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## **TIMETABLING COMMITTEE**

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### **Determination No. 192**

(following a hearing at Kings Cross on 23<sup>rd</sup> September 2003)

*[Note: the previous published determination is ttc182  
which followed a hearing on 29<sup>th</sup> August 2003]*

1. The Committee was asked by Great North Eastern Railway Limited (GNER) to rule that Network Rail Infrastructure Ltd (NRI) should not be empowered to implement, within Version 2.0 of the Rules of the Route/ Rules of the Plan for 2004, the following items which GNER considered prejudicial to its commercial interests:
  - 1.1. Item a): a series of Scotland Region Register Items, requiring possessions during weeks 25 to 34, including 8x54-hour (“Saturday/Sunday”) and 2x29-hour (“Sunday”) possessions south of Drem Jct, and 7x29-hour (“Sunday”) north of Drem Jct;
  - 1.2. Item b): Rules of the Plan proposals to increase the engineering allowance between Edinburgh and the Regional Boundary from one to two minutes in the Up direction, and from two to three minutes in the Down direction;
  - 1.3. Item c): LNE Region register items for weeks 28 and 29 for 2x18-hour all line blockages between Peterborough and Helpston, which impose a second penalty on services disrupted by Item a) above;
  - 1.4. Item d): a proposal for an amendment to the Scotland and LNE Region Section 4 times for Saturday/Sunday possession times with the consequence that the earliest available departure time for Southbound Sunday services from Edinburgh will move from 0900 to 1000.
2. The Committee noted that Items a), b), and c) were directly interrelated. In addition there was evidence of an intention by NRI LNE Region to publish, at a future Version, proposals for S&C renewals between Newcastle and Berwick, using a “*possession pattern [that] will match that agreed for the Scotland Region work*” (Joint Submission 1 a).
3. The Committee noted that the joint submission from the parties set out details of the consultation process that had lead up to the publication of the specific proposals in Version 2.0.
4. In respect of Item a) this also included an assessment of the differences between the Version 2.0 proposals, the possibilities of a single blockade (a proposal earlier canvassed by GNER, but not the subject of this reference) and GNER’s current counter-proposal for a reduced number of longer possessions. The Committee was also in receipt, again in respect of Item a), of a comprehensive document, prepared by NRI Scotland Region, which gave the Committee further details of the works to be undertaken, and an assessment of the potential impact on GNER (and other Train Operators) of that suite of alternatives.

5. Again in respect of Item a) the Committee took note that there did not appear to be any disagreement between the parties as to the necessity for the works in question to be undertaken; the issue between the parties related to the timing of the works.
6. Given the extent to which Item a) was the issue which dominated the submissions, the Committee resolved to address this matter first, acknowledging that some of the other Items would potentially be determined by analogy.
7. The Committee considered whether the issue had been brought to its attention at the appropriate time, and concluded that GNER was entitled to appeal to the Timetabling Committee, against matters included in Rules of the Route/ Rules of the Plan Decision for the Principal Change Date (Track Access Condition D2.2.4), and to bring the reference to the Committee under Track Access Condition D2.1.6, and that the appropriate time was on the issue of the so-called Version 2.0 of the Rules of the Route/ Rules of the Plan.
8. That said, the Committee was concerned to note that GNER's reference took the form of a submission that required the evaluation of alternative strategies, strategies which, were they to be implemented, could impact directly upon the interests of other Train Operators who, at least by implication, are content with what is contained in Rules of the Route/ Rules of the Plan Version 2.0.
9. The Committee therefore considered whether
  - 9.1. the laid down processes made such a situation inevitable, or
  - 9.2. there had been an opportunity for such evaluation to be undertaken at an earlier stage;
  - 9.3. the parties had taken full and reasonable advantage of such opportunities to achieve an analysis of alternatives, and resolution of differences;
  - 9.4. either party had behaved less than reasonably in the discharge of those obligations set out in Track Access Condition D2.1; and therefore whether
  - 9.5. such behaviour should be taken into account, as a factor weighing in favour of one or other party, independent of the other merits of their arguments.
10. The Committee noted that
  - 10.1. the process for review of the Rules of the Route/ Rules of the Plan starts before the Development Commencement Date, and requires that "*Railtrack shall consult with; (i) each Bidder which is likely to be affected by the applicable Rules of the Route or the applicable Rules of the Plan;*" (D2.1.1);
  - 10.2. "*Each Bidder shall:*
    - (a) *consider the notice served on it...and discuss with Railtrack any concerns that it may have...;*
    - (b) *within 3 weeks of receipt of the Preliminary Rules of the Route/ Plan Proposal give notice to Railtrack of any representations or objections....and any alternative proposals it may have*" (D2.1.3);

