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

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### **Determination No. NV9**

(Hearing held at Kings Cross on 6<sup>th</sup>, 12<sup>th</sup> and 26<sup>th</sup> September 2000)

1. The Network and Vehicle Change Committee was asked by Freightliner Ltd (FL) to determine that the arrangements proposed within the Major Projects Notice for the West Coast Route Modernisation PUG 2 Phase 1, should be revised or rejected, because FL believes that the method of implementation will have significant adverse effects on its Services and the operation of its trains during the 2001/2002 Timetable year. Specifically, that
  - 1.1. for the duration of the Major Project Notice the timetable for overnight services between Euston and Crewe would be drafted on the basis that only two tracks would be available ("the two track railway") throughout both the route, and the duration of the 2001/2002 timetable. In consequence,
  - 1.2. a significant number of trains, would be denied the ability to maintain contracted timings (e.g. because of the removal of opportunities for overtaking slower services), and could not therefore be offered paths complying with FL's Firm Contractual Rights, in particular a quantum of paths between Ipswich and Crewe that should be under 5 hours in throughout running time;
  - 1.3. services delayed South of Crewe are unable to connect into paths North of Crewe; and
  - 1.4. even with "the two track railway" there would be a need for further adjustments to paths to permit Rule T2 possessions to be taken on adjacent lines not affected by the full possessions, at the beginning and end of those full possessions. Furthermore
  - 1.5. clear indications had apparently been given that the conditions necessary to fulfil FL's Firm Contractual Rights might not be restored at the conclusion of the period covered by the Major Project Notice, or indeed ever, and that
  - 1.6. the whole project was being implemented in a manner that breached specific undertakings given by Railtrack at the Regulatory Hearings that led to the agreements at the heart of West Coast Route Modernisation PUG 2 Phase 1.
2. Taking all these things together, the view of FL was that Railtrack was acting in a way that was not in accordance with the provisions of Track Access Condition D2.3, and the Committee was asked to rule that
  - 2.1. Railtrack was not entitled to put into effect a proposed method of implementation that did not fulfil FL's Firm Contractual Rights; and
  - 2.2. Railtrack should be directed to produce an alternative method of implementation that does allow fulfilment of FL's Firm Contractual Rights.

3. The view of Railtrack was that, given the scale and importance of the works required for West Coast Route Modernisation PUG 2 Phase 1, and taking account of the provisions of Track Access Condition D2.3, the arrangements set out in the Major Project Notice were appropriate, because
  - 3.1. "the two track railway" was essential to enable the programme of infrastructure works, to which Railtrack was committed as part of an agreement with another Train Operator, to be completed within contracted time scales;
  - 3.2. there is need for complete renewal of the fast lines from Euston to Crewe and partial renewal of the slow lines, along with the Overhead Line Equipment enhancement, signalling and other works. Much of these extensive works will take place on midweek nights and, in the case of plain line track renewals, enable effective use of the High Output Track Relaying and High Output Ballast Cleaning trains;
  - 3.3. "the two track railway" will enable a permanent timetable to be composed that is capable of absorbing a defined degree of works at different locations on different dates within a consistent timetable plan;
  - 3.4. "The increase [in Engineering Allowances] has been contained to a rise from 24 Down/27 Up to 41/32 mins. Euston to Crewe which is not considered unreasonable";
  - 3.5. the Rule T2 possessions are an essential safety requirement in association with the setting up and packing away of rail borne equipment associated with the High Output Track Relaying train;
  - 3.6. given that the provisions of a Major Project Notice had the same force as a change to Rules of the Plan/ Rules of the Route, Firm Contractual Rights could be set aside; and that
  - 3.7. taken overall the arrangements proposed represented an appropriate application of the Decision Criteria (Track Access Condition D4).
4. The Committee noted that
  - 4.1. the definition of a Major Project:
 

*"means any engineering, maintenance or renewal project which requires a possession or series of possessions on one or more sections of track extending over:*

*(a) a period of more than one year; or*

*(b) a period which contains two or more Passenger Change Dates;"*;
  - 4.2. "In...Condition D2.3 the expression "method of implementation" means a statement containing a programme of possessions or other restrictions on the use of the track which would be required in order to carry out the proposed project in question" (D2.3.1), and that the Major Project Notice is the accepted way of documenting that statement; and that

