
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP100

(following a hearing held at Central House, Euston on 24th August 2006)

The Panel

Simon Barrett: elected representative for Non-Passenger Class, Band 2
Kevin Larham: elected representative for Franchised Passenger Class, Band 1
Graham Owen: elected representative for Non-Franchised Passenger Class
Adrian Thear: appointed representative of Network Rail

Panel Chairman: **Bryan Driver**

The nature of the dispute and the Parties

1. The Panel was asked
 - 1.1. by First Greater Western Ltd (FGW) *"to determine that NR has no power to impose the re-timings sought on 18th August, and that timings issued on 7th July and currently implemented should apply in the wtt for the four days concerned."*
 - 1.2. by Network Rail Infrastructure Ltd (Network Rail) *"to ratify that NR has correctly applied the flexing right as per the Decision Criteria and that the amended timings provided subsequent to the caveated offer on 7th July should apply next week."*

The nature of the dispute and the jurisdiction of the Panel

2. Over a 10-day possession commencing 26th August 2006 Network Rail is undertaking major renewals work at Wootton Bassett Junction. During the course of these works trains that would normally work via Wootton Bassett between either Bristol or South Wales and Swindon, require to be diverted onto an alternative route. This diversion affecting a significant proportion of trains involves additional services running over the Berks and Hants line.
3. The scheduling of this possession in August rather than December 2006 had been a matter in dispute before the Timetabling Committee (ttc275); the issues raised by the current dispute do not require any reference back to the earlier dispute.
4. For whatever reason the timescales laid down to comply with the Informed Traveller requirements had not been properly complied with by either party, whether in respect of the submission of the detailed bid, or in the timing of any acceptance. The point at issue related to

- 4.1. the realisation, by Network Rail, that it had formally accepted, and confirmed, paths for diverted FGW services which made it impossible to continue to honour the regular path for EWS service 7A09, the 06:56 4000 tonne stone train from Merehead to Acton, without exceeding the extent of flex allowed in the EWS Track Access Contract;
 - 4.2. the proposal, by Network Rail, to annul the timings of 4 FGW trains previously accepted and advised, and to substitute new timings, in each case further extending the resultant journey time; and
 - 4.3. the contention, by FGW, that it was entitled to insist that the timings previously offered, accepted, and publicly advertised, should be honoured, and that Network Rail should be directed to deal with its obligations to EWS, in respect of 7A09, without further impact upon FGW services.
5. The Panel noted that its jurisdiction derived from the provisions of Network Code Part D Condition D5. The relevant decision of Network Rail (the proposal that the 4 FGW timings be further changed) was dated 18th August 2006, and therefore the Panel was satisfied that the requirement to lodge an appeal in 7 days had been met. The Panel sought from the parties, and obtained, an assurance that both were prepared, and in position, to act appropriately to implement the Panel's determination whichever way it might find.

The Panel's findings of fact in respect of the Dispute

6. The Panel found that
- 6.1. the diversions and re-timings of FGW services are driven by the need to cater for the Wootton Bassett renewals possession;
 - 6.2. as at the time of the hearing, there is a conflict between
 - 6.2.1. an EWS train (7A09), operating over its normal booked route within its normal (Level 1 rights) contractual framework and
 - 6.2.2. three diverted trains (FGW services 1Z84, 1A84 and 1A11), and one other FGW service (2K31 Bedwyn to Reading);
 - 6.3. the laid down procedure for dealing with such a possession and consequential service changes is contained in Network Code Condition D4.8;
 - 6.4. it appeared that neither party had properly complied with the timescales laid down in D4.8. In particular
 - 6.4.1. FGW had initially understood that some services could be worked via a reversal at Chippenham; when this was not confirmed, the submission of bids had been delayed to a date in May;
 - 6.4.2. an offer in response to FGW's bids was made by Network Rail on 7th July. This offer was described as *"All of these schedules have been accepted & published today"*.
 - 6.4.3. the same offer contained a further statement / caveat *"Please note that due to some outstanding discrepancies with the Freight Company's Offer all the attached timings may be subject to change and you will be notified accordingly if this occurs"*.

- 6.5. Network Rail subsequently realised that the offer of 7th July was not technically feasible in relation to conflicts with 7A09. As a result, Network Rail made an informal Proposal during w/e 11th Aug that FGW services be retimed to permit operation of 7A09 within flexing bounds of the EWS contract. This was followed by a Formal proposal by NRI on 18th August to amend timings of 4 FGW trains.
- 6.6. Network Rail was of the view that because it had entered a caveat with the offer of 7th July, it was entitled to seek to amend that offer without the requirement to be bound by the timescales prescribed in D4.8.
- 6.7. Entering of a caveat on an offer to FGW had been commonplace in previous years; as a consequence, the parties had engaged in post offer debates and service revisions to deliver the final timetable.

The Panel's findings of entitlement in respect of the Dispute

7. Bidding, and timetabling, in relation to services during Restriction of Use is subject to provisions of D4.8, which lays down procedures and timescales.
8. Options for Network Rail to flex an offer, or, in effect to cancel an offer and substitute an alternative, are prescribed in Conditions D4.7.2 and D4.8.9. Both rights are heavily circumscribed; specifically
 - 8.1. D4.8.9 is constrained by the need to respect Rules of the Route (a) and, in relation to the use of capacity on diversionary routes, the operation of all the provisions of D4.8, including the respect for laid down time-scales (in this case T-14).
 - 8.2. D4.7.2(b) provides for parties to agree a change, but subject to the written agreement of all other affected parties.
9. There is no provision within Part D, for an offer to be made provisional, and subject to a caveat, in such a way as to enable either party unilaterally to circumvent any of the specific restrictions on NRI's flexing right as in D4.7.2 or D4.8.9.

The Panel's Determination

10. The Panel concluded that
 - 10.1. The conflict between 7A09, and the offered FGW services should reasonably have been apparent at the time that the offer was being prepared. No evidence had been advanced to demonstrate that circumstances had changed in respect of the contractual duties of NRI to either EWS or FGW, since 7th July;
 - 10.2. responsibility for determining how to honour its obligations to two Train Operators remains to the charge of NRI, and the Panel has no authority to direct the parties to follow any course of action that is not supported by rights, and powers, within the provisions of the Network Code;
 - 10.3. although NRI might consider it appropriate to give advice to a Train Operator, at the time of making an offer, that some still fluid circumstances may require details of the offer to be re-visited, such advice cannot modify the provisions of the Network Code.

Thus, entering a caveat to any part of the process may flag up the need for further discussion, but it does not create any right to over turn

10.3.1. the restrictions in D4.8.9 in respect of compliance with due process, or

10.3.2. the requirement in D4.7.2(b) to obtain the agreement of the other party/parties, before implementing any amendment, or substitution of offers.

10.4. the caveat entered by NRI in this case was not explicitly accepted by FGW, and cannot be construed as FGW having surrendered any of its Part D rights in respect of the honouring of duly made offers.

11. Taking all of the foregoing into account, the Panel therefore determined that

11.1. NRI has no flexing right that it can exercise in this instance without the agreement of the affected train operators in accordance with D4.7.2(b);

11.2. that the entering of a caveat on any offers (such as those made at 7th July) does not confer any such *de facto* right; and that therefore

11.3. *“NRI has no power to impose the retimings sought on 18th August, and that timings issued on 7th July and currently implemented should apply in the wtt for the four days concerned”.*

12. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

Bryan Driver

Panel Chairman