
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute references TTP439 and TTP440

(following a hearing held at 1 Eversholt Street, London on 10 October 2011)

The Panel:

Andrew Long	Hearing Chair
Robert Holder	elected representative for Franchised Passenger Class, Band 1
Phil Hutchinson	elected representative for Franchised Passenger Class, Band 2
Ian Kapur	elected representative for Non-Passenger Class, Band 2
David Jackson	appointed representative of Network Rail

The Dispute Parties:

For West Coast Trains Ltd ("WCT")

Jonathan Dunster	Head of Operations & Planning
Susan Nichol	Timetable Strategy Manager

For First/Keolis TransPennine Ltd ("TPE")

George Thomas	Commercial Contracts Manager
Chris Nutton	Resource Planning Manager

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

Matthew Allen	Engineering Access Manager
Marie Heracleous	Observer

In attendance:

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

- 1.1 On 1 September 2011 NR notified WCT and TPE of its decision to plan two 25 hour possessions in Weeks 41 and 42 between Oxenholme and Penrith to deliver switch and crossing track renewal works at Shap. These possessions would operate between the hours of 13.20 on Saturday to 14.55 on Sunday, over the two consecutive weekends of 7/8 January and 14/15 January 2012. Both WCT (TTP439) and TPE (TTP440) notified their dispute of this decision on 8 September 2011.
- 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 Chapter H of the Access Disputes Resolution Rules (the "Rules") 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".
- 1.4 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.

2 Background, history of this dispute process and documents submitted

- 2.1 The Timetabling Disputes referenced TTP439 and TTP440 were both notified by WCT and TPE on 8 September 2011. The references were duly notified to other potentially interested parties in accordance with established arrangements.
- 2.2 As the appointed Hearing Chair and in anticipation of the disputes being heard together because they concerned the same or similar subject matter, I considered that it would be impracticable for a joint reference document to be prepared by WCT, TPE and NR within any reasonable timescale for the early hearing of the disputes; accordingly, WCT and TPE were requested to provide sole reference documents for the Panel's consideration, with NR requested to thereafter provide a statement responding to the issues raised by both operators.
- 2.3 Pursuant to Rule B20, on 18 September the Allocation Chair ordered that the disputes should be heard and resolved together on the grounds that they concerned the same or similar subject matter and that it would be in the interests of efficient and fair resolution to do so.
- 2.3 The sole reference documents were received from WCT and TPE on 22 September and 23 September respectively. Due to their concerns regarding commercial confidentiality as regards passenger loadings, both operators provided redacted versions for the Panel members and for publication, with full non-redacted versions provided for my eyes only as Hearing Chair.
- 2.4 The response statement from NR was received on 29 September.
- 2.5 I was mindful that ORR's recent appeal determination for Timetabling Disputes TTP337/359/382 had considered the matter of redacted material being provided to the appointed Panel members but full data only being supplied to the Hearing Chair, concluding with the view that "generally speaking, best practice is to provide all members of the Panel with the same information for the purposes of their decision-making". Accordingly, with the objective of establishing some form of quantification which could be referred to openly during the hearing and in the eventual determination, on 29 September I issued directions to the Parties with the primary requirement that WCT and TPE should each supply short supplementary statements setting out what point(s) it is that they were wanting to establish by means of the redacted information. These supplementary statements were received on 4 October. Additionally, WCT supplied further data for my eyes only.
- 2.6 The unrestricted documents from the Dispute Parties were made available to other potentially interested parties in accordance with established arrangements.

- 2.7 In accordance with Rule H18(c), following receipt of the Dispute Parties' submissions and supplementary material, I reviewed them to identify any relevant issues of law, of which there were none.
- 2.8 The hearing took place on 10 October 2011. The Dispute Parties made oral opening statements and they were then questioned by all members of the Panel.
- 2.9 I confirm that I 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 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 WCT's principal submissions were as follows:-

- 4.1.1 Possessions in a normal weekend, rather than at a Bank Holiday, would result in a detrimental effect on WCT business and operations, specifically weekend Anglo-Scottish operations. The works had originally been planned for a Bank Holiday weekend but had been cancelled because of the potential of air traffic disruption, resulting from a feared Icelandic volcanic ash cloud event.
- 4.1.2 That NR, had not taken cognizance of industry accepted principles associated with the "seven-day railway" vision. As a result, WCT would be unable to operate its firm contractual rights, such rights being those principal Anglo-Scottish train services contained within the WCT Track Access Agreement and Franchise Agreement.
- 4.1.3 WCT had received no viable reason for NR's requirement to undertake such work at these particular times and how and why they arrived at such proposals, having regard to the Decision Criteria.
- 4.1.4 The seven-day railway vision, widely supported throughout the industry and as shown in various documents (Annex L to WCT's submission; Annex 2 hereto), requires possessions on the West Coast Main Line to be taken mainly at Bank Holidays. Doing so has allowed WCT to expand its weekend passenger market significantly. Customers' travel expectations are that engineering possessions will, in the main, only affect them during Bank Holidays. These possessions would mean that WCT was unable to operate services between Preston and Glasgow on these two Saturday afternoons and Sunday mornings.
- 4.1.5 There are already many other weekends where possessions on the West Coast Main Line are already planned for 2012, to which the work on Weeks 41 and 42 would be additional.
- 4.1.6 No business case has been produced in support of NR's decision.
- 4.1.7 The timing of NR's decision made it very difficult/impossible to make the necessary arrangements to produce a timetable 12 weeks before the planned works, in accordance with the Informed Traveller guidelines. The decision was notified respectively 18 and 19 weeks before the planned possessions which, despite any best intentions, is practically unachievable in terms of meeting Informed Traveller

timescales. NR is in breach of its obligation "wherever possible" to consult in sufficient time.

