
TIMETABLING COMMITTEE

Determination No. 144

(following a hearing at Kings Cross on 24th May 2002)

[Note: previous published determination was determination no.136 of 14th March 2002]

- 1 The Committee was asked by the Grand Central Railway Company (GCR) to direct Railtrack to accept GCR's bid for paths between Newcastle and Manchester in the Winter 2002 Timetable.
- 2 The Committee noted that
 - 2.1 GCR is an aspirational open access operator; it does not currently enjoy any form of Track Access Agreement; it does however qualify "to participate in the procedure set out in this Part D" (Track Access Condition D1.2);
 - 2.2 there have been extensive and prolonged discussions between Railtrack and GCR regarding GCR's plans;
 - 2.3 the parties have been advised that a formal application to the Regulator for approval of a Track Access Agreement, under whatever relevant provision of the 1993 Railways Act, would be best if informed by evidence supporting the practicalities of any paths sought;
 - 2.4 GCR had participated in the Timetabling Conference for the 2002 Timetable, as entitled under the provisions of Track Access Condition D1.2, and had submitted their Priority Date declaration by the due date.
- 3 The Committee therefore considered that, to this extent, all of GCR's participation in the process was consistent with the requirements of Track Access Condition D, and that their "rights, or the expectation of rights, falling within Condition D3.4.1(b), D3.4.1(c) or D3.4.1(d)" had been properly handled by Railtrack, as if compliant, and as required by the final paragraph of Condition D3.4.1.
- 4 The Committee noted further, that in the course of the Timetable Development Period, there had been a significant dialogue about the feasibility and scope of GCR's aspirations, and that, in particular
 - 4.1 both parties had contributed resources and effort to identifying and validating paths for hourly services between Newcastle and Manchester and that a total of 31 such paths had been defined and validated;
 - 4.2 whilst GCR had clear aspirations to run an hourly service they had also been prepared to accept a lesser number, should Railtrack be unable to path an hourly service. GCR had subsequently proposed it constrict its aspirations for the Winter 2002 Timetable to a basic service of 4 trains per day in each direction;
 - 4.3 the parties had appeared to co-operate in a process where, within the context of the normal bid and offer procedure, a larger number of paths were validated and included in the final offer, against a prospect that the Train Operator would then make a selection of those that it would choose to operate. The Committee was concerned that this is to use the Track Access Condition D in a way for which it was not intended, which would, were it adopted widely, lead to much sterilisation of pathing capacity.

- 5 The Committee then considered the further events that had led, after such preliminaries, to the current dispute and took into particular account that
- 5.1 as a result of concerns about the possible impact of GCR's aspirations on other services operated by established Train Operators under existing Firm Contractual Rights, Railtrack had commissioned a series of MERIT runs to test the proposed paths. These runs of MERIT were challenged by GCR on the grounds of inconsistencies in the base timetable data that supported them. The parties were agreed that the impact of GCR's final proposals was of the order of 4 seconds of additional lateness per train for all other passenger services on the routes affected. Railtrack were of the view that this was a decisive impact; GCR considered that this was not significant, in particular in relation to the alleged inconsistencies in the data used;
 - 5.2 The electronic version of the timetable that was issued to all bidders by 12th April 2002 contained details of validated paths, matching GCR's aspirations and designated as "offers";
 - 5.3 Railtrack had written to GCR on 12th April to advise that GCR's bids for the Winter 2002 timetable were rejected, and that "*Railtrack is not prepared to enter into a Track Access Agreement with Grand Central for the service proposed for this Winter 2002 timetable*". Railtrack further stated that "*having due regard to all Decision Criteria.....the bid is rejected.*"
- 6 The Committee considered the provisions of Condition D5 in respect of its powers and noted that
- 6.1 Condition D5.1.1 states that matters that may be referred to the Timetabling Committee for determination, where the "*Bidder is dissatisfied with any decision of Railtrack made pursuant to Condition D1.4, D2 or D3....*" include "*(a) the application by Railtrack of the Decision Criteria;*" and "*(b) the acceptance or rejection by Railtrack of a Bid*".
 - 6.2 Condition D5.5.3 defines the scope of the direction the Committee may give to Railtrack, or to GCR;
 - 6.3 it was satisfied that the Timetabling procedure empowers Railtrack to accept or reject Bids, as made by any Bidder, subject, in the event of rejection, to the Train Operator having the right of appeal to the Timetabling Committee. Where appropriate the Committee may direct Railtrack to modify its proposed timetable to ensure that Bids that relate to Firm Contractual Rights are adequately accommodated. In reaching such determinations the Committee informs its deliberations by reference to the weight given by Railtrack to each of the Decision Criteria (Condition D4).
- 7 Where there is no current Track Access Agreement, but there is a fair and reasonable "*expectation of rights*", the Committee may reasonably determine disputes about Railtrack's application of the priorities in Track Access Condition D3.4.1. However, although it may encourage parties to engage in further dialogue on matters of contention, it has no locus to direct that Railtrack should actually grant access rights to a Train Operator, where Railtrack does not wish so to do. This power is the preserve of the Regulator, as is formally affirmed in the provisions of Track Access Condition D3.5.6: "*Railtrack shall accept and give effect to a Non-Compliant Bid only in accordance with directions issued or an approval given by the Regulator in the exercise of his powers under section 17, 18, or 22 of the Act*".

