

Access Dispute Resolution Rules

Joint Reference

NR / Wrexham & Shropshire

Submission to Timetabling Panel:

TTP224: December 2008 Timetable

Offer

**(A) Dispute of offer for all Wrexham
& Shropshire services.**

1 DETAILS OF PARTIES

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

- (a) The Wrexham Shropshire and Marylebone Railway Company Ltd., whose Registered Office is at Great Central House, Marylebone Station, Melcombe Place, London, NW1 6JJ ("WSMR" ("the Claimant")); and
- (b) NR Infrastructure Ltd, whose Registered Office is at Kings Place, 90 York Way, London, N1 9AG ("NR" ("the Respondent"))

2 THE PARTIES' RIGHT TO BRING THIS REFERENCE

2.1 This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Condition 5.1.1 (b) of Part D the Network Code.

2.2 The dispute concerns the way in which NR has applied the Network Code in relation to WSMR's proposed services between Wrexham and London Marylebone. WSMR contends that NR did not apply the correct priority to the WSMR bid consequently resulting in paths of potentially poorer efficiency and journey time than might otherwise have been the case. The process is facilitated and governed by Part D of the Network Code which is required to be followed by the terms of the track access contract between NR and WSMR

2.3 . Paragraph 5.1.1 of Part D of the Network Code states:

5.1.1 Grounds for making an appeal

Without prejudice to Conditions D4.6.2, D4.7.1 and D4.8.6, if any Bidder is dissatisfied with any decision of Network Rail made under this Part D, including:

- (a) the application by Network Rail of the Decision Criteria;
- (b) the acceptance or rejection by Network Rail of any Bid;
- (c) the exercise by Network Rail of a Flexing Right; and
- (d) any decision of Network Rail which may be referred to the relevant ADRR panel under Condition D2.1.7, D2.1.11, D2.2.4 or D2.2.7,

it may refer the matter to the relevant ADRR panel for determination.

3 CONTENTS OF REFERENCE

The Parties have together produced this joint reference and it includes:-

- (a) The subject matter of the dispute in Section 4;
- (b) A summary of the issues in dispute in Section 5;
- (c) Back ground information to the dispute in Section 6

- (d) A detailed explanation of the issues in dispute prepared by the claimant in section 7;
- (e) A response to the dispute from the respondent(s) in Section 8;
- (f) The decisions of principle sought from the Panel in respect of legal entitlement and remedies in Section 9; and
- (g) Appendices and other supporting material.

4 SUBJECT MATTER OF DISPUTE

- 4.1 This dispute concerns the treatment of WSMR rights in the preparation of the First Working Timetable in relation to the rights and aspirations of other operators seeking paths on the same routes.
- 4.2 Following directions from the ORR, WSMR and NR signed a Track Access agreement on 30th January 2008. WSMR declared to NR that it wished to take up these rights at the Priority date in 1st February 2008. WSMR contend that NR did not accord the correct priority to these rights in the preparation of the 2009 Timetable culminating in an offer on 11th July 2008 that WSMR considered to be substandard. WSMR first made NR aware of its concerns in January 2008.
- 4.3 Paragraph 3.2.3 of Part D of the Network Code shows the order in which slots should be included in the First Working Timetable, viz:

3.2.3 *Priorities in compiling the First Working Timetable*

Without prejudice to the exercise by Network Rail of a Flexing Right, Network Rail shall, in determining the order of priority for inclusion of Train Slots in the First Working Timetable, accord priority:

