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## **TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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### **Determination in respect of consolidated dispute references TTP376 and TTP377**

*(following a hearing held at 1 Eversholt Street, London on 29 September 2010)*

#### **The Panel:**

Peter Barber                      Hearing Chair

Shaun Fisher                      elected representative for Franchised Passenger Class, Band 2  
Nick Gibbons                      elected representative for Non-Passenger Class, Band 1  
Paul Hebditch                      appointed representative of Network Rail

#### **The Dispute Parties:**

##### For Arriva Trains Wales Ltd ("ATW")

Chris Dellard                      Engineering & Access Planning Manager

##### For Northern Rail Ltd ("Northern")

Joanna Williams                      Head of Service Planning  
Mark Ramsay                      Operations & Events Planning Manager  
Helen Bold                      Track Access Support

##### For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Matthew Allen                      Engineering Access Manager  
James Jackson                      Customer Manager (ATW) (part)  
Dan Fredriksson                      Engineering Access Planner  
Jon Plowright                      Customer Relationship Executive (Northern)

##### For West Coast Trains Ltd ("Virgin")

Robert Hodgkinson                      Commercial Operations Manager  
Susan Nichol                      TSP & ROU Liaison Manager  
Sue Rhymes                      Commercial Assistant

#### **Interested party:**

##### For First/Keolis TransPennine Ltd ("TPE")

Stuart Morris                      Possessions Planning Manager

#### **In attendance:**

Tony Skilton                      Committee Secretary

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## 1 Introduction, Substance of Dispute and Jurisdiction

- 1.1 This dispute arises out of two separate complaints by franchised passenger operators, ATW and Northern, relating to the publication by Network Rail of certain interrelated Restrictions of Use (**RoU**) variously in the vicinity of Warrington and Preston, scheduled by NR for Weeks 47, 49 and 50 of the 2011 Rules of the Route (**RotR**). The RoUs in question were each proposed for the period 1335 Saturday to 1500 Sunday, as follows:
- 1.1.1 An RoU in Week 47, at Winwick Junction near Warrington Bank Quay, published in the Period 12 Confirmed Period Possession Plan (**CPPP**) issued by NR following due process in accordance with and as part of RotR version 4, pursuant to Network Code (**NC**) Condition D4.8.2.
- 1.1.2 RoUs in weeks 49 and 50, also at Winwick Junction and at Acton Grange Junction near Warrington Bank Quay, and at Euxton and Farington Junctions near Preston, severally notified by NR after the issue of RotR Version 4, in accordance with the 'late notice' *Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having effect from a Passenger Change Date* (known as **PARTP**) pursuant to NC Condition D2.1.10 and National Rules of the Plan Section 3.
- 1.2 Although the relevant RoUs relate to various locations and were published at various different stages of the RotR process, the complaints made by ATW and Northern in respect of them are essentially the same. These are that, in determining the timing and duration of the possessions concerned, NR failed to have due regard to the Decision Criteria (**DC**) (as set out in the then current version of Condition D6 of the Network Code ); and that, had such due regard been had, the result would have been different, in such a way as to favour the respective local and regional services of ATW and Northern rather than, as is alleged to be the present result, the intercity services of Virgin on the West Coast Main Line (**WCML**). ATW and Northern accordingly propose that NR should take RoUs of different timing and duration, so as to produce the opposite result.
- 1.3 NR maintains that it did have due regard to the Decision Criteria and, in doing so, struck an appropriate balance between the conflicting interests of the various operators concerned and their respective passengers. Virgin (who declared itself a Dispute Party after the Directions Hearing, as described below), whilst acknowledging that its services would be disrupted by the proposed RoUs, prefers them to the alternatives proposed by ATW and Northern, and accordingly does not challenge NR's proposals but rather seeks to uphold them.
- 1.4 I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with Access Disputes Resolution Rules (**ADRR**) Chapter H to hear an appeal under the terms of NC Condition D5, all matters in question having arisen because a "Bidder is dissatisfied with [a] decision of Network Rail made under this Part D" – Condition D5.1.1.
- 1.5 One intending Panel member - Neil Sutton (elected representative for Franchised Passenger Class, Band 1) - was prevented from attending at short notice due to an emergency affecting his employer's operations. The Panel was, however, quorate with the remaining three members selected from the Timetabling Pool, as provided for in ADRR Rule H17.
- 1.6 In its consideration of the parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in ADRR Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.7 The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

## **2 Background, history of this dispute process and documents submitted**

- 2.1 Dispute reference TTP 376 was notified by ATW on 2 August 2010; dispute reference TTP377 was notified by Northern on 3 August 2010. The references were duly notified to other potentially interested parties including TPE, Virgin and freight operators.
- 2.2 I held a Directions Hearing on 13 September 2010 to facilitate understanding of the geography of the subject matter of the two dispute references and to consider whether to consolidate the references for a single hearing and determination. The claimants, other interested parties and NR produced annotated track maps showing the locations of the RoUs in question and the routes and interrelationships of the various passenger services potentially affected by them.
- 2.3 Following that hearing I issued a Directions Letter on 14 September 2010, setting the form, time limits and other guidelines for submissions by the Dispute Parties and participation by any Interested Parties, and consolidating the two dispute references. The effect of such consolidation is that the claims constitute one dispute and that the determination is binding upon each Dispute Party.
- 2.4 Following the Directions Letter and in accordance with its requirements, on 21 September 2010 the Dispute Parties provided two joint submission documents, respectively by ATW and NR in relation to reference TTP376 and by Northern and NR in relation to reference TTP377. NR declined an invitation in the Directions Letter to provide a separate document to clarify the overarching considerations relating to all potentially affected passenger and freight operators taken into account by it in planning the relevant work and putting forward the proposed RoUs, preferring to address these matters in its contributions to the respective joint submissions.
- 2.5 On 24 September 2010 in accordance with the requirements of the Directions Letter, Virgin declared itself a Dispute Party and provided a sole submission document. TPE declined to declare itself a Dispute Party but expressed a desire to continue to be treated as an interested party. No freight operator notified a desire to be treated as an interested party.
- 2.6 Following receipt of the Dispute Parties' submissions, on 24 September 2010 in accordance with ADRR Rule 18(c) I summarised to the Panel the relevant issues of law (including matters of contractual interpretation) which I considered to be raised by the dispute. This was copied to the Dispute Parties on 27 September 2010.
- 2.7 The Hearing of the consolidated disputes took place on 29 September 2010. The Dispute Parties provided written and oral opening statements and were then questioned by the Panel. The Panel required the Dispute Parties to provide certain further data and information to supplement their previous submissions and statements. A timescale was set (and subsequently confirmed to the parties by email) for their provision and for subsequent comment by the parties on each other's further information.
- 2.8 The Dispute Parties provided the required further data and information on 1 and 4 October 2010 and subsequently provided comments (or confirmation of no comment) by an extended time limit of 7 October 2010. The Panel discussed the further information and comments so provided in a telephone conference on 11 October 2010.
- 2.9 In summary, the written material, evidence and information provided to the Panel over the course of this dispute process is as follows:
  - 2.9.1 Annotated track maps produced on 13 September 2010 by ATW, Northern and NR showing the locations of the RoUs in question and the routes and interrelationships of the various passenger services potentially affected by them.
  - 2.9.2 Joint submission document dated 21 September 2010 by ATW and NR in relation to dispute reference TTP376.
  - 2.9.3 Joint submission document dated 21 September 2010 by Northern and NR in relation to dispute reference TTP377.
  - 2.9.4 Sole submission document dated 24 September 2010 by Virgin in relation to consolidated dispute references TTP 376 and 377 including declaration as a Dispute Party.