- 4.3. Track Access Condition D2.3 Major Projects is the only part of Track Access Condition D where the Industry Committee is the Network and Vehicle Change Committee rather than the Timetabling Committee.
5. In reviewing its locus and powers in relation to references relating to a Major Project Notice, the Committee posed the following questions:
  - 5.1. What are the special circumstances that require the use of a Major Project Notice?
  - 5.2. Do those circumstances confer on Railtrack extraordinary powers over and above those other powers contained within Track Access Condition D?
  - 5.3. Does a Major Project Notice, and the procedures set out in Track Access Condition D2.3, afford a Train Operator any extraordinary protection over and above those other powers contained within Track Access Condition D?
  - 5.4. What are the practical implications of the fact that the Committee enjoys wider scope for the giving of directions under Track Access Condition G6.5.3, than it would under the terms of D5.5.3?
  - 5.5. Should any judgement in respect of the method of implementation set out within a Major Project Notice be in any way influenced by the definition of the state of the Network that will result from the completion of the works covered by that Major Project Notice?
  - 5.6. In these circumstances, where there is no associated Network Change Notice (as required by Track Access Condition G1.1), and therefore no definition of the state of the Network that will result from the works covered by the Major Project Notice, does this change the factors that the Committee should take into account in making its determination?
6. In seeking answers to the first three of these questions (paragraphs 5.1 to 5.3 above), which the Committee considered as fundamental points of principle defining its discretion in the specific case in question, the Committee drew the following conclusions:
  - 6.1. The Major Project Notice procedure (Track Access Condition D2.3) is required where Railtrack needs to use a method of implementation, requiring special *“possessions or other restrictions on the use of the track” “extending over: (a) a period of more than one year; or (b) a period which contains two or more Passenger Change Dates”*. It enables
    - 6.1.1. the method of implementation to be protected from challenge or change as part of the normal *“Review of Rules of the Route/Rules of the Plan”* (Track Access Condition D2.4); and
    - 6.1.2. the *“Bidder to evaluate the effect of the proposed project on its Services or the operation of its trains”* (Track Access Condition D2.3.1).
  - 6.2. Once a Major Project Notice has been finalised and adopted, then, to deliver the method of implementation, Railtrack is empowered to introduce changes to the Rules of the Route/Rules of the Plan which, provided they are *“within and*

*consistent with its method of implementation*” cannot be challenged by reference to the Timetabling Committee (Track Access Condition D2.4.6(a), (b) and (c)).

- 6.3. The Train Operator enjoys additional protections under Track Access Condition D2.3 because, when compared with the procedures in Track Access Condition D2.4,
  - 6.3.1. there is a reasonable expectation that the Major Project Notice will be introduced to a timescale that will offer the Train Operator more time “*to evaluate the effect of the proposed project on its Services or the operation of its trains*”;
  - 6.3.2. the timescale for appeal against any unsatisfactory aspect of the Major Project Notice is extended to 30 days (Track Access Condition D2.3.4) from 7 days (Track Access Condition D5.1);
  - 6.3.3. whereas Track Access Condition D2.4.7 gives Railtrack the right, in the context of a Review of Rules of the Route/Rules of the Plan, to continue to implement its proposals, pending the hearing of any reference to the Committee, Track Access Condition D2.3 is silent on such a right in respect of a Major Project;
  - 6.3.4. the Train Operator is not required to accept changes proposed to the Rules of the Route/Rules of the Plan which are not “*within and consistent with [the] method of implementation*” in the Major Project Notice; and
  - 6.3.5. because any reference is determined by the Network and Vehicle Change Committee, in accordance with the discretion defined within Track Access Condition G6.5.3(a) (as amended by D2.3.5(a)), there is the option for the Committee “*to direct [Railtrack or the Train Operator] to accept any submissions made by any party as to the relevant Major Project*” (G6.5.3(a)(ii)).
7. The practical implications of these conclusions for the determination of this specific reference are:
  - 7.1. it requires to be concluded in all respects before the commencement of the normal Review of Rules of the Route/Rules of the Plan for the 2001/2002 Timetable;
  - 7.2. it is reasonable to interpret that the provision in Track Access Condition D2.4.6(a), (b) and (c), that disbars an appeal against a proposed change in Rules of the Route/Rules of the Plan which is “*within and consistent with [the] method of implementation*” in a Major Project Notice, exists because the Major Project Notice hearing provides a prior opportunity for such appeals to be heard. It is not intended that it should permit such changes to be made without any opportunity to appeal. It follows therefore that
  - 7.3. the Network and Vehicle Change Committee must ensure that it gives, to any objection from a Train Operator, that same consideration that the Timetabling Committee would otherwise give to any objection to proposed changes to Rules of the Route/Rules of the Plan that was not subject to a Major Project Notice. That consideration should include taking into account any previous determinations on akin matters by the Timetabling Committee.