4.1.8 NR appears to have based part of their decision making process on the assumption that January represents that period of the year where there is the lowest number of passengers, and is therefore the least disruptive in overall terms in the industry. The e-mail of 1 September notifying the decision had said 'We believe that this access in January represents the times of lowest passenger numbers and the least overall disruption to the network'. By contrast, the principle should be that WCT is operating a service all year round and it should not be prevented from providing efficient services of economic value, purely on the basis of the time of year.

4.1.9 Whilst accepting that the work had to be done, WCT's analysis of the application of the Decision Criteria to these facts (set out in some detail in the submission) supported possessions taking place at a Bank Holiday, rather than a January weekend. WCT had proposed a series of dates when the West Coast Main Line would already be disrupted, including Christmas, New Year, the period between Christmas and New Year, Easter, May Day and Spring Bank/Jubilee.

4.1.10 In concluding its sole written reference, WCT stated that it sought the following determination:

4.1.10.1 That the possessions in Weeks 41 & 42 between Oxenholme & Penrith (PPS Ref Nos. 1528978 & 1528979) are cancelled, and consequently withdrawn from the applicable 'Rules'

and the following remedies:

4.1.10.2 Upon cancellation of the works in Weeks 41 & 42, following a re-appraisal of the most suitable period within which to undertake these applicable works, in conjunction with affected Train Operators, is that Network Rail re-propose them into an appropriate Bank Holiday period within applicable planning timescales

4.1.10.3 A further supplementary remedy, to the overall subject matter here in dispute and relevant to the apparent lack of control within Network Rail of the Late Notification process, is the requirement to bring some discipline to the sheer volume of late submissions, a process so provided for in the Engineering Access Statement.

4.2 TPE's principal submissions were as follows:-

4.2.1 TPE had reluctantly accepted that the engineering work cancelled at short notice in Week 9 would need to be undertaken at a later stage (TPE having disagreed with the decision to cancel at the time). In responding to the cancellation TPE set out its expectation that NR would reschedule the works so as not to require additional Restrictions of Use ("RoUs") in 2011 or 2012.

4.2.2 On 12 August 2011 NR notified TPE of its proposals to take the possessions in January 2012. The notice was issued 22 weeks before the proposed work, in contravention of the practices set out in the Timetable Planning Rules which require NR to notify Train Operators 26 weeks in advance 'where possible'.

4.2.3 The disputed possessions would affect 16 through services each weekend on TPE's flagship Anglo-Scottish route. These services have firm rights under TPE's Track Access Agreement and commitments under the Passenger Service Requirement incorporated into its Franchise Agreement.

4.2.4 NR had failed to articulate the reasons for its position in any form. It had not followed its own requirements so as to produce a business case. Moreover it had failed to explain why it was unable to utilise the existing opportunities already provided by the 2012

Engineering Access Statement, the reasons for the late notification and finally how increasing substantially the aggregate disruption during the 2012 timetable year accords with the Decision Criteria, given the known significance of the route.

- 4.2.5 These possessions significantly increase the weekend restrictions affecting TPE's Anglo-Scottish services during the 2012 timetable. The demand for those services has grown by 135% over the past four years. The proposals will disrupt a significant number of customer journeys by introducing coach journeys between Oxenholme and Penrith/Carlisle into through journeys from Greater Manchester and Lancashire to Scotland.
- 4.2.6 The seven-day railway principles and the Efficient Engineering Access ("EEA") strategy agreed with government for the West Coast Main Line highlight the importance of moderating the impact of engineering work on customers for the long-term growth and stability of the industry. TPE annexed similar documents to those annexed by WCT (see Annex 2).
- 4.2.7 NR has not given due consideration to the opportunities available to schedule the works within the RoUs already provided for by the 2012 EAS. TPE considers NR retains the ability to carry out works during the Christmas shutdown period, Easter, May Day and Spring Bank/Jubilee weekends
- 4.2.9 TPE's own analysis of the Decision Criteria (set out in some detail in their submission) supports a different outcome to that proposed by NR.
- 4.2.10 In concluding its sole written reference, TPE stated that it sought the following determination:

4.2.10.1 That NR has not applied the Decision Criteria correctly and has not paid due consideration to the firm rights of TPE. The Panel is specifically requested to determine that the NR RoUs proposed for Weeks 41 & 42 are cancelled and rescheduled

and the following remedy:

4.2.10.2 A determination that requires NR to undertake the Works under cover of the NR RoUs already provided within the Engineering Access Statement [as set out elsewhere in the submission].

