

---

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

---

### **Determination in respect of reference TTP242**

*(following a hearing held at Central House, Euston on 22<sup>nd</sup> October 2008)*

#### **The Panel**

**Steve Carter:** elected representative for Non-Franchised Passenger Class

**Fiona Dolman:** appointed representative of Network Rail

**Nick Gibbons:** elected representative for Non-Passenger Class, Band 1

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

Panel Chairman: **Bryan Driver**

#### **The Parties**

##### **For First ScotRail ("FSR")**

**Bil McGregor** Contracts Manager

**Colin Berry** Train Planner

**Neil Sutton** Train Planner

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

**Jo Noble** Customer Relationship Executive

**Gareth Richards** for Leeds TPU

#### **Interested Parties, in attendance**

##### **For Transport Scotland**

**Ivor Jones** Head of Rail Transport

**Jonathan Pugh** Head of Rail Regulation

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

1. The Panel was asked by FSR to determine, in relation to the offer made by Network Rail to FSR of Train Slots for the Working Timetable commencing in December 2008 ("the 2009 Timetable"), that Network Rail had not correctly carried out the provisions of Network Code Condition D in relation to the allocation of priorities as between FSR bids for Train Slots, and the bids from "Virgin" West Coast Trains, and that, in consequence

- 1.1. the offers made in respect of Argyle line and Edinburgh to Glasgow via Shotts services resulted in Train Slots that represented journey times that were extended by comparison with both previous Working Timetables and the Base Timetable for the "2009 Timetable";
  - 1.2. the journey times in question, whilst consistent with the Maximum Journey Times within the FSR Track Access Contract, were, in a significant number of cases, in excess of the times required by Service Level Commitment within FSR's Franchise Agreement;
  - 1.3. the flexed Train Slots required an intensity of occupancy of the tracks at Lesmahagow Junction that carried a significant performance risk to some of FSR's other services and that therefore
  - 1.4. Network Rail should be directed to re-visit and revise the offers made to FSR, making such other changes as necessary to the Train Slots offered to other Train Operators.
2. Network Rail contested FSR's case, the main arguments upon which Network Rail rested its defence being that
- 2.1. it had acted in accordance with powers it considered were conferred by Condition D, and, in relation to the planning for the West Coast 2009 Timetable had started the process in 2006, taking advantage of the provisions (D1.5) that provided for additional formal consultation to take place before the Timetable Development Period (the 55 weeks normally provided for in Part D of the Network Code);
  - 2.2. this process had been the subject of extensive dialogue with all Train Operators, and had not been the subject of formal protest from FSR;
  - 2.3. the detail of the timetable had been heavily influenced by Network Rail's decision that *"the hourly Euston to Glasgow Virgin West Coast services [should have] pathways such that they could... achieve the new Virgin Fastest Key Journey Times and projected Maximum Journey Time, along with the need for a minimum turn round of 40 minutes at Glasgow Central"* (Joint submission paragraph 5.5);
  - 2.4. time pressures resulting from this approach meant that, as notified on 6<sup>th</sup> May 2008, *"the strategic timetable, that had been developed, had been validated in detail from Euston to Lanark Junction, but that detailed work could not be done north of Lanark Junction until the commencement of the timetable offer stage. However a basic clean path was known to interact with Shotts service at Uddingston Junction. Network Rail's note dated 6<sup>th</sup> May 2008 set out the issues relating to both the Lanark services and the pathing problems in the Motherwell area."* (Joint submission paragraph 5.5);
  - 2.5. in relation to FSR's rights as expressed in its Track Access Contract, and taking account of all the obligations placed upon Network Rail to exercise the Decision Criteria, Network Rail was satisfied that the 2009 Timetable as proposed was the most even-handed and robust solution to a difficult planning exercise and was one that did not breach any of FSR's Track Access Firm Rights.
3. FSR, the Claimant, invited the Panel to:
- (a) ***Instruct Network Rail to revert to the Base Timetable as bid for by First ScotRail with respect to the Argyle Line services.***

