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

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### **Determination in respect of dispute reference TTP985**

*(following a hearing held at 1 Eversholt Street, London on 5 August 2016)*

#### **The Panel:**

Clive Fletcher-Wood      Hearing Chair

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

David Fletcher	elected representative for Franchised Passenger Class, Band 2
David Langton	elected representative for Franchised Passenger Class, Band 3
Nigel Oatway	elected representative for Non-Passenger Class, Band 2
Elaine Folwell	appointed representative of Network Rail

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

##### **For Abellio Greater Anglia Ltd ("AGA")**

Shane Young	Timetable Development Manager
Charlotte Bindley	Head of Train Planning & Resources
Catherine Rowe	Track Access Manager

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

Andrew Bray	Timetable Production Manager - Scotland
Hazel Chalk	Operational Planning Project Manager - Anglia

##### **For MTR Corporation (Crossrail) Ltd ("MTR")**

Jonathan James	Access Manager
Maureen Dominey	Head of Performance & Planning
Anitta Hayden	Concession Contracts Manager

#### **Interested party:**

##### **For London Overground Rail Operations Ltd ("LOROL")**

Mike Clutton	Timetable Development Specialist
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#### **In attendance:**

Tony Skilton      Secretary

### **Table of contents**

1	Introduction, Substance of Dispute and Jurisdiction	page 2
2	Background, history of this dispute process and documents submitted	page 2
3	Relevant provisions of the Network Code and other documents	page 3
4	Submissions made by the Dispute Parties	page 3
5	Oral evidence at the hearing	page 3
6	Analysis and consideration of issues and submissions	page 7
7	Determination	page 11
Annex "A"	The Decision Criteria (Network Code Condition D4.6)	Page 12
Annex "B"	Sketch diagram showing the locations to which AGA's Class 321 units can be worked, MTR's route to Shenfield and the location of Gidea Park	Page 13

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

- 1.1 On 4 July 2016 AGA notified dispute with Network Rail in relation to Network Rail's decisions regarding the New Working Timetable for December 2016. The dispute was brought under Condition D5.1 of the Network Code as applicable at the time and the Secretary registered it as TTP985.

In notifying the dispute, AGA indicated its intention to work with Network Rail in the hope of resolving the issues without requiring the Timetabling Panel hearing process to be expedited.

- 1.2 AGA's issue was that Network Rail had not offered it the ability to stable a standby empty train at Liverpool Street Platform 18 during the period between the Monday to Friday business peaks in perpetuation of existing arrangements; the capacity had instead been offered to another passenger operator - MTR.
- 1.3 On 13 July 2016 Network Rail informed the Secretary that there was little likelihood of agreement being reached and that a Timetabling Panel hearing would be necessary in order to resolve the matter.
- 1.4 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 ADR Rules to hear an appeal under the terms of Network Code Condition D5.
- 1.5 In its consideration of the Parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in ADR Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.6 The abbreviations used in this determination are as set out in the list of parties above and in this paragraph 1.6.

"ADR Rules" means the Access Dispute Resolution Rules

"ECS" means empty coaching stock

"Liverpool Street" means London (Liverpool Street) station

"PPM" means Public Performance Measure

"Secretary" means the Secretary appointed by the Access Disputes Committee

"WTT" means Working Timetable

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

- 2.1 I was appointed as Hearing Chair on 15 July 2016 and 5 August 2016 was then set as the date for the hearing. At my request, the Dispute Parties - who at that time were AGA and Network Rail - were required to provide Sole Reference Documents. The proposed Panel hearing was duly notified by the Secretary direct to parties which clearly might wish to become involved in the dispute proceedings and also generally by means of the Access Disputes Committee's website.
- 2.2 On the morning of 18 July 2016 MTR indicated its wish to become a Dispute Party.
- 2.3 After I had read preliminary material which had been submitted by AGA in connection with the Notice of Dispute, and mindful of the limited time for the Dispute Parties to prepare their statements of case, later on 18 July 2016 I issued Directions indicating the areas of information which I wished to see covered in the Parties' statements of case.
- 2.4 On 21 July 2016 LOROL notified its wish to become an interested party in the dispute.
- 2.5 AGA served its Sole Reference Document on 22 July 2016. Response statements were served by MTR and Network Rail on 28 July 2016 and 29 July 2016 respectively.

