
TIMETABLING COMMITTEE

Determination No. 87

(following a hearing at Kings Cross on 20th December 1999 and 27th January 2000)

[Note: previous published determination was determination no.86]

- 1 The Committee was asked by English Welsh & Scottish Railway Limited (EWS) to find that Railtrack had acted improperly by including, within the Rules of the Plan for 2000/1, increased engineering recovery allowances for the route section between Camden Junction and Rugby; the consequence of the increase being that Railtrack would not be able to offer Train Slots that were in compliance with EWS' Firm Contractual Rights, for two Down Royal Mail trains.
- 2 The Committee reviewed its standing and considered that the matter raised, a challenge to the proposed Rules of the Plan, brought in accordance with Access Condition D2.4.6, was properly a matter for its determination.
- 3 The Committee noted that the dispute arose because Railtrack and the Train Operator were both of the view that the structure of the Access Agreement, including the Access Conditions, gave them rights which were superior to those held by the other party:
 - 3.1 EWS contended that the trains in question (1C00 and 1F02 Down Royal Mail Trains) were subject to Train Slots defined, within the Access Agreement, in terms of departure from Willesden Railnet terminal, arrival, departure and dwell times at intermediate stops (Rugby and Stafford respectively), and arrival at final destination; and that there existed Firm Contractual Rights (FCRs) for these trains to run, only provided that the Train Operator bid for them in accordance with the procedures in Access Condition D.
 - 3.2 Railtrack contended that, faced with a programme of major maintenance, renewals and upgrade works on the West Coast Main Line, it was obliged to arrange for more works and possessions than could be accommodated within the established engineering recovery allowance. Railtrack therefore sought, in the proposed Rules of the Plan for 2000/1, to increase the engineering recovery allowance between Camden Junction and Rugby from 12 to 18 minutes, and expected Train Operators' Bids to encompass this change.
 - 3.3 Were these changes to be incorporated into the applicable Rules of the Plan, it would not be possible to offer Train Slots for 1C00 and 1F02 compliant with the FCRs asserted by EWS. The parties were in dispute because
 - 3.3.1 Railtrack contended that FCRs were not an absolute constraint on the procedure for making changes to those Rules (Access Condition D2.4), and that, in the circumstances surrounding the works on the West Coast Main Line, the proposed changes were necessary and reasonable.
 - 3.3.2 EWS asserted that its Firm Contractual Rights (FCRs) required Railtrack, for the duration of the Access Agreement, to make ongoing arrangements to permit compliant Train Slots to be offered for these trains.

