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

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### **Determination in respect of dispute reference TTP434**

*(following a hearing held at 1 Eversholt Street, London on 27 February 2012)*

#### **The Panel:**

Clive Fletcher-Wood      Hearing Chair

#### **Members appointed from the Timetabling Pool**

Robert Holder	elected representative for Franchised Passenger Class, Band 1
Steve Carter	elected representative for Non-Franchised Passenger Class
Nigel Oatway	elected representative for Non-Passenger Class, Band 2
David Jackson	appointed representative of Network Rail

#### **The Dispute Parties:**

##### **For West Coast Trains Ltd ("WCTL")**

Robert Hodgkinson	Commercial Operations Manager
Jonathan Dunster	Head of Operations & Planning
Susan Nichol	Engineering Strategy Manager

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

Joe Warr	Lead Access Planner (LNW)
Matthew Allen	Engineering Access Planning Manager

#### **Interested parties:**

##### **For Northern Rail Ltd ("Northern")**

Joanna Williams	Head of Service Planning
Helen Cavanagh	Track Access Manager

##### **For First/Keolis Transpennine Ltd ("TPE")**

Stuart Morris	Possessions Planning Manager
Laura Price	Access & Contracts Manager

#### **In attendance:**

Tony Skilton      Committee Secretary

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## **1 Introduction, Substance of Dispute and Jurisdiction**

- 1.1 On 8 July 2011, Network Rail issued a decision document amending the Engineering Access Statement 2012 (Version 2) on the LNW (London North West) route (the "Decision" and the "Decision Document"). The Decision Document included the Decision to plan an "All Lines" possession to take place from 00 30 to 16 30 on Sunday 1 July 2012 between Heaton Norris Junction and Denton Junction and between Edgeley Junction No. 2 signal box and Slade Lane Junction for the purpose of S&C (Switches & Crossings) tamping of Stockport No. 2 Junction. The intended possession arrangements (identified as PPS 1467966) would preclude rail access to Stockport for the duration of the work and were supplemental to possession arrangements already published in the Engineering Access Statement 2012 (Version 2). WCTL notified that it disputed this decision on 22 July 2011. That this matter remained in dispute despite discussions was confirmed by WCTL and Network Rail signing a Procedure Agreement in counterparts on 26 January 2012 and 6 February 2012 respectively.
- 1.2 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 (the "Rules") Chapter H to hear an appeal under the terms of Network Code Condition D5.
- 1.3 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". The Panel was assisted in this by paragraph 55 of the ORR's Decision in the Appeal from TTPs 337, 359 and 382, which said: 'The proper approach for a Timetabling Disputes Panel where such a reference is made is to consider the evidence before it to determine if the decision by Network Rail was properly made by reference to the relevant parts of the Network Code and, to the extent that the subject matter of the dispute concerns contractual rights, any other relevant contractual obligations. Here, the relevant consideration was whether or not Network Rail had due regard to the Decision Criteria. In ORR's view, an obligation to have "due regard" requires Network Rail to consider each of the Decision Criteria and to give them appropriate weight in the circumstances of the particular case' (and in this context the subsequent change from "due regard" to "consideration" is not significant).
- 1.4 The Decision Document having been issued by Network Rail on 8 July 2011, any appeal needed to be lodged with the Secretary of the Access Disputes Committee by close of business on 15 July 2011 in order to meet the 5 Working Day timescale laid down in Network Code Condition D5.1.2(a). I am satisfied that a bi-lateral agreement was reached between WCTL and Network Rail to extend the appeal period to 22 July 2011 and that the Notice of Dispute was accordingly validly served.
- 1.5 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. The proposed possession in dispute is referred to as the "Stockport ROU" and the work to be carried out as the "Stockport Tamping".