- (a) first, to the satisfaction of any Firm Rights which:
 - (i) a Bidder may have, provided that
 - (A) the rights have been notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(a) and constitute Firm Rights on the intended dates of the operation of those Train Slots; or
 - (B) the rights were exercised in the corresponding timetable prior to the timetable that is being prepared but have not been notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(a). In such case only those rights which relate to quantum and which have been notified to Network Rail prior to the Capacity Request Deadline shall have force; or
 - (ii) Network Rail may have including those contained in the applicable Rules of the Route or the applicable Rules of the Plan, each of paragraphs (i) and (ii) above having equal priority;
- (b) second, to the satisfaction of any rights or expectations of rights which:
 - (i) have been notified by a Bidder to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(c); and
 - (ii) correspond to Firm Rights held by that Bidder at the Priority Date under an Access Agreement in force on that date but which at the Priority Date are prevented from constituting Firm Rights only because any or all of the intended dates of operation of those Train Slots fall after the expiry of the Access Agreement, or fall after the expiry of the Firm Rights from which those Train Slots are derived, and provided that Network Rail reasonably expects that an Access Agreement containing corresponding Firm Rights will be in force on the intended dates of operation of those Train Slots;
- (c) third, having due regard to the Decision Criteria, to the satisfaction of any other rights or expectations of rights which:
 - (i) a Bidder has notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(c); or

- (ii) Network Rail may have including those contained in the applicable Rules of the Route or the applicable Rules of the Plan, and which (in any such case) do not fall within Condition D3.2.3(a)(ii).

each of paragraphs (i) and (ii) above having equal priority; and

- (d) thereafter, having due regard to the Decision Criteria, to the satisfaction of any rights or expectations of rights which a Bidder has not notified to Network Rail on or prior to the Priority Date in accordance with Condition D3.2.1(c) but which are notified to Network Rail in accordance with Condition D3.2.4 or D3.2.6

provided that Network Rail shall only accord priority pursuant to paragraph (a), (b) or (c) above if the Train Slots to which the relevant Firm Rights, rights or expectations of rights relate have been notified to Network Rail on or before the Priority Date in accordance with Condition D3.2.1(d) or included in the Base Timetable.

- 4.4 NR and WSMR confirm that there is no dispute regarding the level of priority that the WSMR rights have been attributed. The rights were firm and were correctly notified to NR at the Priority Date on 1st February 2008.
- 4.5 NR and WSMR confirm agreement that Condition 1.5 applies in this case as a result of the major change instigated as a result of the Major Project to upgrade the West Coast Mainline.
- 4.6 It is the view of WSMR that the priority described in Condition D3.2.3 (a) has not been applied to the WSMR bid in relation to the 2009 Principal timetable and that sub-optimal pathways have been offered to them as a result.
- 4.7 It is the view of WSMR that Network Code Part D Condition 3.2.3 exists specifically to ensure that operators are given the best possible paths commensurate with the priority of the given rights

5 SUMMARY OF DISPUTE

- 5.1 A log of formal communication that took place between NR and WSMR during timetable development is at Appendix 1.
- 5.2 WSMR sent an email on 25th July 2008 to the Secretary of Access Disputes Committee referring this dispute concerning elements of the December 2008 Timetable Offer made by NR on 11th July identifying the dispute as follows:
- In general terms Wrexham & Shropshire contend that NR has not allocated Train Slots to Wrexham & Shropshire in accordance with the priority accorded our Firm Rights by the Network Code Part D Clause 3.2.3. In particular Wrexham & Shropshire Train Slots were not allocated until after Train Slots for other operators who currently do not hold rights for those Train Slots. As a result, Wrexham & Shropshire Train Slots contained within the offer are of poor efficiency and journey time; and
 - In some specific cases which will be set out in the Joint Reference Wrexham & Shropshire have had Train Slots rejected where our Train Slots have been flexed to accommodate other operators aspirations resulting in no Train Slot being offered against a Firm Priority 1 Access Right again including instances where the other Operators hold no rights for the services in question.

- 5.3 WSMR responded to NR's offer on 25th July stating *"that all Train Slots will be subject to a reference to the ADRR panel pursuant to Network Code Condition D5"*.
- 5.4 WSMR and NR have since resolved the specific cases referred to in the second bullet point above and NR have issued a revised offer on 29th August 2008. WSMR accept that these paths are workable and largely within WSMR's contracted rights. Therefore this dispute now only relates to the issue set out in the first bullet point in relation to the efficiency and length of the journey time of the paths contained in the offer.

