
ACCESS DISPUTE RESOLUTION COMMITTEE

Determination No. AD40

(Hearing held at Kings Cross on 15th February 2005)

[the previous published determination is no. AD39]

1. The Committee was asked by Silverlink Train Services Limited (“Silverlink”) to find that the Local Output Commitment for the Relevant Year 2004/5 that had been offered by Network Rail Infrastructure Limited (Network Rail), was inappropriately high, and should be revised downwards. Silverlink based its submission upon seven points of claim, namely that
 - 1.1. (**Claim 1**) the forecast delay value of 4.23 delay minutes per 100 train kilometres was unreasonably higher than the average value across all Train Operators of 3.38 delay minutes per 100 Train Kilometres, and the fifth highest of all Train Operators;
 - 1.2. (**Claim 2**) as compared with the actual performance achieved, by Network Rail, in 2003/4, the LOC value offered reflected a prospective worsenment of Network Rail delay performance by 1.9%. This seemed inappropriate, as compared with a projection, in the 2003 Review by the ORR, of a national improvement of better than 6%;
 - 1.3. (**Claim 3**) given the investment in West Coast Route Modernisation, and the associated disruption to services in recent years, there is a reasonable expectation that Network Rail caused delay to Silverlink services would be reducing (that is that performance would be improving) as compared with previous years;
 - 1.4. (**Claim 4**) completion of the works on the Southern section of WCML, withdrawal of Silverlink services from the Coventry Corridor, and a reversion to 2 track weekend working should all contribute to Silverlink services being exposed to less risk of delay, and therefore a lower LOC value;
 - 1.5. (**Claim 5**) a Performance Plan introduces provision for increased levels of delay from Temporary Speed Restrictions, which seems at odds with a change, effective from the December 2004 Timetable, reducing engineering allowances (box time) at weekends from 7 minutes to 4;
 - 1.6. (**Claim 6**) a Performance Plan introduces provision for increased levels of delay from possession overruns, which seems inappropriate at this stage in the modernisation programme; and
 - 1.7. (**Claim 7**) Silverlink contend that there is scope for “easy wins on performance improvement through simple better management of the network”, and that this contention is borne out by improvements currently being delivered, resulting in “significant reductions in delay minutes”.
2. The Committee gave careful consideration to the nature of its jurisdiction in respect of disputes arising, as in this case, under Part L **Local Output Commitments**, and took especial note of the following [as the dispute arose during the currency of the version of Network Code dated 1st August 2004, all quotations and references are to that version]:

- 2.1. Condition L7.1 provides that “ *...if any Train Operator is dissatisfied as to any matter concerning or in connection with the Establishment of a Local Output Commitment made in respect of it, ... the Train Operator may refer the matter to the Industry Committee for determination under the Access Dispute Resolution Rules (as supplemented or varied by this condition L7)*”.
 - 2.2. Condition L7.3 prescribes timescales to be complied with, in the making of an appeal: these had been complied with appropriately.
 - 2.3. Condition L7.7 requires that “*Any matter referred under Condition L7.1...shall be determined by reference to the Office of Rail Regulation’s LOC Criteria*”.
 - 2.4. Condition L7.5 requires the parties to any Local Output Commitment dispute “*to procure that the Industry Committee ...[is] furnished with sufficient information and evidence so as properly to consider any matter referred to them under Condition L7.1...*”.
 - 2.5. Condition L7.6 empowers the Industry Committee “*to give directions as to the procedure to be followed in the Appeal, including in relation to the making of any written or oral submissions...*”.
 - 2.6. Given the definition of “Established” in Part L, until there has been a final determination of this appeal, whether by the Committee, or by the Office of Rail Regulation, the Local Output Commitment cannot come into effect in accordance with Condition L6.5.
3. In respect of the powers under Condition L7.6, the Committee, having, at a preliminary hearing, decided that the evidence presented by the parties was inadequate for the purposes of enabling the Committee to determine the issues at stake, had (on 11th January) issued formal directions (“the directions”) to the parties as to further evidence and argument to be submitted, and timescales for submission.
 - 3.1. The grounds for issuing the directions were stated as “*that the Parties need to describe their respective parts in the execution of the procedures set up in compliance with Network Code Condition L6 (“ESTABLISHMENT OF LOCAL OUTPUTS AND PERFORMANCE PLANS”), as they related to the specific circumstances affecting the specific Train Operator (in this case Silverlink).*”
 - 3.2. The direction to Network Rail was to “*produce a narrative statement of the procedures used in the Establishment of the Silverlink LOC. This statement will include details of*
 - *the mechanics of the process as laid down (e.g. the starting point for calculations, the process for agreeing a suitable baseline, dates at which proposals were tabled, responses received etc etc);*
 - *what actually happened, and, where that was different from what had been laid down, the reasons for the differences, and whether they disadvantaged Silverlink;*
 - *how Network Rail fulfilled its qualitative obligations under L6.*
 - *why the sum total of all these proceedings resulted, fairly and reasonably, in the offer of the LOC value now in dispute.*”
 - 3.3. The direction to Silverlink was to produce “*its response, including where applicable*
 - *evidence of inadequacies of the process as laid down;*

