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## **NETWORK and VEHICLE CHANGE COMMITTEE**

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### **Determination NV22**

*Hearing held at Kings Cross on 17<sup>th</sup> January 2002*

*[Note: previous published determination was determination nv35]*

1. The Committee was asked by Freightliner Ltd (FL)
  - 1.1. to determine that the Major Project Notice for the Cross Country Route Modernisation (CCRM) (dated 9<sup>th</sup> May 2001), was inadequate for its self declared purpose of catering for the needs of the enhanced services to be operated by CrossCountry Trains, because it did not include new signalling works to improve the line capacity between Banbury and Leamington Spa; and
  - 1.2. to direct Railtrack to enhance the programme of works to include such works.
2. On behalf of FL it was argued that;
  - 2.1. the work programme in question was designed to create the necessary line capacity to allow Railtrack to honour both the quantum, and quality, of Track Access rights, granted to CrossCountry Trains Ltd, under the terms of the 15<sup>th</sup> Supplemental Track Access Agreement dated 9<sup>th</sup> March 2001;
  - 2.2. this Track Access Agreement had been the subject of an ORR hearing, as a consequence of which the Regulator, in his letter of 14<sup>th</sup> February 2001 giving his approval to the proposal, had noted concerns regarding the capacity of the route in question:

*"The proposed agreement, as it was consulted on, would lead to significant capacity problems on the south east arterial corridor from Birmingham to Banbury and Reading. It is apparent at this stage that the infrastructure cannot meet the combination of Cross Country's aspirations and the existing access rights of all train operators over parts of the northern section of this route (particularly between Leamington Spa and Banbury/Aynho Junction). Railtrack has advised the Regulator that it will carry out as much work as is necessary for it to satisfy Cross Country's rights and the existing access rights of other operators for the Winter 2002 timetable. The implication is that Railtrack regards this as a reasonable requirement of Cross Country as its customer".*

- 2.3. The Regulator had further noted that there was recognition that work was under consideration to increase capacity on the stretch, regarded by FL as critical:

*“A further package of signalling improvements is proposed over that section of the route for implementation at a later date. This package would create more capacity on the network between Wolvercote Junction (Oxford), Banbury and Leamington Spa.*

*Its implementation will depend on the outcome of discussions between Railtrack, the SRA and other train operators. The Regulator notes that the entire project is not necessary for him to approve the proposed Cross Country rights. Accordingly, the Regulator is prepared to approve firm rights for the additional Cross Country paths between Leamington Spa and Banbury/Aynho Junction.”*

- 2.4. In the absence of any such signalling works in the Major Project Notice, Railtrack had sought to reassure FL, by the production of an indicative timetable, that it would nevertheless be able to satisfy all parties’ Firm Contractual Rights (FCRs) for the Winter 2002 Timetable. It was FL’s view that the indicative timetable produced only demonstrated the opposite conclusion, in that

2.4.1. some of FL’s FCRs were omitted; and

2.4.2. the existing Rules of the Plan had been breached, in particular as regards headways, and that therefore

2.4.3. the timetable that could be supported by the planned works would carry significant performance risks, and probably would not meet all FCRs.

- 2.5. with the lapse of time, it was not practicable for new signalling works to be delivered in time for the Winter 2002 Timetable, and FL were prepared to consider acknowledging this difficulty in practical ways. However, such consideration would depend upon a dated commitment to carrying out the additional signalling works between Banbury and Leamington;

- 2.6. the ability of FL to protect its own interest had been hindered because

2.6.1. there had been protracted informal consultations, before the Formal Major Project Notice had been issued;

2.6.2. much of the consultation on Timetabling matters had been conducted by Virgin CrossCountry, who had assiduously circulated all iterations of their own service proposals (as at the hearing, at their 83<sup>rd</sup>

iteration), but unsupported by any information from Railtrack as to how this might impact on other Train Operators;

2.6.3. no Network Change Notice had been issued until 12<sup>th</sup> December 2001 (despite forecasts in the Major Project Notice that such a notice would appear in June 2001).

3. For Railtrack it was argued that

3.1. a Major Project Notice related primarily to setting out a “*method of implementation*” for works, and that a claim that certain works had not been included did not fall into the range of matters that can be appealed under Track Access Condition D2.3.4;