- (b) **Determine whether by leaving full consideration of the potential impact of the Virgin West Coast Timetable on the Strathclyde Suburban Services Network Rail were failing to fully comply with Network Code Condition D.**
  - (c) **Determine whether by disregarding the stated requirements of the funder of the Railway (both services and infrastructure) in Scotland, Network Rail can be seen to be adhering to the decision criteria.**
- 4. Network Rail invited the Panel to:
  - (a) **Confirm that First ScotRail have been provided with slots in the First Working Timetable for the 2009 Principal Timetable which satisfy all aspects of their Track Access Contract and the Network Code Part D.**
- 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 FSR (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.
8. In a letter to the parties dated 3<sup>rd</sup> October 2008, the Panel Chairman had directed the Parties to *"furnish [the Panel] with the following information, as it affects each of the services for which the offer is disputed (i.e. First ScotRail) as well as for the services (principally Virgin?) which are provoking the need for change.*
- *Which is the relevant Track Access Contract as approved by the Office of Rail Regulation?*
  - *What are the relevant provisions in the Track Access Contract in respect of the Firm Rights (quantum and service characteristics) that need to be complied with in any Working Timetable?*
  - *Have these provisions been fulfilled in*
    - *the immediate past Timetable ( i.e. that currently in operation)?;*
    - *the Base Timetable? and/or*
    - *the offered First Working Timetable for December 2008 ("the 2009 Timetable")?*
  - *Are there circumstances where the offer in the FWTT is not consistent with the terms of the Track Access Contract, and if so, what is the scale of the failure to honour the terms of the Contract?*
  - *To the extent that there is a failure to honour the First ScotRail Track Access Contract, to what is that attributable? If, as appears to be the case, this is due to the offering of other (conflicting?) paths to another operator, what are the terms of the Track Access Contract (including date approved by Office of Rail Regulation) for that other Train Operator?*
  - *To the extent that the issue between the parties is not one of a failure to offer Train Slots that fulfil the terms of the Firm Rights, but more one of the fulfilment of aspirations, and/or "expectations of rights", a Panel is likely to expect to consider representations as to the manner in which both Network Rail and the Train Operators have carried out their obligations in respect of the procedures laid down in Conditions D1 and D3. As always, the Panel will be required to consider the force of previous determinations and Office of Rail Regulation appeal judgements. The parties' attention is drawn therefore to the recent TTP244, which they may consider has some points of common ground with the current dispute.*
  - *Where the parties advance arguments in support of their respective positions by reference to the provisions of Condition D6 "the Decision Criteria", the parties are advised that it is not generally sufficient simply to refer to one of the criteria; the Panel is*

likely to wish to be convinced, on a criterion by criterion basis, that one course of action meets that criterion better than the alternative advocated by the other party.

- In relation to any arguments that rely upon Condition D6c) the Panel is likely to wish to know that amount of detail, in relation to "any contract to which it is party" that corresponds with "the extent that Network Rail is aware or has been informed of such contract". This does not necessarily require extensive disclosure: however it is important that the Panel is able to assess how far the parties shared a common understanding of the implications of third party contracts that bear upon the Train Slots to be offered in this case.

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

9. Where a section of route is used in common by a number of Train Operators, circumstances can arise such that Network Rail is required in the First Working Timetable to balance the needs of Train Operators with Firm Rights (whether tightly or broadly constrained) against needs that reflect other rights or aspirations for new or revised services that do not yet have the status of Firm Rights. Condition D3.2.3 empowers Network Rail to differentiate between the entitlements of Train Operators to offers of Train Slots, by reference to the status of their rights or expectations of rights, and the actions taken by the Train Operators to assert those rights or expectations of rights before the Priority Date: thus

#### **Condition D3.2.3 *Priorities in compiling the First Working Timetable***

*Without prejudice to the exercise by Network Rail of a Flexing Right, Network Rail shall, in determining the order of priority for inclusion of Train Slots in the First Working Timetable, accord priority:*

- (a) *first, to the satisfaction of any Firm 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 D3.2.1(a) and constitute Firm Rights on the intended dates of the operation of those Train Slots; or*
    - (B) *the rights were exercised in the corresponding timetable prior to the timetable that is being prepared but have not been notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(a). In such case only those rights which relate to quantum and which have been notified to Network Rail prior to the Capacity Request Deadline shall have force; or*
  - (ii) *Network Rail may have including those contained in the applicable Rules of the Route or the applicable Rules of the Plan,*

