
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP95B

(following a hearing held at Central House, Euston on 8th September 2006)

The Panel

Simon Barrett: elected representative for Non-Passenger Class, Band 2

Graham Owen: elected representative for Non-Franchised Passenger Class

Mark Pawson: appointed representative of Network Rail

Andrew Pennington: elected representative for Franchised Passenger Class, Band 3

Panel Chairman: **Bryan Driver**

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

1. First Greater Western Ltd (FGW) asked the Panel to find that Network Rail Infrastructure Ltd (Network Rail) should provide Train Slots for an aspirational overlay weekday peak train service between Paddington and Slough in the December 2006 Working Timetable.
2. The Panel noted that the dispute was brought under the provisions of Network Code Condition D5.1.1(b) “*the acceptance or rejection by Network Rail of any bid*”, and therefore was properly a matter for a Timetabling Panel.

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

3. FGW had bid, in accordance with the provisions and timescales laid down in Network Code Part D, for Train Slots corresponding to additional half-hourly services throughout both the morning and evening peaks, to provide a stopping service between Slough and London Paddington.
 - 3.1. FGW stated that this level of service had been a commitment that it had given when bidding for the Greater Western Franchise.
 - 3.2. FGW stated that at the time of making the commitment in respect of its franchise bid it was aware that no Firm Rights existed for such an overlay service.
 - 3.3. Network Rail stated that it had been aware, at the time of FGW’s franchise bid, of possible requirements to deal with passenger capacity between Slough and Paddington by means of an “overlay” service requiring trains at half-hourly intervals. However, no commitments had been given as to the feasibility of such a proposal.
 - 3.4. FGW’s Track Access Contract still did not incorporate Firm Rights to the Slough overlay service.
4. Recent performance on the Great Western Main line has been the subject of adverse comment and criticism, not least from the Office of Rail Regulation. Network Rail is concerned that new aspirations should not, if converted into new offers, import new threats to the performance that can

be delivered to existing customers. In practice Network Rail has been able to draft a timetable that offers Train Slots for the majority of the services bid for the Slough Overlay service, compliant with the current Rules of the Plan. However, Network Rail, in the light of the ongoing performance problems with the existing Timetable, itself compliant with the same Rules of the Plan, had not been prepared to make offers for Train Slots without further evaluation of the potential for the additional services to exacerbate current problems.

5. In consequence, and with the full agreement of both parties, Network Rail had commissioned RWA Rail Ltd to carry out a simulation exercise using Railsys. This simulation enables assessments to be made of the likely adverse performance consequences of a suite of perturbed circumstances, comparing the proposed 2006 Timetable (with or without potential Slough overlay services) with current performance with the 2005 Timetable.
6. The Panel was pleased to have the assurance of both parties that they accepted both the methodology used, and the results generated, as representative of the potential performance outcome of introducing the Slough overlay service. Both parties agreed that the simulation demonstrated a 4% deterioration in performance when the Slough Overlay service is added to the 2006 Timetable, this on top of a potential deterioration, when the 2006 Timetable (without Slough overlay) is compared with the 2005 Timetable.
7. FGW was of the view that, notwithstanding the results of the RailSys evaluation, where there was the possibility to generate Train Slots for the Slough overlay service compliant with the Rules of the Plan, Network Rail should offer these Train Slots to FGW, and include them in the Working Timetable. Network Rail, by contrast, had a clear view that, because of the results of the RailSys evaluation
 - 7.1. it should not be prepared to offer any Train Slots corresponding to FGW's aspirational bids in respect of the Slough Overlay service; and therefore that
 - 7.2. it would oppose any application, by FGW, for any amendment to its Track Access Contract, to give it Firm Rights in relation to the December 2006 Timetable for the Slough Overlay service.