- 4 This matter had first been brought formally before the Committee as part of reference TTC80, at which point 4 Up Royal Mail Services were also potentially likely to be offered Train Slots that did not fulfil the relevant Firm Contractual Rights. The Committee commended Railtrack for having found it possible, in these 4 instances, to reconcile EWS' Firm Contractual Rights with an 18 minute engineering recovery allowance.
- 5 The Committee decided that determination of this dispute required consideration of the following points:
- 5.1 was there any conflict between EWS' FCRs, and the applicable Rules of the Plan (and Rules of the Route), at the time that the Access Agreement was signed, having received Regulatory Approval?
 - 5.2 what process had to be followed if Railtrack wished to make, and the Train Operator to accept, a non-compliant offer? What was the position if the Train Operator was not prepared to accept a non-compliant offer?
 - 5.3 the provision at paragraph 7.2 of Part VI, within Schedule 1B of the EWS Access Agreement (the Performance Regime), which states that "*Railtrack may alter the Timing of a Train to fall outside its Timing Envelope after giving EWS reasonable notice provided that Railtrack shall be liable to pay to EWS an amount...*" together with the limitation on the payment that "*The maximum amount of such costs payable in any Year in which such an alteration occurs shall be [x]% of EWS total Train Charges for that Train payable in such Year*". Does such a provision only relate to the ability to adjust timings during the currency of a Timetable, and to permit the payment of short run compensation, or does it empower Railtrack to offer timings outside the Timing Envelope for the duration of a complete Timetable?
 - 5.4 what process has to be followed if Railtrack wishes to make changes to the Rules of the Plan? What regard has to be paid, by Railtrack, in proposing such changes, to the full range of Firm Contractual Rights held by all Train Operators? Was Railtrack entitled to assume that all proposed changes were acceptable unless made the subject of a challenge by a Train Operator?
 - 5.5 what is the significance of the parity of status given to Firm Contractual Rights, and the applicable Rules of the Plan, in Access Condition D3.4.1(a)? What is the position where it is proposed that previously applicable Rules of the Plan be superseded by new Rules, and at what stage do those new Rules, if disputed, acquire the status of "*the applicable Rules of the Plan*"? What, in this context, is the force of the suffix to the definition of Firm Contractual Rights within Access Condition D?
 - 5.6 what factors would the Committee have to take into account to test the reasonableness of a proposal to change the Rules of the Plan, as compared with the reasonableness of an objection?
- 6 The Committee acknowledged that it is a body expected (within the confines of its own terms of reference) to take account of pragmatic considerations. It sought therefore to satisfy itself that, whatever its adjudication in this case, alternative courses of action were open to the parties to permit the necessary West Coast Main Line works to proceed, and EWS to receive offers for Train Slots compliant with its Firm Contractual Rights.
- 7 The Committee was of the view that (5.1 above), given there had been no previous disputes about the provision of Train Slots that met EWS' FCRs, it was reasonable to conclude that, at the time the Access Agreement was formalized, those FCRs and the then applicable Rules of the Plan were not incompatible.

- 8 The Committee noted (in relation to 5.2 above) that,
- 8.1 in consequence of deliberations surrounding determination TTC 25 (28th October 1996), Railtrack had included the following instruction within paragraph 6.5.4 of the section “Access Planning Process” of the National Rules of the Plan:
“Any offer made outside the Firm Contractual Rights of an Operator’s Track Access Agreement must be agreed with the Train Operator concerned, and the approval of the Rail Regulator must be obtained for a formal amendment to the Agreement.”;
 - 8.2 the Railways Act 1993 provides, in Section 22, for a process for reaching such amendments, where the parties are in agreement;
 - 8.3 the Railways Act 1993 also provides, in Section 17, a mechanism whereby a Train Operator may seek Access Rights that Railtrack is not minded to grant; and
 - 8.4 there is no reciprocal provision, whether within the Railways Act 1993, or elsewhere, for Railtrack to pursue the creation of a right on its own behalf that would imply the modification or removal of established Train Operator Rights, when the Train Operator was not minded to agree to such a change.
- 9 The Committee noted that the parties were in agreement that the provisions of Schedule 1B (5.3 above) relate to the management of Performance within the currency of a Timetable, and confer on Railtrack the discretion to vary Timings, for a short period, *“as a result of renewal of any part of the Network”*. However the parties did not agree about the application of this provision to a whole Timetable. Railtrack asserted that this provision also allowed changes to be made for the duration of a Timetable whereas EWS believed it did not. The Committee noted that this wider difference of interpretation was potentially a matter for the Access Dispute Resolution Committee, were it to be raised formally by either party.
- 10 The procedures to be followed by Railtrack, where it wishes to change the Rules of the Plan (5.4 above), are set out in Access Condition D2.4.
- 10.1 This procedure includes
 - 10.1.1 obligations on Railtrack to consult with Bidders (D2.4.3), and to have *“consideration of any representations, objections and alternative proposals made by affected Bidders...and, having due regard to the Decision Criteria, decide which amendments if any should be made to the applicable Rules of the Plan ...”* (D2.4.4(a));
 - 10.1.2 for the Train Operator, a right of referral to the Timetabling Committee (D2.4.6); and
 - 10.1.3 for Railtrack, the entitlement to choose to proceed with proposed change, pending the outcome of any determination (D2.4.7).
 - 10.2 There is no explicit reference to what overt regard Railtrack should pay to FCRs in formulating proposed changes to the Rules of the Plan. There is a means by which a Train Operator can seek to protect any FCRs that may be threatened, namely the referral opportunity.
- 11 The Committee took the view that it would not expect Railtrack willfully to disregard Bidders’ FCRs; however Railtrack was entitled to expect that Train Operators would scrutinize properly any proposals for change to Rules of the Plan, and protect their interests through the referrals process as appropriate. The Committee reminded itself that it had previously (in its Note of Extraordinary Deliberations on 1st July 1996) set out tests of reasonableness for the conduct of adequate consultation in such circumstances. The

