
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute references TTP337, TTP359 and TTP382

(following a hearing held at 1 Eversholt Street, London on 20 January 2011)

The Panel:

Andrew Long	Hearing Chair
Robert Holder	elected representative for Franchised Passenger Class, Band 1
Steve Carter	elected representative for Non-Franchised Passenger Class
Robin Nelson	elected representative for Non-Passenger Class, Band 1
Matthew Pocock	appointed representative of Network Rail

The Dispute Parties:

For West Coast Trains Ltd ("WCTL")

Robert Hodgkinson	Commercial Operations Manager
Susan Nichol	Timetable Strategy Manager
Jonathan Dunster	Head of Operations and Planning

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Joe Warr	Lead Access Planner - LNW
Matthew Allen	Engineering Access Manager
Janet Turlington	Customer Manager (Northern)

For Northern Rail Ltd ("Northern Rail")

Peter Warhurst	Timetable Planning Manager
Mark Ramsay	Operations & Events Planning Manager
Helen Bold	Track Access Support

Interested parties in attendance:

For First/Keolis TransPennine Ltd ("TPE")

George Thomas	Access Manager
Chris Nutton	Resource Planning Manager

In attendance:

Tony Skilton	Committee Secretary
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1. Introduction, Substance of Dispute and Jurisdiction

- 1.1. The issues in this dispute are (a) three LNW Route Rules of the Route [ROTR] Section 7 and (b) one Section 5 Restriction of Uses (ROUs), proposed by the Network Access Unit (now Engineering Access Planning) under the 2011 ROTR process; as directed under Network Code D2.1.3 and National Rules of the Plan 2011 (ROTP - Part 1.3.9). Supplemental issues (in TTP382) are items proposed through the Confirmed Period Possession Plan (CPPP) process, under D2.1.10 of the Network Code and ROTP Part 3.5.
- 1.2. Such ROUs were either proposed in v. 1 of ROTR, formally submitted to TOCs in v.2 of ROTR, issued on 5th February 2010 (TTP337) and / or proposed in v.3 of ROTR, then formally submitted through v.4 of ROTR, issued on 9th July 2010 (TTP359). Further subsequent changes under Network Code D2.1.10 and ROTP Part 3.5 have also occurred during December 2010 (under TTP382).
- 1.3. Such dispute arises as a consequence of:
 - 1.3.1. Initially four 12 hour Sunday ROUs proposed in ROTR v.1 during weeks 13 to 16, between Wilmslow / Cheadle Hulme and Slade Lane Jn via Stockport, reducing to two weeks of all day Sunday closures by the issue of ROTR v.2, a situation then remaining unchanged into ROTR v.4. Subsequent CPPP changes have now amended these to three weeks (13 to 15) of 16 hour possessions finishing at 16.30 on Sunday afternoons. This proposal is now also the subject of TTP382. WCTL however request that these three possessions finish approx 3½ hours earlier at around 1300 on each of the relevant Sundays.
 - 1.3.2. No access available, one week in three, for WCTL's last Euston to Wolverhampton SX service (1G49) via the Coventry corridor (Rugby to Birmingham New Street calling at Coventry and Birmingham International) as a result of maintenance work. WCTL request that the route (either the Up or Down line) be opened to allow this service to operate (rather than be diverted via Stafford or other diversionary routes), primarily through the introduction of a locally established "Lookout Operated Warning System" (LOWS) or other bi-directional means / initiatives.
- 1.4. There is no dispute as to the relevance and conformity with due process (i.e. the application of ROTR / ROTP); instead WCTL see the issue as Network Rail's refusal to revise such access opportunities in which WCTL can operate their services.
- 1.5. I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with Access Disputes Resolution Rules (**ADR Rules**) Chapter H to hear an appeal under the terms of Network Code Condition D5, all matters in question having arisen because a "Bidder is dissatisfied with [a] decision of Network Rail made under this Part D" – Condition D5.1.1.
- 1.6. In its consideration of the parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.7. The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.
- 1.8. It became clear in the hearing that in relation to the Coventry Corridor dispute there were possibilities of resolution that had not yet been fully explored and meetings that could take place with those best placed to consider practical consequences of various alternatives. In the circumstances the Panel and I concluded, with some support from the parties and in accordance with Rule H16 of the Access Dispute Resolution Rules, that it was proportionate and in accordance with the overriding objective to permit and encourage resolution by agreement at this stage. An interim determination would provide an opportunity for resolution by agreement within a specified timescale and, in default of agreement, a mechanism for providing further information and a decision shortly thereafter. That interim determination is set out at 11 below. Indeed, I was informed on 1st February 2011 that WCTL had reported resolution of that dispute by agreement. Accordingly the remainder of this decision relates mainly to the Manchester issues.

