
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP244

(following a hearing held at Central House, Euston on 8th September 2008)

The Panel

Matthew Allen: appointed representative of Network Rail

David Langton: elected representative for Franchised Passenger Class, Band 3

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

Graham Owen: elected representative for Non-Franchised Passenger Class

Panel Chairman: **Bryan Driver**

The Parties

For Wrexham, Shropshire and Marylebone Railway Company Limited ("WSMR")

Andy Hamilton Managing Director

Mary Bonar Director

For Network Rail Infrastructure Ltd ("Network Rail")

Simon Smith Customer Relationship Executive

Simon Pilkington Acting Capacity Allocation Manager, Birmingham

Ian Leigh Commercial Advisor

Interested Parties, in attendance

For (Virgin) West Coast Trains Ltd ("WCTL"):

Robert Hodgkinson Commercial Operations Manager

Richard Miller Head of Infrastructure Contracts

For London & Birmingham Railway Ltd ("London Midland" or "LM")

John Quarmby Head of Planning

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

1. The Panel was asked by WSMR to determine, in relation to the offer made by Network Rail to WSMR of Train Slots for the Working Timetable commencing in December 2008 ("the 2009 Timetable"), that
 - 1.1. Network Rail had not correctly carried out the provisions of Network Code Condition D, in particular D1.5 and D3.2.3; and that, in consequence

- 1.2. the offers made resulted in Train Slots giving *"potentially poorer efficiency and journey time than might otherwise have been the case"*; and that therefore
- 1.3. Network Rail should be directed to re-visit and revise the offers made to WMSR, making such other changes to the Train Slots offered to other Train Operators as necessary.
2. Network Rail contested WSMR'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 D1.5 in relation to the planning for the 2009 Timetable that required an additional consultation period that extended the Timetable Development Period beyond the 55 weeks normally provided for in Part D of the Network Code;
 - 2.2. the output from the extended planning process represented undertakings to other Train Operators that could not be reneged upon to cater for requirements that were only specified at a later date;
 - 2.3. the Firm Rights now incorporated into the WSMR Track Access Contract had not been finalised at the outset of the extended planning process; however cognisance had been taken of WSMR's aspirations from an early date, and, once the Firm Rights had been approved by the Office of Rail Regulation these had been introduced into the planning process at an appropriate time; and that
 - 2.4. *"WSMR recognise that NR have offered paths that are technically compliant (with two exceptions relating to stopping pattern) with the rights as set out in the WMSR TAA"* (paragraph 7.4 of Joint Submission).
3. WSMR, the Claimant, invited the Panel to:
 - a. ***"Confirm that when developing major packages of Timetable Change that Condition D1.5 does not remove the obligation from NR to develop the First Draft Timetable in accordance with Condition D3.2.3 regardless of the content of the Base Plan;***
 - b. ***Direct NR to re-evaluate the 2009 Principal Timetable and immediately implement changes to mitigate the effect of the incorrect allocation of priorities; and***
 - c. ***Direct NR to develop a new Base Timetable based on the priorities as they stood at the Priority date on 1st February 2008 that can subsequently be used as the base timetable for the development of the 2009 Subsidiary Timetable."***
4. Network Rail invited the Panel to:
 - a. ***"Confirm that when developing major packages of Timetable Change that it has correctly followed the process described in Condition D1.5 and that once having established a base plan it has no unilateral power to amend that plan for the favour of any operator.***
 - b. ***Confirm that when developing major packages of Timetable change its primary duty is to observe the requirements of Condition D3.2.2 (a) in developing an operable timetable;[sic] which follows the necessary balance between its Firm Rights and the Firm Rights of all Bidders (Condition D3.2.2***

(b) at all times recognising the necessary of Declared (actual and expected) Firm Rights.