6 BACK GROUND INFORMATION TO THE DISPUTE:

- 6.1 WSMR commenced operation of services between Wrexham General and London Marylebone on 28th April 2008 following OOR decision in Sept 2007. This followed an initial Section 17 Track Access Application made on 1st December 2006 and a subsequent application made on 5th March 2007 and directions from the ORR published on 31st August 2007.
- 6.2 WSMR and NR acknowledged that the paths offered to WSMR as part of the 2008 timetable were as good as could be achieved given the "Third" priority afforded those rights held at the time of the Priority Date for the 2008 timetable. As a result the journey time protection afforded the WSMR rights within the agreed TAA are relatively poor by comparison with the capability of the infrastructure and specified equipment. For example journey time protection for WSMR rights is between 250 and 271. This is by comparison of a journey time of 225 that is considered realistic for the prevailing infrastructure and specified equipment. WSMR were assured by NR and the ORR that these long journey time protection rights would not hamper the future improvement of journey times as NR had a duty under the Network Code to offer the best possible journey time that could be achieved commensurate with the rights held by all operators bearing in mind that at future timetable development WSMR would enjoy at least equal rights to other operators on the route. This appears to WSMR to be the significant reason for the existence of Condition D3.2.3.
- 6.3 The 2009 timetable development provides a unique opportunity to re-plan the timetable around the West Midlands almost from scratch given the changes required to deliver the DfT aspirations on the newly completed West Coast infrastructure. Similarly it is likely that once this timetable re-cast is complete it is unlikely to change for the remaining life of the existing franchise operators, i.e. 5 to 8 years.
- 6.4 Given the magnitude of the proposed changes, the planning and development of the 2009 Timetable commenced prior to the ORR confirming that WSMR should be granted a TAA in September 2007. NR started the development of the 2009 Principal Timetable in September 2006 by developing, with affected Bidders, a base plan, as proscribed in Condition D1.5 and published in February 2007.
- 6.5 WSMR first informed NR that it believed that there was a danger of discrimination following consultation conducted by NR in December 2007 and January 2008. At this point NR stated in a letter from Robin Gisby dated 20th December 2007 that "The current status of the work is that the Monday to Friday timetable is complete and undergoing a performance modelling evaluation which will be finalised in January 2008. The Saturday and Sunday

timetables are substantially complete with any remaining issues being resolved by the first week of January 2008". In a letter to Robin Gisby dated 17th January 2008 (see Appendix 1) WSMR highlighted concerns based on the fact that despite the assurance that the timetable was complete, no WSMR paths were contained within the timetable.

- 6.6 NR responded to the WSMR concerns on 30th January (see Appendix 1) stating that NR recognised the concerns and assuring WSMR that this was purely a draft timetable to aid development and that the formal timetable development process starting with the 1st February 2008 Priority Date would follow the Network Code.
- 6.7 NR has worked with WSMR to provide paths for the 2009 TT that meet the firm contractual rights. This has been largely achieved but WSMR register that this it has continued to work co-operatively and closely with NR to achieve this position despite this dispute which has been articulated to NR throughout the period of development. A formal revised offer for 2009 TT is expected imminently. These have shown journey time improvements for some trains compared to May 2008 TT with three trains showing in excess of 20 minutes improvement. None the less WSMR still consider the average journey time to be excessive with only 2 of the 10 weekday trains achieving an acceptable end to end journey time.