2.6 In accordance with ADR Rule H18(c), following receipt of the Dispute Parties' submissions I reviewed them to identify any relevant issues of law raised by the dispute. On 2 August 2016 the other members of the Panel and the Dispute Parties were advised that I did not consider there to be any overarching issues of law arising out of the submissions received.

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 summarized in the course of this determination.

### **3 Relevant provisions of the Network Code and other documents**

3.1 The Version of the Network Code Part D dated 13 July 2015 was applicable to the issue to be determined in this dispute, particularly Condition D4.6 - The Decision Criteria. This Condition is reproduced as Annex "A" to this determination document.

### **4 Submissions made by the Dispute Parties**

4.1 In its Sole Reference Document, AGA asked the Panel:-

4.1.1 To determine that Network Rail had not applied the Decision Criteria correctly, taking the view that its assessment of the two bids received from MTR and AGA was inadequate and did not take into account AGA's business-critical concerns (particularly in respect of detrimental customer impacts, performance and operational impacts and the imposition of unnecessary significant additional costs to AGA).

4.1.2 To direct Network Rail to withdraw its offer to MTR in respect of capacity for a standby train at Liverpool Street Platform 18 and to offer capacity at Liverpool Street Platform 18 to AGA for its standby train.

4.2 In its response statement, Network Rail asked the Panel to uphold its decision to offer No. 18 platform line at Liverpool Street to MTR for stabling between the business peaks, adding that unless AGA adequately demonstrated that it should be awarded the capacity then Network Rail's decision should remain.

4.2.1 Additionally, Network Rail asked that "In this instance Network Rail do not feel it is appropriate for the Panel to find error with Network Rail's processes, but not rule on who should be allocated the capacity".

4.3 In its response statement, MTR provided additional information including indication of certain safety implications and asked that the Panel support Network Rail's decision related to the provision of a MTR standby train at Liverpool Street.

### **5 Oral evidence at the hearing**

5.1 I thought it might assist the Parties during the hearing by seeking clarification of certain points and making some observations before inviting the Parties to make opening statements.

5.1.1 While criterion D4.6.2(c) of the Decision Criteria (*'maintaining and improving train service performance'*) was clearly relevant, it could be assumed for the purposes of the hearing that we were only dealing with 'maintaining' services, rather than 'improving' them.

5.1.2 Next I asked Network Rail to confirm whether it regarded PPM as the sole criterion to be used in this context, or one of a number of criteria. Network Rail's lead representative (who had not been involved in the decision under appeal) confirmed that it was the only criterion considered by Network Rail.

- 5.1.3 Network Rail's statement of case referred to an AGA Class 317 train being stabled at Liverpool Street Platform 1 for a similar period during which the Class 321 train is stabled at Platform 18. Network Rail confirmed that this had not been a factor included in its decision. I expressed the view that I would not wish to take a legalistic view that it should be ignored in seeking to establish the Parties' legal entitlements.
- 5.1.4 Finally I observed that the Panel was considering and seeking to balance contingency arrangements in this Dispute; even though I had asked for further information about earlier use of the Class 321 as a standby train, such information might be helpful, but was unlikely to be determinative.
- 5.1.5 To assist discussions during the hearing, I had prepared a sketch diagram showing the routes which can be worked by AGA's Class 321 units, and by MTR's services. There was no disputing its accuracy from the Parties. The diagram is appended to this determination as Annex "B".

## 5.2 Opening statement by AGA

This is a dispute regarding the allocation of platform capacity at Liverpool Street station for a standby train. The dispute arises over Network Rail's interpretation of Condition D4.6 (Decision Criteria) of the Network Code and concerns how Network Rail has applied the Criteria including, in our view, the artificial emphasis it has placed on some parts and an apparent lack of attention to other areas.

AGA currently has an 8-car Class 321 set positioned at Liverpool Street Platform 18 to act as a standby train between 10 01 and 16 24 on Mondays to Fridays. This standby is regularly brought into service by AGA's Control when a fault develops with another train, or in times of disruption/service recovery. This train is important to AGA's business as it helps to avoid potential cancellations and a further detrimental impact on performance. A Class 321 EMU (electric multiple unit) has traditionally been employed for this role as it is able to substitute for the widest range of services and offers flexibility on the route.