c. Confirm that WSMR 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. paragraph 34 of the Office of Rail Regulation's determination of the appeal against TTP102 (2nd February 2007), had advised that any Panel determination should be structured in such a way as to keep separate
 - 6.2.1. findings in respect of entitlements;
 - 6.2.2. any considerations of whether (and if so what) remedy might be applied; and
 - 6.2.3. *"guidance as to the correct process that should be followed by Network Rail in similar cases to ensure that such a situation would not be repeated in future"*
 - 6.3. the entitlements of the parties in this instance derive from
 - 6.3.1. the Track Access Contract of WSMR (and those of other affected parties);
 - 6.3.2. the observance of the processes and obligations set out in Network Code Part D;
 - 6.3.3. any relevant amplification of the meaning of these documents as contained in a determination of either a *"relevant ADRR Panel"* or the ORR;
 - 6.4. in respect of any question of remedy;
 - 6.4.1. 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"*.
 - 6.4.2. 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.

- 7.1. In a letter to the parties dated 2nd September 2008, the Panel Chairman had directed the Parties to supply *"a tabular summary, showing, for each of the Train Operators, the relevant Firm Rights (Condition D3.2.3 (a)), or "rights or expectations of rights" (Condition D3.2.3 (b)) in question, that are referred to in that letter, and giving the date, and the Track Access Agreement that gave effect to those rights. This should be accompanied by further commentary (which may reflect where the Parties hold conflicting views) clarifying*

- *the status of those Firm Rights, rights or expectations of rights at the Priority Date;*
- *the standing to [sic] which those Firm Rights, rights or expectations of rights, are, or should have been, accorded in the operation of Condition D3.2.3."*

- 7.2. WCTL, London Midland, EWS, and Freightliner had all declared themselves interested parties, but only London Midland had submitted any form of written representation, and only WCTL and London Midland chose to attend the hearing.

Some preliminary issues of definition; the relevant contractual provisions

8. Schedule 5 to the WSMR Track Access Contract (dated 31st January 2008) details the Firm Rights of WSMR to access for services between Wrexham General and London Marylebone in Service Group E101. The Firm Rights to operate include the following :

- 8.1. Number of Train Slots per day between Wrexham General and London Marylebone: weekdays 5 each way; Saturdays 3 each way; Sundays 2 Up and 3 Down;
- 8.2. Calling patterns, including stipulations regarding some stations that are "pick up" "or set down" only in fulfilment of Moderation of Competition provisions in the Track Access Contracts of other Train Operators;
- 8.3. Maximum Journey Times of 270 minutes (4 ½ hours) on weekdays (Up direction) and Saturdays (271 minutes Down direction weekdays);
- 8.4. Departure and Arrival time ranges at London Marylebone, providing for 1Up week-daily arrival between 09:00 and 10:00 (09:30 and 10:30 Saturday); and Down departures between 06:25 and 07:05, and 16:00 and 17:00.

9. In addition it should be understood that

- 9.1. as explained in the decision letter of 10th September 2007 from the Office of Rail Regulation, giving the reasons for its decision of 21st August 2007 to approve WSMR's Section 17 application for Access Rights, the Train Slots that would be available for WSMR to commence operations during the currency of the Timetable commencing in December 2007 ("the 2008 Timetable"), would be fitted in to that Timetable, in a way to minimise impact upon established operations. The Maximum Journey Times, and some of the other contingent provisions regarding service characteristics, reflect what was achievable in the 2008 Timetable;
 - 9.2. for the 2009 Timetable, WSMR had been offered Train Slots that, in a number of cases improved significantly (by up to 45 minutes) on the contracted Maximum Journey Times, although not, apparently, by as much as WSMR had bid for;
 - 9.3. the additional Saturday path each way, and the additional Up Sunday path had been offered in response to a bid from WSMR based on "expectations of rights" still to be incorporated into WSMR's Track Access Contract by means of a Supplemental Agreement.
10. 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

11. Although the Parties were agreed that “WSMR recognise that NR have offered paths that are technically compliant (with two exceptions relating to stopping pattern) with the rights as set out in the WSMR TAA” (paragraph 7.4 of Joint Submission), the Parties disagreed fundamentally as to whether the Train Slots offered were sufficient to discharge Network Rail’s obligations under Network Code Part D.

