TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP102

(following a hearing held at Central House, Euston on 6th September 2006)

The Panel

Steve Carter: elected representative for Non-Franchised Passenger Class
Robin Nelson: elected representative for Non-Passenger Class, Band 2
Simon Taylor: elected representative for Franchised Passenger Class, Band 3
Adrian Thear: appointed representative of Network Rail

Panel Chairman: **Bryan Driver**

The nature of the dispute, the Parties, and the jurisdiction of the Panel

1. The Panel was asked jointly by English Welsh and Scottish Railway Ltd (EWS) and Freightliner Heavy Haul Ltd (FHH) to rule that Network Rail Infrastructure Ltd (Network Rail) was not entitled to impose upon the Train Operators two late notice possessions. Network Rail in turn sought a ruling that it was entitled to take the possessions, and to withdraw the offers associated with the trains that would be affected, as the possessions related to works of an urgent safety of the line nature.

2. The disputed possessions proposed are

   2.1. 2200 to 0300 on Wednesday/Thursday 6th/7th September, T3 Block of Single Line, Dinnington Junction to Maltby Colliery, and

   2.2. 2200 to 0200 on Thursday/ Friday 7th/8th September, T3 Block of both Up and Down lines between Brancliffe East Junction and Dinnington Junction.

3. In each case the possession is required for the purposes of off-loading long welded rails (14 on the first night and 6 on the second) in preparation for the installation of CWR, to replace defective track, over the course of the standard weekend maintenance possession (1530 Saturday to 14:00 Sunday, Sat. 9th/Sun. 10th September 2006).

4. The dispute was brought under Condition D5 of the Network Code, and falls properly to be determined, on the basis of the legal entitlements of the parties, by a Timetabling Panel. It reflected the concern of the Train Operators that the two weeknight possessions were not of themselves justified on safety grounds, given that they were only preparatory work, and that Network Rail had elected to carry out the rail drops at times that suited its convenience, and without any cognisance of the extent of the interruption of traffic, and loss of revenue, to both EWS and FLHH. It was the contention of the Train Operators that Network Rail had acted in a way in which it was not entitled to act.

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

5. The South Yorkshire Joint Line links Doncaster with the Worksop to Sheffield line, and comprises 12 miles of single line (split into two sections by a passing loop at Maltby Colliery) and 3 miles of double track approaching Brancliffe East Junction. The line is heavily utilised during its hours of opening (14:00 Sunday to 15:30 Saturday) for heavy programmes of (principally imported) coal movements to Cottam and West Burton power stations. It is the only practicable route for services from northern sources (Redcar, Tyne Dock etc) to access these power stations without the need for two intermediate reversals involving run-rounds and extended journey times.

6. EWS and FLHH both operate extensive services to the power stations under Level 2 rights (i.e. specifying quantum of trains but not timings). Real-time operations are organised on the basis of a weekly programme, by which the Train Operator bids for a week's paths on a Wednesday, and receives offers on a Friday. This programme is compiled on the basis of input from the power stations, and is an integral part of the process by which the generators blend the coals burnt to control emissions.

7. On Wednesday 2nd August 2006, an ultra-sonic inspection of the line revealed a number of serious track defects. The severity of the flaws detected required high-priority attention; if left un-addressed they would justify closure of the line on safety grounds.

8. Having reviewed the information from the inspection, and taking account of the relevant Group Standards, the existing 25mph line-speed, and the options for remedial work, Network Rail, on Friday 4th August, prepared an internal report. This concluded that

    8.1. the defects concerned could only satisfactorily be addressed by replacing some 400 yards of rail, divided between 2 locations, with Continuous Welded Rail (CWR);

    8.2. the necessary rail could be laid during one of the standard weekend possessions, however, the availability of the necessary rail, meant that the relaying could not be carried out until 9th/10th September, and that, more significantly, the availability of one of the specialised CWR primary wagons (necessary for unloading rail on site), meant that there would be a need for the two overnight possessions the subject of this dispute;

    8.3. other short term measures (e.g. railhead grinding) and an enhanced inspection regime could defer the need to apply either a more restrictive speed limit (5mph) or to close the line on safety grounds; however,

    8.4. if the necessary works were not undertaken then it would be essential that the line be "red-flagged", with effect from Sunday 10th September.

9. The Train Operators were adamant that they had received no intimation (either formal or informal) either of the existence of the defects, or of the prospective need for the two midweek possessions the subject of this dispute. Network Rail was unable to provide evidence one way or the other, although understood that approaches had been made. However, Network Rail described an internal process under which, as part of undertakings given to the Office of Rail Regulation in respect of better compliance with the Informed Traveller initiative, all cases for short notice disruptive possessions are subject to obtaining a high-level authorisation, and that, until that authorisation has been obtained, no such possession has any status as a factor to be taken into account in train planning.

