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## ***NETWORK and VEHICLE CHANGE COMMITTEE***

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### **Determinations nos. NV 26, 28, 29, 30 and 31**

*Hearing held at Kings Cross on 19<sup>th</sup> and 20<sup>th</sup> September 2001*

***[Note: previous published determination was determination no.NV5 and, prior to that, NV21]***

1. The Committee was asked to rule, by 5 separate train operating companies, that aspects of the proposals for undertaking works for the West Coast Route Modernisation, contained in the Major Project Notice Phase 2 dated 18<sup>th</sup> May 2001, were unacceptable because of the impact that they had upon the business of those Train Operators.
2. The Committee noted that each of the 5 appellants, Silverlink Train Services (STS), West Coast Trains Limited (WCTL), ScotRail Railways (SRR), Freightliner Ltd (FL) and English Welsh & Scottish Railway (EWS), was also an interested party in relation to the other 4 appeals. Furthermore, the nature of some of the representations was such that were the Committee to seek to hand down bi-lateral determinations, there would be the risk of making determinations that were mutually incompatible. The Committee decided to deal with this risk by running the hearings concurrently. This determination therefore represents its conclusions on the points brought by all the appellants.
3. The points of contention brought by the parties were as follows:
  - 3.1 SRR were concerned at the impact of the works proposed on the overnight sleeper services.
    - 3.1.1 In respect of weekday services they were concerned to get an assurance that the start and finish times of mid-week possessions throughout the line of route between Scotland and Euston would be coordinated in such a way as to provide an assured daily path for both sleeper services in both the Up and Down directions. In particular, they objected to extended possessions in the Crewe to Euxton Junction, and Oxenholme to Carlisle areas;
    - 3.1.2 In respect of the weekend services, (i.e. departures on Friday night and Sunday night), SRR were concerned that the combination of blockades had the effect that no Up Friday sleeper services would be operated between August 2002 and March 2003: this would make it difficult to operate Down Sunday services, and, indeed, there would be no paths on the West Coast Main Line for such services on several Sundays.
  - 3.2 STS
    - 3.2.1 objected to the dates selected for two of the 18 blockades between Watford and Bletchley in engineering periods 2 and 3 2002; specifically to the proposal that the continuous run of blockades should be interrupted for two weekends in October/November (for school half term and for the Motor Show) and instead be imposed on the weekends of 14

December 2002 and 4 January 2003. Not only are these two latter weekends prime travel weekends for STS, but repeated breaks in the sequence of blockades, each requiring a timetable change, would be very difficult to market effectively, and would import performance risks associated with frequent diagram changes.

3.2.2 were concerned that they had not yet been put in a position to evaluate the impact on their services of the proposed “Midweek Nights Two Track Railway” timetable.

3.3 WCTL, whilst acknowledging that under the terms of their 10th Supplemental Track Access Agreement their powers to object to works forming part of the West Coast Route Modernisation were to a degree constrained, nonetheless wished to make representations that

3.3.1 the 18 blockades proposed between Watford and Bletchley appeared excessive, in relation to the works proposed, and that Railtrack should be required to give a more substantive justification for the need for all these weekends, in particular for the three final weekends that had been described as “contingency”; for similar reasons they considered that a 5 day blockade between Watford and Bletchley over Easter 2003 could reasonably be reduced to a 4 day blockade; and

3.3.2 they objected to the choice of 4 January 2003 for one of the 18 blockades, because of its impact on holiday returning traffic.

3.4 FL were concerned that

3.4.1 they anticipated that the proposed “Midweek Nights Two Track Railway” would not be capable of delivering train paths adequate to fulfil their Firm Contractual Rights;

3.4.2 Railtrack had not been able to give adequate assurances as to the availability, during periods of blockade and extended possessions, of diversionary routes, suitable in terms of both gauge clearance and permitted traction type, to enable FL to meet its commitments; and that

3.4.3 no agreement had been reached with Railtrack in respect of meeting the extra costs that would ensue to FL.

3.5 EWS were concerned

3.5.1 that they anticipated that the proposed “Midweek Nights Two Track Railway” would not be capable of delivering train paths adequate to fulfil their Firm Contractual Rights.

3.5.2 that the likely impact of the “Midweek Nights Two Track Railway” on their services operated for Royal Mail (Consignia) would be at least as bad as had originally been proposed for 2001/2002, and significantly less satisfactory than what was actually being operated in 2001/2002. Therefore, to the extent that they had been able to judge, they believed that implementation of the “Midweek Nights Two Track Railway” in 2002/3 would be in contravention of the effect of determinations NV13 and NV17.

