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

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### **Determination in respect of dispute reference TTP1122**

*(following a hearing held at 1 Eversholt Street, London on 8 September 2017)*

#### **The Panel:**

John Hewitt                      Hearing Chair

#### **Members appointed from the Timetabling Pool**

|               |   |
|---------------|---|
| Andy Roberts  | elected representative for Franchised Passenger Class, Band 3 |
| Nigel Oatway  | elected representative for Non-Passenger Class, Band 2        |
| Matthew Allen | appointed representative of Network Rail                      |

#### **The Dispute Parties:**

##### **For XC Trains Ltd ("XC")**

|                  |                                   |
|------------------|-----------------------------------|
| David Fletcher   | Timetable Strategy Manager        |
| Richard Thackray | Head of Timetabling & Diagramming |
| Pauline Rawlings | Head of Planning & Performance    |
| Nathan Thompson  | Service specification Advisor     |

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

|                  |  |
|------------------|--|
| Andy Bray        | Timetable Production Manager - Scotland    |
| Paul Scott       | Operational Planning Specialist - Scotland |
| Don Roberts      | Route Customer Services Manager - Scotland |
| Ross McInnes     | Operational Planning Project Manager       |
| Charlotte Ashton | Operational Planner                        |

##### **For Abellio Scotrail Ltd ("ASR")**

|              |                                   |
|--------------|-----------------------------------|
| Neil Sutton  | Senior Permanent Planning Manager |
| Perry Ramsey | Operations Director               |

#### **In attendance:**

Tony Skilton                      Secretary, Access Disputes Committee

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## **1 Introduction, Substance of Dispute and Jurisdiction**

- 1.1 On 7 July 2017 XC notified - pursuant to Conditions D2.7.2 and D5.1 - dispute with Network Rail in relation to Network Rail's decisions regarding the New Working Timetable Publication for 2018 ("Principal 2018 WTT" or "2018 WTT", which would commence in December 2017).
- 1.2 The dispute was brought on the basis that some of XC's train services to Glasgow Central had been re-timed by Network Rail to arrive later than in the existing WTT, typically by 3 minutes.
- 1.3 It was XC's understanding that Network Rail had decided upon the re-timings in order to provide a regular 30 minute interval on local services from Lanark to Glasgow Central operated by ASR. XC believed that this objective had been prioritised over the possibility of maintaining or reducing journey times for long distance trains and that the Decision Criteria had not been applied correctly by Network Rail when making its decision.
- 1.4 On 10 July 2017 Network Rail informed the Secretary that it was not expected that XC's concerns could be satisfied and that an early Timetabling Panel hearing would be appropriate.
- 1.5 I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.
- 1.6 In its consideration of the Parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in ADR Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.7 The abbreviations used in this determination are as set out in the list of parties above and in this paragraph 1.7.

"ADR Rules" means the Access Disputes Resolution Rules  
"Secretary" means the Secretary of the Access Disputes Committee  
"SRT" means Sectional Running Time  
"TPR" means Timetable Planning Rule  
"WTT" means Working Timetable

## **2 Background, history of this dispute process and documents submitted**

- 2.1 Some difficulty was experienced in making suitable arrangements for the matter to be heard over the main summer holiday period. I was appointed as Hearing Chair on 21 July 2017 and 8 September 2017 was set as the date for the hearing. At my request, the Dispute Parties were required to provide Sole Reference Documents.
- 2.2 Other operators who might wish to become an interested party or a Dispute Party were alerted to the hearing arrangements on 21 July 2017 and on 25 July 2017 ASR declared itself to be a Dispute Party.
- 2.3 XC served its Sole Reference Document on 18 August 2017.
- 2.4 Network Rail and ASR each served a Sole Reference Document on 30 August 2017.
- 2.5 Having considered the documents provided by the dispute parties, on 31 August 2017 they, and the appointed Panel members, were informed in relation to Rule H18(c) that I had not identified any issues of law as being raised by the dispute, the main issue being the proper interpretation/construction of Part D of the Network Code as regards Network Rail's duties in respect of the WTT and the correct application and weighing of the Decision Criteria.