12. WSMR argued that

12.1. the Train Slots offered contained disproportionate amounts of Pathing time, which when added to other allowances extended journey times by more than 30 minutes in some instances; and that

12.2. this extension to journey times had a significant impact upon the competitiveness of the WSMR service, as compared with road transport;

- 12.3. the need for the Pathing time arose because of Network Rail's decision to leave WSMR paths out of the development of a base "clock-face" timetable for the Coventry Corridor, and instead to make use of an hourly 'freight' path to insert WSMR services into the pattern;
 - 12.4. the Rolling stock used on WSMR trains would be capable of shorter Sectional Running Times than those upon which the 'freight' path was based, and the pathing time was inserted to reconcile the difference resulting in avoidable lengthening of the journey times of WSMR services;
 - 12.5. the need to have recourse to such an expedient would have been avoided had Network Rail acknowledged that WSMR's Track Access Contract and Firm Rights had been approved by the Office of Rail Regulation, and properly declared to Network Rail by the Priority Date in compliance with Condition D3.2.1 "*Notification of Rights to be exercised*";
 - 12.6. although the process of arriving at a Track Access Contract approved by the Office of Rail Regulation had been one conducted with the full knowledge of Network Rail, Network Rail had elected to exclude WSMR's aspirations from the work undertaken in fulfilment of Condition D1.5; this was in contrast to the inclusion of other aspirations, some of which, as at the date of the hearing, still do not have the status of Firm Rights. Furthermore
 - 12.7. Network Rail had misrepresented the relationship between the work done in respect of D1.5 and the formulation of the First Working Timetable, and had therefore failed to accord WSMR's Firm Rights the priority they were due under the terms of Condition D3.2.3(a);
 - 12.8. proper application of Condition D3.2.3 did not imply that WSMR was claiming any right to be "first on the graph"; it did however imply that, where other Train Operators were bidding against rights or expectations of rights that were not Firm Rights, WSMR should not be "last on the graph";
 - 12.9. in consequence the development of WSMR's business was being hampered because Network Rail had misinterpreted its duties in respect of the operation of D3.2.3, and had offered WSMR Train Slots that were "inefficient".
13. Network Rail argued that
- 13.1. the 2009 Timetable was a project that had been under development since at least 2006, and was subject to direction from within the DfT; the objective had been to produce a core standard hour timetable, potentially applicable from 06:00 to 22:00 every Weekday;
 - 13.2. the Coventry Corridor is one of the most constrained stretches of the West Coast Main Line ('WCML') and has been treated as the section of route that determines the Train Slots deliverable on much of the remainder of the WCML, as well as other parts of the Network;
 - 13.3. the design of the Timetable had been complicated by decisions taken which had changed the specification for WCT services on the Coventry Corridor from 4 trains per hour to 3 trains per hour. In order to satisfy Franchise obligations for two trains per hour at local stations on the Coventry Corridor, this altered frequency had in turn required LM to increase its number of Train Slots, and to introduce some skip-stop services;

- 13.4. the intention behind the inclusion in the standard hour timetable of an hourly 'freight' path in each direction, was that these paths would also be available to accommodate other less than hourly services (freight or passenger);
- 13.5. it had maintained dialogue with WSMR throughout the development of WSMR's business plan. During times when there was still uncertainty as to the rights that WSMR might acquire in relation to station stops, and the rolling stock that might be used, Network Rail had taken the pragmatic view that the inclusion of the 'freight' path into the Coventry Corridor hourly timetable ensured that there would be assured quantum of Train Slots for WSMR's services using the Coventry Corridor once WSMR had achieved the status of a Licensed Train Operator with an approved Track Access Contract;
- 13.6. having embarked upon the development of the 2009 Timetable to extended timescales, as contemplated by the provisions of Condition D1.5, and having achieved a degree of endorsement by other affected Train Operators for the "indicative" timetable, Network Rail had construed the effect of Condition D1.5 as creating a situation where, whatever the new factors that might present as at the Priority Date for the 2009 Timetable, it could not offer Train Slots that implied flexing of the "indicative" timetable.