4.3. Network Rail's principal submissions were as follows:

- 4.3.1 The decision to cancel (with only two days notice) the Week 9 works was not taken lightly.
- 4.3.2 The disruptive engineering plan confirmed in the 2012 timetable year is less disruptive than NR had forecast as being required to maintain the infrastructure after the completion of the West Coast project in December 2008. NR forecasts successful delivery of its possession disruption plans for both passenger and freight (the emerging seven-day railway plans).
- 4.3.3 It is not possible for NR to deliver the Shap works within the counter proposals for alternative access without having to defer works which are already planned within the 2012/13 track renewal programme. It seeks to avoid deferring this work or any other work from the 2012/13 programme. This would add to an already existing large volume of essential track renewals between Preston in Carlisle.
- 4.3.4 The only contractual stipulation surrounding decisions in connection with disruptive engineering access is that NR must make all decisions on the Restrictions of Use to include in the respective Engineering Access Statement based upon applying the Decision Criteria set out in the Network Code, Part D, Condition D4.6.

- 4.3.5 In the 2012 timetable year the disruptive engineering access is approximately 55% less disruptive to the operation of the railway than the strategies discussed for the route during 2007 and 2008, when the principles of EEA and seven day railway were developed. The critical difference between current practice and the network availability guidelines developed for the West Coast Main Line in 2006 is that, unless absolutely unavoidable, NR do not disrupt Sunday afternoon and evening trains on a non-Bank Holiday weekend, understanding that this is one of the busiest periods of demand for rail travel on the West Coast Main Line.
- 4.3.6 Failure to revisit Shap "in a timely manner" would have a knock-on effect on the whole West Coast North switches & crossings major renewal programme. Replanning Shap into a future weekend Bank Holiday would cause larger work items to be deferred. The renewal works at Shap had been partially completed; if the quality of the plain line track in the area were to deteriorate, local maintenance teams would be constrained in not being able to take preventive action to avoid reduced speeds. Weeks 41 and 42 constitute the best fit in terms of resource availability and "box time" allowance. The works are currently in a temporary state.
- 4.3.7 NR accepts that the late notification of the proposal and decision has a potential impact on the delivery of uploaded amended Informed Traveller timetables more than 12 weeks before the work takes place. However, NR felt that by joint working with those operators, an amended timetable could be turned round with a six week period between the publication of the decision and the requirement to upload the amended timetable planned by TW -12 i.e. Friday 14 October 2011. NR also accepts that the current 2011 period by period run rate of the number of late notice possessions after TW -26 is higher than 2010, but NR do not recognise the numbers quoted by WCT.
- 4.3.8 NR accepts that in part the choice of date in January was based on recent experience that weekend leisure travel and passenger numbers tend to be less than on other weekends of the year. NR had seen no evidence to disprove this.
- 4.3.9 NR does not have scope within its resource and delivery plan to deliver this work on 27/28 December. NR does not accept that these works can be absorbed within the existing 2012 disruptive engineering because of the knock-on effect to the future.
- 4.3.10 NR has based its application of the Decision Criteria
- a) on the view that it is not in the interests of the network to defer critical works already planned for Bank Holiday weekends in 2012 (so as to create a gap in the programme for Shap) as this adds to the difficulties the industry faces in delivering future track renewal volumes
 - b) without a realistic operator counter-proposal then January, Saturday lunchtime to Sunday lunchtime, restrictions are the best allocation of network capacity (Decision Criteria (a)). The timing of the access reflects the need to have the railway open on Sunday afternoon and evening. The dating of the works in early January is when there is a slight dip in passenger demand.
 - c) there has been no breach of any operator's contractual rights (Decision Criteria (c))
 - d) the temporary track alignment and constraints on maintenance should be rectified as soon as possible (Decision Criteria (e)).
- 4.3.11 In concluding its written submission, Network Rail stated that it sought the following determination, with no other remedies or issues to be determined:
- 4.3.11.1 That NR has correctly applied the Decision Criteria in regard to the decisions taken to include the Week 41 and 42 Oxenholme and Penrith Restrictions of Use in the respective timetable weeks.

5 Oral exchanges at the Hearing

- 5.1 All parties made opening statements. WCT reiterated the points set out in their written submission.

