TIMETABLING PANEL

TTP 96

Great North Eastern Railway Ltd –v–Network Rail Infrastructure Limited
& Grand Central Railway Co Ltd

SUBSTANTIVE SUBMISSIONS BY GRAND CENTRAL RAILWAY CO LTD

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Overview

1. The essence of GNER's case is that Network Rail was wrong to accommodate Grand Central's bids because, at the time of Network Rail's decision, Grand Central did not have a track access agreement in place.

2. This argument is misconceived, for the following reasons.

Modification regime & frustration of ORR decision

3. Parliament has given to ORR the role of determining the efficient and economical allocation of capacity of the railway, including the railway network. It has done this in the Railways Act 1993, sections 17-22A, which require ORR's approval of all new access contracts (except in the case of exempt facilities) and allow ORR to compel a facility owner to grant third party access.

4. The importance and fundamental nature of ORR's role in that respect was emphasised in the judgment of the Court of Appeal in *Winsor –v- Bloom* [2002] EWCA Civ 955 – see paragraphs 13 and 16 in particular.

5. In making its decisions, ORR must discharge its statutory duties under section 4 of the Railways Act 1993. Those duties are, in their totality, Parliament's definition of the public interest as it applies to railways.

6. In the case of Grand Central, on 23 March 2006 ORR announced that Grand Central was to have firm rights to three trains a day between Sunderland and London Kings Cross, within the parameters stated in that decision. Grand Central had applied for the necessary

access rights under section 17, Railways Act 1993, on 25 February 2005, more than a year earlier.

7. In anticipation of its decision in the Grand Central application, and knowing that it could be some months before that decision might be made, ORR took precautionary measures to ensure that its decision could not be frustrated by other operators taking up capacity on the East Coast main line before Grand Central's contract was in place. And so, when these other operators had supplemental contracts approved in the intervening period, ORR inserted into them defeasance or modification provisions. In the case of GNER's access contract, the relevant provisions are in paragraphs 12.1 – 12.17 of Schedule 5. (GNER's submissions do not provide the Panel with the whole version of paragraph 12.)

8. The modification provisions effectively ensure that there will always be room for Grand Central's services, once the contract is in place.

9. Paragraph 12.5 provides for the modification of the GNER contract to make way for Grand Central. This modification can, if necessary, be done against GNER's will – see paragraph 12.13.

10. The modifications must be such as are necessary to avoid Network Rail necessarily being in breach of Grand Central's access contract – see paragraph 12.5(a) – and must give GNER the best available alternative rights – see paragraph 12.5(b).

11. GNER was dissatisfied with ORR's decision on Grand Central's section 17 application, and obtained a judicial review. The judgment of the High Court on 27 July 2006 was to dismiss GNER's application. ORR's decision is to stand. GNER chose not to apply to the Court of Appeal for permission to appeal.

12. But GNER has not given up. It has also made this application to the Timetabling Committee, on the spurious grounds that, because the Grand Central contract is not yet in place, it should be ignored.

13. Grand Central's contract would almost certainly by now be in place if GNER had not added months to the process by launching its unsuccessful judicial review. As it is, Grand Central's final form of track access contract was submitted to ORR, with a submission made jointly with Network Rail, on 3 October 2006. Network Rail and Grand Central met with

ORR on 10 October 2006 to go through the contract and the joint submission. At that meeting, ORR indicated that it fully appreciated the urgency of the matter and that it would endeavour to issue its section 17 directions as quickly as possible. It is possible, although it cannot be guaranteed, that ORR will issue the necessary section 17 directions as early as the end of October 2006.

14. The only purpose of the GNER application is to frustrate the decision of ORR in the Grand Central case. This attempt should not be facilitated by the Panel in the present proceedings.

15. In any case, were the Panel (wrongly) to take the view that the absence of Grand Central's contract at this stage compelled it to accept GNER's arguments, Grand Central would appeal. By the time such an appeal is heard by ORR, Grand Central's contract will be in place. ORR is not likely to frustrate its own decision. Therefore if GNER were temporarily to prevail now, it would only give the parties the expense of an appeal. This would be contrary to the purpose of the timetable development process in the network code and the remit of the Panel to reach fair, rapid and inexpensive determinations of disputes (Rule A1.3(b)).

