
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Panel Decision no.1

(following hearings held at Kings Cross on 19th and 25th April and May 9th 2005)

The Panel

Geoff Appleby: appointed representative of Network Rail

Tony Crabtree: elected representative for Franchised Passenger Class, Band 3

Nigel Oatway: elected representative for Non-Passenger Class, Band 1

Graham Owen: elected representative for Non-Franchised Passenger Class

Panel Chairman: **Sir Anthony Holland**

The Parties

1. The Timetabling Panel was convened to determine the disputes that had been registered by the following Train Operators in respect of the proposals from Network Rail contained in Major Project notice **West Coast Route Modernisation B Final MPN Dec 2005 to Dec 2006**, dated 28th January 2005. The disputes had originally been advised to the Access Dispute Resolution Committee Secretary, to be addressed, in accordance with the previous procedures laid down in the Access Dispute Resolution Rules in the Network Code, by the Network and Vehicle Change Committee, and were

1.1. in respect of Passenger Train Operators

- NV76: First ScotRail;
- NV78: Silverlink Train Services Ltd;
- NV81: First/Keolis Transpennine Express Ltd (TPE);
- NV83: Virgin West Coast Trains Ltd. (VWC); and
- NV84: Central Trains.

1.2. in respect of Freight Train Operators

- NV75: English Welsh & Scottish Railway Ltd (EWS);
- NV77: GB Railfreight Ltd;
- NV79: Freightliner Ltd (FL);
- NV80: Freightliner Heavy Haul Ltd (FLHH); and
- NV82: Direct Rail Services Ltd (DRS)

The nature of the disputes and the jurisdiction of the Panel - a preamble

2. The Panel, being the first constituted under the revised Access Dispute Resolution Rules applicable from 15th April 2005, noted that the jurisdiction in respect of disputes arising out of Condition D2.2 lies with the “Industry Committee”; D2.2.5 requires that the Industry Committee, and its method of proceeding shall be as defined *“under Condition G6.1, and the provisions of Conditions G6.2 to G6.7 (inclusive) shall apply to it mutatis mutandis save that ... the reference in Condition G6.5.3(a)(ii) to “Network Change “shall be treated as a reference to “Major Project”...”*
3. In the applicable version of the Network Code (i.e. that applicable at the date of the hearing, and in force as from 10th January 2005), there are in fact no Conditions G6.4 to G6.7.
4. Other disputes arising out of Part D (i.e. “other than in the circumstances prescribed in Condition D2.2.4”) are to be referred to the “relevant ADRC tribunal for determination” (D5.1.1).
5. “relevant ADRC tribunal” is defined in Condition A1.2 in terms which permit the continuance, at the discretion of “the Counsel to the ADRC” of standing tribunals (a) in respect of timetabling matters and also (b) in respect of network or vehicle change. In practice the Access Dispute Resolution Rules applicable from 15th April 2005
 - 5.1. do not allot any role to a “Counsel to the Committee”; and
 - 5.2. presume that all issues arising out of Part D will be heard by a Timetabling Panel; (Rule A1.14).
6. That said, the same Rule A1.14 bestows on the Disputes Chairman the discretion exceptionally to allocate matters arising out of Part D to other than a Timetabling Panel, where *“there are compelling reasons relating to subject matter”* provided that he invites *“written representations from the dispute parties on his intention to do so and giv[es] proper consideration to any representations made”*.
7. In respect of the cases before it, the Panel found that the disputes in question did not represent opposition to the generality of the Major Project notice, but rather related to specific objections to individual possessions proposed. Most of the references contained a variety of objections which, in practical impact, divided into distinct categories that transcended the pleadings of the individual appellants, namely
 - 7.1. those where the Train Operators contended that the proposed possessions should not proceed at all because of the major impact *“of the proposed project on its Services or the operation of its trains”* (Condition D2.2.1);
 - 7.2. those where the Train Operators contended that *“the effect of the proposed project on its Services or the operation of its trains”* was severe, but that that impact could potentially be palliated given
 - 7.2.1. assurances in respect of the capability and capacity of diversionary routes; and/or
 - 7.2.2. detail adjustment to the applicable dates, and/or to the start and finish times, and/or to the geographical boundaries of individual possessions; and