- 2.6 The hearing of the dispute took place on 8 September 2017. The Dispute Parties made oral opening statements and they were then questioned by me and the other members of the Panel. The Dispute Parties also had opportunity to make closing remarks.
- 2.7 At the conclusion of the hearing, having conferred with the other members of the Panel, I summarized the substance of my determination of the dispute, which was to give general directions to Network Rail specifying the result to be achieved as envisaged by Condition D5.3.1(a). This was sent out to the Dispute Parties in writing on 11 September 2017 to enable them to take matters forward and is confirmed at the end of this written determination.
- 2.8 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarized in the course of this determination.

### **3 Relevant provisions of the Network Code and other documents**

- 3.1 The Network Code Part D was applicable to the issue to be determined in this dispute, particularly Condition D4.6 - The Decision Criteria - which is reproduced as Annex "A" to this document.

### **4 Submissions made by the Dispute Parties**

- 4.1 In its Sole Reference Document, XC identified seven trains as being in contention and requested the Panel to -
- direct Network Rail to overturn its decision and restore the xx12 arrival time of the 1Sxx Service Group into Glasgow Central;
  - confirm XC's understanding of Network Rail's duties under Part D of the Network Code in respect of the WTT, being that in the absence of competing aspirations for capacity it is not for Network Rail to make fundamental changes to the structure of the timetable;
  - confirm that correct weighting and application of the Decision Criteria would have seen the xx12 arrival time of the 1Sxx Service Group, as bid by XC, published at D-26; and
  - confirm Network Rail's communications during the preparation period regarding this change did not meet its obligations under Part D of the Network Code.
- 4.2 Responding in its Sole Reference Document to the issues raised by XC, Network Rail asked the Panel to determine -
- that Network Rail is entitled to exercise its Flexing Rights in accordance with Condition D4.2.2 and confirm that this entitlement is not limited to when Access Proposals are competing for the same Train Slot;
  - that Network Rail has considered and applied the Decision Criteria in accordance with Conditions D4.6.1 and D4.6.2;
  - that Network Rail has fulfilled its Condition D2.6.2 obligation during the preparation of the WTT; and
  - to uphold the decision of Network Rail to allocate the xx12 arrival Train Slot at Glasgow Central to ASR and to allocate the xx15 arrival Train Slot to XC.
- 4.3 In its Sole Reference Document, ASR supported the determinations which were sought by Network Rail.
- 4.4 The Sole Reference Documents are published on the Access Disputes Committee website.

### **5 Evidence at the hearing**

- 5.1 The facts set out below emerged during the course of the hearing.

- 5.1.1 The decision of Network Rail was made against the background of and in the context of new TPRs for the Principal 2018 WTT based on TRIP data which were issued on 2 February 2017. A significant number of SRTs were amended for that revision of the TPRs.
- 5.1.2 XC submitted a D-40 Access Proposal for the 2018 WTT on 3 March 2017 which did not contain any material changes on the Edinburgh – Glasgow corridor. ASR also did not submit an Access Proposal to amend any Train Slots along that route.
- 5.1.3 Thus Network Rail contemplated the changes, the subject of this dispute, on its own initiative and without any request having been made by ASR or XC.
- 5.1.4 Neither XC's EH01 Service Group (which includes all seven of XC's Train Slots in question) nor the ASR HA06 service group (which includes all seven of ASR's Train Slots in question) have interval protection or journey time protection in the respective Track Access Contracts.
- 5.1.5 On Monday 22 May 2017 Network Rail sent to XC a summary of proposed timetable changes relating to the revised TPRs and SRTs. This summary, whilst declaring the 'plans were subject to change' showed that there were no envisaged changes to XC's journey times into Glasgow Central.
- 5.1.6 Network Rail first notified XC of its thinking as regards the seven Train Slots at an informal meeting on Thursday 25 May 2017. Network Rail did so as part of its practice to keep participants regularly informed during the Timetable Preparation Period. At that time the explanation put forward to move XC's arrivals from xx12 to xx15 was to match Virgin Trains West Coast (West Coast Trains Ltd) arrivals in the alternate hours and to allow a patterned arrival for ASR's Lanark – Glasgow services. At that meeting Network Rail was informed that such changes would have a negative commercial impact on XC and thus were not something that XC was likely to agree upon.
- 5.1.7 On Wednesday 7 June 2017 XC representatives contacted Andy Bray, Network Rail's Timetable Production Manager (Scotland), stating that the contemplated changes would have a negative impact on XC's revenue but did not put forward any indication of the likely level of losses. Some partial mitigation changes were also discussed but they did not lead to a concluded agreement.
- 5.1.8 XC was aware that Network Rail was to make its decision by Friday 9 June 2017 and was of the view that if the proposed changes were confirmed it would have a significant adverse financial impact on its revenues, but did not provide to Network Rail any detail or supporting data for Network Rail to take into account in the decision making process because its Commercial Director was away and only he could authorise the release of such data to Network Rail.
- 5.1.9 On Friday 9 June 2017 Network Rail published the 2018 WTT which gave formal notice that the proposed change of the arrival times of seven XC trains from xx12 to xx15 would take effect. At that stage the reasoning for the decision was to facilitate patterned timetables. At the time the decision was made Network Rail assumed that:-
  1. The changes would have some negative commercial impact on XC but did not know what the scale of it might be and did not ask XC for further information. Network Rail assumed the primary commercial focus would be around Edinburgh to Glasgow journey times (rather than England to Glasgow journey times). Network Rail worked on the basis that it had the ability to protect journey times from Motherwell to Edinburgh; that Edinburgh to Glasgow was a key route to XC and sought to ensure that it mitigated possible losses on that route as much as possible.