For December 2016, MTR bid for an 8-car Class 315 standby train of their own also to use Platform 18 at the same time as AGA. Using the Decision Criteria, Network Rail has found in favour of MTR and offered Platform 18 for their standby instead of AGA. AGA has instead been offered additional ECS paths to/from an alternative stabling location at Southend Victoria Carriage Sidings which is 41.53 miles away and hence has a number of negative consequences for our business including financial, performance related and customer impacts to AGA.

In coming to its decision, Network Rail placed a high weighting on Condition D4.6.2(c) "maintaining and improving train service performance"; however, it has disregarded the use of Condition D4.6.2(j) "enabling operators of trains to utilise their assets efficiently".

AGA disputes the outcome and Network Rail's application of the Decision Criteria because we feel it is quite clear that Network Rail's assessment of the two conflicting bids is inadequate. This is because it does not take into account all of the customer, financial and performance disbenefits to AGA that removing this facility would impose on us. We would highlight the proportionality of the risk that AGA's business will needlessly suffer from following withdrawal of its standby, particularly bearing in mind that MTR will be moving to a new station at Liverpool Street by 2019 anyway.

MTR's PPM is currently better than AGA's and generally improving all the time without the use of a standby unit, so AGA believes that the biggest benefit to PPM will be gained from AGA's continued use of its standby unit.

AGA's Class 321 standby train is cleared to operate to a wide range of destinations compared to MTR's Class 315 standby train.

AGA's services are not as frequent as MTR's. If an AGA train is cancelled, customers may have to wait up to 60 minutes for their next service. If a MTR service is cancelled, customers only have to wait up to 10 minutes for the next Shenfield service.

There will be significant additional costs to AGA's business incurred from the increased unit mileage and additional traincrew required to run additional ECS paths to and from Southend.

There will be 166.12 total additional Class 321 miles per day which equates to £53,125.18 in additional costs per annum for AGA.

AGA has examined its existing traincrew diagrams in detail and cannot identify any slack where these additional ECS workings could be crewed without cost. It will therefore be necessary for AGA to have an additional unproductive Ilford driver diagrammed each day just to work ECS to/from Southend. It is anticipated that AGA would actually need to hire two additional train drivers at a total cost of £118,000 per annum.

AGA's Control has previously confirmed that the standby was used 28 times from January to April 2015 and a further 45 times between May 2015 and 8 June 2016 for a variety of reasons. We are now able to present full details of its usage.

AGA is seeking for the Panel to determine that Network Rail has not applied the Decision Criteria correctly and its assessment of the two bids received from MTR and AGA is inadequate, and does not take into account AGA's business critical concerns. Therefore AGA also asks the Panel to direct Network Rail to withdraw its offer to MTR for a Platform 18 standby train and to reinstate the offer of capacity at Liverpool Street to AGA for its standby instead.

We do believe that there is a potential compromise that might be achievable. For example, if MTR's set is crewed, then it makes sense to locate at Gidea Park which is in the middle of their network and can immediately be deployed in either direction when required, giving them additional flexibility to use the spare set at the Shenfield end of their route whilst leaving AGA's set at Liverpool Street Platform 18.

### 5.3 Opening statement by Network Rail

#### *Background*

AGA and MTR both submitted access proposals at D-40 for the December 2016 new WTT which contained the provision of a 'standby unit' stabled during the weekday off-peak period in Liverpool Street station. There is capacity to accommodate one standby unit for this period of time, but not two. Neither AGA nor MTR has stabling rights at Liverpool Street for the December 2016 WTT. As a result, Network Rail applied the Decision Criteria in Condition D4.6.2 and found in favour of MTR's access proposal. Network Rail agrees with the claimant that it has for many years stabled a standby unit at Liverpool Street, however, Network Rail does not believe that the claimant has any grandfather rights to the train slot because of this.

Network Rail believes that there are unanswered questions about the current usage of AGA's standby unit.

Network Rail believes that it has justified its decision in granting the train slot to MTR for the December 2016 WTT against the detrimental impact to AGA in that capacity allocation of a crewed standby unit, as offered by MTR only, will improve industry performance as a whole.

Network Rail believes that it has correctly used and applied the Decision Criteria in Condition D4.6.2 to determine capacity allocation and seeks a determination from the Panel that Network Rail's decision shall stand.