- 7.3. those where the Train Operators considered that there had still not been adequate opportunity to discuss with Network Rail the potential “*effect of the proposed project on its Services or the operation of its trains*”, failing which, the Train Operator considered itself obliged to put an item into dispute, in order to protect its interests should eventual discussions not reach an appropriate and acceptable conclusion.
8. The Panel found that, within the second of these groups (i.e. 7.2 above), in some instances, the matter at issue related to the extent to which the impact of the possessions might be palliated by the payment of costs or compensation, specifically
 - 8.1. contentions that, should some of the possessions proceed, they would amount to the imposition of a Network Change, for which levels and terms of compensation payable are of a different order than for other possessions; and/or
 - 8.2. contentions that alternative arrangements to accommodate trains displaced by possessions, whilst feasible, incur the Train Operator in extra costs, which costs should be met by Network Rail, irrespective of the terms of the relevant Track Access Agreement.
9. In the specific matters identified in 8 above the Panel determined that it had no jurisdiction, because
 - 9.1. consideration of the applicability of the provisions of Part G depended first and foremost upon the due invocation, by Network Rail, or by the Train Operator, of the appropriate provisions of Part G, leading, in the event that there is no agreement between the parties, to the opportunity for the bringing of an appeal to the “relevant ADRC Tribunal” (Condition G6.1). The “relevant ADRC Tribunal” in such an instance would, in the absence of a successor body to the Network and Vehicle Change Committee, be an Access Disputes Panel.
 - 9.2. the Panel can only opine in respect of the extant provisions of the Track Access Agreement in force between the parties, including all the provisions of the Network Code, and the procedural arrangements (in particular in respect of Timetable Change) empowered by the Network Code. The Panel can neither prescribe, nor proscribe, any action by the parties that is not governed by the terms of the Track Access Agreement.
10. Against that background, the Panel acknowledged that the cases before it had been prepared at a time when the expectation had been that all determinations would have been made by the then Network and Vehicle Change Committee, within whose jurisdiction fell both matters of Major Project notice and of Network Change. However, the Panel considered that it had no alternative but to operate under the provisions that were in place at the date of the hearing.
11. The Panel noted that it was the view of the Disputes Chairman (who on this occasion was also the Panel Chairman) that the Panel
 - 11.1. should hear all those matters, as in 7.1 and 7.2 above, that related directly to the practicalities of the operation of Condition D2.2,
 - 11.2. should decline to entertain any arguments that related to matters that lay outside the documented scope of Network Code Part D, and

- 11.3. in respect of the matters in 7.3 above, should look favourably upon any requests from the parties for an adjournment of proceedings, for the purposes of further dialogue, on the understanding that
- 11.3.1. either party retains the unilateral right, in the event of no agreement on how to proceed, to bring the disputed items back before the Panel, and that
 - 11.3.2. until the matters in dispute have been either resolved, or determined by this Panel, Network Rail cannot proceed on the basis that the Major Project notice has been “established”. However,
 - 11.3.3. in accordance with Condition D2.1.7 (and on grounds of practicality), Network Rail is “*entitled to implement (in particular for the purposes of developing the Working Timetable to be implemented on the next succeeding Passenger Change Date)*” the incorporation of the disputed provisions into the “*applicable Rules of the Route*” pending resolution of those disputes, accepting that, an eventual determination may require Network Rail to make further revisions to the Rules of the Route.