*each of paragraphs (i) and (ii) above having equal priority;*
- (b) *second, to the satisfaction of any rights or expectations of rights which:*
  - (i) *have been notified by a Bidder to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(c); and*

- (ii) correspond to Firm Rights held by that Bidder at the Priority Date under an Access Agreement in force on that date but which at the Priority Date are prevented from constituting Firm Rights only because any or all of the intended dates of operation of those Train Slots fall after the expiry of the Access Agreement, or fall after the expiry of the Firm Rights from which those Train Slots are derived, and provided that Network Rail reasonably expects that an Access Agreement containing corresponding Firm Rights will be in force on the intended dates of operation of those Train Slots;
- (c) third, having due regard to the Decision Criteria, to the satisfaction of any other rights or expectations of rights which:
  - (i) a Bidder has notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(c); or
  - (ii) Network Rail may have including those contained in the applicable Rules of the Route or the applicable Rules of the Plan, and which (in any such case) do not fall within Condition D3.2.3(a)(ii),

each of paragraphs (i) and (ii) above having equal priority; and
- (d) thereafter, having due regard to the Decision Criteria, to the satisfaction of any rights or expectations of rights which a Bidder has not notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(c) but which are notified to Network Rail in accordance with Condition D3.2.4 or D3.2.6".

#### **Condition D1.5 Major changes to the timetable**

- 1.5.1 In order to facilitate effective development of the Draft Timetable where Network Rail considers that major timetable changes may be required, for example to accommodate growth in demand for railway services, Network Rail may decide to invoke a consultation process at an earlier stage than would otherwise be the case with a view to increasing the period for consultation and ensuring that the timetable changes are implemented in a co-ordinated fashion.
- 1.5.2 In such circumstances Network Rail shall notify each Bidder in writing of all relevant information about any such major changes and of the Timetable Development Periods likely to be affected by such changes, and shall give notice to all Bidders of the date it proposes to commence the pre-bidding consultation process in respect of the affected Timetable Development Periods.
- 1.5.3 Any Train Operator wishing to propose significant alterations to its services or any Bidder wishing to introduce significant new services shall consult with Network Rail at the earliest opportunity to assist Network Rail in deciding whether or not to invoke an early start to a pre-bidding consultation process and, if so, in deciding when that process should begin.

#### **Condition D3.4 Flexing rights – Preparation of the First Working Timetable**

- 3.4.1 Network Rail may, in relation to

- (a) any Train Slot included in the Base Timetable;
- (b) any request for change notified to Network Rail in accordance with Condition D3.2.1; or
- (c) any aspiration notified to Network Rail in accordance with Condition D3.2.4 or D3.2.6;

exercise a Flexing Right at any time prior to the end of the Finalisation Period, provided that:

- (i) Network Rail shall have first consulted with each person materially affected by the exercise of such Flexing Right;
- (ii) Network Rail shall, in exercising that Flexing Right, have had due regard to the Decision Criteria; and
- (iii) Network Rail shall notify the Bidder of the exercise of its Flexing Right as soon as practicable thereafter.

3.4.2 Network Rail shall exercise a Flexing Right at any time:

- (a) in order to give effect to a decision of the relevant ADRR panel or the Office of Rail Regulation as provided for in Condition D5; or...."

"Base Timetable"

means, in respect of any Timetable Period, the timetable issued by Network Rail in accordance with Condition D2A.3 showing those Train Slots which Network Rail **expects** [emphasis added] to include in the Working Timetable applicable to that Timetable Period;

## The Contentions of the Parties

10. FSR argued that

- 10.1. after the issue of the Base Timetable it had bid to have all the Train Slots that that Timetable contained carried over into the First Working Timetable;
- 10.2. Network Rail had concentrated upon the development of the accelerated West Coast Main Line service for West Coast Trains ("WCT"), and had sought to resolve problems and conflicts working Northwards from London. In consequence,
- 10.3. FSR's first indication that the services in the Base Timetable might be subject to flexing was a note in May 2008, suggesting problems for the Glasgow to Edinburgh via Shotts service ("the Shotts Service"). However
- 10.4. when the timetable offer was received it included a number of other Train Slots that had been flexed to accommodate accelerated WCT services, affecting Argyle services, in particular those serving Lanark, and other services crossing the West Coast Main Line at Lesmahagow or Shieldmuir junctions;

