

Network Rail Infrastructure Limited's
Amended Notice of Appeal to the
Office of Rail Regulation

The Timetable Disputes Panel of the
Access Dispute Resolution Committee
Determination in respect of Reference TTP210

(1) Network Rail Infrastructure Limited

And

- (2) West Coast Trains Limited
- (3) English Welsh & Scottish Railway Ltd
- (4) GB Railfreight Limited
- (5) Freightliner Limited
- (6) London and Birmingham Railways Limited
- (7) First/Keolis TransPennine Limited

1 PARTIES TO APPEAL

Network Rail Infrastructure Limited, whose registered office is at 40 Melton Street, London NW1 2EE (Network Rail) (the Appellant);

The following parties are Respondents to the Appeal:

West Coast Trains Ltd. whose Registered Office is at 120 Campden Hill Road, London, W8 7AR (WCTL)

English Welsh and Scottish Railway Ltd whose registered office is at Lakeside Business Park, Carolina Way, Doncaster, South Yorkshire, DN4 5PN (EWS)

GB Railfreight Limited whose Registered Office is at 15 – 25 Artillery Lane, London, E1 7HA

Freightliner Limited whose Registered Office is at The Podium, Third Floor, Eversholt Street, Euston, London NW1 2FL

London and Birmingham Railways Limited whose Registered Office is at 41-51 Grey Street, Newcastle Upon Tyne NE1 6EE

First/Keolis TransPennine Limited whose Registered Office is at 50 Eastbourne Terrace, Paddington, London W2 6LX

(together referred to in this paper as the Respondents).

2 DOCUMENTS ENCLOSED

- 2.1 The following documents are appended to this Appeal:
Appendix 1 – The Determination dated 19 May.

Appendix 2 – Network Rail’s Appeal dated 19 May.

Unless otherwise indicated references herein to ‘paragraphs’ are to paragraphs of the Panel Determination dated 19 May 2008.

3 BACKGROUND

3.1 This Appeal is entered, whether or not the Parties accept the accelerated appeal timetable proposed by the ORR on 19 May. In the event however, that the expedited procedure cannot be agreed by the parties Network Rail reserves its right to apply for a further Interim Order.

3.2 Network Rail has already entered an Appeal dated 13 May (amended on 19 May) against the partial Determination dated 12 May which related only to the Week 9 possessions.

3.3 The full Determination dated 19 May differs, as might be expected, from the partial Determination and the Panel Chairman’s letter of 12 May. Network Rail’s earlier Appeal should therefore be read in conjunction with the contents of this Appeal and vice versa. That the two Appeals are interlinked inevitably means that there is duplication of the 19 May Appeal in this Notice of Appeal.

4 SUMMARY OF APPEAL AND REMEDIES SOUGHT

4.1 Following the publication of Network Rail’s Final West Coast Route Modernisation Decision document (NAUM-30) on 2 April seven train operators made references to the Access Disputes Committee (one of which later withdrew). A hearing took place before the Timetable Panel of the Access Disputes Committee on Thursday 8 May. Following a request from Network Rail for an expedited determination of the Week 9 Possessions, the Panel published a partial Determination on Monday 12 May, finding in favour of those Respondents which objected to these possessions and holding that the proposed Week 9 Possessions should not be permitted.