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

8. The Panel considered the points made by FGW in respect of the commitments that it carried under its Franchise Agreement in respect of the frequency of service between Slough and Paddington in the peak. The Panel noted FGW's contention that Decision Criterion Network Code D6(b) acknowledged "*the necessity or desirability of...*" "*..enabling a Bidder to comply with any contract to which it is party (including...the franchise agreement to which it is a party)...*". The Panel found that this obligation to a third party does not, of itself,
 - 8.1. confer upon the Bidder any rights of Access that are not already incorporated into a Track Access Contract that has been approved by the Office of Rail Regulation;
 - 8.2. require Network Rail to act in any way that might be to the detriment of the performance enjoyed by other Train Operators, particularly those with approved and documented Firm Rights, and
 - 8.3. provide any means of getting round, or over, physical limitations within the track layout that preclude the plotting of an appropriate Train Slot.

9. The Panel found that Condition D3 grants a clear status to aspirational bids in respect of the development of a specific Working Timetable, and sets standards in respect of how Network Rail should treat them:
 - 9.1. Condition D3.2.3 *“priorities in compiling the First Working Timetable”* sets out that bids for Train Slots that are not supported by Firm Rights (D3.2.3(a)), or which do not correspond to Train Slots supported by Firm Rights that have reached their term, but are expected to be renewed (D3.2.3(b)), shall, provided that they have been notified *“on or prior to the Priority Date in accordance with Condition D3.2.1(c)”*, be dealt with as a third tier of priority.
 - 9.2. This status derives from the presumption that where there are no rights, there are assumed to be *“expectations of rights”*, i.e. that Network Rail is carrying out a technical assessment to confirm the feasibility of conceding rights.
 - 9.3. Network Rail is placed under specific obligations in respect of the thoroughness of any evaluation that it may be required to undertake to establish whether or not it can meet *“expectations of rights”*.
 - 9.3.1. Condition D3.2.2 requires that the Working Timetable
 - 9.3.1.1. *“includes ...the Train Slots shown in the Base Timetable, together with the additions, amendments and deletions requested by Bidders...so far as reasonably practicable taking into account the complexity of those changes, including any reasonably foreseeable impact on the Working Timetable...and having due regard to the Decision Criteria”* (Condition D3.2.2(c)); and
 - 9.3.1.2. *“in Network Rail’s opinion is capable of being brought into operation”* (Condition D3.2.2(a)).
 - 9.3.2. Condition D3.2.4 *“Development of the Draft Timetable”* extends the obligation to *“new aspirations”*, and requires that Network Rail *“shall incorporate each new aspiration into the Draft Timetable in accordance with the priorities set out in Condition D3.2.3...”* *“so far as reasonably practicable taking into account the complexity of the new aspirations, including any reasonably foreseeable consequential impact on the working timetable”*.(Condition 3.2.4(b)).
10. The Panel did NOT find that any of these obligations implied that any aspirational Bid should inevitably progress through the Timetabling process, and the subsequent agreement, and approval by Office of Rail Regulation, of a new, or amended, Track Access Contract. Instead the Panel concluded that
 - 10.1. aspirational bids should be processed as *“expectations of rights”*, for as long as it takes to establish the feasibility of offering practicable Train Slots to meet those aspirations, at which point the Bidder could reasonably anticipate being able to reach agreement with Network Rail on appropriate terms for Firm Rights;
 - 10.2. where Network Rail has concluded that it is not prepared to make an offer against *“expectations of rights”*, then it is open to the Bidder to appeal to a Panel, under Condition D5.1.1(b); in such a case
 - 10.3. a Panel might find that Network Rail has not explored all reasonable possibilities, and therefore should still entertain the Bidder’s *“expectations of rights”*, and seek to include a Train Slot corresponding to the aspiration underpinning the *“expectation of right”*; however,

- 10.4. a Panel has NO authority to direct Network Rail to convert any “*expectation of rights*”, into Firm Rights, as this is a matter for the parties subject to the approval of the Office of Rail Regulation; by the same reasoning
- 10.5. if Network Rail has reasonably concluded that a Train Slot corresponding to the “the *expectation of right*” is NOT “*capable of being brought into operation*”, and the Panel finds in support of Network Rail’s conclusion, then Network Rail and the Panel are effectively concurring that
 - 10.5.1. the Bidder should no longer, for the purposes of the aspiration in respect of the Timetable in question, have an “*expectation of right*”, and therefore
 - 10.5.2. Network Rail is entitled to exclude that aspiration from the Working Timetable.
11. In the view of the Panel, where Network Rail has reasonably decided that it will not support a Train Operator in seeking a specific Firm Right, the matter can only be progressed further by the parties, subject to the approval of the Office of Rail Regulation, and therefore falls outside the jurisdiction of a Timetabling Panel.

