
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Preliminary Record of Determination in respect of disputes references TTP493, TTP494 and TTP495

*(following a hearing held at 1 Eversholt Street, London on 18 September 2012,
adjourned to 24 September 2012 and reconvened on 12 November 2012)*

The Panel:

Peter Barber Hearing Chair

Members appointed from the Timetabling Pool

Robert Holder	elected representative for Franchised Passenger Class, Band 1
Jason Lewis	elected representative for Non-Franchised Passenger Class
Nick Gibbons	elected representative for Non-Passenger Class, Band 1
Paul Thomas	appointed representative of Network Rail

The Dispute Parties:

For Grand Central Railway Company Ltd ("**Grand Central**" or "**GC**")

Chris Brandon	Head of Systems, Alliance Rail Holdings Ltd (" Alliance ")
Chris Hanks	Head of Development, Alliance
Jonathan Cooper	Head of Compliance, Alliance
Ian Yeowart	Managing Director, Alliance

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

Andy Lewis	Operational Planning Project Manager – LNE Route
Matthew Allen	Operational Planning Manager – National
Daniel Grover	Customer Manager – First Hull Trains & Grand Central

Interested party:

For East Coast Main Line Company Ltd ("**East Coast**" or "**EC**")

Shaun Fisher	Head of Operational Planning
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In attendance:

Tony Skilton Secretary, Access Disputes Committee ("**ADC**")

1. Basis of Preliminary Record

- 1.1 This is a preliminary written record of the decisions and conclusions reached in my Determination of disputes TTP493, TTP494 and TTP495, as given extempore in an oral statement at the end of the hearings of these three disputes on 12 November 2012. A full written Determination of the disputes, including the content required under the Rules, will be published as soon as is practicable.
- 1.2 The reason for publishing this Preliminary Record is that it has been drawn to my attention by the ADC that on 23 November 2012 Grand Central has submitted a Notice of Dispute alleging, among other things, that Network Rail has failed to comply with the Panel's ruling in dispute TTP494. Rule 16 requires the Hearing Chair, where appropriate, to adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of subject matter, timescales and significance. In view of the subsequent related dispute notified by Grand Central, and in order to assist the Parties to arrange their business accordingly, I consider it necessary and expedient to

adapt the dispute procedure so as to provide the Dispute Parties with a written confirmation at least of the decisions and conclusions already reached and announced.

- 1.3 The intention therefore is to promote clarity and transparency as to the substance of the Determination and its outcomes, and to do so more expeditiously than the complexity and volume of the matters raised and material produced in the course of the three days of dispute hearings permit for production of the full written reasoned Determination (including a full digest of the parties' submissions, oral exchanges at the hearing and analysis of the conclusions reached).

2 Introduction, substance of disputes and jurisdiction

- 2.1 In this Preliminary Record the abbreviations used are as set out in the list of parties above, in this section 1 and otherwise as specified in the text of the Record.

"**ADRR**" or "**Rules**" means the Access Disputes Resolution Rules

"**Condition**" means a Condition of Part D of the Network Code

"**ORR**" means the Office of Rail Regulation

"**PDNS**" means a Priority Date Notification Statement

"**Rights**" means Firm Rights or Contingent Rights as defined in Part D of the Network Code, either granted or applied for in accordance with a train operator's Track Access Agreement

"**SX**" means Saturdays excepted, i.e. Mondays to Fridays

"**SO**" means Saturdays only

"**Timetable**" means the New Working Timetable Publication for introduction in December 2012

- 2.2 These three disputes arise out of events occurring and decisions made in the course of the bid and offer procedure conducted between Grand Central, an open access passenger operator, and Network Rail under Part D of the Network Code, in preparation for the compilation of the Timetable. The three disputes are connected and were registered by the ADC as TTP493, TTP494 and TTP495. Pursuant to Rule B20, on 12 July 2012 the Allocation Chair ordered that the disputes should be heard 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 disputes concern the following matters:

