

Determination in respect of reference ADP13

(following a Hearing held at Kings Cross on 20th February 2006)

The Panel

John Czyrko: elected representative for Franchised Passenger Class, Band 2
Bill Davidson: appointed representative of Network Rail
Mike Leadbetter: elected representative for Non-Passenger Class, Band 2
John Thompson: elected representative for Franchised Passenger Class, Band 1

Panel Chairman: **Sir Anthony Holland**

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked, by English Welsh & Scottish Railway Ltd ("EWS") to issue specific directions to Network Rail in respect of two detail aspects of Rugby Remodelling (Network Change Notice NC165, of 03/02/05), and one arising from the amendment N165A (dated 10/10/05). These notices relate to the further revision to the plans for Rugby Remodelling, now intended to be operational in time for the 2008 Timetable.
2. EWS' areas of concern were
 - 2.1. [NC165, of 03/02/05]
 - 2.1.1. facilities for egress from Rugby Up Coal Yard, and available capacity for Rugby Up Yard departures, towards Nuneaton via Shilton from commencement of the Final Rugby Layout; and
 - 2.1.2. facilities for access to and egress from the New Bilton branch, and the method of working of that branch, from commencement of the Final Rugby Layout; and
 - 2.2. [NV165A, of 10/10/05] Network Rail's proposal to make passive provision only for Hillmorton Up loop and the practical implications of that decision on signalling capacity and operating constraints.
3. At the core of the dispute were the following questions of principle:
 - 3.1. to what extent do Network Rail's proposals change the practical functionality of the layout at Rugby? Will manoeuvres feasible with the current layout be no longer practicable? Will such manoeuvres still be achievable, but require changes to the lines used or the times available?

- 3.2. to what extent do EWS currently hold Track Access Rights to the facilities in question? Are those rights potentially still valid from the date (2008) at which the remodelling is anticipated to take effect?
 - 3.3. What is a reasonable level of assurance for Network Rail to provide to Train Operators in respect of the functionality of the changes planned? What is the level of re-assurance to which a Train Operator is entitled, and what is potentially unreasonable? Is EWS entitled to require Network Rail to provide comprehensive timetabling proposals (for the 2008 timetable) in order to demonstrate the feasibility of the moves in dispute?
4. The Panel considered that these questions were properly matters to be determined by an Access Dispute Panel in accordance with the provisions of Network Code Condition G6.

The Panel's findings in respect of entitlements

5. EWS, at the time of preparing the submission, was the holder of track access rights in a Track Access Contract scheduled to lapse in 2007. In the event the Office of Rail Regulation, before the date of the hearing, issued a prolongation of EWS' Track Access Contract which extended any rights to 2015.
6. EWS has Firm Level 2 rights for loaded movements of coal traffic from Avonmouth, or from Liverpool Bulk Terminal, to Rugby Up Yard. These rights incorporate contractual benchmark mileages, but relate to quantum only, and not to timing or time of day. The reciprocal empty flows are treated as ancillary movements, and do not carry contractual mileage rights.
7. EWS has no current rights to use the New Bilton Branch on any other than a Spot Bidding basis. EWS has aspirations to develop further traffic through this yard but was not, at the hearing, forthcoming about what that traffic might be.
8. EWS expressed concern that the level of service generally proposed for the 2008 Timetable appears to curtail the availability of the "White Space" that is the essential pre-requisite for developing freight business.

The Panel's findings in respect of practicalities

9. Network Rail recognises that the manoeuvres necessary to depart Down trains from Rugby Up Yard towards Coventry, will, because of layout changes, be different from the current, but is satisfied that it will be in a position to offer such a facility within the prospective daytime interval timetable, once every 2 hours, and more frequently during the night time hours.
10. Network Rail acknowledges that freedom of access to and from New Bilton may, at some times, be restricted, but does not consider that it would be impossible to service this location, should some real traffic prospect arise.
11. Network Rail conceded that, in some circumstances, it might be necessary for some workings of empty stock to run to Northampton to run round. Network Rail was not anticipating that this would be a regular occurrence, and it would seek to ensure that it was not resorted to where this would put a clear Access Right in jeopardy.

