

Sole Reference by a Claimant to a Timetabling Panel in accordance with the provisions of Chapter H of the ADR Rules

Reference - TTP440

1. DETAILS OF PARTIES

1.1. The names and addresses of the parties to the reference are as follows:-

<p>First/Keolis Transpennine Limited "TPE"</p> <p>A company registered in England under number 4113923 having its registered office at:</p> <p>50 Eastbourne Terrace, Paddington London W2 6LG</p> <p>("the Claimant")</p>	<p>Network Rail Infrastructure Limited "NR"</p> <p>A company registered in England under number 2904587 having its registered office at:</p> <p>Kings Place, 90 York Way, London, N1 9AG</p> <p>("the Respondent")</p>
<p>Contact: George Thomas Tel: [REDACTED] Fax: 0161 228 8181 Email: [REDACTED]</p>	<p>Contact: Matthew Allen Tel: [REDACTED] Fax: [REDACTED] Email: [REDACTED]</p>

1.2. West Coast Trains Limited are making a parallel reference of the same issues and will be affected by the decision sought from the Panel. Other third parties that may be affected by the Panel finding are:

- 1.2.1. DB Schenker;
- 1.2.2. Freightliner Group;
- 1.2.3. GBRf;
- 1.2.4. Northern Rail; and
- 1.2.5. Direct Rail Services.

## **2. THE CLAIMANT'S' RIGHT TO BRING THIS REFERENCE**

2.1. This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Condition 3.4.4 & 5.1.2{a} of the Network Code and section 3.5.4 of the 2012 Timetable Planning Rules ("TPRs").

## **3. CONTENTS OF REFERENCE**

3.1. This Sole Reference includes:-

- 3.1.1. The subject matter of the dispute in Section 4;
- 3.1.2. A summary of the issues in dispute in Section 5;
- 3.1.3. A detailed explanation of the issues in dispute prepared by the claimant in Section 6;
- 3.1.4. In Section 7, the decisions of principle sought from the Panel in respect of
  - 3.1.4.1. legal entitlement and
  - 3.1.4.2. remedies;
- 3.1.5. Appendices and other supporting material in Section 8.

## **4. SUBJECT MATTER OF DISPUTE**

4.1. The dispute arises from NR's decision to implement Restrictions of Use ("RoU's") during weeks 41 and 42 of the 2012 timetable year to undertake engineering work deferred from week 9. These RoUs are over and above those established in the 2012 Engineering Access Statement ("EAS"). TPE considers that sufficient RoU's exist within the agreed 2012 EAS to allow NR to carry out the required engineering work, without further RoU's.

4.2. This dispute arises over the interpretation of Condition D4.6.1 of the Network Code, the Decision Criteria.

## **5. SUMMARY OF DISPUTE**

5.1. In consideration of the disruption to air travel anticipated as the result of a volcanic ash cloud during late May 2011, NR took the decision to cancel the RoU it planned to take, under the agreed 2011 EAS, in engineering week 9 (0530hrs Saturday 28<sup>th</sup> May

– 0535hrs Sunday 29<sup>th</sup> May, a total of 48hrs). As a result of this cancellation NR was unable to complete the engineering works scheduled for that week. This included the switching and crossing renewal planned to be delivered by Babcock Rail at shap summit.

- 5.2. As a result of this cancellation, it was reluctantly accepted by TPE that the engineering work would need to be undertaken at a later stage. In responding to this proposal TPE set out its expectation that NR would reschedule the engineering works so as not to require additional RoUs in 2011 or 2012.
- 5.3. On 12 August 2011 NR notified TPE of its proposals to take two sequential weekend RoUs, from 1305 on Saturday 7<sup>th</sup> January to 1455 on Sunday 8<sup>th</sup> January and from 1305 on Saturday 14<sup>th</sup> January to 1455 on Sunday 15<sup>th</sup> January, a total of 52hrs, to undertake the cancelled switching and crossing renewal at shap summit (the “relevant works”) (Annex A contains all relevant correspondence).
- 5.4. The notice was issued 22 weeks before the proposed engineering work was due to begin, in contravention of the practices set out in the Timetable Planning Rules, Section 3.1.2, which requires NR to notify Train Operators of disruptive engineering work where *possible* 26 weeks in advance (Annex C). These rules are in place to ensure that the timetable production process is not delayed by late notification of access requirements and the Inform Traveller timescales are met. As the requirement to undertake the relevant works had been known since early June, TPE sees no justification for the late notification by NR’s and considers it would have been eminently *possible* for the correct timescales to be observed. Furthermore, in making these proposals NR has not followed its own governance processes which require a business case prior to be signed by NR before late notice RoU’s are proposed (Annex B).
- 5.5. TPE responded to this proposal within the 10 work days allowed by the National Rules of the Plan (Annex C) Section 3.4 on 26 August 2011 rejecting the proposals. On 1 September 2011 NR notified TPE that it had taken the decision to proceed with the Restrictions of Use proposed, with a small change to the start time on the Saturday afternoon. As a result TPE referred the decision for determination by the Panel, within the 5 working days allowed by Condition D5.1.2 to the Network Code.

