
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP350
(following a hearing held at Eversholt Street, Euston on Monday 23 August 2010)

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Appendix 1

Extracts from Part D of the Network Code



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Determination in respect of reference TTP350
(following a hearing held at Eversholt Street, Euston on Monday 23 August 2010)

Hearing Chair: Suzanne Lloyd Holt

The Panel:

Simon Taylor (East Midlands Trains) - elected Panel member for Franchised Passenger Class, Band 3

Nigel Oatway (EWS International) - elected Panel member for Non Passenger Class, Band 2

Matthew Allen (Network Rail) - appointed Panel member for Network Rail

Parties to the dispute:

For Southern Railway Ltd ("Southern")

Kai Hills Head of Franchise and Access Contracts

Dave Walker Head of Train Specification and Planning

Phil Hutchinson Specification Planning Manager

For Network Rail Infrastructure Limited ("NR"):

Fiona Dolman Customer Relationship Executive (FCC)

Paul Hebditch Programme manager (Operations & Customer Services)

Paul Thomas Customer Relationship Executive (Southern)

Interested parties in attendance:

For First Capital Connect Ltd ("FCC")

John Beer Access Contracts Manager

Paul French Head of Planning

Chris Patman Senior Commercial Manager

For South West Trains Ltd ("SSWT")

Ian Gee Long Term Planning & Engineering Strategy Manager

Sam Gibbins Regulatory & Industry Contracts Manager

For XC Trains Ltd ("XC")

Robert Thould Head of Planning

In attendance:

Tony Skilton (Secretary)

1 INTRODUCTION AND JURISDICTION

1.1 This dispute arises out of a complaint by Southern following the rejection by NR of their Bid for certain Train Slots to operate revised Weekday and Saturday services between Brighton and Southampton where stops would be made at Eastleigh and Southampton Airport Parkway. That rejection is contained in NR's formal offer of the First Working Timetable to Southern for the December 2010 timetable under Condition D3.2.7 of the version of the Network Code in force on the date the First Working Timetable was issued, namely that dated 25 June 2010.

1.2 In passing, it should be recorded that, in the joint submission of the parties as originally submitted dated 12 August 2010 ("the joint submission"), certain other matters were in dispute - see paragraphs 6.2 and 7.2 of that joint submission. By the date of the hearing, those other disputes had been resolved and were not therefore before the Panel for consideration.

- 1.3 The Panel was satisfied that the matter was one which should properly be heard by a Timetabling Panel, meeting under the terms of Network Code Part D, as all matters in question arose because a *“Bidder is dissatisfied with [a] decision of Network Rail made under this Part D”* - D5.1.1.
- 1.4 One intending Panel member - Jason Lewis of Eurostar International (elected Panel member for Non-Franchised Passenger Class) - was prevented at short notice from attending the hearing, due to sickness. The Panel was, however, quorate, as provided for in Access Dispute Resolution Rule H17.
- 1.5 The Panel reminded itself that, as provided for in Access Disputes Resolution Rule A5, the Panel should *“reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis”*.
- 1.6 The Panel also had much in mind paragraph 34 of the Office of Rail Regulation’s (“ORR”) Determination of the appeal against TTP102 (2 February 2007) in which it had indicated that any Panel determination should give *“guidance as to the correct procedure that should be followed by Network Rail in similar cases to ensure that such a situation will not be repeated in future”*.
- 1.7 The abbreviations used in this determination are as set out on pages 1 and 2 hereof or as specified in the text below.

2 BACKGROUND

- 2.1 Put shortly, when preparing its formal offer of the First Working Timetable for the December 2010 timetable, NR was required to consider Bids from both Southern and XC for certain services which could not both be accommodated on the network. NR accepted the Bid of XC and rejected the Bid of Southern. Southern’s complaint is therefore that, in applying Part D of the Network Code and, in particular, in applying the Decision Criteria at Condition D6, NR misapplied those

Decision Criteria and should have accepted Southern's Bid in preference to that of XC - paragraph 8.1(a) of the joint submission.

