



01 August 2001

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Dear Tom,

**MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS:
ACCESS RIGHTS AND MODERATION OF COMPETITION**

This is a response from National Express Group to your consultation document of 1st June 2001. Some of our individual TOCs are making additional responses, with points of particular relevance to their circumstances.

Responses are given separately in relation to each Chapter, with detailed comments on the drafting of the appendices at the end. But first it may be helpful to comment on three of the “overview” points in your own Foreword, all of which are developed in this response.

We share your view that improved understanding of network capacity and consumption is necessary in order to manage, and optimise, the network better. We are not sure that your proposals will, of themselves, achieve this; indeed their implementation may require a better understanding of the subject than currently exists. But once implemented, we think they will improve management of the trade-off between utilisation and performance.

We support the move towards “trading” of access rights; we do not offer a better mechanism, but fear that your proposed mechanism will suffer from the difficulties inherent in valuing loss of expected profits.

The policy on Moderation of Competition is difficult to evaluate – particularly the cherry-picking element – because of the lack of definition of “cherries”; we would support a fairly wide definition.

We hope this response will be of use and interest to you.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Richard Brown', written over a light blue horizontal line.

Richard Brown
Commercial Director

Comments on Chapter 2 – Access Rights: definition in Schedule 5

In general we much prefer the thrust of the current proposals to the earlier thoughts in the July Provisional Conclusions. There are a few overriding points to make before commenting on a number of detailed points in the chapter:-

- Firstly, the proposals form part of a suite, parts of which have not yet been issued (e.g. Part G, liability and Approval Criteria); we might want further opportunity to comment on the current proposals in the light of the later proposals;
- Secondly, the proposals are written from the perspective of routes with a high measure of standardisation in the service pattern; important parts of the system (especially in Regional networks) do not follow this model, and their rights will require some “free form” drafting; it would be helpful to recognise this explicitly;
- Thirdly, there is a background assumption that capacity is readily measurable, and that capacity optimisation is a developed concept about which most experts will agree; this is simply not the case at present, and cannot be so without a great deal of strategically-led work to determine issues such as what the prime purpose(s) are of specific routes, and what should constitute a “standard path”. It must be for the SRA to determine whether it wishes to embark upon such a strategic review of the routes of the network; but there would clearly be considerable advantage; in particular such an approach would facilitate a scientific approach to assessing the amount of space on the each route which needs to be reserved for performance robustness. One cannot help but observe that the present mess on the WCML would not have arisen had such an approach been followed prior to PUG2 approval. Incidentally, such work would also lead logically to substantial challenge to large elements of some TOCs’ PSR. In the absence of such work, we fear that customisation of your proposed templates will be difficult and adversarial.

Comments on specific sections are as follows:–

2.14 (Maximum journey time). We are delighted that the pathing time concept has been replaced. However, in customising and calibrating Table 6.1, specific pathing time allowances will still be required; if Railtrack still have in mind that generalised figures in the 4 – 5% range will be acceptable (or even more according to paragraph 2.6), negotiations will completely stall. Journey time remains crucial for all TOCs, for a number of reasons and goes to the heart of the access contracts: it is important because of

- resources (extra journey time requires more)
- revenue (time is at the core of all business models for the rail industry)
- public reputation (journey times have been falling steadily since about 1840 but since 1994 have been rising on many parts of the network)

Some early guidance from ORR on acceptable criteria for negotiating pathing time would be helpful.

2.23 (New journey time architecture). We generally welcome this, although we are confused by the stated purpose of Table 6.3 as “protecting against degradation of the network”; Table 6.2 surely achieves this purpose, and we assumed that Table 6.3 was to provide a control on the combined effect of time loss suffered through flex (Table 6.1) and degradation (Table 6.2). If we have misunderstood the proposals, we may wish to qualify our support.

2.31 (Loss of firm rights). Whilst we agree that some current agreements have unduly wide rights as to station calling points, we would point out a significant downside in your proposals. If operators can only propose a new stopping pattern for a train, outside a narrowly defined firm right, by taking the risk that the whole train will be flexed out of recognition in consequence, they will be very reluctant to do so. This will have an ossifying effect on the network by discouraging commercial enterprise and experimentation. Moreover, Railtrack may wish to propose to operators that there are alternative timetabling solutions to particular service issues, but if such solutions do not fit with narrowly defined calling pattern rights, operators may not wish to take the risk.

2.39 (Other Firm Rights). We are pleased to see the reference to retention of platform rights for airport operators. We attach great importance to these.

