
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP03

(following a hearing held at Kings Cross on 20th July 2005)

The Panel

Kevin Larham: elected representative for Franchised Passenger Class, Band 1
Nigel Oatway: elected representative for Non-Passenger Class, Band 1
Andrew Pennington: elected representative for Franchised Passenger Class, Band 3
Paul Richardson: appointed representative of Network Rail

Panel Chairman: **Bryan Driver**

The Parties and the nature of the dispute

The Claimant: English, Welsh & Scottish Railway Limited ("EWS")

The Respondent: Network Rail Infrastructure Limited ("Network Rail")

Other interested parties:

Wessex Trains, a party with an interest in one aspect of the dispute, submitted a statement to the Panel, and attended the hearing.

Great Western Trains had submitted a statement that it "*supports the HOTR programme as currently planned on the Western and does not support an alternative possessions strategy*".

Freightliner and Virgin Cross Country Trains had expressed an interest in the outcome of the dispute.

1. The Panel was asked by English Welsh & Scottish Railway Limited ("EWS") to determine that Network Rail Infrastructure Ltd ("Network Rail") should not be permitted to incorporate into the applicable Rules of the Route for December 2005 to December 2006, a series of midweek overnight double-line possessions over five discrete route sections, each lasting approximately 8 hours, and running every weeknight for 11 (or more) consecutive weeks. These possessions, some of which are extensions of possessions in previous Rules of the Route, and some of which are completely new, are as follows:
 - 1.1. 44 weeks of Route **GW600 Wootton Bassett Jcn to Westerleigh Jcn**, part of the main route from South Wales to London. 2150 to 0545 for the five nights Mon/Tue to Fri/Sat in weeks 42,43,44,45,46,47,48,49,50,51,52,02,03,04,05,06,07,08,09,10,11,12,14,15,16,17,18,19,20,21,22,23,24,26,27,28,29,30,31,32,33,34,35 and 36 (**January to December 2006**).

- 1.2. 11 weeks of Route **GW103 Reading to Didcot**, blocking the two Main lines, with the two Relief lines open as normal for traffic. 2130 to 0530 for the five nights Mon/Tue to Fri/Sat in weeks 42,43,44,45,46,47,48,49,50,51 and 52 (**January to March 2006**).
 - 1.3. 11 weeks of Route **GW105/108 Worle Jn to Cogload Jn**, on the Bristol to Taunton route. 2145 to 0545 for the 5 nights Mon/Tue to Fri/Sat in weeks 26,27,28,29,30,31, 32,33,34,35 and 36 (**September to December 2006**).
 - 1.4. 22 weeks of **GW500 Bedwyn to Heywood Road Jcn** on the Reading-Westbury (Berks & Hants) route. 2215 to 0615 for the five nights Mon/Tue to Fri/Sat in weeks 02,03,04,05,06,07,08,09,10,11,12,14,15,16,17,18,19,20,21,22,23,24. (**March to August 2006**)
 - 1.5. 13 weeks of Route **LN600 Shaftholme Jcn to Colton Jcn** (broadly Doncaster-York on the East Coast Main Line). 2200 to 0555 for the five nights Mon/Tue to Fri/Sat in weeks 24,25,26,27,28,29,30,31,32,33,34,35 and 36 (**September to December 2006**).
2. Although each case had specific characteristics, the common themes were that possessions of these frequencies, and durations, frustrated EWS's Firm Rights (in many cases Level 1 Rights), and required diversions over routes that did not have adequate capability and/or capacity, to accommodate those rights thereby putting the continuing conveyance of the relevant traffic by rail at risk.
 3. Network Rail asked that the Panel should find in favour of incorporating the various possessions into the applicable Rules of the Route, because such double line possessions were essential for the operation of the newly acquired High Output Track Relaying and Ballast Cleaning systems (HOTR); and that intensive use of such machines was a necessary part of allowing Network Rail to honour its commitments to renew the lines in question.
 4. The key issue separating the parties was that EWS considered that it had been given expectations that the HOTR systems would, from an early date, be capable of operation on the basis that the adjacent line would be open for traffic to pass under single line working conditions ("ALO conditions"). Although HOTR had been the subject of extensive proving trials, no method of working, for ALO conditions, had yet been approved by Her Majesty's Railway Inspectorate (HMRI). In consequence, Network Rail contended that it was not in a position to guarantee operation under ALO conditions from any specified date, and therefore was proposing possessions that would ensure that the adjacent line was blocked, in every case, throughout the duration of the December 2005 to December 2006 Timetable.