3 RELEVANT PROVISIONS OF THE NETWORK CODE

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

(i) D3.2.7 Offer of the First Working Timetable

(ii) D6 Decision Criteria

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

4 SUBMISSIONS

4.1.1 While certain parts of the submissions and evidence will specifically be referred to during the course of this Determination, I have taken into account all of the written and oral submissions and evidence of the parties in reaching my decision.

4.1.2 The written material provided to the Panel was as follows:

4.1.2.1 Joint Submission dated 12 August 2010; together with, on the day of the hearing -

4.1.2.2 Opening Statement by Southern;

4.1.2.3 Opening Statement by NR.

4.2 Southern's principal arguments were as follows:-

4.2.1 That in taking account of a recommendation of the Great Western Route Utilisation Strategy ("the GW RUS") published in March 2010, NR misapplied Decision Criterion (b) since that GW RUS had not been published at the Priority Date of 8 January 2010;

- 4.2.2 Given that Southern's Service Level Commitment 2A(Part Two) in its Franchise Agreement ("the Southern SLC") effective from the December 2010 Passenger Change Date, contained an obligation in Route J4 Brighton-Southampton Central for services from Brighton to Southampton to call at Eastleigh and Southampton Airport Parkway stations (see paragraphs 2.1, 2.3 and 2.7 of the Southern SLC) greater weight should have been given by NR to Decision Criterion (c);
- 4.2.3 In contrast, Southern noted that XC's SLC, effective from the December 2008 Passenger Change Date contained a clause which permitted it to extend its Newcastle - Reading Services (Route 2) to and from Southampton, but did not require it so to do.
- 4.2.4 Southern also contended that NR had ignored the circular nature of the service proposed by Southern: the *"trains will operate in a one way circular loop returning from Southampton via Swanwick providing direct services linking Southampton Airport with services to and from Brighton and West Sussex"*- paragraph 6.1.1 of the joint submission. Southern complained that, in so doing, NR had not given sufficient consideration to Decision Criterion (f).
- 4.2.5 Although the argument was not raised in the joint submission, Southern did, in their opening statement at the hearing on 23 August 2010, seek to raise an additional argument in respect of Decision Criterion (f). They submitted that account should be taken of the fact that 40% of Southampton Airport's business was generated in the PO postcodes which commence at Chichester, such that the service bid for would improve connectivity for Southampton Airport with one of its principal markets. Southern submitted the proposal

offered significant improvements to connectivity with the Airport from its second biggest market and also offered commercial benefit to Southern.

4.2.6 In addition, and again this was a point not argued by Southern in the joint submission, they argued in opening that consideration should be given to the financial merits of the respective bids. They pointed out that the GW RUS (at page 154 as reproduced in annex 4 of the joint submission) suggested a financial loss to the industry of £11m through operating the proposed XC service over the period of that RUS, although Southern acknowledged that there were non-financial benefits. The Southern service was forecast to make an (admittedly small) profit.

4.3 NR's position was argued as follows:

4.3.1 In the joint submission they said:

"The Westbound services to Southampton Central which had been bid by Southern as diverted via Eastleigh and Southampton Airport Parkway, have been rejected as they clash with SSWT services which have Firm Contractual Rights. In each alternative hour the change to the SSWT is complimentary to XC service extended from Reading to Southampton Central, although similarly to the proposed Southern Service the XC services currently have no Firm Contractual Rights. The Southern service also conflicts with a number of freight services which operate in the area that also have Firm Contractual Rights" - paragraph 7.1.1 of the joint submission.

4.3.2 NR contended that they had carried out an exercise using the Decision Criteria so as to understand the relative merits of the XC and Southern bids.

4.3.2.1 In relation to Decision Criterion (b), NR submitted that since the XC bid was a recommendation of the GW RUS, its score should be awarded to XC.

4.3.2.2 In relation to Criterion (c), NR awarded the score to Southern on the basis that the Southern bid was a Franchise Obligation whilst the XC service was not (although it was allowed within its SLC).

4.3.2.3 In relation to Decision Criterion (f), NR submitted that the Southern services offered connectivity to Southampton Airport Parkway from the West Coastway services in one direction. The XC services offered connection to all stations between Newcastle and Birmingham from all stations between Reading and Southampton and, on that basis, it awarded the score to XC.

