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

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### **Determination in respect of reference TTP222**

*(following a hearing held at Central House, Euston on 5<sup>th</sup> November 2008)*

#### **The Panel**

**Shaun Fisher:** elected representative for Franchised Passenger Class Band 2

**Jonathan James:** appointed representative of Network Rail

**Nigel Oatway:** elected representative for Non-Passenger Class, Band 1

**Colin Pratt:** elected representative for Franchised Passenger Class, Band 2

Panel Chairman **Sir Anthony Holland**

#### **The Parties**

##### **For Direct Rail Services ("DRS")**

**Chris Connelly** Commercial Director

**Sarka Oldham** Intermodal Account Manager

**Kevin Eccleston** Access Planning Manager

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

**Matt Allen** Network Access Unit Manager

**Gordon Cox** Customer Relationship Executive

**David Kerr** Integrated Planning Manager

#### **Brief Summary of the dispute, and the jurisdiction of the Panel**

1. The Panel was asked by DRS to determine that Network Rail is not entitled to proceed with 54 hour possessions between Dundee and Aberdeen in weeks 41 to 44 in January 2009, because of the adverse impact upon DRS' services operated on behalf of Asda and Eddie Stobart (for Tesco).
2. Network Rail contested DRS' case, the main arguments upon which Network Rail rested its defence being that
  - 2.1. the works in question
    - 2.1.1. were essential maintenance and renewal works,

- 2.1.2. had been planned and consulted through the successive versions of the Rules of the Route;
- 2.1.3. were organised as 4 x 54 hour Restrictions of Use ("ROUs"), as compared with a greater number of shorter ROUs because
  - 2.1.3.1. this did not clash with other major works affecting other areas of Scotland; and
  - 2.1.3.2. this had been deemed by other affected Train Operators to be the least disruptive approach;
- 2.2. the DRS services affected were supported in some instances by Level 1 Rights, but in others were incorporated into the WTT on the strength of Spot Bids. Even Level 1 Rights are subject to the Rules of the Route;
- 2.3. as these ROUs had been in the access plan since Version 1 of the 2009 Rules of the Route, it was unreasonable for DRS to be contesting the matter at this time, given that the Timetable for December 2008 had been settled to the point where Passenger Train Operators were already publishing details of the impact of the diversions in compliance with their "Informed Traveller" T-12 obligations.
- 3. DRS, the Claimant, invited the Panel to:
  - (a) ***direct Network Rail to reduce the duration of the possessions in question in order that DRS can offer an acceptable level of service to their customers, ASDA and Eddie Stobart Ltd.***
- 4. Network Rail invited the Panel to:
  - (b) ***direct DRS to accept the disruptive engineering access plan as detailed in the V3 2009 ROTR and subsequent Confirmed Period Possession Plans.***
  - (c) ***advise DRS that they should have brought this dispute to the Panel's attention earlier and that it is wrong for DRS on these timescales to now seek a determination from the Panel that could impact already amended timetable plans.***
- 5. The Panel was satisfied that the matter is one that should properly be heard by a Timetabling Panel, meeting under the terms of Network Code Part D, as all the matters in question arise because a "*Bidder is dissatisfied with ...decision[s] of Network Rail made under this Part D*". However, the Panel also recognised that one possible outcome of its determination of the matter would be to require Network Rail to review and amend Train Slots already offered and accepted by other Train Operators.
- 6. The Panel reminded itself that,
  - 6.1. as stipulated in the Access Dispute Resolution Rules, it must "*reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis*" (Rule A1.18).
  - 6.2. the entitlements of the parties in this instance derive from
    - 6.2.1. the Track Access Contract of DRS (and those of other affected parties);
    - 6.2.2. the observance of the processes and obligations set out in Network Code Part D;
    - 6.2.3. any relevant amplification of the meaning of these documents as contained in a determination of either a "*relevant ADRR Panel*" or the ORR;
  - 6.3. in respect of any question of remedy;

- 6.3.1. Rule A1.19 prescribes that *"The Panel shall (a) where the Access Conditions or Access Agreement require that a specific remedy be granted, grant that remedy accordingly; or (b) where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Panel, exercise that discretion in accordance with any requirements and criteria set out in the Access Conditions and Access Agreement after due consideration of all remedies and orders that could properly be made"*.
- 6.3.2. Condition D5.3 states that *"any dispute panel shall, in determining the matter in question, have the power:*
  - 5.3.1 *in determining the matter in question:*
    - (a) *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");*
    - (b) *to direct the parties to accept any submissions made by Network Rail as to any Train Slots; and/or*
    - (c) *to specify the Train Slots and other matters which Network Rail should have determined in its decision made pursuant to this Part D,*