- 3.5.3 to seek assurances in respect of the facilities that would be available (paths and/or appropriately gauged diversionary routes) during the periods of the weekend blockades, and the 3-week blockage of slow lines through Tring;
  - 3.5.4 to advocate that the 18 blockades between Bletchley and Watford should be taken on consecutive weekends, with no “blockade free” weekends in October/November 2002;
  - 3.5.5 to report on a number of items, that had been included in their written submission, of which a resolution seemed likely, but had not yet been achieved. EWS wished to reserve the right to leave these items as eligible to be brought before the Committee should the parties not be able to reach agreement.
- 4. Railtrack asserted that the programme of works, and the associated possessions and blockades, set out in Major Project Notice Phase 2 represented a minimum necessary to deliver, to time, the programme of works required for West Coast Route Modernisation. Railtrack acknowledged that the timescales by which they were seeking to complete all the works were largely a function of its agreement with West Coast Trains Limited; however, the actual programme of works contained very large elements of Core Investment Programme, specifically, of the £5.8 billion for the whole project, £4 billion is core investment expenditure.
  - 5. Railtrack also acknowledged that a timetable of the services that could be operated over the proposed “Midweek Nights Two Track Railway” had not yet been produced or circulated to Train Operators. However Railtrack did concede that, by the very nature of the works to be undertaken, the capacity and capabilities of “Midweek Nights Two Track Railway” 2002/03 would be less than is actually operating for the 2001/02 Timetable year.
  - 6. The Committee was pleased to welcome Railtrack’s detailed description of the processes that it set in train for an ongoing iterative consultation with Train Operators in order to ensure the maximum possible consensus for many of the proposals included in the final published version of the Major Project Notice. The effectiveness of the consultation procedure, in relation to the programme of possessions and blockades, was acknowledged by all the Train Operators present. There was concern, however that there had not been any comparable multilateral consultation on the renewed proposals for the “Midweek Nights Two Track Railway”.
  - 7. In relation to specifics Railtrack made the following points:
    - 7.1 The proposal to interrupt the sequence of blockades between Watford and Bletchley, for the last weekend of October, and the first weekend of November 2002, had been made with a view to accommodating travel at school half term, and to or from London Euston and the Motor Show at Birmingham International.
    - 7.2 At its own initiative, Railtrack had sought to explore the option, for SRR, of sleeper services being diverted on to the East Coast Main Line, either for all nights for the duration of the timetable, or for all weekends affected by blockades. Railtrack maintained that it had not been able to come up with a satisfactory proposal in relation to weeknight trains, in part because of

engineering commitments on the East Coast Main Line; however it believed that paths could be made available, under short term planning arrangements, for weekend services. Issues regarding the procurement of suitable traction and train crew for such diversions remained unresolved.

- 7.3 The case for the “Midweek Nights Two Track Railway” was that the volume of work to be undertaken was so great, and so frequent, that it was impracticable to employ the traditional selective double-track section possessions and “weaves”, because the frequency and number of changes would, it was suggested, overwhelm the train planning procedures. Railtrack therefore proposed that all trains be timetabled on the basis of just two lines (with very limited scope for refuging, or for overtaking) being available throughout between Willesden and Rugby (and Crewe). Railtrack stated that this would result in a single timetable, which could operate largely unchanged throughout 2002/03, and argued that this arrangement would avoid frequent short term timetables and provide a greater degree of certainty for all operators. This proposed timetable would be constructed to permit all the necessary works to be undertaken, but, on the basis of preliminary studies, would not permit the honouring of many Firm Contractual Rights.
- 7.4 A major proportion of the works were aimed at restoring the most intensively used main line in the country to a good condition, that this was in the interests of all Train Operators, and that, to the extent that it reasonably could not be avoided, Train Operators should be prepared to accept the associated disruption.
8. The Committee noted that Railtrack’s proposals, and the resultant concerns of the Train Operators, fell into two distinct categories:
  - 8.1 concerns about the timing and duration of blockades, that were essentially debates about achieving the best fit between necessary works, and temporary inconvenience to Train Operators and their customers; they related to finite periods, and did not imply any continuous impairment of Firm Contractual Rights.
  - 8.2 the concerns of SRR in relation to its Sleeper services, and all those concerns registered by several Train Operators in relation to the "Midweek Nights Two Track Railway" which arose because the effect of Railtrack’s proposals appeared to be to deny, for the whole duration of a timetable, fulfilment of Firm Contractual Rights.
9. In relation to the dating of the Watford – Bletchley blockades, the Committee noted that, during the course of the hearing, a consensus emerged, satisfactory to all those Trains Operators represented, that these would be best scheduled over 18 consecutive weekends, concluding on the weekend of 7 December 2002.
10. Whilst recognising that this consensus remained dependent upon Railtrack seeking a strengthening of services (and providing the additional paths) between London and Birmingham International over alternative routes, the Committee was pleased to note the common ground between the parties and therefore, at this stage, makes no further determination on this matter.