## **2 Background, history of this dispute process and documents submitted**

- 2.1 The Timetabling Dispute referenced TTP434 was notified by WCTL on 22 July 2011. The dispute related to the Decision Document issued by Network Rail on 8 July 2011 to amend the Engineering Access Statement 2012 (Version 2), for which Network Code Condition D5.1.2(a) set an appeal timescale of 5 Working Days. After receiving evidence from WCTL that Network Rail had indicated to WCTL an extended timeframe for the making of any appeal against the decisions in the document, the Secretary of the Access Disputes Committee progressed registration of the dispute and it was duly notified to other potentially interested parties in accordance with established arrangements.
- 2.2 As the appointed Hearing Chair, and in anticipation that other Resolution Service Parties might wish to participate in the proceedings, I consented to WCTL providing a sole reference

document for the Panel's consideration and for publication to other Resolution Service Parties, with NR requested to provide a sole reference statement responding to the issues raised.

- 2.3 The sole reference document was received from WCTL on 8 February 2012 and the response statement from Network Rail was received on 17 February 2012. These documents from the Dispute Parties were made available to other potentially interested parties in accordance with established arrangements. In the event, no other Resolution Service Party chose to become a Dispute Party (although two operators opted to attend the Panel hearing as "interested parties").
- 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 and these were advised to the other Panel members and the Dispute Parties on 20 February 2012. These issues are addressed later in this determination.
- 2.5 In its submission, Network Rail made reference to comments from other train operators who anticipated high passenger volumes in the Greater Manchester area wishing to travel into Manchester to attend various named events influencing its decision not to undertake the Stockport Tamping on Bank Holiday Sunday, 26 August 2012, which was a date preferred by WCTL. On 20 February 2012, I issued a Directions Letter in which Network Rail was called upon to provide the evidence upon which it wished to rely to support its contention regarding the likely passenger demand referred to above and the response was duly received on 24 February 2012.
- 2.6 The hearing took place on 27 February 2012. The Dispute Parties made oral opening statements and they were then questioned by the Panel. The "interested parties" were also afforded the opportunity to comment on the matter. One of the "interested parties" assisted the Panel by answering questions put to it.
- 2.7 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to 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 and other documents**

- 3.1 The version of the Network Code dated 7 April 2011 applied on the date that the decision document was issued by Network Rail and thus provides the contractual terms relevant to this dispute. The provisions of the Network Code in issue are, principally,  
D4.6 – The 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 That the dispute arose because of NR's Decision to impose the Stockport ROU in Week 14, in spite of a request from WCTL that the Stockport ROU should be re-scheduled to take place during a Bank Holiday weekend, preferably the August 2012 Bank Holiday (Week 22). This request was made because the established pattern for services on an ordinary (that is not Bank Holiday) Sunday envisages ROUs being completed by lunchtime on a Sunday, to permit WCTL's Very High Frequency ("VHF") timetable to offer three trains per hour to/from, in this case, Manchester, for the heavy passenger traffic returning on Sundays at the end of a normal weekend.
  - 4.1.2 WCTL submitted that the Sunday afternoon traffic during a non-Bank Holiday weekend effectively moves to the Monday of a Bank Holiday weekend, with significantly lighter loadings on Bank Holiday Sundays.

- 4.1.3 WCTL's sole submission was drafted before it had seen NR's case and therefore dealt with issues as seen from WCTL's perspective arising from the discussions between WCTL and NR at earlier stages. WCTL understood that NR's decision was influenced by a view held by NR that disruptive possessions were not to be taken during the Olympic Games, including the period between the Olympic Games and the Paralympics (into which the August Bank Holiday falls).
- 4.1.4 WCTL gave examples of other possessions taking place during Week 22, in spite of the ban on such works referred to above.
- 4.1.5 WCTL also submitted that resources should not be an issue during Week 22 because of the reduced scale of work being undertaken by NR in comparison with most Bank Holiday weekends.
- 4.1.6 The submission then discussed a perception on the part of WCTL that NR was relying too heavily on earlier TTP determinations as precedents. This issue is not discussed in any greater detail because, as explained below, WCTL chose not to pursue this aspect of its claim at the hearing. WCTL also argued that NR's decision had been capricious.
- 4.1.7 Under 'Any Further Issues' raised, in part 7 of its submission, WCTL referred to proposals for similar possessions from December 2012 into 2013 and that WCTL therefore, *'....thought it prudent to highlight that this matter has and appears likely to become, a currently interminable issue that will result in similar disputes in the future. We thought it might benefit the Chairman and members of the Timetabling Committee to be aware of such ongoing concern'* (7.1.2). (The Panel duly noted this, commenting that it could not reach any decision on future disputes).
- 4.1.8 Within its sole submission (at para 4.5) WCTL stated that it considered that, *'....the onus is on Network Rail to provide just reasoning and supportive evidence, as to how they have both weighted and applied, having due regard to the Decision Criteria.....their reasoning behind refusing WCTL's request to move this additional proposal, first and foremost to the 2012 August Bank Holiday weekend'*.
- 4.1.9 In concluding its sole written reference, WCTL stated that it sought the following determination:
- 4.1.9.1 That Network Rail cancels the ROU at Stockport (PPS 1467966) in Week 14 (1 July 2012) and thence works jointly with WCT (*and other industry parties*) to securing a viable alternative during the preferable August 2012 Bank Holiday period, or as a fallback option, any later Bank Holiday period that may follow in the 2013 timetable year
- and the following remedy:
- 4.1.9.2 That Network Rail does not use past and future determinations as specific precedents for the planning of engineering work, specifically (but not necessarily restricted to) future proposals of ROUs in the Stockport area.
- 4.1.10 As discussed below, at the hearing WCTL withdrew the remedy set out at 4.1.9.2 and agreed to re-wording of the determination being sought to become:

That Network Rail cancels the Restriction of Use at Stockport (PPS 1467966) in Week 14 (1 July 2012) and thence works jointly with WCTL and other industry parties to securing a viable alternative, preferably during the August 2012 Bank Holiday period, or as a fallback option, any later Bank Holiday period that may follow in the 2013 Timetable year.

## 4.2 Network Rail's principal submissions were as follows:-

- 4.2.1 It identified the fact that the principal issue to be determined was NR's application of the Decision Criteria.

4.2.2 NR explained the factors which had led it to its decision as being:

"Several factors informed Network Rail's decision to propose the access in week 14 with times of 0030 Sun to 1630 Sun. These were:

- The requirement to carry out the work during 2012 in order to avoid points failures or speed restrictions;
- The lack of suitable tamping resource in the week 40 Bank Holiday;
- The disruptive access on the West Coast Main Line north of Weaver Jn in weeks 6 and 10 (May and Spring/Jubilee Bank Holidays respectively);
- Internal company policy not to permit any significantly disruptive access in week 22 (August Bank Holiday) due to the Olympic Games;
- The ADC and ORR determination of TTP 337 / 359;
- Efficient Engineering Access (EEA) and Network Rail's 7-Day Railway commitment to the ORR.
- Route Categorisation principles applicable to the route concerned."

4.2.3 NR explained its perception of the likely effect of the Stockport ROU on other TOCs whose services would also be affected. It also referred to the fact that WCTL had not provided NR with concrete evidence of the ways in which other similar ROUs had affected WCTL's passengers, going on to explain the reasons for its anticipation of increased demand on August Bank Holiday Sunday referred to in para 2.5 above.

4.2.4 NR accepted WCTL's view that a TTP Determination is only persuasive authority but went on to explain its view that the Determination in TTP359/357 permitted NR to impose ROUs of similar length to the Stockport ROU on similar dates.

4.2.5 In rejecting WCTL's contention that NR's decision had been capricious, NR stated that:

"Although we have not articulated our application of the Decision Criteria explicitly, we have applied them throughout the process. The determination of TTP359 states:

(paragraph 10.3) "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 criticised for that. It seems to me that 'due regard' can be had even when not documented."<sup>1</sup>