*provided that a dispute panel shall only take any action under paragraph (c) above in exceptional circumstances;"*
7. Where, as in this instance, there is a question that the Claimant's rights may not have been afforded the appropriate relative priority, as compared with other Train Operators, the Panel must be satisfied that it is supplied with appropriate facts relating to the standing of the rights of all Train Operators as at the Priority Date for the Timetable in question, and that all Train Operators potentially affected by the determination sought from the Panel should have the opportunity to be considered interested parties to the dispute.

### **Some preliminary issues of definition; DRS' right to a hearing**

8. The Panel considered the suggestion that DRS' case should not be considered because of the lapse of time since the first registering of an appeal against the ROUs. In coming to a conclusion as to whether it would be appropriate to hear DRS' case, the Panel took into account the following:
  - 8.1. the ADC Secretary advised that
    - 8.1.1. an appeal had been formally lodged by DRS, following publication of Version 3 of the Rules of the Route, and that DRS had complied with the timescales prescribed within Network Code Condition D5;
    - 8.1.2. DRS had given him periodic updates in relation to discussions taking place between itself and Network Rail, and had asked that a hearing not be scheduled whilst it believed the parties were potentially reaching an agreement;
    - 8.1.3. DRS had only reported the failure of ongoing discussions in late September, and the hearing had been convened at the earliest practical date thereafter;

- 8.2. DRS advised, and Network Rail confirmed, that, following guidance contained in TTP68, DRS, DRS' customers, and Network Rail now met regularly in tri-partite forum to address operational developments and problems, and that,
- 8.2.1. in relation to the generality of the Rules of the Route, solutions to some "60%" of problems arising from Network Rail proposed ROUs had been found and agreed; but that
  - 8.2.2. if the weeks 41 to 44 ROUs, could not be amended, either to abridge them, or to permit the special passage of DRS' trains, the final customers' needs could only be met if
    - 8.2.2.1. some Sunday services were re-scheduled to contingency Train Slots on Mondays, and
    - 8.2.2.2. Saturday services were transferred, where practicable, to road transport.
  - 8.2.3. in the course of tripartite discussions in June, DRS' customers (Asda and Eddy Stobart) had both been encouraged to quantify the costs associated with temporary diversion to road, the understood implication being that Network Rail would consider meeting such costs (*"ACTION: A MacK to investigate feasibility of Network Rail providing some financial compensation as a consequence of having to provide road transport for these specific weeks"* Page 4 Minutes of DRS and Network Rail Liaison Meeting 19<sup>th</sup> June 2008), and that this would overcome DRS' objections to the ROUs. In the event
  - 8.2.4. when, at a further meeting on 16<sup>th</sup> September 2008, DRS customers presented their assessments of the additional costs they would face, Network Rail advised DRS, that, as the ROUs in dispute were not associated with Network Change, no form of financial compensation could or would be made in relation to those potential costs. In consequence of this response DRS had advised the ADC Secretary that the matter at issue did now require to be heard by a Panel.
9. The Panel found Network Rail's behaviour in this last respect particularly unattractive, inasmuch as it appeared to lead DRS' customers to believe that some compensation of their additional road transport costs would be available, when, in reality this was not the case. The Panel considered that Network Rail's behaviour gave no support to Network Rail's contention that DRS had forfeited its right to an appeal hearing, and the Panel had no hesitation in dismissing Network Rail's submission in this respect, and proceeding with the hearing.

### **Some preliminary issues of definition; the relevant contractual provisions**

10. DRS' objections to the week 41 to 44 ROUs derived from their impact upon the following trains:
- Saturdays;
    - 4A11, and 4A66 Grangemouth (WH Malcolm) to Aberdeen (DRS Craiginchies) and
    - 4N81 and 4N83 Aberdeen (DRS Craiginchies) to Grangemouth (WH Malcolm)
  - Sundays
    - 4A11 Grangemouth (WH Malcolm) to Aberdeen (DRS Craiginchies) and
    - 4N83 Aberdeen (DRS Craiginchies) to Grangemouth (WH Malcolm)