- 10.5. the impact of the flexes was that, in the affected Train Slots, the journey times offered were not consistent with the maximum journey times set down in the Service Level Commitment ("SLC") between FSR and Transport Scotland;
  - 10.6. none of the flexes extended any journey time beyond what was permissible in the Track Access Contract, but there were 51 discrete services where the SLC journey time had been exceeded; mostly by 1 or 2 minutes;
  - 10.7. FSR considered that, because of the provisions of Decision Criterion, Condition D6(c) *"enabling any bidder to comply with any contract to which it is a party (...including the franchise agreement...), in each case to the extent that Network Rail is aware or has been informed of such contracts"*, Network Rail was under an obligation to comply with the journey times specified in the SLC;
  - 10.8. this obligation was part of a larger obligation to Transport Scotland to seek to improve journey times throughout the ScotRail franchise.
11. Network Rail argued that
- 11.1. it was agreed between the Parties that the offer made to FSR complied with the terms of FSR's Track Access Contract, including in all those instances where the SLC maximum journey time had not been met;
  - 11.2. Network Rail's obligations to FSR were on a par with those to any other Train Operator, and that Network Rail had to pay equivalent respect to each Train Operator;
  - 11.3. there were instances where, as compared with the Base Timetable, WCT Train Slots had been flexed to avoid a need to flex an FSR Train Slot;
  - 11.4. the process for developing the 2009 Timetable had been the subject of extensive consultation, and drew on powers and discretions conferred on Network Rail by both Conditions D1.5 and D3;
  - 11.5. Network Rail had duties to take account of all the Decision Criteria *"(none of which necessarily has priority over any other)"* (Condition D6 pre-amble) in making decisions in respect of both individual flows, and the overall robustness of the total Timetable, *"in the interests of all users of railway services..."* (Condition D6(a)).
  - 11.6. within a number of FSR service groups (e.g. Edinburgh, Fife, Aberdeen) Network Rail had delivered improved journey times, but in the instances in dispute, it considered that both the overall strategy for devising the 2009 Timetable, and the Train Slot by Train Slot decisions as to which services (FSR or WCT) to flex stood on their own merits as responsible balanced judgements.

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

12. The Panel considered that its consideration of the points that it had been invited to determine required it to review the case in three steps, separating matters of fact from matters of entitlement, namely
  - 12.1. what Train Slots had FSR been offered, and were those consistent with its Firm Rights?

- 12.2. had Network Rail discharged correctly its obligations under the provisions of Network Code Condition D in its process for preparation of the First Working Timetable?
- 12.3. was Network Rail under a contractual obligation to offer Train Slots that complied with FSR's SLC, irrespective of the impact upon the Train Slots offered to other Train Operators?
13. In regard to the Train Slots that FSR had been offered, the Panel found that the parties were agreed that the Train Slots were consistent with FSR's Firm Rights.
14. Condition D3.2.3 required Network Rail to observe certain priorities in relation to *"the inclusion of Train Slots in the First Working Timetable"*; however this right is explicitly *"Without prejudice to the exercise by Network Rail of a Flexing Right"*. The process that Network Rail had adopted to meet the particularly challenging needs of the 2009 Timetable was acknowledged, by FSR, to have been generally clearly communicated to the Train Operators. In the view of the Panel it was an appropriate procedure, adequately provided for in the provisions of Conditions D1.5 and D3.
15. Uniquely, certain Track Access Contracts, including FSR's, contain "carve out" provisions enabling the Firm Rights of one Train Operator to be modified where necessary, to accommodate the implementation of the accelerated West Coast Timetable. This provision had not needed to be invoked in relation to FSR, but it could be construed that, not only was there no obligation that other Train Slots should be flexed to accommodate FSR Train Slots, there was an implied requirement for FSR to accept flexing, short of amendments to its Firm Rights, to accommodate WCT Train Slots. Such an obligation would of course be subject to considerations of "reasonableness", but the Panel could not see that FSR had been disproportionately disadvantaged by comparison with either WCT, or other affected Train Operators.