2 Background, history of this dispute process and documents submitted

- 2.1 Dispute references TTP 337, TTP359 and TTP382 were notified by WCTL on 26 February 2010, 23 July 2010 and 20 December 2010 respectively. The references were duly notified to other potentially interested parties in accordance with established arrangements.
- 2.2 Various of the matters of concern to WCTL were resolved through discussions. A joint submission document covering all matters remaining in dispute was provided by WCTL and Network Rail on 12 January 2011. The joint submission document was made available to other potentially interested parties in accordance with established arrangements.
- 2.3 Northern Rail declared itself a Dispute Party on 12 January 2011 and provided a submission document on 17 January 2011. This submission document was made available to the original Dispute Parties and to other potentially interested parties in accordance with established arrangements.
- 2.4 In accordance with Rule H18(c), following receipt of the Dispute Parties' submissions, I reviewed them to identify any relevant issues of law, of which there were none.
- 2.5 The hearing took place on 20 January 2011. The Dispute Parties made oral opening statements and were then questioned by the Panel.
- 2.6 I confirm that have taken into account all of the submissions, arguments, evidence and information provided to me and the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarised in the course of this Determination.

3 Relevant provisions of the Network Code

- 3.1 The provisions of the Network Code in issue are, principally:

- 3.1.1 D6 Decision Criteria

The relevant extracts are set out at Annex 1 to this Determination.

4 Submissions made and outcomes sought by Dispute Parties

- 4.1 WCTL's principal submissions were as follows:-

- 4.1.1 WCTL is responsible for running a Very High Frequency timetable (VHF) along the whole of the West Coast Main Line (WCML) from London Euston to major conurbations throughout the Home Counties, West Midlands, Liverpool, Manchester & Scotland as well as serving areas in North Wales and the Lake District.

- 4.1.2 The VHF timetable is the output from a culmination of 10 years of Upgrade work and £8.9bn of expenditure, and represented, at its introduction, 35% uplift in the number of services provided. Part of this uplift in service provision, was the introduction of three services an hour to both Birmingham and Manchester, tailing off to hourly inside, both late night midweek and Saturday evening to Sunday lunchtime periods. Such an unprecedented level of service is provided in parallel with hourly services to Chester, Liverpool, Preston & Carlisle, as well as hourly vital Anglo-Scottish links to Glasgow and Edinburgh.

- 4.1.3 WCTL VHF timetable obligations are enshrined both within its Passenger Service Level Commitments (Version 4 / Dec 2008) contained in WCTL Franchise Agreement with the Department for

Transport (DfT); and within those Rights specified under Schedule 5 of its Track Access Contract (TAC – dated Dec 2008).

4.1.4 Such Rights, when considered in conjunction with those principles applied throughout the industry under the 7-Day Railway concept (part of a regulatory requirement on Network Rail, to increase Network Access through a 37% improvement in Engineering efficiency during Control Period 4), alongside already established Enhanced Engineering Access (EEA) provisions are relevant to all items in dispute.

4.1.5 Network Rail has proposed ROUs that do not allow WCTL to fulfil such obligations and which, as a consequence, have a detrimental effect on the overall business and operations of WCTL and ultimately on its passengers.

4.1.6 The ROUs proposed in the Manchester (Stockport) area allow Network Rail to engage in S&C Tamping and Maintenance activities until 1630 on Sunday afternoons. WCTL has requested that this possession be cut back over the now three proposed weekends (TTP382 applies - Weeks 13-15 in June/ July 2011) to **1300**. As a consequence of such request, WCTL offered earlier starts on Saturday evenings at approximately 2100 to offset the lost 3½ hours from Sunday afternoons. Following further discussions a later request was made by WCTL to Network Rail on December 20th 2010 to further consider reverting back to 4 x 12 hour blocks over weekends 13-16 (or as available in the Engineering period). Such request(s) are all based on a continuing requirement to operate 3 trains per hour, which starts up in earnest at Sunday lunchtime.

4.1.7 The concept of undertaking standard maintenance & renewal activities through ROUs finishing at Sunday lunchtime along the WCML, is now a well established practice (excluding Bank Holiday Sundays), and is encapsulated as part of the ongoing 7-Day Railway Access process, thereby allowing increasing numbers of weekend returning passengers to travel without major disruption.

4.1.8 The second item raised by WCTL relates to a principal need to serve Coventry and Birmingham International stations with the last train from London on midweek nights (Monday to Friday), one week in three. This train (1G49 23.30 London Euston to Wolverhampton) has to be regularly diverted every three weeks via Stafford, reversing, to then terminate at Birmingham New Street much later than booked.

4.1.9 WCTL say that the inability to serve Coventry and Birmingham International on this last service, particularly where so much investment in station facilities such as car parking has taken place, in order to give the optimal travel opportunity to/from London and its environs, is unsustainable in the longer term, especially when Network Rail, under the 7-Day Railway process have a Fund to introduce remedial measures in the form of LOWS or other initiatives which would allow Bi-Directional access (over one line) through such possessions.

4.1.10 There may be other bi-directional opportunities / methods that could be explored as alternatives, but these have not been assessed or readily identified. WCTL also question, bearing in mind those activities actually being undertaken in the ROU (i.e. OHLE maintenance work), whether there really is a necessity to warrant 17 weeks of midweek closure over the year, i.e. 68 nights.

