

OFFICE OF RAIL REGULATION DETERMINATION OF AN APPEAL BY ENGLISH WELSH & SCOTTISH RAILWAY LIMITED AGAINST A DETERMINATION OF THE NETWORK AND VEHICLE CHANGE COMMITTEE REGARDING THE PROPOSED REMOVAL OF RUSCOMBE LOOP (REF. NV58)

DETERMINATION: ORR determines that the appeal of English Welsh & Scottish Railway Limited in respect of determination reference number NV58 (Ruscombe Loop) of the Network and Vehicle Change Committee is rejected.

Introduction

1. On 30 July 2004¹, English Welsh & Scottish Railway Limited ('EWS') notified the Office of Rail Regulation ('ORR') that it was dissatisfied with the decision of the Network and Vehicle Change Committee ('NVCC') in respect of its determination reference number NV58 and that it wished to refer the matter to ORR for determination pursuant to Condition G6.2 of the network code. The NVCC had been asked to determine whether or not Network Rail Infrastructure Limited ('Network Rail') was entitled to implement a Network Change², contained in its Network Change proposal of 10 November 2003, to close and recover Ruscombe Up Goods Loop ('the loop') on the Great Western Main Line and to plain line the up relief line. Following a hearing held at Kings Cross on 20 April 2004, the NVCC had determined that Network Rail was entitled to proceed with the Network Change.

2. Together with its notification of 30 July 2004, EWS submitted to ORR a statement as to the subject matter of the dispute and the reasons why EWS was making the reference. EWS said that the grounds for its appeal would be set out more fully in accordance with the procedure to be determined by ORR.

3. On 24 August 2004, ORR wrote to EWS asking it to specify all grounds for its appeal in sufficient detail to enable ORR properly to consider whether to accept the reference or to decline it under Condition G6.7.1 of the network code. ORR said that this would allow it to determine whether it should hear the appeal and, if so, the procedure that it would expect to follow.

4. On 10 September 2004, EWS responded to ORR's letter of 24 August 2004 giving more detail of the grounds for its appeal as summarised in its letter of 30 July 2004.

5. On 8 October 2004, ORR wrote to EWS to say that it did not consider that EWS had provided reasonable detail, as to the reasons for making its reference, as required under Condition G6.3(a) of the network code and asked EWS to disclose clearly, within the terms of Condition G2, the grounds of its objection. ORR also

¹ EWS's letter was submitted by fax on 30 July 2004 but was erroneously dated 30 June 2004.

² Terms with capital letters, that are not otherwise defined in this determination, have the meaning set out in the network code.

asked for clarification of certain points made in EWS's letter of 10 September 2004 inasmuch as they related to its reasons within Part G of the network code.

6. On 25 October 2004, EWS replied to ORR's letter of 8 October 2004 with further explanation of the grounds for its appeal.

7. On 23 November 2004, ORR wrote to EWS and Network Rail to say that in the light of the additional information provided in EWS's letter of 25 October 2004, ORR had decided that it would determine the appeal. It also gave EWS and Network Rail the opportunity to submit any further and final representations by 8 December 2004 for ORR to take into account.

8. On 8 December 2004, EWS replied with further representations. Network Rail did not make any further representations.

The relevant requirements of Part G of the network code

9. Part G of the network code establishes a mechanism by which changes to the Network can be made. It includes a procedure by which Network Rail can propose changes which reduce the capability of the Network, subject to protections for Train Operators or others who have track access contracts with Network Rail.

10. Condition G1.1(a) requires Network Rail, if it wishes to implement a Network Change, to give notice of its proposal to specific bodies, including each Train Operator that may be affected by the implementation of the proposed change, 'together with particulars of the proposed change which are reasonably necessary to enable that person to assess the effects of the proposed change and to enable each Train Operator to assess the effect of the proposed change on the operation of its trains'.

11. Condition G2.1 requires a Train Operator to give notice to Network Rail if it considers that either:

- (a) 'one or more of the following conditions has been satisfied:
 - (i) the implementation of the proposed change would necessarily result in Network Rail breaching an access contract to which that Train Operator is a party;
 - (ii) Network Rail has failed, in respect of the proposed change, to provide sufficient particulars to that Train Operator under Condition G1.1; or
 - (iii) the implementation of the proposed change would result in a material deterioration in the performance of that Train Operator's trains which cannot adequately be compensated under this Condition G2;

...