Matters of Principle, and Directions to the Parties

12. The Panel noted that the issue of the relative priority of Firm Rights and proposals for possessions (whether in Rules of the Route, or Major Project notices) has been addressed in a number of previous determinations of both Network and Vehicle Change Committee and Timetabling Committee. In the view of the Panel, these past determinations had evolved the following general principles.
- 12.1. Train Operators’ rights to run trains are predominantly long term;
 - 12.2. Network Rail’s obligation to supply Train Operators with a secure Network is ongoing; it cannot always be delivered without interruption to services, and the relevant Parts of the Network Code, and the specific schedules in the Track Access Agreements are framed to permit reasonable interruptions, and to determine if, and how, Train Operators are to be compensated for the impact upon their operations;
 - 12.3. the normal process for planning such matters is as set out in Part D of the Network Code;
 - 12.4. where the proposed engineering works / “*proposed method of implementation of the project*” will have the effect that a Train Operator will be frustrated, for the duration of the Timetable, from running a service for which valid rights are held, this is likely to be seen as a reasonable ground for challenging the proposal and causing it to be modified;
 - 12.5. where the duration of the possessions is only part of a Timetable, then any determination reflects an assessment of the nature, and force of the rights enjoyed on both sides, tempered by considerations of whether there are a number of options for delivering the balance of rights, and whether that balance is the best met by the tabled proposal.

13. 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
- 13.1. 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
- 13.2. 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.
14. In short, where absolute legal considerations are in conflict, the issue of proportionality is an over-arching aspect of the procedures.
15. Following its initial consideration of the submissions from the parties, the Disputes Chairman issued the parties with specific directions. These directions were intended to give the Parties the opportunity to review their representations in the light of the new Rules A1.33 and A1.34.
16. Specifically the Panel wished to ensure that all Parties addressed the following points
- “ Rule A1.18 “*The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other*”.
 - Within the context of a Major Project notice (MPN), the respective legal entitlements will be defined by
 - the explicit provisions of the Network Code and of the individual Track Access Agreement;
 - the extent to which either party (or both) can demonstrate that it has fulfilled those obligations upon which its entitlements depend; and
 - where there is a need to reconcile competing needs of a range of parties, the manner in which proposed courses of action have been informed by the due application of the Decision Criteria (Condition D6).
 - The common characteristic of all references made under the provisions of Condition D2.2.4 is that a Train Operator contends that the proposed “method of implementation” will impact adversely upon the conduct of its business. A Panel, in order to weigh the merits of the case before it, needs the information, to a proportionate level of precision, to enable it to judge,
 - as between the rights of the Train Operator and Network Rail,
 - the case for the “*method of implementation*” proposed, and
 - the scale of the hurt likely to be experienced by the Train Operator.

- On the basis of this information the Panel is required to determine whether the “method of implementation” should reasonably be established, and the Train Operator directed to plan accordingly, or, conversely, that the “*method of implementation*” is judged to be inappropriate, and Network Rail is directed to find other means.
 - In either case, a key consideration for the Panel is the extent to which the MPN (together with any complementary dialogue) actually fulfils the stipulation of Condition D2.2.1 that any notice gives “*such particulars of the proposed method of implementation of the project as are reasonably necessary to enable each such Bidder to evaluate the effect of the proposed project on its Services or the operation of its trains*”. ”
17. The Panel was also sensitive to the perception that the Timetabling process, as set out in Network Code Part D, is sequential. In principle the Major Project notice creates a context for the subsequent crystallisation of the Rules of the Route; the Rules of the Route then set the context for detail incorporation of train specifications into the Timetable. However, the individual Train Operator, before surrendering any right to influence, through the disputes procedure, the detail of the “*method of implementation of the project*” requires an assurance that its service requirements can be appropriately honoured. That assurance can only be based on one of two considerations, namely
- 17.1. a demonstration, in effect a draft timetable, that the services in question (or viable alternatives) can be accommodated; or
 - 17.2. confidence in the integrity of the internal procedures of Network Rail that, where a commitment is given that a service can be provided, then, even though no details can be supplied, that commitment will be honoured, whatever the consequent implication for Network Rail.
18. The Panel considered that the former of these two approaches implied the undertaking of much premature analysis, and that this was potentially an unreasonable extravagance, likely ultimately to be a counter-productive diversion of train-planning resources. However, it may be inevitable, if
- 18.1. there is no alternative, and credible, means of giving the necessary assurance that the detail of the Major Project notice proposals are not inimical to the interests of the Train Operator; and
 - 18.2. there is no credible assurance that appropriate diversionary capacity is, and can be made, available.
19. It was with such considerations in mind that the Chairman, in his directions to the Parties, gave the following general guidance
- “In seeking such information the Panel is NOT seeking to impose upon any party the requirement to carry out prematurely detailed evaluations or planning exercises. Rather the Panel is seeking expressions of best professional judgement upon which it can, with confidence, reasonably depend in making its determinations. Alternatively, where no such professional judgements are proffered the Panel is likely also to take this into account. The rationale for this