4.1.11 In the joint submission, WCTL stated that it sought the following determinations:

4.1.11.1 That the possessions in Weeks 13-15 between Cheadle Hulme and Slade Lane Junction via Stockport are retimed to start earlier at or around 2100 (Saturday) and finish earlier at or around 1300 (Sunday).

4.1.11.2 That 1G49 is given access capability to call at Coventry and Birmingham International on midweek nights (Monday to Thursday) every standard week of the year (Bank Holidays excluded).

4.2 Network Rail's principal submissions were as follows:

4.2.1 It is perfectly possible to carry out these S&C tamps in a different 16 hour window from that proposed. However, information received informally from Northern Rail and Network Rail's knowledge of local circumstances has led Network Rail to apply the Decision Criteria in favour of

Northern Rail on the basis that there is no rail alternative for urban passengers travelling between Manchester Piccadilly and Stockport on Saturday night (whereas there is a rail alternative available for WCTL passengers). Past experience shows that many of these passengers are inebriated and cause significant public order issues if required to use a rail replacement road service. Information received from the British Transport Police indicates that there would be a high likelihood of a breakdown of order at Manchester Piccadilly Station, with the wider implications for potential assaults and damage to property, not to mention verbal and physical abuse of rail staff.

4.2.2 Network Rail's position in the Joint Submission was that it will be possible (as a minimum) to path 2 WCTL services via Styal, Wilmslow and Crewe per hour in each direction. Of these 1 service per hour in each direction can run via Alsager, Kids Grove and Stoke-on-Trent and 1 service per hour in each direction can run via Stafford. Stoke-on-Trent could also be served by a truncated Euston-Manchester service which would terminate and start at Macclesfield. Therefore the number of passengers affected would be reduced as the majority of through journeys and number of seats available would be maintained. In the scenario outlined in this paragraph, between 1300 Sun and 1630 Sun Network Rail anticipated that 8 trains would have to terminate at, or start from, Macclesfield. The remaining 14 WCTL Manchester services would run to destination with additional journey time (anticipated to be approximately 10 minutes for Crewe services diverted via Styal and approximately 20 minutes for Stoke services diverted via Alsager and Crewe). This contrasts with 26 Northern Rail services which will have to be cancelled between Stockport and Manchester Piccadilly if the possessions start at 2100 Sat as proposed by WCTL.

4.2.3 Network Rail contended in the Joint Submission that the impact on passengers will be less than WCTL suggests if the plan outlined above is adopted. At the hearing it appeared to be accepted that a modified version of this proposal would probably apply- see 9.3.4 below. However, Network Rail's substantive submission was unchanged. In addition public order issues are, according to Network Rail, much less likely with the type of passenger travelling on Sunday.

4.2.4 In the joint submission, Network Rail stated that it sought the following determinations:

4.2.4.1 That in publishing the possessions in Weeks 13-15 between Cheadle Hulme and Slade Lane Junction via Stockport as timed between 00 30 Sunday to 16 30 Sunday, Network Rail has correctly applied the Decision Criteria and that therefore the published access should remain unchanged.

4.2.4.2 That in publishing the midweek Section 5 possession opportunities on route MD301 between Rugby Trent Valley Junction and Proof House Junction, Network Rail has correctly applied the Decision Criteria and that therefore the published access should remain unchanged.

4.3 Northern Rail's principal submissions were as follows:

4.3.1 Northern Rail had become a Dispute Party against the possibility of a determination altering the previously published RoUs, due to WCTL disputing the relevant possession times and wanting the RoUs to apply instead to Saturday evenings and until lunchtime on Sundays.

4.3.2 The Manchester Piccadilly to Stockport corridor is a key artery in the Northern Rail service provision south of Manchester with a significant number of services operating to / from Manchester Piccadilly via Stockport. Northern Rail has firm contractual rights on this route. The complexity of the service provision and the stopping pattern needs to be replicated by bus services. In summary, Northern Rail has rights to operate 226 services on a Saturday and 99 services on a Sunday.

4.3.3 The nature of a ROU is that each train operating company on the restricted route is prevented from fulfilling its obligations under its Service Level Commitments (SLC).

4.3.4 Northern Rail's position in this dispute results from extensive experience in managing blocks during the West Coast Main Line upgrade and the understanding gained as a result, in optimising the train /bus service provision. A key issue, in restrictions in the Manchester area, has been the management of the bus operations at Manchester Piccadilly.

5. Interventions by interested parties

5.1 There were no interventions from Interested Parties

6 Oral exchanges at the Hearing

6.1 At the hearing each of the parties made opening submissions and were then questioned by the Panel. In relation to the Coventry Corridor, WCTL raised the issue of Network Change. This is not a matter for this Timetabling Panel and WCTL should (if they so wish) pursue this option elsewhere.