10. On Friday 25th August, Network Rail, in an e-mail, formally asked the Train Operators for their agreement to the two disputed possessions. EWS replied to this e-mail on 29th August (to the original sender who, by this stage, was on leave) declining agreement to the proposal. On Wednesday 30th August, Network Rail, in a second e-mail repeated the request. In neither instance did the request make reference to possible safety of the line considerations, or to the relationship of the possessions to the possibility that the line was under risk of closure. In addition the application was referenced incorrectly to Condition D2.1.8 of the Network Code, a provision which had been superseded by Condition D2.1.10 of the "yellow pages" (effective since the preparation of the December 2005 timetable).

11. The Train Operators both advised, by return, that they were not prepared to agree to the two proposed disruptive possessions. EWS elaborated reasons why the possessions would be unduly disruptive, and focussed on the difficulties associated with the diversionary route proposed. Critically, these possessions were not of a status that required that they be taken into account in the formulation of either the bids, or the offers, for services using the South Yorkshire Joint Line during week commencing Sunday 3rd September.

12. On 1st September, a further e-mail from Network Rail advised the Train Operators that the two possessions had been *"IMPOSED by Network Rail*", and including, for the first time, references to *"the safety of the line"*, and *"The track engineer has given dispensation for these rail replacements until 10/09/2006. However, if the work is not completed by then the line will need to be red flagged."* This led to further exchanges, at more senior managerial levels, and a decision on Monday 4th September to seek a determination by a Timetabling Panel.

13. "*EWS and FHH seek a direction from the committee to direct Network Rail to rearrange the CWR train to be available at the beginning of the possession scheduled for Saturday 9th September and to withdraw the two scheduled possessions as listed in Section 2 of this Joint Submission. EWS and FHH are willing to consider an extension of this possession in order to accommodate this change.*" The program governing the distribution and un-loading of long rails is defined by the availability of primary CWR wagons. Although, it was stated, Network Rail have a number of such units, only 2 are currently operational, and the others are moth-balled. These two units are programmed far ahead, as is confirmed by the evidence that the dates of the disputed possessions were identified in the report of 4th August. Network Rail stated that any attempt to re-program the CWR train to drop the rails at the beginning of the standard weekend possession would cause disruption of other works planned for the weekend. The Panel were not put in a position to test the reasonableness of that assertion.

14. The Train Operators do not dispute the need, and the urgency, of works sufficient to ensure that the CWR is installed and the line can safely be kept open.

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

15. The services affected by the proposed possessions are the subject of Level 2 rights, which confer rights to quantum, but not timings. That said, once these rights have been affirmed through bidding, and once a Train Slot has been offered by Network Rail, and accepted by the Bidder, both parties are deemed *"subject to Conditions D3.4.2, D4.4.2 and D4.7.2, to be bound by that decision"* (Condition D4.7.1).

16. Condition D4.7.2 provides that *"A Train Slot scheduled in the Working Timetable may be varied by Network Rail ;*

    a) in accordance with the procedures provided for in Condition D2.1.10…or

b) *by agreement between Network Rail and the Bidder (provided that every other affected party has also agreed in writing): or*

c) *in order to give effect to a decision of a relevant ADRR panel or the Office of Rail Regulation as provided for in Condition D5".*

17. The Panel noted that the essence of the dispute was that the Train Operators were not prepared to apply D4.7.2(b). Network Rail however contended that Condition D2.1.10, and the consequent provisions of *"Procedure for Altering Rules of the Route/ Rules of the Plan other than with effect from a Passenger Change Date*" (PARTP), (as contained in Section 3 of the National Rules of the Plan), gave them the scope to impose a possession and withdraw, or vary "*Train Slot[s] scheduled in the Working Timetable".* In particular Network Rail quoted the provisions of Section 3.1.3 *"Where a need arises to amend Rules of the Route/ Rules of the Plan to cater for urgent safety requirements or other emergency situations, all parties concerned will co-operate in accelerating the normal timescale in this procedure commensurate with the urgency of the circumstances"*.

18. The Panel considered that this Section 3.1.3 does not directly empower Network Rail to take any specific action. Network Rail is still accountable for conducting an orderly process, for making a decision, and for accepting that that decision can be tested, where appropriate, before a Timetabling Panel. In compliance with D2.1.9, Network Rail has the right to implement a proposal in respect of the Rules of the Plan/ Rules of the Route (and the disputed possessions fall into this category), even when *"referred for determination"*, *"pending the outcome of that determination".*

19. As had previously been found by the Timetabling Committee, in determination ttc212, Section 3.1.3 *"creates an obligation that falls as onerously upon Network Rail as it does upon the Train Operator. It offers the facility by which the parties may, by agreement, dispense with the normal laid down periods for proposals and responses. It does not create any right, for either Network Rail or the Train Operator, to circumvent the need to reach agreement through a process of consultation, or to impose one point of view"*.