Whilst obviously prioritising criterion (e), we have also placed importance on criteria (a), (g) and (i), in that we have made a judgement which prioritises the availability of capacity 'in the interests of all users of railway services' (criterion (a)); 'avoids material deterioration of the service patterns of operators of trains' (criterion (g)); and 'ensures that ...appropriate provision is made for reservation of capacity to meet the needs of Timetable Participants whose businesses require short term flexibility...' (criterion (i)). Network Rail has made a conscious decision to keep the August Bank Holiday substantially clear of major disruption on main routes – all the access referred to by WCTL in WCTL Sole Submission Annex "L2" on main line routes requires a block of 2 lines where 4 lines are available and it is of relatively short duration. This is because Network Rail has made a substantial sacrifice in its 2012 access plan by not carrying out work in week 22 – typically this Bank Holiday would contain a number of major S&C and Plain Line track renewals; signalling work; bridge reconstructions etc. This has all been removed in 2012 in order to support the country's transport needs during a period of high visitor numbers and intense scrutiny of the success of UK plc's public transport system. By and large we have worked very effectively with our Train and Freight Operator colleagues to plan work outside of week 22, in the main in other Bank Holidays, although not exclusively. We have prioritised access which is significantly disruptive, for example 29 hour all line block access requiring extensive diversions to be moved to other Bank Holidays. The Stockport S&C tamp, while significantly disruptive is not of the same order of disruption as (for example) a 29 or 54 hour block of the

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<sup>1</sup> I note that 'due regard' is not a feature of the version of the Network Code applicable during the 2012 Rules process (Oct 2010), Network Rail being merely required to 'apply' the Decision Criteria, although the principle is the same.

WCML north of Weaver Junction. It is also worth stating that if week 22 had been available to plan significant disruption we would have proposed as a priority 54 hour-type all lines blocked access on the WCML north of Weaver Jn, given the high volume of plain line and S&C renewals we require to undertake on this route. An S&C tamp at Stockport would not have been planned in week 22 as it would have clashed with the WCML access and it would have caused significant disruption to local Greater Manchester traffic which we try to avoid (along with major disruption in Merseyside) on the August Bank Holiday for the reasons outlined in para. 5.7."

- 4.2.6 In summary, NR concluded that its arguments favoured its position because it had scheduled the Stockport ROU well before the Olympic and Paralympic Games, because it did not regard it as acceptable to block main routes three days before the start of the Paralympic Games, thus prioritising Decision Criteria (a), (g) and (i).
- 4.2.7 Given this, NR felt that the Stockport ROU was acceptable in Week 14. Although at this point in its submission NR accepted that TTP359 did not discuss dates, NR could conclude that such restrictions were acceptable in a non-Bank Holiday weekend.
- 4.2.8 Finally, NR argued that it would be unreasonable to restrict the work included in the Stockport ROU to Bank Holiday weekends alone.
- 4.2.9 In concluding its written submission, Network Rail stated that it sought the following determination, with no other remedies or issues to be determined:
  - 4.2.9.1 That Network Rail has correctly applied the Decision Criteria in regard to the decision taken to include the Week 14 Stockport Restriction of Use in the respective timetable week.

## **5 Oral exchanges at the Hearing**

- 5.1 Both Parties made an opening submission.
- 5.2.1 WCTL's submission was its first opportunity to reply to NR's sole written submission. WCTL emphasised that the dispute was not about the timing of the Stockport ROU, but the date on which it was to take place. WCTL commented on the 'minimal amount of correspondence' received from NR since July 2011 concerning this dispute.
- 5.2.2 WCTL commented on the list of factors referred to by NR in its sole submission, and noted that a number of them were not contractually binding. In WCTL's submission, therefore, the only relevant issues were the degree to which the precedent set in TTP359 influenced NR's decision, and NR's internal policy decision not to carry out this work during the August Bank Holiday because of the Olympic Games (the "Internal Policy Decision").
- 5.2.3 WCTL commented that two of the three events which NR claimed would increase traffic in the Greater Manchester area on the Bank Holiday Sunday were not actually taking place in Manchester at all (one being in Liverpool, the other in Warrington), and that there had been blockades during the Bank Holiday in previous years.
- 5.2.4 WCTL introduced a new factor, a major concert recently booked to take place at Heaton Park, Manchester during the Bank Holiday weekend, which the British Transport Police ("BTP") (in an annexed e-mail) estimated would generate attendance of approximately 75,000 people each day. The e-mail from BTP expressed concern about any disruption to travel.
- 5.2.5 In its submission WCTL withdrew its requested remedy (set out at 4.1.2.9) above. The note on legal issues referred to at 2.4 above had invited the Parties to make submissions on whether this remedy was one which a Panel could or should make, given that it would merely duplicate the provisions of the existing Rule A7.
- 5.3.1 NR had not been previously aware of WCTL's intention to withdraw the remedy sought in 4.1.2.9, so still referred to it in NR's prepared opening submission.

