctly refused to give effect to an invalid declaration under Condition D2.1.2(a), it is not correct to characterise Network Rail's position as one of freedom to sell the capacity a second time. If the access beneficiary in question is not entitled to have his access rights translated into train slots because he is unable to satisfy the necessary conditions under Part D for a particular timetable period, the capacity in that timetable period will not have been sold a first time. This is because Eurostar's access rights under Schedule 5 of its contract, being qualified in the way I have explained, are not rights which must be translated into train slots in the working timetable come what may. If the conditions for their going into the timetable are not met, they stop there. There is no entitlement to train slots and so none is allocated. It follows that the capacity is unallocated until Network Rail sells it to another user or allocates it for engineering or other purposes.

95. The position is no different when an access beneficiary, even though he is able to use his access rights to go into the timetable, decides not to do so. He is then required to make a declaration to that effect under Condition D2.1.2(b) and Network Rail is then entitled to disregard those rights for the timetable period in question and to allocate or use the capacity in question in some other way. That is not a denial of the access beneficiary's rights. Nor is it selling the capacity a second time. Rather, it is the natural consequence of the legitimate exercise of an access beneficiary's discretion not to require train slots corresponding to its access rights to be put into the timetable.

96. In fact, the two positions come together because if an access beneficiary holding Firm Contractual Rights is unable to make a valid declaration under Condition D2.1.2(a), the network code obliges him to make a declaration under Condition D2.1.2(b) so as to allow Network Rail to proceed with the timetable development process without troubling with the rights which are not to be translated into train slots.

97. Declarations under Condition D2.1.2 last for one timetable at a time. When an access beneficiary holding Firm Contractual Rights has elected not to require them to be translated into train slots in a particular timetable, Network Rail should of course ensure that, in using the capacity which would otherwise have been used to meet the Firm Contractual Rights in question, it does not do so for more than one timetable period at a time. If it does commit the capacity for longer and the access beneficiary decides, in respect of a later timetable period, to make a valid declaration under Condition D2.1.2(a), Network Rail may find itself in the position of having to break one or other contract because it could not honour both. However, in this case, Network Rail properly told Eurostar that, if it does use the capacity for other purposes, it will only do so on a timetable-by-timetable basis and so there should be no risk of conflict in the future. In any case, if Network Rail were to try to sell capacity to an extent which is irreconcilably inconsistent with an existing contract, and if the new access contract requires the approval of the Regulator (as almost all do), it could be expected that in the regulatory approval process the holder of the existing rights would object and the Regulator would require from Network Rail satisfactory answers to his questions about the possible overselling of capacity.

The harshness of the consequences

98. I turn now to Eurostar's arguments concerning the unfairness or burden of the obligation to pay high fixed charges for something it cannot use, and its contention that the economics of the bargain made in 1994 is a relevant consideration in looking at the factual matrix of the contract. I reject its contentions in this respect. The factual matrix of the network code is not confined to the circumstances in which Eurostar entered into its contract. The network code is a single set of rules incorporated by reference in virtually all track access contracts. They mean - and must mean - the same in every such contract. It would be unsustainable for me to decide the question of the meaning of a common term of all contracts on the basis of what one party says is an external influencing factor affecting only his contract. A particular provision of the network code could not be interpreted one way in the Eurostar case and another

way in a dispute between Network Rail and another access beneficiary. The factual matrix which I must consider in this case includes the common nature of the network code and its purpose as a single code for, amongst other things, the fair and efficient allocation of capacity.

99. In any case, Eurostar's frustration with its contract cannot, in my opinion, affect its interpretation. Simply regretting what has been done in the past is not a relevant consideration in the construction of a commercial contract. It is plain now that in 1994 Eurostar contracted for more capacity than it could use. It knew or should have known then that it might not be able to use all the capacity contemplated in the contract. It agreed to pay high fixed charges for what Eurostar is confident are rights at the extreme upper end of the hardwired spectrum. It did this in a contract of extraordinarily long duration. And it failed to include in the contract a mechanism for the adjustment or surrender of access rights which it no longer required and for which it was not willing to continue to pay. Such a mechanism was - and continues to be - included in virtually all franchised passenger track access agreements, the first of which was entered into relatively shortly after Eurostar's contract.