7 EXPLANATION OF THE DISPUTE AS SET OUT BY THE CLAIMANT

- 7.1 WSMR contends that despite the assurance received on 30th January 2008 and subsequent representation to Train Planers and Account Executive, NR has continued to utilise the draft timetable as presented in December 2007 and have sought to fit the WSMR paths around all other passenger operators already on the graph. WSMR believe that this is contrary to Network Code Part D Condition 3.2.3. It should be noted that many of the services in the draft timetable have lower priority rights than those held by WSMR – some are still subject to consultation currently being undertaken by ORR. Specific Examples are as follows:

- Virgin West Coast services proposed for the Coventry to Stechford corridor include 3 services in each direction in each hour. Full Access Rights for all these services are currently with the ORR for consideration. Wrexham & Shropshire recognise that the fundamental reason for the major change at December 2008 is to implement a new timetable based on improved West Coast services, but that is why the provision of West Coast reopener clauses have been inserted in other operators' TAAs, to enable changes if necessary. These Train Slots were all satisfied prior to Wrexham & Shropshire's Train;
- London Midland have sought to implement a changed service and stopping pattern on the Coventry to Stechford corridor as a part of the significant timetable change. In order to continue the quantum of stops at various stations, an **additional** service is proposed to be operated on the route between Birmingham International and Coventry. As at the Priority Date the additional rights required for this changed service pattern were not in place. These additional rights are currently the subject of a Supplemental Application to the ORR. These Train Slots were all satisfied prior to Wrexham & Shropshire's Train Slots despite having a lower priority as set out in the Network Code Part D;

- ARRIVA Trains Wales have sought to extend their services onto the Coventry to Stechford corridor from Birmingham New Street as far as Birmingham International. As at the Priority Date the additional rights for this change were not in place. These additional rights are currently the subject of a Supplemental Application to the ORR. These Train Slots were all satisfied prior to Wrexham & Shropshire's Train Slots despite having a lower priority as set out in the Network Code Part D. NR contend that this is in a part of the standard hour pattern that does not affect the proposed WSMR paths – however this makes that assumption based on overlaying the WSMR paths on an existing timetable rather than creating it in priority order which may have produced a different timetable, and also ignores the potential of conflict with this revised service pattern between Wolverhampton and Shrewsbury where these services can interact for the whole route;

This pattern is repeated between Stechford and Wolverhampton where notably the London Midland local services have changed time and stopping pattern and between Wolverhampton and Wrexham where both Arriva Trains Wales and London Midland trains have changed pattern. As such WSMR believe that NR have failed to apply Network Code Part D Condition 3.2.3.

- 7.2 WSMR evidence the above by the fact that all meetings that have taken place with NR to develop WSMR paths have been based on the draft timetable as initially developed in the February 2007 Base Plan and as presented in consultation by NR at December 2007. Subsequent to this plan there has in WSMR's opinion been little evidence of flexing of other operators paths to accommodate WSMR paths. This has been further complicated by NR's view that where flexing of other operators has been required, because of the December 2007 consultation, NR were only able to flex these services with the other parties permission rather than to flex on the basis of contractual rights as WSMR believe should have been the case.
- 7.3 WSMR believes that had NR applied condition 3.2.2 correctly then it is highly likely that the paths offered to WSMR would have been more efficient and have a faster journey time, particularly through the West Midlands area. This could have allowed the following:
 - (a) WSMR and NR to have agreed quicker end to end journey times and/or to have agreed to place appropriate performance allowance into services when approaching critical parts of the Network, thus resulting in a combination of quicker and more robust paths overall; and
 - (b) WSMR and NR to agree an appropriate path between Coventry and Stechford that was not the designated hourly Freight path. As a consequence of the current situation a number of these strategic hourly paths are lost to the Freight operators. Also the freight path is unsuited to the type of train operated by WSMR and results in 8½ minutes pathing time to make the WSMR service match the slower freight path.
- 7.4 WSMR recognise that NR have offered paths that are technically compliant (with two exceptions relating to stopping pattern) with the rights as set out in the WSMR TAA,. However this does not address the fact that most paths are still highly inefficient in the West Midlands with significant pathing time due to having to pick their way through the other passenger services already on the graph rather than to have them correctly flighted from the outset. WSMR believe that having offered compliant paths that meet the journey time

protection within the TAA does not on its own satisfy the requirements of the Network Code Part D condition 3.2.2.

