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OFFICE OF RAIL REGULATION

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Dear Sirs,

FIRST SCOTRAIL APPEAL UNDER PART M OF THE NETWORK CODE IN RESPECT OF DETERMINATION TTP242 OF THE TIMETABLING PANEL – DETERMINATION BY ORR UNDER CONDITION M4 OF THE NETWORK CODE

Summary

1. On 7 November 2008 First ScotRail Ltd ("FSR") served an appeal notice on ORR under condition D5.2 of the Network Code in respect of a determination of the Timetabling Panel ("TTP")¹. FSR brought its original appeal to the TTP on the basis that Network Rail Infrastructure Ltd ("Network Rail") had not adhered to the provisions of Part D of the code in its allocation of priorities for bids for train slots as between FSR and West Coast Trains Ltd ("WCT"). The particular issue which forms the basis of FSR's appeal to ORR is the TTP's decision on one of the specific questions referred to it in the original appeal, namely *'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.'*

2. The preliminary procedural matter to be determined by ORR is whether or not it should hear the appeal. In a letter dated 21 November 2008 ORR offered Network Rail the opportunity to make written representations on the issue of whether or not the appeal should proceed. In its response dated 27 November, Network Rail stated that it had no objection to the appeal being heard. ORR wrote to both parties on 2 December 2008, stating that it had extended the deadline for its decision on whether or not to hear the appeal to 12 December 2008.

¹ Timetabling Panel's determination dated 29 October 2008 in respect of reference TTP242.

3. Having considered the papers submitted under this appeal, ORR has now concluded that it should not hear the appeal and that the decision of the TTP should stand. The background to this appeal and the reasons for ORR's decision are set out below.

Background

4. The TTP was asked to determine the following issues:

- (a) *'whether by leaving full consideration of the potential impact of the Virgin West Coast Timetable on the Strathclyde Suburban Services, Network Rail were failing fully to comply with Network Code Condition D; [It was referred to as Condition D rather than by identifying the specific condition within Part D]*
- (b) *'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'.*

5. FSR alleged that as a result of Network Rail's allocation, the train slots in respect of the Argyle line and Edinburgh to Glasgow via Shotts services represented journey times that were:

- (a) longer than both previous Working Timetables and the Base Timetable for the 2009 Timetable;
- (b) in excess of the times required by the Service Level Commitment ("SLC") within FSR's franchise agreement.

Further, the services required an intensity of occupancy of the tracks at Lesmahagow Junction that carried a significant performance risk to some of FSR's other services.

6. FSR invited the TTP to instruct Network Rail to revert to the Base Timetable as bid for by FSR with respect to the Argyle line services, making such changes as necessary to the train slots offered to other train operators. Network Rail invited the TTP to confirm that FSR had been provided with slots in the First Working Timetable which satisfied all aspects of their Track Access Contract and the Network Code Part D.

7. The TTP's main findings were as follows:

- (a) As agreed between the parties, the train slots FSR had been offered were consistent with its firm rights;
- (b) The 'carve out' provisions in FSR's Track Access Contract could be construed to encompass an implied requirement for FSR to accept flexing, short of amendments to its firm rights, to accommodate WCT train slots (subject to considerations of reasonableness);

- (c) No evidence had been put before them to substantiate any suggestion that Network Rail had acted in a way which breached its procedural obligations pursuant to Part D;
- (d) Part D requires Network Rail to exercise significant discretion in relation to prioritisation of train slots and it had not exercised this in a way which exceeded its powers or curtailed FSR's firm rights;
- (e) The suggestion that Strathclyde Suburban Services had been particularly disadvantaged was *'a reference to a practical decision in relation to a production matter for which Network Rail has sole responsibility and for which, in the event of problems, Network Rail is accountable.'* Further, *'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... the Panel consider[ed] it had no grounds for censuring Network Rail's approach;'*
- (f) In relation to the suggestion that Network Rail's exercise of discretion had not taken adequate account of the SLC (which specifies maximum journey times), the TTP held that:
 - (i) *'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;'*
 - (ii) *'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 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;'*
 - (iii) *'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.'*