### **The Panel's Determination**

16. Taking all of the foregoing factors into account, the Panel found, in relation to the specific questions put by the parties, as follows.
17. ***"Confirm that First ScotRail have been provided with slots in the First Working Timetable for the 2009 Principal Timetable which satisfy all aspects of their Track Access Contract and the Network Code Part D"***
  - 17.1. although some services on both the Argyle Line and the Shotts Line have been adjusted in ways that extend the journey times, the changes are not, in any case, such that they breach any of FSR's documented Firm Rights. None of the changes would require any amendment to FSR's Track Access Contract before they could be incorporated into the 2009 Timetable. This is a matter of agreement between the parties;
  - 17.2. there has been no evidence put before the Panel to substantiate any suggestion that Network Rail has acted in a way that is in breach of its obligations in respect of the procedures Network Code Part D prescribes it should follow.

**18. Determine whether by leaving full consideration of the potential impact of the Virgin West Coast Timetable on the Strathclyde Suburban Services Network Rail were failing to fully comply with Network Code Condition D.**

- 18.1. the Panel acknowledges that Network Code Condition D requires Network Rail to exercise significant discretion in respect of the prioritisation of Train Slots for inclusion in the Timetable, and the degree to which such Train Slots should be flexed, and that in any situation arguments can be made that different priorities and flexing might have resulted in different Train Slots.
- 18.2. in respect of the processes adopted by Network Rail to facilitate the production of the 2009 Timetable as it affects FSR and WCT, the Panel finds that these have conformed with Network Code Condition D, and that Network Rail has not exercised any discretions in ways that exceed its powers, or curtail any of FSR's Firm Rights;
- 18.3. in respect of the suggestion that the Strathclyde Suburban Services had been particularly disadvantaged by the decision by Network Rail to develop the WCT timetable from the South, Northward, the Panel found that
  - 18.3.1. no FSR Firm Rights had been breached;
  - 18.3.2. this is a practical decision relative to a production matter for which Network Rail has the sole responsibility, and for which, in the event of problems, Network Rail is accountable;
  - 18.3.3. Network Rail's approach had enabled it to deal first with those parts of the Network which served the most complex traffic patterns; and therefore
  - 18.3.4. as "*a knowledgeable peer group with relevant railway expertise*" (ADR Rule A1.3(a)), the Panel considers that it has no grounds for censuring Network Rail's approach.

**19. Determine whether by disregarding the stated requirements of the funder of the Railway (both services and infrastructure) in Scotland, Network Rail can be seen to be adhering to the decision criteria.**

- 19.1. The Panel notes that this comment is made in relation to the terms of the SLC on FSR, and the implication that Network Rail's exercise of discretions has not adequately taken account of the SLC. The Panel finds that
  - 19.1.1. its locus is set in relation to the terms of the Track Access Contract, and that, whilst it must take account of the existence of external factors that have a bearing upon the operation of the Track Access Contract, it cannot find that an external factor should weigh with its determination to the detriment of due consideration of factors within the Track Access Contract and the Network Code. In particular, where the SLC and the Track Access Contract are not uniform in their impact, the Panel must find on the basis of the terms of the Track Access Contract;
  - 19.1.2. the SLC falls to be considered under Condition D6(c): as such it has to be considered by Network Rail along with each of the other Decision Criteria in Condition D6. The Panel is satisfied that Network Rail in its determination of the

respective weight to be given to the different Decision Criteria has not behaved either capriciously, or in ignorance of the provisions of the SLC, and therefore should not be censured on this ground;

- 19.1.3. to the extent that FSR is disadvantaged by a difference in the force of the terms of its Track Access Contract and the SLC, FSR has both the scope and the opportunity to seek amendments in one or both to achieve any necessary alignment.

**20. *Instruct Network Rail to revert to the Base Timetable as bid for by First ScotRail with respect to the Argyle Line services.***

- 20.1. the Panel does not consider that it has been given any valid grounds for making such a determination or direction.
21. For the avoidance of doubt, the Panel considers that this finding is without prejudice to any opportunities that may yet be presented for the improvement of the detail of the 2009 Timetable, nor is it to prejudice any future variations to Journey Times consistent with the terms of FSR's Firm Rights, whether initiated by FSR through a Bid, or by Network Rail through the exercise of a Flexing Right.
22. 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.



27/10/08

Bryan Driver  
Panel Chairman