Rights of aspirant operators

16. Part D of the network code clearly provides for parties who do not yet have access contracts to participate in the timetable development process. Conditions D2A.2.4, D3.2.3(b), (c) and (d) all speak of "expectations of rights", and accord the holders of such expectations locus in the timetable development process. Condition D1.6.2 only shuts out of a working timetable a party who has not yet turned that expectation into a contract by the time the working timetable goes live. That will not be the case with Grand Central.

17. Moreover, Directive 2001/14/EC and the Railways Infrastructure (Access and Management) Regulations 2005 confer on Grand Central the right, as an applicant, to take part in the timetable development process.

18. It is therefore clear that Grand Central is entitled to participate in the timetable development process and to be accorded due status. The rights of Grand Central are rights under the network code – see Condition A6.2, which confers the necessary rights under the Contracts (Rights of Third Parties) Act 1999. It is therefore wrong to say that Grand Central

lacks status in the process, or that it lacks a contractual basis for its participation in the process.

19. Grand Central's rights are also rights under Directive 2001/14/EC and the Railways Infrastructure (Access and Management) Regulations 2005, and cannot be denied. Grand Central respectfully refers the Panel to its notice of appeal dated 9 October 2006 for a fuller exposition of its *locus* in the timetable development process.

20. ORR's decision of 23 March 2006 says that Grand Central is to have firm rights. It would therefore be perverse and wasteful for Network Rail to behave contrary to that decision, as if it had not been made.

21. Network Rail has properly sought to honour the spirit and the letter of ORR's decision, knowing that Grand Central will have the necessary contract in time, and that ORR has already determined – through the imposition of the modification regime – that Grand Central will have the necessary first priority.

22. The timetable development process is designed to facilitate the placing in the working timetable of access rights of operators who do not yet have the necessary contract, but will do so in time. Moreover, Condition D3.4.2(b) provides that Network Rail must – not may – exercise Flexing Rights if it is necessary to do so in order to comply with directions issued by ORR under section 17, Railways Act 1993.

23. It would have been perverse for Network Rail to have ignored these clear provisions, which all point one way – the right of Grand Central to have effect given to the rights which ORR has already decided it should have and will have in time.

Flexing Rights

24. A Flexing Right is constrained by the terms of the access contract in which it appears. It has no separate existence.

25. The relevant determination of the nature of flexing rights is in the decision of the Rail Regulator in *Network Rail Infrastructure Limited –v- Eurostar (UK) Ltd* [2003] RR 1, paragraph 63:

> "In establishing a timetable, in most cases the Firm Contractual Rights which Network Rail has to accommodate contain degrees of what is known as 'flex'. When a contract has flex in it, Network Rail is given freedom to allocate to the access beneficiary in question train slots which do not exactly reflect his bid. The extent of the freedom is a direct function of the amount of flex in the contract. This gives Network Rail the ability to allocate and use capacity efficiently, within the constraints of the access contracts which it has with access beneficiaries. The converse of an access right with flex is one which is hardwired. A completely hardwired access right would be a right to a particular trainpath with no flex whatsoever. If a bid is timeously and properly made, and is in exercise of a completely hardwired Firm Contractual Right, Network Rail has no discretion; it is obliged to allocate to the access beneficiary in question the trainpath for which he has bid. Hardwiring comes in degrees. The less the flex in the right, the greater the right is hardwired. Hardwiring is therefore the most expensive use of capacity of all since the slots in question are fixed and Network Rail must allocate other train slots around hardwired slots and may never move them."

26. However, the right has to be viewed in the totality of the contractual matrix. Schedule 5, paragraph 12 of GNER's access contract contemplates the contract being modified to whatever extent is necessary to make way for Grand Central's contract. It is therefore right that Network Rail approaches the exercise of flex in that light. To do otherwise would be to ignore a material and relevant part of GNER's contract, and the associated provisions of the network code.

27. As explained above, Condition D1.6.2 only shuts out aspirants' rights if they have not crystallised by the time the trains are to run.

Grand Central's access rights

28. In the Part D timetable development process for the timetable beginning on 10 December 2006, Grand Central made compliant bids for paths. It was offered and has accepted the paths set out in Annex 1 to these submissions. (The Sunday paths are subject to

confirmation, and Grand Central will supply that to the panel and the parties as soon as possible.)

29. Grand Central and Network Rail are presently negotiating the departure time ranges – that is, the envelopes of flex – around these paths. Once established, these envelopes will go into Table 8.3 of Schedule 5 to Grand Central's access contract. If Grand Central and Network Rail fail to agree on the envelopes of flex, ORR will decide the matter and reflect its decision in the contract which it directs Network Rail to enter into with Grand Central under section 17, Railways Act 1993.