- 7.4. Track Access Condition G6.5.3 empowers the Committee specifically “ *to direct the parties to accept any submissions made by any party as to the Major Project*”. Such directions could include, provided the Committee was satisfied that they were consistent with a reasonable interpretation of the provisions of the relevant agreements, that
- 7.4.1. the Train Operator should accept "the two track railway" as proposed: or that
- 7.4.2. Railtrack should prepare an alternative method of implementation.
8. Finally, at the level of principles, and in response to the questions at 5.5 and 5.6 above, the Committee noted that
- 8.1. in some circumstances a Major Project Notice may be served as a complement to a Network Change. However, any appeal against the Major Project Notice is to be resolved without prejudice to the provisions of Part G of the Track Access Conditions in respect of that Network Change, or to the requirement to respect the provisions of Track Access Condition D2.4 in regard to Rules of the Route/Rules of the Plan;
- 8.2. FL contended that the arrangements described in the Major Project Notice, in respect of "the two track railway" were proposed to last for an indefinite period; however, neither party had taken steps to ensure that the arrangements described in the Major Project Notice were made the subject of a Network Change notice, served in accordance with Part G of the Track Access Conditions;
- 8.3. the Major Project Notice covered the 2001/2002 Timetable period only, but that works associated with this Major Project were already in hand that had not been the subject of any earlier Major Project Notice;
- 8.4. the Major Project Notice had been issued only a very short time before the publication of proposals otherwise to revise the Rules of the Plan/ Rules of the Route, and that some of those revisions proposed are required to implement the Major Project Notice;
- 8.5. the Major Project Notice does not extend to the date for the completion of the works necessary for West Coast Route Modernisation PUG2; Railtrack has stated that further Major Project Notices will be issued;
9. In turning to the specific details of this reference, the Committee reminded itself that the purpose of a Major Project Notice (Track Access Condition D2.3.3) is to give notice of the “*proposed method of implementation for the proposed project, provided that:*
- (a) *in deciding such proposed method of implementation, Railtrack shall have due regard to the Decision Criteria; and*
- (b) *it shall have taken into account any comments submitted to it pursuant to Condition D2.3.2*”

10. This obligation includes the need to enter into full dialogue with each affected Train Operator, to take full account of representations made, and to have due regard to the Decision Criteria. In respect of "the two track railway" the Committee was of the view that Railtrack had made reasonable arrangements for the Train Operator to make any comments, as in Track Access Condition D2.3.3(b). However, the timing of the Major Project Notice in relation to the timetable for the Review of the Rules of the Route/Rules of the Plan had posed problems in respect of the time available for consultation.
11. The main matter at issue was whether the method of implementation proposed was reasonable "*hav[ing] due regard to the Decision Criteria.*"
12. The Committee noted the magnitude of the works, and the strategic importance of West Coast Route Modernisation PUG2 Phase 1 (and Phase 2) to the general health of the industry; the Committee was clear that that did not absolve Railtrack from any of its obligations to carry out scrupulously the provisions of Track Access Conditions D2.3 and 2.4, and Part G.
13. The Committee acknowledged the general merits of the scheme that the method of implementation described in the Major Project Notice is intended to deliver. However the Committee noted that the Major Project Notice is silent on the substance of that scheme and that there is no Network Change proposal by which to assess the benefits that accrue to the Train Operator from the scheme. The Committee thought that this was unfortunate in the circumstances of this case, where there are, in the evidence presented, suggestions of
  - 13.1. an apparent inconsistency between the declared shape of the network at the end of the implementation process (whether a Network Change, or a restoration of the *status quo ante*), and the method of implementation,
  - 13.2. allegations that the method of implementation will result in changes affecting the ability of the Train Operator to operate services on the Network beyond the time frame of the Major Project Notice, and/or
  - 13.3. a Train Operator being asked to accept a transitional loss of rights against real benefits when the works are complete.
14. In respect of the specific arguments advanced by the parties, the Committee gave its consideration to each in turn, in each case seeking to take account of the Decision Criteria, and the need to meet tests of reasonableness.
15. The parties were agreed that the effect of the proposal to time the West Coast Main Line as "the two track railway" would be to prevent FL from being offered paths for its scheduled Services, in particular those between Ipswich and Crewe, that fulfilled the requirements of the journey time specifications within the Track Access Agreement.
  - 15.1. For FL it was advanced that this was a failure to fulfil Firm Contractual Rights, and gave inadequate weight to Decision Criteria D4(a), (b), (c), (f), (i) and (l).
  - 15.2. For Railtrack the case was advanced that Decision Criteria D4(a), (c), (d), (k) and (l) supported a view that the broader interest in completing the project should take precedence over individual rights.