Appeal to ORR

8. FSR's appeal to ORR is based on the TTP's decision on one of the questions referred to it in the original appeal, namely *'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.'* In particular, it cites the reasoning given by the TTP which is set out at paragraph 7(f)(i) above. Condition M3 of the Network Code provides that a party must set out in a Notice of Appeal why a determination is (i) wrong or (ii) unjust because of a serious procedural or other irregularity. FSR's Notice of Appeal sets out the following grounds (which have been summarised):

(a) The decision is wrong because:

- (i) It does not take into account the Decision Criteria in the wider context including Network Rail's licence obligations (which require it to consider the stated requirements of the funder). In this case, the funder is Scottish Ministers and their objectives are published in the National Transport Strategy;
- (ii) In addition to the Decision Criteria, the TTP should have considered the Scottish High Level Output Specification ("SHLOS") which commences in April 2009. The SHLOS includes an expectation that Network Rail will continue to permit the services specified (in the SLC) in the ScotRail franchise to operate throughout Control Period 4. Had they done so, the SLC would have been given greater weight.
- (iii) The TTP was incorrect to state that *'where the SLC and the Track Access Contract are not uniform in their impact, the Panel must find on the basis of the Track Access Contract.'*

(b) The decision is unjust because of a serious procedural or other irregularity:

- (i) The Decision Criteria do not explicitly direct Network Rail to take account of the published strategies of Scottish Ministers. Their directions and guidance to ORR include the need to take account of Transport Scotland's published strategies. Transport Scotland would therefore expect that the Decision Criteria in Network Code Part D, for which ORR is responsible, would include consideration of these strategies. The Decision Criteria should be updated to require cognisance of these priorities.

Apart from this comment in respect of the need to update the Decision Criteria, FSR has not explicitly set out in its Notice of Appeal the remedy it seeks.

9. Condition M4 sets out a non-exclusive list of grounds on which ORR may refuse to hear the appeal. The specified grounds are:

- (a) the matter in question is not of sufficient importance to the industry;
- (b) the reference is frivolous or vexatious;
- (c) the conduct of the party making the reference ought properly to preclude its being proceeded with; or
- (d) it is appropriate or convenient for the matter instead to be disposed of by the High Court (in Scotland, by the Court of Session).

ORR has concluded that none of the specific grounds are applicable to this appeal.

10. However, as noted above, the list of specified grounds on which ORR may decline to hear a reference is expressly non-exclusive. The word "including" which precedes the specific grounds is to be construed without limitation (see condition A1.1(f)), so that ORR may reach a decision on other grounds.

11. ORR has previously applied the 'real prospect of success' test in its decision dated 28 October 2005 on whether or not to hear an appeal brought by Freightliner.² ORR concluded in that case that it should not allow an appeal to proceed, given the impact in terms of time and resources that it has on each of the parties, in cases where it considers that the appeal does not have a real prospect of success.

12. For the reasons set out below, ORR considers that this appeal does not have a real prospect of success and therefore has decided not to hear the appeal. The two limbs on which FSR's grounds of appeal are based are considered in turn below, dealing first with the limb concerning 'injustice due to procedural or other irregularity'.

Injustice due to procedural or other irregularity

13. This limb is clearly intended to cover those circumstances in which there was an irregularity in the procedure adopted by the TTP or some similar situation (ie. the limb concerning whether the decision was 'wrong' covers substantive arguments on the merits of the decision and this limb deals with technical points in the process so far that had a bearing on the fairness of the outcome).

14. The circumstances outlined in (B)(ii) of FSR's Notice of Appeal clearly do not amount to injustice due to procedural or other irregularity. FSR's submissions suggest that

² Appeal of the Access Dispute Panel's determination in respect of reference ADP10 issued on 16 August 2005.

the TTP should have had regard to a factor (Scottish Ministers' published strategies) to which, on the current wording of the Decision Criteria, Network Rail is not obliged to have regard. If there was no requirement to consider it, there was no irregularity in failing to do so. If FSR seeks to suggest that the 'irregularity' in question is the fact that the criteria in place do not fully reflect matters to which regard should be had, this certainly cannot be categorised as an 'irregularity' in the TTP appeal process or in Network Rail's decision-making process.