5.6. TPE has continued to work with NR to arrive at a solution that would be acceptable to both parties. TPE has also worked with other Train Operators to propose alternative approaches to the delivery of the relevant works within the RoU's identified in Annex D. NR has not moved its position as a result of these discussions or sought to clearly articulated the reasons for its position in any form, still less by reference to a business case.

5.7. If taken the disputed RoUs would affect 16 through services each weekend on TPE's flagship Anglo-Scottish route. These services been firm right under TPE's Track Access Agreement (Annex E) and commitments under the Passenger Service Requirement (Annex F) incorporated into its Franchise Agreement.

5.8. TPE is disputing the timing of these RoUs as NR has failed to explain:

5.8.1. why it is unable to utilise the existing opportunities already provided by the 2012 EAS to undertake the relevant works;

5.8.2. the reasons for the late notification; and

5.8.3. how increasing substantially the aggregate disruption during the 2012 timetable year accords with the Decision Criteria, given the known significance of the route.

5.9. For the avoidance of doubt it is noted that TPE does not dispute the necessity for the relevant works to be undertaken.

## **6. EXPLANATION OF EACH ISSUE IN DISPUTE AND THE CLAIMANT'S ARGUMENTS TO SUPPORT ITS CASE**

6.1. The imposition of 2 RoU's of 26 hours increases, by approx 50%, significant weekend RoU's affecting TPE's Anglo-Scottish services during the 2012 timetable year. The existing RoU's in the London North Western areas total only 111hours of disruption to passenger services (Annex D). This level of increase affecting very significant passenger flows is not to be tolerated, particularly in the light of NR's reassurances to the industry that it would contain disruptive engineering work so as not to inhibit the growing market for weekend travel (Annex H).

6.2. Demand for TPE's Anglo-Scottish services has grown by of 135% over the past 4 years. This growth has been driven by increased leisure travel resulting from changes in travel patterns and TPE's targeted pricing and marketing campaigns. As a result the leisure market now makes up over 70% of TPE's revenues, much of which is derived from this flagship route. NR's proposals will, therefore, disrupt an estimated [REDACTED] (based on existing growth rates and reservations profiles detailed in Annex G) customers journeys by introducing a coach journey between Oxenholme and Penrith/Carlisle into through journeys from Greater Manchester and Lancashire to Scotland. This will add over 35 minutes to journeys and cause substantial disruption to customers (particularly those with impaired mobility) making through journeys. The inconvenience of having to change from a train, to a bus, then back onto a train, will most likely result in many leisure customers (who travel by rail largely at their discretion) deciding not to travel or making other arrangements to do so, thereby losing valuable revenues on the weekends in question.

6.3. Increasing the aggregate volume of RoUs is also likely to make the route less desirable in the long term, causing customer satisfaction, passenger numbers and revenues to fall. For this reason the 7 day railway principals and the efficient engineering access strategy agreed with government for the WCML (Annex H), highlight the importance of moderating the impact of engineering work on customers for the long term growth and stability of the industry. It is particularly significant for TPE that disruption to its Anglo-Scottish services, resulting from engineering work, is contained within those times agree by the EAS process, not only to ensure customers are not unduly disrupted but to allow operators to pursue growth and development in the long term.

6.4. Given this background TPE is most concerned that NR has not given due consideration to the opportunities available to schedule the works within the RoU's already provided for by the 2012 EAS. TPE considers NR retains the ability to carry out the Works during the following opportunities:

6.4.1. in the London North Western region (Annex B):-

6.4.1.1. Week 2 between Preston and Carnforth Junction from Saturday 7<sup>th</sup> April 2125hrs to Monday 9<sup>th</sup> April 0505hrs – This access could be

expanded to include a work site at shap summit taken to coincide with the similar RoU in the Scottish region (see below).

6.4.1.2. **Week 6** between Carnforth Junction and Penrith from Saturday 5<sup>th</sup> May 2125hrs to Monday 7<sup>th</sup> May 0550hrs – NR will in fact be carrying out plain line track renewals at shap summit during this time. One would expect this fact, along with the RoU's in the Scottish region makes week 6 an excellent opportunity to undertake the required works.

6.4.1.3. **Week 10** between Carnforth and Upperby Junction from Saturday 2<sup>nd</sup> June 0600hrs to Monday 4<sup>th</sup> June 0500hrs – The limits of this RoU will allow access to shap summit without amendment.

6.4.2. in the Scottish region (Annex B):

6.4.2.1. **Weeks 2** between Summit and Symington from Saturday 7<sup>th</sup> April 0800hrs to Monday 9<sup>th</sup> April 0430hrs – This would provide a marked synergy with the above RoU in the London North Western region.

6.4.2.2. **Week 6** between Lockerbie and Wamphray from Saturday 5<sup>th</sup> May 0645hrs to Monday 7<sup>th</sup> May 0430hrs – Again this would provide synergies with the above RoU in the London North Western region.