TTP493 - the alleged failure of Network Rail to adhere to required timescales for producing the Timetable, as regards GC's proposed service 1A68 1518 (SX) Sunderland to London (King's Cross) (and complementary return and SO services), resulting in NR's rejection for inclusion in the Timetable of GC's Access Proposal for these services;

TTP494 - Network Rail's rejection for inclusion in the Timetable of GC's Access Proposal for service 1D81 (variously referred to also as 1D72) 1608 (SX) London (Kings Cross) to Wakefield Kirkgate, allegedly due to NR's favouring East Coast's conflicting Access Proposal for service 1B88 1608 (SX) London (Kings Cross) to Newark; and

TTP495 - Network Rail's rejection for inclusion in the Timetable of GC's Access Proposal for service 1N93 1323 (SX) London (Kings Cross) to Sunderland, allegedly due to NR's favouring GB Railfreight's conflicting Access Proposal for service 6N50 1106 Maltby Colliery to Tyne Coal Terminal which had been bid as a Train Operator Variation.

- 2.4 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 ADRR Chapter H to hear an appeal under the terms of Network Code Condition D5.

- 2.5 In its consideration of the parties' submissions and its hearing of the disputes, 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".

3 Background, history of dispute process and documents submitted

- 3.1 GC originally notified its dispute of NR's apparent decisions on all three matters on 2 July 2012. The reference was duly notified by ADC to other potentially interested parties including East Coast, and it was initially proposed that a Timetabling Panel would hear the disputes on 9 August 2012. The Hearing Chair appointed for that date asked that a sole reference document for the three disputes be provided by Grand Central in the interest of seeking clarity of argument and also to facilitate early publication in anticipation that other Resolution Service Parties might wish to participate in the proceedings. Network Rail was asked also to provide a sole reference document in response.
- 3.2 In the event, the hearing did not proceed on 9 August but was deferred at Network Rail's request, with Grand Central's agreement, because they were still in dialogue regarding the issues and also because of relevant regulatory outputs being anticipated imminently from ORR in relation both to Rights applied for by various train operators and to a Competition Complaint previously brought by Alliance against NR. With time passing, the Dispute Parties wished to proceed to a hearing and the dispute was reinstated at Grand Central's request, ORR having indicated its position on the Rights applications but not on the Competition Complaint.
- 3.3 A new hearing date was arranged for 18 September 2012, which necessitated a change of Hearing Chair. On appointment I consented to the Dispute Parties continuing to provide sole reference documents. By this time GC had notified a further dispute with NR which had been registered by ADC as TTP518. In the interests of efficiency, TTP518 was listed by ADC to be heard on the same day as the already consolidated disputes TTP493, 494 and 495, since it involved the same Dispute Parties GC and NR and their respective representatives and raised analogous issues of compliance with Part D of the Network Code.
- 3.4 The sole reference document from Grand Central was received on 28 August 2012 with some supplementary material following on 31 August. The response statement from Network Rail was received on 10 September. These documents from the Dispute Parties were made available to other potentially interested parties in accordance with established arrangements under the Rules. East Coast subsequently opted to be represented at the hearing as an "Interested Party" in relation to dispute TTP494.
- 3.5 In its submission, Grand Central referred to roles played in the timetabling process by its associated company Alliance and provided various items of correspondence involving that company. On 11 September (and following an earlier preliminary indication of the requirements), I issued a Directions Letter which called upon Grand Central to clarify its legal relationship with Alliance and the roles of GC and Alliance respectively in relation to the documents submitted by GC and the facts recorded in them (in relation to TTP518 as well as TTP493-5) and to provide certain other clarifications and information, including a chronology of events in relation to TTP493-5 and further supporting correspondence and other material. Network Rail was invited to comment on the further information so provided and this exercise was completed within the timescale set, on 14 September.
- 3.6 In accordance with Rule H18(c), following receipt of the Dispute Parties' submissions, I reviewed them to identify any relevant issues of law and on the afternoon of 14 September the other Panel members and the Dispute Parties were informed that I did not consider there to be any overarching issues of law arising out of the submissions.

I also noted that there were some issues of contract interpretation which, being of mixed fact and law, were the substance of the disputes to be determined.