- 5.3.2 NR commented further on the lack of any detailed impact statement from WCTL, which NR accepted might have influenced its Decision. It relied in part of Northern's reported view which supported the work being carried out in Week 14 rather than Week 22 and referred to an apparent preference on CrossCountry's part for work of this kind to be carried out during normal weekends.
- 5.3.3 In its opening submission NR stated that it would appeal any Determination that restricted disruptive possessions at Stockport to Bank Holiday weekends only. At the end of NR's submission it was pointed out to NR that no such Determination was sought, even if the Panel had felt that it was legally able to reach such a Determination (which for the avoidance of doubt, the Panel thought would be beyond its powers, as such an order would prevent NR from exercising its legal duty to apply the Decision Criteria in accordance with the Network Code).
- 5.3.4 Although the note on legal issues (referred to at 2.4) invited the Parties to make submissions on how NR's Internal Policy Decision not to carry out disruptive possessions between the Olympic and Paralympic Games might be aligned with the Decision Criteria, NR's opening submission did not deal with this point.
- 5.4 In response to questions from the Panel, WCTL provided the answers shown below.
- 5.4.1 WCTL explained the effect on its customers of earlier blockades and how services were altered to cope with a blockade at Stockport. This illustrated which customers suffered the greater degree of disruption.
- 5.4.2 Although WCTL was concerned about providing commercially confidential information, especially during the current re-franchising exercise, the Panel explained that it did not need such detail, but wished to understand the effects in broad terms. WCTL believed that traffic on the Manchester – London route on a Bank Holiday would be only about two-thirds the level of traffic on a normal Sunday (with the normal Sunday demand being transferred to a Bank Holiday Monday). On a normal Sunday trains would often leave Manchester full soon after the service increased to the level of 3 tph (trains per hour).
- 5.4.3 The reduced service during the last blockade coped 'because it had to', but after any period of disruption WCTL received an increased level of complaints, often endorsed by Passenger Focus. But this led to over-crowding, in spite of attempts by WCTL to manage demand during the period of disruption.
- 5.4.4 The figure of a reduction in demand by about one-third was reinforced by WCTL's view that if there were no constraints on timetable alterations, 2 tph from Manchester to London on a Bank Holiday Sunday would be sufficient to meet the demand.
- 5.4.5 WCTL estimated that about 25% of the traffic on Manchester – London services originated from Stockport. During a blockade at Stockport southbound passengers would be bussed to Wilmslow or Macclesfield.
- 5.5 In response to questions from the Panel, NR provided the answers shown below.
- 5.5.1 The NR representatives could not be sure at which level in NR the Internal Policy Decision was taken that disruptive possessions should not be imposed between the Olympic and Paralympic Games; they thought that it might have been at Board level, but volunteered that this was only their speculation. They did not know whether this policy had been shared with the industry through any body such as the National Task Force, nor whether it had received any endorsement from the rest of the industry stakeholders. They thought that the policy had been adopted primarily for reputational reasons, but emphasised that they were not fully informed about the way in which the policy had developed.
- 5.5.2 Had it not been for this policy, NR would have been prepared to move the Stockport ROU to Week 22, although the resources would in all likelihood have been required for higher priority work, such as a 54 hour blockade north of Weaver Junction to deal with the outstanding work renewing plain line and S&C which is required.