100. Eurostar further argued that, in its case, the network code could be construed differently if that contract had a mechanism for the surrender of access rights and that that would make Network Rail's refusal to give effect to its declaration reasonable. But reasonableness is not the correct test; it is validity which determines the question.

Amendments to the contract

101. In paragraphs 6.5 and 7 of its determination, the Timetabling Sub-Committee suggested that the parties negotiate amendments to the contract which give Eurostar an incentive to make a (valid) declaration under Condition D2.1.2(b) and, if those negotiations failed, to engage in the dispute resolution procedure provided for in Clause 11 of their access contract and, failing that, seek the guidance of the Access Dispute Resolution Committee.

102. Those paragraphs of the Timetabling Sub-Committee's determination contain not only a further error of law - as to the circumstances in which a Condition D2.1.2(b) may be made, with which I have dealt above - but, more seriously, reveal a fundamental misunderstanding on the part of the sub-committee as to the nature of its jurisdiction and of the resolution of legal disputes generally.

103. I assume that the sub-committee made those statements in the purported exercise of powers conferred by Condition D5.5.3 of the network code, which reads:

'in determining [a reference made to it under Condition D5.1 or D5.2], ... [the sub-committee shall have the power] ... to direct [Network Rail] to comply with directions which specify the result to be achieved but not the means by which it shall be achieved ("general directions")',

or Condition D5.5.4, which reads:

'having given general directions, on the application of [Network Rail] within 7 days ... of the determination of the matter in question ... to make such further orders as it shall consider appropriate in order to provide the parties with guidance as to the interpretation and application of such general directions'.

104. It is also possible that the sub-committee believed that it was acting under paragraph A1.1 of the Access Dispute Resolution Rules which says:

"The purpose of the [Access Dispute Resolution Committee] is to discuss and, if possible, settle by agreement disputes which are referred to it ...".

105. Condition D5.5.3 deals only with the determination of the dispute before the Timetabling Sub-Committee. This is apparent from the opening words "in determining the matter in question". The tribunal's jurisdiction is therefore limited to that function. It is neither within the terms of Condition D5.5.3 nor inherent in the jurisdiction of the tribunal that it may suggest to the parties how they might reach a negotiated settlement of their dispute, or, still less, conduct themselves after the tribunal has made a determination (assuming it has). The tribunal's task is to determine disputes when the parties have failed to settle them by themselves. If the parties had been able to settle the dispute before it reached the tribunal, there would have been nothing for the tribunal to do. The fact that a case is before the tribunal means that it is a case for the tribunal to determine. The general directions contemplated by Condition D5.5.3 are directions by the tribunal, given as part of the determination of a dispute, which tell Network Rail what outcome it is to secure, leaving it to the company how it achieves that result. It is not a power to send the parties away to negotiate a new contract or an amendment to their existing one.

106. In relation to Condition D5.5.4, the tribunal would also have been in error in thinking that it could give guidance to the parties under that Condition in the sense of sending

them away to negotiate new contractual provisions. The power to give guidance under Condition D5.5.4 is a power to assist the parties in interpreting and applying general directions under Condition D5.5.3. It does not go further than that.

107. The tribunal would also have been wrong to interpret paragraph A1.1 of the Access Dispute Resolution Rules as giving it a role in trying to get the parties to agree a settlement of their dispute. The reference in that condition to disputes being settled by agreement is a reference to the procedure of the tribunal which, under paragraph A5.11.1, must reach its decisions by unanimous agreement. It is the agreement of the members of the tribunal that is specified in paragraph A1.1, not the agreement of the parties to the dispute.