4.3.2.4 NR effectively rejected Southern's argument that extra weight should be given to Criterion (b) and made it clear in the joint submission - paragraph 7.1.6 - that they had treated each of the Decision Criteria as equal.

4.4 NR's essential submission was that, in applying the Decision Criteria, they considered the fit between the proposed new services and those bid for by existing passenger and freight operators on the affected route sections and concluded that the XC proposal was more compatible in that respect.

5 INTERESTED PARTIES (RESOLUTION SERVICES PARTIES)

5.1 Having heard the opening submissions of Southern and NR, I invited the other parties present, namely SSWT, XC and FCC to indicate if any of them wished to

declare themselves Dispute Parties. All indicated they were currently content to be in attendance in an observing capacity.

5.2 I further invited SSWT, XC and FCC to indicate if any of them wished to make any observations to the Panel. SWT indicated they wished to make certain observations and consent was given to that intervention.

5.3 SSWT's representative told the hearing that SSWT were very concerned about performance and, particularly, the potential impact of the proposed Southern service upon the performance of SSWT and other Operators in the Southampton area. This was, they said, especially in view of the tight turnaround of some 5 minutes which Southern trains would have scheduled at Southampton Central Station. SSWT indicated that they considered it appropriate for the Panel to be aware that SSWT had previously worked with Southern to extend their turnaround at Southampton Central from 9 minutes to 14 minutes because of performance concerns.

6 ORAL EXCHANGES AT THE HEARING

6.1 Having studied the joint submission of the parties (12 August 2010) and having listened carefully to their opening statements, Panel members and I sought clarification on a number of matters arising out of those submissions and statements. Although the parties' answers to questions were not put as sworn evidence, I have taken the view that the Panel and I were entitled to regard them as true statements provided to assist the hearing and I have therefore taken them into account when reaching my determination. The following specific points were clarified:

6.1.1 The proposed Southern service would start at Brighton, carry on to Eastleigh where it would reverse, then to Southampton Central via Southampton

Airport Parkway then return on the direct route from Southampton Central to Brighton.

6.1.2 If Southern's bid were accepted and the service put into operation, a passenger arriving at Southampton Airport would not see the Southern service as available through to Brighton: they would see these trains as only going to Southampton Central. To address the fact that people from the PO postcode area could get onto a train direct to Southampton Airport Parkway but, on their return, would not see trains going back to their PO area, Southern would provide information at Southampton Airport with leaflets, also by flyers in their local area and by providing information on their own journey planning website.

6.1.3 Although the importance of the PO postcode catchment area to Southampton Airport's business was not argued by Southern in the joint submission, that passenger information had been provided by them, at least in part, to NR when Southern made their Bid.

6.1.4 NR did consider that information provided by Southern but looked more consciously at the connectivity of the respective Bids.

6.1.5 In terms of access rights for the relevant services, Southern currently had quantum but no access rights application under way at present as they had not been offered the Train Slots. XC had quantum to Reading but would need additional rights through to Southampton Central.

6.1.6 NR had considered the issue of performance - Criterion (g) - when weighing the respective bids of Southern and XC. XC has quite a few miles of through running, less conflicting moves and tightish turnaround at Southampton Central. The Southern workings were quite complicated in the local area

but they could be made to work at Eastleigh but they had very tight - some four minutes - turnaround at Southampton Central. NR had issued their remit for performance modelling when they commenced consideration of the Bids and that was due to be completed on 24 September 2010. In the meantime, and based on the information available, NR had marked performance Decision Criterion (g) as neutral.

6.1.7 In relation to Decision Criterion (o) - taking into account commercial interests - it was clear that although Southern, when making their bid, had not specifically put to NR the point they sought to make in relation to the likely loss of £11m for the XC service over the life of the GW RUS, that information was available to NR as going into the relevant RUS. NR proceeded on the basis that XC expected to run the extra movements at a profit.