15. FSR expressly states in its Notice of Appeal that it is its view that 'the Decision Criteria should be updated to require cognisance of these priorities.' Amendment of the Decision Criteria in Part D of the Network Code is not an outcome which can be achieved by way of an appeal from a decision of the TTP. It is an issue which requires separate representations unconnected with the appeal process and a full industry consultation. ORR will write separately to the industry parties on this matter.

Wrong Decision

16. In the absence of an issue of irregularity (procedural or otherwise), in order successfully to appeal the TTP's decision, FSR would need to demonstrate that the TTP's decision was wrong. The grounds on which it argues that the decision was wrong are set out at paragraph 8(a) above.

17. Part 3.4.1 of Part D of the Network Code sets out conditions with which Network Rail must comply in order to exercise a flexing right. The relevant condition in the present case is the obligation to have '*due regard to the Decision Criteria*'³. FSR's question to the TTP (set out at paragraph 1 above) was posed in terms of whether or not the Decision Criteria had been adhered to by Network Rail, specifically in relation to consideration of funders' requirements. The grounds contained in FSR's Notice of Appeal do not have any real prospect of demonstrating that the TTP's decision on that issue was wrong, since they are based primarily on an alleged failure to consider material which, by FSR's own admission, is not currently encompassed by the Decision Criteria.

18. The paragraph of the TTP's determination outlined at 7(f)(ii) above makes clear that TTP was aware that the funders' requirements as set out in the form of maximum journey times in the SLC contained in the franchise agreement fell within condition D6(c) of the Decision Criteria. FSR's argument appears to be that greater weight would have been placed on the SLC if documents such as the SHLOS and National Transport Strategy had been taken into account. However, as FSR itself admits, the priorities of Scottish ministers do not form part of the Decision Criteria. The SHLOS does not even commence until April 2009. Therefore, the documents cited by FSR do not form part of the Decision Criteria and Network Rail was not obliged to take them into account.

³ Network Code Part D paragraph 3.4.1(ii)

19. Equally, FSR's argument that Network Rail did not take account of the 'Decision Criteria in the wider context' (specifically, so as to include Network Rail's licence obligations) does not advance its position. While Network Rail's licence obligations are undoubtedly an important feature of the general regulatory framework, the factors to be considered in the specific context of Network Rail's power to exercise a flexing right are encompassed by the Decision Criteria.

20. Finally, FSR has criticised the TTP's conclusion set out at 7(f)(i) above. However, it has failed to make explicit the nature of its criticism, what it proposes the correct conclusion to have been and more importantly, how that conclusion has any bearing on the grounds of appeal FSR has brought. Therefore, while ORR is not entirely clear as to the meaning of that paragraph of the determination, it does not consider its citation by FSR to be of assistance to it in demonstrating why the decision of the TTP on this issue is wrong and why this appeal should proceed.

21. ORR notes that the TTP stated at paragraph 19.1.2 of its determination that it was '*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.*' ORR would not wish this paragraph, taken out of context in future cases, to cause any confusion as to the obligation on Network Rail in relation to the consideration to be given to the Decision Criteria. As stated at paragraph 17 above, in exercising a flexing right Network Rail is required to have '*due regard to the Decision Criteria.*' This formulation of the obligation was set out by the TTP at paragraph 9 of its determination. In ORR's view, an obligation to have 'due regard' requires Network Rail to consider each of the Decision Criteria and to give them appropriate weight in the circumstances of the particular case. In any event, FSR has not sought to raise the issue of the formulation of the obligation as a ground of appeal.

Conclusion

22. For the reasons stated above ORR has concluded that the appeal should not proceed to it under condition M4 of the Network Code and that the TTP's determination in respect of reference TTP242 should stand.

Yours faithfully,



Michael Beswick