108. In paragraph 7 of its determination, the Timetabling Sub-Committee contemplated that, if the parties have failed to negotiate an appropriate amendment of their contract, they could either refer that failure to dispute resolution under Clause 11 of their contract or ask the Access Dispute Resolution Committee for guidance. This too displays a failure on the part of the sub-committee to understand basic principles of the law of contract and its own jurisdiction. As explained in paragraphs 91 and 92 above, it is not for a tribunal to make a contract for the parties. Therefore the suggestion that the dispute resolution procedure in their contract could be used for that purpose is inept. Further, it is not within the jurisdiction of the Access Dispute Resolution Committee to act as a mediator or facilitator when parties have been unable to agree a new contract or an amendment of an existing one. The tribunal is there to resolve disputes. It has no other functions.

Width of Firm Contractual Rights

109. I turn now to Eurostar's argument that the right to take part in the timetable development process is also a Firm Contractual Right whose exercise or non-exercise can be the subject of a declaration under Condition D2.1.2. There are serious difficulties when one comes to apply this analysis to the making of a declaration under Condition D2.1.2(a). Condition D2.1.4(a)(i), which establishes the priorities for access rights being translated into train slots in the draft timetable under Condition D2.1.3, says that the rights in question must be Firm Contractual Rights on the "intended dates of operation of those Train Slots". Moreover, Condition D2.1.3 requires Network Rail to compile a draft timetable "which is in accordance with Condition D2.1.4 and which ... in [Network Rail]'s opinion is capable of being

brought into operation". These concepts of actual operation of train movements - which are plainly the object of the draft timetable - sit very uneasily with the notion that Eurostar's declaration under Condition D2.1.2(a) is of an intention to take further part in the bidding process rather than operate trains, and indeed the notion that Eurostar need have no such intention when making a Condition D2.1.2(a) declaration.

110. If Eurostar were correct that the making of a declaration under Condition D2.1.2(a) is itself the exercise of a Firm Contractual Right, this would consist of a declaration to exercise a right to make the declaration which has just been made. The circularity is plain. One cannot both exercise a right and, in exercising it, say you intend to exercise it in the future and not now. Therefore, to make sense of Condition D2.1.2(a), the Firm Contractual Rights which are the subject of the declaration cannot be the making of the declaration itself, and, having regard to the context of the establishment of draft timetable, in my opinion must be the rights to run trains. Condition D2.1.2(a) speaks of an intention to exercise Firm Contractual Rights - that is, in the future - and so the same Firm Contractual Rights cannot thereby also be exercised by the declaration of intention.

111. In relation to Eurostar's argument that the Condition D2.1.2(a) declaration is a statement of intention to exercise in the future a right to take part in the timetable development process, in my opinion this too is unsound. The context of Part D of the network code is relevant here too. It is entirely concerned with the establishment of a workable and sensible timetable, and speaks throughout of actual train movements. The timetable being compiled is a document which shows train movements, not the procedural steps which have been taken by bidders in getting to the working timetable. It does not make sense for Network Rail in some way to be required to reflect a declaration to take a further part in the timetable development process in the draft timetable compiled under Condition D1.5. That Condition provides for a timetable showing train movements and nothing else.

112. This conclusion is reinforced by Condition D2.1.2(i) which provides that, in the case of a declaration under Condition D2.1.2(a), a bidder must "give an indication of the Train Slots that will be bid for in exercising those rights". In my opinion, this makes it plain that the declaration under Condition D2.1.2(a) must be a declaration of an intention to run a train, not to make a bid or play some other part in the bidding process.

113. In defence of its argument, Eurostar says the definition of "Firm Contractual Right" could have been drawn more narrowly, and made expressly limited to a right to a train movement. It is not and, Eurostar says, it is deliberately wider than that narrow formulation. If the draftsman had intended Firm Contractual Rights to be limited to these things, why did he not say so?

114. This argument is often used in a case of the disputed interpretation of a contract. But if it were clear, there would be no dispute. In *Charrington & Co -v- Wooder* [1914] AC 71, Lord Dunedin said, at page 82:

> "I do not think it rests with either party to say to the other 'If the meaning is as you contend, why did you not express it otherwise?' Both contentions as to the true meaning can be expressed by a gloss ... If either of these glosses had been expressed there would be no possibility of dispute. It therefore comes back to the question, What is the true interpretation of the expression in the contract?"