- *evidence of where the implementation of the process may have lead to unfairness, or to the setting aside of valid considerations;*
- *any relevant commentary on the effectiveness and fairness of Network Rail's execution of L6.2 and 6.3;*
- *examples of the manner and substance of the Train Operator's Responses under L6.4, and the perceived adequacy of the responses given by Network Rail under L6.5; in particular, the rationale used by Silverlink to challenge Network Rail's own rationale, and the arguments then put forward by Network Rail to defend its proposals;*
- *why the sum total of all these proceedings, and the LOC offer that resulted, was NOT fair and reasonable."*

3.4. The General guidance given was that *"It is to be expected that Network Rail's statement will demonstrate, to its satisfaction, that there was an appropriate and fair process for calculating Silverlink's LOC. The onus of proof that that process was not fair, and /or did not produce reasonable outputs, lies with Silverlink."*

4. The Committee acknowledged that Condition L7.7. required that *"Any matter referred [to it] shall be determined by reference to the Office of Rail Regulation's LOC Criteria"*. The Committee noted that the Office of Rail Regulation's LOC Criteria document (in this case, that circulated by letter in May 2004) sets out 10 discrete Criteria, that are in turn glossed by some 14 Notes. Furthermore, the document is introduced by a covering letter, which covers issues not otherwise addressed in the Criteria. In their respective pleadings, the parties had variously sought to support their arguments by reference to all four relevant documents i.e. the Network Code, the Criteria, the Notes and the Covering letter.
5. The Committee resolved, in part by reference to the practice in the rest of the Network Code, that this set of documents should be differentiated as follows:
 - 5.1. Condition L of the Network Code is contractually binding upon the parties, and, by virtue of Condition L7.7, incorporates the Office of Rail Regulation's LOC Criteria;
 - 5.2. the Office of Rail Regulation's LOC Criteria bind the Committee to consider any reference "against" the 10 criteria. This in turn requires the Committee to assess which of the parties, if either, has complied the more closely with a reasonable interpretation of the intent of each relevant Criterion;
 - 5.3. the Notes to the Criteria are advisory, and for the most part relate to the practicalities of setting up the initial Local Output Commitments; whilst they have persuasive authority for both the parties, and the Committee, they do not generate binding contractual commitments on either party;
 - 5.4. a covering letter ("covering letter"), whilst it may inform the deliberations of both the parties and the Committee, in respect of the intentions behind various propositions, has no contractual force.
6. The Committee was of the view, which was confirmed by the parties, that there was no matter to address in respect of Network Rail's compliance with the force of Criterion (e) *"Consistency with Network Rail's other obligations"*. (*"The Regulator would expect to give priority to criterion(e) (consistency with Network Rail's other obligations) and then give appropriate weight to each of the other criteria...)*. Equally there did not appear to be any dissent that required consideration of Criteria (b), (c), (i) or (j).