- 10.3. the engineering strategy matters that have resulted in the disputed part of Version 2.0 of the Rules of the Route/ Rules of the Plan were the subject of a succession of meetings and consultation documents starting on 21<sup>st</sup> January 2003, with an Inter-Regional Engineering Conference on 7<sup>th</sup>-9<sup>th</sup> April, and a Regional Engineering Conference on 29<sup>th</sup> April 2003, to all of which GNER had been invited, and at each of which there had been scope for GNER concerns to be voiced; the matter was also an agenda item at the ECML Joint Board on 10<sup>th</sup> March 2003;
- 10.4. at the Regional Engineering Conference on 29<sup>th</sup> April 2003 (which GNER did not attend, or submit comments to), *“Network Rail noted that in respect of these proposed ECML possessions all operators in attendance agreed to the strategy in principle, with Freight Operators requesting that access be maintained to the facilities at Torness, Oxwellmains and Dunbar”* (Joint Submission section 3);
- 10.5. at further exchanges with NRI, GNER, on 7<sup>th</sup> May *“requested consideration of a blockade strategy for the engineering work in Period 3”* a request that was repeated at the Line of Route Meeting at the Timetable Conference on 24<sup>th</sup> June 2003.
- 10.6. *“GNER acknowledges that it should have been more forthcoming in its response to the proposals from Network Rail”* (Joint Submission);
- 10.7. *“GNER’s formal rights to agreement and appeal are based around publication of the respective editions of the Rules of the Route. This is where formal agreement is reached”* (Joint Submission).
- 10.8. The alternative strategy for which GNER is seeking to make the case in the Joint Submission, is not a blockade strategy but one involving a reduced number of extended possessions (5x3-day, and 1x4-day).
11. The Committee was of the view that, whereas it is the case that the publication of the Rules of the Route Decision is the first opportunity for a Train Operator to seek the adjudication of an outside body, it is not the first opportunity for the Train Operator to assert its interests. Indeed, successive determinations of this Committee, and revisions to the Track Access Conditions, have all been concerned with ensuring that formal dispute resolution should only be needed where full consultation, reasonably undertaken, has failed to produce an outcome satisfactory to the parties. In this instance,
  - 11.1. NRI appeared to have offered all parties the maximum opportunities for constructive dialogue;
  - 11.2. there had been opportunities for dialogue that GNER did not appear to have taken advantage of; and
  - 11.3. Version 2.0 appeared to be the logical outcome of all the consultation that had taken place.

12. That said, the Committee considered that it was required to consider the merits of the arguments advanced by GNER as they had been tabled. Dependent upon those merits it could find in favour of either parties within the limits of the powers set down in Track Access Condition D5.5.3. Furthermore, were the Committee to be of a mind to accept GNER's representations, it could give NRI the necessary "*general directions*", including directions to adopt a different Strategy. In such circumstances it has always been the understanding and practice of the Committee that any Train Operator that, as a consequence of that direction, was faced with a new proposition that it would otherwise have sought to contest, should be given, in turn, the opportunity to appeal.
13. In respect of the merits of GNER's case, still only in respect of Item a), the Committee noted that the strategy proposed by NRI will affect GNER in the following respects:
  - 13.1. train cancellations;
  - 13.2. additional operating costs for replacement buses etc;
  - 13.3. possible Schedule 7 penalties payable to the SRA;
  - 13.4. loss of revenue associated with passengers electing not to travel, or to use alternative modes, to avoid disruption,and that GNER assessed the cumulative impact of such factors would be a net loss of approximately £900k. The alternative canvassed by GNER would also result in all of the above listed dis-benefits, but GNER assessed the cumulative loss at approximately £700k.
14. The Committee noted that NRI did not contest, in principle, GNER's assessment of the potential impact of the current proposal, and that it had sought to express the impact of all the possible options, not just on GNER, but also on the other Train Operators, both passenger and freight. The Committee noted that the alternative pressed by GNER actually led to the cancellation of a greater number of GNER services, albeit with an adverse impact on a slightly smaller number of passengers. For Virgin CrossCountry Trains, EWS and Freightliner Heavy Haul, the numbers of potential cancellations were significantly higher with the GNER proposal, than for Version 2.0 (for ScotRail the number of service cancellations was a constant).
15. The Committee considered that these few indicators, which appeared to suggest that the margin of betterment accruing to GNER from the canvassed alternative, was not compelling as compared with the scale of detriments that the alternative would imply for other Train Operators. Given that the other Train Operators had not seen fit to appeal against the proposals in Version 2.0, this meant that there was no compelling case to require NRI to amend its strategy.
16. The Committee therefore determined, in respect of Item a), that it would be inappropriate to issue NRI with any "general direction" which would cause it to dismantle arrangements which were perceived to have the support of those Train Operators that had participated wholeheartedly with all stages of the formulation of the Rules of the Route, and that therefore GNER should be directed to accept NRI's proposals as contained in Version 2.0.

17. In respect of Item c), and the acknowledged intention (as in paragraph 2 above) to add further work on LNE Region to coincide with the works in Item a), the Committee determined that it was appropriate to issue general directions that
  - 17.1. the register works near Peterborough must be timed and managed such that they do not contribute to any further disruption of GNER services over and above that which is implied by Item a); and
  - 17.2. NRI LNE Region must proceed, without further delay, to publication of full details of the works they aspire to carry out between Newcastle and Berwick. These proposals must be the subject of full and prompt consultation with all affected Train Operators. It would, however, be the expectation of the Committee that, unless the Train Operators so request or agree, all the LNE works will not cause any incremental hours or days of interruption to services, as compared with those caused by the Scotland Region works detailed in Version 2.0.
  
18. In respect of Item b) the Committee noted that the reason for introducing the extra minute in each direction related to current condition of track. The Committee considered that such a physical consideration had to take precedence over considerations such as the possible impact that such a change to journey times might have on the ORCATS revenue allocations. That said, the Committee noted that all the works in Item a) were aimed at achieving an improvement in condition of track, and therefore directed NRI that:
  - 18.1. they should use best endeavours to ensure that provision of the necessary Engineering Allowance for the 2004 Timetable does not result in significant detriment to journey times South of the Regional Boundary;
  - 18.2. these increased Engineering Allowances may not be rolled over into following timetables but must be separately justified at the appropriate time in the 2005 Rules Consultation cycle.
  
19. In respect of Item d) the parties advised the Committee that they wished for further time to discuss the matter, and that they envisaged that there would not be any requirement to ask the Committee to re-address this matter on a future occasion.

Bryan Driver

Independent Vice Chairman