- 2.9.5 Opening Statement dated 29 September 2010 by ATW in relation to dispute reference TTP376.
  - 2.9.6 Opening Statement dated 29 September 2010 by Northern in relation to dispute reference TTP377.
  - 2.9.7 Opening Statement dated 29 September 2010 by Virgin in relation to consolidated dispute references TTP 376 and 377, with Control log extracts appended.
  - 2.9.8 Opening Statement dated 29 September 2010 by NR in relation to dispute reference TTP376 and ATW.
  - 2.9.9 Opening Statement dated 29 September 2010 by NR in relation to dispute reference TTP377 and Northern.
  - 2.9.10 Letter dated 1 October 2010 from NR enclosing supplementary information provided in response to Panel's request at the Hearing.
  - 2.9.11 Letter dated 1 October 2010 from ATW enclosing supplementary information provided in response to Panel's request at the Hearing (published version redacted for confidentiality).
  - 2.9.12 Email dated 1 October 2010 from Northern enclosing provisional supplementary information provided in response to Panel's request at the Hearing.
  - 2.9.13 Letter dated 1 October 2010 from Virgin enclosing supplementary information provided in response to Panel's request at the Hearing (published version redacted for confidentiality).
  - 2.9.14 Letter dated 1 October 2010 (received 4 October) from Northern enclosing final supplementary and updated information provided in response to Panel's request at the Hearing.
  - 2.9.15 Email dated 4 October 2010 from Northern enclosing additional final supplementary and updated information provided in response to Panel's request at the Hearing.
  - 2.9.16 Note dated 4 October 2010 from NR containing responses to Virgin's and Northern's supplementary information.
  - 2.9.17 Letter dated 6 October 2010 from Virgin containing responses to ATW's and Northern's supplementary information.
  - 2.9.18 Letter dated 7 October 2010 from Northern containing responses to ATW's, Virgin's and NR's supplementary information.
- 2.10 I confirm that have taken into account all of the submissions, arguments, evidence and information provided to me and the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarised in the course of this Determination.

### **3 Relevant provisions of the Network Code**

- 3.1 The provisions of the Network Code in issue in these two references are, principally:
  - 3.1.1 D2.1.10 Procedure for amendment of the Rules of the Route/Plan and amendment of scheduled Train Slots
  - 3.1.2 D4.8.2 Supplemental Timetable Revision Process
  - 3.1.3 D6 Decision Criteria

The relevant extracts are set out at Annex 1 to this Determination.

### **4 Submissions made and outcomes sought by Dispute Parties**

- 4.1 At the outset of the Hearing I reminded the Parties of certain general issues of law (including matters of contractual interpretation) of particular concern which I had previously notified as being raised by the dispute, and on which submissions had been invited, as follows:
  - 4.1.1 The power of the Panel as an appeal body to review the exercise of discretion by NR and the range of options available to the Panel, especially as regards remedies, in view of the specific remedies sought by the various Dispute Parties;

- 4.1.2 Whether any difference of consideration should be given to the actions of NR at the different stages in the process – essentially, who has the burden of showing what is “right” at a particular juncture;
  - 4.1.3 How the Network Code requires the Decision Criteria to be weighted, themselves a range of conflicting factors to be balanced against each other;
  - 4.1.4 Whether and when the Decision Criteria methodology was used by NR in the context of the decisions under consideration;
  - 4.1.5 Implications for planning of possessions in future periods (as raised in ATW's written submission); and
  - 4.1.6 Track Access Agreement Schedule 4 implications (as raised in ATW's written submission).
- 4.2 ATW's principal submissions were as follows:-
- 4.2.1 Under dispute reference TTP376 ATW challenged NR's published decisions on possessions in the 2011RotR at Winwick Junction and Acton Grange Junction in Weeks 47 (19 & 20 February 2011), 49 (5 & 6 March 2011) and 50 (12 & 13 March 2011). The published possessions affected ATW's Chester to Manchester service which operates over about 5 miles of the WCML between Acton Grange Junction and Winwick Junction, calling at Warrington Bank Quay station in between. Alternative or diverted services would be available for passengers from Chester and North Wales, but passengers from the intermediate stations of Helsby, Frodsham and Runcorn East would have to be bussed.
  - 4.2.2 NR had previously discussed with ATW and other affected operators the need in 2011 for a series of possessions of around 25 hours' duration in the relevant areas. This pointed to either an all day Sunday block or a block that affected both Saturday and Sunday. From previous experience, ATW had concluded that when around 25 hours are required, all day Sunday possessions would be significantly less disruptive of its service than Saturday to Sunday possessions. This was included in a document explaining ATW's preferred policies for possession planning on each of its routes known as the “Amended Timetable Planning Guidelines”, produced by ATW earlier in 2010 and shared with NR.
  - 4.2.3 However, in eventually setting these possessions under dispute from 1335 Saturday to 1500 Sunday rather than on Sunday only, NR appeared to have decided in favour of Virgin at the expense of ATW, given that the intercity WCML services of Virgin would apparently be more disrupted by all day Sunday possessions. Whilst accepting that it was a difficult choice, ATW maintained that in reaching this decision NR had not applied the Decision Criteria in a fair manner in a way that properly reflected the impact on ATW's customers and on its business.
  - 4.2.4 ATW believed that rail customers expected to be affected by possessions on Sundays, would check before travelling and would plan accordingly; but that customers making local journeys between urban centres on Saturday mornings would simply not travel if disrupted in the afternoon. Those that did travel could be more difficult to manage, especially football supporters returning from a match and those travelling later who might be inebriated. ATW considered it had a duty to its customers to do all that it could to provide a reasonable service on Saturdays.
  - 4.2.5 ATW therefore maintained that the impact on ATW of Saturday to Sunday possessions would be disproportionate, and that it was unreasonable for NR to place such a heavy burden on one operator to favour another. ATW considered it appropriate for the Panel to be able to look in detail at NR's application of each of the Decision Criteria and, if necessary, to form alternative views. ATW also believed that the Panel had the authority to direct NR to take another course of action to reduce the impact on ATW of the possessions in their current form.

4.2.6 ATW's written submission stated that it sought the following determinations:

4.2.6.1 That the possessions in question should be amended to be 0001 Sunday to 0100 Monday (or something very comparable).

4.2.6.2 That future possessions of 25 hours' (or comparable) duration affecting ATW's services on the WCML should be planned on Sundays only, including but not limited to those in Period E of 2011 that ATW had separately referred to the Access Disputes Committee (**ADC**) (reference TTP360, hearing requirement pending).

4.3 Northern's principal submissions were as follows:

4.3.1 Under dispute reference TTP377 Northern challenged NR's published decisions on possessions in the 2011 RotR which would block the Fast Lines in the Farington area between Euxton Junction and Preston Ribble Junction in Weeks 49 and 50. The published possessions affected a number of Northern's services from and to Preston and Blackpool, to and from various destinations.

4.3.2 These Farington area possessions were originally proposed as 1335 Saturday to 1500 Sunday but then amended in NR's published decision in RotR Version 4, to 2300 Saturday to 0030 Monday, apparently through the application of the Decision Criteria by NR. Northern subsequently received a Late Possession Request from NR, followed by a Decision, modifying possessions in Weeks 49 and 50 in the Farington area and also the Warrington Bank Quay area, back to 1335 Saturday to 1500 Sunday. The late change caused Northern to question the due application of the Decision Criteria by NR.

4.3.3 The possessions between Acton Grange Junction and Golborne were also changed by the same Late Possession Decision to the same start and finish times as for the Farington area possessions. These restrictions affected Northern's Liverpool to Warrington services directly and also resulted in the withdrawal of an hourly Manchester Airport to Manchester Piccadilly service to accommodate diverted Virgin services. This series of possessions was being considered under ATW's dispute reference TTP 376; Northern had accordingly applied to be joined to that dispute.

4.3.4 Following continued dialogue with NR regarding the timetable implications of the Late Possession Decision, Northern was advised that NR's preferred timetable solution would still result in the removal of certain Northern services between Manchester and Manchester Airport, together with the flexing of Northern's service in the Preston area. One of the options explored as part of this work was the diversion of Virgin's London to Glasgow service via Manchester rather than Virgin's Birmingham to Scotland service which had been diverted on previous occasions; however, Northern was advised that this option would not be pursued as Virgin was unable to resource it. This option would have allowed the operation of the full booked Northern train service in the Manchester area alongside the diverted Virgin service.

4.3.5 Northern had also expressed concerns over the robustness of the high level train plan in the Preston area given the available infrastructure, and the potential impact on performance, both in the Preston area and across the North West. Northern believed that the fact that certain afternoon trains would run earlier than normal would create confusion for its customers, who would not have experienced this disruption on their outward journeys. Northern operated a greater number of services on Saturdays than Sundays: this reflected Northern's customer travelling patterns, which on Saturdays were primarily day trips for leisure purposes, with higher passenger flows than Sundays, and which were not planned or booked in advance.

4.3.6 Northern noted that it also had the challenge of a number of Premiership football teams holding matches in the North West and regularly needed to provide strengthening and special trains for such events at the request of the British Transport Police. For example, if Bolton Wanderers were playing at home on one of the days of the disputed

possessions, Northern did not think it would be able to operate a special service, which would impact upon crowd control for the fans as well as for Northern's customers on the day. There were also greater challenges for Northern in terms of passenger handling on Saturday evenings. Whilst certain elements of the possessions decision were acceptable to Northern, the elements which formed the subject of this dispute were not.