7. The Committee noted, from the account given by Network Rail in response to the directions, that Network Rail was of the view that it had complied with the provisions of Part L, and thus with Criterion (a), because it had undertaken a comprehensive programme of consultations with the Train Operator, resulting in the compilation of a Performance Plan, and the calculation of the potential benefits, expressed in terms of potential reductions in Network Rail caused Delay Minutes.
8. Silverlink acknowledged that, up to this point in the procedure, Network Rail had indeed complied with the requirements of Part L of the Network Code; the Committee did not dissent from this point of view. Silverlink was however objecting to the next elements of the process adopted by Network Rail, because
 - 8.1. it contended that Network Rail's decision to apply the impact of the Performance Plan to a baseline derived from actual performance in 2003/4 penalised Silverlink. This was because 2003/4 had been a year in which Silverlink performance had been severely affected by the impact of West Coast Route Modernisation (WCRM) works (and therefore disproportionately worse) whereas, in 2004/5 it was to be expected that some of the benefits of those works might start to be delivered, and therefore Silverlink's performance would be correspondingly better;
 - 8.2. the calculation of the LOC Offer was subject to a further modification, because Network Rail had, by its own account, introduced a process for disaggregating the National Regulatory Target on a "top-down" basis, first to Area General Managers, and then to Train Operators, and that, as a consequence, any benefits identified in the Performance Plan that exceeded the "share" derived by the "top-down" process had been excluded from the LOC Offer.
9. In summary,
 - 9.1. Silverlink considered that the process used had been unfair because
 - 9.1.1. the baseline used should have been subject to adjustment to take account of the particular adverse circumstances that had affected performance in 2003/4, and
 - 9.1.2. Network Rail had not contractualised all of the potential improvements identified in the Performance Plan.
 - 9.2. Network Rail, by contrast, held that
 - 9.2.1. the baseline used (2003/4) was the same as for all other Train Operators, and
 - 9.2.2. it was entitled, by the terms of Part L, to adopt a process which allowed it to decline to contractualise any improvement in Delay Minutes, beyond the National Regulatory Target, which in 2004/5 is for 12.3 m Delay Minutes attributable to Network Rail.
10. In relation to the arguments advanced by the parties to support their respective positions, the Committee noted that
 - 10.1. use was made, in reference to those initiatives that had been excluded from the LOC offer, and in the covering letter, of the term "stretch", but that this did not appear anywhere to be a defined term;
 - 10.2. Network Rail was seeking to debar Silverlink from making any challenge to the make up of the LOC Offer, citing as authority, Note 11 "*the Regulator would not expect a Train Operator to Appeal about the detailed content of a Performance Plan*";

- 10.3. Network Rail was maintaining, by reference to Criterion (d) *“the Substance of the LOC”*, and to Note 6, that Network Rail was under an absolute and inflexible obligation to produce a package of LOC offers that, in aggregate would deliver, in 2004/5, 12.3m delay minutes attributable to Network Rail. In particular it cited *“the consistency of the LOC with a realistic projection of Network Rail attributable delay minutes...taking into account:... (ii) the Regulator’s national projections of future Network Rail performance at the preceding access charges review” (criterion (d) [part]*, and *“Note 6: the Regulator expects the projection of Network Rail-attributable delay minutes across the network to be consistent with the annual targets set out in the access charges review 2003”*;
- 10.4. Network Rail was further extrapolating from this perception
- 10.4.1. the need for it to have the “top-down” process, to disaggregate the National target;
 - 10.4.2. the right, as a consequence of that process, to contractualise some performance initiatives inside the scope of the LOC Offer, and to decline to contractualise others outside it (within “stretch”); together with
 - 10.4.3. the argument, also informed by the reference to Excess Aggregate Local Outputs (Criterion (g)), that were it, as a result of an appeal, to be required to make an adjustment to any one LOC, it would also be required to make equivalent compensating adjustment to other LOCs;
 - 10.4.4. that the Committee should hesitate before making any determination that required the adjustment of any LOC.
- 10.5. Silverlink, by contrast, was arguing that, whatever the level of obligation that Network Rail chose to assume in respect of Criterion (d)(ii), that same level of obligation ought also to be assumed in respect of Criterion (d)(i), which would require the LOC to take into account *“(i) Network Rail’s network licence obligations, including in particular Condition 7, concerning network stewardship”*. In consequence, a LOC offer which did not take into account, within the Performance Plan, any initiative being pursued in fulfilment of Licence obligations, would potentially be a defective LOC offer, by the standards of the whole of Criterion (d).
- 10.6. A Scattergram presented by Network Rail, which showed that, during periods 8 to 11 2004/5, Silverlink’s comparative performance had improved from fifth worst to sixth worst amongst all Train Operators, and that actual Minutes Delay had averaged around 2.5 minutes per 100 Train Kms, as compared with the 3.13 Minutes upon which the LOC offer was based.
- 10.7. The parties were continuing, in full-hearted co-operation, to take relevant steps to agree and deliver all initiatives that had been identified, whether within or outside the Performance Plan.
- 10.8. the Regulator’s projection of Network Rail attributable delay minutes, with which the 2005/6 LOCs will require to be consistent, is 11.3m minutes.
11. The Committee, in relation to these arguments, came to the following essentially pragmatic conclusions.
- 11.1. As the process defined in Network Code Part L mandates extensive consultations on the make up of the Performance Plan, and that this is an intrinsic stage in the Establishment of the LOC, such consultations cannot be excluded from the ambit of Network Code L7.1.

