

First Trenitalia West Coast Rail Limited Sole Reference TTP1610

1 DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows:-

- (a) First Trenitalia West Coast Rail Limited whose Registered Office is at 4th Floor Capital House, 25 Chapel Street, London, United Kingdom, NW1 5DH ("Avanti West Coast" (AWC) ("the Claimant")); and
- (b) Network Rail Infrastructure Limited whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("Network Rail" (NR) ("the Defendant")).
- (c) AWC contact details: Mike Hoptroff, Head of Operational Planning & Engineering Access, Avanti West Coast, Victoria Square House, Victoria Square, Birmingham, B2 4DN.

1.2 Third parties that may be affected by the Panel finding in any of the ways sought in this sole reference are West Midlands Trains (WMT), Legge Infrastructure Services (in respect of NR/HS2 'Materials by Rail' services), Serco Caledonian Sleeper, Abellio ScotRail, Grand Central North West, Northern Rail, Transport for Wales and Freightliner Heavy Haul.

2 THE CLAIMANT'S' RIGHT TO BRING THIS REFERENCE

2.1 This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Conditions D2.6, D4.2 and D4.6 of the Network Code.

3 CONTENTS OF REFERENCE

This Sole Reference includes:-

- (a) The subject matter of the dispute in Section 4;
- (b) A detailed explanation of the issues in dispute in Section 5;
- (c) In Section 6, the decisions sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (d) Appendices and other supporting material.

AWC considers the revenue information contained in paragraphs 4.3, 5.3(d), and 5.4(c), and Appendix A, to be commercially sensitive. AWC therefore requests this information is held as confidential and redacted from (i) any version of this sole reference document shared beyond the members of the TTP1610 Panel, the Claimant and Defendant and (ii) any published decision and reasons.

4 SUBJECT MATTER OF DISPUTE

4.1 This is a dispute regarding the decision made by NR in their offer for the May 2020 New Working Timetable (the "Offer") to flex 85 AWC trains (53 Monday-Friday, 26 Saturday and 6 Sunday – details in Appendix A), resulting in extended end-to-end and intermediate journey time.

4.2 AWC objects to that decision on the basis that:

- (a) The proposal will result in a detriment to AWC's customers and the industry, as a result of slower journeys and increased journey times. This amounts to a deterioration of services to the public and less effective use of industry assets (rolling stock and train crew);
- (b) Contrary to the ranking of priorities required by Part D4.2, Network Rail has flexed AWC's services to accommodate other operator bids which either were made after the Priority Date Notification Statements (PDNS) were lodged at D-40 or do not have Access Rights / an expectation of Access Rights. This position, in respect of both West Midlands Trains and HS2 Materials by Rail, is explained in more detail in sections 5.3 and 5.4.; and
- (c) When flexing AWC's bid services Network Rail did not correctly apply the Decision Criteria required by Part D4.6 (and has not explained how the decision takes account of the Decision Criteria). Had it done so it would not have flexed AWC's services as it did. This is explained in more detail in section 5.2.

4.3 [Paragraph redacted at request of AWC]

4.4 In addition, AWC believes NR's communication during the Timetable Preparation period regarding the changes was insufficient and does not satisfy Network Code Condition D2.6.2(b). At the point of submission, joint work between the parties reduced the level of flex from 387 AWC trains in total affected by flex at Offer, to 85 AWC trains affected by flex where this is not recoverable within the existing (December 2019) end-to-end and intermediate journey time. Had NR communicated in accordance with the requirements of D2.6.2(b) these remaining outstanding flexes could have been addressed. This is explained in more detail in section 5.1.

5 EXPLANATION OF EACH ISSUE IN DISPUTE AND THE CLAIMANT'S ARGUMENTS TO SUPPORT ITS CASE

5.1 The Process of Preparing the May 2020 New Working Timetable

- (a) AWC submitted a D-40 Access Proposal for the May 2020 timetable on 9 August 2019 (See Appendix B).