The nature of the dispute in relation to the jurisdiction of the Panel and consequential Directions to the Parties

5. The appeal was made in accordance with Network Code Condition D5.1.1, and therefore falls to be determined by a Timetabling Panel.
6. The Panel considered that in practical terms, the ultimate contents of the "applicable Rules of the Route", reflect the "legal entitlements of the dispute parties" (ADRR Rule A1.18), which are a function of both stated rights, and due compliance with the processes for achieving consent, as set out in Network Code Condition D2. This perception underpinned the directions given to the parties by the Panel Chairman on 1st July 2005.

Extract from letter from Bryan Driver, Panel Chairman (on behalf of the Disputes Chairman) to the parties (1st July 2005)

Reference TTP 03; EWS vs Network Rail: Restrictions of Use in respect of High Output Track Renewals 2006

- *“The issue at the centre of the dispute requires a Panel to assess whether the way in which Network Rail has interpreted its discretions and powers, as conferred by Network Code Part D, to impose Restrictions of Use through the Rules of the Route, is consistent with its entitlements under the Track Access Agreement, and/or is reasonable under all the circumstances.*
 - *For EWS the matter becomes one of its entitlement to require Network Rail not to proceed with specific Restrictions of Use.*
 - *The Panel will require to decide whether*
 - *there are any limits upon the number, and nature, of Restrictions of Use that Network Rail is entitled to propose;*
 - *there are any absolute criteria against which to assess whether or not proposals for Restrictions of Use should be permitted;*
 - *the parties are contractually required to argue their respective positions by reference to the Decision Criteria (Network Code Condition D6);*
 - *there are any established tests of reasonableness in respect of the arrangements for imposing, agreeing or rejecting Restrictions of Use, including, for example, in relation to scales of disruption to services, and/or the adequacy of diversionary routes; and, if so, whether*
 - *the disputed Restrictions of Use should be adopted in this case.*
 - *In considering these matters, then, in any area where there is a requirement that the Decision Criteria should be taken into account, the Panel would expect to hear arguments as to the precedence, if any, to be accorded as between the discrete criteria, and why that order of precedence supports any particular position.*
 - *In addition, where, as in this particular case, the nature and timings of the Restrictions of Use is directly influenced by a decision by Network Rail to contract for the provision and operation of new forms of track renewing equipment, the Panel will seek arguments as to the significance of the qualification to Condition D6(a) found at the conclusion to Condition D6.*
7. In this particular case, the central argument advanced by Network Rail related to the question of when, and in what form, it would receive approval from HMRI for the operation of HOTR under ALO conditions. The Panel acknowledged that it had no jurisdiction to pass any sort of judgement upon what is, or is not, a safe method of working.
8. However, the method of working of the HOTR equipment that Network Rail has chosen to adopt has a contractual consequence because it requires changes to the Rules of the Route. Determination of whether or not changes may be made to the Rules of the Route, to accommodate Network Rail's chosen course of action (given that such changes (in particular the requirement to take longer possessions) are to the detriment of the fulfilment of the contractual rights of affected Train Operators), is a matter of “*legal entitlement*”, and therefore does lie within the jurisdiction of the Panel.