- 4.2 Network Rail Appealed against the Determination by a Notice of Appeal dated 13 May and subsequently amended on 19 May.
- 4.3 Network Rail applied to the ORR for an interim order permitting it to proceed with the Week 9 Possessions. On 15 May the ORR granted an interim order permitting the Week 9 Possessions to proceed, the relevant Respondents having in the interim withdrawn their objection to the Week 9 Possessions.
- 4.4 Network Rail hereby appeals to the ORR against the full Determination pursuant to:
- (a) Condition D5.2 of the Network Code; and
 - (b) Part M of the Network Code.
- on the grounds that the Panel's Determination was wrong in law and on the facts and that on a correct interpretation of the same Network Rail's appeal should be allowed. Network Rail seeks the ORR's judgment that any interim order made by the ORR should be confirmed and that various declarations should be made as set out at paragraph 11 below.
- 4.5 Pursuant to Condition D5.2 of the Network Code, the ORR is the appropriate body to hear the appeal of disputes arising out of an ADRR decision. This position is confirmed in Part M of the Network Code and Network Rail cannot see any reason why this process should be departed from.
- 4.6 Network Rail therefore considers that ORR should hear the appeal. In particular, with regard to Part M4.1:
- 4.6.1 The matters in question are of significant importance to the industry;
 - 4.6.2 The Appellant's reference is not frivolous or vexatious;
 - 4.6.3 There are no issues raised relating to the conduct of the Appellant; and,
 - 4.6.4 It is appropriate for the matter to be disposed of by the ORR, in particular because the ORR's knowledge of both:
 - (a) the issues in dispute; and
 - (b) the significance which the proposed possessions would have on the industry

is a distinct advantage which the ORR has over any other potential appeal body.

5. THE DETERMINATION

5.1 In summary the full Determination held as follows:

General Approach to Interpretation

5.1.1 The ORR's Provisional Order under section 55 of the Railways Act 1993 obliged Network Rail to take

“...full account of the risks associated with achieving the Delivery including...operational and timetabling resources to reduce the impact of possessions on operators.”

Network Rail was therefore obliged to produce an analysis of that impact (paragraph 7.4).

In this regard,

“actions taken by any of the parties that the Panel finds to be at odds with any parties' entitlements, cannot by definition be deemed reasonable, and the Panel's determination of entitlements, or of any prescription of remedy, must take this principle into account.” (paragraph 7.5)

5.1.2 The essence of the Decision Criteria is that they provide the basis by which disputing parties can assess their differences. In the absence of such a dialogue the same Criteria provide the Panel with practical tests of the reasonableness of the parties' behaviour, given that many of the Criteria relate as much to the duties of the parties to each other, as they do to their respective rights (paragraph 18).

5.1.3 The responsibility is on Network Rail to justify each proposal, and to demonstrate with due regard to the Decision Criteria why each amendment to the ROTR strikes the most appropriate balance between the interests of Network Rail and the Train Operator bearing in mind the terms of the Provisional Order (paragraph 18).

5.1.4 When invoking the provisions of PARTP the burden of demonstrating good reasons to the Train Operators why they should acquiesce is on Network Rail (paragraph 29).

TTP102 and Section 3.1.3 of PARTP

5.1.5 In this earlier Panel Determination and Appeal to the ORR it was held that section 3.1.3 (urgent safety and other requirements provision) does not directly entitle Network Rail to take any specific action but merely created a facility to dispense through Consultation with the normal time periods which otherwise must be observed by Network Rail (paragraph 8 quoting ORR judgment paragraphs 20, 21 and 25).

Application of Section 3.1.1 of PARTP in General

5.1.6 Network Rail may use PARTP to propose changes which require individual, rather than a package of proposals to be justified and agreed on an individual basis (paragraph 13.5.2) and Network Rail cannot reach a conclusion (by implication decision under section 3.5.1) before each Train Operator has individually accepted each individual proposed amendment to the Rules of the Route (paragraph 13.5.3).

Application of Section 3.1.1 of PARTP on Week 9 Possessions

5.1.7 As the amendments proposed do not relate to urgent safety requirements or other emergency situations Section 3.1.3 does not apply (paragraphs 19 to 21).

Requirement for Network Rail to give reasons for its decisions under PARTP

5.1.8 There is no explicit obligation on Network Rail to state its reasons for decisions taken under Section 3.5.2 of PARTP. However, the Wednesbury principle¹ applies because Network Rail must take account of the representations of the Train Operators, the Decision Criteria and Provisional Order and therefore Network Rail must give

¹ This principle is usually stated as being offended where a decision making body has reached a conclusion which no reasonable body could make.

details of its rationale. In the absence of such an explanation Network Rail's decision could be construed as capricious, as indeed could any determination of the Panel (paragraph 14).