4.3.7 Northern questioned whether due cognisance had been given by NR, in applying the Decision Criteria to these possessions, to the impact on Northern's customers and its ability to manage passenger loadings on its services. No evidence of this had been shared by NR with Northern prior to the compilation of the joint submission document for the Panel.

4.3.8 Northern's written submission, (as amended on the provision of further information to the Panel following the hearing) stated that it sought the following determinations:

4.3.8.1 Whether NR was entitled to make a decision to amend the RotR which was not consistent with the application of the DC in RotR Version 4 (by which Northern is presumed to have meant a determination that NR's such decision was in fact not consistent with the application of the DC).

4.3.8.2 That NR be instructed to withdraw the changes made to RotR Version 4 as issued in the Late Possession Decision of 29 July 2010 and revert to the timings stated in the RotR documentation dated 9 July 2010 (by which Northern is presumed to have meant RotR Version 4).

4.4 Virgin's principal submissions were as follows:

4.4.1 Virgin had become a Dispute Party in the consolidated dispute references TTP376 and 377 against the possibility of a determination altering the previously published RoUs, due to ATW and Northern disputing the relevant possession times and wanting the ROUs to apply instead all day on each applicable Sunday. Virgin maintained that such alteration of the published RoUs would subsequently have a direct and negative impact on its WCML business and operations, as well as setting precedents that could affect the whole industry in the longer term.

4.4.2 Virgin believed that there was now established recognition throughout the industry that weekend travel opportunities are just as important as weekdays. NR had been funded and was thus committed to achieving a regulated network availability output improvement during Control Period 4 (CP4) of 37% for passenger services, such requirement seeing NR introducing a "Network Availability Implementation and Delivery Plan (NAIP)" where the concept of a Seven Day Railway over a 'Top 20' set of routes which included the whole of the WCML was now being gradually introduced. For Virgin, this marked the first step towards the establishment of a 'Key 4' Anglo-Scottish strategy where services on Sundays start up again from approx 1330 onwards. Such strategy enabled through long distance 'out & back' travel opportunities (out Saturday morning and back Sunday afternoon/evening) to be maintained, as well as minimising the overall effect to the network.

4.4.3 In support of the contended importance of maintaining continuity of such out & back Anglo-Scottish travel opportunities during both weekdays and weekends, Virgin noted that its rail:air market share of Anglo-Scottish flows had risen between 2004 and 2009 from 6% to 18%, culminating in a rise of approx 16% in total overall revenue growth across all routes in just the last year. In passenger load terms, the Anglo-Scottish flows had seen loadings rise by approx 55%. Virgin was also experiencing increasing levels of overcrowding on these services and tabled Control log extracts as examples of this.

4.4.4 If the previously published RoUs were altered to become all day Sunday closures, the implications for Virgin were considerable, particularly in the light of ongoing competition against airlines. The effect of and uncertainty resulting from having to reconstruct already established timetables, alongside resultant re-diagramming of appropriate

resources, combined with the expectant variances in customer information provision, would undermine the progress the industry had otherwise been making during CP4.

4.4.5 Whilst accepting that NR required access to maintain and renew the WCML, particularly between Crewe (Weaver Junction), Preston and Glasgow, Virgin noted that NR already had numerous amounts of weekend access and activity between these locations during the 2011 timetable year. Such exceptional access requirements had only been acceptable to Virgin (excluding Bank Holidays) due to the strategy of maintaining through Saturday morning and Sunday afternoon travel continuity. Virgin therefore contested ATW's claim that NR was disproportionately disadvantaging ATW by the proposed possessions, because during 2011 there would be 31 weekend closures affecting Virgin's Anglo-Scottish services north of Crewe.

4.4.6 Virgin's written submission (at paragraphs 6(a) to 6(f)) set out a number of examples of evidence supporting the view that NR had properly considered and applied specific DC in deciding upon the published Saturday to Sunday possessions in question, and therefore favouring maintaining such possessions unchanged. These examples included high level consideration and assessment of the various operators' actual services, and the relative passenger numbers and amounts of required overall seating capacity of such services, which would be affected by, on the one hand, maintaining the published Saturday to Sunday possessions versus, on the other, changing them to all or substantially all day Sunday.

4.4.7 Virgin put forward its own views regarding some of the general issues of law and contract interpretation raised by me under ADRR Rule H18(c), and also some other matters of contract interpretation not raised by me, in relation to their application to certain specific matters raised by the Dispute Parties.

4.4.7.1 Virgin acknowledged that this dispute should be approached from the standpoint of the effect and application of the relevant parts of the Network Code rather than the exclusivity of the Dispute Parties' Firm Contractual Rights in their respective Track Access Agreements. This was because, despite Virgin having more services at risk of being affected, there was no doubt that all the potentially affected services of all the Parties, whether on a Saturday or Sunday, have equal Level 1 Firm Contractual Rights status. Similarly, whilst the Panel had the jurisdiction to "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis" under ADRR Rule A5, such legal entitlements were not derived only from Firm Contractual Rights but were dependent on compliance with the processes and obligations set out in the Network Code and thus the PARTP. Virgin noted that the Network Code had to take precedence over "the Underlying [Access] Contract", as previously explored and confirmed in Determination TTP271.

4.4.7.2 Consequently, the relevant dispute issue became the application of the Network Code by NR during its RotR proposal and decision making process. Virgin considered that the dispute raised no issue regarding the actual application of the RotR or PARTP by NR, but concerned only its application of the DC – for, as far as Virgin could tell, at the time, whilst not appearing to be the most simple application of Network Code Condition D2.1, the RoUs were nonetheless proposed and applied by NR in a timely manner in accordance with those guidelines required of it. Likewise the actual physical nature of the works associated with the RoUs did not appear to be in dispute, but the application to them of definitive start and finish times and duration for the necessary possessions. Virgin accordingly felt that NR had no other choice but to apply the DC in such a way so as to minimise the overall effect to the network both in terms of duration and application around the clockface.

4.4.7.3 In support of NR's application of the DC in compliance with its duty to apply them fairly, Virgin drew the Panel's attention to an additional opening

paragraph in the new Decision Criteria section of the Network Code, effective from 1 October 2010; this would be Condition D4.6.1 and it had been proposed due to ongoing industry concerns over such application and supported by the ORR. The change explained how and in what circumstances the Decision Criteria are to be applied by NR, namely:

*"Where Network Rail is required to resolve any matter by applying the considerations in paragraphs (i)-(xv) below ("the Decision Criteria") it must consider which of the Decision Criteria are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail.*

*Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Decision Criteria will lead to a conflicting result then it must decide which is or are the most important Decision Criteria in the circumstances and when applying it or them, do so with appropriate weight".*

4.4.7.4 Virgin therefore concluded that, in seeking to minimise the overall disruption to the industry in relation to these three weekends only, NR had correctly surmised that the overall effect upon Virgin services was of greater overall importance to the industry, and some would say the 'National Interest', than the overall effect on ATW and/or Northern services.

4.4.7.5 As regards precedents, Virgin referred to ATW's request for a decision that would in effect set a precedent that all RoUs on the WCML which would directly affect ATW's services in the future should be limited to Sundays only. This, Virgin believed, did not take into account the overall interests of all rail users. Virgin did not see how, because this dispute was relative to just three weekends (Weeks 47, 49 and 50) ATW could request that the outcome (if the determination were to be in ATW's favour) should be rolled forward to apply to all future RoUs. All RoUs that NR applied for were primarily in different locations and of differing durations, encompassing varying workstreams and resources every weekend or weeknight. ATW's request would not only restrict NR in its quest to maintain, renew and enhance the network, but also probably necessitate a radical redeployment of work-bank requirements, plant and resources. This would be particularly acute north of Weaver Junction towards Preston, as that part of the WCML was where the most intensive and intrusive work needed to be undertaken over the coming three years. There would, as NR had already alluded to in documentation before the Panel, be the possibility of performance issues if such works were placed in jeopardy.

4.4.8 In summary, Virgin considered that the overall effect of changing the published RoUs to all day Sunday would be extremely detrimental to its business and operations, as well as impacting on the currently increasing and improving long term recovery of weekend rail travel. Comparing the overall effect on customers of those Train Operators involved, Virgin remained steadfastly of the opinion that NR had applied the Decision Criteria correctly, and in effect sought a determination accordingly.