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

The common elements to all the disputed possessions

9. The Panel found that the motivation for Network Rail in seeking 8-hour, double-line blockages, related to an assessment that this permitted the HOTR to operate at optimum engineering, and economic, efficiency. However, within the 8 hours, the nature of the activity, and the extent to which it inevitably requires the blocking of adjacent lines varies significantly. Broadly,
 - 9.1. the HOTR is on site for only the first 5 hours of the possession. This period in turn subdivides into a period of setting up, a working session of approximately 1½ hours, followed by another period of striking down, and leaving the site;
 - 9.2. during the setting up and striking down phases there is an inevitable need for some periods of blockage of the adjacent line(s);
 - 9.3. during the time that the HOTR is working, it is Network Rail's aspiration that the adjacent line should, in most instances, be unaffected and open for traffic (albeit subject to speed and other restrictions). Network Rail believes that, with HOTR now working in service, it will be possible, by the end of September 2005, to confirm, on a site by site basis, the feasibility of working under ALO conditions, and to seek appropriate approvals from HMRI. If such approvals are forthcoming then working under ALO conditions would, subject to site conditions, be adopted wherever possible;
 - 9.4. after the HOTR has left the site, there is a need for further work by other on-track machines (e.g. tampers and dynamic track stabilisers), before the work line can be returned to traffic at the planned speed. The machines used in this second period of the Possession are of types that work throughout the system under conditions that generally do not require possession of the adjoining line.
10. In principle, a reduction in the length of track relayed per possession by the HOTR, would also result in a reduction in the time required by the follow-up machines, and therefore, theoretically, would permit the duration of the possession to be reduced. The Panel noted the response of the Network Rail representatives that reducing the duration of the Possessions would significantly impair the economics of deploying the HOTR. The Panel further noted the implication that the decision to acquire and deploy HOTR had been underpinned by Network Rail's expectation that it would not be challenged where it sought to increase the number, and duration, of possessions, given that, as it had advised the Train Operators, ALO conditions would usually be available.
11. By contrast, the position of EWS was that, in principle, it would not be pursuing its objections, were it to get satisfactory undertakings that the Possessions, whilst perhaps increasing to 8 hours duration on the work line, would be confined, on the adjacent line, to no more than the bare minimum necessary for the set up and strike down operations for the HOTR.
12. The Panel noted Network Rail's confident prediction, in respect of 2007 that "*Adjacent Line working will then be available and its constraints known*". (Joint Submission paragraph 5.1.2)

13. The Panel found that it did not appear that Network Rail had given consideration to the possibility of introducing ALO conditions after the departure of the HOTR, and during the period when the other machines were operating on the work line. The Panel noted that
 - 13.1. it did not appear that traffic passing on the adjoining line under such conditions breached any new principles, or required any new HMRI approval;
 - 13.2. were there to be any general, rather than site specific, reasons advanced as to why traffic could not operate over the adjacent line during the latter 3 plus hours of the possession after the departure of the HOTR, it would call into question the worth and feasibility of obtaining the benefit of working under ALO conditions for the entire duration of the possession (subject to the HOTR set up and strike down periods);
 - 13.3. introduction of ALO conditions during the latter part of the HOTR possessions (i.e. after the HOTR has left the possession), would give scope for reducing the duration of the total blockage of routes; this could be of real benefit on some of the currently contested route sections, but, on others, because of the spread of traffic, would offer only a limited benefit.

GW600 Wootton Bassett Jcn to Westerleigh Jcn

14. The Rules of the Route for the 2004/5 Timetable provide, with the agreement of the Train Operators, for a weeknight 7-hour all-line possession (21:50 to 04:45) for 30 weeks per annum. The proposed Rules of the Route for the 2005/6 Timetable require the possessions to be taken for 44 weeks per annum and each individual possession to be extended for an extra hour (21:50 to 05:45).
15. The diversionary route for these works is via Box. The time penalty for most EWS services is around 20 minutes and has been judged not to be sufficient to exceed Network Rail's Flexing Rights on EWS's Level 1 Rights. The practical impact on total numbers of services has to be considered in relation both to the additional 14 weeks of possessions, and the extra hour per night.
16. Network Rail gave details of other works at both Westerleigh Junction and Wootton Bassett Junction during 2006, and its view that the increased disruption would be balanced by the complete renewal of this route section by the end of 2006 reducing the need for disruption thereafter.
17. In respect of this specific route section, Network Rail stated that the requirement to disconnect, and subsequently re-instate, ATP equipment also contributed to the need for an 8-hour possession. The Panel noted that the representations from EWS related to the potential for running trains over the adjacent line, trains that were not themselves equipped with ATP, and which would, in any event, be running past an active work site, at reduced speed, and under Single Line Working (SLW), or bi-directional signalling, conditions.

GW103 Reading to Didcot

18. The possessions in the proposed Rules of the Route for the 2005/6 Timetable are not significantly different in either duration or frequency from those incorporated into the current Rules of the Route, and are catered for by a "2 Track Railway timetable" over this route section.