- (b) AWC's proposal was based upon AWC's firm rights and largely on existing train services. It contained no expectation of, or prior agreement to, any material changes to arrival times at AWC intermediate stations or final destinations, other than where a small number of additional station calls were specified.
- (c) AWC (and previously, Virgin Trains) have been very clear with NR over successive timetable periods, that the erosion of end-to-end journey times has a material impact upon ridership and undermines the competitiveness of rail over other transport modes. It consequently reduces rail's attractiveness and overall industry ridership.
- (d) During the May 2020 timetable preparation period, NR sent AWC 'flexing spreadsheets' as it identified services which it wished to vary in the proposal. These spreadsheets identified many proposed flexes. Appendix C contains the individual spreadsheets and a table & graph of the number of affected trains detailed in each version.
- (e) By 8 November 2019 (week 13 of the Timetable Preparation period), NR had notified AWC of 313 AWC schedules affected by flex.
- (f) On 15 November 2019 NR published the timetable for May 2020, giving formal notice of the changes to the timetable and providing a final list of AWC schedules affected by flex. This list contained a significant increase in the number of schedules flexed, compared with the previous versions of the flexing spreadsheet received (an increase of 74 schedules flexed compared to the cumulative number of schedules by 8 November 2019). As can be seen in Appendix G (AWC's Response to the Offer), AWC found additional flexes that required explanation. Aside from these omissions, whilst in most cases a short reason for flex was provided, the rationale for making one decision over another was not clear.
- (g) AWC asked NR for clarification of specific flexing decisions in the period prior to the timetable being formally offered (examples in Appendix D), but nothing was received from NR explaining the significant WMT timetable changes and their impact on AWC until an email was received from NR on 5 November 2019, the day after receiving Version 9 of the flexing spreadsheet (see Appendix E). This email noted that *"...a large number of trains moved by 1 or 2 minutes due to changes in calling patterns of West Midland train services"* amongst other issues affecting AWC schedules but contained no rationale. This was 12 weeks into the timetable preparation period, and only 2 weeks prior to Timetable Offer, giving AWC very little opportunity to understand, evaluate and respond before the timetable was offered. AWC made a further request for more information to understand the revised WMT service pattern and impacts on 12 November 2019 (see Appendix E). No response was received.
- (h) Between receipt of the Timetable Offer on 15 November 2019 and AWC's Offer Response on 29 November 2019, AWC was invited by NR to provide details of any specific issues

requiring resolution in the Offer as received. AWC sent an email to NR on 21 November 2019 detailing some specific issues (see Appendix F). No response was received to this email.

- (i) As part of AWC's Offer Response, provided to NR on 29 November 2019, AWC asked NR for more clarity on, and background to, its individual decisions (see Appendix G). With little progress made to resolve these issues, on 12 December 2019 AWC issued a Notice of Dispute in relation to NR's decisions regarding the May 2020 New Working Timetable.
- (j) Network Rail has not described the application of the Decision Criteria to its decision making at any stage.
- (k) After issuing the Notice of Dispute, AWC has continued to proactively work with NR to resolve outstanding flex items in the time available. This has enabled parties to reduce the number of affected services to 85 AWC trains (53 Monday-Friday, 26 Saturday and 6 Sunday). The details of each individual flex are included in Appendix A (the latest iteration of the flexing spreadsheet at 30 January 2020).
- (l) AWC believe that NR was aware that a significant number of schedules would be flexed during the timetable preparation period but did not communicate the full extent of this as required by the Network Code, prior to Timetable Offer. The Network Code D2.6.2(b) states that NR "*...shall consult further with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable...*". Evidence provided in NR's own flexing spreadsheets and communications to AWC demonstrates they did not do this, as the level of detail explaining NR's decisions in respect of individual flexes, was insufficient.
- (m) Had NR communicated to AWC in accordance with The Network Code D2.6.2(b) during the preparation of the May 2020 timetable, regarding the decisions that they needed to make, dialogue could have taken place that could have avoided this dispute.

