
TIMETABLING COMMITTEE

Note of Extraordinary Deliberations arising from Reference No. 180

(following a hearing at Kings Cross on 4th August 2003)

[Note: previous published determination was determination no 168]

1. This is a note of extraordinary deliberations by the Timetabling Committee at a meeting held to address representations received from ScotRail Railways (SRR) in relation to aspects of Version 7 of the Rules of the Route for the Winter Two period of the 2003 Timetable.
2. The issue between SRR and Network Rail Infrastructure Ltd (NRI) related to the extent of the Sunday/Monday possessions affecting the West Coast Main Line (WCML) during the Winter Two period, and that, as a consequence, there was the likelihood that offers compliant with SRR's Firm Contractual Rights (FCRs) in respect of the Sunday Night Highlander and Lowlander sleeper services could not be made. SRR therefore sought the support of the Committee that a route should be provided via the ECML for ScotRail Sleeper services on Sunday night/Monday morning in Period 4 2003/04. Because during that same period there was an equivalently onerous programme of possessions on the ECML, this would mean curtailing the provisions of the Rules of the Route, to the extent necessary to ensure that compliant offers within its FCRs for the Sunday night/Monday morning Sleeper services could be made.
3. Having heard the representations from SRR, and from NRI, the Committee decided that, for technical reasons described below, it could not accept the representations as a formal reference under procedures defined in the Access Dispute Resolution Rules, and therefore it could not make a formal determination on the merits of the appeal. Nonetheless, the Committee considered that, in order to reach that decision, it had been required to address significant matters of interpretation of process, as well as of the behaviour of the parties, and that it was required to set out and publish its findings, for the guidance of the parties.
4. The Committee noted that
 - 4.1. The basic framework of WCML possessions for the 2003/04 Timetable had been published in proposal form in a Major Project Notice on 17th May 2002, as Version 1 of Rules of the Route on 24th May 2002, and finalised in Version 2 of Rules of the Route on 19th July 2002;
 - 4.2. Proposals in respect of changes necessary for the Winter One and Winter Two periods were published (as Version 4 and Version 6) in 6th December 2002 and 11th April 2003 respectively;
 - 4.3. The final (Version 7) Rules of the Route had been published on 30th May 2003, and these were the subject of the appeal by SRR;
 - 4.4. SRR had sought to register a dispute with the Timetabling Committee in respect of Version 6, but had not met the 7-day cut-off deadline prescribed in Track Access Condition D2.4.6.

5. The Committee considered whether or not the Track Access Conditions could be understood as allowing any appeal at the Version 7 stage, and if so what matters might reasonably be admitted at that stage. In addition, as having a bearing on that matter, they reviewed the manner in which the parties had discharged their respective responsibilities, as laid down in the Track Access Conditions, before finally bringing matters to the attention of the Committee.
6. The Committee noted that the parties had readily collaborated in the bringing of a joint reference to the Committee, and that there had been no representations that this was not appropriate. However, the Committee was of the view that the following aspects of the issues as presented were pertinent to its deliberations.
 - 6.1. NRI was represented by both its Scottish, and London and North East Region managers, but the account management responsibility, within NRI, for the totality of the SRR sleeper activities, was vested with the Scottish Region representative.
 - 6.2. The Rules of the Route for the ECML were not subject to any specific direct challenge from SRR, except insofar that they shut off the option of routing the Sunday night/Monday morning sleepers over the ECML. SRR confirmed that it had recently acquired access rights over the ECML for those occasions when such a routing might be required.
 - 6.3. As each successive Version of the Rules of the Route for WCML had been published, SRR had expressed an objection because the possessions proposed appeared to frustrate its FCRs in respect of the Sunday night/Monday morning Sleepers. No evidence was brought as to the manner in which those objections were expressed and/or recorded, but NRI did not dissent from the view that such objections had been expressed. Only after the publication of Version 6 of the Rules of the Route did SRR seek to invoke the Access Dispute Resolution Rules to assist it in the making of its objections, and, even then, only belatedly.
 - 6.4. Although NRI was aware of SRR's objections at each stage, they did not enter into any sort of dialogue, with a view to identifying how services might be planned to minimise disruption to the Sleepers and their regular clientele. It appeared that the only response was that implied by the re-issue, at successive Rules of the Route Versions, of unchanged proposals.
7. The Committee noted further that
 - 7.1. SRR had originally objected to proposals in the Major Project Notice (MPN) relating to the West Coast Route Modernisation (WCRM) Project, regarding Period 4 blocks on WCML.
 - 7.2. At a WCRM meeting on 15 October 2002, NRI advised SRR that they would offer a suitable alternative route for the Sunday night/Monday Sleeper service, but did not guarantee that the ECML route would be used. SRR did not pursue this matter further with the Network and Vehicle Change Committee (NVCC).
 - 7.3. However, SRR had brought to the NVCC, in November 2002, the matter of assuring the continuity of Sleeper services during a specific period of planned disruption proposed in the MPN. The Committee noted that