11. In relation to the assertion by WCTL that the works could be accomplished in fewer blockades than 18, the Committee considered that this was a technical debate that WCTL should pursue further with Railtrack (involving their respective specialist advisors), and not reasonably a subject for determination by this Committee. That said, the Committee was of the view that Railtrack ultimately bears the technical responsibility for the adequacy, and the timeliness of works carried out. The Committee anticipated that were, as a consequence of an ongoing dialogue between WCTL and Railtrack, it to prove possible for works to be reliably accomplished in fewer, or shorter blockades, then, provided there was no increased risk of overruns, such changes would probably have the support of all other Train Operators. Similar considerations would apply in relation to the possibility of reducing the 5 day blockade at Easter 2003.
12. With regard to SRR's sleeper services, and all the concerns raised in relation to the "Midweek Nights Two Track Railway", the issues of principle had all previously been addressed in determinations NV9, NV13, NV17 and NV18. In relation to those previous determinations, the Committee took particular note of the following conclusions.

*“Where the train operator chooses to assert its rights through a reference to this Committee, then this Committee cannot direct that that train operator be required to abandon its claim to those rights; in which case the Committee cannot, without very good cause, uphold a proposed method of implementation which makes it impossible for such rights to be honoured.” (NV13 para. 19)*

*“Railtrack was within its powers as under a Major Project Notice (Track Access Condition D2.3) to propose that the timetable for the night hours over the West Coast Main Line should only be for ‘the two track railway’. However, such a proposal if challenged by a train operator whose Firm Contractual Rights [FCRs] are directly affected by the proposal, has to be judged by reference to the extent to which Railtrack can demonstrate that the impact on the affected train operator of the proposed method of implementation is a reasonable minimum, having due regard to the Decision Criteria.” (NV13 para. 20.1)*

*“Railtrack require to convince train operators (and failing them, the Committee) of the good reasons why their rights should be subjugated, in the wider interest served by the proposal; otherwise, as in ttc87, it will find itself obliged to modify Rules of the Route/Rules of the Plan to accommodate specific Services running in paths compliant with Firm Contractual Rights.” (NV13 para. 18, and NV17 para. 10.4)*

*“where there is conflict between elements of the work programme, and the honouring of [the Train Operator’s] FCRs to the [set] standard, then the honouring of FCRs shall take greater precedence: again for the avoidance of doubt, where this will involve Railtrack in increased payment to other parties, Railtrack shall make such increased payments*

*where there is a disagreement, ... between Railtrack and [the Train Operator], as to the detailed timing of individual services, [the Train Operator] may refer that disagreement to the Timetabling Committee ...” (NV17 paras 11.2 and 11.3)*

13. The Committee noted that in relation to the proposals for a two track railway timetable for 2001/02, Railtrack, and the Train Operators involved (FL and EWS) had, in response to the directions given in determinations NV9, 13, 17, and 18, been able to arrive at a practical solution for 2001/2. This solution had involved the Train Operators in some degree of acquiescence in the breaking of Firm Contractual Rights. The concern, of all the Train Operators making representations on this matter, was that the proposal for 2002/3 was significantly more restrictive, in particular because it provided very little scope for faster services to overtake slower ones.
14. The Committee considered this evidence, and noted that the proposal for the "Midweek Nights Two Track Railway", in timetable form, would not be available for some weeks, but that informal advice had already been received that many of the special arrangements made in the 2001/02 timetable, would not be repeated in 2002/03. The Committee was of the view that this was an unacceptable situation for all Train Operators affected, and could reasonably be construed by the Train Operators as an attempt progressively to erode their Firm Contractual Rights.
15. The Committee therefore determined that:
  - 15.1 it would note, but otherwise not further intervene in, the agreement between the parties as to the scheduling of the 18 blockades between Watford and Bletchley without a two week gap. Should the matter not ultimately be resolved, any of the parties may refer the matter back to the Committee for resolution;
  - 15.2 it is not reasonable for SRR to be asked either to experience the level of disruption to week night services, or to forgo weekend services throughout the period of the blockades, and that therefore Railtrack should take further steps to achieve satisfactory paths, for all these services. For the avoidance of doubt, the Committee would consider this obligation to find satisfactory paths to have been fulfilled if
    - 15.2.1 in respect of week night services, a route is kept open, and documented in the appropriate permanent timetables, so that SRR may reasonably be assured that electrically hauled trains may be worked through to destinations in times that approximate reasonably to those contained in SRR's Firm Contractual Rights. If this requires specific co-ordination or curtailment of possessions (on this or other routes) to permit the passage of these trains, then this shall generally be done, except on occasions where SRR agree to the contrary, such agreement not unreasonably to be withheld;
    - 15.2.2 in respect of weekend services, a route which may include diversion over the East Coast Main Line, or any other suitable route, is kept open, and documented in the appropriate timetable, so that SRR may reasonably be assured that trains may be worked through to destinations, or to an alternative London terminal, in times that approximate reasonably to those contained in SRR's Firm Contractual Rights. Where such routeing or timing requires the provision of additional, or alternative traction and or train crew, Railtrack shall use all reasonable endeavours to ensure that the acquisition of such resources by SRR is facilitated.