30. Grand Central presently expects that if agreement is to be reached, that agreement may be achieved as early as next week, *i.e.* the week commencing 16 October 2006. Grand Central will notify the panel and the other parties to the dispute if and when the matter has either been resolved by agreement with Network Rail or remitted to ORR to decide.

31. Whatever envelopes of flex are established by ORR, GNER will have to assess whether their size will trigger the Schedule 5, paragraph 12 modification regime in its access contract. But the temporal point is unaffected – the Grand Central access contract will be established very soon, and it would be pointless for Network Rail to operate on any other basis.

Maximum journey time – offer inconsistent with maximum journey time

32. An offer outside the maximum journey time is a breach *unless* the contract contains the necessary width or flexibility to extend the maximum journey time. In this case, GNER's contract *does* contain that width and flexibility. Schedule 5, paragraph 12 of GNER's contract obviates the need for an amendment of the contract, since it is a self-modifying regime, i.e. it provides for the contract to be changed without the agreement of both parties and without there being a formal, separate amendment under section 22 or 22A, Railways Act 1993.

33. As explained above, Schedule 5, paragraph 12 provides a complete answer to the issue of whether there is enough flexibility in GNER's access contract. There is that flexibility, because Schedule 5, paragraph 12 supplies it. There will therefore be no breach.

Pathing time & Rules of the Plan

34. Network Rail would be acting perversely if it did not seek, in the complex process of developing the working timetable, to give effect to ORR's decision. Parliament has put ORR in charge of capacity allocation, and ORR's jurisdiction is supreme.

Relative standing of rights

35. ORR has decided that Grand Central is to have firm rights. It would be perverse for Network Rail to accord them any lower priority.

D3.2.3 priorities

36. ORR has decided that Grand Central is to have firm rights. It would be perverse for Network Rail to accord them any lower priority.

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37. As explained in paragraph 13 above, ORR is expected very shortly to issue section 17 directions for a Grand Central access contract with rights which begin on 10 December 2006.

Alleged lack of adequate consultation

38. GNER is wrong to assert lack of adequate consultation. The reality is that in developing the ECML timetable, very considerable consultation was carried out, in which GNER fully participated.

39. On 30 March 2006, following the announcement of ORR's decision (on 23 March 2006), Network Rail sought to implement ORR's decision. In doing so, Network Rail gave all ECML interested parties an outline of the way in which they expected to complete the timetabling work. All parties were given the opportunity to comment, and notwithstanding those comments, a proposed timetable of events was accepted, work was begun, and meetings planned. It is only now, at paragraph 7 of GNER's reference to the timetabling panel, that GNER seeks to challenge that timetable.

40. At every meeting, each party was told of the current situation, and debate and dialogue took place with all parties present. At times, especially early in the established

process, meetings were fraught, but as progression was made, a consensus was evolving, with each party playing its part in accepting change. This is the essence of co-operative working in ensuring that the timetable is developed in a rational and coherent way, always so as to give effect to the decisions of ORR which, as stated before, has been placed in charge of the fair and efficient allocation of capacity of railway assets.

41. It is now apparent, from the submissions made by GNER in the present reference, that GNER is now suggesting that its representative(s) at these meetings did not have permission to agree outputs on GNER's behalf. Such a lack of authority was never communicated to the representatives of the other parties attending the meetings. If it had been, then the whole atmosphere of the meetings would have been different. It is not conducive to co-operative working by industry parties in the timetable development process, if one of the parties takes part on the basis that it may upset the outcome later, if it does not like it.

42. GNER is now seeking to challenge virtually every decision made by Network Rail following these meetings, despite its failure to object at the time.

43. In its submissions, GNER has not mentioned the fact that despite their request to go from Kings Cross at xx10 to Leeds (changed from xx05) - which was not part of ORR's decision - every operator co-operated, as did Network Rail. A review of the amount of work entailed (see the minutes) shows that had Network Rail refused to carry out the Leeds paths work at this time, then much more time and resources could have been engaged in trying to deal with Grand Central's particular application – including work to finalise the "4th path" that was part of Grand Central's application.

44. GNER has also failed to mention that the xx10 service clockface was agreed by Grand Central accepting a 7 minute early start on the 0811 (back to 0804), with no compensating reduction in journey time. This was done by Grand Central in the spirit of co-operation, which was evident at the time.

