
An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference ADP10

(following a Hearing held at Kings Cross on 2nd August 2005)

The Panel

John Czyrko: elected representative for Franchised Passenger Class, Band 2
Julia Glenn: appointed representative of Network Rail
Bil McGregor: elected representative for Franchised Passenger Class, Band 1
Nigel Oatway: elected representative for Non-Passenger Class, Band 1

Panel Chairman: **Sir Anthony Holland**

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked, by Freightliner, on behalf, of both Freightliner Limited (FL), and Freightliner Heavy Haul Limited (FLHH) to rule on a matter carried over from the determination of the Timetabling Panel in its Decision no.1 of May 2005.
2. In that determination, the Panel had ruled on whether a range of possessions proposed by Network Rail and contained in Major Project notice **West Coast Route Modernisation B Final MPN Dec 2005 to Dec 2006**, dated 28th January 2005 should, or should not, be included in the “*applicable Rules of the Route*”.
3. In the course of that hearing, FLHH had raised a point of principle

25 *“In respect of NV80, Freightliner Heavy Haul advised the panel that the only outstanding issue related to the running of the 6M28 12:00 Mossend to Crewe service on each Saturday during Period D which will require to be re-routed. FLHH advised the Panel that it had received proposals from Network Rail for the train in question to be re-routed over the ECML. This was potentially acceptable in terms of the service provided to FLHH’s customer, but would incur FLHH in additional costs estimated at £1,100 per occasion. FLHH wished to make its agreement to the possessions in question conditional upon receiving an undertaking from Network Rail that it would meet FLHH’s additional costs.”*

4. The Timetabling Panel had considered that this was a matter of interpretation of the legal entitlements of the parties that raised issues that were outwith the matter before it. The parties (FLHH & Network Rail) were therefore given directions as to how to progress the matter, as follows:

26. *The Panel determined that, prima facie, and in the absence of much supporting evidence, such an offer of a re-routed service appeared to be a reasonable response to FLHH's concerns. It would be appropriate for both parties to plan on the basis that this would be the way in which this train would operate during the possessions in question, and that FLHH's objection to the relevant possessions should be over-ruled.*
27. *In respect of the matter of Network Rail meeting FLHH's additional costs, the Panel was aware that this matter had previously been considered from two perspectives, namely*
- 27.1. *there may be occasions where it is "politic" for parties to reach an accommodation (e.g. to save one party harmless), as a consequence of which all involved have the chance to adopt a course of action, which overall implies lower/lowest levels of cost /disruption;*
- 27.2. *rights to compensation/liquidated damages are generally set out in individual Track Access Agreements.*
28. *In addition the Panel noted that there is a high level working party currently considering issues in relation to the alternative routing of freight services, which may also address matters of additional costs.*
29. *The Chairman directed FLHH that, if it wished to pursue the matter of such additional payments, it would need to do so in the form of a separate argument as to its view of the legal entitlements set out in the relevant Track Access Agreements. The Chairman therefore invited FLHH to arrange for its legal advisors to submit "bullet point" arguments setting out the reasons why it considers that*
- 29.1. *it has an absolute right to insist on delivery of the specified timings and routing of 1M28;*
- 29.2. *any agreement to waive this right may be contingent on additional payments, and that such additional payments*
- 29.2.1. *are provided for within its Track Access Agreement, and/or*
- 29.2.2. *are reasonable, and /or*
- 29.2.3. *are not precluded by its Track Access Agreement.*
30. *FLHH's bullet point arguments should be submitted to the Committee Secretary by 31st May 2005, and copied to Network Rail. Network Rail should then arrange for an appropriate response to be prepared by its legal advisors, and supplied to the Secretary (copy to FLHH) within 14 calendar days of the receipt of FLHH's response. The Chairman will then issue Directions as to how any outstanding differences should then be resolved in accordance with the Access Dispute Resolution Rules.*

5. In making representations in response to these directions, FL had included instances in respect of both FLHH's service and other inter-modal services operated by FL. In the light of those representations it was apparent that this matter related to a specific point of principle, which, whilst exemplified by the circumstances surrounding the diversion of the 6M28 12:00 Mossend to Crewe service (and the resulting additional costs to be incurred by FLHH) concerned the broader interpretation of the FLHH Track Access Agreement, rather than the narrower issue of the operation of Part D of the Network Code. For this reason it was appropriate that it should fall to be determined by an Access Disputes Panel.