Any notice of the kind referred to in paragraph (a) above shall include the reasons for the Train Operator's opinion.³

12. EWS and a number of other Train Operators⁴ gave notices to Network Rail claiming that one or more of the conditions was satisfied. Network Rail therefore referred the matter to the NVCC, as provided for in Condition G6.1. Following the NVCC's determination, EWS was dissatisfied with its decision and, pursuant to Condition G6.2, referred the matter to ORR.

ORR's consideration of EWS's appeal

13. ORR's consideration of EWS's appeal has been limited to a review of the decision of the NVCC and of the representations made to ORR following the reference. ORR did not consider that a re-hearing was necessary in this case, as the questions at issue are relatively limited in scope and the positions of the parties - certainly following receipt of EWS's letters of 10 September and 25 October 2004 - were clear.

14. The central questions for this appeal revolve around the application and interpretation of Condition G2.1(a) and whether the NVCC was correct to conclude that none of the three conditions in that provision had been satisfied by EWS. ORR has concluded that the NVCC's determination NV58 should stand and EWS's appeal is rejected. The remainder of this determination explains the reasons for this determination.

Condition G2.1(a)(i) of the network code

EWS's arguments

15. In its letter of 25 October 2004, EWS outlined further its interpretation of its contractual position in relation to Condition G2.1(a)(i).

16. At no stage has EWS argued that the recovery of the loop involved an infringement of a specific access right.

17. EWS's view was that EWS (and other freight operators) had a permission to use the whole Network Rail network, contained in Clause 5 of their track access contracts. EWS considers that it could therefore prevent a Network Change by arguing under Condition G2.1(a)(i) that the implementation of the Network Change 'would necessarily result in Network Rail breaching an access contract to which that Train Operator is a party'. EWS's view was that such a right would, however, only be applicable in those circumstances 'where Network Rail proposes to amend the freight operating constraints in such a way that a freight operator believes that the network change will adversely affect the prospects of allowing its business to grow and evolve over time'. EWS said that, when it entered into its existing track access agreement, it did so 'in expectation that the entirety of the contract would enable the business

³ Condition G2.1(b) requires a Train Operator to notify Network Rail if it considers that it should be entitled to compensation from Network Rail for the consequences of the implementation of the change. However, this provision is not relevant to this appeal.

⁴ First Great Western Link Limited, Great Western Trains Limited, GB Railfreight Limited and CrossCountry Trains Limited.

to grow and evolve in response to the changing nature of its customers' requirements'. In this particular case, EWS believed that removal of the loop would indeed have an adverse effect on its ability to grow and evolve its business.

18. EWS argued that the NVCC was wrong to conclude that 'any objection to a change should logically require to be justified only on the basis of identified specific impact on contractual rights rather than in the generality of rights'. EWS interpreted the NVCC's position to mean that unless a Train Operator could demonstrate a specific impact of the change on its train service then an objection under Condition G2.1(a)(i) may be considered invalid. EWS considered that this interpretation would set a misleading precedent. EWS said that the wording of Condition G2.1(a)(i) did not support the NVCC's interpretation because it does not appear to provide that there has to be a specific impact on a specific access right for an objection under Condition G2.1(a)(i) to be notified. Instead, EWS said that Condition G2.1(a)(i) could apply to any terms of an access contract, whether specific or general.

ORR's assessment

19. ORR's assessment of EWS's arguments in relation to Condition G2.1(a)(i) is set out below in two parts:

- (a) the relevance of the permission to use clause in EWS's track access agreement; and
- (b) the NVCC's determination in respect of Condition G2.1(a)(i).