- 3.7 The hearing commenced on 18 September 2012. TTP518 was taken first and was concluded that morning (with the determination being issued on 17 October 2012). TTP493-5 then commenced that afternoon. The Dispute Parties made oral opening statements in relation to all three disputes and were then questioned by the Panel. A transcription was made of the hearing proceedings, which included Declarations of Interest by members of the Panel.
- 3.8 It proved not practicable to complete the hearing proceedings on the afternoon of 18 September as lines of questioning were not concluded on that day, necessitating an adjournment. Of dates considered for reconvening without undue delay, 24 September proved the least inconvenient although it precluded one Panel member – Jason Lewis – from attending, due to a prior diary commitment. I was satisfied that the Panel would nevertheless remain quorate within Rule H17; neither Dispute Party demurred and it was noted that any particular “open access” interests could still be represented by the Non-Passenger Class member of the Panel.
- 3.9 The adjourned hearing accordingly reconvened on 24 September 2012. Certain additional evidence which had been requested of Grand Central during the course of the 18 September session was provided in readiness for the reconvened session. The hearing proceeded with further questioning of the Dispute Parties by the Panel, including some extended general debate as to the correct interpretation of certain critical provisions of Part D of the Network Code. In the event, several issues emerged on 24 September which necessitated the provision of further additional information by the Dispute Parties to substantiate their respective contentions.
- 3.10 5 October 2012 was set for completing exchange of the further material sought from the Dispute Parties and of applicable comments (including an invitation for East Coast to contribute observations). This exercise was completed within the timescale set. As the exchange of information and associated views of the Dispute Parties gave rise to certain fresh considerations, the Panel decided that the hearing should again be reconvened to enable some specific matters to be examined further by direct questioning of the Dispute Parties rather than in correspondence. I issued a summary of the issues arising out of the proceedings up to that point and the further information now provided by the Dispute Parties, which the Panel intended to be dealt with at the further reconvened hearing. These issues were communicated by the ADC to the Dispute Parties on 23 October 2012.
- 3.11 Meanwhile on 17 October 2012, Alliance (presumed in this respect, at least, to be acting as agent for GC) had submitted a formal request for disclosure of various PDNS documents by Network Rail, asserting that it was in Network Rail’s gift to share the information and that refusal hitherto on the part of Network Rail to provide it did not give any comfort that Network Rail was correctly managing the relevant part of the process. Alliance stated that it sought the documents in order to determine the extent of Flex that Network Rail had at its disposal and to determine levels of priority under Network Code Condition D4.2.2. After conferring with the Panel members, I concluded that I should reject the request to order disclosure and this also was advised to the Dispute Parties on 23 October 2012.
- 3.12 After consideration of several possible dates for reconvening, and delayed by the non-availability of necessary participants, 12 November eventually proved the least inconvenient, although it again precluded Jason Lewis from attending and Daniel Grover (Network Rail) was also unable to be present. Network Rail did not consider this absence to be detrimental to its position.
- 3.13 The hearing accordingly reconvened for the second time on 12 November 2012, in relation to all three disputes. Following further extensive questioning by the Panel on the issues which I had previously notified, the Dispute Parties were given opportunity

to make closing submissions and East Coast as an Interested Party (in relation to TTP494) was also afforded the opportunity to comment on the matters.

- 3.14 At the conclusion of the hearing on 12 November, having conferred with the other members of the Panel, I summarised the substance of my Determination of the disputes, including their outcomes and the reasons for them, as confirmed at the end of this Preliminary Record of the Determination. Immediately following this summary, East Coast raised an enquiry as to the consequences for its conflicting service the subject of TTP494, and the Panel addressed this.
- 3.15 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarised in the course of this Preliminary Record of the Determination.