6. That said, the Panel made clear that any interpretation that it might make of the point of principle, whilst it might inform the parties in their future compliance with the provisions of Network Code Part D, was without prejudice to any right of recourse the parties may have under the provisions of Network Code Part D, including the Timetable Appeal Procedure (Condition D5).

A Summary of the Arguments

7. The Panel was disappointed to note that, in its representations, FL had not complied with the directions given in respect of either the substance or the format of the arguments to be advanced. In particular the Panel regretted that FL had opted not to seek legal advice, but acknowledged that that was a matter for FL's discretion.
8. **In support of its case FL argued that :**
 - 8.1. the trains in question are the subject of Level 1 Rights; Train Slots conforming to Level 1 Rights are a legal entitlement.;
 - 8.2. because the services have Level 1 Rights, any circumstance which, at the instigation of Network Rail, makes it impossible to provide Train Slots that comply with those rights, constitutes a breach of contract.
 - 8.2.1. A breach of contract requires that the Innocent Party should be compensated for Relevant Losses (Track Access Agreement Clause 8.2);
 - 8.2.2. Network Rail has no entitlement, within the terms of the [Freight Model Clause] Track Access Agreement, to take possessions;
 - 8.2.3. the Track Access Agreement incorporates the Network Code,
 - 8.2.4. the Network Code *“does not lay out an entitlement of either party to Firm Rights in the case of the Train Operator or in the case of Network Rail an entitlement to implementing changes to the Rules of the Route (which are in conflict with a Train Operator's Firm Rights)”*.
 - 8.2.5. *“the Network Code lays out a process by which Network Rail can propose changes to the Rules of the Route to the Bidder (Network Code Condition D2.1.2), the Bidder has the opportunity to make representations or objections (Network Code Condition D2.1.3). Network Rail then makes a decision on the changes to the Rules of the Route it wishes to implement having considered any representations made by Bidders and having due regard to the Decision Criteria (Network Code Condition D2.1.4).”*
 - 8.2.6. *“Whilst the Decision Criteria is a list of criteria, none of which necessarily has priority over any other, it is not a list of absolute entitlement by either Network Rail or Bidders and therefore any decision made against this list can only be a decision of judgement and not of legal entitlement.”*
 - 8.2.7. Therefore, where, as a consequence of a proposed possession, the Train Slot[s] that could potentially be offered would be outside any associated Level 1 Rights, and the operation of any such Train Slot requires the Train Operator to commit additional resources (or incur additional costs), such costs should reasonably be construed as Relevant Losses, for which the Train Operator should be compensated; therefore