#### *Matters raised by AGA*

- (a) Network Rail has presented a different view to that of AGA with regards to how frequently the existing standby unit has been used.
- (b) Network Rail agrees that a Class 321 has greater route clearance than a Class 315, as referenced by AGA in section 5.7 of its document. This is only relevant if the standby unit is used on the routes to Southend Victoria, Braintree, Colchester Town, Clacton-on-Sea, Ipswich and Norwich.
- (c) Network Rail queries whether AGA no longer has a suitable standby train at Liverpool Street as asserted in Section 5.1 of its dispute document, as Network Rail understands that AGA has an additional Class 317 unit stabled between the peaks at Liverpool Street Platform 1, which could be used for Great Eastern Main Line services. Additionally, Network Rail would like to understand why this additional provision is not given a higher profile in the AGA dispute document.
- (d) In Section 5.15 of AGA's dispute document it states that there are no alternative stabling locations in the London area to accommodate an additional 8-car Class 321, and that AGA has no Depot Access Agreement in respect of Gidea Park Carriage Sidings. Network Rail is of the opinion that AGA does not need a Depot Access Agreement to access Gidea Park Carriage Sidings as this is a Network Siding. Network Rail would like to understand if this option would potentially deliver efficiencies to the costs that AGA has calculated in its dispute document.
- (e) Network Rail made its decision regarding capacity allocation based on the impact on industry performance as a whole rather than on the impact on one operator. The PPM calculations in Section 5.3 of AGA's dispute document do not take cognisance of the overall PPM benefits that a crewed unit will provide as it will be able to be quickly deployed.

#### *Matters raised by MTR*

- (a) Network Rail understands that MTR's Class 315 unit will be fully crewed and will be available for use by other operators between Liverpool Street and Shenfield. Network Rail believes that this will deliver performance benefits for the industry overall.
- (b) Network Rail acknowledges the performance analysis in Section 4.2 of MTR's supporting document and that the provision of a standby train would have saved MTR PPM failures.
- (c) Network Rail agrees with MTR that there was an incident on 4 July where a points failure occurred in the Liverpool Street area and AGA was unable to move its standby unit following a request from Network Rail, due to no driver being available.

#### 5.4 Opening statement by MTR

MTR is pleased that Network Rail supported its proposal to provide a crewed standby unit at Liverpool Street from the December 2016 Timetable change.

MTR supports the rationale applied by Network Rail in assessing the AGA and MTR proposals and Network Rail's interpretation and application of the Decision Criteria.

Although AGA has stabled a standby train at Liverpool Street Platform 18 for a number of years, MTR does not believe that any 'grandfather rights' should apply and that the allocation of capacity from December 2016 should be without bias towards any operator.

MTR also notes that AGA currently has a second standby unit at Liverpool Street, which is usually stabled at Platform 1 between 09 48 and 16 28 and could be utilised for Great Eastern services.

MTR is aware of the Network Rail policy and ORR guidance regarding the granting of stabling rights in Schedule 5 of the Track Access Contract, and will not seeking stabling rights for the standby train at Liverpool Street. MTR does however have an aspiration to provide a standby unit at Liverpool Street until the May 2019 Timetable, (when we expect that services will be extended to Paddington).

Gaps in the train service, due to late running or cancellations, leads to overcrowding on stations and can result in stations being closed for a period of time. Whilst this is a particular risk during peak hours, there is an increasing risk off-peak as well. The provision of a standby train will reduce the risk of extended service intervals and station closures and 'knock-on' delays from the off-peak period impacting on the evening peak period.

There is financial and reputational risk to MTR (and Transport for London) if performance and customer experience does not continue to improve on this route.

MTR is susceptible to disruption caused by other operators (passenger and freight) and is keen to work with Network Rail and other train operators to improve industry performance.

The MTR standby train will be crewed and could be used for:-

- Recovering late running
- Replacing failed / defective rolling stock, and
- Assisting other operators with service recovery or conveying their customers.

MTR has challenged some elements of the AGA paper and has also added some further justification of its own - but we are keen to emphasise that we will work with Network Rail and AGA to find a solution that is right for the rail industry.