Failure to Give Reasons/Rationale in relation to Week 9 Possessions

5.1.9 It is unacceptable that the Train Operators have not been given adequate details of precisely how Network Rail propose to mitigate the impact of possession on the Firm Rights (paragraph 25).

5.1.10 The Train Operators have not been given sufficient exposure to Network Rail's rationale as to why it considers having due regard to the Decision Criteria the possessions are justified and their impact on Operators mitigated.

5.1.11 Therefore the Week 9 Possession should not be permitted.

Failure to Give Reasons/Rationale in respect of the other Disputed Possessions

5.1.12 Network Rail has not provided sufficient information and the Possession Request cannot be granted although further dialogue may result in agreement or permit the Panel to grant possessions (paragraph 28 and following).

Individual Possession Applications and the Effect of NAUM-30

5.1.13 PARTP does not contain any explicit provision enabling Network Rail to propose a suite of possessions as a package, or a strategy, as opposed to requiring each amendment to be justified and agreed on an individual basis (paragraph 13.5.2).

5.1.14 Failing to grant any particular possession might affect VHFT's² implementation in December 2008. However, no arguments were put forward by Network Rail as to why this did not require the individual possessions to be justified and accepted by the Train Operators (paragraph 30).

² Very High Frequency Time Table.

5.1.15 The Panel was not required or qualified to comment on the merits or desirability of implementing the VHFT by any given date other than in responding to any argument that one date favours a particular Decision Criterion as justifying a particular judgment on an individual amendment (paragraph 44.7). In relation to XCT the well being of its franchise on a successful implementation of VHFT was not a matter of direct concern.

What information/rationale should have been provided to the Train Operators/the Panel?

5.1.16 The information required by the Panel (and by implication the Train Operators) is:

- (i) The extent of the contractual commitments of Operators to their customers and an appreciation of the acceptable limits of potential disruption;
- (ii) The opportunities to pass during a disruption traffic with special requirements;
- (iii) The measures Network Rail intends to take to preserve key requirements such as safe journey times for schoolchildren, access of maintenance depots, alternative routes for electric traction and for W10 gauge intermodal traffic and access to freight terminals.
- (iv) An indication of the capacity of alternative routes and their use for other Train Operators (paragraph 31).

5.1.17 However, this does not mean that a fully drafted timetable is required but that:

- (i) Train Operators need advice in broad terms of e.g. proposed available train slots per hour and their allocation between each passenger and freight operator.
- (ii) Professional train-planning judgment will provide a reasonable degree of assurance but,
- (iii) When Network Rail gives such comfort it is committing itself to produce a plan which delivers the substance of those assurances (paragraph 32).

6 THE CONSTRUCTION OF THE TRACK ACCESS AGREEMENT (“TAA”) AND THE NETWORK CODE

- 6.1 Each of the Respondents has entered into a TAA with Network Rail. The Network Code is a common set of rules which apply to all parties who have regulated TAAs. The Network Code is incorporated into the TAAs by their terms. Under the Network Code Network Rail is obliged to create Rules of the Route and other systems. While the terms of the TAA and the Network Code and the Rules of the Route are regulated by the ORR, in law these arrangements between Network Rail and the Respondents are matters of contract and to be interpreted in accordance with the usual rules applying to their construction.
- 6.2 Accordingly the object of their construction is to discover from their terms the intention of the parties. That task must be approached objectively and the question is not what one or other of the parties meant or understood by the words used but the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.³
- 6.3 Further, an agreement ought to receive that construction which its language will admit which best gives effect to the intention of the parties as collected from the whole of the agreement, and that greater regard is to be had to that intention than to any particular words which they may have used to express their intent.⁴ Thus the contract must be construed with reference to its object and the whole of its terms.⁵
- 6.4 When the words in the operative part of an agreement are ambiguous the recitals can be used to discover the true intention of the parties. However, clear words in the operative part cannot be controlled by the

