
TIMETABLING COMMITTEE

Determination No. 168

(following a hearing at Kings Cross on 23rd January 2003)

[Note: previous published determination was determination no 161C]

- 1 The Committee was asked by the Grand Central Railway Company (GCR) to direct Railtrack to accept GCR's bid for paths between Newcastle and Manchester in the Summer 2003 Timetable.
- 2 The Committee noted that
 - 2.1 GCR is an aspirational Open Access Operator; it does not currently enjoy any form of Track Access Agreement;
 - 2.2 there have been extensive and prolonged discussions between Railtrack and GCR regarding GCR's plans;
 - 2.3 the parties have been advised that a formal application to the Regulator for approval of a Track Access Agreement, under whatever relevant provision of the 1993 Railways Act, would be best if informed by evidence supporting the practicalities of any paths sought;
 - 2.4 GCR had participated in the Timetabling Conference for the 2003 Timetable, as entitled under the provisions of Track Access Condition D1.2, and had submitted their Priority Date declaration by the due date, in accordance with procedures that had been discussed and agreed in the course of the Timetabling Conference;
 - 2.5 Although, as previously considered by the Committee in respect of reference ttc144, GCR has aspirations for a large number of new services, the bid for the Summer 2003 Timetable relates exclusively to a service of 4 trains per day in each direction, to be worked by HST train sets.
- 3 The Committee considered that, to this extent, all of GCR's participation in the process was consistent with the requirements of Track Access Condition D, and that their "*rights, or the expectation of rights, falling within Condition D3.4.1(b), D3.4.1(c) or D3.4.1(d)*" had been properly handled by Railtrack, as if compliant, as required by the final paragraph of Condition D3.4.1. However, at the end of the Timetable Development period, Railtrack had advised GCR that, although it had established that the paths sought were practicable, and were identified within the Timetable database, the formal bid would be rejected, and therefore no offer of paths would be made.
- 4 The Committee noted that a similar position in respect of the inclusion of paths in the database had been reached (as documented in ttc144) in respect of the Summer 2002 Timetable. However, whereas in that instance Railtrack had expressed an unwillingness to enter into a Track Access Agreement with GCR, in this case Railtrack was prepared to concede that, in due course, it would be prepared to co-operate with GCR in the presentation of an appropriate submission to the ORR;

- Railtrack was not clear as to whether such an application would ultimately require to be made under Section 18 of the Railways Act 1993, with Railtrack's endorsement, or, because of continuing hesitancy on Railtrack's part, under Section 17.
- 5 The Committee noted further, that in the course of the Timetable Development Period, there had been a significant dialogue about the feasibility and scope of GCR's aspirations. However, the reason being given by Railtrack for declining to make an offer to GCR related fundamentally to a doubt, as it perceived, as to whether GCR would be able to procure the rolling stock necessary for the operation of the service during the currency of the timetable. In consequence Railtrack considered that it would not be good stewardship of the Network to make any formal offer of the paths bid for. GCR's Bid had therefore been rejected and GCR advised in accordance with Track Access Condition D3.5.1(a).
 - 6 The Committee noted that there is much evidence of activity by other parties which could be construed as giving credence to a view that GCR might not be in a position to supply rolling stock by an appropriate date; on the other hand, GCR is convinced that this will not be a problem, and believes that it has produced adequate evidence to support this contrary view. The Committee declined to get drawn into a consideration of which was the view more likely to prevail, and chose to confine its focus to the question of whether Railtrack had acted appropriately, and within its rights, in the case in question.
 - 7 The Committee was mindful of the following factors:
 - 7.1 The industry is under an obligation not to put barriers to entry for Open Access Operators, and as such to ensure that such new entrants are not subjected to tests that would be unreasonable if applied to other Train Operators.
 - 7.2 Once an offer for a path has been formally made, that path becomes (subject to contractual terms) a commitment to the Operator concerned, and therefore not readily available to be deployed to other Train Operators. Whilst this process of commitment, and consequent shutting off of alternative possibilities, is an intrinsic part of the Timetabling process, there could be grounds for declining to make this commitment where there is a reasonable doubt as to whether all of the necessary resources etc., would be available for the paths actually to be used.
 - 7.3 The paths that had been identified, and included in the database, but not offered to GCR, did not materially conflict either with any other declared aspirations, nor with the fulfilment, within agreed Flexing Rights, of the declared rights of any other Train Operators using the routes in question.
 - 7.4 That there is no inhibition on Railtrack, were it so minded, to making a formal offer to GCR in accordance with Track Access Condition D3.5.1, but that it could only implement the offer on the conclusion of a Track Access Agreement approved by the Regulator.
 - 7.5 Where there is no current Track Access Agreement, but there is a fair and reasonable "*expectation of rights*", the Committee may reasonably determine disputes about Railtrack's application of the priorities in Track Access Condition D3.4.1. However, although it may encourage parties to engage in