- 8 On the other hand, and in particular in relation to the advice given to the parties and cited in paragraph 2.3 above, the opinion of the Committee, in cases of dispute about the practicalities of paths, may be of value to the parties in arguments before the Regulator, in relation to the desirability of acceding to applications for rights.
- 9 The practical consequences of all the foregoing for this dispute are that,
- 9.1 during the period (i.e. up until the receipt of the letter of 12th April) when GCR could reasonably believe that they had an “*expectation of rights*”, then it would have been possible for the Committee to determine any dispute regarding Timetabling matters, covered by the provisions of Track Access Condition D and Condition D3.4.1 in particular, and informing its decision by reference to the Decision Criteria; however,
 - 9.2 once, for whatever reasons, Railtrack made its decision not to enter into any sort of Track Access Agreement with GCR for the Winter 2002 Timetable, it in effect declared that it would not take part in seeking the “*approval given by the Regulator in the exercise of his powers under section...18,...of the Act*” (Track Access Condition D3.5.6);
 - 9.3 such a move by Railtrack places the Committee in the position that it must decide whether it can comment on the merits of Railtrack’s decision (in relation to the Decision Criteria) or whether it is precluded from comment because Railtrack has, by its decision,
 - 9.3.1 effectively extinguished GCR’s “*expectations of rights*” insofar as Track Access Condition D is concerned;
 - 9.3.2 excluded GCR’s Bids from the protection of the final paragraph of Condition D3.4.1; and therefore
 - 9.3.3 condemned GCRs Bids (unless upheld by the Regulator) to a status of Non-Compliant Bids.
- 10 After careful consideration the Committee decided that, had Railtrack, in its letter of April 12th made mention only of rejecting a bid, then the merits of that decision would have been a proper subject of the Committee’s deliberations. However, as Railtrack had made the matter one of declining to enter into a Track Access Agreement this moved the matter into the purview of Sections 17 and 18 of the Railways Act 1993, and therefore beyond the locus of this Committee. In these circumstances it would be wholly inappropriate for the Committee to give any comfort to either party as to the merits of any case they might subsequently put before the Regulator.
- 11 The Committee therefore decided that it would only rule on those matters that related directly to the due operation of Track Access Condition D, and determined that
- 11.1 to use the Track Access Condition D procedures as a means of investigating pathing options could, were it adopted widely, lead to much sterilisation of capacity throughout the Network, and should be avoided;
 - 11.2 Railtrack and GCR had both complied with the provisions of Track Access Condition D, up to the issuing by Railtrack of the letter of April 12th 2002;
 - 11.3 up until the issuing of the letter of April 12th GCR could reasonably assume, from the actions of the parties that they had “*expectations of rights*” subject only to such considerations of difficulties in pathing as could not be resolved either between the parties or by reference to this Committee: however

- 11.4 the issuing of that letter, in the precise terms used, moved this dispute away from a matter of the due application of Track Access Condition D, to a question of whether a new Open Access Operator should be granted Access Rights;
- 11.5 where no Track Access Agreement exists, Railtrack is within its rights, subject to challenge before the Regulator, to decline to enter into such an Agreement;
- 11.6 where, as in this case, Railtrack decides that no Track Access Agreement is to be concluded, Railtrack cannot ultimately “*accept and give effect to*” what will always be in effect a “*Non-Compliant Bid*”; rejection of GCR’s Bid by Railtrack is a corollary of this position;
- 11.7 the Committee considers that, by its action in declining to enter into an agreement, Railtrack has moved the substance of the reference outside the locus of this Committee, which therefore declines to comment on the merits of Railtrack’s decision.
- 11.8 For the avoidance of doubt the Committee wishes to emphasise that this determination should not be construed as implying
 - 11.8.1 any prejudgement of the merit of a possible application by GCR to the Regulator for a Track Access Agreement; nor
 - 11.8.2 any endorsement by the Committee of the merits of any of the paths identified, or of any of the conclusions that Railtrack has drawn from the MERIT runs; nor
 - 11.8.3 that GCR should in anyway be discouraged either from pursuing the Rights to which they aspire, or from participating in the Timetabling process for the 2003 Timetable.

Bryan Driver

Chairman of Committee