The Panel’s Determination

12. The Panel found that
 - 12.1. in respect of the Slough overlay service FGW’s bids were aspirational; as such they fall to be dealt with as “expectations of rights” rather than firm rights, and are properly accorded a lower priority in respect of the operation of Network Code Condition D3.2.3;
 - 12.2. Network Rail has demonstrated that it has evaluated options with a thoroughness that can reasonably be judged to fulfil the requirements set down in Condition D3.2.2(c) by seeking to include in the base Timetable “*the additions...requested by the bidders ...so far as reasonably practicable taking into account the complexity of those changes, including any reasonably foreseeable consequential impact on the working timetable, and ...having due regard to the decision criteria*”;
 - 12.3. Network Rail has demonstrated that it has evaluated options with a thoroughness that can reasonably be judged to fulfil the requirements set down in Condition D3.2.4(b) that “*Network Rail shall, so far as reasonably practicable taking into account the complexity of the new aspirations, including any reasonably foreseeable consequential impact on the working timetable*”. In particular, Network Rail has commissioned evaluations of the “*reasonably foreseeable consequential impact on the working timetable*”, the validity of the results of which are accepted by both Network Rail and FGW.
 - 12.4. those efforts have lead Network Rail (taking into account the current levels of performance, together with all its commitments to other Train Operators) to the conclusion, that, whilst it is technically possible to allocate Train Slots that comply with the applicable Rules of the Plan to a majority of the “overlay services”, a Timetable constructed in that way would deliver significantly worse performance both as compared with the 2005 Timetable, and as compared with a version of the 2006 Timetable that does not incorporate such services;
 - 12.5. Network Rail therefore declines to incorporate such services in the Working Timetable for December 2006, and would oppose any application by FGW to the Office of Rail Regulation

to have its aspirations for the Slough Overlay service translated into a Firm Right in respect of the December 2006 Timetable.

13. The Panel therefore concluded that
 - 13.1. Network Rail is the party with the ultimate authority to determine the technical feasibility, within Network Code Part D, of meeting the aspirations of a Train Operator not in possession of a relevant Firm Right, subject only to the rights of appeal set out in Condition D5;
 - 13.2. Network Rail has fulfilled all of its responsibilities to FGW in respect of its proper administration of the provisions of Network Code Part D, in relation to FGW's aspirations to operate the Slough Overlay service during the December 2006 Timetable;
 - 13.3. The Parties are agreed that the inclusion of the Slough Overlay service in the 2006 Timetable would have an adverse effect upon performance, affecting other Train Operators in addition to FGW; in such circumstances, it is, in the view of the Panel, reasonable to conclude that Network Rail is entitled to decide that it does not wish to put its performance obligations in jeopardy, and so to decide that it will not incorporate the Slough Overlay service into the 2006 Timetable;
 - 13.4. in terms of the operation of priorities within Network Code Part D, the effect of this conclusion by Network Rail should reasonably be that FGW can no longer claim that it has "expectations of rights" in respect of the Slough Overlay service.
14. The Panel therefore determined that,
 - 14.1. where Network Rail has demonstrably complied with the provisions of Network Code Part D, and has reasonably concluded that there should be no "expectations of rights" the issue in question becomes one for FGW to raise, through an application for rights, with the Office of Rail Regulation; as such
 - 14.2. the issue becomes one that lies beyond the scope of the provisions of Network Code Part D, and therefore one where the Panel has no jurisdiction that would enable it to find in favour of the position brought by FGW.
15. 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