6.1.8 Both of the services as proposed by, respectively, Southern and XC were in those TOCs' Priority Date submissions.

6.1.9 There was no agreement in place or intended between NR and XC regarding profit sharing on the additional services offered.

6.1.10 Although the GW RUS was not in place at the Priority Date, it was in place when NR made their offer of the First Working Timetable under D3.2.7 and all the parties concerned were aware of its contents even at the development stage.

6.1.11 NR had taken account, when applying Decision Criterion (c), of the fact that Southern's SLC contained a requirement for the proposed service whereas XC's SLC was permissive - trains "may" travel through to Southampton Central - and had scored that Criterion in favour of Southern. However, NR

had decided that the recommendation of the GW RUS - Criterion (b) - should sway the overall marking process.

6.1.12 NR acknowledged that no Decision Criteria table had been drawn up, shared with and explained to the TOCs: they had however advised the TOCs of the number of neutral decisions they had taken and told them specifically about the Criteria they considered were in issue.

6.2 Those were the arguments and clarifications put to the Panel.

7 ANALYSIS

I now turn to my consideration and analysis of the arguments put by the parties.

7.1 It was plain from the joint submission that the real issue between the parties was the extent to which the Decision Criteria had been applied by NR when deciding to reject Southern's Bid. It was evident, from the clarification which Panel members and I sought from the parties in the course of the hearing, that no Decision Criteria table had been produced by NR in the course of their deliberations prior to the Offer of the of the First Working Timetable. Further, we were told that there had been no detailed review as between NR and the two interested parties giving consideration to each of the Decision Criteria. We received written and oral arguments only in relation to Decision Criteria (b), (c) and (f). I return to those points below.

7.2 In relation to those Decision Criteria on which written and oral submissions have been received, in my judgment, the position is as follows:-

7.2.1 **Decision Criterion (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;

As appeared in the joint submission, the GW RUS was published on 1 March 2010 i.e., it was not in place at the Priority Date of 8 January 2010. Southern sought to argue that, at there was no published RUS at the Priority Date, Criterion (b) should not apply.

7.2.2 NR countered that all relevant parties, including Southern, had been involved in the consultation process in the establishment of the GW RUS so were aware of its contents and further, that GW RUS was in place by the time the Offer of the First Working Timetable was made.

On the basis that, in its consideration of Criterion (b) of Condition D6, NR is to consider *“the necessity or desirability of.....seeking consistency with any current Route Utilisation Strategy....”* in my judgment those words entitled NR to take account of the GW RUS which was being developed as at the Priority Date and which had been published in final form prior to the date of the Offer. Accordingly, I take the view that NR, when scoring against Southern and in favour of XC, applied this Criterion (b) correctly.

7.2.3 Decision Criterion (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 of has been informed of such contract);”***

NR acknowledged that the Southern Bid was a Franchise Obligation, whilst the XC service was not (although it was allowed within XC’s SLC) and in

applying this Criterion, scored in favour of Southern. The requirements of Decision Criterion (c) are plain and NR clearly acknowledged Southern's obligations as a Franchise Operator.

Southern's complaint was not that NR had incorrectly applied Criterion (c) but rather that they should have given it greater weight. Condition D6 provides that:

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

It follows that Condition D6 envisages, in an appropriate case, that greater weight may be given to one or more Criteria. In this dispute, the parties have presented arguments in relation to three Decision Criteria - (b), (c) and (f) - and neither has sought to present substantive arguments on the relevance or importance of any of the other Criteria. Taking account of the arguments put in respect of those three Criteria, and of the clarifications noted from the hearing, in my judgment this was not a case in which greater weight should have been given to Criterion (c). It was correctly scored by NR in favour of Southern and then balanced with the other Criteria specifically in play.