6.2 In relation to the Stockport dispute the questions and answers focussed on a practical examination of the competing proposals and their implications in various different ways. There was one major factual correction, namely that the 3323 passengers said to be affected on a Saturday evening was not a correct figure; this was instead a maximum figure (for 17 out of 26 trains). Further WCTL acknowledged that there were Saturday evening issues, having recently seen Northern Rail's submission, but remained of the view that the concerns were insubstantial. There was also some discussion as to the WCTL service provision on the affected Sunday afternoons – see 9.3.4 below.

7 Issues arising of Law and Contract Interpretation

7.1 There were no specific issues of law nor of contract interpretation. The determination rests on an application of the contract provisions to the facts.

8. The Decision Criteria

8.1 Network Rail is obliged, in reaching its decision, to have 'due regard' to the Decision Criteria. In its joint written submission with WCTL, Network Rail had included a grid listing all the Decision Criteria and setting out Network Rail's position as regards its application of each individual criterion in determining the access pattern for the relevant works – summarising the evidence as to the characteristics of the possessions, Network Rail's opinion as to the effect of the possessions and the weighting given by Network Rail to the criterion in question. It was not suggested that these grids were developed by Network Rail, nor communicated by it to any train operators, at the time of engaging in the process of developing the Rules of the Route or as a direct tool informing Network Rail's application of the Decision Criteria in the course of that process. Rather, it appeared that the grids recorded Network Rail's retrospective analysis of the substance of its judgments made in balancing the competing interests of the parties. I do not propose to summarise the full content of these grids here but will include some reference to them in the analysis below in this determination

8.2 There was no criticism on procedural grounds. But WCTL did dispute the application of the Decision Criteria. Its criticisms were;

8.2.1 Whilst there are a number of Decision Criteria which can be applied in such circumstances, primarily criteria (b), (d), (e), (g), (h), and (l), the overriding criterion appears to be (a). WCTL advocated the approach in TTP 376/377. In that determination, the conclusion was that the evaluation of competing interests in such a situation revolved principally around the application of criterion (a). This is *"...sharing the capacity, and securing the development of, the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services..."*

8.2.2 WCTL contend that following the meeting in August, Network Rail should have considered the merits and application of criterion (a), in weighing up those differences (taking into consideration that

the duration of the ROU is of the same duration in either option) between train service and passenger loading affect, alongside those considerations applicable to the workstreams and resourcing required to undertake the maintenance work. WCTL had emphasised the high numbers of passengers on a Sunday afternoon (although as per previous hearings WCTL asked for this sensitive information to be made available to the hearing chair only; due to the circumstances regarding the re-franchising process) WCTL contend that Network Rail, in the conclusion of the ROU proposals through the now, CPPP process, should have, but did not, accept that Network Rail will now, not be providing the “....carriage of passengers.... in the most efficient and economical manner in the interests of all users of railway services...”

8.2.3 WCTL also contended that criterion (g) is important here too, as this was said to be an unnecessary “....deterioration of service patterns...” which could be reduced by moving the same number of ROU hours around the clockface (i.e. earlier).

8.3 Network Rail’s view was (unsurprisingly) that it had correctly applied the Decision Criteria. In particular it had been influenced by the impact on passengers and the public order issue. Northern Rail supported Network Rail’s analysis and conclusion. In summary, Northern Rail was firmly of the opinion that Network Rail had applied the Decision Criteria correctly, and sought a determination accordingly.

9 Analysis and consideration of the Saturday evening and Sunday afternoon alternatives

9.1 The issue ultimately is in fact comparatively simple; although the background facts, issues and implications are more complex. It had been common ground that there should be 16 hour possessions and also that these should occupy the whole of Sunday morning 00.30 – 13.00. The difference between the parties was whether the other 3 hours 30 minutes of those possessions should be on Sunday afternoon from 13.00 – 16.30 or start on Saturday evening at 21.00. All parties accepted that either was technically feasible. Whichever decision Network Rail made would have a detrimental effect on one of the Train Operators and be a major inconvenience to passengers of that company. Therefore Network Rail had to make a decision that would cause the least damage and be the lesser of two evils.

9.2 Effect on passengers; there are some features which are common to both proposals. Both Northern Rail and WCTL had firm contractual rights for the affected trains prior to a Network Rail decision; plainly their respective passengers would be affected and inconvenienced. Furthermore, the information about the effect on passengers is, in places, approximate, incomplete or imperfect. Some passenger figures are incomplete; the impact may (or may not) be ameliorated by advance publicity and the plans for the running of alternative services are not yet finalized. There is a risk therefore in attempting to be over-scientific in assessing the figures. All references to figures below are subject to those qualifications.

9.3 Sunday afternoon; the effect on WCTL services/ passengers is:-

9.3.1 WCTL’s services to / from Manchester Piccadilly run throughout the week, including most of the weekend. There are three services per hour operating in each direction via Stockport with two services running via Macclesfield and Stoke-on-Trent; the other service running via Wilmslow and Crewe. Only one service of the two via Stoke-on-Trent calls at Macclesfield.

