
NETWORK and VEHICLE CHANGE COMMITTEE

Determination No. NV 17

Hearing held at Kings Cross on 24th January 2001

[Note: previous published determination was determination no.NV15 and 16]

1. The Network and Vehicle Change Committee was asked by English Welsh & Scottish Railway (EWS) to determine that the revised arrangements within the amended Major Project Notice for the West Coast Route Modernisation PUG 2 Phase 1, and proposed by Railtrack in response to the directions given in NV13, were inappropriate, and should be revised or rejected. EWS believes that the revisions to the method of implementation are insufficient, and will still “result in significant non-compliance with its Firm Contractual Rights” and therefore have major adverse impact upon the operation of its trains during the 2001/2002 Timetable year.
2. The Committee decided that the nub of the case related to whether the parties, but in particular Railtrack, had responded in such a way to the directions given in NV13 that the objections to "the two track railway", upheld in that determination, could now be overturned, and Railtrack permitted to implement that Major Project Notice as amended. The Committee noted that, in NV13 it had directed that

“Railtrack should therefore withdraw the proposal for "the two track railway" as tabled, and, starting from the premise that every effort should be made significantly better to reflect the detail of EWS’ Firm Contractual Rights, should submit new proposals for the timetabling of overnight trains over the route between Euston and Crewe during the term of the Major Project Notice.” (NV13 para. 20.3)

and that

“20.4 For the avoidance of doubt, the parties should understand that

20.4.1 the revised proposal from Railtrack may be a variant on "the two track railway" , or an entirely different proposal;

20.4.2 the proposal should be devised with the maximum consultation with EWS and with other Train Operators who may be affected;

20.4.3 EWS is expected to identify priorities in respect of the Firm Contractual Rights where detail compliance is the most critical to the commercial interests of the parties, ”

3. The Committee noted that, in the comprehensive joint submission, there was reference to the fact that many of the EWS rights at the centre of this dispute are currently the subject of re-negotiation and representations to the Regulator. However, the Committee noted that there was tacit acceptance between the parties that
 - 3.1. the rights in question should be taken into account in planning services between Euston and Crewe; and that

- 3.2. the particular rights in relation to the long term contract with the Royal Mail, were well acknowledged, and understood by all parties as regards to their priority.
4. In considering the proposals that had been tabled by Railtrack, the Committee noted that:
 - 4.1. reference was made to 5 Options;
 - 4.2. of these, Option 2 related to the continuation in force of the 2000/2001 Rules of the Route, but the others were based around a perceived requirement to carry through a given body of works by specific fixed date;
 - 4.3. although there had been some consultation, there had been only one informal meeting on 2nd November, between Railtrack Zone Operations Planning, and the Train Operators, but with no records kept of the discussions;
 - 4.4. evaluation of all options for their impact on timings had been undertaken in respect of two services;
 - 4.5. only one option, Option 1, had been evaluated by Railtrack in any sort of detail, in respect of its implications for the Timetable; this option had been devised starting from the premise that the programme of works is fixed, and requires full possession of two lines throughout the night, and that Train Operator rights should only be honoured to the extent that the residual capacity permitted.
5. The Committee noted that, as a consequence of the procedure above, Railtrack proposed to adopt Option 1, and had prepared a timetable offer to EWS. In that offer,
 - 5.1. out of the Royal Mail services, two had been rejected altogether (with the parties in disagreement as to whether EWS held Firm Contractual Rights (FCRs) for these services) and 32 contractual timing envelopes had not been respected. As compared with the first "two track railway" proposal, only one service had become totally compliant with its FCRs. 5 services were more nearly compliant with FCRs, 1 was worse, and 4 were unchanged in their degree of non-compliance.
 - 5.2. in respect of other night-time West Coast Main Line freight services 34 (25% of total) had been excluded from the Timetable altogether, and the schedules of a further 5 services (4%) had been severely disrupted.
6. The Committee considered that this situation might have been improved upon, had there been more wholehearted consultation between the parties. However the Committee did not consider that the degree of improvement achieved stood up to a test of reasonableness, in relation to *"starting from the premise that every effort should be made significantly better to reflect the detail of EWS' Firm Contractual Rights"*.
7. For this reason the Committee considered that the position was largely unchanged, as compared with NV13, in that

"the Committee cannot, without very good cause, uphold a proposed method of implementation which makes it impossible for such rights to be honoured."