- 5.5.3 In respect of other work being carried out in Week 22, the NR representatives explained that the other work within LNW Route was much less disruptive than the Stockport ROU. They were not aware of the scope of work being carried out on other Routes. Although a dispute has been registered in relation to access near London King's Cross over the August Bank Holiday they had no detail of that dispute, but thought that it might be limited to the impact on Empty Coaching Stock moves to and from Bounds Green Depot.
- 5.5.4 The NR representatives were clear in saying that the Stockport work could not be carried out within two shorter possessions. They were not engineers, so were unable to comment any further on the possibility of doing the work on two tracks first, while the other two remained open for traffic, before reversing the process, even if this required a longer possession. While this could not be pursued within this Dispute, it would be examined further in case it might avoid a future Dispute over tamping the S&C at Stockport.
- 5.5.5 NR confirmed that because of the limited amount of work being carried out elsewhere on the network during the 2012 August Bank Holiday, resources would not be an issue if it had been decided to carry out the Stockport ROU in Week 22.
- 5.5.6 As to the extent of the authority of TTP359 in respect of the date of the Stockport ROU, NR submitted that as the date of the blockade was not in dispute (as opposed to its timing, which was) then it supported the use of TTP359 as a factor for consideration.
- 5.5.7 NR was asked to expand on the e-mails from Northern and TPE that it had submitted in response to Directions Letter. It accepted that the figures provided by TPE did not really assist the argument either way. NR submitted that the real weight of Northern's evidence reflected the number of Northern's stations which could not be served by train at all during an all lines blockade at Stockport. (This point had not been mentioned by Northern in its e-mail). Otherwise NR accepted that the Northern e-mail was fairly equivocal. NR had not obtained any evidence from CrossCountry to support NR's contention that CrossCountry would prefer the Stockport ROU to take place during an ordinary weekend.
- 5.5.8 When asked to respond to the legal question as to how the Internal Policy Decision could be aligned with the Decision Criteria, NR felt that it was difficult to answer. It was accepted that NR could not rely on internal guidelines, but principles such as EEA had been held to influence decisions on possessions and therefore NR felt that the Internal Policy Decision could be linked back to the Decision Criteria. NR felt that it aligned with Decision Criteria on two counts, that of making sure that the network is available for traffic in the Summer, and that of keeping main routes open.
- 5.5.9 NR was placing weight on criterion (e), but would also try to carry out work at the time supported by the majority of operators, or at least when operators were neutral between alternative dates.
- 5.5.10 NR was asked to explain the degree of weight that the Internal Policy Decision had played in its decision. The internal policy decision was said to be placed third, after the need to do the job, and the historical time at which work has previously been carried out at Stockport, given that following disruption at Stockport on 2010 and 2011 they thought this was workable; and then the Internal Policy Decision.
- 5.5.11 NR did accept the general proposition that InterCity traffic is lower on a Bank Holiday Sunday than on a normal Sunday.
- 5.6.1 The Panel sought to establish from both Parties what information had been available to NR before it reached the decision leading to this Dispute, to understand how NR might have applied the Decision Criteria; what requests NR made for further information from WCTL and other operators; and what information WCTL had volunteered. The Panel was particularly keen to establish this as it appeared to the Panel that input had only been requested from other operators in response to the Directions Letter issued on 20 February 2012.
- 5.6.2 While NR was unable to be clear about what information it had sought from operators at the date of the Decision, it did accept that it was aware of WCTL's general concerns about



disruptive possessions on non-Bank Holiday weekends. When specifically asked whether NR had explored with other operators WCTL's request to re-schedule the Stockport ROU to Week 22, NR's representatives felt that there had been informal discussions, and that the issue would have been discussed with operators, but could not be more specific and were unable to say whether any further review of the Decision Criteria occurred at this stage.

