

Sunil Gupta,  
Model Clauses Project,  
The Office of the Rail Regulator,  
1 Waterhouse Square,  
138-142 Holborn Bars.  
LONDON EC1N 2SU

By fax. 0207 282 2042.

Tony Crabtree,  
Access & Planning Manager,  
Wales & West Passenger Trains Ltd.,  
WW 125, Brunel House,  
2 Fitzalan Road,  
CARDIFF, CF24 OSU.

02920 430251 430245 fax.  
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Dear Sunil,

### **SECOND CONSULTATION ON MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS**

Thank you for your letter of 19<sup>th</sup> April and the attached second consultation on draft model clauses. Thank you also for arranging the most useful and informative seminar last week.

This response compliments that already sent by the Prism group and goes into more detail on certain issues and reflects some of the specific details pertinent to Wales & West and also for Cardiff Railway Company who have asked me to represent their interests too.

In general I find the tone and content of your April document to be most acceptable. I will generally be adding to what you have proposed or possibly stressing our approval of your proposals where I believe that they may be under threat from other quarters. If I make no comment on an issue, it is because I am satisfied with what you say. As is usually the case with our company and its widespread interests and characteristics, there is very little that is not relevant to us.

I will take your headings in order:

### **INTRODUCTION AND PROCESS**

I agree that the implementation of the Model Clauses should be a "big bang" approach. It is important that the necessary. Detail work is finished in advance of implementation. .

In particular, I am concerned about schedule 5. The creation of templates for access rights will need to be a negotiation in its own right because there will be operators who find the templated format degrades some characteristics of their rights *in* some way, (Conversely there may be some who do not object because they will find their rights enhanced in some subtle way!). Once the templates are agreed, it will be a matter of detailed negotiation with Railtrack as to how the rights are converted into the new format and the figures etc entered. As I said at last week's seminar, I do not believe this to be a trivial task and it needs to be factored into the implementation timescales.

I also think that we need to be absolutely clear as to the phasing of the introduction of Model Clauses with the new franchise agreements, the renegotiated track access agreements and possible boundary changes to these. As I understand it, the franchises in the first tranche keep their existing boundaries. This will not be the case with some in the later rounds and the model clauses need to take account of the need to move boundaries, (It could be argued that the Charging Review is affected more by this).

## **ACCESS RIGHTS AND CAPACITY CONSUMPTION**

### **DEFINITION OF RIGHTS**

#### **TEMPLATES**

I support the principle of standardised templates for access rights as I mention above. However, there needs to be a sufficient variety of template methods to cover the genuine variety of needs, characteristics etc that an operator needs to run its business and meet its contractual obligations with sSRA. I strongly support your view in 3.9 that a variety of templates is needed. In the case of many TOCs, particularly the ex Regional ones, several templates will be needed for each to cope with the variety of routes within their portfolio. This may also be the case with others such as Anglia where they took a mix of ex InterCity and Regional services.

#### **FLEXIBILITY**

In the case of Wales & West, there needs to be enough flexibility in the description to cover the minor changes that happen between timetables. Often these are reactionary changes made in the aftermath of the timetable offer. They do not make any material change to capacity consumption or performance but would need extensive use of Section 22 amendments late in the process if there was not sufficient flexibility in the definition of the Rights. We would be seriously concerned if the model clauses contained no templates with the appropriate flexibility, I should like to discuss this further with you and would be willing to assist in the drafting of the appropriate templates.

#### **PATHING TIME**

On all our shared routes we are faced with reacting to other TOCs' services so we need a lot of flexibility in our rights to cope with unpredictable nature of the variations we face. There is no point having a service "hard-wired" if it essential that it interacts properly with the relevant InterCity service. In order to provide protection against the risks inherent in such a situation, we need some overall protections. Our principle overarching protection is the Pathing Time cap. This gives huge flexibility to Railtrack in where they can flex (or more accurately - "stretch") our services but worsenments in one area need to be balanced by betterments elsewhere once the cap is approached. We also need journey time protection such that certain journeys have a limit on the "stretch" that can be applied. The Pathing Time cap should ensure that the journeys do not all get "stretched" at the same time.