However such a conclusion, whilst it might require the Committee to consider whether or not individual initiatives ought properly to form part of the Performance Plan, or be left within “stretch”, would not serve to entitle the Train Operator to query the technical means by which Network Rail might seek to deliver a specific commitment.

- 11.2. The LOC offer process has the potential to be unwieldy, and therefore there is considerable merit, from the perspective of responsible practical management, in instituting some form of provisional “top-down” allocation of targets to the level of the individual Train Operator. However, the decision to institute such a process is one made by Network Rail and is not mandated, as a process, anywhere in Network Code Part L.
- 11.3. To treat the results of a “top-down” process as an inflexible constraint upon the setting of individual LOC offers, is also the function of an executive decision by Network Rail. The Committee notes the basis on which Network Rail has sought to validate that stance, by reference to Criterion (d), and its construction that “*consistency of a LOC with....the Regulator’s national projections of future Network Rail performance*”, means that, at all times, the sum of all LOCs must equate to exactly 12.3m minutes.
- 11.4. The Committee concedes that to choose to interpret “consistency with” as meaning “absolutely equal to” is a tenable position, in respect of common English usage. It is, however, not the only possible interpretation that can be placed upon the words. Indeed the Committee notes that the [non-contractual] covering letter actually says “*For 2004/05, we expect Network Rail’s realistic projection of performance to be **more or less [emphasis added]** equal to the regulatory target of 12.3m delay minutes across the Network*”.
- 11.5. The Committee accepts that Network Rail is at liberty to choose to adopt a process that depends on its particular interpretation of the force of “*consistency with*”. However, because other interpretations are possible, it cannot be argued that the chosen process is axiomatically fair, in the face of allegations of unfairness which may be found to be sustained after consideration of detailed arguments.
- 11.6. By the same token, the Committee does not accept that its discretion (in respect of determining that a LOC offer requires to be altered) can be constrained by Network Rail’s choice of management process. Condition L7.10 would be unnecessary were there no such authority, or were Network Rail able unilaterally to circumscribe it.
- 11.7. It will, of course, remain a matter of judgement for Network Rail as to whether the practical effect of such a determination “*is to commit Network Rail to a level of operational performance capability or quality of the Network, or any other matter, materially beyond the targets and other requirements of Network Rail established by the Office of Rail Regulation in the most recent access charges review (definition of Excess Aggregate Local Outputs)*”. Where Network Rail consider that there are grounds to make other changes, this is enabled by the provisions of Condition L9, which in turn provides for another affected Train Operator to test the grounds for such change.
- 11.8. The Committee furthermore considers that, whatever the construction placed upon the words “*consistency with*” it reasonably applies with equivalent force to both the provisions in Criterion (d) and also to Criterion (e). That said, the Committee considered that it had not been presented with sufficient arguments to make a judgement as to what effect an equivalence between Criterion (d)(i) and (d)(ii) might have, and how that equivalence might translate into a different LOC Offer.