- 15.3. Furthermore Railtrack asserted that the process of introducing changes to Rules of the Route/Rules of the Plan, whether via Track Access Condition D2.3 or D2.4, empowered Railtrack to require Train Operators to accept non-compliant offers to accommodate works, because each Firm Contractual Right was contingent upon Rules of the Route/Rules of the Plan.
  - 15.4. The Committee noted that the Timetabling Committee (in its Determination no. TTC87 of 27<sup>th</sup> January 2000), had considered the rights of Railtrack to make changes to Rules of the Route/Rules of the Plan, at the expense of Firm Contractual Rights held by EWS for Royal Mail services over the West Coast Main Line;
  - 15.5. After reviewing that precedent Determination TTC87, the Committee noted that, in that determination, Railtrack had only been given approval to incorporate changed timing allowances into the Rules of the Route (i.e. to enable those allowances to become part of the applicable Rules of the Route), provided they made exceptional provision for the two trains that were that were the subject of the reference to be timed in compliance with their Firm Contractual Rights, and NOT subject to the new allowances; in effect Railtrack had been barred from using the provisions of Track Access Condition D2.4 to force EWS to accept paths which were not in compliance with asserted Firm Contractual Rights.
16. The Committee therefore considered the case for "the two track railway" as propounded by Railtrack, and concluded that:
    - 16.1. Railtrack has the responsibility for finding the appropriate method of implementation for any Major Project, just as it bears the cost of any failure to deliver such works against other contractual deadlines;
    - 16.2. whilst "the two track railway" may provide for an effective maintenance and renewal programme, with efficient operation of High Output On-Track machines, the intensity of the proposed programme of works is primarily required in order to deliver the standard of infrastructure implied in the commitments given to another Train Operator in respect of West Coast Route Modernisation PUG2 Phase 1;
    - 16.3. there is no provision within the FL Track Access Agreement that requires FL to surrender any of its rights solely to facilitate Railtrack's achievement of its commitments to another Train Operator;
    - 16.4. Railtrack had not, in any aspect of the evidence presented to the Committee, given any indication of how soon, or how surely, on the completion of any of the works, FL would be in a position to be offered paths that would adequately fulfil its Firm Contractual Rights in respect of any of the trains in question; and
    - 16.5. it did not accept Railtrack's argument that the weight of the responsibility to deliver the Major Project meant that a Major Project Notice, could, in order to facilitate the works, insist on introducing an unchallengeable method of implementation that forced the Train Operator to accept that its Firm Contractual Rights should not be honoured.

17. Put another way, as the Major Project Notice could not finally be enforced until the Committee had heard and ruled on the substance of any objections from Train Operators, Railtrack require to convince Train Operators (and failing them, the Committee) of the good reasons why their rights should be subjugated, in the wider interests 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.
18. In the circumstances of the case in question, 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. However, it might direct that the Train Operator should accept a temporary curtailment of those rights, but only where there are reasonable grounds for such curtailment, "*having due regard to the Decision Criteria*". In making this sort of direction, the Committee would take into account the other possible options open to Railtrack for implementation, and the long term implications (including benefits) for the Train Operator, of the works to which the Major Project Notice relates.
19. The Committee therefore determined that
  - 19.1. 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 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.
  - 19.2. Taking account of the evidence presented, and its assessment of the tests of reasonableness that the Committee had decided best fitted the particular circumstances of a Major Project Notice, and having due regard to the Decision Criteria, Railtrack, in promulgating the particular version of "the two track railway" for the 2001/2002 Timetable, did not appear to have given sufficient weight to FL's Firm Contractual Rights, in respect of the Ipswich to Crewe [and other] services.
  - 19.3. Railtrack should therefore withdraw the proposal for "the two track railway" as tabled, and, starting from the premise that every effort should be made significantly better to reflect the detail of FL's Firm Contractual Rights, should submit new proposals for the timetabling of overnight trains over the route between Euston and Crewe during the term of the Major Project Notice.
  - 19.4. For the avoidance of doubt, the parties should understand that
    - 19.4.1. the revised proposal from Railtrack may be a variant on "the two track railway" , or an entirely different proposal;

- 19.4.2. The proposal should be devised with the maximum consultation with FL and with other Train Operators who may be affected;
- 19.4.3. FL is 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,
- 19.4.4. the solution found may still be subject to appeal to the Committee in accordance with D2.3, but not in respect of D2.4.
- 19.4.5. the solution found for 2001/2002 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; and
- 19.4.6. this determination is without prejudice to the right of either party to invoke the provisions of Track Access Condition Part G.

Bryan Driver  
Chairman,  
Network and Vehicle Change Committee