The Pathing Time cap is vital as being directly related to our ability to meet the PSR we believe. As "white space" is consumed by other operators' trains, we believe that Pathing Time will increase at a slightly raster rate. Our need to apply for PSR derogations (to avoid PSR breaches) will also increase in direct proportion. Such a movement is unacceptable to sSRA who regard PSR as paramount. It is also unacceptable to us because of the drift towards longer journey times, worse connections, extra resources and loss of revenue, Railtrack regard Pathing Time as their "safety valve". Unfortunately we have no means of dissipating the pressure when the valve blows. When Railtrack is unable to contain the pressure, it is because they have not cased the Network pinch points in advance of accepting new traffic. The remedy is with them. If they have problems with incentives and remuneration, then that is unfortunate, but at least the charging review offers an opportunity to put thing right.

The new draft franchise agreement is no less rigorous than the present. If we adopted the Railtrack offer of only quantum rights, we would probably be in default with SRA sooner rather than later. That is not to say that we disregard *the* worries of Railtrack. I accept that we can never get a track access agreement which will forever guarantee 100% PSR compliance. That is a risk we face. Similarly, Railtrack must accept a Pathing Time cap and face a similar risk that on occasions they must take action to uphold our rights. They cannot expect an agreement which is 100% sure of easy compliance. What we must bout do is take on a share of the reasonable risks. We cannot do this until we have seen and studied the new franchise agreement draft.

#### **RULES of ROUTE/PLAN**

In the previous paragraphs, I talked about Pathing Time and journey time. It is important to constrain the ability of Railtrack to let infrastructure or Rules of the Plan changes increase journey times. If such changes reduce capability (depending on what operators value), then they need to be fed through the proper channels i.e. Network Change. I fully agree that the Rules of the Plan need to be made more rigorous. The present level of definition of certain key terms is still inadequate. This comes to light at Timetabling Committee when the Rules of the Plan are under scrutiny. They are frequently found wanting. The "National Rules of the Plan" initiative is to be commended but should be speeded up in an attempt to get the material deficiencies ironed out and standardised. The process should not however destroy the very useful working arrangements embodied in the Rules. They are an intensely practical working document as well as a target for the lawyers!

I agree with you that access rights should be subject to the agreed Rules of the Route and Plan. In this respect, it is vital that the change processes are rigorous. I appreciate that the process is difficult and hugely multilateral, but there has been a tendency for some changes not to be highlighted as well as they might have been in the past. This has included damaging proposals which have sometimes been spotted and at other times escaped unnoticed. I am pleased to say that in recent Timetable Committee hearings we have noticed the rigour of the process improve significantly and I believe in Railtrack's desire to improve further.

## CALLING PATTERN

You make a suggestion of a right to fixed calling patterns. While this is useful up to a point, we would be very worried about being tied to fixed patterns. Our PSR is not compatible with having fixed patterns on all services. Some of our Journey times would be broken and our connection obligations could be breached if we were forced to make only particular sequences of calls on all services. Calling patterns are a very valuable way of optimising our attempts to find PSR solutions and similarly provide excellent solutions to pathing problems etc. For example, if we are faced with catching up a slow timed freight heading north from Newport to Shrewsbury, then we can insert some of our PSR stops in it and take them out of another train. This train may then run north faster and thus meet another PSR or business criterion. This is not to say that station calls are at our whim, but they do at least provide valuable flexibility. The same applies to Railtrack. Their flexing right includes the ability to move (or request the move of), add or delete stops. In order to contain the possible unacceptable consequences, we have list of minimum numbers of stops per station to prevent us being flexed at the expense of our PSR where the Decision Criteria might not be strong enough in our favour. Of course, where it is desirable, we try to stick to certain patterns and adopt "standard hours" wherever it is expedient. In many areas we are highly active in trying to promote the use of standard hours. This may, however require us to omit stops where we have been held outside a particular location (eg Westbury) but wish to regain a pattern departure (e.g. from Romsey and Southampton). We may miss stations (e.g. Dean and Dunbridge) to achieve this.