115. The correct approach is to consider the words used in the context in which they appear, and against the commercial purpose of the contract. When faced with a dispute on interpretation such as this, the tribunal should determine the commercial purpose of the contract under consideration and, having done so, choose the meaning which best serves that purpose. In *Antaios Cia Naviera -v- Salen Rederierna AB* [1985] AC 191, Lord Diplock said:

> "... if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

116. Commenting on Lord Diplock's speech, in *Co-operative Wholesale Society Ltd -v- National Westminster Bank plc* [1995] 1 EGLR 97 (CA), Hoffman LJ said:

> "This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement."

117. And in *Arbuthnott -v- Fagan* (Court of Appeal, 20 July 1993), Sir Thomas Bingham MR said:

"Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he meant. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: the instrument must speak for itself, but it must do so *in situ* and not be transported to the laboratory for microscopic analysis."

118. In my opinion, it is plain that the draft timetable and the working timetable which comes after it are intended to be documents which efficiently allocate the capacity of the railway as between competing purposes - both within the class of access beneficiaries as between themselves and between access beneficiaries on the one hand and Network Rail - with its requirements for engineering work - on the other. That is their commercial purpose, and the interpretation which Eurostar seeks to put on the rights of an access beneficiary in the timetable development process is entirely inconsistent with that. Eurostar's declarations were not in relation to trains which would run; rather they concerned trains that everyone then knew would not run. The timetable development process is concerned with trains that will not run only to the extent of firmly excluding them from the process further and from the timetable which is being devised. In this respect, it would be to turn the process on its head to require Network Rail to put into the timetable trains that would not and could not run in that timetable period.

119. As for Eurostar's argument that the words "in respect of" in the definition of "Firm Contractual Right" bring in rights which are wider than simply rights to operate trains and include rights to take part in the timetable development process, considered in the contexts in which Firm Contractual Rights appear it is more consistent with the scheme of the network code and the contract that the narrower definition is the right one. If the rights were as wide as counsel for Eurostar contended, they would include rights as to, for example, confidentiality and default. But the scheme in which the definition is used does not support, or sit easily with, such an interpretation. Moreover, if the wider interpretation were correct, the words "in respect of the quantum, timing or any other characteristic of a train movement" in the definition of "Firm Contractual Right" would be otiose because everything under an access

agreement is concerned in some way or another with train movements. The qualification at the end of the definition of "Firm Contractual Right" also points clearly to the rights being ones to run trains and not other rights. It says that, to be a Firm Contractual Right, the right in question must be "not expressed to be subject to any contingency outside the control of the holder of the right, except, in the case of paragraph (a) above, the applicable Rules of the Plan or the applicable Rules of the Route". That qualification does not fit with the wider definition for which Eurostar contends because rights other than rights to run trains would not be so expressed in any case.

Hardwired nature of access rights

120. In the light of my conclusion that Eurostar's Firm Contractual Rights are inherently qualified in the way described in paragraphs 79-82 above, it is not necessary for me to determine in this appeal whether they have the hardwired qualities which Eurostar argue for them. The qualifications affect access rights irrespective of where they are on the hardwired-flex spectrum.

Issue 2 - Network Rail's entitlement to make a judgment about the validity of a Condition D2.1.2(a) declaration

Issue 2 - argument

121. Eurostar argued that it is not open to Network Rail to make a judgment about the validity of a declaration under Condition D2.1.2. It argued that if Network Rail had that right, Network Rail would be entitled to determine the extent of the rights of the train operator in question. In that respect, Eurostar relied upon the terms of Condition D2.1.4(a) which requires Network Rail first to satisfy any Firm Contractual Right which has been declared "in accordance with Condition D2.1.2(a)". As in relation to issue 1, its case was that it was entitled to make a declaration of intention to run trains when it had no such intention because that declaration was itself the exercise of a Firm Contractual Right.