- 5.6.3 In this context NR alleged, however, that WCTL usually only gave one word responses, such as "Accepted" or "Declined", to proposals from NR. This point was not challenged by WCTL, but was addressed before closing submissions, when the Panel drew NR's attention to the document containing the original Decision, together with a long list of other proposed possessions. A number of these had a response from WCTL running to at least 6 lines; others referred to questions posed to NR, to which WCTL had not received any response. NR confirmed that in the light of this document it did not persist in its allegation against WCTL.
- 5.6.4 WCTL was unable to be precise about the degree of information which it had shared with NR, although it was noted that the decision was made shortly before a number of disruptive possessions in 2011 from which WCTL had gained more experience of disruption.
- 5.7.1 Although Northern chose not to be joined as a Dispute Party, Northern's representatives assisted the Panel by answering questions from the Panel.
- 5.7.2 Northern confirmed that the various festivals referred to by NR occurred on an annual basis, so traffic would have been affected by previous blockades.
- 5.7.3 As far as the concerts at Heaton Park were concerned, which WCTL had raised at the hearing, Northern's experience was that Heaton Park was too far from any National Rail station to generate enough traffic to require extra train capacity to be arranged or to pose crowd control problems. A nearby Metrolink tram stop provided access to Heaton Park.
- 5.8 NR gave a closing submission, emphasising that in its view the Decision Criteria had been correctly applied, given the information available to NR at the time. The Stockport ROU would inevitably cause significant disruption whenever it occurred, NR was therefore not assisted by the generic nature of the responses. NR could path 3 tph for WCTL via Styal, which would offer a complete service from Manchester to London. The fact that WCTL chose to terminate 1 tph at Macclesfield was its own decision, but if NR had been provided with practical information on how the process had worked last time it might have reconsidered its Decision.
- 5.9 NR's final point was that if the Panel found against NR in this Dispute then Northern might appeal any decision to re-schedule to work for Week 22. Northern's representatives felt unable to indicate how likely such an appeal might be.
- 5.10 WCTL chose not to make a full closing submission, but for the avoidance of doubt WCTL explained to the Panel that it did not treat issues arising from Rules matters lightly and only progressed matters to dispute when it was key for its business.
- 5.11 WCTL also asked the Panel to take cognisance of the e-mail from BTP concerning the concert in Heaton Park during August Bank Holiday, which WCTL felt had not been fully explored in the hearing. The Panel observed that the evidence provided by Northern in response to questions indicated that its expectation was that these concerts would not have any appreciable effect on its services, as the local suburban operator. Further, the BTP e-mail only referred to engineering work in a general sense, so if WCTL wanted the matter explored further the Panel would need to know what question was posed to BTP. WCTL noted this and decided not to pursue the matter any further.

## **6 Analysis and consideration of issues and submissions**

- 6.1 The Parties agreed that the issue for decision was whether NR had correctly applied the Decision Criteria; the Panel shares this view.

- 6.2 In reaching its decision the Panel sought to establish how (or indeed whether) NR had applied the Decision Criteria, but it had only limited success in obtaining evidence on this point during the hearing.
- 6.3 In opening remarks at the hearing I referred to the view of Andrew Long, Hearing Chair in the Determination of TTP359, that, *'It seems to me that Network Rail's approach was to make decisions with the Decision Criteria in the background but without documenting the fact; I do not think that they should be criticized for that. It seems to me that 'due regard' can be had even when not documented'*. While I do not dissent from that proposition (and I do not think that the later Network Code amendment from 'due regard' to 'consider' alters the point), I observed that it would make the task of a Panel much easier, and possibly even avoid disputes reaching a hearing, if there were evidence to explain how NR applies the Decision Criteria, and how operators use the Criteria in their responses to NR.
- 6.4 The Panel regretted the fact that in this case it was not assisted by any such evidence, as the Decision Criteria only seem to have been considered by the Parties at a relatively late stage in this Dispute.
- 6.5 The Panel also felt that the Parties had not assisted themselves, or each other, by a lack of dialogue between them throughout this process (which is required to comply with the responsibility of NR and all Timetable Participants to collaborate with each other set out in Part D of the Network Code at Condition 1.1.8). Both Parties should participate fully in this dialogue, although the Panel recognises that the responsibility to obtain information to inform its decisions rests on NR.
- 6.6 Turning to the Decision Criteria, the Panel had to assess what weight it considered that different factors had played in NR's decision. While noting NR's evidence that the Internal Policy Decision was only the third factor to be considered, the Panel was struck by the heavy weight placed on this Internal Policy Decision in NR's sole submission and in its opening submission to the hearing.
- 6.7 As explained above, NR did not respond to the invitation to make submissions on this point and it was only dealt with by NR in response to questions from the Panel. NR advanced no substantive argument as to where the Internal Policy Decision should fit into the Decision Criteria.
- 6.8 In the absence of any suggestion from NR, the Panel considered whether it might possibly fit into criterion (p) ('taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the [earlier criteria]', but in the light of NR's evidence that the main reason for the policy was to protect NR's reputation the Panel felt that this did not fit properly into this criterion.
- 6.9 The Panel therefore concluded that the weight placed by NR on the Internal Policy Decision meant that NR was allowing a factor which is not one of the Decision Criteria to influence its decision on the Stockport ROU to an extent which means that the Decision cannot be regarded as fair and non-discriminatory.
- 6.10 Should further grounds for reaching this conclusion be required, the Panel noted NR's evidence that it would try to carry out work at the time supported by the majority of operators, or at least when operators were neutral between alternative dates (see para 5.5.9 above). The Panel feels that this approach, if adopted, would be a correct interpretation of the Decision Criteria, especially (a) and (l).
- 6.11 In this case, however, there is no clear evidence of what discussions took place with other operators. But NR was faced with strong opposition from one operator, whose case that traffic on Bank Holiday Sundays is much lower than on normal Sundays is accepted by NR (and the Panel).
- 6.12 The recently-acquired evidence from other operators is, in the view of the Panel, equivocal on the part of Northern. TPE's evidence shows a very limited difference in demand at Stockport between a Bank Holiday Sunday and a normal Sunday, but the difference (4%) was so limited –