- 7.5 WSMR note that NR have sought to justify their actions based on Network Code Part D Condition 1.5. WSMR believe that this justification is misplaced for the following reason:

(a) WSMR can find nothing in Condition 1.5 or any other part of Part D of the Network Code that suggests in any way, that in circumstances where Condition 1.5 is invoked, that this removes the obligation of NR to act in accordance with Condition 3.2.3 in the preparation of the First Working Timetable.

(b) NR were aware of WSMR's aspirations during 2006. These aspirations were re-enforced by the S17 Application for a Track Access Agreement made by WSMR to the ORR on 5th March 2007. Further on 31st August 2007 the ORR issued directions to NR to enter into a Track Access Agreement with WSMR. Despite this over 3 months later NR issued a Draft Timetable for consultation that did not contain any reference to the WSMR paths. Therefore WSMR fail to see what justified the inclusion of DfT and other stakeholder aspirations for what became West Coast, London Midland and Arriva services whilst at the same time ignoring the aspirations of WSMR even when it became clear in August 2007 that the WSMR rights would be enacted.

- 7.6 The timetable as offered by NR will have a significant effect on potential revenue to the WSMR business in that it will make the service difficult to market against the competition. The slower journey times can make a significant impact on the results of computer based enquiry systems which are not programmed to take into account the benefits of direct rather than changing services making it more difficult to attract both business and leisure travellers to rail as many are put off completely by the prospect of changing trains once or more to complete a journey from the areas that WSMR serve. The large amount of pathing time in the West Midlands means that the paths are on average at least 8 mins longer through that section than WSMR believe ought to be reasonably achievable.

8 RESPONSE TO THE DISPUTE BY THE RESPONDENT

- 8.1 NR has worked with WSMR to provide appropriate paths, and indeed has provided all paths for the 2009 TT that meet the firm contractual rights. These have shown significant journey time improvements for most trains compared to May 2008 TT, three trains in excess of 20 minutes improvement. Therefore NR believes it has provided slots within the contractual journey times for WSMR and therefore satisfied WSMR's Firm Contractual Rights.
- 8.2 NR started the development of the 2009 Principal Timetable in September 2006 by developing, with affected Bidders, a base plan, as proscribed in Condition D1.5 and published in February 2007. Although this was before WSMR had been granted a TAA they had been active participants in the timetable process as observers and were represented at the Rail Industry Planning Conference held in Newcastle during February 2006. As WSMR did not hold any Firm Rights at this stage of the development, NR would not have been in a position to put any WSMR pathways into the plan. It was only able to include those operators who held Firm Rights along with those other operators that had, or were expected to have, Firm Rights by the time the 2009 Principal Timetable would come into effect.