³ Chitty on Contract at 12-0

⁴ Chitty on Contract at 12-044

⁵ Chitty on Contract at 12-063

recitals.⁶ Lastly words are to be given their ordinary and natural meaning.⁷

7 PART D OF THE NETWORK CODE AND THE RULES OF THE PLAN

7.1 The non contractual Explanatory Note Part D sets out the procedures by which the Working Timetable, Rules of the Route and Rules of the Plan may be changed. It states,

“Although changes may be made to the Working Timetable at any time, significant changes⁸ in the Passenger Timetable may be made only twice a year, namely at the dates referred to as the Principal Change Date (in December) and the Subsidiary Change Date (in May).”

7.2 Paragraph L of the Note states,

“In its capacity as manager of the Working Timetable, Network Rail is required to make a number of decisions, including whether to accept Bids for new or different timetable slots, how to reconcile competing or conflicting Bids and how to exercise any right it may have to flex a particular Train Operator’s Bids (to the extent that the Train Operator’s service specification allows it). Network Rail must have due regard to specified Decision Criteria when making decisions regarding proposed changes to the Working Timetable and to any application Rules of the Route and applicable Rules of the Plan. These criteria are to be weighed and balanced by Network Rail in light of the particular circumstances surrounding each decision and in certain circumstances Network Rail must also consider whether it is reasonably practicable for proposed amendments to the Working Timetable to be developed and implemented in the time available”.

⁶ Chitty on Contracts at 12-066

⁷ Chitty on Contracts at 12-055

⁸ Significant changes involve for instance the introduction of new services on a permanent basis and do not cover the situation with which is being dealt with here.

- 7.3 The 'Rules of the Plan' are defined by Part A of the Network Code as being the rules regulating for any part of the Network the standard timings and other matters necessary to enable trains to be scheduled into the Working Timetable applicable to that Part of the Network, being rules which specify among other matters train timings etc.
- 7.4 By Condition D1.1 Network Rail must establish and manage the systems necessary to implement the procedures described in Part D. By Condition D2.1 Network Rail must review the Rules of the Plan before the Development Consultation Date, consult with bidders and following the giving of consideration of the same and having due regard to the Decision Criteria, decide what amendments should be made to the Rules. Following receipt of its decision Bidders may refer any matter to the ORR within the time limits set out in Condition D5.1.
- 7.5 Under Condition D2.1.10
- “Network Rail shall include within the Rules of the Plan a procedure to enable amendment of the...Rules of the Plan and consequential amendment of scheduled Train Slots other than as provided for in the foregoing provisions of this Condition D2.1. Notwithstanding the provisions of Condition D2.1.9, Network Rail shall not be entitled to implement any change to that procedure until any appeal against any such change has been determined pursuant to Condition D7.”
- 7.6 Under Condition D2.1.11,
- “Each of the procedures proposed by Network Rail pursuant to Condition D2.1.10:
- (a) shall provide that no amendment shall be made to the applicable Rules of the Plan...unless:
- (i) Network Rail shall have consulted, to the extent reasonably practicable, with each Bidder likely to be affected by the amendment or revision (as the case may be); and
- (ii) Due regard shall have been had to the Decision Criteria; and

- (b) shall be deemed to have been accepted by each such Bidder unless any such Bidder shall, within 5 Working Days of the relevant procedure being sent to it, have referred any aspect of it to the relevant ADRR panel for determination in accordance with Condition D5.”

Condition D6 sets out the Decision Criteria.

