

## **Determination in respect of reference ADP08**

*(following a Hearing held at Kings Cross on 16th August 2005)*

### **The Panel**

<b>Tony Crabtree:</b>	elected representative for Franchised Passenger Class, Band 3
<b>Nick Gibbons:</b>	elected representative for Non-Passenger Class, Band 1
<b>Julia Glenn:</b>	appointed representative of Network Rail
<b>John Thompson:</b>	elected representative for Franchised 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 Virgin West Coast (VWC) and Network Rail Infrastructure Ltd (Network Rail) to rule on the level of compensation to be paid, by Network Rail to VWC, in respect of Bus Replacement services. The particular dispute related to the weekend possessions, during Engineering periods O and A of the December 2004 Timetable, that had blocked the West Coast Main Line to all passenger train services between Crewe and Glasgow.
2. To cater for the needs of its passengers, VWC had devised and implemented a programme of Bus Replacement services. As the possessions had been taken for works that, at least in part, were associated with Network Change, it was accepted by both parties that payment, by Network Rail of Bus Replacement Costs (BRC) was, in principle, due under the terms of Network Code Condition G2.2: *“an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by the Train Operator as a consequence of the implementation of the proposed change”*.
3. The dispute had arisen because Network Rail was of the view that the actual level of Bus Replacement services that VWC had introduced was excessive in certain areas, and therefore, Network Rail was only prepared to reimburse VWC a proportion of the relevant costs.
4. The programme of Bus Replacement services, as planned and operated by VWC, had cost VWC, £1,115,794; Network Rail was of the view that an adequate service could have been provided for £854,000, and had paid VWC this amount, leaving £261,294 as the difference between the parties.
5. As the main element of both parties' arguments related to the construction to be placed upon the word “reasonable” in Network Code Condition G2.2, this was legitimately a matter for an Access Dispute Panel to determine, in accordance with the provisions of Network Code Condition G6.
6. The Panel was dissatisfied that the parties had made more difficult than ought necessarily to be the case, the understanding of the points of difference. Arguments in relation to matters of principle, as compared with issues of detail appertaining solely to quantification, had been mixed together.

Furthermore, although the joint submission was well nourished with appendices, neither party, in the respective arguments, had sought to demonstrate to Panel members why the various sets of data supported one position in preference to another. Even the supplementary information tabled as a consequence of the issuing, by the Panel Chairman, of specific directions, had not achieved adequate clarity.

7. That said, the Panel was of the view that it was a matter for the parties if their respective positions were not adequately argued or substantiated. In consequence, the Panel had no choice but to proceed to a determination, doing the best it could with the material before it.

### **The Panel's findings of fact**

8. Network Rail had originally, in the relevant West Coast Route Modernisation (WCRM) Major Project notice (MPN), proposed that the works necessary on the WCML would be undertaken in the course of lengthy absolute blockades. This proposal had proved unacceptable to significant numbers of Train Operators. As a consequence the WCRM team of Network Rail had convened a conference at Windermere in May 2004 to consider options. This conference had concluded that the least unattractive way of getting this work done would be for Network Rail to take regular weekend possessions, for the whole of the WCML between Crewe and Glasgow.
9. The conclusions of the Windermere conference were consulted more widely in the industry, and a set of firm proposals for the Crewe to Glasgow possessions was formally tabled at the end of July 2004.
10. VWC, with Virgin Cross Country (VXC) the Train Operator most directly affected by the revised possessions, undertook the design of what it considered to be an appropriate programme of Bus Replacement services. This included all the work necessary to ensure that details of train services, and of Bus Replacement services were finalised in time to meet the deadline for Train Service Data Base (TSDB) upload on 29<sup>th</sup> September 2004. VWC, in collaboration with the Timetable planners in Network Rail, carried out the processes required by Network Code Part D; however, full compliance with the timescales for either the permanent planning process, or with those of Informed Traveller, were not achieved.
11. Although there had been occasions in the past when possessions had blocked the WCML between Crewe and Preston, or Preston and Carlisle, or Carlisle and Glasgow, there was no precedent for simultaneous possessions blocking the whole length between Crewe and Glasgow. By the same token, whilst there was precedent for programmes of Bus Replacement services for the shorter possessions there was no previous experience of what might be appropriate for a Crewe to Glasgow possession, with all the intermediate stops that that encompassed..
12. The plan for Bus Replacement services that VWC had devised was referred to as a "modular plan". It departed from previous practice in that it did not provide for designated buses to connect into, or out of, specified train services. Instead it provided for a regular interval service of buses between Crewe and Preston, a separate service between Preston and Carlisle, and further services between Carlisle and Glasgow, and Carlisle and Edinburgh, with the expectation that passengers would, as appropriate, take a first available bus, and would, where necessary, change buses at Preston and/or Carlisle. The basic service was intended to cater for the needs of the passengers of both VWC and VXC, and also to honour the connections normally made with the services of other companies. The services included direct services, limited stop services calling at principal stations, and some feeder services to serve stations, such as Wigan and Penrith, that, in the opinion of VWC should not be served by incorporating extra stops (and journey time) into through services. This modular plan was the basis for the TSDB upload of 29<sup>th</sup> September 2004, and for subsequent preparation of the national timetable, and all the related station publicity material.