- 5.5 In accordance with usual practice, the Panel Members questioned the Dispute Parties to clarify issues in the Parties' statements of case and were able to explore the further matters arising from their questions. The Dispute Parties were given the opportunity to question each other, which none thought to be necessary. LOROL, as an interested party, was given the opportunity to make comments, but had nothing to add. The points emerging which were relevant to the decision are discussed in the next section, so I do not think it necessary to summarise these exchanges in this section.

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

### **6.1 The Parties' Legal Entitlements**

Any Timetabling Panel must examine this question in the broad sense.

- 6.1.1 Our first step was to look at the narrow sense of 'entitlement', to ask ourselves if either of the Operators had any right, contractually or otherwise, which would require us to find in that Operator's favour.

None of the Parties had been able to point to any such right, which we thought to be the correct position.

- 6.1.2 We considered very briefly the general contractual rules dealing with forming terms of a contract by conduct, and the possible strength of an argument based on legitimate expectations. In the light of the statutory duties placed on Network Rail in preparing successive WTTs, however, we concluded that these principles were not applicable in this Dispute.

### **6.2 The AGA Class 317 unit at Platform 1**

We thought it necessary to decide on the relevance of AGA's Class 317 unit stabled at Platform 1 at Liverpool Street. Even though Network Rail accepted that this had only been raised in its statement of case, it also accepted that it had not been considered

when Network Rail reached the decision under appeal. As Timetabling Panels ordinarily seek to identify solutions which are acceptable to Parties, which can on occasion lead to a Dispute being withdrawn, we explored the relevance of this unit during the hearing.

- 6.2.1 It became clear that Route Availability and route knowledge issues effectively limited the use of this unit to the West Anglia lines.
- 6.2.2 The possibility of MTR's 8-car Class 315 unit being stabled on the same platform line was explored, but this would prevent the use of permissive working in this platform between the peaks.
- 6.2.3 Further, although all platforms at Liverpool Street can provide access to all Down lines, to reach the Great Eastern Main Line from Platform 1 involves using the ladder junctions at Bethnal Green West; an unplanned move of this kind would be highly likely to disrupt the intensive pattern of existing services. This factor also limits the possibility of the Class 321 unit being stabled at Platform 1 rather than Platform 18.
- 6.2.4 Therefore we concluded that the Class 317 unit stabled at Platform 1 need not be considered further.

#### 6.3 Network Rail's application of the Decision Criteria

At this stage we turned to Network Rail's application of the Decision Criteria, to assess how much confidence we could place in the way in which Network Rail had reached its decision. This document had been provided by AGA although Network Rail confirmed that it was the document which it had used. Our examination reflected the clarification provided by Network Rail at the opening of the hearing, that it regarded PPM as the only relevant criterion (thus engaging Condition D4.6.2(c)). In fact, in this document Network Rail had also set out factors relating to Criterion D4.6.2(f).

#### 6.4 Criterion D4.6.2(c)

- 6.4.1 On being pressed, Network Rail was unable to explain how it had weighed the PPM of MTR, a Metro-style operation with a 0-3 minutes target, against AGA's more widespread services, to which a 0-10 target applies. It was clear that Network Rail had not considered the different effect on passengers if an AGA standby unit were to be available, when compared with the effect if the standby unit was MTR's instead. We were not persuaded of the practicality of MTR's offer to use its standby unit as far as Shenfield to assist AGA in times of disruption, given the existence of the current services at 10 minute intervals.
- 6.4.2 In this context it was our conclusion that it appeared that the real reason for stabling the Class 321 unit at Platform 18 is for AGA's operational convenience; it is not a true standby unit as it is not crewed. We gave this factor weight in reaching our decision.
- 6.4.3 There appeared to be stark differences between Network Rail's understanding of how often the Class 321 has been used, compared with AGA's view. As explained at commencement of the hearing (see para 5.1.4 above), we regarded such information as likely to be helpful rather than determinative, which is why we did not think it necessary to reach any findings of fact on the historic usage on the Class 321.
- 6.4.4 Our assessment was that there were some circumstances in which it could not be used, but that there were others in which it could substitute for another unit on six services each hour operated by AGA, four of which only operate once an hour.