9.3.2 On Sundays there are three trains per hour from Manchester after 11.00 am and from Euston after 12.00 noon. This service provision is to cater for those numbers of passengers expecting to travel ‘out & back’ over the weekend (primarily outward on Friday ‘pm’ or Saturday ‘am’ and back on Sundays, primarily from lunchtime onwards).

9.3.3 A 16.30 Sunday finish time would mean that many services would either have to be consequently retimed, cancelled or cut back to start / terminate short of destination / origin ; services that would otherwise be moderately to highly loaded. Under Network Rail’s proposals there would, according to WCTL, be a distinct deterioration in service provision as well as the commercial and operational affect on both passenger and resources (Decision Criteria parts g) and j) refer), especially if 1 in 3 services start / terminate at Macclesfield.

9.3.4 WCTL demonstrated the effects on services and passengers in Annex M of the Joint Submission. I had acceded to WCTL's request that the passenger figures be kept confidential from other companies including therefore the other panel members. The precise service provision had not yet been determined and there was not yet a validated train plan. It became common ground that the most likely service provision would be that three services per hour would run. Of these, two diverted services per hour would run to/from Manchester via Crewe and Styal. The third service would start/finish at Macclesfield and serve Stoke. (However it appeared at the hearing that the only service to Stoke would be the service to/from Macclesfield and that for capacity reasons neither of the other two services per hour would call at Stoke. There are some differences from Network Rail's plan outlined in the Joint Submission and at 4.2.2 above)

9.3.5 There was a difference between the parties as to the delay caused by the diversions. Each said that their estimate was based on previous experience. WCTL put the delays at respectively 40 minutes and 20 minutes. Network Rail's estimate was 20 minutes and 10 minutes respectively.

9.3.6 Annex M showed the number of services affected as 13 diverted and 7 cancelled (i.e operated to/from Macclesfield). The number of passengers affected was within the confidential part of Annex M.

9.3.7 WCTL also contended that this service pattern may cause overcrowding and public order issues. This is considered below.

9.3.8 The other impact on Sunday afternoons for WCTL passengers was the need for some replacement buses. WCTL would not operate a London-Stockport service nor a Manchester-Stockport/Macclesfield service.

9.4 Other passenger effects - Saturday evening effect on WCTL and Saturday/Sunday for Northern Rail.

9.4.1 By comparison the effect on WCTL and its passengers is much, much less on a Saturday evening. Annex M shows 4 Northbound services diverted, two by the longer time and two by the shorter (i.e 40/20 minutes according to WCTL and 20/10 minutes according to Network Rail.) WCTL also say that the number of services that would have to be thinned out would be negligible, as only three Up services would likely have to be cancelled; (which run via Stoke). It was not made explicit at the hearing what replacement bus services would be required, but the natural inference is that there would be some.

9.4.2 The impact on Northern Rail of Saturday evening possessions. The potential impact in terms of passenger numbers was shown at Annex Q of the Joint Submission. A total of 26 services are affected, 13 in each direction. The consequences are set out at section 6 of Northern Rail's submission, in particular the Table at 6.1.1(c). The position is complex; in some cases a bus replacement service is required throughout the service, in other cases for some intermediate stations only. The length and duration of bus journeys varies, up to 45 miles and from 20 minutes to 2 hours 30 minutes. Northern Rail say that 43 buses will be needed.

9.4.3 There are again complications in assessing the numbers affected. There is only data available for 17 out of 26 services. Included in the 9 services for which there is no data, there are 3 out of 4 key services out of Manchester Piccadilly after 23.00. The other service in that period has the highest loading (258) out of all affected services (and much higher than the loadings for the equivalent service around 21.00 and 22.00). Moreover the only other service at around 23.00 (22.50) from Manchester has another comparatively high loading of 158 passengers. The natural inference – although this must remain an estimate, not proof – is that the other 3 services after 23.00 would also have comparatively high loadings. Therefore data for one third of services is missing including 3 trains for what may be the key post 22.45 period at Manchester Piccadilly.

9.4.4 In the Joint Submission it was said that 3323 passengers were affected from 17 out of 26 trains. This figure was wrong, as was accepted at the hearing. That figure includes some double counting as it is a total of passengers respectively leaving / arriving at both Manchester and Stockport. 3323 is therefore a maximum for those 17 out of 26 services. The passenger count leaving / arriving at Manchester was 1074 and 734 so the minimum affected is 1808, and in reality somewhere between

the maximum and minimum figures, depending on the turnover of passengers at intermediate stations. Moreover if the other 9 services are loaded pro rata the figures become something between 2700 and 5000. (NB by pro-rata the arithmetic method is to multiply the existing number by 26/17).

9.4.5 Effect on Northern Rail on Sunday afternoon. There is also an effect on Northern Rail, as well as WCTL, if the possessions extend until 16.30 on Sunday. The services affected are listed at Annex D of Northern Rail's submission. Annex D is compiled in a similar way to Annex Q of the Joint Submission and is subject to similar qualifications. 19 services are affected for which there is data available for 17 services. If the same method as above is used it produces a maximum of 2252 and a minimum of 1227 for 17 out of 19 services. The number of buses needed was not given.