5.2 Decisions arising from the Preparation of the May 2020 New Working Timetable and the Consideration of all Relevant Interests

- (a) This section sets out Network Rail's obligation to apply the Decision Criteria, its failure to do so properly and consequently the need to revisit the Offer.
- (b) D4.2.1 of the Network Code sets out that "*In compiling a New Working Timetable in accordance with Condition D2 Network Rail shall apply the Decision Criteria in accordance with Condition D4.6*".
- (c) D4.6 describes NR's objective, where it is required to decide any matter, as "*...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...".

- (d) In achieving the objective, Network Rail is obliged to apply the considerations in D4.6.2.
- (e) In this case, introducing flexes which increase 'Intercity' journey time reduces overall industry revenues and market size. It runs contrary to the Objective (above) as it reduces the efficiency of services (which are longer), makes them less economical (as revenues fall) and is not in the overall interest of passengers (who have slower services) or AWC as the operator. In particular it is contrary to:

- (i) Decision Criteria (d) *"that journey times are as short as reasonably possible."*

These proposals are a retrograde step by proposing increases to end-to-end journey times;

- (ii) Decision Criteria (e) *"maintaining, developing and improving the capability of the Network"*

Longer journey times amount to a reduced network capability;

- (iii) Decision Criteria (f) *"the commercial interests of ... any Timetable Participant..."*

The increased journey times result directly in substantial revenue loss and less efficient service provision (as outlined in Appendix C). This not only affects AWC but amounts to a loss of revenue for the industry as a whole (including through reduced connections). Network Rail did not enquire into this impact and consequently cannot have properly considered the Decision Criteria; and

- (iv) Decision Criteria (j) *"enabling operators of trains to utilise their assets efficiently"*

Longer journey times underutilises rolling stock capabilities and keeps vehicles in operation longer thereby reducing staffing / stabling options.

- (f) For decisions that impact long-distance high-speed operators like AWC, not only is it important to consider the sharing of capacity across the network, but also the materiality of flex for operators where Access Proposals are sensitive (in terms of revenue and modal shift) to even small journey time increases, alongside the other considerations.
- (g) Network Rail has not provided any analysis of the Decision Criteria on which it relied when assessing the Offer. If it has not actively considered the Decision Criteria its decisions are non-compliant. If it has, it should provide that contemporaneous analysis such that AWC can engage with NR in relation to it.

- (h) On the basis above, AWC considers that NR has not correctly applied the Decision Criteria (or has not applied the Decision Criteria at all) and that a proper application of the Decision Criteria would not result in the flexes in the Offer. As a consequence NR should be directed to revisit the timetabling decisions and issue an offer without the flexes proposed.
- (i) As a matter of industry interest and transparency, AWC will also request a declaration from the Panel that Network Rail should provide bidders with its analysis of the Decision Criteria when it applies to them, including in this case.

5.3 Decisions arising from the Preparation of the May 2020 New Working Timetable: West Midlands Trains

- (a) This section sets out Network Rail's obligation to give priority to bids in the order required by Part D4.2, Network Rail's apparent failure to do so in relation to the bid by West Midlands Trains ("WMT") and consequently AWC's right to have its bid considered on that basis.
- (b) In accordance with Part D4.2(d), where not all Train Slots requested by bidders can be included in the new working timetable, Network Rail must allocate Train Slots in the following order of priority (as relevant):
 - (i) Firm Rights which will subsist throughout the Timetable Period, such as AWC's rights;
 - (ii) Contingent Rights or any expectation of rights of any Timetable Participant;
 - (iii) Rights notified after the Priority Date.
- (c) AWC based its bid on firm rights prior to the Priority Date. As outlined below, WMT's bid was based upon late notification and/or an expectation of rights (which may or may not be a reasonable expectation of rights). WMT's bid rights should therefore be subordinated to AWC's. Contrary to that requirement, NR has flexed AWC's rights substantially to allow WMT's bid.
- (d) [Paragraph redacted at request of AWC]
- (e) WMT's bid must have been submitted after the priority date for the reasons set out below.
- (f) WMT provided evidence to the PMO Steering Group (The Industry's Timetable Readiness Project Management Office) immediately prior to the May 2020 timetable PDNS date in July 2019 (see Appendix H). In summary, the update acknowledged that the implications of proposed changes to the timetable following the May 2019 timetable changes for WMT were yet to be confirmed, that the (previously submitted) Notice of Significant Change needed to be entirely rewritten based on new aspirations to improve performance, and that the

submission for the May 2020 would be completely different to work packages previously presented and could impact on NR Capacity Planning resource plans.

