
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP04

(following a hearing held at Kings Cross on 22nd August 2005)

The Panel

Geoff Appleby: appointed representative of Network Rail
Colin Berry: elected representative for Franchised Passenger Class, Band 1
Steve Carter: elected representative for Non-Franchised Passenger Class
Nick Gibbons: elected representative for Non-Passenger Class, Band 1

Panel Chairman: **Bryan Driver**

The Parties and the nature of the dispute

1. The Dispute was brought by the Intermodal division of Freightliner Ltd (FL), and called upon the Panel to rule that a 51-hour possession proposed by Network Rail Infrastructure Limited ("Network Rail") for week 49 of the 2005/6 Rules of the Route should either be refused, or curtailed.
2. The possession proposed is a 51-hour possession (0100 Sat – 0400 Mon) between Millbrook and Brockenhurst for track renewals in Week 49 (w/c Saturday 4th March 2006). It is objected to by FL because it will preclude the operation of 4 services for which FL holds Firm Rights on the morning of the Saturday. The 4 services are:

4B31 0946 (SO) Southampton MCT – Marchwood FLT arr 1009

0B31 1022 (SO) Marchwood FLT – Southampton MCT arr 1044

4B33 1146 (SO) Southampton MCT – Marchwood FLT arr 1209

0B33 1220 (SO) Marchwood FLT – Southampton MCT arr 1242

The nature of the dispute in relation to the jurisdiction of the Panel

3. The Dispute arises from a decision of Network Rail's which may be referred to the Timetabling Panel under Condition D2.1.7 of the Network Code. The appeal was made in accordance with Condition D5.1.1 of the Network Code, and therefore falls to be determined by a Timetabling Panel.

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

4. The Panel found that the original submission from the parties was not sufficient for a clear understanding of the reasons for the dispute. However, after questioning the parties, the Panel found the following matters of fact.
 - 4.1. The services in question are run because of the limited capacity under the cranes at Southampton Maritime Container Terminal (SMCT). Trains that have arrived at the terminal on Friday evening, are, when discharged, worked as sets of empty wagons for stabling in the Marchwood terminal. As a consequence the SMCT then has capacity available to receive and discharge two other loaded trains with traffic for shipping with scheduled departures over the weekend.
 - 4.2. The issue therefore for FL is not that it needs to work commercial services to Marchwood on a Saturday, but that, if it cannot free the relevant roads in SMCT, then two other inbound commercial services will be unable to complete their scheduled journeys.
 - 4.3. Network Rail is proposing to undertake works in the area on three consecutive weekends (weeks 49, 50, and 51).
 - 4.3.1. The possession proposed for week 51 does not impact upon FL operations.
 - 4.3.2. The original proposal for week 50 was also for a 51-hour possession commencing 0100 Saturday; following a review of the work content for that possession, Network Rail had agreed that the start could be postponed to 0900, and FL had agreed that the two trains in question (4B31 and 4B33), and the two reciprocal light engine movements (0B31 and 0B33) should be retimed to complete their passages before 0900.
 - 4.3.3. The work content in week 49, which relates primarily to plain line renewals either side of Redbridge Junction, is not susceptible to being compressed into a shorter duration. Were a shorter possession to be directed by the Panel, it would require some work to be scheduled to another possession at another time.
 - 4.4. The possession in week 49 also encompasses the Test Valley line as far as Romsey. However no works are scheduled over that length of route. None of the works actually relate to the switch and crossing work at Redbridge Junction (including the junction giving access to the Arrival and Departure Road for SMCT), and it is probable that engineering trains within the possession will pass over the available routes.
 - 4.5. There have been discussions between the parties as to alternative locations to which the wagons might be worked (Cardiff FLT, Clapham Yard, and Eastleigh among them), but these have not reached an acceptable conclusion. Indeed it appeared to the Panel, from some of the supporting correspondence, that there had been a will within FL not to seek an agreed solution but to go prematurely to formal dispute resolution.
 - 4.6. Three passenger Train Operators (Wessex Trains, South West Trains and CrossCountry Trains), are adversely affected by the proposed possessions in all three of weeks 49 to 51. It appeared that all three had agreed to the proposals as the most appropriate way of addressing the need for track renewals on the section of route in question.