9.4.6 Northern Rail preferred the Sunday afternoon possession. It affects fewer of their passengers. Buses are, it is said, easier to obtain. But, most importantly, also because of perceived public order issues on Saturday evenings.

9.5 Public Order

9.5.1 Network Rail's decision to avoid Saturday evening possessions was significantly influenced by the public order issue. WCTL disputed the significance of Saturday evening public order issues in the Joint Submission, stating that public order normally only became a problem from 23.30. Network Rail said 'Past experience shows that many of these passengers are inebriated and cause significant public order issues if required to use a rail replacement road service. Information received from the British Transport Police indicates that there would be a high likelihood of a breakdown of order at Manchester Piccadilly Station, with the wider implications for potential assaults and damage to property, not to mention verbal and physical abuse of rail staff.' Northern Rail supported this, adding that in their experience disorder was not limited to the period after 23.30.

9.5.2 Importantly Northern Rail also produced material from the British Transport Police. Peter Holden, Area Commander stated :-

' Past experience shows that bus replacement services do not move passengers as effectively as a train service and leads to groups of passengers congregating on the station and station approach. Previous late evening bus replacement services/operations at Piccadilly have involved BTP officers being called to numerous disputes concerning rail staff and bus drivers with problematic rowdy/drunken passengers. Despite publishing information through various media sources about bus replacement services my experience is that either through the effects of excessive alcohol, or ignorance of the facts, the majority of passengers turning up at Piccadilly station still expect to be conveyed by train. Frustrations then arise due to the inconvenience to their journeys or a perceived/real lack of information, which places a large demand on police, who are targeted along with rail staff and bus operatives.'

9.5.3 BTP also mentioned the manning and funding requirements. It is fair to say that BTP did not go as far as to say that the disorder that was likely to arise would be unmanageable.

9.5.4 Annex Q shows 5 trains to depart from Manchester from 22.45-23.37. Two of these normally have a loading in excess of a total of 410 passengers. If the loadings of the other trains are similar there will be many hundreds – indeed possibly approaching one thousand - to manage in under an hour late at night.

9.5.5 The experience of Northern Rail, Network Rail, British Transport Police and an analysis of the figures all point in the same direction. They support Network Rail's assessment that there is a serious prospect of disorder with targeting of rail and bus staff and police. The experience is from recent years and similar situations.

9.5.6 WCTL also point to a public order issue. This is said to be due to the risk of overcrowding on Sunday afternoon resulting from the reduced service pattern of 2 services per hour to/from Manchester with a third starting/finishing at Macclesfield. Network Rail said they had considered this aspect, but did not believe that disorder would result. In one of the more colloquial expressions used at the hearing Network Rail accepted that 'a bit of a scrum' might result but it would not be worse than that. The trains have, I was told, 439 seats.

The passenger loadings are confidential but my assessment of the figures agrees with that of Network Rail. It seems very unlikely that there would be, on the figures, overcrowding of a serious enough nature to cause disorder.

9.6 The balancing exercise. Having considered the above how does that impact on Network Rail's decision?

9.6.1 In summary:-

9.6.1.1 Number of passengers. On Sunday afternoon the number of WCTL passengers affected is confidential, but high (i.e many thousands) . The number of WCTL passengers to be bussed is confidential, but a smaller number, and affected by the precise arrangements on Sunday afternoons, particularly for Macclesfield. The number of Northern Rail passengers to be bussed is (if pro rata-ed) around 1300- 2500.

9.6.1.2 On Saturday evenings the Northern Rail passengers to be bussed are 1808-3323 for 17 out of 26 services or if pro-rata-ed potentially 2700-5000. There may also be some WCTL passengers to be bussed.

9.6.2 Quality of effect on passengers. The 7 Day Railway document at Annex F of the Joint Submission states ' TOCs (and passengers) do not like bus substitution (especially at weekends), and the costs of putting on a bus replacement service are high. Bus substitution is suppressing demand as passengers are deterred from using trains on the weekend from fear of being put on a bus for part of their journey' It is clear that the degree of inconvenience/discomfort from a replacement bus service is higher than an equivalent delay where (as will be the case with most affected WCTL passengers) of remaining on a WCTL train. The overall comparative impact of course also ultimately depends on the duration of the delay.

9.6.3 The overall conclusion therefore on effect on passengers, subject to all the caveats that make all figures and assessments to be estimates rather than calculations of definitive figures, is

a) on the Network Rail proposal more WCTL passengers are affected (but the majority of them will be on a WCTL train whilst being diverted and delayed)

b) on the WCTL proposal it is likely that more passengers have to be bussed (but the extent of the difference depends on/is affected by the caveats to the figures)

c) passengers who are bussed are, in general , more seriously affected

9.6.4 There is then the public order issue; on which the conclusion is that Network Rail are right in apprehending a risk of public disorder with consequential targeting of rail, bus and police staff.

9.6.5 Other issues - Revenue. The parties did not supply any material which would have attempted to assess the impact of the respective alternatives in money terms. This was understandable, although there may be other cases where industry losses take on a greater role.