20. Under Clause 5.1 of EWS's track access agreement, Network Rail grants EWS permission to use its network in accordance with the terms of the agreement. However, Clause 5.2 states that the permission to use the network shall, except where the context otherwise requires, be construed to mean permission, among other things, 'to use the track comprised in the Network in accordance with the Network Code for the provision of the Services in accordance with their Service Characteristics and for any Alternative Train Slots, using the Registered Equipment in accordance with the Freight Operating Constraints'⁵. The Services are set out in Schedule 5 of the track access agreement. Some of these are route and time specific (Level 1 Rights), others state the origin, destination and quantum, but without specific timings or routes (Level 2 Rights). Clause 5.2 explicitly provides that the permission to use is subject 'in each case and in all respects to the network code and the Freight Operating Constraints'.

21. ORR does not consider that EWS has demonstrated before the NVCC or in this appeal that the implementation of the proposed Network Change will necessarily result in a breach of its track access agreement. The expectations which EWS may have had at the time it entered into the contract, as referred to in its letter dated 25 October 2004, do not constitute contractual terms. As the former Rail Regulator observed in *Network Rail Infrastructure Limited v Great North Eastern Railway*

⁵ The 'Freight Operating Constraints' are defined as 'the Rules of the Route, the Rules of the Plan and the Working Timetable (including all appendices to the Working Timetable, including the Sectional Appendix and all supplements to the Sectional Appendix)' and detail the capability of the network.

Limited [2003] RR2: “The proper construction of a contract is a question of law. The process of arriving at a correct interpretation of a contract involves having regard to the whole contract, together with its factual matrix which includes its commercial purpose. The intentions of the parties to the contract are to be ascertained in this way objectively, and without regard to what the parties might say they thought they were doing when they made the contract.” In any event, ORR does not accept EWS’s interpretation of the permission to use clause and considers that it would lead to a perverse outcome because it would enable EWS (and other freight operators) to prevent any Network Change taking place anywhere on the Network, irrespective of whether the operator had any specific rights on the route where a Network Change was being proposed.

22. The assessment above is consistent with the NVCC’s conclusion that: ‘It cannot be right to challenge a Network Change solely on the grounds that it would result in change to the Network’ (paragraph 9.4 of its determination). ORR therefore rejects this element of EWS’s appeal.

Condition G2.1(a)(ii) of the network code

EWS’s arguments

23. In its letter of 25 October 2004, EWS said that it had notified Network Rail of an objection under Condition G2.1(a)(ii) because the information given by Network Rail in the Network Change proposal was inadequate for EWS to assess the effects of the proposal on the operation of its trains. Network Rail’s proposal stated only that the loop was to be removed from May 2005, with no information about the effect that this would have on the timetabling of trains from that date. EWS said that Network Rail also failed to provide information about the effects of removing the loop on day to day perturbations, periods of planned engineering works or the remaining capacity on that part of the network. EWS said that it had therefore requested Network Rail to provide it with evidence of the robustness of future timetables following the commencement of the integrated Great Western franchise out of Paddington, with a full timetable to be developed, including the effects on freight, so that all affected parties could consider it before a final decision was taken.

24. EWS also argued that Network Rail did not provide it with information that the use of the loop, in EWS’s opinion, ‘would be expected to increase by over 50% with effect from the Summer 2004 timetable’, nor did it provide information that the First Great Western Link proposals would result in an enhanced timetable from December 2004 that could, in EWS’s opinion, result in greater use of the loop because more trains would be using the relief lines all the way from Reading to London. EWS said that the absence of this information meant that it remained uncertain whether other information pertinent to the planned removal of the loop was still not being made available by Network Rail. However, information that had become available, such as the increase in use of the loop from the Summer 2004 timetable and plans to increase the service pattern between London and Reading could, in EWS’s view, ‘constitute a change to a previously agreed network change ... because the views of any affected party may change in the light of this fuller information’.

25. EWS also argued that material flaws in Network Rail’s cost saving assumptions about the removal of the loop are also a relevant consideration within the terms of Part G. It said that this is because such information constitutes particulars of the proposed change which are reasonably necessary for a party consulted under

Condition G1.1 to assess the effect of that proposed change. It added that if Network Rail's cost assumptions were subsequently found to be incorrect, 'this would also constitute a change to a previously agreed network change, as it could result in an affected party changing their view of the proposed change'.