further dialogue on matters of contention, it has no locus to direct that Railtrack should actually grant access rights to a Train Operator, where it does not wish so to do.

- 8 For the avoidance of doubt, the Committee established with the parties that there was no question of either party being fundamentally opposed to the ultimate signing of a Track Access Agreement, but that there was a difference between the parties as to their confidence that such agreement, and acceptance by the Regulator, could be obtained by the commencement of the Summer 2003 Timetable. With this established the Committee was satisfied that it lay within its locus to issue a determination on the merits or otherwise of Railtrack's course of action, in rejecting GCR's bid.
- 9 The Committee therefore considered the following points as key to its determination
 - 9.1 within the complex business of becoming an Open Access Train Operator, the new entrant needs assurance that paths, for which it will also be seeking to negotiate rights, are actually deliverable. It is not improbable that this will imply that provisional commitments need to be given, to meet the needs of the timetabling process, in advance of the negotiation of the Track Access Agreement. However,
 - 9.2 Railtrack would not be discharging its responsibility to other Train Operators were it to give the absolute commitment implied by the formal acceptance of a Bid, and so close off capacity to other users, where it retains a reasonable doubt that the capacity so committed would ultimately be used by the Train Operator making the bid.
 - 9.3 In the circumstances of this case, Railtrack's doubts are reasonable as to the ability of GCR to be able to conclude all the necessary preliminaries in order to be able to operate a service over the paths in question from the commencement of the Summer 2003 Timetable; in this respect Railtrack's reluctance formally to accept GCR's Bid, for the Summer 2003 Timetable, can also be considered reasonable.
 - 9.4 That said, there is nothing in the circumstances of the case, or in the provisions of the Track Access Conditions, which would prevent the Committee from directing Railtrack to make explicit provision for the paths bid for by GCR.
- 10 Taking all these considerations into account the Committee determined that
 - 10.1 Railtrack's decision not to make an offer of paths to GCR was reasonable and could be justified; however
 - 10.2 there is sufficient evidence of GCR's serious intention to put in place all the elements necessary to run a service making use of the paths for which they have bid, and that therefore Railtrack should be planning in the expectation that paths will ultimately need to be found to meet GCR's aspirations. Therefore
 - 10.3 it would not be reasonable were Railtrack, as a consequence of this determination, to make arrangements or agreements to dispose of the identified capacity in any way that would preclude GCR from introducing its planned service during the currency of the Summer 2003 timetable, except in the case where it is satisfying reasonable Spot Bid needs of other Train Operators.

- 11 For the avoidance of doubt, this determination
- 11.1 does not create any presumption as to the rights, in advance of the negotiation of a Track Access Agreement, that GCR may aspire to, or bid for, in future Timetables (ie after Summer 2003);
 - 11.2 does not prevent Railtrack, between now and the end of the Summer 2003 Timetable, from making sensible use of the capacity in question for the purpose, of fulfilling the reasonable Spot Bid needs of other Train Operators; provided that Railtrack shall not make any such alternative commitments without prior consultation with GCR; and.
 - 11.3 does not imply any prejudgement of the merit of a possible application by GCR to the Regulator for a Track Access Agreement.

Bryan Driver

Chairman of Committee