as well as being against NR's case – that this evidence did not assist the Panel. Although NR claimed support from CrossCountry, it was unable to obtain any evidence to confirm CrossCountry's view.

- 6.13 The Panel therefore concludes that to persist with the Decision to carry out the Stockport ROU in Week 14 in these circumstances represents a failure to apply the Decision Criteria correctly.
- 6.14 In reaching this decision the Panel noted that the 2012 August Bank Holiday is unusual, in that resources to carry out the tamping at Stockport are not an issue because of the reduced engineering workload elsewhere on the network. Consequently, this Determination cannot be relied upon by either Party even as persuasive authority in any future Dispute concerning the allocation of tamping resources during a Bank Holiday weekend.
- 6.15 Quite properly, WCTL is not seeking a Determination that the Stockport ROU shall take place in Week 22, but that it shall not take place in Week 14 and that NR should consult with all affected operators to identify an alternative date, preferably during the August Bank Holiday or another Bank Holiday weekend. The Panel recognises that WCTL's preference might not be achievable although there could be a lack of logic in directing that work cannot be carried out in Week 14 when it might later be proposed for Week 15.
- 6.16 However, the Panel trusts that in selecting an alternative date for carrying out the Stockport Tamping, NR and the operators involved will all have the Decision Criteria in mind, so that even if the work is not re-scheduled for Week 22, the date will be selected on a basis that complies with an appropriate application of the Decision Criteria, and is seen to do so by all affected operators.
- 6.17 In the light of the Panel's conclusions, it did not think it necessary to make any finding as to whether the Decision was capricious.

## **7 Determination**

Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, I **DETERMINE** that Network Rail cancels the Restriction of Use at Stockport (PPS 1467966) in Week 14 (1 July 2012) and thence works jointly with WCTL and other industry parties to securing a viable alternative, preferably during the August 2012 Bank Holiday period, or as a fallback option, any later Bank Holiday period that may follow in the 2013 Timetable year.

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.



**Clive Fletcher-Wood**  
Hearing Chair

**7 March 2012**

## **Annex 1 to Timetabling Panel determination of reference TTP434**

### **Extract from Network Code**

#### **PART D – TIMETABLE CHANGE (7 April 2011)**

##### **CONDITION D4.6 – THE DECISION CRITERIA**

4.6.1 Where Network Rail is required to decide any matter by applying the considerations in paragraphs (a)-(p) below ("the Decision Criteria") it must consider which of the Decision Criteria is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Decision Criteria will lead to a conflicting result then it must decide which is or are the most important Decision Criteria in the circumstances and when applying it or them, do so with appropriate weight. The Decision Criteria are:

- (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 (A) published by the Strategic Rail Authority or the Department for Transport before 31 May 2006 or (B) established by Network Rail in accordance with its Network Licence;
- (c) enabling a Timetable Participant to comply with any contract to which it is party (including any contract with its customers and, in the case of a Timetable Participant which 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 Timetable Participants 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 Timetable Participant's previous level of utilisation of Train Slots;
- (n) avoiding, unless absolutely necessary, changes to provisional International Paths following issue of the applicable Timetable Planning Rules;
- (o) avoiding changes to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates;
- (p) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing.

In applying the Decision Criteria, the terms of any maintenance contract entered into or proposed by Network Rail shall be disregarded.