and the preceding paragraphs is the over-arching need for the Panel to have an understanding of the continuing viability of the commercial operation carried out by the Train Operator”;

and

- “All parties are reminded that, where the Panel seeks further information, it does so on the basis that the information supplied in response represents the views, and, where appropriate, the commitment, of the corporate body party to the dispute. All parties should ensure that their level of representation before the Panel is adequate to ensure that this is the case”.

The Parties’ response to the Directions

20. The Panel found that, although, in most instances, case specific questions included in the Directions had been addressed, the Parties had not generally sought to argue their cases on the basis of a substantiated demonstration of their respective legal entitlements. In many instances there appeared to be an assumption that the Panel members

20.1. could be relied upon to have comprehensive prior knowledge of all the contractual documents involved, not just the Network Code (a reasonable expectation), but also the provisions of the individual Track Access Agreements and Schedules;

20.2. could, if overwhelmed with undifferentiated detail, be relied upon to appreciate the significance of the individual matters, even without the benefit of any guidance as to why they purportedly supported the particular arguments being advanced.

21. This was therefore a disappointing aspect, given the importance that the Panel had attached to the issuing of directions, and the Panel records that **such an approach in the future is not likely to be acceptable**. However, in this instance, given the fact that resolution of outstanding disputes in respect of the Major Project notice is a time critical element in the overall Timetabling procedure, the Panel resolved to do the best it could with the material before it. At the same time it resolved that

21.1. where failures of the parties to comply with directions meant that the Panel lacked basic information, it would assume that such basic information did not exist, or, more particularly, was not considered important by the parties; and

21.2. it would ask the Access Disputes Committee to commission the production of a thorough briefing document setting out the minimum information required to present a case before a Panel.

The disposal of individual cases which did not require the Panel to make a final determination

22. The Panel noted that, following its guidance in relation to which body had jurisdiction in respect of claims that certain works, or methods of working, should be considered as Network Changes, the case (NV78) brought by Silverlink, and the associated pleadings within the reference from Virgin West Coast (NV83) had been **withdrawn**.

23. In respect of the following cases the Panel was asked to give the parties the benefit of an **adjournment**;
- 23.1. **NV76: First Scotrail**; in respect of assurances being given that there would in practice be acceptable paths found for the Anglo-Scottish sleeper services;
- 23.2. **NV84: Central Trains**; in respect of
- 23.2.1. multi-partite discussions that had been started to determine how passenger needs in the West Midlands area, during periods when the Trent Valley line was closed, might be met by adjustment to all Passenger Train Operators' services; and
- 23.2.2. assurances as to capacity to out-stable trains equal to 22 vehicles during periods when normal access to depots is denied.
- 23.3. **NV83: Virgin West Coast Trains Ltd**; in respect of continuing debates about the extent to which the programme of West Coast Route Modernisation possessions requires multiple major possessions to take place at the same time, imposing unreasonable diversions and cancellations on the whole of the VWC service pattern. The Chairman directed that, in the event that this case did proceed to a further hearing, the parties should provide a clearly documented statement of their respective views as to the applicable rights of VWC for the dates in question.
- 23.4. **NV75: English Welsh & Scottish Railway Ltd**; in respect of 42 possessions where insufficient information had been received as to the extent to which they would require re-timing and/or diversion of affected services, but where there was a reasonable expectation that most requirements could be anticipated to be met.
24. The Panel was content to accede to each of these requests for adjournment, but emphasised to the Parties that
- 24.1.1. either party retains the unilateral right, in the event of no agreement on how to proceed, to bring the matter back before the Panel;
- 24.1.2. until the matters in dispute have been either resolved, or determined by this Panel, Network Rail cannot proceed on the basis that the Major Project notice has been "established"; in which case
- 24.1.3. incorporation of the relevant contested provisions into the "*applicable Rules of the Route*", shall be subject to the caveats set out in Condition D2.1, and conditional upon the terms of any eventual determination;
- 24.1.4. all outstanding matters should be addressed as matters of urgency; and
- 24.1.5. if agreement is reached such that there is no longer a matter for this Panel, or an alternative panel, to address, then the Secretary should be advised specifically that the reference is withdrawn .
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.
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.