2.43 (Terminology). It would be helpful if it was clarified in the drafting in every case whether specified rights (or “entitlements” as the drafting now calls them) are maxima (i.e. there is a right to bid and have accepted a lesser number), minima (i.e. there is a right to bid and have accepted a greater number) or absolute (i.e. there is the right to bid and have accepted only the precise number specified). It has normally been assumed that quanta are an example of the first, service frequency the second, and

journey times the third; it would appear that Simmons & Simmons have some different emerging thoughts and the opportunity should be taken to clarify the intention. One can generally infer the intention from the use (or omission) of the term "...and may bid" in relation to additional rights; but it would be much better to define the intention positively.

2.49 (Network Code). Given our earlier comments on the need for some free-form expression of non-pattern rights, we think it would be unwieldy to try and list all operators' rights within the Network Code. However, a linked database (perhaps accessed through the Railtrack web site) would be a useful management tool.

2.51 (Detailed comments). Some Detailed comments on drafting are given in an appendix to this letter.

Comments on Chapter 3 – Changes of rights over time.

We note that policy is now decided and that consultation is about implementation. Generally we do feel that an acceptable position has been reached. We have no comments on proposed Part J of the Network Code.

Comments on Chapter 4 – Moderation of Competition.

If we have understood the proposals correctly, the new regime can be summarised as

- Basically, no protection except where existing protection is "hard wired" to a date later than the MOC2 expiry date;
- Purchasers of new or amended rights can apply for protection if they can make a case based on one of two criteria, investment or cherry-retention;
- TOCs may submit existing flows for ex ante protection, using the same two criteria; (Paragraphs 4.6 and 6.1 read quite grudgingly on this, whereas Paragraph 6.10 reads more generously)
- TOCs may also apply for ex post protection as and when a potential new entrant seeks new competitive rights.

Assuming this analysis is correct, we would first make the following general comments on the thrust of the policy:-

- Given the SRA's policy on open access, as articulated in the Strategic Agenda, of "revisiting the goal of ever-increasing on-track competition", the proposed ORR approach to MOC3 appears to be high-risk; depending on how tightly the criteria are drafted, the likely immediate result will be a reduction by some orders of magnitude in the number of protected flows;
- Whilst it is arguable that much of the protection within MOC1 and MOC2 was needless (the number of protected flows reduced by a large proportion between MOC1 and MOC2, very few of the flows losing protection became contested, and few if any TOCs reached the ceiling thresholds for protection during MOC2), it would be brave to conclude that a similar effect will be necessarily be observed from the transition to MOC3, which as currently proposed will see the elimination of much MOC protection;
- The criteria of investment and (anti)cherry-picking we support in principle, subject to comments below;
- We suggest there is another criterion, which should be to prevent over-concentration of service on particular flows. When there is competition for a particular flow within a route, the battle for market share on that flow incentivises both operators to put disproportionate resource and effort into that flow, at the expense of other flows on the route which are not contested. It is arguable, for example, that [TOC] stop more trains at [X] than they otherwise would (at the expense of journey times to [Y] or [Z] in order to swing market share from [Other TOC], or that [TOC] and [Another TOC] overprovide [W] with fast London services (at the expense of journey times from [area] or the service pattern at intermediate stations). Whilst these examples may not matter much because they are dense service patterns anyway, a similar effect on less dense services could be damaging. We suggest, therefore that where the likely result of competitive entry would be over-concentration of service on a particular flow at the expense of other flows on a route, then this should be an additional MOC criterion. The scope is clearly greater where the incumbent is operating a level of service on the route as a whole materially in excess of PSR and is in a position to switch resources to overserve the contested flow.

Turning to points made within the document, we would comment as follows:-

4.9 (Protection of Investment). We do not understand the comment that “the mere fact that investment would not be profitable without protection from competition would not be sufficient reason...for protection”. We suggest that there should be a presumption that investment which would be profitable given MOC protection, but unprofitable without should normally warrant a proportionate degree of protection, subject of course to the points you make about benefits to passengers. However, the key word is “proportionate” and we would like to see room for new operators who are operating a significantly different service on a flow; for example, an operator running services from A to D via B and C may wish to provide new direct services from B and C to a point E. The most logical way of doing this would be to extend its trains from D to E, but it is prevented from doing so if the direct flow from A to E has absolute protection; in this scenario we would suggest that protected flows should be on the direct or quickest route, and that alternative (and significantly slower) options could remain unprotected.

4.11 (Control of cherry picking.) There is very little definition suggested as to what is meant by “cherries”. The document discusses the concept in terms of “profitable, less-profitable or even loss-making routes”. In practice, “cherries” are more likely to be flows than routes in the railway context, but the concept of analysing the profit (or loss) of franchised TOCs to route or flow level is almost meaningless given the structure of track access charges and franchise payments. This is a serious weakness in the document, and it is impossible to know whether “cherries” are envisaged as unusual and exotic fruits found only in small numbers and exceptional circumstances, or as part of everyday life with a bunch to be found in every TOCs fruit bowl.