- 5.2 NR's opening statement was brief and its main three paragraphs stated "informal discussions started in early/mid June ... our track renewals delivery team have looked at the suggested options ... for delivering within existing access or amended Bank Holiday access but without a detrimental impact on the existing 2012/13 programme this cannot be achieved. It is important that a plan is agreed which addresses the current shortfall with the renewal works at Shap; the current design cannot be maintained if maintenance (teams) need to intervene and (this) is only a temporary solution in terms of track geometry. Completing the work at the earliest opportunity to ensure the longevity of the whole junction renewal ...[is] ... to avoid any potential premature failure of any of the installed units as a result of the implementation of the temporary design. From a delivery point of view the track renewal team have not been able to split the work into shorter possession durations than 25 hours ... whenever these possessions are taken it is impossible to avoid the need for alternative route replacement services or token diverted train services via the Settle to Carlisle route and significantly extended journey times".
- 5.3 TPE put its case very clearly. Its opening statement included "we accept that NR must have the opportunity to take disruptive possession to maintain, renew and improve the network. Such opportunities must however make optimal use of the disruption they cause. In our view the proposals before us today do not achieve that aim. These proposals would disrupt our Anglo-Scottish services over two weekends to deliver one engineering outcome. Further disruptive possessions are already planned in the year which affect access to the same line of route without undertaking any work on it. This position is not acceptable."
- 5.4 TPE continued 'Our reference points out that there are multiple opportunities to extend or amend the access footprint for existing work which would have proportionately less significant impact on demand and growth. NR's insistence that such an approach cannot be achieved appears to be informed by concerns related to the overall volume of work in coming years, which we do not consider justifies the suboptimal solution proposed. Furthermore, we do not believe NR has exhausted the possibility of undertaking work at Shap under cover of existing possessions or by amending their footprints. The explanation given does not clearly explain why the work cannot be re-prioritised and draws in issues related to the overall work bank which cannot be properly explored in the context of this dispute and we believe should be addressed in the negotiation of annual possession requirements following the processes set out in Part D.'
- 5.5 TPE's opening statement continued 'In addition...NR has not put forward a convincing case that the work at Shap is urgent. Reviewing NR's paper it appears that the impact on the network will be limited and such work might be safely deferred. NR appears not to have considered this flexibility in reaching a decision. Finally NR has made no clear reference in its response to a full analysis of the Decision Criteria and as a result has not understood the key concerns we have put forward. In particular NR has persisted in applying the logic that its inability to easily reschedule works at Shap within existing possession in 2012 means that it should simply arrange the works to take place away from peak summer demand. We strongly contend that this approach is erroneous as it takes into account the operational requirements of Network Rail and insufficient account of actual demand during January or the long-term impact of possession disruption.'
- 5.6 TPE's opening statement concluded "The Decision Criteria clearly requires the interest of rail users to be served by balancing the impact of removing service to undertake works against the potential risks and benefits associated with the works. We have demonstrated significant demand exists on the weekends in question and have not been persuaded that NR explored all possibilities for deferring and rescheduling the work to reduce disruption to railway services. We are therefore seeking a determination that NR be required to make greater use of the possessions on the West Coast Main Line already agreed in order to reduce the impact of this work on services and customers".
- 5.7 There then followed the oral exchanges between the parties. The matters discussed are set out here according to topic. First, passenger loadings and the redacted material. In response to my Directions, TPE had estimated that each service affected would carry in excess of 118 customers. TPE set out that it sought to establish that "each train affected was 'well loaded'". NR accepted that description. WCT had sought to establish that "passenger loadings now tend to be high all year round". NR were reluctant to accept this description as entirely accurate; they

responded that "there are peaks and troughs". To resolve this issue it was suggested to the parties that, compared to other weekends, the information provided showed loadings on the weekend of 8/9 January to be lower but that the difference between that weekend and other weekends was 'not massive' (the respective percentage uplifts from the January weekend figures being set out in their additional open material). WCT agreed this as a fair summary; TPE commented that such loadings would not be key to the dispute. NR's submission had referred to a 'slight dip' in January and NR recognised that there was "no great time to go in" on the Preston-Carlisle route. On the basis of that discussion the Panel concluded, and the parties agreed, that there was sufficient material and agreement of the descriptions so that it would not be necessary to refer to the redacted material regarding passenger loadings. (The material compared weekends throughout the year against each other; it did not compare Bank Holidays as well because, as WCT pointed out, there are no undisturbed bank holidays on the West Coast Main Line without engineering works). Accordingly the hearing could proceed (as ORR had recommended in TTP 337/359/382) on the basis of all members of the Panel relying on the same material.