4 Decisions and conclusions

- 4.1 The decisions and conclusions reached in my Determination of the disputes, as summarised at the end of the final hearing day on 12 November 2012, are as set out below.
- 4.2 I noted that the Panel had achieved the objective of reaching a conclusion that day and were in a position to give the substance of the decision on these three disputes in a form which could amount to a Determination for the purposes of the Rules. I noted that I wished to be transparent and make it clear that it would prove difficult to prepare, agree and issue the fully written Determination within the 10 working day period proposed by the Network Code. I proposed that what I was about to say would be sufficient to stand as the Determination for the purposes of the Rules and the Network Code, and also for practical purposes as enabling everybody, and particularly Network Rail, to act on it within what was then already a relatively short timescale before the Timetable Change Date. I noted that the eventual full written Determination might contain additional detailed analysis, but that this statement would set out the broad steps of reasoning applied.

TTP494

- 4.3 Grand Central's relevant bid for the service under dispute should have been accorded, in effect, priority level (iv) under Condition D4.2.2(d), because it was a bid that came into being after the Priority Date. Therefore, the best it could achieve was priority level (iv). Alliance's bid, which was made prior to the Priority Date and as at the Priority Date may or may not have had priority level (iii), in effect had been allowed to lapse. Without the legal possibility of transferring the bid rights that went with it from one Timetable Participant, Alliance, to another, Grand Central, whatever priority was or should have been achieved by the Alliance bid at the Priority Date was lost when its bid was not proceeded with and, instead, a bid from Grand Central came into being and was proceeded with.
- 4.4 The conflicting bid by East Coast should also have been accorded priority level (iv), because it failed to satisfy the requirements of Condition D4.2.2(d)(iii) in failing to give rise to a possible reasonable "expectation" in Network Rail, as the recipient of the bid, that the relevant Rights would have been achieved. This was principally because the service for which the Rights would have become relevant was bid for in alternative modes and, as a matter of logic, it was not possible to have an "expectation" (even if the expectation was only of a possibility, rather than a probability) that two parallel and mutually exclusive things could come about.
- 4.5 There were thus two bids, both capable of being accorded equal priority under Condition D4.2.2(d) albeit, it appeared, at level (iv) rather than level (iii). Therefore, on the face of it, the Decision Criteria would have been applicable to resolve the

conflict. The exercise of applying the Decision Criteria had been carried out and communicated by Network Rail, to some degree.

- 4.6 Had the application of the Decision Criteria remained the determining factor, I would have been minded to accept Grand Central's analysis of the proper application of the Decision Criteria as ultimately favouring their bid. That would have been for two reasons: first, the proper weighting to be given to the relevant Decision Criteria; and secondly, the timing of when the weighting exercise had been carried out by Network Rail and whether the original weighting had been changed or supplemented.
- 4.7 However, that particular consideration was not central to the final determination, because it had turned out that, on any view, the offer that had been made to East Coast was itself non-compliant with the Timetable Planning Rules, as regards the headway that needed to be accorded to the path bid for. The conclusion that the offer was non-compliant was arrived at on the basis of an interpretation agreed by all present at the hearing, in the absence of a specific provision in the Timetable Planning Rules dealing with the situation where a through-train headway for a route is expressed without also expressing a particular variant of that for a train terminating at a particular station on the same route, in this case Newark Northgate.
- 4.8 The interpretation agreed by all present was that, if the Timetable Planning Rules state an applicable headway for the whole of the route in question or at least that part of the route that includes that particular station, the default headway is that applicable to the route as a whole. It was agreed that this was not complied with in the offer to East Coast. Therefore, the path as offered to East Coast on the offer date should not have been given preference over the path that was capable of being offered to Grand Central.
- 4.9 For that reason I concluded, and stated that I so determined, that the 1608 path that had been bid for by Grand Central should be awarded to them and included by Network Rail in the Timetable. That was the substance of the Determination on TTP494. I expressed the hope that it was stated with sufficient reason and clarity that it could properly be regarded as standing as the Determination on that dispute, and as something that could be acted on.