- 8.3 The basic structure of the 2009 Principal Timetable is a pattern service of three trains an hour between London (Euston) and Birmingham and London (Euston) and Manchester. As a consequence a number of alterations to other operators' services had to be made. These included revised calling patterns, particularly on London Midland services in the Birmingham to Coventry/Northampton Service Group. This has precluded putting WSMR services in any slot other than the freight path identified in February 2007 base plan without deterioration of the local service calling pattern in the Birmingham – Coventry/Northampton service Group.
- 8.4 London Midland has Firm Contractual Rights to some of the quantum, intervals and calling pattern for the slots in has bid for. It should be noted that some time intervals at stations on this corridor have been altered and give a poorer service interval in comparison to the existing Timetable (e.g. Hampton-in-Arden). Further Timetable alterations would have seen this situation worsen. NR believes that besides not being in the best interests of passengers would be contrary to the spirit of the Decision Criteria.
- 8.5 In Section 6.1 (c) WSMR refers to the timetable recast. If the timetable recast is based on repeating hourly patterns to include a WSMR slot, this would, in our opinion be an inefficient use of capacity, as of a possible 16 slots from 06:00 to 21:00 (for example) only 5 would be used and the other 11 would be unusable by other operators because they would only be between Stechford and Coventry . Instead by providing a freight slot each hour and using this for WSMR as we have done, demonstrates that our capacity allocation decisions have been made within the spirit of the Decision Criteria, in particular Condition D6(i). and that by providing a multi user slot, there is every chance of them being used on a short term basis by other operators.
- 8.6 NR points out that the WSMR Rights are not route specific therefore it is possible that they can also be routed via Solihull, if we this is an optimal use of capacity. However in the past both NR and WSMR have agreed that it is preferable for performance that New Street should be avoided if practicable.
- 8.7 Virgin Trains has Firm Rights under its existing TAA to three slots per hour between Birmingham and Euston. NR has to provide the best achievable pathways to make full and effective use of the upgraded infrastructure on the West Coast Main Line. On this basis NR believes Virgin Trains to have priority one access rights and have provided three paths per hour.
- 8.8 The situation with London Midland's Rights has already been described in 8.4 above.
- 8.9 Arriva Trains, Wales service extensions to Birmingham International do not impinge on WSMRs services, although not supported by Level 1 Rights when declared at the Priority Date, NR has believed that ATWs aspiration could be delivered without detriments to WSMR and have acted throughout on this basis.
- 8.10 Working within the February 2007 Base Plan, NR consider that they have used every endeavour to persuade other operators to flex their services, to the advantage of WSMR. NR believes that to have moved unilaterally beyond the February 2007 Base Plan would have been contrary to Condition D1.5. NR does not consider it unreasonable that WSMR should approach other operators directly to seek them to flex their services. It is WSMRs opinion that other operators had lower rights but as described above, the Timetable was constructed with the expectation that Rights already existed or would exist before WSMR had been given authority to enter into a TAA with us.

- 8.11 In acting as described above NR have sought to fulfil the requirements of the Network Code, and in particular Part D Conditions 1.5 and 3.2.3.
- 8.12 NR believes that the paths offered to WSMR are compliant with WSMRs Firm Contractual Rights and that Part D of the Network Code has been satisfied.

9 DECISION SOUGHT FROM THE PANEL

- 9.1 WSMR invites the panel to:
- a. Confirm that when developing major packages of Timetable Change that Condition D1.5 does not remove the obligation from NR to develop the First Draft Timetable in accordance with Condition D3.2.3 regardless of the content of the Base Plan;
 - b. Direct NR to re-evaluate the 2009 Principal Timetable and immediately implement changes to mitigate the effect of the incorrect allocation of priorities; and
 - c. Direct NR to develop a new Base Timetable based on the priorities as they stood at the Priority date on 1st February 2008 that can subsequently be used as the base timetable for the development of the 2009 Subsidiary Timetable.
- 9.2 NR invites the panel to:
- a. Confirm that when developing major packages of Timetable Change that it has correctly followed the process described in Condition D1.5 and that once having established a base plan it has no unilateral power to amend that plan for the favour of any operator.
 - b. Confirm that when developing major packages of Timetable change its primary duty is to observe the requirements of Condition D3.2.2 (a) in developing an operable timetable; which follows the necessary balance between its Firm Rights and the Firm Rights of all Bidders (Condition D3.2.2 (b) at all times recognising the necessary of Declared (actual and expected) Firm Rights
 - c. Confirm that WSMR have been provided with slots in the First Working Timetable for the 2009 Principal Timetable which satisfy all aspects of their Track Access Contract and the Network Code Part D.

10 SIGNATURES

For and on behalf of NR

Signed

Print name

Position: _____

Date: _____

For and on behalf of WSMR

Signed

Print name

Position: _____

Date: _____

This is a control mechanism; it provides the panel with the re-assurance that the dispute has been referred with the knowledge and understanding of the disputing corporate bodies. This is important, as engaging in formal dispute resolution implies a commitment to accepting the outcome of that process.