The Panel's findings of fact in respect of the Dispute

14. 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
 - 14.1. what Train Slots had WSMR been offered, and were those consistent with its Firm Rights?
 - 14.2. had Network Rail discharged correctly its obligations under the provisions of Network Code Condition D 3.2.3 in its process for preparation of the First Working Timetable?
 - 14.3. had Network Rail otherwise departed from the procedures set down in Network Code Condition D3, and if so, what was the justification for such a departure?
15. In regard to the Train Slots that WSMR had been offered, the Panel noted that it had been given details of the extent to which the weekday Train Slots offered incorporated journey times that were generally faster than those in the 2008 Timetable, but no indication of how they possibly differed from the Bids that had been made. That said the Panel found that the Train Slots were consistent with WSMR's Firm Rights
 - 15.1. in respect of Quantum;
 - 15.2. in respect of Service Characteristics
 - 15.2.1. Maximum Journey Times were all compliant;
 - 15.2.2. Departure/ arrival time ranges had been met, except that, with the ready acquiescence of WSMR the arrival time of the first Up service at London Marylebone was 3 minutes earlier than the 09:00 to 10:00 window; and
 - 15.2.3. some trains did not stop at all stations that WSMR had rights to serve, again with the acquiescence of WSMR.

16. Operation of Condition D3.2.3 intrinsically relies upon Bids being differentiated on the basis of the status of the rights, or expectations of rights that all the interested Train Operators hold as at the time of "*Notification of rights to be exercised*" (Condition D3.2.1). On the basis of the information put to it, the Panel found that, for the purposes of formulating the First Working Timetable, and in relation to the Coventry Corridor, as at the Priority Date
 - 16.1. WSMR enjoyed Firm Rights for all its weekday services which qualified as priority under D3.2.3(a). However, the Firm Rights do not give any specific right to use the Coventry Corridor, as opposed to any other available alternative;
 - 16.2. LM had Firm Rights for sufficient services to meet its Franchise obligations; however, in circumstances where the WCT service to Birmingham became a 20 minute interval service, LM would require additional rights which were not Firm Rights as at the Priority Date;
 - 16.3. WCT had Firm Rights to operate 3 trains per hour over the Coventry Corridor; however WCT is currently seeking necessary amendments to the Service Characteristics in the Track Access Contract.
17. Network Rail did not include specific Train Slots catering for WSMR's services into the work undertaken to develop the 2009 Timetable during the preliminary development consultation period (Condition D1.5), nor were any paths for WSMR included in any output from that exercise. However, Network Rail maintained that the combination of the planned "freight" path within the standard hour on the Coventry Corridor, together with the options more readily identifiable between Wolverhampton and Wrexham, and over the route shared with Chiltern Railways, were kept in mind during the development process. However, as recorded in paragraph 39 of the decision letter of 10th September 2007 from the Office of Rail Regulation, giving the reasons for its decision of 21st August 2007 to approve WSMR's Section 17 application for Access Rights, Network Rail had informed ORR that if routed via the Coventry Corridor, WSMR paths would align with the hourly 'freight' path in the draft timetable. In the event that this path is not available, it would be necessary to find a path by another route.
18. When challenged by WSMR, Network Rail sought to re-assure that that output was only an "indicative" Timetable (letter of 30th January 2008, Simon Smith to Andy Hamilton), and was without prejudice to any bid that WSMR might make for inclusion within the First Working Timetable. In practice, Network Rail has sought to assert that the indicative Timetable should be rolled forward to be both the Base Timetable, and then the First Working Timetable. Furthermore, Network Rail sought to represent that Base Timetable to be a binding commitment to the relevant Train Operators, which could not be further flexed, and to place upon WSMR the responsibility for seeking possible adjustments to the Timetable on the basis of bi-lateral discussions with other Train Operators. The Panel were given details of the dialogue that had taken place between LM and ORR regarding WSMR's Timetable.