11. DRS holds Level 1 Rights for 4A11 and 4N83 to operate on all seven days of the week. To meet the needs and trading patterns of its final customer (Asda), DRS normally operates these services on an MX basis. Where Sunday ROUs preclude the operation of the normal service then, with the agreement of Network Rail, Sunday's trains are run on a Monday instead. The Firm Rights in respect of these services relate specifically to the use of rolling stock to W7 gauge.
12. As regards the other Saturday services (4A66 and 4N81) DRS does not hold Level 1, or Level 2 Rights in respect of either of these services; these trains are operated (or about to commence operations) for Eddy Stobart (for Tesco), on the basis of Train Slots currently supported by Spot Bids. Measures are in hand to incorporate Firm Rights necessary to support these services into a Supplementary Access Agreement.
13. The Panel was satisfied that
  - 13.1. DRS had asserted its interests as regards its Level 1 Rights at the Priority Date,
  - 13.2. it had also declared its aspirations in respect of the Tesco services as "expectations of rights"; and
  - 13.3. had made use of Spot Bids to implement the services not yet subject to Level 1 or 2 rights.

## **The Contentions of the Parties**

14. **DRS** argued that
  - 14.1. the development of the Asda traffic, and the imminent start of the Eddy Stobart (Tesco) Traffic, were both significant breakthroughs for rail freight as both were flows that were completely new to rail. However
  - 14.2. because of the move by the customers to eliminate at-store stocking capability and replace it with just-in-time delivery from Regional Distribution Centres (RDCs), the traffic depended upon reliable transits between the relevant RDC (Grangemouth) and final delivery from Aberdeen to the respective supermarkets, using purpose provided 45ft ISO containers on dedicated trains and lorries. The train schedules were designed to meet the combined constraints of
    - 14.2.1. "stock-picking" schedules at the RDC;
    - 14.2.2. connection opportunities for traffic inbound to Grangemouth, particularly from the International Rail Freight Terminal at Daventry,
    - 14.2.3. delivery times, and shelf re-stocking times at the Supermarket; and
    - 14.2.4. the need to keep containers and wagons in efficient cycles.
  - 14.3. the contingency arrangements associated with the occasional use of Monday Train Slots to accommodate services that are prevented from operating on a Sunday, can be utilised in this instance but there is no equivalent arrangement that will cater for the alternative movement of those services that are prevented from operating on a Saturday;
  - 14.4. the tri-partite liaison arrangements (alluded to above at paragraph 8.2) meant that Network Rail was fully party to all the operational implications of DRS' negotiations with its customers, and that therefore Network Rail, in its planning of possessions should have acknowledged the need to pass DRS' Saturday trains, whether by delaying the start of

the possessions, or by passing the trains through the possessions, possibly making use of Single Line Working.

- 14.5. DRS acknowledged that consideration had been given to diverting the affected Saturday trains via Inverness and Elgin, but that it had not been possible to find practical paths that complied with the constraints enumerated in 14.2 above;
- 14.6. active consideration was being given to the only other practical alternative which was for traffic that had unavoidably to pass on the four affected Saturdays to pass by road; such alternative road provision would mean incremental transport costs, and it was DRS' view that
  - 14.6.1. these costs should be met by Network Rail, and that
  - 14.6.2. Network Rail had given encouragement, to both DRS and DRS' customers that such might be the case.
15. DRS was not contesting the need for Network Rail's programme of works, but considered that the packaging of the works into only four 54 hour possessions had disadvantaged DRS disproportionately.
16. **Network Rail** argued that
  - 16.1. all the works were indeed necessary, and in some cases pressing;
  - 16.2. using 54 hour possessions had enabled a range of works to be undertaken within the same overall Dundee to Aberdeen blockages, and that such an arrangement had been supported by the passenger Train Operators affected as confining the disruption to the minimum number of weekends;
  - 16.3. the specific works to be undertaken on the double line sections were such that the unaffected line was required to be used by extensive programmes of works trains, which did not permit being interrupted for the passage of DRS' services;
  - 16.4. the work site between Inverkeilor and Montrose blocks the Single Line North of Usan during weekends 43 and 44;
  - 16.5. Network Rail had complied with the procedures laid down in Network Code Part D in relation to the consultation procedures applicable to finalising the Rules of the Route; and that
  - 16.6. even Level 1 Rights duly declared at the Priority Date are subject to the "*applicable Rules of the Route*"; "*expectations of Rights*" and Spot Bids have to defer to ROUs included in the duly consulted Rules of the Route;
  - 16.7. any change to the planning of the Week 41 to 44 ROUs would now involve Passenger Train Operators in changes to their published schedules, and put them in breach of their Informed Traveller obligations.
17. Network Rail confirmed that all the works planned for weeks 41 to 44 are renewal or maintenance works and do not constitute Network Change. It acknowledged that, as currently formulated, the provisions of its Track Access Contract with DRS do not provide for DRS to be paid compensation for disruption resulting from ROUs that have been incorporated into the "*applicable Rules of the Route*" other than where the ROUs relate to Network Change.