- 8.2.8. it was reasonable for a Train Operator to make its agreement to any proposal by Network Rail for a possession conditional upon Network Rail's agreement to pay such Relevant Losses; and, furthermore, where Network Rail does NOT agree to such payment, the relevant possession should NOT be granted.
9. **Network Rail** conceded that in circumstances, where a Restriction of Use is required to implement a Network Change, then Network Code Part G provides for Train Operators to recover Relevant Losses. However, Network Rail argued that Network Change does not apply to Restrictions of Use taken to carry out renewals. A Train Operator's only entitlement to compensation for delays and cancellations caused by renewals is in accordance with Schedules 4 and 8 of the Track Access Agreement. .
10. **Network Rail rejected FL's arguments (outlined in paragraph 8.2 above) and countered that**
- 10.1. the rights of the parties to a Track Access Agreement are subject to the provisions of all of the Track Access Agreement, which incorporates the Network Code and the Operating Constraints;
- 10.2. more specifically, Firm Rights, of which Level 1 Rights are generally the most tightly drawn, are explicitly contingent upon the Operating Constraints, which include the relevant "applicable" Rules of the Route;
- 10.3. the point in the timetable development process where disputes of this nature arise is at a time when Network Rail wishes to propose how the Rules of the Route might be changed, as a precursor to preparing the first Draft Timetable;
- 10.4. the provisions of Condition D2 ensure that there is an opportunity for a Train Operator to object to such proposals, and, if necessary to seek a direction in its support from a Timetabling Panel.
- 10.5. all of Network Rail's proposals in respect of either possessions, or, subsequently, allocation of Train Slots within the constraints of "the applicable Rules of the Route", "must be capable of justification through a process of scrutinising it against the Decision Criteria, set out in Part D"
11. Taking the above arguments into account, Network Rail's conclusion was that:
- *"Network Rail believes that protection for train operators is intended to be afforded through this Part D process rather than through the train operator having any ability to refuse to agree proposals, which otherwise accord with the Decision Criteria, unless a negotiated payment is made to the train operator in return for its consent."*
 - *On the subject of payment, clause 11.3(a) of the track access agreement ... precludes the train operator generally from recovering Relevant Losses to the extent that they result from delays to or cancellation of trains unless there is a particular basis (e.g. Part G for Network Change) which does allow for such recovery.*
 - *The rationale for this is that the regimes set out in Schedules 4 and 8 are intended to be the sole means whereby e.g. cancellations necessitated by renewals are compensated for. Passenger TOCs have a similar provision to clause 11.3(a) in their track access agreements. Although passenger TOCs enjoy more elaborate compensation principles in their form of schedule 4, this is because they have contracted to make a balancing access charge supplement payment to Network Rail." (Network Rail Submission paragraphs 9 to 11).*

The Panel's findings in respect of law

12. The Panel noted the description offered by Network Rail of Network Code Part D as “a form of words, offering a cloak of contractual respectability to an underlying grinding operational process”. In its Decision no.1 the Timetabling Panel had found along similar lines, if somewhat more prosaically, that

- *“Whilst Rule A1.18 requires that “The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other”, the legal entitlement to any train service is a function of not just the formulation of the train specification in [Schedule 5 of a track access contract], but also the extent to which all parties have complied, and with what diligence, with the procedures for consultation and debate incorporated in the Network Code. In effect*
 - *the legal entitlements of Train Operators are a fusion of the documented expression of their Firm Rights, and their active compliance with the procedures by which those rights can be exercised, implemented and protected; and*
 - *the legal entitlement of Network Rail to a degree of latitude in curtailing the benefits enjoyed by the Train Operators is, by the same token, a function of being able to demonstrate that the curtailment sought is a reasonable minimum, in proportion to other considerations.*
- *In short, where absolute legal considerations are in conflict, the issue of proportionality is an over-arching aspect of the procedures.”* (Timetabling Panel Decision no.1, paragraphs 13 and 14).

13. Given the need to maintain and renew the Network, and in those circumstances where that need cannot be met without taking Restrictions of Use, Network Rail has, by virtue of the provisions of Network Code Part D, the right to propose changes to the Rules of the Route that incorporate new or amended Restrictions of Use.

14. In relation to the point at issue, a determination of the appropriateness, or not, of including a proposed Restriction of Use into “*the applicable Rules of the Route*”, requires a Panel to take a view of the balance of the reasoned approaches of the parties in question. In practical terms this is the final measure of which is the stronger legal entitlement.

15. In the case in point, therefore, a calculation of potential additional costs is an appropriate argument by which the Train Operator might wish to support a claim that the Restriction of Use should not be included in the Rules of the Route. Such an argument has its validity as a matter of fact, as the FLHH instance quoted in paragraphs 3 and 4 above shows. However the fact of inconvenience, and additional cost, although it may contribute to the overall case for determining which party's overall interest should prevail, does not create an entitlement to compensation.