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

19. As regards the Bids made and offers received in respect of WSMR's Firm Rights, the Panel found that there could be no ambiguity but that WSMR had the right to a quantum of 5 weekday paths in each direction with the Service Characteristics set out in Schedule 5 of its Track Access Contract.
20. Given that WSMR has not specifically contested the instances where individual trains have not been scheduled to stop at certain stations or scheduled within arrival/departure ranges, the

Panel finds that Network Rail has satisfied WSMR's entitlement derived from its Firm Rights, by offering the Train Slots it had offered in the 2009 Timetable.

21. The Panel further finds that, notwithstanding any other preparatory works that may have been undertaken in respect of any timetable, including pursuant to Condition D1.5, Train Operators are entitled to expect that the detail of their Bids, and any associated flexing of conflicting services should be undertaken on the basis of priorities established strictly in accordance with Condition D3.2.3. However, this does **not** imply that all priority (a) Bids are to be satisfied, before any priority (b) Bids are put on the graph; the priorities specified in Condition D3.2.3 are all '*without prejudice to the exercise by Network Rail of a Flexing Right*'. This means that, in the process of translating Bids into the First Working Timetable, Train Slots allocated to meet any Bidder's Firm Rights accorded 'first priority' under Condition D3.2.3(a) can still be flexed by Network Rail within the bounds of those Firm Rights, in order to accommodate any other Train Slots in the First Working Timetable, irrespective of the status of the rights or expectations of rights supporting those Train Slots.
22. The Panel notes that, when challenged, Network Rail did not seek either to sustain its arguments in respect of the status of outputs from consultation conducted under Condition D1.5, nor to advance any fresh ones. The Panel finds that the wording of Condition D1.5 does not create any entitlement for Network Rail to pre-empt any of the subsequent provisions of Condition D2A or D3, and that Network Rail was in error to have asserted that it could not, of its own initiative, flex Train Slots contained in any such "indicative" Timetable.
23. All that said, as the Parties are agreed that Network Rail has generally fulfilled WSMR's Firm Rights, the Panel considers it has no need to attempt a qualitative judgement as to whether, in this instance, had Network Rail taken a different approach in relation to the application of Condition D3.2.3, this would necessarily have resulted in a different First Working Timetable that would have
 - 23.1. offered WSMR Train Slots giving faster journey times, and still
 - 23.2. accommodated all of the rights and declared aspirations of other Bidders.

The Panel's Determination

24. The Panel found that,
 - 24.1. as regards the 2009 Timetable, the Train Slots furnished to WSMR were, in all but a small number of detailed aspects, consistent with WSMR's Firm Rights.
 - 24.2. there appeared to be a tacit acceptance by the Parties that the element of non-compliance in respect of some station stops was an acceptable *quid pro quo* for the achievement of an Arrival in London Marylebone at 08:57 for the first weekday Up service; and that
 - 24.3. the general terms in which WSMR's Firm Rights were expressed would afford significant opportunity for WSMR to bid for improvements in Journey Times for following Timetables.
25. The Panel therefore determined, in respect of the submissions by the parties as specified in paragraph 9 of the Joint Submission as follows:

- 25.1. ***Confirm that WSMR 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***

WSMR has not been provided with slots in the First Working Timetable for the 2009 Principal Timetable which satisfy all aspects of their Track Access Contract, but the particular areas where the offer is technically non-compliant (as opposed to “not as good as it might be”) are not contested by WSMR;

- 25.2. ***“Confirm that when developing major packages of Timetable Change that it [Network Rail] has correctly followed the process described in Condition D1.5 and that once having established a base plan it has no unilateral power to amend that plan for the favour of any operator.***

