

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

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

Introduction

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

Factual Background

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

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

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

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

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

Relevant provisions

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

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

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

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

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

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

¹ PARTP provides a means of altering the Rules of the Route and/or Rules of Plan other than through the twice – yearly process having effect from the Passenger Change Dates. Available at http://www.networkrail.co.uk/browse_documents/rules_of_the_route/outrotp7/nrop07p.pdf

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

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

..

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

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

..

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

..

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

The Panel's determination

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

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

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

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

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

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

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

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

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

The grounds and conduct of the appeals before ORR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORR's consideration of the appeal

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

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

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

ORR will deal with each of these issues in turn.

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

Application of Section 3.1.3.

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

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

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

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

Compliance with the PARTP requirements

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

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

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

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

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

The Panel's assessment of the evidence

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

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

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

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

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

Compliance with the ADRR

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

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

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

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

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

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

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

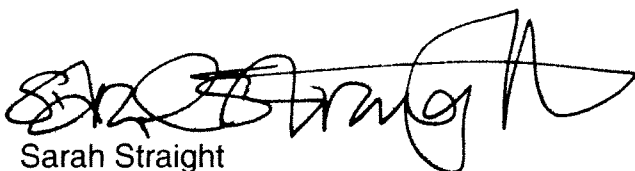
33. ORR shares the concerns of the Panel regarding the manner in which Network Rail sought to implement the possessions. Network Rail has acknowledged that it should have communicated the serious nature of the defects and the constraints on its ability to repair the line to EWS and FHH in a much clearer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

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

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

Conclusion

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



Sarah Straight
Duly Authorised by the Office of Rail Regulation

2 February 2007