19. The volume of trains scheduled to pass over this route section when no other diversions are in place do not consume the total capacity of the "2 Track Railway timetable", and, in principle, sufficient capacity remains available to accommodate diverted services during times when, for example, the Berks & Hants line is blocked. (The current 2005 Rules of the Route provide for mid-week night possession of the Berks & Hants line to be taken one week in every four).
20. When working under possession on the Up Main line the specific set up and strike down needs of the HOTR may require the temporary blocking of the adjacent Down Relief line; this will reduce the residual capacity available in the "2 Track Railway timetable".

GW105/108 Worle Jn to Cogload Jn

21. These possessions are scheduled to take place from September 2006 onwards, and will require services to be diverted via Castle Cary and Bath. 11 EWS paths per week are affected, and will suffer the penalty of significantly extended journey times between Cogload Jn and Bristol. Of those services only 4 (6M72 (MThO) and 6V41 (MThO)) are the subject of Level 1 Rights.
22. The Panel noted the representations of Wessex Trains that
 - 22.1. the timing and duration of these all-line blockages would seriously affect its ability to ensure that rolling stock could reach essential maintenance facilities; but that
 - 22.2. the introduction of ALO conditions would provide scope for making the necessary movements, and would be a constraint that Wessex would be prepared to work within.

GW500 Bedwyn to Heywood Road Jcn (Berks & Hants route)

23. The Rules of the Route for the 2004/5 timetable provide for mid-week night possessions for approximately 9 hours Monday night/Tuesday morning and approximately 8 hours Tuesday night/Wednesday morning to Thursday night/Friday morning. These are subject to a possession pattern of one week in every four resulting in 13 weeks of possessions per annum. The proposed Rules of the Route for the 2005/6 timetable, provides for 2 blocks of 11 consecutive weeks of nightly 8-hour possessions over a period of 23 weeks.
24. During possessions of the Berks & Hants line, traffic is diverted via the Didcot and Melksham diversionary route the capacity of which is limited by the 7 miles of single track between Thingley Junction and Bradford North Junction. Some of the available capacity between Thingley Junction and Wootton Bassett will already be consumed by the diversion of trains from GW600 Wootton Bassett Jn to Westerleigh Jn if the proposed possessions for that section are incorporated into the Rules of the Route.
25. Coinciding with certain of the 22 weeks of possessions proposed for the Berks & Hants line during the 2005/6 timetable, possessions associated with the Basingstoke re-signalling project will also take place. The normal diversionary route during possessions of the Southampton to Reading route would be via the Berks & Hants line. Therefore during the weeks when it is proposed to take possessions on both the Berks & Hants line and at Basingstoke, the Didcot to Melksham route will be required to accept two sets of traffic diversions. Network Rail concedes that this route does not have the capacity to accommodate all of the services affected.

26. The predominant EWS traffic that will be affected by the 22 weeks of possessions is the heavy aggregates trains from Whatley and Merehead quarries. These trains (which all enjoy Level 1 Rights), if diverted via Melksham, suffer a significant journey time, resource utilisation, and (in some instances) payload penalty. The fact that the pattern of movement is from a quarry to a stockpile permits the impact of the current “one week in every four” possession pattern to be “smoothed”. This cannot be achieved when the interruption is week in week out (with only one week’s intermission) for almost half a year.

LN600 Shaftholme Jcn to Colton Jcn

27. The Rules of the Route for the 2004/5 timetable do not provide for any mid-week night possessions on this section of route, which is electrified, and cleared to W9 Gauge. When it is necessary for this section to be blocked, the available diversionary route (via Ferrybridge and Milford) is not electrified, is only cleared to W6 gauge, and has limited spare overnight capacity.
28. The 2006 Rules of the Route propose that for 13 weeks in September through to December 2006, HOTR 8-hour possessions of both lines will occur every week-night. These will result in the diversion of significant numbers of EWS (and other) services, will require the provision of diesel traction in lieu of electric, and will prevent totally the passage, during night hours, of all trains conveying traffic requiring in excess of W6 gauge capability.
29. The Panel noted that, in the joint submission from EWS and Network Rail, the latter stated, in respect of this route section, *“However, for possessions between Shaftholme Jn and Colton Jn, the issue is that “adjacent line open” status has been found not to be available under any circumstances, due to isolation and track circuit issues. Despite the specified diversionary route via Knottingley being well known and often used, where EWS have previously used diesel traction instead of electric traction as necessary, it is agreed that any W9 gauge traffic cannot be diverted.”.*
30. The Panel noted that although EWS had provided details of the Level of Right of every affected train, no confirmation was given as to whether any had an explicit contractual right to operate at W9 gauge, or with electric traction, and if so which. At the same time it was noted that Network Rail had not sought to contest the implied existence of such rights.