- 5.8 Communication. Both WCT and TPE complained of a lack of communication both before and after the decision had been taken, WCT accepting that some of the earlier communication was oral. Both also said there had been no dialogue since the decision notification of 1 September nor any explanation of the reasoning for the decision.
- 5.9 Mr Allen's response was that he was unable to say definitely on behalf of NR but would have hoped that most of their considerations were communicated, although it would have been orally. There had been some conference calls and some communication. He said that he hoped that where, such as here, the decision might be contentious, that there would be careful and particular communication to the train operating companies. But he could not be sure that this had happened on this occasion. Mr Allen subsequently searched for more; the product is set out at 5.14 below.
- 5.10 The only written material before the Panel on communication was the email of 1 September, the full text of which is "thank you for your responses to Network Rail's proposals for late disruptive possessions to deliver Shap S&C renewals in 2012. I thank you for your counterproposals to deliver this work in alternative access. Network Rail has considered your proposal; however, the required resources cannot be secured to deliver the required work in your suggested possession times. It is essential that we deliver these works in order to maintain current performance levels. There are no alternative methods of delivering these works in reduced times. We believe this access in January represents the times of lowest passenger numbers and the least overall disruption to the industry. Therefore I will be issuing a decision shortly confirming Network Rail's decision on the access".
- 5.11 Alternative dates for the work. WCT and TPE indicated the alternatives that they would have preferred. WCT hoped that the work could be carried out between Christmas and New Year. WCT said that they focused on Bank Holidays (such as Easter, May Day and Spring Bank/Jubilee) because there is already major work planned; but other weekends would be acceptable if the work can fit with existing planned footprints. TPE agreed. They said there were three Periods in 2012 with much planned work affecting services over this route. They said they too were open to adjusting planned possessions; WCT commented that Period D could be suitable as there were many jobs in Scotland which already affect train services.
- 5.12 Mr Allen said that it was only now becoming clear that extending existing possessions could be acceptable and that NR had not looked at that previously. WCT and TPE disagreed; TPE stating that their position was that they would accept lengthening the time of existing possessions in order to accommodate this work and that that was made clear to NR's Route Director personally when the Week 9 work was cancelled.
- 5.13 Mr Allen stated that Weeks 41 and 42 are the only dates that NR has identified capability for the work, because they know there is a clear opportunity. There is also a pending dispute for Week 46 (also relating to deferred "ash cloud" work elsewhere on the West Coast Main Line). NR, when realising that the Informed Traveller deadlines were at risk, did not think of putting work back into February because NR knew there were these two clear weekends in January.

- 5.14 After an adjournment Mr Allen reported that e-mails had been traced dating back to 7 June 2011, principally between NR and WCT, exploring the window of Weeks 41 to 52 for necessary works at Warrington and Shap. Responses from train operating companies were that NR should either change the proposed weeks or change the footprint of possessions which were already programmed. NR had also looked at doing work during Weeks 47-52 as this was favourable from a resources point of view but no proposal was developed because of there being possessions on the East Coast route. Mr Allen had not been able to trace anything regarding informal dialogue with TPE prior to the issue of the decision on 1 September.
- 5.15 When challenged on the resource issue in relation to alternatives, Mr Allen said that this was the information provided to the Engineering Access planning team. NR had not explored doing the work by extending any of the 14–16 hour sessions which are planned for the area.
- 5.16 Safety/urgency. NR confirmed that there were no safety issues arising from delay in doing the work beyond January. NR were asked about their statement which included a reference to "failure to revisit Shap in 'a timely manner' will have a knock-on effect..." NR said that the engineers had not given a specific date by which the work had to be done, but that the longer they operated with the temporary track conditions the less likely it is that the asset will last the expected 30-40 years due to the unusual wear at this time.
- 5.16 Decision Criteria. In answer to questions, NR said that the basis of the application of the Decision Criteria would be as follows. In a discussion, the Engineering Access team goes through the issues, takes account of any agreed initiatives, considers how the work will impact on the train service and also what impact it might have on other operators; they then conclude what they consider was reasonable. When asked about the impact of the lack of clarity in communication on the Decision Criteria, NR responded that they were unsure of the communications that took place, such as what questions were asked in response to the initial notification or the response given regarding resources.
- 5.17 NR explained that they wanted to get the unfinished Shap job completed. They said it was principally about being unable to find a slot in 2012 which would not mean deferring other work. There was a major programme of 10 years worth of re-sleeper works about to be announced without dated proposals as to how it might be done. When it was suggested that work is moved around quite often, NR responded that "the future challenge is so great that we wanted to avoid the ripple effect going forward".
- 5.18 NR summarised their position on Decision Criteria as "we looked at how to programme the work and initially wanted to get it in the period January – March 2012, which is a period without any Bank Holidays. So we looked at whether we will be able to schedule it in to any later Bank Holiday weekend but concluded that we were unable to do so without pushing work out of the programme into other years, so we looked at normal weekends. After some discussion with train operating companies and being aware that we were running up against Informed Traveller timescales we decided upon Weeks 41 and 42 as the East Coast route was open to Anglo-Scottish passengers and experience tells us that the trains over Shap are quieter in January. To put the work to another weekend would add to a backlog of work to be done between Preston and Carlisle. Our problem was the difficulty of being able to resource work to meet the counterproposals received from customers."
- 5.19 Closing submissions. WCT said that the 33 weekends of disruptive possessions already planned over the 52 weekends of the year was the upper level of acceptability and a further two weekends of disruption was just not acceptable. TPE said it was still not clear why NR was unable to make use of engineering access already available to them. Further TPE had given NR information regarding the markets it intended to serve and did not consider that the information provided by NR regarding this decision satisfied the Decision Criteria. NR had nothing further to add.

