
NETWORK and VEHICLE CHANGE COMMITTEE

Determination nos. NV 37, 38, 40, 41, 43 and 46

Hearing held at Kings Cross on 7th and 8th November 2002

[Note: previous published determination was determination NV44]

1. The Committee was asked to rule, by 6 separate train operating companies, that aspects of the proposals for undertaking works for the West Coast Route Modernisation project (as set out in Major Project Notice 2003/4 Works, Amendment No.1 Final Proposal dated 29th August), were unacceptable because of the impact that they had upon the business of those Train Operators.
2. The Committee noted that each of the 6 appellants, Silverlink Train Services (STS), First North Western (FNW), ScotRail Railways (SRR), Arriva Trains Northern (ATN), Freightliner Ltd (FL) and English Welsh & Scottish Railway (EWS), was also an interested party in relation to one or more of the other 5 appeals. Furthermore, the nature of some of the representations was such that were the Committee to seek to hand down bi-lateral determinations, there would be the risk of making determinations that were mutually incompatible. The Committee decided to deal with this risk by running the hearings concurrently. This determination therefore represents its conclusions on the points brought by all the appellants.
3. In the event, the bringing together of the parties served to ensure that consultations were continued, both before and during the hearing, and the Committee was satisfied
 - 3.1. to note, and accept, the report of the parties that some referred issues had now been resolved to mutual satisfaction; and
 - 3.2. to acquiesce in those circumstances where the parties had requested a further delay, because they now considered that a potential path to a solution had been identified, which they wished the opportunity to explore fully.
4. The points of contention brought by the parties and remaining for the Committee to determine were therefore as follows
 - 4.1. SRR was concerned at the particular impact upon the overnight Sleeper services, for the duration of the 9-day blockade, in August 2003, at Bourne End. In particular, given the importance, to these services, of the level of business at this part of the holiday period, it considered that
 - 4.1.1. it had not been given the time necessary to arrange for appropriate provision of resources to operate over an alternative route; and that

- 4.1.2. it was unreasonable that the most logical alternative route, the ECML, should also be affected, for the first four days of the Bourne End Blockade, by a blockade at Newark Crossing.
 - 4.2. STS considered that Railtrack had acted in an unjustified way by proposing to roll forward, without consultation, the same train service plan for STS, in respect of the Two Track Midweek Nights Railway, that had applied in 2002/3. STS' view was that this arrangement had been agreed as a result of concessions that it had made to meet the needs of all parties in the wake of the Committee's determination NV26 to 31. STS considered that
 - 4.2.1. the particular arrangement of Two Track Midweek Nights Railway that had been adopted for 2002/3 unduly compromised STS' exercise of its Firm Contractual Rights;
 - 4.2.2. there was a presumption in the Committee's previous rulings that such an arrangement should not be rolled forward;
 - 4.2.3. the current arrangements had proved able, because schedules had been drafted to incorporate pathing time, to permit more in the way of stops in late evening services than had originally been planned; and that therefore
 - 4.2.4. STS should have been offered the benefit of some preliminary discussion/modelling of alternative proposals that might the better have fulfilled its Firm Contractual Rights.
 - 4.2.5. Railtrack had failed, despite STS' reasonable requests made in accordance with Track Access Condition D2.3, to pursue with any vigour any alternative approach to fulfilling STS service aspirations other than the rolling forward of the arrangements for 2002/3.
5. Railtrack, in response to both these cases, maintained that, given the magnitude of the changes made to the programmes of works in the original Major Project Notice, and the speed at which supporting proposals for possessions etc had had to be produced, it had sought to achieve the minimum disruption to all parties, compatible with delivering the works to schedule. It acknowledged that
 - 5.1. it had proposed, on its own initiative, that the arrangements used in the 2002/3 Timetable in respect of the Two Track Midweek Nights Railway should be rolled over, as a means to reduce the already huge workload that the revised MPN was imposing on Access Planning resources;
 - 5.2. the coincidence of the Bourne End blockade with that previously agreed for Newark Crossing was unfortunate, but it had reluctantly come to the conclusion that there was no scope for either to be re-scheduled.
6. The Committee noted that the context of both disputes was a revised proposal made by Railtrack, with the encouragement of the SRA, to progress the West Coast Route Modernisation more effectively, by making use of strategic blockades, and that the proposals for the Bourne End, and other blockades, had been developed in a very

short period. The Committee was also conscious that the level of co-operation from all Train Operators was itself evidence of the extent to which there was general support, both for the objectives and for the methods of implementation proposed under the amended Major Project Notice.