The issues of contract raised by the Dispute

31. The issues of contract raised by this case are not new in principle although they may be more acute in implication. The Panel noted that Determination TTP01 had made a concise formulation of the principles
- *“The Panel noted that the issue of the relative priority of Firm Rights and proposals for possessions (whether in Rules of the Route, or Major Project notices) has been addressed in a number of previous determinations of both Network and Vehicle Change Committee and Timetabling Committee. In the view of the Panel, these past determinations had evolved the following general principles.*
 - *Train Operators’ rights to run trains are predominantly long term;*
 - *Network Rail’s obligation to supply Train Operators with a secure Network is ongoing; it cannot always be delivered without interruption to services, and the relevant Parts of the Network Code, and the specific schedules in the Track Access*

Agreements are framed to permit reasonable interruptions, and to determine if, and how, Train Operators are to be compensated for the impact upon their operations;

- *the normal process for planning such matters is as set out in Part D of the Network Code;*
- *where the proposed engineering works / “proposed method of implementation of the project” will have the effect that a Train Operator will be frustrated, for the duration of the Timetable, from running a service for which valid rights are held, this is likely to be seen as a reasonable ground for challenging the proposal and causing it to be modified;*
- *where the duration of the possessions is only part of a Timetable, then any determination reflects an assessment of the nature, and force of the rights enjoyed on both sides, tempered by considerations of whether there are a number of options for delivering the balance of rights, and whether that balance is the best met by the tabled proposal.*

- *Whilst Rule A1.18 requires that “The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other”, the legal entitlement to any train service is a function of not just the formulation of the train specification in [Schedule 5 of a track access contract], but also the extent to which all parties have complied, and with what diligence, with the procedures for consultation and debate incorporated in the Network Code. In effect*

- *the legal entitlements of Train Operators are a fusion of the documented expression of their Firm Rights , and their active compliance with the procedures by which those rights can be exercised, implemented and protected; and*
- *the legal entitlement of Network Rail to a degree of latitude in curtailing the benefits enjoyed by the Train Operators is, by the same token, a function of being able to demonstrate that the curtailment sought is a reasonable minimum, in proportion to other considerations.*

- *In short, where absolute legal considerations are in conflict, the issue of proportionality is an over-arching aspect of the procedures.” (Determination TTP01 paragraphs 12 to 14)*

32. In this case, there was no suggestion that either party had not achieved “*their active compliance with the procedures by which those rights can be exercised, implemented and protected*”. Nor was there any challenge as to the validity of the Firm Rights asserted by EWS, or to Network Rail’s right to propose revisions to the Rules of the Route. The issue therefore becomes one of whether the proposals “*demonstrate that the curtailment sought is a reasonable minimum, in proportion to other considerations*”.

33. The Decision Criteria (Network Code Condition D6), in this context, are not directions to the parties, but are factors to be taken into account (“*the necessity or desirability*”) by Network Rail in weighing up alternative courses of action. In effect the Panel is entitled to probe that Network Rail, in making its decision in accordance with Network Code Condition D2.1.5, has taken into account the force of all 14 criteria, and then come to a reasoned judgement as to why, in the circumstances of the case, some should reasonably weigh more than others. It is not sufficient to establish that there is a criterion that appears to validate a chosen course of action, unless it can also be demonstrated why that criterion should prevail in the face of the others (“*none of which necessarily has priority over any other*”).