4.5 NR's principal submissions were as follows:

4.5.1 NR confirmed that the matters in the instant consolidated dispute references TTP 376 and TTP377 related to the times chosen by NR to take disruptive engineering access between Acton Grange Junction and Golborne Junction in Weeks 47, 49 and 50 and between Euxton Junction and Preston South Junction in Weeks 49 and 50. NR gave an explanation of the engineering background to the required works and outlined its position on the key issues raised by the dispute references.

- 4.5.2 In the case of dispute reference TTP376, the asset condition of the network infrastructure at Winwick Junction, situated on the WCML just north of Warrington Bank Quay, necessitated that during the timetable year 2011 engineers should plan to renew 8 units of switches and crossings. 4 passenger operators and 5 freight operators had timetabled services on this section of the route and on a typical day – Mondays to Fridays – some 280 trains were planned to operate there. Local track maintenance teams were managing a particular problem with the condition of the ballast underneath Winwick Junction; proper rectification of the faults could only now be achieved by renewing the junction. Due to the shaking of the track there had been a number of repeated signalling equipment failures at the junction, producing performance issues on the day. Investigation revealed that a temporary speed restriction would be required within the next 12 to 18 months, possibly lowering the line speeds from 90 mph on the Up line and 80 mph on the Down line to either 50 or 60 mph.
- 4.5.3 NR recognised the sensitivity of planning disruptive engineering access in the Warrington Bank Quay area. NR's principles when considering access plans in this area were:
- only plan 25.5hr possessions when there is no alternative;
  - unless the work is of a complex nature, access should be constrained to 16 hour possessions; and
  - when it is safe and efficient to do so, plan Adjacent Line Open or Single Line Working past the worksites.
- Unfortunately, NR could not apply these principles when working on part of the Winwick Junction site.
- 4.5.4 The original plan had been to deliver these Winwick Junction works in six 25.5 hour possessions but following challenge from all affected operators, NR had been able to alter the access footprint to four 16 hour possessions and three 25.5 hour possessions. This amended possession footprint had reduced by 12.5hrs (8%) the disruptive possession footprint required to deliver the works, and had reduced the impact on half-day Saturday possessions by 50%.
- 4.5.5 In RotR Version 1, NR had planned the possession times for the 25.5 hour possessions as 1335 Saturday to 1500 Sunday; these times and the requirement for six 25.5 hour possessions remained unchanged until RotR Version 4. It was not until June 2010 that NR's delivery team in track renewals confirmed that they had sufficient confidence to agree a reduction in disruptive access. At this stage NR felt some doubt as to the logic for choosing the right possession times, it being felt that such choice should be influenced by the determination of dispute reference TTP271 (which concerned analogous issues on the WCML). The possessions times were altered in Version 4 of the RotR, which should not have happened without the relevant steps of Section 3 of the National Rules of the Plan – consultation with industry stakeholders – having been undertaken, as these possessions were in the Principal Timetable period. This failure to follow due process subsequently meant that Week 47 was formally processed via the process in NC Condition D4.8 and Weeks 49 and 50 were formally processed by the Section 3 National Rules of the Plan procedure.
- 4.5.6 In planning these possessions NR formed the opinion that overall a fewer number of passengers would be impacted by the possession times being 1335 Saturday to 1500 Sunday. The reasons for this were that:
- with the exception of passengers wishing to travel to or from Helsby, Frodsham and Runcorn East, all other passengers had an alternative rail service; and
  - on a Sunday afternoon it is not possible to operate a level of diverted Virgin Anglo-Scottish train services via Manchester which meets passenger demand.
- 4.5.7 In the case of dispute reference TTP 377, the asset condition of the network infrastructure at Farington, located on the WCML in the Preston area necessitated that during the timetable year 2011 engineers should plan to renew 540 yards of track and track formation on the Up Fast line. Track quality at this location was ranked as very poor – a "red" in terms of NR's asset monitoring regime. 5 passenger operators and 5

freight operators had timetabled services on this section of the route and on a typical day – Mondays to Fridays – some 346 trains were planned to operate there. The work was originally planned to be delivered in three 25.5 hour possessions and in Version 1 of the RotR it was dated for Weeks 28, 29 and 30. The work could only safely be undertaken with a three line overhead line isolation because of clearance issues with the adjacent lines.

- 4.5.8 Operators' responses to RotR Version 1 indicated that they wanted this work to be dated at the same time as other disruption between Crewe and Preston which required WCML services to be diverted via Manchester. As a result, in RotR Version 2 these possessions were re-dated to Weeks 48, 49 and 50. Following further challenge from all operators, NR had since been able to alter the access footprint for this Farington work to only two 25.5 hour possessions. Overall this had reduced the disruptive possession footprint to deliver the works by 33%.
- 4.5.9 Again, by June 2010 the track renewal delivery team had sufficient confidence in its amended plan to agree a reduction in disruptive access, and it was at this stage that NR felt some doubt as to the logic for choosing the right possession times for Winwick Junction, which consequently impacted on the times for the works at Farington. The possession times were altered in RotR Version 4, again something that should not have happened without the relevant steps of Section 3 of the National Rules of the Plan having been undertaken. Subsequently, to correct this mistake, NR decided to re-consult the possessions via the steps outlined in Section 3 of the National Rules of the Plan and this was done 5 days after the issues of RotR Version 4.
- 4.5.10 NR noted that it did not understand the 'bi-lateral agreement' asserted by Northern in paragraph 6.2.1 of the joint submission for reference TTP377. It was NR's opinion that overall a fewer number of passengers would be impacted by the co-ordination of the works at Farington with the works at Winwick Junction. NR had received a very clear steer from all operators that these works should be planned simultaneously.
- 4.5.11 NR concluded that whenever a non-standard Section 4 RotR possession opportunity on the Fast lines is taken in the Farington area, train services need to be retimed. The results of a timetabling exercise which looked at Saturday afternoons confirmed that all timetabled services could operate through the Farington area with only minor flexing of timings, primarily required for station working purposes at Preston. It was not clear to NR as to why Northern should view this as unreasonably disadvantaging any particular operator, as all operators on the route needed to switch to Slow line running with the exception of those Anglo-Scottish intercity services which would be removed from the timetable due to the works at Winwick Junction. No other train service reductions were required in the Preston area.
- 4.5.12 In its joint written submissions with ATW and Northern respectively, NR stated that it sought the following determinations:
- 4.5.12.1 In relation to dispute reference TTP376, that it had correctly applied the DC in regard to the decisions that were made in the CPPP for Week 47 and the RotR changes published by email on 27 July 2010 and that ATW are asked to accept the 1335 Sat to 1500 Sun possession times at Warrington Bank Quay in Weeks 47, 49 and 50.
- 4.5.12.2 In relation to dispute reference TTP377, that it had correctly applied the DC in regard to the RotR amendment published on 29 July 2010 and that Northern are asked to accept the 1335 Sat to 1500 Sun possession times at Warrington Bank Quay in Weeks 47, 49 and 50 and at Preston in Weeks 49 and 50.
- 4.5.13 In each of its joint written submissions with ATW and Northern, NR had included a grid listing all the DC and setting out NR's position as regards its application of each individual DC in determining the access pattern for the relevant works – summarising the evidence as to the characteristics of the possessions, NR's opinion as to the effect of the possessions and the weighting given by NR to the DC in question. It was not

suggested that these grids were developed by NR, nor communicated by it to any of the parties, at the time of engaging in the process of developing the RotR or as a direct tool informing NR's application of the DC in the course of that process. Rather, it appeared that the grids recorded NR's retrospective analysis of the substance of its judgements made in balancing the competing interests of the parties. I do not propose to summarise the full content of these grids here but will include reference to them in the analysis below in this determination.

## **5 Interventions of Interested Parties**

- 5.1 I invited TPE, attending the Hearing as an interested party, to make any observations it wished to. There were no other interested parties in attendance.
- 5.2 TPE explained that it was satisfied with the Saturday to Sunday possession arrangements as it had quite a number of longer distance passengers to Scotland so would not wish possessions to be for all day on Sunday only. TPE had no issue with the current proposal for the three Weeks under notice; TPE had had an issue regarding the possession arrangements at Farington – south of Preston – but was now reasonably satisfied that its trains could run through the area. TPE had also been concerned regarding previous loss of one of its Manchester Airport services but that concern had since been addressed.