20. For the Panel therefore, the considerations are broadly similar to those in all other disputes about what may or may not be included in the Rules of the Route: is the proposal reasonable, as compared to the benefits and dis-benefits likely to accrue to all affected parties? The principal difference with other cases, is that the Panel may consider that the nature of the "*urgent safety requirements or other emergency situations",* requires, or justifies, a different standard of reasonableness in respect evaluation of possible alternatives, and speed of implementation.

21. That said a previous Timetabling Committee, in determination ttc265, had stated that the operation of Section 3.1.3 had itself to be subject to tests of reasonableness, and that *"For the avoidance of doubt, Network Rail is to understand that the Committee does not take kindly to situations, such as this, where, because past failures of planning and/or delivery of works have narrowed down the scope for discretion, the potential outcome of disputes is constrained."*.

22. In this particular case, the Panel found that

    22.1. the Network Rail internal review procedure described in Paragraph 9 above has no contractual standing within either of the Track Access Contracts, nor within the Network Code. As such it does not entitle Network Rail to withhold information that otherwise

might reasonably be expected to have been shared in fulfilment of the obligations for co-operation in PARTP 3.1.3;

22.2. the fact that information known within Network Rail from 4th August could not be proven to have been shared with the Train Operators until Friday 1st September, the date by which the programme of Train Slots for the days in question had been finalised, did not appear to satisfy a test of reasonableness in respect of "*Where a need arises …to cater for urgent safety requirements or other emergency situations*;"

22.3. there had been no opportunity found for timely dialogue aimed at mitigating the degree of hurt to the Train Operators deriving from the proposed possessions, and that therefore

22.4. the Panel's "*scope for discretion"* had been unreasonably narrowed.

The Panel's Determination

23. The Panel concluded that its determination should be dominated by

23.1. the applicability of the provisions of PARTP, and

23.2. the circumstances applying as at the date of the hearing.

24. In respect of the circumstances of the case, the Panel finds as decisive that

24.1. the nature of the defects on the South Yorkshire Joint Line are such that, if they are not addressed, the line will require to be closed for all traffic with effect from 10th September 2006;

24.2. the remedy for the defects requires that some 400 yards of track be replaced by CWR;

24.3. the scheduling by Network Rail of the limited number of primary CWR wagons means that there are no available alternatives to two possessions on the nights of Wednesday or Thursday; and that

24.4. the Train Operators have been offered paths some of which will require to be amended or withdrawn (under Condition D4.7) to accommodate these possessions.

25. The Panel is not satisfied that these circumstances, which apply on the day of the hearing (and of the first possession), were inevitable consequences of the identification of the defects in question on 2nd August (i.e. could not have been modified or handled differently), but concludes that there is little practical benefit to re-visiting with hindsight those actions that might otherwise reasonably have been expected to have been done.

26. In respect of the applicability of PARTP, the Panel finds that

26.1. the rail drop possessions are *de facto "safety requirements",* but only because the other circumstances now, make it impossible otherwise to carry out the re-railing scheduled for 9/10th September, and which is unquestionably a *"safety requirement"*;

26.2. in such circumstances, the obligation on both parties set out in PARTP 3.1.3 *"to cater for urgent safety requirements or other emergency situations"… "by co-operating in accelerating the normal timescales in this Procedure commensurate with the urgency of*

the circumstances" is not reduced or removed because the previous actions of the parties have not necessarily been the most appropriate; and that therefore

26.2.1. Network Rail is entitled to the co-operation of the Train Operators in seeking a workable solution in the shortest timeframe; and

26.2.2. the Train Operators are entitled to the co-operation of Network Rail to share all relevant information timeously, and to use all reasonable endeavours to ensure that any consequential re-routing and re-timing of EWS and FLHH services is assisted as a matter of first priority.

27. The Panel therefore determines that Network Rail is entitled, within the framework of PARTP, to decide which of the reasonable available options for possessions it will adopt. Furthermore, taking account of all relevant factors as at the date of the hearing, the Panel determines that the least unreasonable option is for Network Rail to take the rail drop possessions on 6th and 7th September, as a preliminary to preserving the safety of the South Yorkshire Joint line by carrying out the installation of CWR on 9th/10th September.

28. 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