45. By looking at services individually comment can be made on each position.

46. Initially it must be stressed that GNER itself imports undue operational risk onto the network by operating HSTs in 2+9 formation – in the knowledge that point to point timings cannot always be maintained.

47. In relation to paragraph 4.2 of GNER's submission, the offered trainslots appear to have been flexed within the normal envelope.

48. The whole basis of the multipartite meetings was to discuss flex, re-timings etc – and it was made clear to all parties at an early stage, having been raised by some, that turnaround times would be a critical factor in acceptable performance. At no time did GNER express any support at these meetings for sub 45-minute turnarounds as being acceptable, but GNER now seeks to take precisely that position.

49. GNER complains of undue flexing. It fails to mention that, in order to make best use of the capacity of the network, operators have been flexed to accommodate both GNER's xx10 Leeds services, and their much requested – but now not to be used – Leeds half hourly paths. All this work was done for GNER's benefit in a co-operative manner, and it is GNER which has clearly had the benefit of most of the output hours from NR. (See minutes of 6 June 2003 meeting – Annex 2)

50. Despite the necessary time constraints, all operators and NR tried fully to accommodate GNER's changing aspirations.

51. Further investigation shows that GNER are happily content to flex their own – and other operator services for their benefit, including changing stopping patterns, but continue to challenge, through this forum, to deny the rights of a new entrant.

52. At paragraph 12.5 of its submission, GNER seeks to state that no discussions were held on necessary modification provisions, and yet the issue was clear at every meeting which all affected parties, including GNER, attended. Indeed at the final meeting on 23 June 2006, Shaun Fisher for GNER is recorded as follows: "SF thanked SH [Steve Hall] and RW [Richard White] for all their hard work and thanked other TOCs for their co-operation during this process". These are not the words of a party unhappy with the alleged lack of consultation.

53. At paragraph 6.2.2 of GNER's submission, the date of 30 June 2006 is when all other operators received Network Rail's report. In relation to the minutes of previous meetings up to 23 June 2006, no carried forward actions were left un-actioned.

54. At paragraph 6.2.3 of GNER's submission, it is clear that these services were flexed within GNER's contractual entitlements.

55. In paragraph 6.3 of GNER's submission, it is important to note that Grand Central can operate in anything up to 2+7 formation, and timings are based on such a formation. It is therefore not correct to "assume" that all services will operate in 2+6 formation.

56. It was also made clear in the early problems identified (Dec 06 ECML capacity review – problems identified SX – attached as Annex 3) produced by Richard White for the meeting on 23 June 2006, that "...there is an existing performance problem involving 1A31 (GNER)." Solutions were identified with changes to FCC and this GNER service. This service was clearly already a performance issue and needed addressing.

57. It is worth noting that at the meeting of 12 May 2006, GNER accepted that "...the flexing of 1E21 is within the contractual rights".

58. At the 12 May 2006 meeting, GNER indicated no disagreement with the changes proposed for 1A30 and 1A31, contrary to the statement at paragraph 6.3.2 of its submission. The stated position of Network Rail is correct.

59. In respect of 1A46, the minutes show extensive consultation regarding the 1630 Sunderland – Kings Cross proposed service, and the eventual discussion and proposal of a re-timing – a full 60 minutes later at 1730 – which Grand Central, in the spirit of co-operation accepted.

60. The impact on this train appears to be 1 minute outside the envelope. Grand Central believes that at one of the meetings EWS accepted a movement outside their maximum journey time in order to accommodate the many changes that came about, most by the re-

timing of Leeds services and the request for additional services to Leeds by GNER. This recollection may be confirmed by Network Rail.

Conclusion

61. For the reasons given above, GNER's submissions lack merit and should be rejected.

62. It is futile for GNER to try to frustrate ORR's decision on capacity allocation by trying to use the dispute resolution process in the current reference.

63. If GNER's reference to the timetable panel were successful on the grounds that Grand Central lacks an established access contract, it would be contrary to the purpose and provisions of the network code in relation to aspirant access rights holders, and in any event superseded by ORR's imminent section 17 directions.

64. The issue of the delayed crystallisation of Grand Central's access rights is about to become academic.

65. The purpose of the timetable development process in the network code – including the access dispute resolution regime – is to give effect to and facilitate, not impede, the decisions of ORR on capacity allocation. ORR is hardly likely to sanction the frustration of its own decision.

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