34. That point of principle made, the Panel conceded that the parties appear to acknowledge that the Decision Criteria of most influence in this case are
- “*b) enabling a Bidder to comply with any contract to which it is party (including any contracts with their customers and, in the case of a Bidder who is a franchisee or franchise operator, including the franchise agreement to which it is a party), in each case to the extent that Network Rail is aware or has been informed of such contracts;*” and
 - “*d) maintaining, renewing and carrying out other necessary work on or in relation to the Network;*”
35. In practical terms, there would be no trains run, if the Network is not maintained and renewed; on the other hand there may be no trains to run at all, if the method of assuring the Network is maintained and renewed is so disruptive that the Train Operator’s customers transfer their traffic to alternative modes of transport.
36. Within this reference, the Panel considered that the other external factors in each of the five cases directly affected the relative weight to be given to either of these two criteria (whilst also taking account of the other 12), and therefore which of the claimant or the respondent should have the stronger entitlement.
37. Before making its final determination of each case however, the Panel considered that it needed to revisit two other matters raised by the parties, and which had also exercised the Panel that had deliberated TTP01.
38. The first of these is the matter of the role of the professional judgement of the parties. At paragraph 5.4.1 in the submission “*EWS is also concerned that where diversionary routes have remained that they are able to cope with the required numbers of diverted services..... EWS requires that timetable exercises be carried out at the earliest opportunity to ascertain whether the network can accommodate all services*”.
39. In response Network Rail stated that it “*is confident that sufficient capacity is available on the diversionary routes*”, and then cited (but only in part) the directions given to the parties to TTP01. In full, as set out in that determination, these read “*In seeking such information the Panel is NOT seeking to impose upon any party the requirement to carry out prematurely detailed evaluations or planning exercises. Rather the Panel is seeking expressions of best professional judgement upon which it can, with confidence, reasonably depend in making its determinations. Alternatively, where no such professional judgements are proffered the Panel is likely also to take this into account. The rationale for this and the preceding paragraphs is the over-arching need for the Panel to have an understanding of the continuing viability of the commercial operation carried out by the Train Operator*” (Determination TTP01 paragraph 19).
40. The Panel is prepared to accept the “confidence” of Network Rail as an undertaking, based on professional judgement, that it can, and will, discharge its responsibilities to provide its Train Operator customers with adequate diversionary routes. It is, after all, Network Rail that is responsible for honouring such commitments. At the same time, the Panel must give equivalent consideration to the professional judgement of EWS when, at paragraph 7.6, it asserts that circumstances “*may result in EWS’ customers taking their business elsewhere*”. It is, after all, EWS that has the experience, and the accountability, for dealing with customers that (unlike those of Network Rail) do have alternative suppliers to turn to.

41. In an appeal such as this, the professional judgements of the parties are an inevitable input to the Panel's balancing of the Decision Criteria. The Panel has therefore to assume that the parties, in offering those judgements as factors for the Panel's consideration, are making implied commitments in relation to the Panel's determination. Thus, in this case,

41.1. if the Panel accepts Network Rail's confidence, and agrees that it will not direct Network Rail to "carry out prematurely detailed evaluations or planning exercises" it is on the understanding that Network Rail has committed itself to providing the necessary train slots or facilities. Equally,

41.2. if the Panel accepts EWS' assertion, and therefore upholds its appeal against the proposed Rules of the Route, it is on the understanding that EWS has every expectation that the train slots in question will, on the days or weeks be required for the passage of real flows of traffic.

42. Finally, the Panel considered the question of the adequacy of alternative routes, in respect of capability, whether in respect of length limits, trailing load limits or gauge limits. In TTP01 the determination addresses the particular issue of gauge limits in relation to the Freight Operating Constraints, and concluded that

- *"the Structure gauge to which any particular stretch of line is cleared forms part of the Operating Constraints for that stretch of line. Under the terms of the Track Access Contract (Freight Services), each Train Operator has permission to operate trains that exploit the Operating Constraints to the full, and Network Rail does not have the right to modify permanently the Operating Constraints without invoking the provisions of Network Code Part G Network Change;*
- *the Track Access Contract (Freight Services) does not, unless specifically providing to the contrary, confer on Train Operators any general right to operate trains that exceed the relevant Operating Constraints in any respect;*
- *all the Train Operators who are party to this particular objection have chosen to develop services over the WCML which take full advantage of the fact that the Operating Constraint for the WCML is W10, which permits the conveyance of 9'6" high ISO containers, without recourse to lower platform wagons; this is in natural conformance with their entitlements under the Track Access Contract (Freight Services);*
- *the Panel has not been shown any documentation to support any claim by a Train Operator that its rights have been particularised to confer on it a right to operate designated services at W10 gauge in all circumstances, nor to load onto Network Rail any general obligation to modify the Operating Constraints, to provide diversionary routes for such services;*