6 Analysis and consideration of issues and submissions

- 6.1 History. The volcanic ash cloud from Iceland is continuing to disrupt UK travel. Had it not been for the threat of a volcanic ash cloud, the work which is the subject matter of this dispute would already have been done (on a Bank Holiday in May of this year, 2011). Cancellation at short notice of a planned possession is a bad outcome for everyone; passengers have been told of the disruption, but the benefit of the engineering works is not achieved. Worse still, on this occasion, the threatened volcanic ash cloud did not materialise. However, that decision, contentious at the time (and doubtless having been taken at a high level) is for the purposes of this decision, only history. It made things difficult for everyone; however, it did not alter their obligations.
- 6.2 Redacted material. WCT and TPE explained that they had provided some material for the Hearing Chair only. They did not wish, for understandable commercial reasons (including re-franchising issues) to make that information more widely available. Redacted material makes the hearing more difficult to run; there are additional sets of papers and, more importantly, two classes of people in the room – those who are privy to the information and those who are not. However, if the information is available only to the Chair, this carries real risks. There will be discussion of his analysis of the material with the Panel; more importantly anything sufficiently key to affect the decision is likely to be included in the written material available on the Access Disputes Committee's website for public consumption. The Chair has a tightrope to walk; the risks include the possibility of (unwittingly) disseminating, albeit in a summarised form, to the Panel or public, information which is regarded as commercially sensitive. Conversely, if the Hearing Chair keeps the information close to his chest (so as to avoid the risk of disclosing commercially sensitive information) the Panel may not get the full force of the point behind the redacted information. It is for these reasons (and others) that ORR viewed this as not best practice. Fortunately, as can be seen from the discussion at the relevant section in paragraph 5.7, this problem is successfully dealt with by the parties expressing openly in words the point(s) to be established and then seeking get them agreed (or otherwise). Therefore this hearing proceeded successfully with the same information available to everyone. Parties that need, in subsequent cases, to include some confidential information might wish to adopt the practice of seeking to agree the thrust of their point with the other parties in advance.
- 6.3 Issue for decision. All parties agreed and I consider that the issue for the decision is whether NR have correctly applied the Decision Criteria. Both WCT and TPE referred to their contractual rights, but both accepted that NR would have the right to take the possessions provided that they had correctly come to decisions based on a proper application of the Decision Criteria. Further, both TPE and WCT criticised the absence of a business case from NR. However, it was accepted that the requirement for the production of the business case was an internal NR requirement.
- 6.4 Other procedural point. TPE also said that NR was in breach of the Timetable Planning Rules 2012 where, at 3.1.2, it is said that NR will consult "wherever possible" with train operators so as to meet Informed Traveller deadlines. NR's response to this is set out at 4.3.7 above; hoping to shorten timescales by collaboration for an imposed possession was perhaps somewhat optimistic. However, this point is subsidiary only to the Decision Criteria, so I do not think it needs further consideration here. (N.B. The publically available Timetable Planning Rules and Engineering Access Statement had some out of date, and therefore inaccurate, terminology and cross references to other documents; nothing turned on that but the documents ought to be reviewed).
- 6.5 Factual issue – passenger loadings. As set out in section 5 above, there was eventual agreement on the substance of the position in relation to passenger loading. NR accepted TPE's assessment, having been told that there were estimated to be 118 passengers per affected train, that each affected train is "well loaded". Similarly, although agreement of WCT's submission on figures was slightly more difficult, it was agreed that the relevant January weekends were the low base point for passenger numbers representing a "slight dip", that the difference between the January figures and figures on other weekends was "not massive" and that there was "never a good time to go into the Preston – Carlisle route".

- 6.6 Factual issue – the seven-day railway. The documents relied on by WCT and TPE (Annex 2 to this determination) show strong support for the seven-day railway concept. This includes NR's Strategic Business Plan of October 2007 stating, for example, "there is strong evidence of suppressed demand at weekends, especially on Sundays; weekend revenues are affected by disrupted services (25 – 50%) and bus substitution is suppressing demand as passengers are deterred from using trains on the weekend from fear of being put on a bus for all or part of the journey." It was also clear that the train operators' vision was to run a more intensive and less disrupted weekend service. NR did not seriously dissent from these propositions. However, they are of course subject to need to carry out engineering work; the seven-day railway can only operate insofar as it is consistent with carrying out engineering work that is necessary. That will inevitably involve some disruption at some time; the key question is when and how much.
- 6.7 The same point was better expressed in the ORR determination of the appeals in TTP337/359/382. ORR stated (para 59 et seq) "it is ORR's view that EEA is, effectively, a set of principles developed through discussion with the industry and DfT. These principles go to the efficiency of Network Rail's engineering work, including the optimisation of possessions, with the aim of enabling Network Rail to maintain and renew its network infrastructure more efficiently, while minimising major disruption in contributing to offering operators and end users an improved availability of the network. EEA has been reflected in Network Rail's Strategic Business Plan objectives. These were submitted to ORR as part of the 2008 periodic review process and are reflected in the Delivery Plan. The principles embodied in EEA are not manifested in a particular contractual agreement. ORR has noted Network Rail's position that EEA reflects goals not rules. This is reflected in a note by Peter Leppard, Network Rail (Head of West Coast 2008) ... It sets out the possession hours from December 2008 and states "Inevitably there will occasionally be items of engineering work which cannot be made to fit into the above hours. Although exceptions will be made for these where justified, it must be understood that such exceptions will not be the norm". Because EEA is a set of principles, rather than a set of ordered rules, it is not possible always to fulfil each and every principle. Indeed, at times principles which are consistent in theory may emerge as conflicting in a particular practical situation."
- 6.8 Passenger loadings and seven-day railway – conclusion. The above statement from ORR correctly sets out the position. Both the passenger loadings and seven-day railway are relevant in assessing whether engineering work should be carried out on a January weekend. They are, however, not decisive and must be weighed against the other factors in applying the Decision Criteria.
- 6.9 Decision Criteria. The Decision Criteria to be applied are those contained in the July 2011 version of the Network Code set out at Annex 1 to this determination. The wording is different from previous versions and thus previous decisions on the different wording are only of limited assistance. Similarly a new version of the Decision Criteria is being consulted on but is not yet in force. For the purposes of this decision, however, the July 2011 version must be applied.
- 6.10 The Decision Criteria in the July 2011 Code start "Where Network Rail is required to decide the 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 the light of the particular circumstances, Network Rail considers the 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".
- 6.11 NR acknowledged that they did not specifically apply the Decision Criteria individually nor document that process prior to making the decision of 1 September. The lack of documentation is, in itself, not critical. It is more important that NR applies the substance of the Decision Criteria than record it meticulously in writing.