TTP493

- 4.10 Dispute TTP493 as brought was initially characterised as a complaint about Network Rail's handling of the process, as regards a particular bid, and in particular the effect of an email from Network Rail to Grand Central on 14 April 2012 which said, as at this particular point between the Priority Date and the offer date, Network Rail had consulted and discussed this as much as they possibly could and they could not do anything more with it until after the release of the Timetable. Grand Central asserted that this stance of Network Rail, as so communicated, of itself disadvantaged them in the whole process.
- 4.11 I concluded that, whilst it appeared that such an approach by Network Rail might indeed have disadvantaged Grand Central in the process, it had not done so in a way that gave rise to any further disputable consequences or that had a material effect on the outcome. This was because as a matter of contract, whatever defect there may have been in the process, the outcome was that there was at least one service bid for by another operator, which was identified by Network Rail and accepted by Grand Central as contractually overriding Grand Central's bid for the service in question, 1A68 1518 (SX) Sunderland to London (King's Cross) (and complementary return and SO services).
- 4.12 The determination on TTP493, accordingly, was that Network Rail was entitled not to award Grand Central the service that was bid for. That was as far as I thought it necessary to go in terms of the actual determination, i.e. simply to say that Network Rail was entitled not to offer the service bid for by Grand Central, thereby intentionally

leaving it open, because not specifically directed, as to what Grand Central or indeed Network Rail might do as a result of that.

- 4.13 One of the specific outcomes sought by Network Rail, on both TTP493 and TTP495, was that Grand Central should be directed to accept whatever was offered instead. I noted that I was not minded to direct that, because I did not think it necessary to a just determination of the dispute. I considered it preferable to leave it up to Grand Central as to what it might wish to do, whether to accept it, seek further consultation or challenge it. For the purposes of the determination on TTP 493, therefore, I confined it to saying that Network Rail was entitled not to accept Grand Central's bid and so should not be directed to accept it.

TTP495

- 4.14 In substance, the outcome for TTP495 was the same as for TTP493, though having arrived there by a slightly different route. Network Rail had been able to produce at least one conflicting service bid for by another operator that, effectively, worked out as having a higher contractual priority and therefore had to be taken as contractually overriding the service bid for by Grand Central, 1N93 1323 (SX) London (Kings Cross) to Sunderland.
- 4.15 On this matter we had devoted some time to considering whether the identified contractual overriding applied to all five days of the SX period. We had reached the conclusion, which apparently was accepted by all parties at the hearing, that this decision did indeed apply to all five days, because of the way in which the service had been bid and the content of the relevant PDNS.
- 4.16 The determination on TTP 495 accordingly was also that Network Rail was entitled not to accept Grand Central's bid for the particular service the subject of that dispute. As with TTP493, I declined to go further and direct any specific action or consequence as a result, so excluding a direction that Grand Central should accept the alternative path which had eventually been offered by Network Rail in that case.
- 4.17 I noted that a difference between TTP493 and TTP495 was that in the latter, the alternative path was offered to Grand Central not at the offer date but some time afterwards as part of the ongoing consultation process. I had considered whether, because of that distinguishing factor, there was a case for making some additional direction to Network Rail to the effect that it should have acted in a certain way, which should have resulted in the service eventually offered having been available for offer as at the offer date rather than some time thereafter. I declined so to decide, because I was satisfied that the process of continuing to discuss and consult on possibilities after the offer date was common in the industry, on both the freight and passenger sides. Therefore, the fact that Network Rail had not come up with that particular alternative offer at the time of the offer date, which might or might not have affected Grand Central's reaction, would not justify a specific direction that Network Rail should now do something particular or that it should have done so.
- 4.18 As for TTP494, I confirmed my hope that it would be accepted by all parties that this extempore statement was adequately expressed to constitute the determination for TTP493 and 495, and that it was stated in a form and with sufficient detail to be acted on for practical purposes with the imminent Timetable Change Date in mind. I invited the Dispute Parties to make any further observation they wished in relation to this statement. Grand Central did not wish to do so. Network Rail noted that the interesting issue for them to work out was that they had already been instructed (by ORR) to enter into Rights regarding the 1608 path the subject of TTP494, but they were sure of finding a way of picking up that issue and confirmed that this was something they would have to work on.

Peter Barber
Hearing Chair



5 December 2012