The inference from this lack of definition is that cherries are to be defined through emerging case-law. This is unsatisfactory; if TOCs interpret “cherries” differently in submitting their ex-ante lists, those who have been sparing will resubmit longer lists and the process will re-iterate wastefully until the definition has become clear. If TOCs choose not to submit ex ante lists but to wait until another TOC actually tries to contest one of their flows, there may be two perverse outcomes:-

- Either the uncertainty and risk may inhibit the development of perfectly acceptable new services; or
- the proponent of an unacceptable new services, and the incumbent, will be put to needless cost and distraction in fighting the point.

We suggest that more definition (and examples) should be provided in the final policy. Our own view would be that on routes where the service offered is at or close to the PSR, virtually all flows of any consequence should be regarded as potential “cherries” and that any new entrant wishing to contest any such flow should demonstrate that the generation/abstraction ratio is high. On routes or parts of routes where the service is materially above the PSR level, cherry-picking should be regarded as the selective targeting of particular flows, where the economic response from the incumbent is likely to be service withdrawal (reversion towards PSR) affecting the wider route (or part-route).

The objective should be to reach a definition of “cherry” that is sufficiently clear to remove doubt as to whether a particular flow will fall within the definition; if this is not possible, then there is a case for defining all cherries ex ante, i.e. with MOC1 and MOC2 style long lists.

Paragraph 4.15 (Form of protection). It is not clear whether the control generally envisaged is prohibition, or whether – as per paragraph 4.12 – the general control is compensation from the new entrant to the PSR incumbent (whether channelled via Railtrack or not). We are nervous of the compensation route. Firstly, the mechanics of determining the payment will be very difficult and the process time-consuming, costly and adversarial; secondly, the amount determined will always turn out “wrong” in the light of events – this will either unbalance the market or (if error correction mechanisms are allowed) lead to annual battles about the size of error; thirdly, if the competition is allowed (but compensated), the service concentration phenomenon to which we have earlier referred may also occur.

Comments on Chapter 5 – Methodologies for Compensation.

We have in part commented already in the response on Chapter 4. We have further comments as follows.

5.3 (Calculation of compensation). In principle, there is no doubt that the value-based approach is preferable. But we have reservations about its practicality in the rail context. The analogy is with compulsory purchase of property under planning law. In theory the value of a piece of estate is the net present value of the expected profit stream if the estate is let; in practice however there is a wealth of knowledge of property values, and a particular valuation can be done on the basis of “comparables”,

without recourse to the underlying “NPV of profits” calculation. In the context of rail paths, there is no such knowledge base of “comparables”, so it will be necessary to estimate profits. This calculation is going to be highly dependent on the assumptions made and could vary by orders of magnitude depending on, say, the assumptions made on market growth. We fear that the likelihood of parties agreeing a valuation is low.

5.11/5.12 (Value Based Approach). Paragraph 5.11 graphically illustrates (unintentionally no doubt) the horrors of the compensation route by using expressions such as “average fare revenue per train...for each relevant flow” and “specified assumptions from recognised industry approaches”. These things simply do not work at such a level of disaggregation.

We do not accept that “other” costs will be insignificant. Resource plans are optimised at most timetable changes, and an increase in journey times would generally lead to an increase in both rolling stock and crew diagrams.

5.13 (ditto). We also disagree with ignoring the competitive effect of the new entrant’s service pattern. The new entrant is likely to target lucrative times of day, and abstraction can be expected to be higher than average all-day loadings. Furthermore there is no mention of the effect of price competition (which is likely to arise in a contested market). The net effects of this (i.e. after allowing for the volumetric growth) should be an input to the calculation of compensation.

Comments on Chapter 6 – Implementation.

6.1 (Nomination of flows). We do not like the optional and timeless “if operators consider it necessary” approach. As indicated earlier, we would urge clarification of the definitions so that operators understand the criteria simultaneously and submit flows to a set timescale.

6.4 (documentation). We would support the publication of the protected flows within the Network Code.

6.8 (Access Protection Payments). We agree that payments should be channelled through Railtrack.