- (g) An Access Application from West Midlands Trains for changes to their timetable from December 2019 was only consulted with Timetable Participants on 25 September 2019. As the consultation only began on 25 September 2019, it is not realistic that these timetable changes could have been presented to NR in August 2019 at the Priority Date for May 2020.
- (h) AWC consequently understands that NR must have accepted a modified Access Proposal from WMT later than D-40. It must consequently be subordinated to AWC's bid which was made on time (D4.2.2(d)).
- (i) In any event there is a realistic possibility that WMT will not obtain the access rights on the basis of which it bid for the reasons below.
- (j) Despite further significant changes expected to WMT services from May 2020 (which have caused a number of flexes to AWC services and which AWC understands to include changes to service patterns on the Coventry corridor, final destinations of services and stopping patterns), an Access Application from WMT for these changes has yet to be consulted with Timetable Participants at the point of submission.
- (k) As a result, AWC has not had the opportunity to understand in detail, or formally respond to, NR, WMT and ORR on the capacity, performance and commercial implications. However, given the performance issues seen since May 2019 and the lack of evidence to suggest that the May 2020 timetable changes will have a positive impact on performance, AWC believes that it is by no means certain that Access Rights can be 'expected' to be granted. AWC has seen no formal submission from either NR or WMT that the changes implemented from December 2019 have, and further changes expected in May 2020 will, materially improve performance.
- (l) A further complicating factor in the WMT timetable changes for May 2020 and their impact on Timetable Participants, is AWC's understanding that NR's planners had to wait for the outcome of an independent review (instigated by NR and led by Dick Fearn) into WMT's aspiration for a 4th Fast Line path south of Hanslope Junction (though AWC is unclear as to whether this aspiration was borne out of performance issues seen since May 2019 or related to wider franchise aspirations). AWC was advised at the PMO Steering Group on 14 November 2019 that the 4th path review recommended that the 4th path be rejected, which led to WMT's bid for services from May 2020 utilising the 4th fast line path being rejected by NR (see Appendix I for an extract from the PMO's May 2020 RAG Assessment in respect of WMT Timetable Readiness, circulated following the PMO Steering Group on 14 November 2019). A decision this late into the preparation period for the May 2020 timetable pushed the

validation and any resulting decisions far later into the development period than would have been desirable, for such an extensive suite of changes.

- (m) This lack of certainty over the changes as presented by WMT in August 2019 (and subsequently) for May 2020, and in particular the Access Rights and performance implications, compressed the time available and opportunity for NR's planners (and by association affected Timetable Participants) to work through the implications in any meaningful way prior to the publication of the May 2020 New Working Timetable. AWC has not seen evidence to demonstrate NR's application of the Decision Criteria in line with Part D, nor understands how NR reached their conclusions about whether they should exercise their Flexing Right in the time available.
- (n) For the reasons above, AWC believes that NR has not complied correctly with the Network Code, in relation to the application of the Decision Criteria under D4.2.1, or the prioritisation of Rights (paragraph d) under D4.2.2, on the basis that AWC services, underpinned by existing firm rights, have been flexed for services which may not currently have Access Rights or may have been bid late.