16. The Panel does not accept the argument, advanced by FL, for an entitlement to compensation for Relevant Losses consequent upon a proposal for a Restriction of Use, because it ignores the sequential nature of the Part D process.

16.1. FL's & FLHH's Track Access Agreements incorporate the Network Code;

16.2. All the Firm Rights under FL's & FLHH's Track Access Agreements are subject to the Operating Constraints, which include the Rules of the Route;

- 16.3. Network Rail can propose and incorporate changes to the Rules of the Route through the proper application of the relevant processes contained in Network Code Part D, subject to the outcome of any appeals;
- 16.4. Before a Train Slot is allocated to a Level 1 Right, that right has to be exercised by making a Bid for a Train Slot. Both the formulation of a Bid and the allocation of Train Slots require to be compliant with the “*applicable Rules of the Route*”; and, in principle, both bidding and allocation do not occur until after completion of the Rules of the Route process;
- 16.5. Until the Train Operator has been allocated a Train Slot, in compliance with the provisions of Network Code Part D, there is no basis upon which to deem there has been a breach of contract, and therefore no basis on which to assess a Relevant Loss; and
- 16.6. Schedules 4 & 8 of FL’s & FLHH’s Track Access Agreements are the only contracted provisions by which FL & FLHH receive any compensation for Restrictions of Use taken for the purposes of carrying out renewals.

The Panel’s determination

17. The Panel therefore determined that

- 17.1. where, in the course of the operation of the provisions of Condition D2 a Train Operator considers that it will suffer an unreasonable impact from a proposed change to the Rules of the Route, it is entitled to support its case against the proposal with whatever arguments it considers appropriate, whether in dialogue with Network Rail, or within the formal dispute resolution procedure;
- 17.2. all such arguments (including any references to the Decision Criteria) are likely to be taken into account by any Appeal Body (Timetabling Panel, or Office of Rail Regulation) in any weighing up of the merits of the contested proposal;
- 17.3. the likelihood of additional costs is a reasonable argument to adduce in support of a particular point of view; however, the advancing of the argument does not mean that an entitlement is thereby created, unless the argument is based upon an explicit contractual right;
- 17.4. it does not accept FL’s argument that such additional costs should be deemed Relevant Losses, nor that it has any explicit contractual entitlement to compensation for additional costs in any of the circumstances quoted; therefore
- 17.5. in such circumstances, it is quite clear that there is no power of veto of proposed changes to the Rules of the Route, contingent upon the payment of any such compensation; and therefore
- 17.6. where, as was the case in several parts of Timetabling Panel Decision no.1, an Appeal Body has not upheld FL’s or FLHH’s reasoned objection, the proposed Restriction of Use to carry out renewals can become part of the “*applicable Rules of the Route*”, and
 - 17.6.1. FL’s & FLHH’s Firm Rights become subject to any proposed Restrictions of Use that are incorporated within the “*applicable Rules of the Route*”, and

17.6.2. FL or FLHH's entitlement to compensation in such cases is through the terms of Schedules 4 & 8 of their respective Track Access Agreements, and otherwise the parties are required to meet their respective costs where they lie.

17.7. an Appeal Body does not have the discretion to rule that a party has an entitlement that is not already provided for in the contract.

18. The Panel would wish to make clear that, in this determination

18.1. it is neither endorsing nor qualifying the particular findings of Timetabling Panel Decision no.1;

18.2. it is addressing a specific matter of entitlement raised by two of the parties to Decision no.1 (FL & FLHH), and such consideration does not stand in the way of any party's general right of appeal against any aspect of that Decision, provided only that the appeal is/ has been lodged in the prescribed manner;

18.3. it is not offering any guidance or direction as to the weight any future Timetabling Panel might give to any one argument advanced in support of a comparable case.

19. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

Sir Anthony Holland

Panel Chairman