## **6 Oral exchanges at the Hearing**

- 6.1 After considering the written submissions and statements of the Dispute Parties as listed in paragraph 2.9 above, and having heard the parties' further oral submissions in their opening statements, I and the Panel questioned the parties' representatives to clarify a number of points arising out of their submissions. In line with the practice adopted at previous Timetabling Panel Hearings, although the individuals' answers to questions were not taken as sworn evidence (in common with the parties written submissions, statements and further information provided), I consider that we are entitled and indeed (in the absence of any indication to the contrary) obliged to accept them as true and accurate statements. Accordingly I have taken them into account in reaching this Determination.

The following issues were so questioned, discussed and clarified:

- 6.2 We explored the extent to which it was apparent or otherwise that, in the course of producing its various notifications and decisions at any of the stages during the RotR planning process, NR actively applied or otherwise had regard to the DC:
- 6.2.1 ATW did not recall NR discussing the DC or mentioning them in email correspondence. Northern had not requested demonstration of DC considerations but had asked questions which would have related to the DC; Northern did not believe the DC had been considered. Virgin had not raised the DC as they were satisfied with NR's proposals.
- 6.2.2 NR maintained that its planners had had the DC in mind when assessing their proposals, they had referred to them sometimes if not always during dialogue and correspondence, and responses from operators were not always defined in such a way as to enable assessment against the DC. NR acknowledged that the specific DC grids had been worked out retrospectively in preparing the submissions for this Hearing, but NR noted that they would have been unable to produce cogent DC grids at this stage anyway, had they not been a reflection of the considerations that had actually been applied during the process, in substance if not in form. NR pointed towards mention of the DC in some of the email correspondence annexed to the submissions.
- 6.2.3 The DC grids produced for the dispute submissions showed NR's 'weighting' methodology of the individual criteria as being first to determine which criteria were relevant and which irrelevant to the factual circumstances, and then to determine whether the relevant criteria favoured mainly NR's position or that of one of the operators. NR maintained that this evidenced it having had 'due regard' to the DC.

- 6.2.4 The Panel asked how that system of evaluation worked where, as here, the basic question was not how to apply or give relative weighting to several relevant but conflicting criteria, but how to apply a single (or at least, the most) relevant criterion so as to strike an appropriate balance between a number of competing interests. NR's reply acknowledged that this was not easy, but required common sense; NR maintained that its approach was to teach its staff to consider "is the railway there when there is demand for it?" If the answer was "no", then NR considered they had got it wrong.
- 6.3 A number of references had been made in the submissions and elsewhere to various planning guidelines agreed and used to inform the RotR and timetabling processes by both the operators and NR, such as ATW's 'Amended Timetable Planning Guidelines', Virgin's 'Key 4 Anglo-Scottish strategy' and upcoming 'Joint Network Availability Plan', and NR's own planning documents shared with the operators. When questioned on the status of these documents, all the operators and NR agreed that they were not contractually binding and were for operational guidance only. Accordingly, whilst it was naturally desirable for such agreed plans to be followed where practical, they were not necessarily a material consideration for application of the DC.
- 6.4 ATW and Northern had estimated the numbers of passengers on their services affected by the proposed possessions, and the revenue impact, but were asked to provide further data in support of their estimates. Virgin had passenger load factors to hand, but was asked, as were ATW and Northern, to provide data showing actual estimated passenger numbers affected on their services, as well as financial impact in terms of relative costs for passengers.
- 6.5 ATW confirmed that in effect only three of the stations on its affected services would fail to be served by trains at all (Helsby, Frodsham and Runcorn East); all others would be served by either ATW's diverted services or those of other operators. ATW was asked to provide data on passenger numbers affected at these stations. NR had made certain assumptions as to the capacity of, among others, Northern's services to absorb passengers from ATW's affected services; NR and Northern were asked to provide data to sustain or invalidate these assumptions.
- 6.6 ATW and Northern had raised the issue of their past experience of the effect of possessions of the kind proposed on their general ability to cater for the needs, and deal with the adverse consequences, of special Saturday categories and numbers of passengers such as football supporters and inebriates. Northern confirmed that the relevant Saturdays involved significant Premiership matches in the cities served by their affected services, but acknowledged that planning for specials to accommodate such events was inevitably a short term and somewhat unpredictable exercise, due not least to Sky Television's propensity and ability to require the last minute rescheduling of major matches to suit its TV scheduling requirements. ATW was unaware of what specific matches or events might be taking place on the weekends affected. It was acknowledged by all parties that concerns over the anticipated effect of football supporters on the affected services were somewhat nebulous and ultimately did not have much bearing on the timing of the possessions in question.
- 6.7 ATW in its submissions had raised doubts, in advance of bidding for the services, as to NR's high level train plan and capacity to accommodate, among other matters, diversions of ATW's services affected by the relevant possessions. NR maintained that the capacity was available to path trains from Chester to Manchester via Stockport. ATW acknowledged that such rail diversions would take about the same time as over the booked route, as distinct from the replacement bus service which would take about double the time. NR, ATW and Northern were asked to provide information to substantiate a less speculative assessment of the actual capacity for diversion of the ATW services.
- 6.8 Northern had raised similar high level concerns as to the robustness of the timetable for these particular weekends. Its concerns related particularly to its ability to service the patterns of Saturday passenger flows that were emerging in the North West, and to the impact on passengers' connections to onward journeys, largely on Northern's own services. Northern were asked to provide data to substantiate the assertions that connections might be

significantly affected. NR maintained it was confident that the whole Northern train plan through Preston could still be operated, without the need for attaching and detaching at Preston, but with some flexing of services with relatively long turnround times. Northern acknowledged that the proposed timetable was compliant with the Rules of the Plan headways, as asserted by NR.

- 6.9 Although Northern's Preston services had been accommodated, all twelve of their Manchester Piccadilly to Manchester Airport services had been required to be withdrawn, to accommodate Virgin's diverted Birmingham to Glasgow services. Virgin were questioned as to the possibility of resourcing some of their services differently, by running Class 57-hauled Pendolinos, in order to permit some of Northern's Manchester Airport services to run. Virgin maintained that there were a number of reasons why this would neither be reasonably practicable in the circumstances, nor in any event necessarily provide a solution. Virgin and NR were asked to provide some further brief analysis of the possibilities for alternative operating arrangements for the Virgin services.
- 6.10 Virgin had noted that they would still suffer from a significant number of disruptions north of Crewe. In order to maintain a service for the substantial numbers of passengers affected, NR said they tried to maintain 16 hour possessions over Saturday night as the norm, which still left Virgin reasonable access at the main times needed, Saturday mornings and Sunday afternoons. The proposed Winwick and Farington possessions fell outside this pattern but their effect could at least be alleviated as long as they did not extend into the whole of Sunday. A major consideration for Virgin, taking all WCML disruptions into account, was maintaining the general efficacy of the weekend Anglo-Scottish services – as promoting effective competition with air travel over the same routes, and maintaining the growth of long distance rail travel that had been seen to materialise in recent years. Virgin were accordingly asked to provide information substantiating the numbers of passengers for whom the competition provided by air travel could be a real issue, and identifying the scale of growth in the rail market that was being asserted.
- 6.11 NR had mentioned being influenced by consideration of the determination in reference TTP271, in generally favouring local services where possible, but was questioned as to why that result had not obtained in the instant dispute. NR explained that it regarded TTP271 more as giving guidance as to the sort of individual factors to be considered in assessing the relative claims of local versus long distance services. In that case the disruption had been near the end of the long distance service where the loads were lighter and a relatively short final diversion was feasible. In the present case, by contrast, NR had concluded that the relevant factors favoured the long distance service.
- 6.12 Northern in their written submission had asserted that NR's decisions to take Saturday to Sunday possessions on the WCML without individual reference to the DC constituted a "bi-lateral agreement", without further elaboration. Asked to explain this assertion, Northern indicated that it was based on an assumption drawn from NR's change from the possessions notified in RotR Version 4 to those in the Late Possession Request issued only 5 days later. Northern had inferred from this change that NR had reached a bi-lateral agreement with Virgin. NR and Virgin both confirmed that there was no such agreement and Northern accepted this.