13. VWC considered that the plan for Bus Replacement services, as entered into TSDB, was proportionate to its estimate of the needs of Rail customers, taking into account that
  - 13.1. some train services were still running between Crewe and Preston, albeit by a slower diversionary route via Manchester,
  - 13.2. publicity was drawing attention to the fact that passengers between London and Glasgow would, other than on the three weekends that the ECML was itself closed, be advised to travel on services out of Kings Cross; and that
  - 13.3. the scale of the disruption was likely to deter absolutely a significant number of passengers.
14. There was an established, but informal, liaison process by which VWC and the WCRM team of Network Rail had, in the past, consulted each other, in the course of wider monthly liaison meetings, in respect of arrangements for Bus Replacement services. Past practice had been that VWC had devised appropriate programmes of Bus Replacement services, and Network Rail had met the costs.
15. There had been two such liaison meetings between the date of publishing the finalised programme of Crewe to Glasgow possessions (30<sup>th</sup> July 2004), and the date of the TSDB upload (29<sup>th</sup> September 2004). The parties agreed that the principle of the “modular plan” had been aired at those meetings. The parties did not however agree as to whether, at those liaison meetings, the WCRM team of Network Rail had been given sufficient, of the information later uploaded to TSDB, to enable it to understand the detail, and potential cost of the plan.
16. The WCRM team asserted that it was not provided with details of the plan or its costs until a meeting on 13<sup>th</sup> October 2004 and that, at that meeting, and at a subsequent meeting on 20<sup>th</sup> October, VWC considered that no amendments should be made affecting either the content of TSDB, nor the preparation of publicity material (for which the cut-off date was 22<sup>nd</sup> October). The Panel was not put in a position to assess whether WCRM had in fact pressed for the details of the proposed plan, or whether both parties had proceeded on the expectation that, as on previous occasions there would be tacit agreement about both the plans and the costs.
17. Network Rail had tabled, as part of the joint submission, a counter-plan for Bus Replacement services, from which a certain number of (primarily feeder) services were excised, with other services being required to make additional calls. VWC asserted that Network Rail had not tabled this counter-plan before the event; Network Rail had, however, used that counter-plan, in retrospect, as a yardstick by which to determine which of VWC’s accounts for Bus Replacement services it would not settle.
18. Network Rail contended that its main area of concern related to the level of Bus Replacement services provided between Crewe and Preston, and that this was an area where there should have been adequate prior information to assist in the formulation of a proportionate plan. VWC countered that Network Rail, in the accounts that it has not settled, has challenged the services between Preston and Carlisle as much as between Crewe and Preston. The Panel was not given the information readily to differentiate between these two assertions.

### **The Panel’s findings in respect of law**

19. The Panel considered that, in respect of its specific remit (*“the Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis”* ADR Rule A1.18), the issue before it related to the extent of the discretion accorded to the respective parties, in relation to the assessing, and incurring of *“reasonable”* costs, by Network Code Part G, and Condition G2.2 in particular.