The Panel's findings and determinations in respect of other cases

31. The Panel considered that, after sifting out all the forgoing, it was still expected, by the Parties, to make determinations in respect of the following matters. In every instance the matter in question involved more than one Train Operator, and therefore the Panel decided that it should consider all representations together, and make determinations on the basis of the overall balance of the issues raised.
 - 31.1. Possessions between **Preston and Carlisle** during Period A (14th January to 27th March 2006) and Period B (1st April to 12th June 2006), and the proposal that the **"44hr SPO blocks...be extended 5½ hours on 1 week in 2 during this period"**. Proposal objected to by TPE (NV81) and DRS (NV82).
 - 31.2. Possessions for the purposes of renewing **Longsight South Junction Switches and Crossings** in weeks 14 to 24 (2nd July to 11th September) causing interruption of all TPE services between Manchester Piccadilly and Manchester International Airport for varying periods each weekend. Requirement to divert/bus other passenger services (VWC, CrossCountry Trains, Northern Rail), and divert freight services (FL and EWS). TPE objects to the timing of the proposal absolutely (NV81), EWS and FL seek assurances regarding diversionary capability and capacity.
 - 31.3. Extended weekend Possessions at Camden, Trent Valley Lines, Longsight, Harthope Viaduct, and Motherwell, having the effect that W10 gauged routes will be closed to W10 freight trains, with no suitable alternative W10 routes, and therefore need to curtail W10 carryings on affected (mostly Saturday or Monday morning) services. Objected to by EWS (NV75), GBRailfreight (NV77), FL(NV79), and DRS (NV82).

Preston and Carlisle

32. In respect of the possessions between **Preston and Carlisle**, the Panel found that
 - 32.1. Network Rail could not give any clear justification either why the possessions needed to be extended, and, more particularly, why that should be on a 1 week in 2 basis;
 - 32.2. the principal passenger train affected is the first (03:49 Monday) TPE departure from Barrow, for Manchester Airport (MIA). This train conveys up to 20 passengers;
 - 32.3. a substitute bus service, because of the nature of the roads leaving Barrow, would require to depart from Barrow at approx 03:00 to maintain an arrival time (by train or throughout bus) at MIA at 06:13;
 - 32.4. a proposal that the timing of a first passenger service should vary on alternate weeks would appear to be at direct odds with Decision Criterion (k) *"avoiding wherever practicable frequent timetable changes, in particular for railway passenger services"* (Network Code Condition D6);
 - 32.5. Monday morning extensions of these possessions will also delay 4S39 and 4M30 DRS services, by 3 and 4 hours respectively, given that both these services are planned to convey W10 gauge traffic, and that there is no alternative W10 diversionary route;

- 32.6. Network Rail had suggested that, within the framework of possessions as proposed, it could schedule works so that, on the weeks with a longer possession, the additional works would all be undertaken on the Northern half of the section, so as to permit the Barrow – MIA service to operate to a consistent timetable. Such a proposal would not be of any benefit to DRS.
33. **The Panel considered such limited facts as were laid before them and determined that**
- 33.1. **the rights held by TPE** (and, to an extent qualified by the findings at 37 below, those of DRS) **require to be taken into account, and cannot simply be set aside;**
- 33.2. **the need for the proposed 1 week in 2 possession extension has not been adequately substantiated, and in particular, relative to the nature of the upset it will cause;**
- 33.3. **Network Rail should not be permitted to include in the established Major Projects notice the extensions to these possessions beyond 00:30 Monday.**