Issue 2 - analysis and conclusions

122. I am unpersuaded by Eurostar's arguments. I have already dealt with the right of an access beneficiary to make a declaration under Condition D2.1.2(a) when it has no

intention to run trains. If an access beneficiary can make a declaration under Condition D2.1.2(a) to the effect that it intends to run trains when it does not, it follows that it could make a declaration under Condition D2.1.2(b) to the effect that it did not intend to run trains when the opposite is the case. That would be a bizarre result.

123. Network Rail is entitled to make a judgment as to the validity of a declaration under Condition D2.1.2(a). If, as Eurostar argue, Network Rail were required to accept a declaration which it knows to be false, from that point onwards the process for the establishment of the timetable would be proceeding on a misconception. As counsel for Network Rail put it, it would require Network Rail to put on a blindfold and willingly be misled as to the intentions of the access beneficiary in question. Black cannot be white.

124. Condition A1.5 of the network code requires both Network Rail and access beneficiaries at all times to act in good faith when exercising their rights under the network code. If Network Rail is satisfied that a false declaration has been made (whether knowingly or recklessly), that may be a breach of the good faith obligation in the contract on the part of the access beneficiary in question. In my opinion, it could not have been contemplated at the time the network code was devised that, with an obligation of good faith expressly included, Network Rail should be required to proceed on the basis of something which it may have reasonable grounds to believe has been done in breach of that requirement or is otherwise invalid.

125. Eurostar argued that, in making what it described as an "artificial" declaration under Condition D2.1.2(a), it was not acting in bad faith because it genuinely believed that it was entitled to declare that it intended to run trains when it did not. I accept that, at the time it made the declarations, Eurostar had that belief and was not acting in bad faith. However, that does not affect the point that if Network Rail believes there has been a false declaration it should not be required to pretend otherwise. With the ruling in this appeal, all access beneficiaries are now on notice that their declarations must be genuine. Indeed, counsel for Eurostar accepted in oral argument that if Condition D2.1.2(a) requires a genuine intention to run trains, an access beneficiary could not in good faith make any other declaration.

126. My conclusion in relation to the right of Network Rail to make a judgment about the validity of declarations is reinforced by the terms of Condition D5. That Condition

entitles an access beneficiary to refer the matter to the Timetabling Sub-Committee and then to the Regulator if it is "dissatisfied with any decision of [Network Rail] made pursuant to Condition D1.4, D2 or D3". This clearly indicates that Network Rail is expected to make a decision under Condition D2 and, in my opinion, that includes a decision as to the validity of a declaration. Eurostar argued that, under Condition D2, Network Rail is entitled to make judgments about whether an access beneficiary has any Firm Contractual Rights which may be subject to a declaration under Condition D2.1.2(a), but it may not go further and make a judgment about the validity of the declaration itself. I can see no logical basis for making that distinction. Both matters are concerned with the right of the access beneficiary to make the declaration. Network Rail's judgment can extend to every aspect of the declaration. If an access beneficiary is aggrieved by the decision, it has the right to challenge it under Condition D5.

127. It follows from my conclusion in this respect that there is no question of Network Rail, in making a judgment about the validity of Eurostar's declaration, in any way determining the extent of Eurostar's rights. The rights are inherently qualified in the way I have described, and Network Rail is entitled to have regard to those qualifications when assessing the validity of the declaration.

DETERMINATION OF THE TIMETABLING SUB-COMMITTEE

128. In this judgment, I have criticised the decision of the Timetabling Sub-Committee in its particulars. I believe I should add some general remarks about the approach which that body has taken to this case.

129. It is striking that, in purporting to answer questions of law, the determination of the Timetabling Sub-Committee contains no legally relevant reasoning whatsoever. Indeed it is difficult to discern any reasons - legal or otherwise - given for its determination other than it believes that certain propositions or outcomes are or are not reasonable. I have to say that it is to be regretted that a tribunal which is required to deal with questions of law, and in particular the interpretation of complex commercial contracts, should so misunderstand or neglect its functions as to deny the parties which come before it reasons for its decisions.