The factual background

26. Network Rail's proposal for change (10 November 2003) described the scope of the change as the recovery of the Ruscombe Up Goods Loop and gave the loop's location on the Network. It said that the implications of the change were that the loop would no longer be available for use and that the recovery formed part of the Great Western Region's switch and crossing work bank, targeted at improving the condition of the Network. The reason for the change was said to be to avoid the unnecessary renewal of life-expired assets; the change would form part of the rationalisation of the Network. No further details were given.

27. On 9 December 2003, EWS responded to Network Rail. Among other points made, it said that it would like to obtain evidence of the loop's redundancy and also 'an indicative timetable proposal from the various contenders for the future integrated Great Western franchise which would show the extent to which the faster trains now operated by Thames Trains could be accommodated without using the Up Relief Line at this point. I do not believe that this could be accomplished prior to the selection of a preferred bidder and timetable validation of the proposals including consultation on proposed access rights.'

28. EWS's response also noted that it was engaged in a dispute concerning Network Rail's planned night-time two-track railway method of organising engineering works in the area. It considered that the removal of the loop would exacerbate the difficulties of pathing trains through the affected area and was 'grossly premature'.

29. On 23 December 2003, Network Rail responded to EWS, noting that it had completed its assessment of usage of the loop, which showed an average of seven trains per period using the loop over the previous 21 periods. It said that it understood that 'a Great Western Franchise and Route Utilisation strategy [*sic*] with [the] SRA is about to commence', but that Network Rail did not envisage any additional local services between Maidenhead and Reading.

30. On 28 January 2004, EWS notified Network Rail that it was unwilling to agree to the proposal for change, noting that removal of the loop would be premature when route utilisation and engineering possessions issues had not been resolved.

31. On 6 February 2004, EWS restated its objections to the proposal for change. Specifically in relation to Condition G2.1(a)(ii), EWS asked for robust future timetables following commencement of the integrated franchise covering services out of Paddington and added that this needed to be developed and supplied to affected parties before the potential loss of paths and capacity could be assessed. This point was included in the subsequent reference to the NVCC.

32. The record of the hearing held on 20 April 2004 indicates that neither Network Rail nor EWS in their initial presentations to the NVCC or in their final statements referred specifically to Condition G2.1(a)(ii) or the adequacy of the information provided by Network Rail.

33. The deliberations of the NVCC noted that there was no evidence that Network Rail had failed to provide information, as prescribed in Condition G2.1(a)(ii) (paragraph 5.7 of the record of the hearing). In the NVCC's written determination, paragraph 6.4.2 states that 'no instances were advanced as evidence that "[Network Rail] has failed ... to provide sufficient particulars to that Train Operator..." (Access Condition G2.1(a)(ii))'.

34. In its notification of its appeal to ORR of 30 July 2004, EWS did not refer specifically to Condition G2.1(a)(ii) or the adequacy of information provided by Network Rail. However, it did say that it considered that the NVCC had been wrong to refuse to consider evidence about Network Rail's cost savings assumptions in relation to the planned removal of the loop. It argued that if the cost savings assumptions were flawed then 'Network Rail's reasons for implementing the change as advised in accordance with Condition G1.1 should be called into question'.

35. In its response of 10 September 2004 to ORR's request that EWS specify its grounds for appeal in greater detail, EWS again did not refer specifically to Condition G2.1(a)(ii) or the adequacy of information provided by Network Rail, but repeated its earlier argument about flawed cost savings assumptions.

ORR's assessment

36. ORR's starting point in considering this part of EWS's appeal is the NVCC's finding that 'no instances were advanced as evidence that "[Network Rail] has failed ... to provide sufficient particulars to that Train Operator. . ." (Access Condition G2.1(a)(ii))'. In the case of EWS, this conclusion is wrong; paragraph 7.4 of the reference to the NVCC stated that it had asked for robust future timetables following commencement of the integrated franchise covering services out of Paddington and added that this needed to be developed and supplied to affected parties before the potential loss of paths and capacity could be assessed. EWS did indeed make such a request in its response of 9 December 2003 to Network Rail's proposal for change notice. However, for the reasons set out below, ORR does not consider that this error by the NVCC invalidates its determination.