2. There might be some performance benefits but did not know what the scale of them might be because it had not run any modelling. Network Rail is conscious of the need to improve performance and even if the outcome might be modest it can have a cumulative effect and so it is usually given some weight in the decision making process.
- 5.1.10 On Tuesday 20 June 2017 Network Rail responded to a request from XC for further information and that information appeared to reinforce that the reasoning behind the change was the running order from Uddingston Junction to Glasgow Central and the consequent re-patterning of the ASR 2Bxx Lanark to Glasgow Central services.
- 5.1.11 XC expressed concerns about the impact of the changes. A meeting between all Timetable Participants was scheduled for 28 and 29 June 2017 to discuss the changes in the published timetable and the implications, but this meeting was cancelled at short notice on Monday 26 June 2017 because Network Rail had not understood either the time or cost involved in uploading the data into its modelling system, the data was therefore not available and so there was no point in the meeting going ahead.
- 5.1.12 On Friday 7 July 2017 XC issued its Notice of Dispute in relation to the 2018 WTT 2018.
- 5.1.13 On Thursday 10 July 2017 Network Rail provided a write-up of its application of the Decision Criteria which included reference to performance. A series of conference calls took place between representatives of XC and Network Rail during which performance data was shared, but Network Rail was unable to show an understanding as to how the change to the running order from Uddingston Junction would improve overall performance.
- 5.2 At the hearing XC tabled - requesting that it be kept confidential to the hearing due to commercial sensitivity - revenue modelling data undertaken using the industry's recognised MOIRA tool (Model of Inter-Regional Activity) which suggested that the timetable changes associated with the seven XC services might lead to an overall annual industry revenue loss of some £51k but with the annual impact upon XC itself being a revenue loss perhaps approaching a figure some four times greater.

## **6 Analysis and consideration of issues and submissions**

- 6.1 From the above summary of the facts, it was clear to the Panel that at some time between 22 and 25 May 2017 Network Rail arrived at the decision to make a proposal to effect changes to the seven XC services which are the subject of this dispute. Network Rail shared that proposal with XC and in consequence was aware that it was controversial and would have some negative commercial impact on XC.
- 6.2 At the time the decision was made, it appears that Network Rail had broad and imperfect information and data before it. That was not an ideal or satisfactory position. At the hearing, both Network Rail and XC representatives acknowledged that communications between the two organisations could and should have been better.
- 6.3 The materials before Network Rail were thin. It appears to have relied upon assumptions, some of which turned out to be misdirected. It did not seek clearer and firmer data from XC. Equally XC did not volunteer data to support its fear of a significant adverse commercial impact because it could not obtain internal authority to do so. That is hardly satisfactory in this modern age with its ease of global communication currently enjoyed.
- 6.4 Since the date on which Network Rail made its decision a good deal of further information has come to hand which ought to be taken into account and weighed appropriately in the decision making process. It is axiomatic that the more information

and data available to a decision-maker the probability is that the quality and robustness of the decision will be better informed.