**Longsight South Junction Switches and Crossings - weeks 14 to 24:
2nd July to 11th September 2006**

34. In respect of the possessions to renew **Longsight South Junction Switches and Crossings (S&C)**, the Panel found that
- 34.1. there was general agreement amongst all parties, including the principal objector TPE that the works required to be undertaken, and that the nature of the works required some periods of all–line blockage;
- 34.2. the duration of the all-line blockages may have been increased by the requirements to install the replacement S&C to Absolute Geometry Standards (i.e those consonant with the requirements of Enhanced Permissible Speeds);
- 34.3. with the exception of TPE, all Train Operators (Northern Rail, VWC, CrossCountry Trains, Arriva Trains Wales, EWS and FL) had acquiesced, to the point of not registering objections, with a view that the least disruption to business patterns for freight and passenger operators would be achieved by undertaking the work during Summer/School holiday weekends;
- 34.4. for TPE, these same summer weekends represent the peak for one of their critical flows namely business to and from MIA;
- 34.5. during periods of all-line blockage at Longsight South there is no alternative route to enable TPE services to serve MIA. When, at other times, the blockage is confined to the Fast Lines, and the Up & Down Goods line, access to MIA can be maintained. However, during these periods, other operators also have an interest in assuring service over the route;
- 34.6. during the 11 weeks in question there will be NO route open between Manchester Piccadilly and MIA
- 34.6.1. on every Sunday, between 01:30 and 09:30;

- 34.6.2. on 6 of those Sundays (weeks 16 to 19 and 23 to 24), between 09:30 and 05:40 Monday; and
- 34.6.3. on 3 of those weekends (weeks 17, 18 and 19, i.e. 21st July to 7th August) between 23:30 Friday and 01:30 Sunday.
- 34.7. No Rail service to MIA from the Manchester direction will be provided on 3 Saturdays, and 6 Sundays;
- 34.8. TPE's view is that airline passengers, with their baggage, and their concerns about potential for missing flights, are clients who do not use trains regularly, and who do not take kindly to being transferred to buses; disruption at this time of year is therefore going to damage TPE's business disproportionately;
- 34.9. The works in question are all renewal works and there is no possibility of compensation payments under the provisions of Network Code Part G;
- 34.10. there has been no suggestion made that the possessions proposed are disproportionate to the work to be undertaken;
- 34.11. Network Rail has been in active discussions with some of the other Train Operators about arrangements to apply during the period of the works. No information was put before the Panel as to whether those alternative arrangements would impact upon the service that could be operated to MIA at the times when only the Slow Lines were open.
- 35. The Panel therefore, on the basis of the information laid before it, determined that**
- 35.1. TPE does have Firm Rights to the services to MIA, and some of those Firm Rights will not be able to be exercised on the 6 weekends of longest closures; however, such rights are ultimately subordinate to "the applicable Rules of the Route" once these have been established;**
- 35.2. in the long term those rights cannot be honoured if the Longsight S&C is not renewed; the proposals therefore reflect Network Rail's concerns in respect of Decision Criteria (c) and (d);**
- 35.3. Network Rail does appear to have sought to time those works to achieve the least hardship to the largest number of operators, and has obtained a significant degree of consensus for that timing; and that therefore**
- 35.4. applying the principle of proportionality to this particular issue, Network Rail should be entitled to incorporate the possessions in respect of the Longsight S&C works into the established Major Project notice.**

Diversions routes for W10 gauge trains

36. The Panel found that
- 36.1. the West Coast Main Line (WCML) is currently cleared for the conveyance of wagons loaded to W10 gauge;