- 6.12 For the Decision Criteria to be successfully applied, there are two preliminary matters to be successfully dealt with. Firstly, NR must consider what is the range of alternatives against which their preferred decision is being judged. Secondly, they must have enough information on which to make a fair and reasonable decision; much of that information will come from the consultation process with train operators.
- 6.13 The test. The test for the correct application of the Decision Criteria is by reference to the words of Condition D4.6.1, therefore whether NR had complied with its obligation 'to 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 discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail'.
- 6.14 The key facts and findings. These are firstly the passenger loadings in January ('well loaded'/'slight dip' etc) as set out in 5.7 and 6.5. Secondly, on the Seven Day Railway, WCT and TPE have a legitimate business aspiration to run a seven day service, which is also in the interests of the network and industry as a whole – see 6.6 and 6.7 above. Thirdly, the consequence of these two points is that NR should make all reasonable efforts, including considering all serious alternatives, to avoid possessions on the West Coast Main Line, whenever possible, on non Bank Holiday weekends. Fourthly, NR restricted their consideration of alternatives; they did not give full consideration to other options (see 5.11 and 5.12 above). NR also did not fully consider other future options, because NR did not consider options which might involve deferring other work – because of 'the ripple effect' (see 5.17 and 5.18). Sixthly, NR's articulation of its reasoning to WCT and TPE was limited to the e-mail of 1 September. Seventhly, there is no specific date by which the work must be done, as set out in 5.16.
- 6.15 Conclusion and reasons. The Panel and I have concluded that NR has not properly and successfully applied the Decision Criteria. There was no real evidence that they have done so. Moreover we find as a fact that the suggestions made by the train operating companies and alternative opportunities for carrying out the work had not been properly explored. An example of this was the statement at the hearing that it was only now becoming clear that possessions in other weekends might be acceptable. In fact the evidence (including the e-mails which Mr Allen located over an adjournment) indicated that this possibility had been raised at an early stage. Further, there has been insufficient articulation by NR to the train operating companies of its consideration of the Decision Criteria; in that respect NR's decision was flawed because it did not have sufficient material available. Further, NR has not established a case to support its assertion (the primary assertion at the hearing) that the necessary work could not be planned for some alternative later date without creating a backlog – especially as the task had been advised as not being time critical. In doing so it gave undue weight to its own operational considerations and insufficient weight to operators' and passengers' legitimate expectations.
- 6.16 The decision of NR is therefore not 'fair and not unduly discriminatory' because NR did not consider all the relevant alternatives, did not have all the relevant information and unduly constrained its own decision making. An analysis of the Decision Criteria (not set out in detail here) on my view tends to favour WCT and TPE; but the key point is that NR were not in a position to make any fair assessment.
- 6.17 In reaching this conclusion I accept and adopt the formulation as set out by TPE in their opening statement cited above at 5.4, 5.5 and the first two sentences of 5.6.
- 6.18 Remedy. Both WCT and TPE requested that an order be made cancelling the work in Weeks 41 and 42. This will be granted. They also asked the determination to specify when the work should take place (respectively in either a Bank Holiday period or within restrictions of use already provided within the EAS). I do not make such an order. There are two reasons; firstly, more information would be needed to decide when is the right time for the work to be done; this should be achieved through the proper and normal procedures with a full and constructive dialogue. Secondly there are interests of other parties who were not represented at the hearing which would need to be taken into account. These are again best dealt with through proper application of the established procedures. Finally, WCT also asked for a supplementary remedy whereby NR would be required "to bring some discipline to the sheer volume of late submissions" due to the "apparent lack of control within Network Rail of the late notification

process". I do not think that I or this Panel has any jurisdiction to make such an order in the context of this dispute.

- 6.19 This decision is, in accordance with the comparatively new Access Dispute Resolution procedures, mine as Hearing Chair alone. It does, however, have the full support of all of the Panel members. It is fair to say that the industry members of the Panel were surprised by the lack of communication in this case. NR was in breach of the spirit as well as the letter of the rules. NR had been put into a difficult position. It may also be that the decision being made in the way it was, was done with best intentions (because of impending deadlines). If so, the opposite effect was achieved; a road that is paved with good intentions does not necessarily lead to a desirable destination.