5.4 Decisions arising from the Preparation of the May 2020 New Working Timetable: HS2 Materials by Rail

- (a) This section sets out Network Rail's failure to comply with the obligations of Part D in relation to priority of bids in relation to Materials by Rail's ("MbR") bid. The relevant obligations under Part D are set out in 5.3(b) above.
- (b) Network Rail has wrongly flexed AWC's services to give priority to MbR services which have not yet obtained access rights or an underlying Network Change. In accordance with D4.2.2(d) AWC's firm rights should have been prioritised ahead of such possible future rights.
- (c) [Paragraph redacted at request of AWC]
- (d) AWC engaged with both NR and HS2 on MbR services and their issues and implications through forums such as the PMO Steering Group, NR's HS2 Materials by Rail on North West & Central Route regular stakeholder meetings, and through regular update to NR's HS2 Industry Co-ordination Group for North West & Central Route.
- (e) Despite these HS2 trains being planned into the May 2020 timetable (and a number into the December 2019 timetable but without flex impact to AWC services) the Network Change allowing NR to use the former platform 17 at London Euston station has yet to be consulted under Part G of the Network Code, and AWC understands that Access Rights for the trains have yet to be applied for. Timetable Participants were also advised at the PMO Steering Group on 9 January 2020, that the services are now "likely to start in 2021" rather than

during 2020 (see an extract from a presentation given to the PMO Steering Group on 9 January 2020 in Appendix J) given that Notice to Proceed for HS2 was expected in December 2019 but has not yet transpired.

- (f) AWC believes that these new MbR trains, now that NR have confirmed that they are not likely to start until 2021 (and still subject to Notice to Proceed for HS2), have no Access Rights, and no network siding in which to operate to and from, should be removed from the May 2020 timetable and all consequential flex to Timetable Participants removed. If the services are required from December 2020, then the Network Change and Access Rights approvals processes must be followed by NR, HS2 and their contractors as a matter of course, and NR should use the Network Code Part D in order to consider whether to exercise its Flexing Right prior to allocating Train Slots in the prescribed order of priority.

6 DECISION SOUGHT FROM THE PANEL

6.1 AWC request the panel to determine that:

- (a) NR has not conducted itself in accordance with Network Code Condition D4.2.1 in respect of its decisions arising in the preparation of the May 2020 New Working Timetable.
- (b) NR has not conducted itself in accordance with the prioritisation of rights detailed in Network Code Condition D4.2.2.
- (c) NR's communication during the Timetable Preparation period regarding the changes was insufficient and has not satisfied Network Code Condition D2.6.2(b).

6.2 AWC request the panel to direct NR to:

- (a) Provide evidence of both weighting and application of Decision Criteria for each flex in accordance with Network Code D4.6 and how it considers those decisions to be both fair and not unduly discriminatory.
- (b) Going forward, consult and agree with Timetable Participants its objectives for particular timetable development activities in advance of D-40 (in order to gain approval for any particular set of outcomes to be delivered at Timetable Offer).
- (c) Re-evaluate its decisions in respect of the WMT and HS2 Materials by Rail Access Proposals in respect of May 2020 in accordance with Part D of the Network Code, provide evidence that it has done so, and remove consequential flex to AWC services where necessary.
- (d) Compensate AWC for any detrimental revenue impact from services that have been flexed as a result of decisions made in discordance with Part D of the Network Code, where it is not possible to remove the flex from the May 2020 timetable. Where this may not be

possible for the May 2020 timetable, guarantee the flex will be removed from the December 2020 timetable.

- (e) Give a declaration that in future Network Rail should apply the Decision Criteria to decisions as required by the Network Code Part D and provide an analysis of the application of the Decision Criteria to operators contemporaneously.

7 APPENDICES

The Claimant confirms that it has complied with Access Dispute Resolution Rule H21.

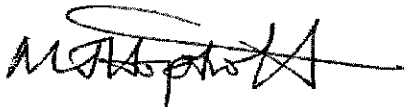
Extracts of Access Conditions/Network Code are included where the dispute relates to previous (i.e. no longer current) versions of these documents.

All appendices are bound into the submission, and consecutively page numbered. To assist the Panel, quotations or references that are cited in the formal submission are highlighted (or side-lined) so that the context of the quotation or reference is apparent.

Any information only made available after the main submission has been submitted to the Panel will be consecutively numbered, so as to follow on at the conclusion of the previous submission.

8 SIGNATURE

For and on behalf of First Trenitalia West Coast Rail Limited

A handwritten signature in black ink, appearing to read 'Mike Hoptroff', with a stylized flourish at the end.

Mike Hoptroff
Head of Operational Planning and Engineering Access