9.6.6 Other issues – EEA. WCTL also attached significant importance to the Enhanced Engineering Access provisions which envisage more of a 'seven day railway'. Both Network Rail and Northern attached less significance to these provisions. Plainly it is desirable for a 7 day railway, including for the reasons set out in Annex F of the Joint Submission (Network Rail October 2007 Strategic Business Plan – Supporting Document – Seven Day Railway) and in Annex G (Network Rail CP4 Delivery Plan Network Availability-Implementation Plan (v2) January 2010.)

9.6.7 It seems to me that these considerations are relevant and important but not decisive. They feed into TOC contractual rights, passenger expectations, levels of demand and passenger loadings. It was said in TTP 271 that the standing of the EEA document is that a) it does not have contractual force in the context of the individual Track Access Agreements but b) its intended objectives have significant industry support and c) any such statement of guidelines should be taken into account in an objective assessment of Network Rail

proposals. Plainly it is disappointing for there to be disruption to the WCML, particularly after the investment made and the effects on passengers in achieving the upgrade. But I accept Network Rail's contention that this is a factor to be weighed and not decisive in itself.

9.6.8 The balancing exercise – conclusion. The effect on passengers is by no means clear cut -see 9.6.3 above. Those arguments are finely balanced. In that respect there is no clear reason for favouring one alternative over the other. However, the public order element (9.6.4) is clearer and important and a key element in favouring the decision made by Network Rail. The fears of disorder are well founded, based on practical experience of similar events in recent years, widely shared and supported by an independent view from the British Transport Police. Accordingly, the conclusion I reach, taking all relevant factors into account, is that the balance is in favour of avoiding possessions on Saturday evenings. This is because of the clear risk of public disorder late on Saturday evenings including risks to transport staff, other factors being finely balanced.

10 Network Rail's decision

10.1 The starting point is that responsibility for best use of the Network, and for ensuring that it is the most efficiently maintained and renewed, subject only to the overall approval of the Office for Rail Regulation the exclusive responsibility of Network Rail. Therefore, as explained for example in para 34 of TTP 317 and in para 15 of TTP 271, to find against Network Rail there would have to be either a failure in execution one of the procedures, an unreasonable frustration of a specific right of a Train Operator, unreasonably putting a Train Operator at a disadvantage or (significant here) that Network Rail have 'made a decision (described as 'capricious' in TTP 317 and in TTP 271) which did not take into account either the facts of the case, or the guidance embodied in the Condition D6 the Decision Criteria'

10.2 In this case there is no criticism on procedural grounds. WCTL sensibly advocate adoption of much of the approach in TTP 376 and 377, particularly para 8.5. That approach is that the 'exercise becomes entirely one of assessing and balancing the practical merits of the parties' various competing interests' and also that the exercise mostly revolves around Criterion (a).

10.3 The process undertaken by Network Rail was not a one off but ultimately became a process. Whilst they did not construct a Decision Criteria grid until after the event, there was a process of engagement, dialogue and evolution of the proposals. Throughout that dialogue other parties were free to raise specific aspects of the Decision Criteria. It seems to me that Network Rail's approach was to make decisions with the Decision Criteria in the background but without documenting that fact; I do not think they should be criticized for that. It seems to me that 'due regard' can be had even when not documented.

10.4 The substance of the criticism of the decision was, in effect, the outcome. The contention was that having weighed all the information and the criteria Network Rail should have favoured WCTL's version. WCTL say that the application of either Criterion (a) alone or the entirety of the criteria should have resulted in a different decision.

10.5 There is an alternative method, which involves a thoughtful and forensic consideration of each of the components (i.e criteria) in the Grid. The contents of the Grid appear in many ways to be (as they are) a retrospective evaluation constructed to support a decision which has already been made. The scoring on the Grid often appears (as is not unexpected) to be the product of the overall judgment. That value judgment has influenced Network Rail's scoring. Such a forensic analysis of the Decision Criteria might well conclude first that the key issue is Criterion a) - which ultimately turns on the public order issue, the comparative effects on passengers not being at all clear cut. Secondly, however that there are numerous criteria which are scored in the Grid in favour of Network Rail but might be said (prior to the overall judgment) to be neutral, such as (c), (e), (g) (h) and (i). Further there are criteria that Network Rail has scored as irrelevant/not applicable that might be said to be relevant- such as (d) (f) and (k). In some ways therefore the Grid compiled by Network Rail has been of limited assistance in this case; it scores unduly favourable to the Network Rail decision.

10.6 Having said that the decision still comes down to a practical evaluation of the competing proposals and, in my judgment, Network Rail were justified in scoring Decision Criterion (a) in favour of their decision, primarily on public order grounds as set out at 9.6.8 above. Similarly Network Rail were, in my judgment, justified in overall evaluating the decision, on the basis of all criteria, in favour of Sunday afternoon possessions. This is so, having taken into account all relevant factors including the EEA provisions, that more passengers overall are affected on a Sunday, that the number of affected passengers on Saturday evening was fewer than in the Joint Submission, that the Decision Criteria grid was unduly optimistic in Network Rail's favour and that only one of Network Rail's two principal reasons is accepted in this determination.