20. In this last respect, the Panel considered that a determination of what is “reasonable” had to take account of both the relevance of the proposal to the circumstances, and the manner in which the proposal has been made. The Panel noted that whilst Condition G2.2 gives an apparent scale to the level of compensation payable (“an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by the Train Operator as a consequence of the implementation of the proposed change”) this is by way of qualification of “the compensation referred to in Condition G2.1”.
21. Condition G2.1 places on a Train Operator the obligation to give notice to Network Rail if it considers that “(b) it should be entitled to compensation from Network Rail for the consequences of the implementation of the Change”; and, “Any notice of the kind mentioned in paragraph (b) above shall include a statement of the amount of compensation required and the means by which the compensation should be paid, including any security or other assurances of payment which Network Rail should provide. Any such statement shall contain such detail as is reasonable to enable Network Rail to assess the merits of the Train Operator’s decision”.
22. In other words, whilst the Train Operator is the party both in a position to, and entitled to, make an assessment of what may be required by way of Bus Replacement services, the question of whether or not the costs of those Bus Replacement services are met by Network Rail depends on the (not unreasonable) “ statement...to enable Network Rail to assess the merits of the Train Operator’s decision”.
23. Condition G2.4 lays down particular time limits where, if the Train Operator has presented a statement, Network Rail is obliged to pay the stated level of compensation, or take the matter for resolution by an Access Dispute Panel; failure in this respect would have the consequence that “ the proposed Network Change shall not be implemented”.
24. The practical impact of these provisions is that the parties are required to carry out full and prompt consultations, leading to agreement, before there can be a definitive outcome with respect to the payment of consultation, and/or the implementation of a scheme.
25. Consultations, as required by the terms of the Track Access Agreement and the Network Code may be facilitated by the existence of informal liaison structures. However, such informal arrangements cannot be adopted as a substitute for due compliance with contractual terms, in this case Conditions G2.1, G2.2 and G2.4.
26. Both parties now have the benefit of experience with using Bus Replacement services for Crewe to Glasgow possessions. Future Bus Replacement service plans will be informed by such experience. Such information may be relevant to an assessment of which case, in hindsight, had the more merit. It is not, however, relevant to an assessment of whether what was done in mid 2004 was, in the terms of the Network Code “reasonable”.

## **The Panel’s conclusions and determination**

27. The Panel therefore concluded, doing the best that it could with the information before it, that
  - 27.1. the circumstances that gave rise to the need for regular Crewe to Glasgow possessions resulted from a rejection of Network Rail’s previous planning in respect of WCRM, and a need to develop and implement plans in a much shorter period than allowed by the normal operation of the provisions of Network Code Part D;

- 27.2. the lack of any precedent for a Crewe to Glasgow possession implied that there was no working precedent for appropriate Bus Replacement services plans;
- 27.3. the only body in a position to devise a programme of Bus Replacement services was VWC; as the body accountable for meeting the quality of service needs of passengers, it was entitled to expect that whatever it devised should be incorporated in the relevant timetables;
- 27.4. by contrast, VWC's entitlement that Network Rail should pay for the costs of that Bus Replacement Plan, was dependent upon its compliance with the provisions of Network Code Condition G2, in particular in respect of the provision of a "*statement....to enable Network Rail to assess the merits of the Train Operator's decision*".
- 27.5. the existence of an informal liaison procedure, and a past practice of Network Rail WCRM project paying for the costs of Bus Replacement services in cases of Network Change, may have contributed to both parties overlooking the need to comply formally with the provisions of Condition G2;
- 27.6. In the circumstances following on from the rejection of the Major Project notice, and the radical re-planning arising out of the Windermere conference, it would be reasonable to expect Network Rail to be particularly attentive to the detail of those plans and arrangements upon which the overall project depends.
- 27.7. VWC was in dialogue with Network Rail over the detail of the Bus Replacement services plan as part of the process for including the necessary entries in the National Train Plan. It would not be unreasonable for a Train Operator to assume that information passed by a Train Operator to Network Rail is available to the body corporate of Network Rail. This is an important basic assumption in the Track Access Agreement, namely that a Train Operator is trading with a single corporate entity.
- 27.8. the entitlements of the parties under the Track Access Agreement are not passive rights, but are validated by the respect paid by the parties to the prescribed procedures (in this case the dialogue required in respect of the operation of Condition G2). In a circumstance where prescribed procedures have not been followed, it is likely that any basis of absolute entitlement will have been undermined.
- 27.9. it is not persuaded that either of the parties represented before the Panel understood fully their responsibilities in relation to their administration, on behalf of their employers, of the terms of the Track Access Agreement.
28. The Panel therefore determined that
- 28.1. in respect of the planning of Bus Replacement services for the Crewe to Glasgow possessions, VWC had acting reasonably and within its rights, to devise a plan;
- 28.2. VWC was not entitled to assume that the costs of such a plan would be borne by Network Rail, in the absence of compliance with some formal exchange of information recognised by the parties as complying with the provisions of Network Code Condition G2;
- 28.3. the amount of detail supplied to Network Rail train planners for the purposes TSDB upload could have been sufficient to fulfil the information requirements of Network Code Condition G2;
- 28.4. it is not apparent why plans for Bus Replacement services that had been advised to the Train planners in Network Rail were not also known to the WCRM team;