- 7.7 Section 3 of the Rules of the Plan sets out PARTP. It states that the procedure will be used by Network Rail to add, substitute or delete engineering access opportunities contained with the Rules of the Route.
- 7.8 By Section 3.1.3 where a need arises to amend the ROTR to cater for urgent safety requirements or other emergency situations, all parties will co-operate in accelerating the normal timescales commensurate with the urgency of the circumstances.
- 7.9 By paragraph 3.3.1 Network Rail can propose changes to any part of the Rules of the Route. Under paragraph 3.3.2,
 - “Network Rail shall notify to all Train Operators affected details of the proposed change including a concise explanation of its reasons. Proposed changes to ROTR arising before publication of the Draft Period Possessions Plan shall be notified by Network Rail in a single co-ordinated document to be issued each 4 weeks.”
- 7.10 Paragraph 3.4 states,
 - “3.4.1 Each Train Operator receiving notification of a proposed change in accordance with paragraphs 2.3 or 3.2 above will consider that proposal and respond to Network Rail within 10 working days from receipt of the notification, indicating:
 - 3.4.1.1 its agreement to the proposed change or
 - 3.4.1.2 details of a counter proposal and an explanation of its reasons or
 - 3.4.1.3 in the case of ROP items such as section running times a request that a joint investigation is carried out.

3.4.2 Any Train Operator whose response is not received within 10 working days will be deemed to have agreed to the proposed change and will forfeit any right of appeal.

7.11 Paragraph 3.5 states,

“3.5.1 Network Rail shall give due consideration to responses received from Train Operators in accordance with paragraphs 4.1 and 4.2 above and shall decide which changes, if any, should be made to ROR/P

3.5.2 In reaching its decision Network Rail shall have due regard to the Decision Criteria in Network Code Condition D6

3.5.3 Network Rail will notify its decision to each affected Train Operator within 5 working days of the last date for receipt of responses under paragraph 4.1 above.

3.5.4 Any Train Operator, if it disputes Network Rail’s decisions may Appeal to a Timetable Panel and any such Appeal...”

8. THE PANEL’S REASONING RELEVANT TO THE APPEAL

8.1 The Panel’s Determination imposes on Network Rail, as the Respondent to the Train Operators’ appeal from Network Rail’s decision, an obligation to demonstrate good reasons for the possession changes it has proposed.

8.2 The Determination appears to interpret TTP102 and section 3.1.3 in effect as prohibiting Network Rail from making a decision under section 3.5.3 unless and until the Train Operators have agreed a possession.

8.3 In the absence of any explicit contractual obligation to provide the Train Operator with its reason for a decision under Section 3.5.3, the Determination relies upon the Wednesbury principle.

8.4 The Determination requires that Network Rail in addition provides information to the Train Operators but does not explain the legal basis of the obligation.

8.5 The Determination does not accept that the package of possessions can be justified under PARTP nor that a package of possessions within

NAUM-30 can provide a reason why in the light of the Decision Criteria an individual possession should be granted.

9. ERRORS IN THE PANEL'S REASONING

- 9.1 *Obligation to present good reasons for change* – This is now expressed in perhaps less onerous form than in the partial Determination. Network Rail refers to its Appeal against the partial Determination in relation to this point.
- 9.2 *TTP102 and Section 3.1.3* – TTP 102 dealt with Section 3.1.3. In that case Network Rail had failed to follow the timetable required by sections 3.3.2, 3.4.1 and 3.5 and had instead treated section 3.1.3 as if it gave Network Rail a right to impose a possession without doing so in an emergency. The ORR's judgment was that Network Rail had no right to impose a possession under section 3.1.3 absent agreement but must go through the standard procedure. It is not authority for the proposition that Network Rail is not entitled to make a decision under section 5.2.3 if it has followed the required procedure.
- 9.3 *The Wednesbury Principle – Reasoning and the Provision of Information* – As was pointed out in Network Rail's appeal against the partial Determination the actual requirements under Section 3 of PARTP are:
- (i) notification of proposed changes including a concise explanation of Network Rail's reasons.
 - (ii) within 10 working days of receipt of Network Rail's proposal the Train Operator must provide details of a counter proposal and an explanation of its reasons.
 - (iii) Network Rail must give due consideration to the responses received having "due regard to the Decision Criteria" and inform the Train Operator of its decision within 5 days.
- 9.4 This is not in Network Rail's submission a situation in which its decisions under section 5.4.3 are subject to the Wednesbury principle as expressed in the Determination. Were they to be so making