## **7 Further information provided by Dispute Parties**

- 7.1 In the course of the questioning summarised in section 6 above, I and the Panel formed the view that a number of the Dispute Parties' assertions and expressed opinions needed further substantiation by appropriate data and evidence if they were to be regarded as carrying sufficient weight or otherwise as having merit in bearing on this Determination. Accordingly, as noted in section 6 above, during the oral interchange at the Hearing and at the end of it we listed several items or categories of further information which we required the parties to produce to us. I subsequently wrote to the parties confirming the list and the timescales for production of the information.
- 7.2 The further information so required was as follows:

- 7.2.1 From ATW: the e-mail correspondence exchanged with Network Rail regarding the revision of the possession times for the Winwick area; the passenger numbers likely to be affected by the proposed alterations to ATW's services, saying how the various passengers are affected and indicating the costs of the passenger journeys concerned; in particular, indicating the likely numbers of passengers affected at Runcorn East, Frodsham and Helsby stations and providing the data behind the figures already provided in the joint submission regarding the potentially lost revenue.
  - 7.2.2 From Northern: evidence as to whether or not there is capacity on Northern's services to accommodate passengers transferring off or away from ATW's services, with indication as to whether there would be a knock-on effect upon the rolling stock arrangements for the weekends concerned; the passenger numbers likely to be affected by the proposed alterations to Northern's services, saying how the various passenger types are affected and indicating the costs of the passenger journeys concerned; available data regarding anticipated impact upon passengers' connection opportunities, indicating separately the position regarding connections between Northern's own services and the position for passenger connecting to/from other operators' services.
  - 7.2.3 From Virgin: information regarding the anticipated load factors on Virgin's Sunday services expressed as estimated numbers for the affected trains, indicating the costs of the passenger journeys concerned and also indicating the financial impact of the revised train service arrangements in terms of the fares made available to customers; estimates of the numbers of London to Scotland and Birmingham to Scotland passengers who are likely to migrate to trains via the East Coast route in order to travel on the weekends concerned under (a) the service arrangements as currently proposed and (b) if the possessions were to apply just for the whole of Sunday instead.
  - 7.2.4 From Network Rail: demonstration as to whether there is capacity to accommodate diverted ATW trains via Stockport on the Saturday afternoons.
  - 7.2.5 From Virgin and from Network Rail (which could be provided jointly if desired): a brief explanation of the alternative train working methods available for Virgin's services, saying whether or not they are viable for the weekends in question.
- 7.3 The required information was duly produced by the parties in the form and on the dates recorded in paragraphs 2.9.10 to 2.9.18 above.

## **8 Issues arising of Law and Contract Interpretation**

- 8.1 As I have previously noted, prior to the Hearing I identified certain general issues of law (including matters of contractual interpretation) which I considered to be raised by the dispute and the content of the parties' submissions. I think it right to explain my conclusions on these issues first, since they will inform the extent of what I can determine in relation to the specific practical issues in dispute. I believe it is appropriate to raise these issues for consideration in some detail here, both to provide possible clarification to inform future Panels constituted under the new ADRR regime, and also being mindful of the ADRR Rule A5 requirement noted in paragraph 1.6 above, that the Panel must "*reach its determination on the basis of the legal entitlements of the Dispute Parties*" etc.
- 8.2 The first such issue concerns the power of a body such as an ADC tribunal or panel to reopen the exercise of a general discretion by a body whose decision is appealed, here NR. Under the various provisions of NC Part D, NR (for these purposes to be considered in its role as a quasi public body holding a statutory monopoly) is required in effect to exercise a discretion in balancing a range of competing interests. These interests include (but not exhaustively) those spelt out by the DC, to which Network Rail is specifically mandated to have 'due regard'.
  - 8.2.1 The question that arises is whether, in reviewing the result of the exercise of that discretion at the suite of a dissatisfied party, the Panel is legally empowered to revisit the whole exercise from scratch and substitute its own view as to the result of how the Panel itself would have exercised the discretion in the same circumstances. Or,

whether the Panel is empowered (or constrained) to determine something less than a wholesale reopening of the matter, by reference to the Panel's view of the degree of 'reasonableness' shown by NR. The alternatives could range from substituting a distinct result proposed as being more reasonable by one (or more) of the other dispute parties; to simply upholding (as being at least sufficiently reasonable) or rejecting only the specific result proposed by NR; to leaving Network Rail's result alone unless it is found to have been so unreasonable as to have been perverse (sometimes referred to as the 'Wednesbury' test of reasonableness, after a case of that name which was referred to in reference TTP210).

- 8.2.2 This issue is governed largely by the interpretation of the relevant provisions of Part D which introduce the DC and refer matters arising to ADRR for 'determination'. However it is also governed by general principles of law applicable to the exercise of a discretion by a body carrying out a public function, such as NR. The issue has been implicitly relevant to many previous TTP decisions, and in some cases has been expressly considered.
- 8.2.3 The most recent revision of NC Part D, effective as of 1 October 2010 (i.e. two days after this Hearing) is of help here. The new Condition D5.3.1(c) is clearer and more direct than its previous equivalent old Condition 5.3.1(c) (cited in section 3 above), in providing explicitly that [the Panel] "*may substitute an alternative decision in place of a challenged decision of Network Rail*", provided that such power "*shall only be exercised in exceptional circumstances*".
- 8.2.4 Under the former version my conclusion in any event would have been that, in order to have a meaningful appellate role, the Panel must at least have jurisdiction to consider more than merely whether NR has been totally perverse or not, but I was uncertain to what extent the Panel had power to go any further than that. However, in the light of the new Part D provision, even with its unfortunately vague proviso, I believe it is clear that the Panel has power to reopen the exercise of NR's discretion from the beginning.
- 8.2.5 New Condition D5.3.1(b) also gives the Panel a more broadly expressed power than previously, simply to uphold NR's decision: "*it may direct that a challenged decision of Network Rail shall stand*". In the light of the general broadening of Condition 5.3 in the new version, I think it is reasonable to interpret this as permitting just as extensive a revisiting of NR's decision where the eventual determination is to uphold the decision, as where it substitutes an alternative decision by the Panel. In other words I believe it permits an upholding of NR's decision even where NR's reasoning has been imperfect, because the Panel can if necessary substitute its own reasoning, even if the decision remains the same. I propose to interpret the previous Condition 5.3 in this light for the purposes of this dispute.
- 8.3 The second general issue is closely related to the first, and concerns the Panel's power to determine or award particular remedies sought by the parties.
- 8.3.1 Both the claimants here, ATW and Northern, ask expressly for particular remedies in the shape of, in effect, the Panel itself directly making (or injuncting NR to make) certain identified changes to the latest RotR to have been published. The changes sought include substituting a series of specific possessions which are different in duration or timing, or both, from those determined by Network Rail as the outcome of its planning process. Some are possessions that have already been initiated, considered and rejected by Network Rail as ineffective for their intended purpose; others are possessions first proposed by the respective claimant, whether now or previously in the course of the timetabling process, as its preferred alternative to those initiated by Network Rail.
- 8.3.2 The question that arises here is whether, or the extent to which, the Panel has the power to make such very specific awards. This would amount to the Panel in effect directing Network Rail as to how to plan for and manage its engineering works; I have to question the extent to which it is appropriate for any Panel to do so by substituting

either its own view or that of either or both of the claimants, as to what is necessary or sufficient to achieve a desired engineering outcome for the benefit of the network.