130. The tribunal was established in 1994 to deal with questions of law as well as issues of a railway operational nature. Paragraph A5.10 of the Access Dispute Resolution

Rules expressly contemplates the tribunal obtaining legal advice in such circumstances, either because a party to a dispute has required that it do so or on the motion of the Chairman of the tribunal. In my opinion, in approaching the questions raised in this case, the tribunal should have obtained legal advice.

131. In important cases, an approach such as was taken by the Timetabling Sub-Committee in this case can only increase the probability that a dissatisfied party, in the absence of coherent reasons for why it has lost, will exercise its rights to appeal the matter or have it taken elsewhere for determination. And when the case comes on appeal, the matter may well, as in this case, involve the appeal tribunal hearing the case almost as one at first instance. In this case, I regret that I have derived no assistance whatsoever from the determination of the tribunal below.

132. In less important cases, the determination of the tribunal will frequently stand, and railway industry participants and others may be guided by it and may make decisions on the strength of it. Yet if its reasoning is defective or absent, the guidance which it can properly provide may be worthless and could do harm. That is contrary to the interests of the industry and of the ultimate users of the railway, and it should not continue.

SUMMARY AND ANSWERS TO SPECIFIC QUESTIONS

133. Eurostar's rights, as an access beneficiary under its access contract with Network Rail, are subject to a number of inherent qualifications. The most significant of them for the purposes of this appeal is that, before access rights under Schedule 5 of an access contract can be translated into train slots in the working timetable, the timetable development process in Part D of the network code must be complied with. In the case of Firm Contractual Rights of the kind held by Eurostar, that requires a valid declaration under Condition D2.1.2(a) of the network code, and that means a statement of a genuine intention to run trains using the access rights in the contract. Eurostar was not able to make such a declaration because it had no rolling stock of the kind permitted by its contract, and instead made a false declaration. Network Rail was entitled to make a judgment as to the validity of the declaration and rightly refused to accommodate the Eurostar declaration in the draft timetable, the bidding information which is used to draw up the working timetable and so the working timetable itself.

134. In relation to the parties' specific questions (set out in paragraph 52 above), my answers are therefore as follows:

(a) Network Rail was entitled to refuse to include Eurostar's night services trains in the draft timetable for summer 2002; it was required to do so;

(b) Network Rail's refusal did not amount to a suspension of Eurostar's Firm Contractual Rights, nor has Network Rail any power to suspend such rights under Part D of the network code;

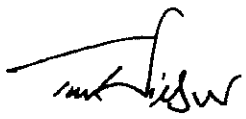
(c) an access beneficiary is not entitled to make a declaration under Condition D2.1.2(a) that it intends to exercise its Firm Contractual Rights to run trains when it has no such intention;

(d) Network Rail may refuse to give effect to a declaration under Condition D2.1.2(a) when it has reasonable grounds to believe and does honestly believe that the declaration has not been validly made; that refusal may itself be challenged using the dispute resolution processes in the network code;

(e) the Timetabling Sub-Committee was wrong to determine that "... it is unreasonable to expect that a train operator should be prepared to relinquish the exercise of Firm Contractual Rights, by declaring under Condition D2.1.2(b), unless the track access agreement (or some negotiated variation to the track access agreement (negotiated in accordance with due process)) provides for the abatement of access charges that would otherwise be payable"; the Timetabling Sub-Committee misunderstood its proper functions and misdirected itself in law; and

(f) the Timetabling Sub-Committee was wrong to suggest that Eurostar and Network Rail should hold commercial negotiations in relation to the surrender of Eurostar's access rights and the giving of financial compensation by Network Rail; such a suggestion was outside the functions of the tribunal and should not have been made.

135. For the reasons I have given, I overrule the determination of the Timetabling Sub-Committee and allow the appeal.



Thomas P Winsor
RAIL REGULATOR

6 March 2003