- 11.9. Silverlink’s argument in relation to the poor performance in the benchmark year (2003/4) required the Committee to address whether the force of Criterion (f) “*any material differences between LOCs made in respect of different Train Operators*”, implied that all LOCs should be derived uniformly mechanistically (e.g.all LOCs based on the same baseline year, irrespective of individual circumstances) or whether there should be some considerations of “fairness” to ensure that one Train Operator was not inappropriately disadvantaged.
- 11.10. There is an issue for the Committee, at this stage in the year, as to whether any determination it might make should be aimed at requiring the parties to revisit a LOC that is almost expired, or whether it should aim to inform the formulation of a more representative LOC for 2005/6.
12. Faced with this considerable amount of evidence and arguments, much of which stemmed from a lack of clarity in the documents applying to LOCs, the Committee could only do the best it could in difficult circumstances. Therefore, the determination of the Committee is
- 12.1. that the procedures laid down in Network Code Part L for evolving, through consultation, the Performance Plan required to underpin an LOC Offer to Silverlink, appeared to have been carried through in a manner that could be considered to have met the requirements of Part L;
- 12.2. that the LOC offer actually made to Silverlink in respect of Relevant Year 2004/5, does not incorporate the benefits of all the initiatives identified in the Performance Plan consultation. Some initiatives have not been contractualised, and are categorised instead as “stretch”. The term “stretch” is not defined in any of the documents;
- 12.3. that the process by which Network Rail has disaggregated its National Regulatory target of 12.3m delay minutes, to the level of individual Train Operators , is a pragmatic device of management which has enabled Network Rail to retain some degree of control over the outcomes of the processes laid down in Part L. As such it has the understanding of the Committee. However, this “top-down” process
- 12.3.1. does not figure explicitly in the provisions of Part L of the Network Code;
- 12.3.2. is justified, by Network Rail, by reference to its particular interpretation of LOC Criteria d)ii), and the explanatory notes 6 and 7. The Committee accepts that this is a tenable interpretation of these provisions, but considers that it is not in any way the only possible interpretation; and
- 12.3.3. would not be sufficient justification for defending a LOC offer which other considerations showed to be unfair.
- 12.4. that the reliance placed by Network Rail on LOC Criteria (d)(ii) to advance its argument in relation to an absolute, and inflexible commitment to a National Regulatory Target, might reasonably, as Silverlink assert, require it to give an equivalent absolute and inflexible commitment to the provisions of LOC Criteria d)i). The Committee suspects that neither party has fully appreciated the potential significance of such a conclusion, and it does not believe that in this determination it has heard sufficient argument from both sides to unravel this potentially significant issue.

- 12.5. that in relation to the representations, made by Silverlink, that a TOC operating in an area where the infrastructure has been the subject of intensive investment and improvement, might reasonably have expected not to receive an LOC offer that was amongst the worst, the Committee has some sympathy with this position. However, the Committee notes
 - 12.5.1. the case made by Network Rail that some of the benefits of that investment cannot be realised immediately , at this stage in the LOC cycle, together with
 - 12.5.2. the data submitted suggesting that recent actual performance is a significant advance on that reflected in the LOC Offer for 2004/5, and that
 - 12.5.3. the National Regulatory Target for Relevant Year 2005/6 is reduced by 1,000,000 delay minutes to 11.3m minutes, and that therefore
 - 12.5.4. both parties should have a common interest in concluding a more competitive LOC offer for 2005/6.
- 12.6. that the argument, advanced by Network Rail, that a finding in favour of one Train Operator cannot result in a need to raise that Train Operator's LOC Offer, or that any such adjustment would necessarily require to be compensated for in variations to other offers, is weak, because it depends upon Network Rail's particular interpretation of its discretions in relation to LOC Criteria d) and its self-imposed "top-down" process.
- 12.7. that in the light of the ongoing dialogue between the parties in relation to future initiatives, the fact that 2004/5 was only a part year subject to special provisions, and that actual performance, as it affects Silverlink, has improved relative to the benchmark, the Committee is not persuaded that the LOC Offer made to Silverlink has been demonstrated to be unfair in a way as to require amendment.
- 12.8. that the Committee has not found the May 2004 version of the LOC Criteria to be of sufficient clarity to be of decisive assistance in reaching a determination of this case.
- 12.9. that the industry initiative to revise Part L is to be applauded.
13. Taking account of all of the foregoing, and totally without prejudice to any issues that might arise in relation to the LOC Offers for 2005/6, the Committee determines that it would not be to either party's advantage to require that the consultation for the Silverlink Local Output Commitment for 2004/5 be re-opened, and therefore directs that that Local Output Commitment should be hereby Established in accordance with the provisions of Network Code Part L.

Sir Anthony Holland,

Chairman