Committee noted that the manner of Railtrack's consultation in this case was not in question; EWS' challenge was to the impact of the specific proposal upon its ability to bid in accordance with the timing envelopes set out in Schedule 3 of its Track Access Agreement, and which it claimed as a Firm Contractual Right.

12 The Committee formed the opinion, in relation to (5.5 above) the interpretation of Access Condition D3.4.1(a), that

12.1 the apparent parity of status accorded to Bidders' rights and Railtrack's rights relates to their equal priority in relation to other rights, including Spot Bids;

12.2 in relation to a Bid, this "*equal priority*" would not apply where a Bid is not compliant with "*the applicable Rules of the Plan*".

12.3 "*the applicable Rules of the Plan*" are those that ultimately take effect for a given section of route for the duration of a given Timetable; pending the resolution of any disputes (such as this one, and brought under Access Condition D2.4.6), Railtrack is entitled (under Access Condition D2.4.7) to implement its proposed Rules as if they are those that will ultimately apply;

12.4 such action by Railtrack is at Railtrack's risk: if, as a result of a reference to the Timetabling Committee, Railtrack is not able to implement some proposed changes, then Railtrack would be obliged to accept, as compliant, and as of equal priority, bids that, in other circumstances, would not have that status.

12.5 Railtrack's right of discretion under D2.4.7 does not in any way diminish or take precedence over a Bidder's FCRs in relation to a determination of a dispute relating to the priority within D3.4.1.

13 In reaching this view the Committee also gave careful thought to the definition of Firm Contractual Right:

"means:

(a) in the case of a Bidder, a right under its Access Agreement in respect of the quantum, timing or any other characteristic of a train movement; and

(b) in the case of Railtrack, a right under the applicable Rules of the Plan or of the applicable Rules of the Route

which is not expressed to be subject to any contingency outside the control of the holder of the right, except, in a case within paragraph (a) above, the applicable Rules of the Plan or of the applicable Rules of the Route".

In particular the Committee considered an argument, advanced by Railtrack, that the implication of the suffix to this definition was that any changes to the Rules of the Plan would always take precedence over Bidders' rights.

14 The Committee concluded that it did not accept that argument, its view being that the force of the suffix is that neither party's rights should be dependent on, or subordinate to, some other party's discretion. Thus, for example, the Bidder's rights must not be contingent upon a customer fulfilling a prior condition. Nor, again for example, may Railtrack express its rights to be contingent upon the preferred method of working of one of its maintenance contractors. The exception made, in respect of Bidders' rights, is to ensure that, where in Access Agreements, rights are expressly documented as subject to applicable Rules of the Plan, they do not have a lesser status than rights that are not so documented. In practical terms this implies that