- 7.3.1. that hearing had been specifically concerned with the impact on the sleepers of the nine-day blockade in August 2003 at Bourne End, together with the coincident blockade of the ECML for the replacement of Newark Crossing; and that
- 7.3.2. NVCC had directed, as part of its determination, that

“Railtrack come up with definite proposals, for the period of the Bourne End blockade, for a route so that SRR may reasonably be assured that its Sleeper Services may be worked through to destinations, in times that approximate reasonably to those contained in SRR’s Firm Contractual Rights. If this requires specific co-ordination or curtailment of possessions to permit the passage of these trains, then this shall generally be done, except on occasions where SRR agrees to the contrary, such agreement not unreasonably to be withheld” (NV37,38,40,41,43 and 46 paragraph 10.1)
8. The Committee noted that the timing of this determination (7th and 8th November 2002) cut across the timescales for the normal progression of the successive Versions of the Rules of the Route, and that it was evident that SRR presumed that this ruling by NVCC provided definitive guidance to NRI in respect of all re-timings of the Sleeper services.
9. Whilst the Committee was sympathetic to the view that the NVCC ruling could be interpreted as setting a benchmark:
 - 9.1. that hearing related to a set of specific circumstances; and therefore
 - 9.2. SRR could not rely on NRI necessarily construing that NVCC ruling as having general force, particularly when, as in this case, the occasion to object to the Version 2 Rules of the Route had already passed, and the possessions affecting the operation of these Sunday night/Monday morning sleeper services were not substantially changed in the Versions published subsequent to this determination; furthermore
 - 9.3. SRR had a responsibility to be pro-active in protecting its own interests, including the making of timely formal appeals to the Dispute Resolution Committees.
10. The Committee noted that a central feature of the case that SRR wished to make, in order to object to the possessions set out in Version 7 of the Rules of the Route, was that such indicative timings of the Sunday night/Monday morning Sleeper services as had been provided were not compliant with FCRs, nor could they be construed as conforming to the spirit of the NVCC determination.
11. Finally, the Committee considered the force of the provisions of Track Access Condition D2.4, and the rights and expectations of the respective parties at the various stages of the procedure, in particular
 - 11.1. when can NRI reasonably assume that proposals can be deemed to be agreed, and therefore part of the “applicable Rules of the Route”; and therefore
 - 11.2. when does a Train Operator forfeit the opportunity to appeal against a proposal for change, or “*if no changes are proposed, that fact*” (Track Access Condition D2.4.2(a))?

12. Taking advantage of the numbering of Versions that had applied in the evolution of the 2003 Rules of the Route, and the restrictions placed on NRI (in particular in the subscript to Track Access Condition D2.4.2) as to the extent of the changes that it can introduce, the Committee was of the view that
 - 12.1. SRR should normally have appealed to Timetabling Committee against any items contained in Version 2 (whether the result of changes, or decisions not to change) within 7 days of publication ; to the extent that the matters of concern derived from the MPN, then the route of appeal is to the NVCC in accordance with Track Access Condition D2.3;
 - 12.2. SRR had had the opportunity to make an appeal against Version 4 in relation to the Winter Timetables, provided it could demonstrate some factor which would justify such an appeal;
 - 12.3. SRR had had the opportunity to make an appeal against Version 6 in relation to the Winter Two Timetable, provided it could demonstrate some factor which would justify such an appeal, but had not exercised its right in the required seven days.
 - 12.4. Version 7 should be construed as the definitive “*applicable Rules of the Route*”, not subject to appeal or change (except to the extent required by an earlier appeal that has not been finalised at the time of publishing Version 7, and as provided for in Track Access Condition D2.4.7).
13. Taking all of the foregoing into account the Committee concluded that SRR’s appeal against the operation of the applicable Rules of the Route fell, not on its merits, but because it had not been pursued to a formal conclusion, with the appropriate Committee, and in a timely manner. Therefore, on the basis of this reference, the Committee makes no determination in relation to the merits of the Rules of the Route for Winter Two as compared with the options they leave for the running of Sleeper services.
14. For the avoidance of doubt, the Committee advises the parties that
 - 14.1. Matters of this significance do require full, and formal, dialogue to take place between the parties: un-documented exchanges and presumptions are not an adequate safeguard of either party’s interests;
 - 14.2. When a formal offer of paths is made to SRR in respect of the sleeper services, SRR will be fully entitled to refer that offer to this Committee, if it considers that there are grounds so to do;
 - 14.3. The Committee’s decision in this instance should not be construed as any sort of endorsement that such indicative paths as may so far have been considered are in fact compliant, or non-compliant, whether with SRR’s FCRs, the applicable Rules of the Route, or the NVCC determination of November 2002.

Bryan Driver
Chairman of Committee