6.4.3. The Christmas shut down period is also available, with limited works programmed for this section of route.

6.5. In summary TPE considers that this reference demonstrates NR has not properly applied the Decision Criteria in reaching a decision on the proposed RoU's. The relevant elements of the Decision Criteria and issues related to those elements are set out below:

Condition D4.6.1	Decision Criteria Item	Relevant issues
(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	<ul style="list-style-type: none"> <li>• As outlined above the RoU's proposed will have a significant impact on the users of railway services and the development of the Network for the carriage of passengers.</li> <li>• It is not clear how NR have</li> </ul>

	maintenance, improvement and enlargement of the Network;	applied this criterion in reaching its decision.
(c)	enabling a Timetable Participant to comply with any contract to which it is party (including any contract with its customers and, in the case of a Timetable Participant which 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;	<ul style="list-style-type: none"> <li>• NR is aware that TPE's franchise agreement incorporates the Passenger Service Requirement attached at Annex F.</li> <li>• It is not clear how NR have applied this criterion in reaching its decision.</li> </ul>
(d)	maintaining and improving the levels of service reliability;	<ul style="list-style-type: none"> <li>• NR has not advised TPE of any concerns related to service reliability in conjunction with the Works. As such TPE does not believe the decision has been reached as a result of such considerations.</li> <li>• It is not clear how NR have applied this criterion in reaching its decision.</li> </ul>
(e)	maintaining, renewing and carrying out other necessary work on or in relation to the Network;	<ul style="list-style-type: none"> <li>• TPE does not dispute that the Works need to be carried out. It does however dispute the RoU's proposed by NR to undertake the Works.</li> </ul>
(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;	<ul style="list-style-type: none"> <li>• In all relevant regards NR's proposals will degrade the service patterns currently established for the 2012 timetable in weeks 41&amp;42.</li> <li>• It is not clear how NR have applied this criterion in reaching its decision.</li> </ul>
(k)	Facilitating new commercial opportunities, including promoting competition in final markets and ensuring reasonable access to the Network by new operators of trains;	<ul style="list-style-type: none"> <li>• The proposed RoU's will disrupt the development of the Anglo Scottish market for the reasons outlined above.</li> </ul>

		<ul style="list-style-type: none"> <li>It is not clear how NR have applied this criterion in reaching its decision.</li> </ul>
(l)	avoiding wherever practicable frequent timetable changes, in particular for railway passenger services;	<ul style="list-style-type: none"> <li>The proposed RoU's increase the frequency of significant weekend timetable changes for railway passenger services by 50%.</li> <li>It is not clear how NR have applied this criterion in reaching its decision.</li> </ul>
(p)	taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing;	<ul style="list-style-type: none"> <li>The likely impacts on passenger journeys and income both in the weeks 41&amp;42 and during 2012 should be considered under this criterion.</li> <li>TPE acknowledges that NR has its own commercial considerations to take into account. However, it has not been made clear how these relate to the issue at hand.</li> </ul>

## 7. DECISION SOUGHT FROM THE PANEL

7.1. The Panel is requested to determine that NR has not applied the Decision Criteria correctly and has not paid due consideration to the Firm Rights of TPE. The Panel is specifically requested to determine that the NR RoU's proposed for weeks 41 & 42 are canceled and rescheduled.

7.2. TPE seeks the following remedies:

7.2.1. A determination that requires NR to undertake the Works undercover of the NR RoU's already provided within the EAS, as set out above.



## 8. APPENDICES AND ANNEXES

8.1. TPE confirms that by virtue of the table below it has complied with Rule H.21 of the Access Dispute Resolution Rules, which requires that copies of the following documents shall also be annexed and cross referenced to the reference:

8.2. the relevant extracts of contractual Documents containing the provision(s) under which the referral to the Timetabling Panel arises and/or provisions associated provision(s) associated with the substance of the dispute; and

8.3. any other Documents referred to in the reference.

Annex A	Copies of email correspondence between NR and TPE in respect of the proposed RoUs
Annex B	Extracts from the EAS pertaining to NR's approach to late notice requests.
Annex C	Extracts from the TPRs outlining the process for dealing with amendments to the EAS.
Annex D	Extracts from the 2012 EAS relating to weekend RoUs in LNW and Scotland in weeks 2, 6 & 10.
Annex E	Extracts from TPE's Track Access Agreement dated 30 January 2004.
Annex F	Extracts from TPE's Passenger Service Requirement as applicable from May 2011.
Annex G	[redacted] Passenger counts data for the Chairman
Annex H	Extracts from NR's publications to outline its strategic position
Annex I	Relevant extracts from Part D to the Network Code

**9. SIGNATURE**

The Claimant

For and on behalf of

First/Keolis Transpennine Limited

Signed

A handwritten signature in black ink that reads "G. Thomas". The signature is written in a cursive style with a large, looped initial "G".

**George Thomas**  
**Commercial Contracts Manager**