“Confirm that when developing major packages of Timetable Change that Condition D1.5 does not remove the obligation from NR to develop the First Draft Timetable in accordance with Condition D3.2.3 regardless of the content of the Base Plan;

The process laid down in Condition D1.5 is essentially facilitational; any base plan produced as a result of such consultation is indicative, and does **not** in any way pre-empt the due operation by Network Rail of the processes laid down in Conditions D2A, or Condition D3. In particular, the drafting of a base plan does not inhibit Network Rail from the exercise of any of the discretions contained in Condition D2A or Condition D3, whether to prioritise its response to Bids, or to flex offers. The formulation of a base plan may be a useful exposition of what timetable is feasible, and a reasonable benchmark against which to assess the impact of new or revised aspirations, but it does not constitute any form of obligation, either in general or specific terms, to any one Train Operator. Any case made by Network Rail for refusing to incorporate a particular Bid, needs to be argued on its merits by reference to its implications for the First Working Timetable, and not by reference to the output from Condition D1.5

- 25.3. ***Confirm that when developing major packages of Timetable change its [Network Rail's] primary duty is to observe the requirements of Condition D3.2.2 (a) in developing an operable timetable; which follows the necessary balance between its Firm Rights and the Firm Rights of all Bidders (Condition D3.2.2 (b) at all times recognising the necessary [sic] of Declared (actual and expected) Firm Rights***

Whilst Network Rail is under a clear obligation (under Condition D3.2.2(a)) to produce a timetable that “is capable of being brought into operation” there has to be an expectation that any Firm Rights that have been agreed, and have been approved by the ORR, are, both individually and in aggregate, “capable of being brought into operation” and will be incorporated into the WTT in accordance with the rights exercised on, or before, the Priority Date. Other than in regard to its observations in respect of the status of Condition D1.5 (which were in any case subsequently withdrawn by Network Rail) the Panel is not minded to find that Network Rail otherwise departed from the procedures set down in Network Code Condition D3 in any way that can be deemed to be to the detriment of WSMR's Firm Rights.

- 25.4. ***Direct NR to develop a new Base Timetable based on the priorities as they stood at the Priority date on 1st February 2008 that can subsequently be used as the base***

timetable for the development of the 2009 Subsidiary Timetable

In formulating future First Working Timetables, Network Rail must continue to ensure that WSMR's bids in relation to its Firm Rights are accorded priority to the extent required by the provisions of Condition D3.2.3(a). The Panel considers that correct operation of Condition D3.2.3 should not prove prejudicial to either WSMR's freedom to bid for reductions in Journey Times, or NRI's rights to effect necessary and permitted flexing of individual Train Slots to achieve an efficient Timetable.

25.5. *Direct NR to re-evaluate the 2009 Principal Timetable and immediately implement changes to mitigate the effect of the incorrect allocation of priorities;*

In the circumstances where the substantive issues that have been argued by the Parties relate primarily to matters of principle in the operation of the Timetabling procedures, and that it has been demonstrated that WSMR's Firm Rights have (largely) been honoured, the Panel considers that there is no provision in either the Track Access Contract or the Network Code that prescribes a remedy be granted in accordance with ADR Rule A1.19 (a). Furthermore, taking account of all the other arguments from the Parties, the Panel considers that there is no need for it to exercise its discretion, as contemplated in ADR Rule A1.19 (b), "*after due consideration of all remedies and orders that could properly be made*", in circumstances where it has not been demonstrated that WSMR has been materially wronged. Therefore there are no grounds for directing Network Rail as requested.

26. For the avoidance of doubt, the Panel considers that this finding is without prejudice to any opportunities that may 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 WSMR's Firm Rights, whether initiated by WSMR through a Bid, or by Network Rail through the exercise of a Flexing Right.



Bryan Driver
Panel Chairman

23/7/2008