- 8.3.3 This issue also is clarified to some extent by the new October 2010 version of NC Condition D5.3.1(a), which now gives a rather more general power than previously to the Panel to "*give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved*". (The previous equivalent, current for the purposes of this dispute, empowered the Panel to "*direct Network Rail to comply with directions which specify the result*" etc) Nevertheless, I think it is appropriate to point out that there must still be some practical limits to what the Panel can specifically require NR to do or refrain from doing. However, it is not necessary for the purposes of this Determination to explore what those limits might be, since (subject to the exceptions in the next two paragraphs) that conundrum does not affect this Determination.
- 8.3.4 The first exception is that in its submission, as noted in paragraph 4.2.7.2 above, ATW specifically seeks a ruling binding on "future possessions of 25 hours (or comparable) duration affecting ATW's services on the WCML", requiring that they be planned on Sundays only, "including but not limited to those in Period E of 2011 that ATW has separately referred to ADC (reference TTP 360, hearing pending)". No limit in scope or time appears to be placed on this objective. Even without any detailed analysis of all the possibilities that this admits, it must be the case that no Panel could in any event grant such an open-ended request, even if it were to try to include practical limits to it. To do so would be to purport to tie NR's hands in operating the RotR process for ever after, let alone to prejudge the outcome of a separate dispute which has apparently already been referred for determination.
- 8.3.5 The other exception is that ATW raised the issue of the adequacy of the Schedule 4 revenue compensation available to it for its disrupted services, in relation to its assumed actual revenue loss resulting from overall suppression of passenger numbers rather than just directly affected trains, with the assertion in its written submission that its potential revenue loss if the proposed possessions are taken could exceed its Schedule 4 compensation. Again without the need for detailed analysis, it seems that this cannot be a proper consideration for a Panel such as this to take into account in evaluating the proposed timing of possessions. As far as the Panel is concerned, the level of Schedule 4 compensation, including the extent (if any) to which it takes account of estimated levels of disaffected would-be passengers, must be regarded as a 'given' determined by policy and consultation, and ultimately by ORR.
- 8.4 The next general issue concerns the relative effect of Network Rail's actions at different stages of the timetabling process.
- 8.4.1 In principle it appears it should not make any legal difference to the outcome of the challenge, whether the possessions complained of were notified as part of the Supplemental Timetable Revision process under condition D4.8, or under the short notice provisions of Section 3 of the National Rules of the Plan (PARTP) derived from condition D2.1.10 and D2.1.11.
- 8.4.2 However I had noted that TTP210 determination (at paragraph 29) suggested that there could be a possible difference, in that "*Condition D4.8 relates to the execution of agreed possessions, whereas PARTP is an 'upstream' process in which Network Rail has more the status of suppliant, seeking to introduce changes, for example, new or extended possessions*". That means in principle that "*it is upon Network Rail that falls the burden of demonstrating the good and sound reasons as to why Train Operators should acquiesce in changes, potentially to their detriment, to Rules of the Route or Rules of the Plan that have previously been agreed*". In other words, Network Rail has the onus of justifying the changes effected through the PARTP process, whereas it is for an affected Train Operator to justify a complaint against a possession introduced through the Supplemental Timetable process.

- 8.4.3 I have therefore had to consider whether this possible difference between the two stages was a relevant consideration in this dispute; and, if so, whether it might produce a different result for the Weeks 49 and 50 possessions than for Week 47.
- 8.4.4 I have concluded that it is clear from the parties' submissions, and was endorsed by what was said at the Directions Hearing, that no complaint is made in this dispute as to the timing and other procedural compliance of Network Rail's operation of the various stages of the Part D process for developing the timetable and the CPPP, or for notifying successive changes at particular stages. It is only the substance of the outcome of that process that is expressly challenged, in the shape of the result of Network Rail's exercise of its discretion in applying the Decision Criteria. The fact is that that exercise has either been adequately discharged or it has not – irrespective, it seems to me in the circumstances of this case, of whether it is for Network to prove the positive or for the operators to prove the negative. Thus, notwithstanding that the proposed possessions for Weeks 49 and 50 were notified under the late notice provisions in PARTP, I do not consider that that for the purposes of this dispute there is any practical difference to the outcome resulting from any technical issue as to the burden of proof in the matter.
- 8.5 The next general issue is central to this dispute, namely NR's method of applying and weighting the DC.
- 8.5.1 Various provisions of Network Code Part D require Network Rail to have 'due regard' to the DC. This language by itself is not of much assistance in determining how the DC are to be evaluated and applied in any particular instance, since 'due' is a relative term that only has any meaning in relation to a suitable given benchmark. Up till now neither the Network Code nor precedent TTP determinations on the point have offered such a benchmark.
- 8.5.2 On this point I was assisted by Virgin's submission, as noted in paragraph 4.4.7.3 above, which referred me to the new Decision Criteria section of the Network Code effective from 1 October 2010, contained in new Condition D4.6. This reflects a welcome change of language in the whole of the new Part D, whereby NR is now required simply to 'apply' the DC in appropriate circumstances, rather than have 'due regard' to them. In evaluating the former version of the DC for the purposes of this Determination, I propose to interpret 'have due regard' accordingly.
- 8.5.3 Many of the Decision Criteria, in both the old and new versions, are in direct conflict with each other, in that they cannot all be satisfied at the same time. Some Criteria however conflict not so much with each other but internally, that is, in the application of the same Criterion to different parties and in differing circumstances. Any system adopted to rationalise their application must at least accommodate both these distinct kinds of conflict.
- 8.5.4 For the first time the new Condition D4.6 goes some way towards recognising and accommodating the fact that there are two different ways of applying the DC. First, NR *"must consider which of the Decision Criteria are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail."* Secondly, *"Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Decision Criteria will lead to a conflicting result then it must decide which is or are the most important Decision Criteria in the circumstances and when applying it or them, do so with appropriate weight"*.
- 8.5.5 At least two weighting systems are therefore possible: weighting the relevance and degree of satisfaction of each individual Criterion in a scale relative to the others, in its application to all potentially affected parties in the particular set of facts under consideration; or weighting the extent to which the application of each relevant Criterion favours the position taken by one dispute party or another. Network Rail's DC grids

included in the two joint submissions mostly adopt the latter system, but not completely and not entirely consistently. I note that TTP350, a very recent TTP determination and one of only two so far under the new ADRR regime, also appears to adopt the latter weighting system.

- 8.5.6 Here, as in TTP350, although NR has retrospectively constructed DC grids showing its weighting of a number of different Criteria which, not surprisingly, apparently work out as favouring NR, in reality the focus is on one Criterion, (a) *"sharing the capacity, and securing the development of, the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services..."* The exercise thus becomes entirely one of assessing and balancing the practical merits of the parties' various competing interests in relation to the application of the single relevant Criterion, rather than comparing the merits of competing Criteria. I do not think it necessary, therefore, to undertake a detailed analysis or commentary on the components of the DC grids produced by NR in the joint submissions.
- 8.5.7 In trying to achieve that balance of competing interests, in the absence of any other contractually explicit yardstick for determining what lies at the heart of DC D6(a) – *"sharing the capacity...of the Network... in the most efficient and economical manner in the interests of all users of railway services..."* – I concluded, with the concurrence of the Panel, that the most sensible metric was that of benefit to the ultimate consumer, the passenger or freight customer, in the sense of looking for the solution that demonstrably provides the greatest good for the greatest number. Hence our requests to the parties for more concrete and complete information as to likely numbers of passengers on the potentially affected services.
- 8.6 The final general issue is as to the timing of NR's applying and weighting the DC. The question here is what is the effect of (if such be proved to be the case) of Network Rail not having actively applied or evaluated them at the time of making its original decisions, but instead using them retrospectively to justify the position it has taken on issues of conflict. This issue also is touched on in the determination in TTP350.
- 8.6.1 As previously noted, during the Hearing the Panel and I questioned all the parties as to the extent of NR's apparent consideration or explicit mentioning of the DC actually at the time of discussions and correspondence concerning the successive stages of the 2011 RotR process. At the end we included a request for copies of correspondence which might assist in this area. All the parties produced something along these lines.
- 8.6.2 At the Hearing I observed that when dealing with the conflicting interests of different operators, NR perhaps needed to be more communicative, because, for example, when the issues surrounding Decision Criterion (a) in reference TTP377 were examined rigorously, the volume of passengers and distances being travelled clearly became matters of relevance warranting quantification. NR had heard the Panel asking the operators for more information but, for the future, this was an area where NR should be seeking facts and figures to inform its decision making. NR asked what would then happen if one operator provided visible hard data but experience informed NR that the circumstances should be weighed more favourably for another operator which did not provide relevant data. I advised that it would be satisfactory for NR to make a decision if it set out the thought process which included its knowledge of the aspect about which it did not have facts provided by an operator. However, NR's over-riding approach to transparency clearly needed to be kept proportionate and it was unlikely to be necessary for data gathering to be done for every possession.
- 8.6.3 As regards actual application of the DC in this case, my reading of the oral exchanges and the correspondence subsequently produced is that it all does reasonably demonstrate Network Rail as having given consideration to the relevant factors for the DC, at least Criterion (a), at the appropriate times, in substance if not in form. Clearly, however, it would have been more helpful if Network Rail's 'workings' could have been clearly explained at each stage by reference to specific contractual Criteria.