- 15.2.3 where the parties agree that services should be started and/or terminated at a suitable point north of London, Railtrack should bear responsibility for all SRR's incremental costs, including any costs associated with the conveyance of passengers to and from that point and London Euston.
- 15.3 where Railtrack are unable to offer Train Operators paths, compliant with Firm Contractual Rights, over the West Coast Main Line, during weekend blockades and the three-week blockade of the slow lines through Tring they should use all reasonable endeavours to ensure that suitable paths are offered over alternative routes that are suitably cleared for gauge, and that where such routing or timing requires the provision of additional, or alternative traction and or train crew, Railtrack shall use all reasonable endeavours to ensure that the acquisition of such resources, by the Train Operator, is facilitated.
- 15.4 it is not persuaded by Railtrack that the circumstances, and justification for the "Midweek Nights Two Track Railway", as proposed in this Major Project Notice, are significantly different from the arguments that were advanced in support of the proposal for a "Two Track Railway" in 2001/02; and that therefore the reasons which caused the Committee (in the previous determinations (NV9, NV13, NV17 and NV18)) to direct Railtrack to seek ways of honouring the Firm Contractual Rights of Train Operators affected by that proposal in 2001/02, still held good for 2002 / 2003.
16. In these circumstances the Committee does not accept the proposals for a "Midweek Nights Two Track Railway" for 2002/03 that offers Train Operators still less compliance with Firm Contractual Rights than has been achieved in 2001/02. For the avoidance of doubt, the parties should understand that:
- 16.1. Railtrack should withdraw its proposals for the "Midweek Nights Two Track Railway" as tabled;
- 16.2. Railtrack shall be free to propose a variant to the method of implementation, including a modification to the "Midweek Nights Two Track Railway", which shall be devised with the maximum consultation with Train Operators who may be affected;
- 16.3. all Train Operators are expected to identify priorities in respect of the Firm Contractual Rights where detail compliance is the most critical to the commercial interests of the parties;
- 16.4. the solution found may still be subject to appeal to the Committee in accordance with D2.3, but not in respect of D2.4;
- 16.5. any solution found for the 2002/03 Timetable year, the duration of the Major Project Notice in question, shall be entirely without prejudice to the content of any future Major Project Notice relating to future stages of the project. However, practical solutions that were found and operated during 2001/02 are to be considered one test of the reasonableness of any new proposals.

17. The Committee acknowledged that this finding introduced, for the second year, an uncertainty into both the engineering planning and the Timetabling processes. The Committee considered that this was an inevitable consequence of Railtrack having brought forward, in the current Major Project Notice, in comparable circumstances, proposals not dissimilar in their implications for Train Operators to others that had been rejected in previous determinations. As, from comments made by the parties, this situation was likely to recur in future Major Project Notices, the Committee felt it right that it drew the parties' attention to the fact that the "Midweek Nights Two Track Railway", which was in effect a regular curtailment of the capabilities of the network, might reasonably be construed as a Network Change. Were any of the parties to invoke the provisions of Track Access Condition G, this could provide an opportunity for the concept of the "Midweek Nights Two Track Railway" to be considered in relation, not just to a single Major Project Notice, but for as long a period as might be required to fulfil the needs of West Coast Route Modernisation.

Bryan Driver  
Chairman