- *The Panel therefore concluded that, whilst the desirability of developing traffics to W10 Gauge, and the need to ensure that such traffics can pass at all times, may appear commercially self-evident, it does not form part of the legal entitlements enjoyed by the Freight Train Operators in the case when the WCML is unavailable. Nevertheless, the effort made by all parties, in particular by Network Rail, to ensure that, in as many instances as possible, diversionary routes, adequate in both capability and capacity, are made available, is to be applauded and encouraged. Such effort does not however confer any additional legal rights or obligations on any party.*

- ***The Panel therefore, on the basis of the information laid before it, determined that, in all those cases where objectors have sought to modify or curtail possessions on the sole ground that the possession would not allow W10 gauge traffic to be conveyed on services that would be diverted as a result, such objections do not have the legal substance for the Panel to direct that Network Rail should be required to modify those possessions to meet those objections. To the extent therefore that those possessions have not been contested on any other grounds, the Panel determines that Network Rail should be entitled to incorporate them into the “established” Major Project notice.”*** (TTP01 paragraphs 36.7-36.11, 37 and 38).
43. The Panel is required by ADR Rule A1.17 *“take note of its prior determinations (and those of any predecessor body) and of any other relevant tribunal other than a superior tribunal, as persuasive authority but need not be bound by the same;”*. In TTP01, the circumstances related to possessions of short duration, requiring the re-scheduling of an occasional service, and it was not considered that this level of disruption was decisive.
 44. By contrast, the proposed HOTR possessions are of such a duration that the impact on the Train Operator is as if the Freight Operating Constraints have been changed, rather than temporarily curtailed. Put another way, if a Train Operator has developed a market, and generated income for Network Rail, and that market depends directly upon the availability of a particular Freight Operating Constraint, then there is a real risk that that market will be lost if the period of time over which that Freight Operating Constraint might be curtailed is unduly protracted. It would be reasonable to argue that curtailing a Freight Operating Constraint to the point where a market is lost could be deemed to be a frustration of Decision Criterion (b), and therefore a ground for rejecting a proposed Restriction of Use.
 45. The Panel considered whether the period of time to which a Freight Operating Constraint might reasonably be curtailed was a fixed quantity, or whether it depended entirely upon circumstances. The Panel concluded that where the curtailment meant that the traffic could still pass, but with possible economic penalties, the reasonable time limit on the curtailment would be longer than in cases where the traffic simply could not pass until the curtailment was withdrawn.

The Panel’s findings and Determination

46. The Panel concluded, in relation to the generality of the HOTR possessions, that
 - 46.1. the proposal to incorporate 8-hour mid-week night double-line possessions into the totality of the 2006 Rules of the Route, reflected a prospective worst-case scenario. The Panel acknowledged that Network Rail was not at liberty to operate the HOTR machines themselves under ALO conditions unless, or until, it had the specific safety approval of HMRI. The Panel notes and approves the commitment expressed to seeking that approval with the minimum delay.
 - 46.2. on the basis of the information before it,
 - 46.2.1. there was no equivalent constraint upon operation of the “other” machines under ALO conditions,

46.2.2. Network Rail should therefore give urgent consideration to re-defining the HOTR possessions, as they affect the adjacent line, in order that, wherever possible that line is made available for traffic to pass once the HOTR has left the site/ ceased operating: and that

46.2.3. if it is not possible to arrange to work the “other machines” under ALO conditions, (subject to site specific constraints) this would call into question the prospective feasibility and benefit of undertakings given about the HOTR working under ALO conditions.

46.3. Network Rail's right to propose, for incorporation into the 2006 ROTR, possessions necessary for the operation of the HOTR, is the same as its right to propose any other possession, and is subject to the same right of challenge by Train Operators. The fact that the physical characteristics of the HOTR, as compared with those of other machines, require longer, or more disruptive possessions than is the case for other machines, does not imply that HOTR possessions should, by definition, be given preferential consideration when challenged.