37. Procedurally, ORR considers that there is an onus on a party bringing an appeal to present its case properly and consistently throughout. In this case, the relevance of Condition G2.1(a)(ii) to EWS's arguments was not made clear at a number of key points:

- (a) during the presentation of EWS's case to the NVCC and in its final statement to the NVCC;
- (b) in its notification of its appeal to ORR of 30 July 2004; and
- (c) in its response of 10 September 2004 to ORR's request that EWS specify its grounds for appeal in greater detail.

38. ORR has a wide discretion as to the conduct of appeal proceedings, including whether it should limit the appeal to a review of the first instance decision or engage in a full re-hearing. Where a party seeks to rely in an appeal on a ground of objection which was not made clear before the NVCC, ORR has discretion, among other things, to refuse to consider the new ground. In this case, ORR has gone a very long way in giving EWS an opportunity to put its arguments, particularly in relation to

Condition G2.1(a)(ii), and in exercising its discretion to consider them. However, it has concluded that Network Rail complied with Condition G1.1 in any event.

39. On the substance of EWS's arguments, ORR notes that Network Rail was required to provide 'particulars of the proposed change which are reasonably necessary to enable [EWS] to assess the effects of the proposed change and to enable [EWS] to assess the effect of the proposed change on the operation of its trains'. The information provided in the proposal for change of 10 November 2003 could be described as basic, although some further information was provided later, notably on recent usage of the loop. However, ORR considers that the particulars provided by Network Rail on 10 November 2003 were adequate to comply with Condition G1.1. Its reasons for this conclusion are based on the interpretation of the expression 'reasonably necessary to enable [a party] to assess the effects of the proposed change':

- (a) the words 'reasonably necessary' need to be viewed in the circumstances of the case. These include the facts that:
 - (i) whilst there is disagreement about likely future use of the loop if it is retained, the loop was used infrequently in the two years before November 2003, so the effect on any one operator of its removal was unlikely to be very serious; and
 - (ii) the impact of the proposed Network Change is not a complicated one: the removal of the loop would mean that it would be unavailable and that alternative means would be needed to deal with, in particular, disruptions to services and the impact of engineering works on the relevant routes;
- (b) Condition G1.1 places the onus on the Train Operator to *assess* the effect of the proposed change and to *assess* the effect of the proposed change on the operation of its trains. Assessing the effects of a Network Change proposal is not Network Rail's responsibility. It will be a question of fact in each case whether the information provided was detailed enough to comply with Condition G1.1;
- (c) Condition G1.1 refers to the *effect* of the proposed change. It does not require Network Rail to provide a *justification* for the proposed change. In ORR's view, there is no reason why 'effect' in this context should be given anything other than its ordinary and natural meaning *i.e.* the effect on the Train Operator that needs to be notified under Condition G1.1. It follows that ORR does not accept EWS's argument that material flaws in Network Rail's cost savings assumptions are relevant for the Train Operator under Condition G1.1.

40. Accordingly, ORR therefore rejects this element of EWS's appeal.

Condition G2.1(a)(iii) of the network code

EWS's arguments

41. EWS's letter of 25 October 2004 said that, in giving a notice of objection under Condition G2.1(a)(iii), EWS was not suggesting that no amount of compensation for the removal of the loop could be adequate under Condition G2. Instead, it meant that if it was not in possession of all the information necessary to

assess the full effects of the change, it could not readily assess the compensation to which it should be entitled.

ORR's assessment

42. ORR considers that an objection that a Train Operator was 'not in possession of all the information necessary to assess the full effects of the change' should be made under Condition G2.1(a)(ii). The wording of Condition G2.1(a)(iii) is quite clear in referring to a proposed change which, if implemented, would result in a material deterioration of the Train Operator's trains that could not adequately be compensated under Condition G2. As EWS's letter of 25 October 2004 concedes that adequate compensation could be calculated (once the expected effects of the removal of the loop were ascertained), it follows that ORR must also reject this aspect of EWS's appeal.

Conclusion

43. For the reasons given above, ORR rejects the appeal by EWS.

Keith Webb
Chief Executive
Office of Rail Regulation

28 January 2005