changes to the Working Timetable and to any application of the Rules of the Route and applicable Rules of the Plan would become impossible.

- 9.5 There is no explicit requirement in the contract that the information set out in paragraphs 5.1.14 and 5.1.15 above must be provided. As pointed out in Network Rail's appeal against the partial Determination any implication of a contractual term along these lines in the light of the 5 working days available to Network Rail to make its decision having received a Train Operator's response is absurd.
- 9.6 This is indeed evidence of a central confusion in the Determination between two processes. One, is the proposal to alter possessions which must be dealt within the timescales set out. The other is the practical consultation between Network Rail and the Train Operators which allows the development of mitigations over time. The latter process cannot in general be conducted under the timescales imposed by section 3.
- 9.7 The Determination calls in aid the ORR Provisional Order although in fact that Order contained no obligation on Network Rail to provide any analysis to Train Operators in the PARTP procedure.
- 9.8 In Network Rail's submission the requirements imposed by the Panel would make the Section 3 PARTP system simply unworkable.
- 9.9 *A package of possessions cannot be justified under PARTP and the package of possessions within NAUM-30 cannot provide a reason why in the light of the Decision Criteria any individual possession application should be granted* – There is no legal basis for differentiating between individual applications and a larger number of individual applications placed together in a package. The absence of explicit provisions dealing with individual applications placed together in a package cannot in itself mean that a single overwhelming factor judged under the Decision Criteria cannot outweigh all other factors. There is no logical or legal reason for the assertion concerning Naum 30. The need to meet the December deadline is capable of meaning, and in Network Rail's submission at paragraph 10 below means, that under a correct application of the Decision Criteria meeting the

deadline can (and in this case, following consideration, does) outweigh any considerations of the Train Operators to the contrary in regard to individual possessions, always recognising that Network Rail must seek to mitigate as far as possible (whilst still achieving the December deadline) disruption to all Train Operators.

- 9.10 In Network Rail's submission therefore the interpretation of Section 3 and the findings of the Panel based upon the same are mistaken.

10 NETWORK RAIL'S SUBMISSIONS AS TO THE CORRECT INTERPRETATION AND CONCLUSIONS RELATING TO SECTION 3 PARTP

- 10.1 Network Rail repeats its submissions made in section 10 of its Appeal against the partial Determination *mutatis mutandis*.

- 10.2 In respect of the Determination's apparent interpretation of condition D2.1.10 in the Determination, the change to "that procedure" which prevents implementation pending determination is plainly a reference to the "procedure to enable amendment of the ROTR" and not to the implementation of proposed changes to the possessions under condition D2.1.9.

11 Conclusion

- 11.1 Network Rail submits that the Panel's determination was wrong in law and mistaken in its factual and legal conclusions as set out above and that on a correct view of the law and facts the ORR should confirm its interim order(s) and to make declarations that:

- (a) Network Rail gave due consideration to the responses received from Train Operators pursuant to paragraph 3.5.1 of PARTP;
- (b) Network Rail, in reaching its decision on the Possessions, had due regard to the Decision Criteria in Network Code Condition D6;

- (c) Network Rail had no specific contractual obligation to supply the Train Operators with timetable information but in any event had done so to the extent reasonably practicable to enable the Train Operators to bid, and Network Rail to offer, a suitable alternative timetable; and
- (d) the Panel erred in finding for the Respondents at first instance.

Network Rail
27 May 2008