- 6.4.5 This contrasted with MTR's proposal, that its Class 315 unit would be crewed throughout the day, so that it would be more immediately available than AGA's Class 321.
- 6.4.6 In weighing this factor, however, we were influenced by the usefulness of either option to passengers.
- 6.4.7 We accept MTR's submission that it is required to operate a metro-type service, and that intervals of more than 10 minutes effectively undermine that concept (quite apart from any requirements placed on MTR by Transport for London). We also accepted that the average loading of MTR's off-peak services is higher than the highest loading of an AGA service to Braintree (the example most frequently used during the hearing).
- 6.4.8 That said, our qualitative judgment was based on our interpretation of what would provide the greatest good for the greatest number of passengers and meeting the objective of the Decision Criteria set out in Network Code Condition D4.6.1 (i.e. "to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services"); we felt that making MTR's passengers wait 10 minutes for the next scheduled service, when no passenger will be travelling for more than 20 miles, was less disruptive than delaying a smaller number of passengers for an hour in reaching more distant destinations. While MTR had raised safety issues, these applied more in the peak period, which is not relevant in this Determination. On the usage figures provided by MTR, in anything other than exceptional circumstances an off-peak MTR service should be able to absorb passengers from a previous cancelled service.

#### The alternative options

- 6.4.9 Another factor that we considered was the alternative option offered to AGA, and other alternatives emerging during the hearing.
- 6.4.10 Network Rail stated that the Southend Victoria option had emerged in discussions with AGA, and had been the only option considered by Network Rail. It had offered ECS paths to and from Southend Victoria to enable the Class 321 to be stabled there. AGA had expressed doubts about the robustness of these paths. We did not think it necessary to reach any decision on this point, however, because even if AGA had standby drivers at Southend Victoria (which it confirmed it did not), stabling the Class 321 train at Southend, over 41 miles from Liverpool Street, led us to conclude that realistically it could only be used as a standby for an Up service from Southend Victoria, rather than being able to be used on the wide range of AGA's routes from Liverpool Street if stabled there.
- 6.4.11 The possibility of AGA stabling its Class 321 at Gidea Park emerged at a late stage before the hearing. There seemed to be some confusion about the status of Gidea Park, with AGA thinking that it would have to pay to stable its unit there. Our conclusion (falling short of a finding) was that it is a Network Siding and, therefore, forms part of Network Rail's national network to which AGA can have access, although part of it is in the process of being converted to a Light Maintenance Depot operated by MTR as carriage washing plant is to be installed there.
- 6.4.12 Regardless of this point, Gidea Park is not a station served by AGA, so once an uncrewed unit is stabled there it could only be used if a driver were to be sent to Gidea Park, and it would then take further time to get the unit to Liverpool Street.

- 6.4.13 In contrast, if MTR's crewed Class 315 train were to be stabled at Gidea Park it would be located two-thirds of the way from London on what is currently MTR's only route, between Liverpool Street and Shenfield. It was agreed during the hearing that failures can occur anywhere, but are more likely to occur when a train reverses at its terminus, and that failures are statistically no more likely to occur at Liverpool Street than at Shenfield (for MTR), or, say, Norwich for AGA. The availability of MTR fitters at Liverpool Street means that a defect there is more likely to be repaired quickly than one at Shenfield.
- 6.4.14 MTR agreed that a crewed unit in the Carriage Sidings at Gidea Park could be brought into a platform to enter service in a matter of minutes. We therefore concluded that a crewed MTR standby unit at Gidea Park could enter service at Gidea Park station to replace a failed unit on either an Up or Down MTR service. This would result in less disruption to passengers than a full cancellation, especially in the Up direction.
- 6.4.15 We concluded that if the Class 321 train were to be stabled at Southend Victoria the only practical standby function that it could offer would be on an Up service from Southend. Further, we did not think that it would be practicable for AGA to stable it at Gidea Park.
- 6.4.16 In contrast again, we concluded that locating the standby MTR unit at Gidea Park was practicable. In some circumstances it would not be as useful as stabling the unit at Liverpool Street, but in other circumstances it would be more useful to have the standby unit two-thirds of the way along MTR's line of route, rather than at one end of it, especially as MTR operates a simple shuttle service between Liverpool Street and Shenfield.

Our conclusions relating to Criterion D4.6.2(c)

- 6.4.17 On examining the application of this Criterion alone we concluded that Network Rail had failed to consider all the relevant factors and to weight them correctly even within this Criterion. By this point, therefore, we had concluded that Network Rail's application of the Decision Criteria was flawed.