- 3.2. a re-signalling scheme (the Cherwell Valley Re-signalling Scheme) was in preparation, and that that scheme would, in due course, address the current headway and capacity constraints between Aynho Junction and Leamington Spa. However, this scheme was not proceeding to any commitment as regards funding, or timescale;
  - 3.3. Railtrack considered that the works proposed would be sufficient to enable it to meet all those obligations for the Winter 2002 Timetable to which it was committed and to which the Regulator had referred, and that
  - 3.4. should the eventual timetable produced for Winter 2002 fail to meet FL's FCRs or aspirations, this matter should be referred to Timetabling Committee for resolution.
4. The Committee noted that it had given serious consideration to the matter of locus relative to the special status on Major Project Notices, in relation to its previous Determination NV9, a case also brought by FL. In that Determination, the Committee had taken the following positions:
- 6.1. "The Major Project Notice procedure (Track Access Condition D2.3) is required where Railtrack needs to use a method of implementation, requiring special *"possessions or other restrictions on the use of the track"* *"extending over: (a) a period of more than one year; or (b) a period which contains two or more Passenger Change Dates"*. It enables
    - 6.1.1. the method of implementation to be protected from challenge or change as part of the normal "Review of Rules of the Route/Rules of the Plan" (Track Access Condition D2.4); and
    - 6.1.2. the *"Bidder to evaluate the effect of the proposed project on its Services or the operation of its trains"* (Track Access Condition D2.3.1).
  - 6.2. Once a Major Project Notice has been finalised and adopted, then, to deliver the method of implementation, Railtrack is empowered to introduce changes to the Rules of the Route/Rules of the Plan which, provided they are *"within and consistent with its method of implementation"* cannot be challenged by reference to the Timetabling Committee (Track Access Condition D2.4.6(a), (b) and (c)).
  - 6.3. The Train Operator enjoys additional protections under Track Access Condition D2.3 because, when compared with the procedures in Track Access Condition D2.4,
    - 6.3.1. there is a reasonable expectation that the Major Project Notice will be introduced to a timescale that will offer the Train Operator more time *"to evaluate the effect of the proposed project on its Services or the operation of its trains"*;
    - 6.3.2. the timescale for appeal against any unsatisfactory aspect of the Major Project Notice is extended to 30 days (Track Access Condition D2.3.4) from 7 days (Track Access Condition D5.1);
    - 6.3.3. ...
    - 6.3.4. ... and
    - 6.3.5. because any reference is determined by the Network and Vehicle Change Committee, in accordance with the discretion defined within Track Access Condition G6.5.3(a) (as amended by D2.3.5(a)), there is the option for the Committee *"to direct [Railtrack or the Train Operator] to accept any submissions made by any party as to the relevant Major Project"* (G6.5.3(a)(ii)).

7. The practical implications of these conclusions for the determination of this specific reference are:
  - 7.1. ...;
  - 7.2. it is reasonable to interpret that the provision in Track Access Condition D2.4.6(a), (b) and (c), that disbars an appeal against a proposed change in Rules of the Route/Rules of the Plan which is “*within and consistent with [the] method of implementation*” in a Major Project Notice, exists because the Major Project Notice hearing provides a prior opportunity for such appeals to be heard. It is not intended that it should permit such changes to be made without any opportunity to appeal. It follows therefore that
  - 7.3. the Network and Vehicle Change Committee must ensure that it gives, to any objection from a Train Operator, that same consideration that the Timetabling Committee would otherwise give to any objection to proposed changes to Rules of the Route/Rules of the Plan that was not subject to a Major Project Notice. That consideration should include taking into account any previous determinations on akin matters by the Timetabling Committee.”
  
5. In endorsing this view of its role in relation to Major Project Notices, the Committee was faced with some difficulties:
  - 5.1. FL’s objection is not against the “*method of implementation*” as such; nor is it in any way a problem with either the Rules of the Plan/Rules of the Route, or with the Timetabling of trains during the duration of the “*method of implementation*”;
  - 5.2. FL’s objection is rather that the “*method of implementation*” is intended to produce an end state which, FL believe, will be missing a crucial element, namely the Cherwell Valley Re-signalling, without which, Railtrack may not be able to honour FL’s FCRs;
  - 5.3. FL had admitted that the appeal had, in part, been brought at the present time, and to this Committee, because there did not appear to be any other way of getting timely consideration of a major problem; however, that major problem did not really arise until Railtrack sought to honour Cross Country Trains’ 15<sup>th</sup> Supplemental Track Access Agreement. In other words, assuming no project slippage, FL’s objection related to the time AFTER the completion of the “*method of implementation*”.
  
6. That said, the Committee noted that, in this case, at the conclusion of the “*method of implementation*”, the Network would have significantly changed by comparison with its state before implementation of “*method of implementation*”. In this respect, this Major Project Notice differs from one that deals with a large programme of renewals; it can only be judged by reference to the Network Change Notice that relates to the changed state the “*method of implementation*” is destined to produce. Indeed the Committee was of the view that FL’s objection, even allowing for the fact that it related to works that were not proposed, should, in the normal course of events have been brought to this Committee, but as a reference brought in accordance with the provisions of Access Condition G.