10.7 Rule H14 of the Access Dispute Resolution Rules provides that a Timetabling Panel shall 'provide determinations on the basis of the expertise of a knowledgeable peer group with relevant railway expertise'. It is fair to say that the railway members of this panel, with their considerable expertise and experience, found the decision that had faced Network Rail as a very difficult one. The relevant considerations, particularly as to the effects on passengers, were finely balanced. The effects on WCTL passengers were regrettable but the need for the work means that someone has to lose out.

10.8 The conclusion I have come to is that Network Rail have correctly applied the Decision Criteria. They have taken into account relevant factors, including having due regard to the Decision Criteria. They have applied their knowledge of the facts, including experience of the consequences of previous work on the West Coast Main Line and the consequences of previous possessions. The Decision that they have come to is the outcome of that proper consideration. The Decision is reasonable, proportionate, experience based and results from having due regard for the Criteria.

11 Determination

Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues,

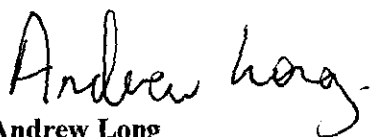
I DETERMINE:

That in publishing the possessions in Weeks 13-15 between Cheadle Hulme and Slade Lane Jn via Stockport as timed between 0030 Sun to 1630 Sun, Network Rail have correctly applied the Decision Criteria and that therefore the published access should remain unchanged.

In relation to 1G49 that a) Network Rail and WCTL shall use best endeavours to resolve this dispute by 17 February 2011 by discussion and agreement. The parties are to make available relevant staff and to engage constructively. In default of agreement the parties shall provide to the Panel with details of all the practical solutions which might be considered to avoid diverting 1G49 from the Coventry Corridor, together with an indication of their operational and financial viability for each Party. This information may be provided either jointly or individually, but it is to be in the hands of the Committee Secretary by

10 00 on Friday 18 February. If the information is provided individually, it must be copied to the other Party and any comments regarding the other Party's contribution are to be with the Committee Secretary by 12 00 on Friday 18 February.

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



Andrew Long
Hearing Chair

1st February 2011

Annex 1 to Timetabling Panel determination of reference TTP337, TTP359 & TTP382

Extracts from Network Code

CONDITION D6 - DECISION CRITERIA

The Decision Criteria consist of the necessity or desirability of the following (none of which necessarily has priority over any other):

- (a) sharing the capacity, and securing the development, of the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services having regard, in particular, to safety, the effect on the environment of the provision of railway services and the proper maintenance, improvement and enlargement of the Network;
- (b) seeking consistency with any current Route Utilisation Strategy which is either (i) published by the Strategic Rail Authority or the Department for Transport before 31 May 2006, or (ii) established by Network Rail in accordance with its Network Licence;
- (c) enabling a Bidder to comply with any contract to which it is party (including any contracts with their customers and, in the case of a Bidder who is a franchisee or franchise operator, including the franchise agreement to which it is a party), in each case to the extent that Network Rail is aware or has been informed of such contracts;
- (d) maintaining and improving the levels of service reliability
- (e) maintaining, renewing and carrying out other necessary work on or in relation to the Network;
- (f) maintaining and improving connections between railway passenger services;
- (g) avoiding material deterioration of the service patterns of operators of trains (namely the train departure and arrival frequencies, stopping patterns, intervals between departures and journey times) which those operators possess at the time of the application of these criteria;
- (h) ensuring that, where the demand of passengers to travel between two points is evenly spread over a given period, the overall pattern of rail services should be similarly spread over that period;
- (i) ensuring that where practicable appropriate provision is made for reservation of capacity to meet the needs of Bidders whose businesses require short term flexibility where there is a reasonable likelihood that this capacity will be utilised during the currency of the timetable in question;
- (j) enabling operators of trains to utilise their railway assets efficiently and avoiding having to increase the numbers of railway assets which the operators require to maintain their service patterns;
- (k) facilitating new commercial opportunities, including promoting competition in final markets and ensuring reasonable access to the Network by new operators of trains;
- (l) avoiding wherever practicable frequent timetable changes, in particular for railway passenger services;
- (m) encouraging the efficient use of capacity by considering a Bidder's previous level of utilisation of Train Slots;
- (n) avoiding, unless absolutely necessary, changes to provisional International Paths following issue of the applicable Rules of the Plan; and
- (o) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing.

In its consideration of paragraph (d) of this Condition D6, Network Rail shall not be entitled to determine that its Restrictions of Use of any part of the Network shall be as contemplated by any relevant maintenance contract by reason only of the terms and conditions of that contract. In this paragraph, "relevant maintenance contract" is a contract which Network Rail shall have entered into, or shall intend to enter into, with any person for the maintenance, renewal or the carrying out of any other work on or in relation to the Network.