6.5 Criterion D4.6.2(f)

- 6.5.1 Network Rail's document did consider this Criterion, including a brief reference to the additional costs which AGA would incur by stabling the Class 321 unit at Southend Victoria. (We did not examine these costs in detail, but did accept that substantial costs would be incurred, even if the Gidea Park option were chosen instead of Southend Victoria).
- 6.5.2 Network Rail also accepted that the reduction in Track Access Contract Schedule 8 costs falling to MTR would be outweighed by some of the costs which AGA would incur, although this only included a small number of those costs. In spite of this conclusion - which was defective in itself - Network Rail only gave this factor a low weighting.
- 6.5.3 This low weighting reinforced our conclusion that Network Rail's application of the Decision Criteria was flawed.

6.6 Criterion D4.6.2(j)

- 6.6.1 AGA drew attention to the fact that Network Rail regarded this Criterion as Not Applicable, which we concluded that it clearly is. Simply balancing the effect of an ECS move by AGA to Southend Victoria against one by MTR to Gidea Park clearly relates to the more efficient utilisation of assets, even before considering the fact that MTR would have a driver available for its standby unit, which AGA does not.

- 6.6.2 It could be argued that AGA placed some of its arguments about costs under this heading, whereas it should properly belong under Criterion D4.6.2(f), but we accept the weight of the argument in favour of AGA under both headings, of increased costs and the efficient use of assets.

6.7 Substituting the Panel's decision for that of Network Rail

- 6.7.1 Network Rail's statement of case made it clear that it was seeking a ruling from the Panel, rather than having the question remitted back to Network Rail for reconsideration. The Panel therefore had to substitute its own application of the Decision Criteria for Network Rail's flawed application.
- 6.7.2 Our decision reflects the Panel's view of which alternative provides a better opportunity for services to be maintained to provide the greatest benefit to passengers; of the additional costs which AGA would undoubtedly face if it could no longer stable its Class 321 at Platform 18; and the fact that the option of stabling MTR's Class 315 at Gidea Park might on occasion be even more beneficial than stabling it at Liverpool Street.
- 6.7.3 The Determination only relates to which Operator should have priority at Liverpool Street Platform 18 and does not direct MTR to select the Gidea Park option (which was not a matter on which we are entitled to make a Determination). We trust, however, that all Parties will consider the Panel's views on this point.
- 6.7.4 The Determination does, of course, only apply to the December 2016 WTT. If the circumstances were to remain unchanged this Determination would not bind a later Timetabling Panel, but it would be entitled to regard our Determination as persuasive. As successive WTTs are developed we get nearer the point at which MTR will cease to operate into Network Rail's station at Liverpool Street.

**7 Determination**

- 7.1 Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, my determination is that Network Rail shall withdraw its offer to MTR in respect of capacity for a standby train at Liverpool Street Platform 18 and instead offer the capacity to AGA for its Class 321 standby train.
- 7.2 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

17 August 2016

## **Annex “A” to Timetabling Panel determination of reference TTP985**

### **EXTRACT FROM THE NETWORK CODE, PART D (13 July 2015)**

#### **4.6 The Decision Criteria**

- 4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services (“the Objective”).
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the “Considerations”) in accordance with Condition D4.6.3 below:
- (a) maintaining, developing and improving the capability of the Network;
  - (b) that the spread of services reflects demand;
  - (c) maintaining and improving train service performance;
  - (d) that journey times are as short as reasonably possible;
  - (e) maintaining and improving an integrated system of transport for passengers and goods;
  - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
  - (g) seeking consistency with any relevant Route Utilisation Strategy;
  - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
  - (i) mitigating the effect on the environment;
  - (j) enabling operators of trains to utilise their assets efficiently; and
  - (k) avoiding changes, as far as possible, 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.
- 4.6.3 When applying the Considerations, Network Rail must consider which of them 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 is 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 Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.
- 4.6.4 The Objective and the Considerations together form the Decision Criteria.

Annex "B" to Timetabling Panel determination of reference TTP985

SKETCH DIAGRAM (TO SCALE) SHOWING THE LOCATIONS TO WHICH AGA'S CLASS 321 UNITS CAN BE WORKED, MTR'S ROUTE TO SHENFIELD AND THE LOCATION OF GIDEA PARK