## ORIGIN-DESTINATION DESCRIPTORS

To list our rights by origin-destination as you imply would give Wales & West a big problem in view of the number of such pairs. In our most recent SX timetable, there were 240 such pairs for only 630 trains, For SO and Sundays there will be more again. Some sort of abbreviated way, as we have at the moment would be the only practical way of tackling the situation.

## TIERED RIGHTS

I am sceptical about the value of this proposal. I think it attempts to make too much of the status of all the desirable "characteristics" of the exercise of quantum rights which are presently regulated by D4 processes. I agree that there are quantum rights (i.e. train miles on specified routes) and Firm Contractual Rights to characteristics (e.g. quantum of station calls or clockface rights) and "other characteristics. I cannot see how they need to be tiered. I think their hierarchy speaks for itself. I believe that guidance notes or a code of practice may help, but I suspect that any attempt to tabulate the rights as suggested will be a hopeless task of dubious value.

## REVIEW OF RIGHTS

I believe that compulsory purchase by Railtrack would utterly destroy the ability of franchisees to raise funds. It is a fundamental plank of our business that our ability to earn - our tools of the trade are secure. It would be desirable to make it easier to trade rights at TOC discretion. Wales & West has done some limited trading in the past with Railtrack and we would value the ability to engage in such trading again when the need arises. If the issue was one of contention with Railtrack then we would invoke Schedule 7 Part 9, but the principle of this mechanism can be operated quite easily in a non confrontational situation which is to be preferred and still results in a supplemental agreement.

I think the main concern with this issue is that TOCs could hoard unused rights with some devious intent. I think that the concern is largely overstated. If a TOC has unused rights on a congested section of railway it is quite able to agree with Railtrack that it will not exercise them for a particular period. Thus Railtrack may sell in excess of 100% capacity for that period with confidence. Wales & West has no problems with such isolated incidences. Where the incumbent is happy, then we bid across their rights and the general good is served. If, however, an operator held unused rights to slots which, if exercised would fill the railway and they refuse to co-operate then there is a different scenario. If they refuse to confirm that they will not exercise them, then they could be said to be blocking progress. I think that such a scenario, if it ever emerged would rapidly be sorted out when higher authorities with wider interests started to apply pressure.

If a particular operator wishes to pay for an enhancement and wishes to have rights over the infrastructure with a particular performance buffer, then they should ensure that the Rules of the Plan are amended to reflect the desired headways or whatever device is wished. It is unrealistic to have unused PATHS for performance buffers. If the paths are timetabled and then not used by the operator for 90 days, they are lost! The performance buffer needs to be more tangible. Another device is to specify in the Rules of the Plan some sort of maximum usage (e.g. 6 paths out of 7 at Birmingham or max 90% into Paddington). On a multi user railway, these devices all seem somewhat lacking.

If there was to be a mechanism for trading rights, we would prefer it to be via Railtrack as a central broker. We can see problems if TOCs try to trade rights with each other. TOCs are, of course free to "use" each other's rights using the device of through trains. In this case, the rolling stock is traded instead but achieves a similar objective.

## **CAPACITY WARRANTY**

I believe that this is essential. If Railtrack have sold rights with certain qualities, then they should warrant that the desired paths can be delivered to the specified quality. If they are unable to do so, it must indicate that the capacity is not available. They should then have made some suitable enhancement prior to attempting to timetable the rights. (See my comments under "Pathing Time"). To sell something and then not deliver it or guarantee compensation is untenable. In the case of Wales & West, failure to deliver a slot or to deliver it at poor quality will probably cause us to contravene PSR. For all TOCs, the failure is at the very least going to lead to a business loss.

I do not believe, as I have said many times that Railtrack (or anybody) can give a totally accurate assessment of "capacity take". There will always need to be a certain tolerance level on the accuracy of the assessment. This will be a wide tolerance on a multi-user two-track railway and may be a very fine tolerance on a single track branch line with one loop. The capacity consumed by a particular batch of rights will depend on how the operators choose to express their rights in a particular year amongst other things. However, I believe that it should be possible to state roughly what capacity is left for particular uses on sections of route AFTER the timetable has been prepared. Where the "white space" is very low, it could be argued that performance should dictate that no more rights were sold. If the line is so congested for capacity to be under question, I would argue that the performance risk was already too great. No more rights should be sold until there has been an enhancement to ease the main pinch-point.