- 36.2. where the WCML is blocked, the alternative routes available for freight trains are not cleared to W10 standards. Some routes are cleared to W9 standards, and these, it has been confirmed, still include the Chiltern route out of London;
- 36.3. Network Rail's programme of gauge enhancements between Felixstowe and the WCML has been undertaken at the direction, and funding, of the SRA; currently that direction does not encompass the clearance of alternative routes. However, Network Rail has commissioned a study of the potential costs of clearance of a diversionary route to W10 standards from Camden to Willesden Junction via Gospel Oak;
- 36.4. volumes of traffic conveyed in 9'6" high ISO containers are growing very sharply, and represent a major opportunity for the Freight Train Operators; they also pose a significant challenge if the only wagons available to convey them require a route cleared to W10 standard;
- 36.5. wagons exist for the conveyance of 9'6" high ISO containers over routes cleared for W9, and, in some instances, still smaller gauges, but are small in number and already generally committed to other traffics operating over other routes;
- 36.6. the Track Access Contract (Freight Services) for all the Freight Train Operators in question grants Permission to Use *"the track comprised in the Network ...subject, in each case and in all respects to... the Operating Constraints"*;
- 36.7. the Structure gauge to which any particular stretch of line is cleared forms part of the Operating Constraints for that stretch of line. Under the terms of the Track Access Contract (Freight Services), each Train Operator has permission to operate trains that exploit the Operating Constraints to the full, and Network Rail does not have the right to modify permanently the Operating Constraints without invoking the provisions of Network Code Part G Network Change;
- 36.8. the Track Access Contract (Freight Services) does not, unless specifically providing to the contrary, confer on Train Operators any general right to operate trains that exceed the relevant Operating Constraints in any respect;
- 36.9. all the Train Operators who are party to this particular objection have chosen to develop services over the WCML which take full advantage of the fact that the Operating Constraint for the WCML is W10, which permits the conveyance of 9'6" high ISO containers, without recourse to lower platform wagons; this is in natural conformance with their entitlements under the Track Access Contract (Freight Services);
- 36.10. the Panel has not been shown any documentation to support any claim by a Train Operator that its rights have been particularised to confer on it a right to operate designated services at W10 gauge in all circumstances, nor to load onto Network Rail any general obligation to modify the Operating Constraints, to provide diversionary routes for such services;
- 36.11. in the Major Project notice Network Rail has given indications of its willingness *"to ensure that diversionary routes as reasonably practical are available"* and also that *"Freight Operators have indicated their requirements with regard to W9 Multifret and Unilog gauge and W10 diversionary route clearances, and these are being actively pursued. Those directly involved will be kept updated of progress with this requirement"*. (Major Project notice Section 9).

37. The Panel therefore concluded that, whilst the desirability of developing traffics to W10 gauge, and the need to ensure that such traffics can pass at all times, may appear commercially self-evident, it does not form part of the legal entitlements enjoyed by the Freight Train Operators in the case when the WCML is unavailable. Nevertheless, the effort made by all parties, in particular by Network Rail, to ensure that, in as many instances as possible, diversionary routes, adequate in both capability and capacity, are made available, is to be applauded and encouraged. Such effort does not however confer any additional legal rights or obligations on any party.
38. **The Panel therefore, on the basis of the information laid before it, determined that, in all those cases where objectors have sought to modify or curtail possessions on the sole ground that the possession would not allow W10 gauge traffic to be conveyed on services that would be diverted as a result, such objections do not have the legal substance for the Panel to direct that Network Rail should be required to modify those possessions to meet those objections. To the extent therefore that those possessions have not been contested on any other grounds, the Panel determines that Network Rail should be entitled to incorporate them into the “established” Major Project notice.**
39. For the avoidance of doubt, where the Panel has determined that Network Rail is empowered to incorporate possessions or other restrictions of use into the established Major Project notice, Network Rail may also incorporate those possessions or other restrictions of use into the ‘*applicable Rules of the Route*’ in accordance with the relevant provisions of Condition D2 of the Network Code (10th January 2005), and a Train Operator’s right of appeal against those Rules of the Route will be constrained in accordance with Condition D2.1.6.
40. 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