- 14.1 the Bidder is precluded from asserting any option within his rights that might conflict with the then applicable Rules of the Plan;
 - 14.2 if the Bidder allows changes to the Rules of the Plan to be introduced without challenge, then those changes would also constrain the options that might be asserted, and the Bidder would be deemed to acquiesce, for the duration of the Timetable to which those changed Rules of the Plan would be applicable, to such curtailment of rights; however
 - 14.3 if the Bidder challenges the proposed changes to the Rules of the Plan, in order to be able to assert particular options within his FCRs, and the challenge is upheld, then the applicable Rules of the Plan would not incorporate those changes, and therefore the options would not be curtailed;
 - 14.4 if the challenge is not upheld then the Rules would incorporate the proposed changes, and the Train Operator's options would be curtailed accordingly;
 - 14.5 Railtrack does not have the unilateral right, in the face of an admissible challenge, to curtail the Train Operator's options to the point where, in order to seek a Train Slot to fulfil a right of quantum, the Train Operator is also obliged, against his will, to bid for characteristics that are different from those that are documented as the contracted characteristics.
- 15 The Committee reviewed the grounds upon which it might determine any challenge to a proposal to amend the Rules of the Plan (5.6 above). Taking account of relevant past determinations, it considered that any assessment of such matters would necessarily take account of
- 15.1 the grounds advanced, by Railtrack, in explanation for the change; and
 - 15.2 the nature of the Firm Contractual Rights threatened by the proposed change, and the degree of potential hurt.
- 16 In principle, this would involve a comparison of the relative significance of the relevant Decision Criteria, in particular Condition D4(d) for Railtrack, and D4(b) for the Train Operator. However, the Committee was also concerned to ensure that, in addition to weighing the significance of the Decision Criteria, it did not stray into making a determination that was beyond its powers.
- 17 In respect of Railtrack's position, (Decision Criterion (d) "*maintaining, renewing and carrying out other necessary work on or in relation to the Network*" (Access Condition D4(d))), the Committee noted that
- 17.1 the proposal to increase the engineering recovery allowance had arisen because Railtrack had recognized, during the formulation of the 2000/2001 Rules of the Plan, that the existing engineering recovery allowance of 12 minutes did not meet "the need for additional possession to undertake forthcoming WCML route upgrade works" in addition to routine maintenance. As a consequence,
 - 17.2 when formulating proposals for the Rules of the Plan for 2000/2001, Railtrack "took the opportunity to amend the engineering recovery allowance to equal the possession allowance proposed within the ROTR. This enabled Railtrack and its Contractors to plan up to the maximum of two double section possessions each week night without having to amend the permanent timetable on a weekly STP basis".
 - 17.3 whilst "*none of [the Decision Criteria] necessarily has priority over any other*", there is the qualification "*In its consideration of paragraph (d) of this Condition D4, Railtrack shall not be entitled to determine that its possessions of any part of the*

Network shall be as contemplated by any relevant maintenance contract by reason only of the terms of that contract". The Committee noted that Railtrack's view was that the proposed double weaves were needed, and were the least disruptive method of programming the required work, taking into account the needs of all operators on the route and were not proposed by reason of the terms of a maintenance contract.

- 17.4 in its determinations TTC24 (in respect of works at Lumley Bridge), and TTC25 (in respect of works in Horsefall Tunnel), it had ruled that Railtrack was not entitled to programme those works to disadvantage Train Operators, if there was an alternative that meant less disadvantage; in the case of TTC24 Railtrack had been directed to renegotiate with contractors to permit works to be done at a time more costly to Railtrack, but less disadvantageous to the Train Operator.
- 17.5 EWS' Firm Contractual Rights had only been put in jeopardy (because of the proposal to increase the engineering recovery allowance) as a consequence of a decision, by Railtrack, to undertake more works during the 2000/2001 Timetable than in previous years (including works in connection with a major network upgrade).
- 18 In respect of Decision Criterion (b) (Access Condition D4(b)) "*enabling a Bidder to comply with any contract to which it is party (including any contracts with their customers...) ... in each case to the extent that Railtrack is aware or has been informed of such contracts*", the Committee was of the view that
- 18.1 EWS' access rights in relation to 1C00 and 1F02 (the two Down Mail Trains) were formulated to support EWS' contractual obligations to the Royal Mail, and were known in all relevant respects to Railtrack; and
- 18.2 "*any contract to which it is party*" includes, for the Train Operator, the Firm Contractual Rights within the Access Agreement itself; these are clear and unambiguous in relation to the definition of the Timing Envelopes for 1F02 and 1C00.
- 19 EWS, in response to questioning, advised that they had approached their customer, Royal Mail, concerning the effect that the proposed changes to Rules of the Plan would have on the timings of 1F02 and 1C00. Royal Mail had made clear their unwillingness to accept such changes.
- 20 The Committee noted that EWS' rights for 1C00 and 1F02 were expressed in terms of envelopes of times (spanning 10 minutes) at both origin and subsequent points, and that there was a degree of overlap between the two timing envelopes. Introducing the full extra 6 minutes of engineering recovery allowance would make it impossible to stay within those envelopes for both trains, and probably for either train.
- 21 Taking the points at 17, 18, 19 and 20, together with those at 8 and 14, the Committee concluded that
- 21.1 Railtrack's proposed changes reflected Railtrack's assessment of which method of working would be the least disruptive. Given the scale and importance of the works, the nature of Railtrack's proposals were such that, were the point at issue one where Railtrack's requirements could be met by flexing an offer within EWS' rights, then this should be done.
- 21.2 However, in order to accommodate the proposed changes to the Rules of the Plan, EWS were being required to bid for, and accept, Train Slots which did not comply with the