46.4. when determining, by reference to the Decision Criteria, whether or not an HOTR possession should be incorporated into the Rules of the Route, the Panel must also take account of the overall commercial interests of the parties (Decision Criterion (n)) *“taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing...”*. This however is a matter of balancing the relative interests. Thus

46.4.1. the Panel should properly take account of the medium term gain to Train Operators, in terms of improved track quality, that can be achieved by the efficient use of the HOTR (as compared with other methods). In general terms, it would be reasonable to weigh off such a gain against the scale of short term disruption to train operations. On the other hand

46.4.2. where a change offers one party (Network Rail or the Train Operator) a potential cost economy, that economy is not necessarily a justification for making a change, particularly when that change will result in a diseconomy for the other party. In such circumstances, it would not be appropriate to argue that one party should suffer a disproportionate dis-benefit, in order that the other can realise a significant economic gain. Therefore,

46.4.3. in this instance, the potential economy to Network Rail from using HOTR, is not, in itself, a compelling argument in favour of the proposed possessions, but has to be weighed against the negative commercial impact to Train Operators.

47. Taking all the foregoing into account the Panel determined in relation to the five particular proposed sets of possessions, as follows.

GW600 Wootton Bassett Jcn to Westerleigh Jcn,

48. The Panel considers that, as this programme of relaying, taken together with the other planned works affecting the junctions, offers the potential of a complete route section renewal, and that the available diversionary routes are adequate to deliver services broadly compliant with the Firm Rights of EWS, **these possessions should be incorporated into**

the 2006 Rules of the Route. In making this decision the Panel expects Network to minimise the extent of the disruption to train operations by complying with the Panel's conclusions made in paragraph 46.2.2 above.

GW103 Reading to Didcot

49. The Panel considers that, given the “2 Track Railway timetable proves adequate, to deliver services broadly compliant with the Firm Rights of EWS, **these possessions should be incorporated into the 2006 Rules of the Route.** The parties are directed to monitor the impact of the need for some blocking of the second adjacent line, and the implications that this might have on future possessions. In making this decision the Panel expects Network to minimise the extent of the disruption to train operations by complying with the Panel's conclusions made in paragraph 46.2.2 above.

GW105/108 Worle Jn to Cogload Jn

50. The Panel considers that, given the difficulties presented by these possessions, to a limited number of EWS services, and to Wessex trains, and the fact that these possessions will not commence until September 2006, **these possessions should NOT be incorporated into the 2006 ROTR as proposed, but should be re-proposed on the condition that they will proceed only if, by this date,**

50.1. **the HOTR is cleared to operate under ALO conditions over this route section; and**

50.2. **the supplemental timetable revision process (Network Code Condition D4.8) for the Timetable Weeks in question takes such ALO conditions into account.**

GW500 Bedwyn to Heywood Road Jcn

51. The Panel considers that, given the difficulties presented by these possessions to a significant number of EWS services, the fact that it will not be feasible to honour EWS's Level 1 Rights within the limits of Network Rail's Flexing Right, and the likely impact upon the business of EWS's customers, **these possessions should NOT be incorporated into the 2006 ROTR as proposed, but should be re-proposed on the condition that they will proceed only if,**

51.1. **the HOTR is cleared to operate under ALO conditions over this route section; and**

51.2. **the supplemental timetable revision process (Network Code Condition D4.8) for the Timetable Weeks in question take such ALO conditions into account.**

52. **This finding is without prejudice to Network Rail's ability to carry out HOTR possessions within the constraints provided by the current Rules of the Route (i.e. a 13 week “one week in every four” possession pattern 21:05 to 06:15 Monday night / Tuesday and 21:55 to 06:15 Tuesday night / Wednesday to Thursday night / Friday).**

LN600 Shaftholme Jcn to Colton Jcn

53. The Panel considers that the difficulties presented by these possessions fall into two categories.
 - 53.1. the need to provide diesel, rather than electric, locomotives for the duration of the possession has an economic consequence, but is not of itself a factor in preventing traffic from passing. It is not therefore, in itself, an absolute ground for determining against the HOTR possessions; by contrast
 - 53.2. a situation where a potential category of traffic (overnight intermodal traffic) cannot pass for the duration of the possessions (in this case 13 weeks) is quite unacceptable.
54. Given the above, and the fact that currently in the Rules of the Route there are no mid-week night possessions permitted at all over this route section, **these possessions should NOT be incorporated into the 2006 ROTR as proposed.**
55. 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