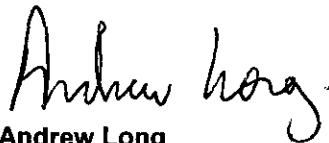
7 Determination

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

I DETERMINE:

In both TTP 439 and TTP440 that Network Rail has not correctly applied the Decision Criteria and that the possessions for Weeks 41 and 42 between Oxenholme and Penrith are cancelled and the work should be rescheduled.

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

19 October 2011

Annex 1 to Timetabling Panel determination of references TTP439 and TTP440

Extracts from Network Code

PART D – TIMETABLE CHANGE (19 July 2011)

CONDITION D4.6 - 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 the 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.

Annex 2 to Timetabling Panel determination of references TTP439 and TTP440

Extracts from documents relating to the "Seven Day Railway" vision

Extract from 2012 Network Statement

4.5 Allocation of capacity for maintenance, renewal and enhancements

As part of the timetable development process, Network Rail is obliged to produce two documents for each of the bi-annual timetables: Timetable Planning Rules and Engineering Access Statement. Both documents are subject to iterative development, with a right of appeal (please see section 4.4.2) where railway undertakings believe their rights are being unreasonably affected. Once agreed, Engineering Access Statement form Network Rail's 'firm rights' allocating capacity for the purpose of undertaking engineering activities.

The Engineering Access Statement sets out that where any specified line of route is closed for engineering access that certain alternative routes are kept open for the purpose of diverting affected traffic.

A prime example of this in practice is the East Coast and West Coast Routes to Scotland. Where one of the afore mentioned Routes is closed, the other will always be kept open to ensure a service is maintained between London and Scotland.

4.5.1 Process

The process for establishing the allocation of capacity for maintenance, renewal and enhancements through the Engineering Access Statement is described in section 2.5.1, and the integration of these arrangements into timetable development is addressed in section 4.4.1.

Where it is necessary to refine the established Engineering Access Statement in order to deal with short-term changes relating to individual 'possessions' on the network, either Network Rail or railway undertakings may propose changes to the Engineering Access Statement through a process which is contained in the Timetable Planning Rules.

Future plans

We are now developing a programme that will move towards meeting our customers' future aspirations for network availability on routes where benefits can be demonstrated. The industry has been working together to understand what a seven day railway would actually mean for each route, and to define the enabling interventions which would be required. We have, in conjunction with train operators, identified eight priority routes on which seven day railway investment would deliver the greatest benefit. The seven day railway is an aspiration to run services seven days a week without interruption by means of more efficient planning of engineering access.

Network Rail October 2007 Strategic Business Plan

Supporting document

Seven Day Railway

It is envisaged that Control Period 4 (CP4) will form a transitional period from today's access regime to the full 7 day railway concept. It is anticipated that the concept will be introduced incrementally on a route specific basis, with the south end of the West Coast Main Line adopting the 7 day railway concepts with effect from the December 2008 timetable.

Demand

The following key conclusions have been reached from our analysis with operators of the potential demand:

- there is strong evidence of suppressed demand at weekends, especially on Sundays;
- weekend revenues affected by disrupted services (25-50% loss);
- there is additional demand late evening and on specialist flows such as airports traffic;

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;

2.4. SSSG

The work carried out on the West Coast Mainline by the joint industry Sustainability Strategy Steering Group (SSSG) was naturally subsumed within EEA. SSSG was set up to realise the benefits of the £8 billion investment in the West Coast Mainline. It adopted many of 7 day railway principles and highlighted the net industry revenue prize to be had if Network Rail could implement the recommended access regime confirmed by the business analysts.

The proposed access regime gives Birmingham, Liverpool and Manchester a service to London on every day of the week and with weekend journey times only slightly increased from the weekday timings. In addition the strategy required a through route (either West Coast Main Line or East Coast Main Line) to be maintained at weekends.

The resulting possession times available for maintenance and renewal work are very challenging for Network Rail. However, it was confirmed that Network Rail would initially implement the proposed access regime south of Crewe from December 2008 with the intention of extending it to the whole of the West Coast Main Line from December 2009 onwards.

The proposed access regime requires the implementation of new methodologies for renewals activities and changes to the delivery of the maintenance regime.

2.5. Extension of analysis to 7 day railway

2.5.1. EEA analysis

The EEA and SSSG studies have shown the opportunities to optimise revenue and costs that exist on specific routes. As this work stream gained momentum it provided the correct environment to see realistic possibilities in the industry wide desire to run more of a 7 day railway

2.5.3. TOC and FOC aspirations for a 7 day railway

ATOC, on behalf of the industry Possessions Steering Group has led a series of discussions with all the TOC's and FOC's regarding their aspirations and infrastructure requirements for a 7 day railway. The output from these is summarised below. These meetings have reinforced the widely held view that the industry wants to run a more intensive and less disrupted weekend service.