characteristics documented in the Access Agreement. For EWS to seek the proposed timings for its own purposes and to enjoy contractual protection for those characteristics, it would need to seek a formal change (a Section 22 amendment) to its Regulated Track Access Agreement. EWS has made clear that it does not wish to seek any such amendment to its FCRs.

- 22 That said, the Committee was mindful that there is a general desire, within the industry, that Railtrack carry out the works on the West Coast Main Line, and that those works will imply significant upheaval, both in 2000/2001, and, in prospect, for subsequent timetables. The Committee was of the view that these were of a magnitude, and duration, that they would be *“likely materially to affect the operation of trains by that operator on the Network”* (Access Condition G, definition (iii) of Network Change). In other words, they were likely to constitute a Network Change, and therefore it would be appropriate for Railtrack to initiate the procedures set out in Access Condition G in respect of those works. This would reduce the risk of timetabling disputes arising in future years of the upgrade works. Equally it is open to a Train Operator to invoke the Network Change process in circumstances where it believes that a Network Change has taken place without due process being followed by Railtrack.
- 23 Furthermore, the Committee acknowledged that, given the programme of works for 2000/1, the amount of actual engineering recovery time to which trains would need to be subject, would vary within the timetable period. It opined that, whereas for advertised passenger services it is desirable to include consistent paths, based on the full recovery allowance, for the duration of the Timetable, it would not prejudice the ability of Railtrack to progress the works on the West Coast Main Line if it were to require Railtrack to timetable the EWS services in accordance with the documented Timetable Envelopes. Where necessary in the short term, Railtrack could amend those services through the procedures set out in Access Condition D3.8, and in these circumstances paragraph 7 of Schedule 1B of EWS’ Track Access Agreement would apply and would provide a mechanism for calculation of compensation payments.
- 24 The Committee therefore determined that:
- 24.1 EWS has, and has asserted through the Bidding process, Firm Contractual Rights in respect of the timings to apply for 1F02 and 1C00, within the 2000/2001 Timetable. Railtrack must honour these Firm Contractual Rights.
- 24.2 Railtrack may only introduce, for the generality of services, the proposed amendments to the Rules of the Plan for the 2000/2001 Timetable, (incorporating engineering recovery allowances of 18 minutes between Camden Junction and Rugby), provided they make explicit, exceptional provision, on the face of the Rules of the Plan, to cater for the timing requirements of 1F02 and 1C00. These shall be as set out in the EWS FCRs, and Railtrack shall amend accordingly the offers made.
- 24.3 Railtrack, in order to permit the carrying out of the planned programme of works, shall be empowered to make use of the provisions of the Supplemental Timetable Revision Process (Access Condition D3.8), and Paragraph 7 of Schedule 1B of the EWS Access Agreement, to vary the timings of 1F02 and 1C00, within the currency of the Timetable. In exercising these discretions, Railtrack will ensure that the impact, and the number of occasions when these trains are required to be timed to run other than in compliance with the contracted timing envelopes, is kept to the minimum.
- 24.4 This determination shall not remove from EWS the right, should practical experience of the operation of these services demonstrate that a change in the capability of the Network is materially affecting the operation of trains, to invoke consideration of the matter under the Network Change Procedure.

Bryan Driver

Chairman