I approve of the production of consolidated agreements.

## **OUTPUT STATEMENTS**

I fully support the proposal. In general, I think that operator based statements are needed in order to reflect the particular qualities that each operator values. On a multi operator route, the needs of different operators may be opposed and a route statement would probably never get to be agreed! Besides, our track access agreement is bi-lateral. If output statements are created, there needs to be an equal reduction in CRR, Account Plan and related processes. The current overlap between CRR, Account Plan, NMS and IOS is presently too great and causes loss of focus.

The sorts of other issues that matter to us are:

- possession strategy and timetabling. Can Railtrack commit to a possession plan for the route which will allow ease of timetabling and long periods with no disruption?
- Can we ensure that where infrastructure failure is not compensated by schedule 8 (e.g. loss of bay platforms) there is a performance and availability guarantee?
- General behaviour in working arrangements. We need to see the proposed licence modification before we decide if we need a defined output.

## **NETWORK ENHANCEMENT**

I have already covered a number of related issues and agree in general with what you propose, I have difficulty with the attempts to rely only on outputs. While this is fine in theory, there are many other considerations. In almost any other industry, I would agree. However, in other industries, the factory is not also the shop window. The input is critical because we may get the output we seek at the expense of some other unrelated output. Similarly, another operator may get the output they desire at the expense of Wales & West because of the method of input chosen. We cannot get away from the fact that inputs and outputs are of vital concern to all parties where time characteristics are relevant. While we may not care about the design of point motors or fishplates, the track layout and signalling plan is not a mere input. Similarly, the Rules of the Plan entry (the "output") are mere disembodied words without the accompanying physical layout. Without becoming too engaged in Railtrack's concern, I cannot accept that the inputs can be ignored: (Incidentally, I am not sure how your para 5.7 is worked out. The examples quoted seem to relate more to capacity than timings.)

You ask in 5.13 about consultation. As I have said above, inputs and outputs are linked in the iterative cycle and I see no alternative to consultation at nearly all points of the process from 0 to 5. I expanded upon this in my response to Railtrack on their document about TOC input to create enhancements on Railtrack engineering proposals. I can forward this if you wish.

You asked for detailed comments on how users derive benefit from enhancements. You ask for this to consider charging users other than the "Proposer". As I said at the seminar, where do you draw the line? An enhancement to a piece of line may enable greater capacity or better speed. There will be clear benefits to certain trains passing over that line. However, the line may feed into a congested location some distance away. Because of the new found flexibility on the piece of route, it may be possible to time trains into the congested station to greater advantage. It may enable trains to get in earlier and thus make connections, etc. The affected operators at thus

congested station may not even travel over the upgraded line but could see greater benefits than the operator(s) who does. The network benefits of any enhancement will always be felt over a wider area than the enhancement itself. The logical conclusion to the proposal is that a giant Moira run must be done for each change and every TOC charged (or refunded) accordingly. I can just imagine Scotrail's reaction when they have to pay a contribution to a line speed improvement at Shrewsbury. The only relatively certain outcome is that a user taking extra quantum rights should pay - but if they were taking new quantum rights they would pay anyway. A clear threshold is going to be needed if any other contribution criterion is to be sought. Wales & West is a TOC which has suffered degradation of timetable quality as the Network has become more congested. It will take a lot of enhancements before quality is restored to that at day one. Only once quality had been restored and exceeded for a suitable time would I even consider that contributions should be discussed.

### **LIABILITY AND REMEDIES**

Again, I agree with your general sentiments.

You ask about liability in the event of breach of another obligation. If the Access Agreement contains a requirement or a promise then it should be delivered. If it is not then at the very least, the business loss should be recovered subject to the usual conditions about consequential loss. Liquidated damages are appropriate and should be applied as widely as possible.

There needs to be some sort of materiality threshold to avoid small claims (to and from Railtrack) blocking the system. The ORR proposal for a "behaviour" licence condition should sweep up the minor concerns.

Tony Crabtree