## The Panel's findings of entitlement in respect of the Dispute

18. The Panel considered that the arrangements that the parties had described for bi- and tri-partite consultation to support the development of new traffic opportunities, and to explore the options for mitigating the impact of ROUs were clearly effective and commendable. However they had to be considered as supporting the parties' respective duties and obligations, as laid down in Network Code Part D, but not as substituting for them.
19. In relation to the operation of Condition D2 '*Consultation Process to establish the Rules of the Route/Plan*', DRS had not sought to offer any evidence that Network Rail had acted in any way that contravened the laid down processes, or exceeded the limits of its discretion. The essence of the DRS case was that
  - 19.1. it did not like the outcome of Network Rail's conduct of the process in relation to weeks 41 to 44, and that
  - 19.2. because of the information exchanged in the tri-partite liaison forum, Network Rail should have known that it would not like that outcome, and therefore
  - 19.3. Network Rail should have proposed alternative arrangements that enabled DRS' services to operate.
20. The Panel finds that, in relation to the generality of Network Rail's operation of Condition D2, as it affects the Dundee to Aberdeen line in weeks 41 to 44,
  - 20.1. Network Rail is entitled to propose four 54 hour ROUs as the most effective way of delivering the works required; and that
  - 20.2. that proposal represents a reasonable course of action in relation to its responsibilities to all affected Train Operators; and that,
  - 20.3. Network Rail had not behaved towards DRS in a way that was at odds with the terms of Condition D2.
21. The Panel agrees with Network Rail that even Level 1 Rights are subject to the "*applicable Rules of the Route*" and that Spot Bids should take cognisance of consequent ROUs. As at the time of this hearing, the Panel, in balancing its consideration of the likely effects on all Train Operators potentially affected by its determination, cannot but conclude that the ROUs in question should remain incorporated within the "*applicable Rules of the Route*". The Panel therefore considers that Network Rail should not be adjudged to have arrived at a "wrong" conclusion, or to have failed to have carried out its functions pursuant to Network Code Condition D.
22. That said, the Panel is uncomfortable with Network Rail's assertion that DRS should have sought a hearing at an earlier stage because it was clear from the supporting evidence that DRS had had its expectations raised about possible compensation payouts in return for its agreement to the ROUs for which there could be no contractual basis. An earlier hearing would not have caused a Panel to conclude that the respective entitlements of the parties were any other than as appear on the face of the Track Access Contract and the Network Code. However, had it occurred earlier, it might have resulted in the identification of other possible measures of mitigation.

## The Panel's Determination

23. Taking all of the foregoing factors into account, the Panel found, in relation to the specific questions put by the parties, as follows.
24. ***"...advise DRS that they should have brought this dispute to the Panel's attention earlier and that it is wrong for DRS on these timescales to now seek a determination from the Panel that could impact on already amended timetable plans."***
- 24.1. this is not a ground for refusing to determine the relative entitlements of the parties, particularly in circumstances such as this where Network Rail may have had a part in causing the Train Operator to delay advancing its case.
25. ***"...direct Network Rail to reduce the duration of the possessions in question in order that DRS can offer an acceptable level of service to their customers, ASDA and Eddie Stobart Ltd."***
- 25.1. whilst recognising that the possessions in question do impact upon the level of service that DRS can provide, the Panel considers that Network Rail is entitled to propose and implement the possessions as planned;
- 25.2. the possessions as planned appear appropriate and reasonable, and that any change would probably be to the greater detriment of other Train Operators.
26. ***"...direct DRS to accept the disruptive engineering access plan as detailed in the V3 2009 ROTR and subsequent Confirmed Period Possession Plans."***
- 26.1. there is no reason why Network Rail should remove the ROUs that are the subject of this dispute from the applicable Rules of the Route,
- 26.2. Network Rail is entitled to proceed with their implementation, and therefore
- 26.3. DRS' services must accordingly be adjusted.
27. For the avoidance of doubt, these findings do not relieve either party from seeking whatever other expedient might be appropriate to assist DRS to ***"offer an acceptable level of service to their customers"***.
28. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.



12th November 2008

Sir Anthony Holland  
Panel Chairman