7.2.4 Decision Criterion (f) *"maintaining and improving connections between Railway Passenger Services;"*

It emerged in part from the joint submissions, and very clearly in the course of the clarification sought from the parties during the hearing, that whilst the Southern services bid would offer connectivity to Southampton Airport Parkway from the West Coastway Services running from Brighton to Southampton Central (via Eastleigh), the bid as proposed did not improve

connections between Railway Passenger Services in the return direction as the West Coastway Services are routed via the direct route from Southampton Central to Brighton (i.e. not via Southampton Airport Parkway). It was plain from the evidence that a passenger arriving at Southampton Airport and wishing to travel back towards Brighton would have to be aware, or alternatively find out, that he could use the Southern service to Southampton Central, which then forms the West Coastway service to Brighton. Additionally, it was plain that the level of Westbound passenger service calling at Swanwick and stations to Bitterne would be reduced by Southern's bid and this may bring about deterioration in connections for passengers travelling from those stations.

NR argued that the XC services offered connection to all stations between Newcastle and Birmingham and all stations between Reading and Southampton. They took the view that the opportunities presented by the XC bid in linking the south west to destinations further north outweighed the benefits offered by the Southern bid in running along the South Coast.

In my judgment, having considered the arguments and evidence submitted, I consider that on balance NR did correctly apply this Criterion (f).

7.3 Neither Southern nor NR made any detailed submissions specifically in relation to Decision Criterion (g) - performance - but since the issue was commented upon by one of the Interested Parties in attendance - SSWT as an observing Operator - I think it right to mention that issue briefly here.

7.3.1 **Decision Criterion (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;”

NR in the joint submission dated 12 August 2010, merely indicated that performance was scored neutral as between Southern and XC and that performance modelling had been commissioned as per the GW RUS recommendations. SSWT in comments to the hearing expressed some unspecified concerns about performance. Southern made no submission on the point and did not challenge NR’s decision to mark Criterion (g) as neutral.

Given the absence of any real evidence on the issue, and in the absence of any challenge to NR’s decision on this issue by Southern, I do not deem it necessary to make any ruling on the point.

7.4.1 Before I proceed to my determination, and having in mind that the ORR has indicated that, in an appropriate case, guidance should be given as to the correct process to be followed so as to ensure that such a situation would not be repeated in future, I think it right to touch on the points which I highlighted under 7.1 above namely;

7.4.1.1 The fact that no Decision Criteria table had been produced by NR; and

7.4.1.2 The fact that NR had not discussed with the relevant TOCs’ the approach it was taking to each of the individual Decision Criteria.

7.4.2 I appreciate of course that neither the Network Code nor the Access Dispute Resolution Rules require production in every case of a Decision Criteria table but it seems to me that, even on an informal basis, it is desirable as a

cross checking device in the decision-making process that such a table be prepared.

Even if, as I equally appreciate, the preparation of a Decision Criteria table is, for whatever reason, not thought appropriate in a particular case, it does seem to me desirable, in the interests of open communication and transparency, both of which are desirable in reaching the fair determination of a dispute, that NR should endeavour to discuss with the relevant TOCs its approach to each of the Decision Criteria. In my judgment, such an approach could well be of assistance in minimising the extent of or resolving disputes.

8 DETERMINATION

Having considered carefully the submissions and evidence as set out in paragraphs 4 and 6 and based on my analysis of the legal issues as set out in paragraph 7

I DETERMINE

That Network Rail has not misapplied the Decision Criteria in rejecting Southern's Bid in preference to XC's.

I confirm that, so far as I am aware, this determination is legally sound and appropriate in form.

Suzanne Lloyd Holt

A handwritten signature in black ink, appearing to read 'Suzanne Lloyd Holt', with a long horizontal flourish extending to the right.

Hearing Chair

6 September 2010

APPENDIX 1

3.2.7 *Offer of the First Working Timetable*

Network Rail shall, on or before the last day of the Finalisation Period, provide to each Bidder, and to each Qualified Person who has (or on whose behalf another person has) first agreed to pay the reasonable costs of Network Rail in providing that information:

- (a) the Working Timetable which shall show:
 - (i) in respect of Principal Change Date, those Train Slots which Network Rail has decided to include in the Working Timetable commencing on that Principal Change Date; and
 - (ii) in respect of a Subsidiary Change Date, those Train Slots which Network Rail has decided to include in the Working Timetable commencing on that Subsidiary Change Date; and
- (b) details of those Train Slots which Network Rail has decided not to include in the Working Timetable.

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 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.