Nor did the Committee consider that the case had been made that

" it might direct that the Train Operator should accept a temporary curtailment of those rights, but only where there are reasonable grounds for such curtailment, "having due

regard to the Decision Criteria”. In making this sort of direction, the Committee would take into account the other possible options open to Railtrack for implementation, and the long term implications (including benefits) for the Train Operator, of the works to which the Major Project Notice relates” (NV13 para. 19)

8. The practical implication of such a conclusion is that Railtrack's proposals to adjust Rules of the Route/Rules of the Plan, to permit the operation of "the two track railway" in 2001/2002 would fall, leaving in place only such Rules as had been agreed in accordance with the procedures in Track Access Condition D2.4.
9. The Committee then took account of the arguments advanced by Railtrack that, although it would be possible to re-schedule some of the works to accommodate, to a greater extent, the FCRs of the Operators affected, to do so would put in jeopardy Railtrack's ability to honour the rights of other Train Operators under a future Timetable (i.e subsequent to 2001/2002). The Committee was of the view that its judgement should be made in relation to the relative rights that applied during the term of the Major Project Notice in question; in this context it maintained its previous understanding that

“ there is no provision within the EWS Track Access Agreement [past or proposed] that requires EWS to surrender any of its rights solely to facilitate Railtrack's achievement of its commitments to another Train Operator;” (NV13 para. 17.3)

In other words, the Committee took the view that rights in the timetable year in question have priority over rights, not as yet bid for, in a future timetable.

10. The Committee therefore gave serious consideration to directing Railtrack to adopt its Option 2, as requested by EWS, so requiring it to implement, for the 2001/2002 Timetable, the Rules of the Route/Rules of the Plan that applied in 2000/2001. However, recognising the need to give clear and practicable guidance, and to take account of the compressed timescales still available to finalise the 2001/2002 Timetable, the Committee took account of the following considerations:

10.1. the process of debating the Major Project Notice, other than in respect of “the two track railway”, has already seen much preparedness to agree changed methods of working by many Train Operators, and some flexibility from Railtrack: this progress should not be lost;

10.2. the principal problem with even the amended “two track railway” proposal is that it provides few, if any, opportunities for fast trains to overtake slower trains, and therefore tends to frustrate the FCRs of all faster trains;

10.3. the Committee was not convinced that Railtrack had used its best endeavours to introduce an element of flexibility into “the two track railway” concept that might overcome this problem;

10.4. there is an established precedent that

“Railtrack require to convince Train Operators (and failing them, the Committee) of the good reasons why their rights should be subjugated, in the wider interests served by the proposal; otherwise, as in Timetabling Committee TTC87, it will find itself obliged to modify Rules of the Route/Rules of the Plan to accommodate specific Services running in paths compliant with Firm Contractual Rights”.
(NV13 para. 18)

11. The Committee therefore determined that Railtrack is only permitted to continue with implementation of “the two track railway” part of the Major Project Notice (as amended), on the following clear understandings that:
 - 11.1. for all those trains where EWS have indicated that the latest proposals do not comply with FCRs and are unacceptable (as listed in Annex I to the Joint submission), Railtrack shall produce new timing proposals, which must “*significantly better... reflect the detail of EWS’ Firm Contractual Rights*”; for the avoidance of doubt, this
 - 11.1.1. implies that the degree of compliance, on a train by train basis, should be no worse than that which would have been achieved had the Rules of the Route/Rules of the Plan that obtained for the 2000/2001 Timetable continued in force;
 - 11.1.2. does not empower EWS to seek further improvements to services for which acceptable offers are deemed to have been received (i.e. services not included in Annex I to the joint submission).
 - 11.2. where there is conflict between elements of the work programme, and the honouring of EWS’ FCRs to the standard in paragraph 11.1 above, then the honouring of FCRs shall take greater precedence: again for the avoidance of doubt, where this will involve Railtrack in increased payments to other parties, Railtrack shall make such increased payments;
 - 11.3. where there is disagreement, even taking account of the preceding paragraphs 11.1 and 11.2, between Railtrack and EWS, as to the detailed timing of individual services, EWS may refer that disagreement to the Timetabling Committee in accordance with the provisions of Access Condition D5.1. However, it is expected that any reference should only occur after the fullest possible consultation, and the use, by both parties of all reasonable endeavours to find an acceptable solution;
 - 11.4. all Railtrack agreements with EWS, and between Railtrack and other Train Operators, as regards the other provisions of the Major Project Notice shall be considered to be unaffected by the provisions of this determination.

Bryan Driver
Chairman,
Network and Vehicle Change Committee