12. Network Rail acknowledges that, at some point in future, traffic levels may require the construction of a loop at Hillmorton, but has satisfied itself that it will be in a position to meet all currently known commitments in the medium term without the need for such loop. Network Rail considers that it is taking the most appropriate action by making passive provision within land, track layout and signalling design such that there should be no evident impediment to building Hillmorton Loop at some future date when an appropriate business case can be made.
13. In respect of EWS' contention that Network Rail should be required to demonstrate the basis of their assertions by undertaking a detailed timetabling exercise, 2 years in advance of the Timetable in question, the Panel re-iterated the conclusions of an earlier Timetabling Panel (TTP01):

“17.1 In seeking such information the Panel is NOT seeking to impose upon any party the requirement to carry out prematurely detailed evaluations or planning exercises. Rather the Panel is seeking expressions of best professional judgement upon which it can, with confidence, reasonably depend in making its determinations. Alternatively, where no such professional judgements are proffered the Panel is likely also to take this into account. The rationale for this and the preceding paragraphs is the over-arching need for the Panel to have an understanding of the continuing viability of the commercial operation carried out by the Train Operator” .

14. In respect of the grounds that might support EWS' claim to oppose Network Rail's proposed changes, the Panel referred to the earlier determination of the Network and Vehicle Change Committee in respect of the closure of Ruscombe loop, and noted in particular:

- *“In respect of some elements of the freight operating constraints, namely the Rules of the Route/ Rules of the Plan, there is ample precedent, in the determinations of both this Committee, and of Timetabling Committee, that changes can be opposed, and overturned, but only on the basis that changes would infringe specific access rights. There is no precedent for challenging change in the generality.*
- *It would be illogical to treat other aspects of the freight operating constraints differently. At any time they are the product of past history and duly applied change procedures (Condition D or Condition G as appropriate), and any objection to change should logically require to be justified on the basis of identified specific impact on contractual rights. It cannot be right to challenge a Network Change solely on the grounds that it would result in change to the Network.*
- *Where no rights, or reasonably prospective rights, are infringed, it would be wrong to curb Network Rail's freedom to exercise its discretion as to the detailed management of the Network, given that it is Network Rail that is the accountable body for both the efficiency and the safety of that Network” (NV58 paragraphs 9.3 to 9.5).*

15. The Panel noted that this determination had been taken on appeal to the Office of Rail Regulation, but that there its conclusions had been upheld.

The Panel's Determination

16. The Panel therefore determined that
 - 16.1. in respect of the ability of Network Rail to honour commitments to service Rugby Up Yard, Network Rail had given EWS sufficient comfort regarding the capability of the revised layout to deliver contractual rights, that it would not be reasonable to require Network Rail, as requested by EWS, to carry out a full timetabling exercise;
 - 16.2. in respect of the arrangements to serve New Bilton, should the need arise, Network Rail had given EWS sufficient comfort regarding the capability of the revised layout that it would not be reasonable, particularly in the absence of any established Track Access Rights, to require Network Rail, as requested by EWS, to carry out a full timetabling exercise;
 - 16.3. in respect of the construction, or the holding back, of Hillmorton Loop, Network Rail is the only body responsible for making any decision, and/or preparing any business case, and is by extension the body accountable for the performance implications of any decision. EWS is entitled to bring forward facts that might weigh in favour of an earlier decision in favour of the construction of the loop, but cannot require Network Rail to divert resources to this end from other higher priority tasks.
 - 16.4. in all three instances Network Rail has acted responsibly and in compliance with any EWS entitlements, and EWS's pleadings are ill-founded and unreasonable.
17. For the avoidance of doubt, the parties should understand that in all the above instances the Panel has found for Network Rail on the basis of the undertakings made by Network Rail's representatives as to the capabilities of the revised layout at Rugby. Network Rail should be aware that such undertakings, as documented here, and not otherwise contested, are by their nature commitments that Network Rail must fulfil when relevant timetables are in preparation.
18. 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.

Sir Anthony Holland

Chairman