The issues of contract raised by the Dispute

5. There is much precedent with respect to the weight to be given to Firm Rights to individual train services, when comparing the strength of those rights with the need to undertake, through the inclusion of possessions in the Rules of the Route, necessary maintenance and renewals.
6. In Timetabling Panel's Determination of reference TTP01, the Panel formulated the view that the entitlements in question, for the Train Operator and for Network Rail, are a function of both specific Firm Rights, and the due compliance with process. Thus
 - *"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." (Timetabling Panel Decision no 1, paragraphs 13 and 14).*
7. This concept was amplified further in Determination ADP10 of the Access Dispute Panel:
 - *"In relation to the point at issue, a determination of the appropriateness, or not, of including a proposed Restriction of Use into "the applicable Rules of the Route", requires a Panel to take a view of the balance of the reasoned approaches of the parties in question. In practical terms this is the final measure of which is the stronger legal entitlement." (ADP10 paragraph 14).*
8. The approach of Network Rail, in this instance, appears, taking weeks 49 to 51 together, to be proportionate to the work to be undertaken, and to acknowledge the generality of the Train Operators' interests. By contrast, FL's main interest appears to be that it should still be able to receive the two Saturday afternoon loaded services into SMCT. It follows that FL's actual requirement is for access to a secure stabling point for the two sets of empty wagons, and not an absolute need to run those wagons to Marchwood.
9. Considerations of proportionality therefore would need to take into account
 - 9.1. Network Rail's readiness (or not) to incorporate the finding of an alternative stabling point into its proposals; and
 - 9.2. FL's readiness to collaborate with any reasonable proposal.

The Panel's findings and Determination

10. The Panel therefore, doing the best with the material before it, concluded that:
 - 10.1. it appears that the work content proposed by Network Rail in respect of the 51-hour possession in week 49, cannot be compressed into a shorter period to permit the possession to commence at 0900 Saturday. The Panel is satisfied that, on the evidence of the effort that was put into shortening the duration of the possession in week 50, that it should reasonably accept the judgement of Network Rail in this respect;
 - 10.2. the 51-hour possession in week 49 encompasses the totality of the lines from Redbridge to Brockenhurst, and from Redbridge to Romsey. However, within the overall possession there are a number of discrete work sites, and some sections of line, whilst necessary for the possession, are not themselves the subject of work of a nature that would physically prevent the passage of trains, under the proper supervision. This would, for example, appear, on the basis of the information before the Panel, to be the case with the connection between the Maritime Arrival and Departure line, and the Down Test Valley line;
 - 10.3. account had to be taken of the extent of the upheaval being experienced, as consequence of the possessions in weeks 49 to 51, by other Train Operators, and the extent to which
 - 10.3.1. they had acquiesced in that disruption, and
 - 10.3.2. would suffer additional disruption were it necessary to defer some of the works from week 49 to an additional possession;
 - 10.4. FL does have Firm Rights to operate the services between SMCT and Marchwood, and the force of those rights should be taken into account in the formulation of any determination; however
 - 10.5. the purpose of those rights is to ensure that SMCT is freed of a surplus of wagons to enable other inbound loaded trains to be handled on a Saturday; there is no other commercial purpose to these rights; therefore,
 - 10.6. in its view, the effect of those rights can reasonably be deemed to have been honoured if FL is provided with an alternative suitable location for the stabling of the empty wagons for such period until once again required for loading at the SMCT;
 - 10.7. whilst options for the stabling of wagons at Cardiff, Eastleigh or Clapham yard had been considered, other options nearer to Maritime terminal had not been considered, such as the lines in the Western Dock, the storage sidings at Maritime terminal itself, or one of the Test Valley lines (i.e. stabling of empty wagons within the possession).
11. The Panel therefore determined that, on the evidence it had heard,
 - 11.1. although FL has rights for specific movements that cannot be honoured if the possession goes ahead, the purpose for which those rights are held could reasonably be fulfilled, and without detriment to any obligation to any third party, by means of other train movements and wagon stabling arrangements;

- 11.2. it was not apparent that all realistic options had been explored; and therefore
 - 11.3. there were no good grounds for denying to Network Rail the 51-hour possession proposed for inclusion in the Rules of the Route for week 49; however
 - 11.4. Network Rail was directed to explore further with FL all as yet unevaluated options for providing temporary stabling facilities for the two sets of empty wagons in question, including on lines within this possession.
12. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

Bryan Driver

Panel Chairman