COMMENTS ON THE DETAIL OF APPENDIX B

TABLE 2.1 (QUANTUM OF SLOTS)

- 2.1 Delete "up to". The Operator should simply be entitled to the number of slots.
- 2.2/2.3 The reasons (and limits) for "extra" flexing rights need to be stated; they are far from obvious.
- 3.1 This provision is not very clear. In order to provide for the majority of routes and localities, there needs to be an explicit ability for a more "free form" description. The "note to table" should be greatly expanded to indicate that bespoke descriptions may be essential.
- This table and 3.2 are the only rights being offered to Operators as to timing of trains. They are all contingent on adherence to the "Regular Calling Pattern". As drafted, the Regular Calling Pattern Provision may be hard to apply to large swathes of the timetable. If that happens then all rights to timing disappear too.
- The table seems to assume a significant number of trains-per-hour. In fact many routes run on one or less trains-per-hour but still need protection and still have onerous PSRs. It is likely that only a free-form description could accommodate the need.
- Specifically, there needs to be a provision to allow a certain number of trains-per-hour for high volume TOCs. There also needs to be the ability in column 2 to specify "routes", "groups of stations" or "sections" where the service interval is applicable.
- Despite the reference in 5.3, section 3.1 makes no mention of Specified Equipment.

TABLE 3.2 CLOCKFACE DEPARTURES

The table needs to be able to describe the nature of the clockface concerned. Is it conventional, e.g. 10xx, 11xx, 12xx, or 1014, 1044, 1114, 1144 etc or irregular e.g. 1000, 1025, 1100, 1125. Column 3 describes the "number of clockface departures per hour". This is a somewhat obscure description and should be deleted in favour of "description of clockface". As drafted, Railtrack could offer xx05, xx10 and xx15 every hour as a three-train-per-hour clockface.

There needs to be the ability to describe clock faces which may not operate on certain hours or in which no trains exist for certain hours.

TABLE 3.3. FIRST & LAST TRAINS

We assume that these provisions will replace the tables presently in schedule 4.

The wording in 3.4 should read "..... entitled to operate trains WITHIN the times". As drafted there is a clear implication that the operator is banned from operating outside these times which is not the case, or certainly should not be.

TABLE 4. CALLING PATTERNS

This calling pattern provision will work well for commuter operations which have great regularity and for branch lines where each train calls at all stations as a general rule. Elsewhere (possibly 50% of the network), some type of looser format will be necessary. It would be worth doing trials on "Strategic" or "Regional Main Line" routes to determine workable standard formats to minimise the amount of "pure text" description. We would be happy to co-operate with such trials.

- 4.2 Amend to ".....Railtrack may insert pathing time for reduced calls subject to the decision criteria. "
- Within this clause there is one of many redundant references to Railtrack's right to flex; such redundant references are unhelpful as they imply there is an additional right to flex on top of that in the Decision Criteria.

4.4 ADDITIONAL CALLS

It is totally unacceptable to have all the Additional Calls as right-to-bid. Operators have PSR requirements for minimum numbers of calls at most stations. Railtrack must be required to provide that minimum number provided the operator bids for that number.

Railtrack could then have a flexing right subject the Decision Criteria to move stops from one service to another if absolutely necessary to validate a workable timetable. These rights to calls would need to be set out in tabular form or stated in text. Such a provision must be inserted in these proposals.

TABLE 6.1 JOURNEY TIMES

The reference to Station Dwell Time should explicitly state that this is the Rules of the Plan entry and not the actual in any particular timetable. Extended Station Dwell Time can often occur in lieu of Pathing Time and can sometimes be hidden.

The definition of Pathing Time should be extended to include "... extra Station Dwell Time added or requested by Railtrack over and above the Rules of the Plan allowance...".

There needs to be a process to administer this proposed provision. In the event that the various relevant Allowances change, there needs to be a process to amend the Journey Times. There will hopefully come a time when these change relatively often (line speed improvements, recovery time associated with route enhancements etc). If that is the case, there could be a need for all the Journey Times to be reviewed twice a year. Such a process could either be in-built or subject to Supplemental Agreements. An ORR view would be appreciated.

TABLE 6.2 FASTEST JOURNEY TIMES

The Criteria Document needs to be very clear as to what is intended. Given clear guidelines, we see this as a way of protecting against Network deterioration and upwards creep of allowances and a limited protection against congestion. It may well be possible for Railtrack to offer the requisite single slot while all others may be heavily padded by Pathing Time. Guidance as to the linkage between 6.1, 6.2 and 6.3 are essential.

TABLE 6.3 MAXIMUM JOURNEY TIMES

This appears to be protection against pathing time, allowances and congestion. Again clear guidelines are essential.

Without sight of the liabilities consultation and the consequences of failure, further comment is difficult.

TABLE 8.1 PLATFORM RIGHTS

There needs to be a separate table for firm platform rights (for the likes of Gatwick Express) and contingent rights (e.g. Central for convenience at Birmingham).

TABLE 8.2 CONNECTIONS

This proposal needs to be compatible with the provisions in the National Rules of the Plan which presently cover the issue in part. Also, many of the margins referred to are actually in an industry database which must be acknowledged.