6.5 Network Code Condition D5.3 provides that the primary role of this Panel is to give general directions to Network Rail specifying the result to be achieved but not the means of achieving that result. In effect the Panel may reject an appeal, but cannot allow an appeal, or substitute an alternative decision in place of that disputed, save in exceptional circumstances. No such circumstances were put before the Panel nor did it believe any existed.

6.6 For these reasons the Panel gave directions to Network Rail to reconsider its decisions in the light of the more detailed information provided or to be provided to it. In doing so, the Panel directed that Network Rail should consider the differing circumstances and implications on each of the seven Train Slots in dispute.

6.7 The Panel understands that that exercise has now been concluded.

6.8 In these circumstances it is unnecessary for the Panel to make detailed observations on each of the submissions put forward during the course of the dispute and the hearing but at the invitation of the parties the Panel makes a number of observations in the remainder of this Section 6 that may be of wider or more general assistance.

#### 6.9 **Flexing Rights**

XC challenged Network Rail's power or entitlement to make unilateral decisions regarding the structure of the timetable such as it did in this case. XC submitted that the opening of Network Code Condition D4.6.1 begins with the phrase "*Where Network Rail is required to decide any matter...*" and no decision was required because there were no competing or rival Access Proposals before Network Rail.

In response Network Rail drew attention to Condition D4.2.2(c) and its right to exercise its Flexing Right. It claimed that is what it did in this case by amending a Train Slot between D-40 and D-26. Network Rail further submitted that its power in this regard was not limited to resolving conflicts but extends to unilateral decisions aimed to achieve The Objective set out in Condition D4.6.1.

In paragraph 4(g) of its Sole Reference Document, Network Rail cited an example where it had used its Flexing Right, unilaterally to the benefit of XC's services into Edinburgh Waverly from both Glasgow Central and from England.

The Panel noted the provisions of Condition D1.1.11 and, in particular, the definition of "Flexing Right" set out therein which allows Network Rail to use its Flexing Right in respect of "Rolled Over Access Proposals" which both XC and ASR had submitted in respect of the trains subject to this dispute. Neither this definition nor the provisions of Condition D4.2.2(c) constrain Network Rail's use of its Flexing Right when compiling the New Working Timetable to be used only where there are conflicts between Access Proposals.

Having carefully considered the relevant provisions of the Network Code Part D and the proper interpretation of the words used, the Panel prefers and adopts the submissions made on behalf of Network Rail on this point.

#### 6.10 **Decision Criteria**

XC also challenged the application of the Decision Criteria in a number of respects which need not be examined in detail due to Network Rail being directed to reconsider its decisions in light of the further information that has emerged (or may emerge) subsequently.

*'Maintaining and improving train service performance'*

Network Rail accepted that at the time the decisions were made it had little, if any reliable data before it to support this criterion.

To a large extent Network Rail relies on the benefits of patterned arrivals. Whilst accepting that patterned departures are of assistance to passengers, the Panel was not convinced that patterned arrivals are of the same level of significance. The more so where only some of ASR's arrivals into Glasgow Central are similarly patterned. Network Rail appeared to accept this point but argued that it was helpful to make a start and that gradually the objective might be achieved in the long run.

*'Commercial interests of ... any Timetable Participant of which Network Rail is aware.'*

It has already been noted that XC had not provided detailed data on the revenue impact of the proposed decisions prior to Network Rail coming to a final decision on the proposals. It follows that XC can hardly complain that such data was not taken into account. The Panel has already made plain that communications (on both sides) could and should have been better. It is not clear to the Panel that Network Rail considered each of the seven trains separately and took into account any financial implications for ASR.