## **9 Analysis and consideration of commercial issues, submissions and further information**

- 9.1 Finally, therefore, I turn to a consideration of the specific practical and economic factors relevant to the application of Decision Criterion D6(a) as between ATW and Northern, on the one hand, and Virgin on the other; and of the other commercial and operational issues which this dispute has given rise to. In doing so I am taking into account, as previously noted, the parties' submissions prior to and at the Hearing, the oral exchanges on particular points of information during the Hearing, and the further data and information provided after the Hearing by the parties at the Panel's request. It is these considerations that inform the conclusions of this Determination.
- 9.2 In the light of the foregoing, the main practical issue of substance was clearly the relative impact of the proposed possessions in terms of numbers of passengers affected on the various services. On this we were provided with a considerable volume of data much of which was presented in somewhat impenetrable form. In particular, very few clearly identifiable relevant totals were volunteered, making it necessary to sift through pages of service data, loading factors, and rolling stock types to try to find a relevant thread. The most comprehensible analysis of it was in Virgin's comments on the ATW figures, but without equivalent analysis of Northern's figures nor of Virgin's own figures (which in any case have been redacted so as not to be available to industry members on the Panel). It was helpful that Virgin had become a Dispute Party as this led to the production of more information regarding comparative passenger-carryings than might otherwise have been forthcoming from the other parties. In any event, however, from even a rough analysis of the data, it is clear that the numbers of passengers affected, as between ATW/Northern on the one hand and Virgin on the other, are different almost by an order of magnitude - ATW/Northern's being in the low thousands, Virgin's in the high thousands or possibly tens of thousands.
- 9.3 As regards the relative financial impact on passengers, from the data provided (though again without being able to derive arithmetically precise results from it), the overall pricing on the affected Virgin services, not surprisingly, is materially higher than the ATW/Northern services pricing, irrespective of any advance purchase/on the day differentials.
- 9.4 Virgin provided substantial further information (also redacted so as not to be available to industry members on the Panel) identifying a significantly greater number of passengers on the Anglo-Scottish services who would be likely to migrate to other intercity operators' services or other modes of transport if severely disrupted by diversions via Manchester during all day Sunday possessions than would be the case for 1335 Saturday to 1500 Sunday possessions. In my view this supported the contention that the proposed alternative of all day Sunday possessions could have a material adverse effect on Virgin's objective, which I accept as beneficial to the rail industry as a whole, of promoting effective competition with air travel over the same routes, and maintaining the growth of long distance rail travel that has been seen to materialise in recent years.
- 9.5 Northern provided additional information (which they said was incomplete) on count data and average load factors, generally supporting the conclusion that Northern's services do have capacity to accommodate relevant passengers from/to ATW's affected services. In this context the relevant passengers are only those bussed from/to Helsby, Frodsham and Runcorn East, because Chester/Manchester passengers can get the diverted ATW services via Stockport etc. Northern having said it is too difficult at this stage to provide any analysis showing major rolling stock implications of such additional passengers led to the conclusion that there are unlikely to be any such major implications.
- 9.6 As regards the possibility of Virgin arranging alternative resources to avoid displacing the Northern Manchester Piccadilly/Airport services, Virgin's additional information made an adequate case that the exercise of diagramming Class 57s to haul Pendolinos would be disproportionate to the objective.
- 9.7 Network Rail provided additional information to the effect that they could, after all, path hourly rather than two-hourly Virgin services diverted via Manchester. This should enable Virgin to maintain both London-Glasgow and Birmingham/Glasgow services, albeit at reduced frequencies during the periods of the possessions.

9.8 Having regard to all of the above practical and economic factors and information relevant to the application of Decision Criterion D6(a) as between the contending operators, I have concluded that the metric identified in paragraph 8.5.7 above – that of benefit to the ultimate consumer in the sense of demonstrably providing the greatest good for the greatest number – clearly weighs, in this case, in favour of the solution which minimises disruption to the Virgin WCML Anglo-Scottish services. I therefore consider that NR's decisions to take RoUs of timing and duration which favoured this result were justified.

## 10 Determination

Having considered carefully the submissions, evidence and further information as set out in sections 4, 6 and 8, and based on my analysis of the legal and contractual issues as set out in section 8 and the commercial and operational issues in section 9,

### **I DETERMINE:**

Network Rail has not misapplied the Decision Criteria in publishing Rules of the Route amendments on 29 July 2010 in the Period 12 Confirmed Period Possession Plan (CPPP) incorporating Restrictions of Use in the Warrington Bank Quay area in Week 47; nor in publishing Rules of the Route amendments on 29 July 2010 in a Late Possession Decision incorporating Restrictions of Use in the Warrington Bank Quay area and the Preston area in Weeks 49 and 50. Accordingly I direct that its decisions in this respect shall stand. This determination is in respect of consolidated dispute references TTP376 and TTP377.

I confirm that, so far as I am aware, this Determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



**Peter Barber**  
**Hearing Chair**

**21 October 2010**

## **Annex 1 to Timetabling Panel determination of reference TTP376 & TTP377**

### **Extracts from Network Code**

#### **2.1 Review of the Rules of Route/Rules of Plan**

##### *2.1.10 Procedure for amendment of the Rules of the Route/Plan and amendment of scheduled Train Slots*

Network Rail shall include within the Rules of the Plan a procedure to enable amendment of the Rules of the Route and the Rules of the Plan and consequential amendment of scheduled Train Slots other than as provided for in the foregoing provisions of this Condition D2.1. Notwithstanding the provisions of Condition D2.1.9, Network Rail shall not be entitled to implement any change to that procedure until any appeal against any such change has been determined pursuant to Condition D5.

#### **4.8 Supplemental Timetable Revision Process**

4.8.2 Network Rail shall,

(a) on or before each Revision Period Commencement Date, provide to each Bidder its outline proposals for revision of the allocation of capacity in respect of the Timetable Week to which such Revision Period Commencement Date relates in order to enable Network Rail to take the Restrictions of Use contained in the Rules of the Route and/or Rules of the Plan applicable to that Timetable Week;

(b) in consultation with Bidders, develop the structure of the amended train plan for the relevant Timetable Week, including any revision of the allocation of capacity, in accordance with agreed criteria, on Routes directly affected by Restrictions of Use included in the applicable Rules of the Route and/or Rules of the Plan and on diversionary routes; and

(c) within 4 weeks of each Revision Period Commencement Date, notify each affected Bidder:

(i) of its capacity allocation decisions and proposed structure for the amended train plan for the relevant Timetable Week; and

(ii) whether Network Rail requires any Bidder to prepare a Revised Bid in respect of any Timetable Week Slot in that Timetable Week.

#### **CONDITION D6 - DECISION CRITERIA**

The Decision Criteria consist of the necessity or desirability of the following (none of which necessarily has priority over any other):

- (a) sharing the capacity, and securing the development, of the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services having regard, in particular, to safety, the effect on the environment of the provision of railway services and the proper maintenance, improvement and enlargement of the Network;
- (b) seeking consistency with any current Route Utilisation Strategy which is either (i) published by the Strategic Rail Authority or the Department for Transport before 31 May 2006, or (ii) established by Network Rail in accordance with its Network Licence;
- (c) 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;
- (d) maintaining and improving the levels of service reliability
- (e) maintaining, renewing and carrying out other necessary work on or in relation to the Network;
- (f) maintaining and improving connections between railway passenger services;

- (g) avoiding material deterioration of the service patterns of operators of trains (namely the train departure and arrival frequencies, stopping patterns, intervals between departures and journey times) which those operators possess at the time of the application of these criteria;
- (h) ensuring that, where the demand of passengers to travel between two points is evenly spread over a given period, the overall pattern of rail services should be similarly spread over that period;
- (i) ensuring that where practicable appropriate provision is made for reservation of capacity to meet the needs of Bidders whose businesses require short term flexibility where there is a reasonable likelihood that this capacity will be utilised during the currency of the timetable in question;
- (j) enabling operators of trains to utilise their railway assets efficiently and avoiding having to increase the numbers of railway assets which the operators require to maintain their service patterns;
- (k) facilitating new commercial opportunities, including promoting competition in final markets and ensuring reasonable access to the Network by new operators of trains;
- (l) avoiding wherever practicable frequent timetable changes, in particular for railway passenger services;
- (m) encouraging the efficient use of capacity by considering a Bidder's previous level of utilisation of Train Slots;
- (n) avoiding, unless absolutely necessary, changes to provisional International Paths following issue of the applicable Rules of the Plan; and
- (o) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing.

In its consideration of paragraph (d) of this Condition D6, Network Rail shall not be entitled to determine that its Restrictions of Use of any part of the Network shall be as contemplated by any relevant maintenance contract by reason only of the terms and conditions of that contract. In this paragraph, "relevant maintenance contract" is a contract which Network Rail shall have entered into, or shall intend to enter into, with any person for the maintenance, renewal or the carrying out of any other work on or in relation to the Network.