7. The Committee noted, with some dismay, that, when the Major Project Notice was published on 9<sup>th</sup> May 2001, the relevant Network Change Notice(s) had not already been issued, nor were they issued at the same time.
  - 7.1. The Committee is of the view that, for this type of Major Project Notice, this is unacceptable, and works to the disadvantage of all parties. This is particularly the case where, as in this instance, Railtrack may be seeking that a Train Operator accepts a short term pain against a long term gain.
  - 7.2. Within the published Major Project Notice it is stated that “*We expect that the final Network Change notice will be issued in June 2001*”. However, this Network Change notice may be crucial to the Train Operator’s decision as to whether or not to appeal any aspect of the Major Project Notice (because the “*method of implementation*” needs to be assessed by reference to the Network Change).
  - 7.3. Given that, under Track Access Condition D2.3.4, the Train Operator has only 30 days to register an appeal against a formal Major Project Notice (i.e. issued in accordance with Condition D2.3.3), a publication date for the associated Network Change notice that falls during, or even worse after, that appeal period, invites the suspicion that Railtrack is seeking to avoid possible challenges to the Major Project Notice. The Committee would find it difficult to rule out an appeal against a Major Project Notice that relies on (or, as in this case, has had to anticipate) information within the relevant Network Change notice, unless that appeal was delayed 30 days beyond the (belated) publication of that essential relevant Network Change notice.
  - 7.4. This matter of the interdependence of some Major Project Notices and the Network Change process has been addressed in previous determinations. The Committee, once again, reminds Railtrack of the need to ensure that when, or indeed before, a Major Project Notice is issued, the Train Operators are also in possession of the relevant formal Network Change notice. The Train Operator is reminded of the mechanism available to protect its interests within Track Access Condition G 2.1.
8. In practice, as the Committee notes with all the greater irritation,
  - 8.1. the essential Network Change Notices were not finally published until 12<sup>th</sup> December 2001; this appeared in part to be due to the fact that informal consultations (in the view of the Committee laudable, but with the disadvantage for the Train Operator that they cannot be referred to the Committee), had been allowed to delay publication of the formal Network Change Notice;
  - 8.2. Freightliner has sought to make the matter of the Cherwell Valley Re-signalling one part of a separate reference made under Track Access Condition Part G “Network Change”; and that
  - 8.3. Railtrack has sought to exclude that part of FL’s Network Change reference, on the grounds that it is to be addressed at this hearing.

9. The Committee therefore determined that
  - 9.1. A reference arising out of the terms of a Major Project Notice, issued and consulted in compliance with Track Access Condition D2.3, is properly a matter for this Committee and is to be determined as prescribed in Conditions D2.3 and G6.
  - 9.2. The definition of a Major Project makes it clear that it relates to the application of a “*method of implementation*”; such a “*method of implementation*” may relate to works done to restore the Network to a previous state, or to change it in a way that qualifies as a Network Change as defined in Track Access Condition G.
  - 9.3. This Committee has established, in previous determinations, that, in relation to the determination of matters relating to Rules of the Plan/Route, it is carrying out an adjudicating role, for the duration of the Major Project, that otherwise, in relation to individual reviews of the Rules of the Plan/Route, would be undertaken by the Timetabling Committee. This Committee is satisfied that it is also empowered to address matters that relate to “*the effect of the proposed project on [the Train Operator’s] Services or the operation of its trains,*” insofar as they also relate to the duration of the “*method of implementation*” described in the Major Project Notice.
  - 9.4. In respect of the line capacity between Aynho Junction and Leamington that is the subject of this dispute, and the fact that it will not be changed by the carrying out of the “*method of implementation*”, this is a matter that relates to the state of the Network AFTER completion of the works. Within the context of a reference made under the provision of Track Access Condition D2.3, which relates only to the duration of the “*method of implementation*”, the Committee is not therefore able to make a direction that Railtrack should modify the nature of the end-state of the Network, and so require additions to the work described in the Major Project Notice.
  - 9.5. However, in reaching this conclusion the Committee noted that many of FL’s problems had arisen out of the fact that the Network Change and the Major Project Notice processes had been allowed to get out of step. The Committee wished to remind the parties that
    - 9.5.1. The Network Change procedure, when properly and timeously carried out, provides all parties with the opportunity to seek to protect their interests, both in relation to the changes that are planned, and such other changes which might reasonably be required.
    - 9.5.2. Although the Committee encourages the use of informal preliminary consultation in such processes, this should not be a cause for delay to the formal procedures, nor should the informal process prejudice a Train Operator’s scope to protect its own interests.
    - 9.5.3. It is not reasonable for Railtrack to press ahead with the implementation of a Major Project Notice relating to changes to the Network, where such changes have not been formally the subject of the Network Change procedures in Track Access Condition G.

9.5.4. In the light of the considerable delays in the publication of the Network Change Notice (forecast, in the MPN, for June 2001, but not published until nearly 6 months later), and the fact that FL's concerns relate to the viability of the imminent Winter 2002 Timetable, it is understandable that FL should seek to escalate what it considered a reasonable concern, into a formal dispute, at the earliest opportunity, by such channels as it perceived were open to it.

9.5.5. FL should reasonably have had an earlier opportunity to pursue this appeal under Access Condition G.

10. For the avoidance of doubt:

10.1. A reference heard under Condition D2.3 is specifically without prejudice to the provisions of Part G. It follows therefore that any determination given above does not either preclude or prejudice any objection or appeal against the content of the notice of Network Change (dated 12<sup>th</sup> December 2001), and which may fall to be considered by this Committee.

10.2. In the event that, on production of the Draft Timetable and Bidding Information in February 2002, there is dispute as to the extent to which FL's rights and aspirations are thereby fulfilled, any reference of such dispute should be made to the Timetabling Committee as prescribed in Track Access Condition D. This determination shall not be prayed in aid, by either party, to justify any aspect of their respective pleadings before that Timetabling Committee.

Bryan Driver  
Chairman