- 28.5. the status of the WCRM team of Network Rail, in respect of delivering compliance by Network Rail with the Track Access Agreement, and enforcing compliance by the Train Operator remains unclear;
- 28.6. there are good grounds for considering that both parties were tacitly expecting that VWC's programme of Bus Replacement services would be no more contentious than previous such plans, and that previous informal processes that had dealt with those previous plans (including the meeting of costs by Network Rail) would still apply;
- 28.7. although the time between the publication of the possessions, and the TSDB update was not generous, it could, had either party taken the initiative, have allowed time for more formal application of the provisions of Condition G2. This is the more the case because the essence of VWC's programme of Bus Replacement services was that it was not fine tuned to other train planning considerations; once devised, it could readily have been subjected to appropriate costing and consultation. ;
- 28.8. any formalisation of the process would have clarified the areas of difference between the parties; there would, as a consequence, have been opportunity for the parties to have sought clarification of the relative entitlements by means of a reference to a Panel;
- 28.9. in the circumstances where the parties have both contributed to a non-observance of due process, both parties may reasonably be judged to have compromised their entitlement. In such a case the Panel finds that
- 28.9.1. it is not reasonable for VWC to expect that Network Rail should meet all its costs for Bus Replacement services, when it cannot demonstrate that it has adequately complied with the formal requirements of Network Code Condition G2 in respect of providing sufficient *"to enable Network Rail to assess the merits of the Train Operator's decision"*.
- 28.9.2. it is not reasonable for Network Rail to confine its settlement of VWC's Bus Replacement services costs to a yardstick that was not available at the time commitments were made in the published timetables, and was also not, in compliance with Condition G2.2, subjected to any assessment of reasonableness by reference to an Access Dispute Panel.
29. In these circumstances, the Panel considers that neither the Track Access Agreement nor the Network Code require that any specific remedy be granted, and that therefore the provisions of Rule A1.19 (b) apply, namely
- "The Panel shall ... where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Panel, exercise that discretion in accordance with any requirements and criteria set out in the Access Conditions and Access Agreement after due consideration of all remedies and orders that could properly be made"*.
30. The Panel therefore has decided that, in accordance with its powers in Rule A1.71 it will make an order that *"one dispute party shall pay an amount of money ...to another party...specified in the determination"*, and that the payment shall be made by Network Rail to VWC.
31. The Panel Members are not unanimous in their determination of the amount that Network Rail should pay. Three members are of the view that the sum should be £130,000, or broadly 50% of the difference between the parties, as reflecting a view that both parties contributed equally to a failure of dialogue and due process. One member (Julia Glenn) is of the view that the sum should be no more

than £52,000, or broadly 20% of the difference between the parties. The basis of her minority view is that the onus is on the party that is making a Part G compensation claim to provide sufficient detail for the other party to assess the merits of the claim as early as possible, and at least prior to the costs being incurred. Written evidence was provided that shows that VWC was told in October that NR would only pay reasonable costs and that these, even in estimate form, had not yet been agreed.

32. In circumstances "*where the Panel is not able to make a unanimous decision*", Rule A1.70 requires the Panel Chairman to make a determination. I therefore determine that the payment by Network Rail to VXC in full settlement of the disputed costs for Bus Replacement services for the Crewe to Glasgow possessions in Periods 0 and A of the December 2004 Timetable shall be £130,000.
33. 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