- 6.11 ASR had not carried out any revenue modeling surrounding its services under notice and Network Rail was without capability to compile such information. ASR observed that XC's commercial considerations seemed to be limited to passenger revenue and did not take account of potential industry overall cost savings which might accrue from the changes, for example, through improved performance. The Panel is not persuaded of the significant adverse commercial impact being asserted by XC. Revenue losses of the scale indicated are not thought to be of any real significance in the context of the overall finances of the industry nor can it reasonably be thought significant for the turnover of a business the size of the XC franchise, especially as the Panel was informed by XC that MOIRA data does not include an operator's direct sales to passengers under any advance ticket purchase scheme.
- 6.12 The Panel arrived at the view that each of the seven XC trains required to be considered by Network Rail separately because of the implications attaching to each of them impacting differently on XC and ASR.

The Panel had before it more detailed data and information than that available to Network Rail when it published its decisions on 9 June 2017. On the basis of the limited (and still imperfect) information that emerged during the course of the hearing, and balancing the rival pros, cons, interests and aspirations of the Dispute Parties, the preliminary view of the Panel was that the arrival time at Glasgow Central of xx12 ought to be allocated as follows:

|      |    |       |        |
|------|----|-------|--------|
| 1S31 | SX | 12:12 | To XC  |
| 1S35 | SX | 14:12 | To ASR |
| 1S39 | SX | 16:12 | To XC  |
| 1S33 | SO | 12:12 | To XC  |
| 1S35 | SO | 14:12 | To XC  |
| 1S39 | SO | 16:12 | To XC  |
| 1S47 | SO | 20:12 | To ASR |

- 6.13 Having reached the conclusion that on the basis of currently available information a proper application of the Decision Criteria was in favour of XC for five of the seven services in contention, the Panel had to review Condition D5.3.1 to decide on the remedy. It could comply with D5.3.1(a) by giving *'general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved'*, but could only *'substitute an alternative decision in place of a challenged decision of Network Rail'* under D5.3.1(c) if *'exceptional circumstances'* had arisen. Clearly it

could not be credibly submitted in this dispute that exceptional circumstances had arisen entitling the Panel to substitute its own decision under D5.3.1(c), and thus no such submission was made by any of the Dispute Parties. This appeal must therefore be determined in the context of Condition D5.3.1(a).

## **7 Determination**

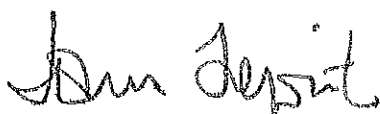
7.1 Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, my determination is that Network Rail is directed to reconsider its decisions in respect of each of the seven trains, the subject of this dispute, taking into the account the information provided to date and the further information (if any) to be provided pursuant to this direction, and to that end:

(1) Network Rail was by 13 00 Monday 11 September 2017 to notify XC and ASR what further information (if any) it requires in order to give consideration to the further points that emerged during the course of the hearing;

(2) XC and ASR were by 17 00 Wednesday 13 September 2017 to respond to any request made pursuant to (1) above and shall provide all and any further or other information or data which each of them wishes Network Rail to take into account when carrying out its reconsideration of its decisions; and

(3) Network Rail was by 17 00 Friday 15 September 2017 to notify XC, ASR and the Secretary of its reconsidered decisions in respect of those seven trains.

7.2 I confirm that, so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



John Hewitt  
Hearing Chair

29 September 2017



## Annex “A” to Timetabling Panel determination of reference TTP1122

### EXTRACT FROM THE NETWORK CODE, PART D

#### 4.6 The Decision Criteria

- 4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services (“the Objective”).
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the “Considerations”) in accordance with Condition D4.6.3 below:
- (a) maintaining, developing and improving the capability of the Network;
  - (b) that the spread of services reflects demand;
  - (c) maintaining and improving train service performance;
  - (d) that journey times are as short as reasonably possible;
  - (e) maintaining and improving an integrated system of transport for passengers and goods;
  - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
  - (g) seeking consistency with any relevant Route Utilisation Strategy;
  - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
  - (i) mitigating the effect on the environment;
  - (j) enabling operators of trains to utilise their assets efficiently; and
  - (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates.
- 4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in the light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.
- 4.6.4 The Objective and the Considerations together form the Decision Criteria.