7. That said, the Committee considered that, in making any determination of the issues before it, it ought once again to take cognisance of certain points of principle that had informed its previous decisions. In particular

“Where the Train Operator chooses to assert its rights through a reference to this Committee, then this Committee cannot direct that that Train Operator be required to abandon its claim to those rights; in which case the Committee cannot, without very good cause, uphold a proposed method of implementation which makes it impossible for such rights to be honoured.” (NV13 para. 19)

“Railtrack was within its powers as under a Major Project Notice (Track Access Condition D2.3) to propose that the timetable for the night hours over the West Coast Main Line should only be for ‘the two track railway’. However, such a proposal if challenged by a Train Operator whose Firm Contractual Rights [FCRs] are directly affected by the proposal, has to be judged by reference to the extent to which Railtrack can demonstrate that the impact on the affected Train Operator of the proposed method of implementation is a reasonable minimum, having due regard to the Decision Criteria.” (NV13 para. 20.1)

“where there is conflict between elements of the work programme, and the honouring of [the Train Operator’s] FCRs to the [set] standard, then the honouring of FCRs shall take greater precedence: again for the avoidance of doubt, where this will involve Railtrack in increased payment to other parties, Railtrack shall make such increased payments (NV17 para 11.2)

8. Furthermore the Committee noted that it had specifically, in relation to the Two Track Midweek Nights Railway, laid down that *“any solution found for the 2002/03 Timetable year, the duration of the Major Project Notice in question, shall be entirely without prejudice to the content of any future Major Project Notice relating to future stages of the project. (NV26 to 31 para 16.5).*
9. Recognising the magnitude of the works involved, and the extent to which there was evidence of considerable collaboration and willingness to compromise from all parties, the Committee considered that it could not, reasonably, in the particular circumstances of this specific Major Project Notice, make a determination in respect of the individual interests of either STS or SRR, the effect of which would be to re-open any of the multiplicity of other agreements already reached. On the other hand, there was a need to acknowledge the peculiar circumstances underlying this amended Major Project Notice, and to ensure that the exceptional means that had, of necessity, been used to introduce it, could not, in any way, be construed as a precedent for the future.
10. The Committee therefore determined, in respect of SRR, that the Bourne End blockade, and the coincidental Newark Crossing blockade do constitute an unreasonable infringement of SRR’s Firm Contractual Rights. However, in the larger context of West Coast Route Modernisation, the Committee does not consider that, it would be either proportionate or appropriate to exercise its right,

under Track Access Condition G6.5.3, to direct Railtrack not to proceed with the Bourne End Blockade. The Committee does, however, direct that

- 10.1. Railtrack come up with definite proposals, for the period of the Bourne End blockade, for a route so that SRR may reasonably be assured that its Sleeper Services may be worked through to destinations, in times that approximate reasonably to those contained in SRR's Firm Contractual Rights. If this requires specific co-ordination or curtailment of possessions to permit the passage of these trains, then this shall generally be done, except on occasions where SRR agrees to the contrary, such agreement not unreasonably to be withheld;
 - 10.2. SRR is to exercise its endeavours to resource the use of any proposed alternative route, or routes, for the purposes of assuring the sleeper services over the duration of the Bourne End blockade;
 - 10.3. in the particular circumstance of this case, should such routeing or timing require the provision of additional access rights, or the use of alternative traction and or train crew, Railtrack shall use its reasonable endeavours to ensure that the acquisition of such resources by SRR is facilitated;
11. The Committee considers that, given the wealth of experience within the industry of formulating special timetables and resource plans to cater for special passenger services, the parties are directed to proceed on the presumption that, notwithstanding the Newark and Bourne End blockades, satisfactory and economic solutions to permit the Sleeper services to operate can be found.
 12. The Committee determined in respect of STS that
 - 12.1. STS had had a reasonable expectation that, before Railtrack introduced, for the 2003/4 Timetable, any form of proposal for a Two Track Midweek Nights Railway timetable, there would be an opportunity to review, and modify, that proposal to achieve, where practicable, a lesser curtailment of STS's rights;
 - 12.2. given all the circumstances of the current state of preparation for the 2003/4 Timetable, and the range of commitments on Access Planning resources, it would now be an inappropriate use of such resources to require them to carry out the analysis and simulation sought by STS in respect of that timetable; however
 - 12.3. there should be no question of introducing any such a proposal (for a Two Track Midweek Nights Railway) for the 2004/2005 timetable, without affording all parties the opportunity for such a review and, where practical, revision; and
 - 12.4. provision should be made for such reasonable work to be carried out, in response to reasonably formulated requests from STS or other Train Operators, before bringing forward any proposals for Two Track Midweek Nights Railway for the 2004/5 and subsequent Timetables.

- 12.5. In reaching these conclusions, which are unique to this determination, the Committee is acknowledging Railtrack's immediate difficulties in respect of the timescales and resources necessary to deliver these new initiatives to further the West Coast Route Modernisation project. The Committee considers that the stage has now been reached, however, where Railtrack should give the industry a clear picture of the extent, and possible duration, of the future use to be made of Two Track Midweek Nights Railway.
13. Insofar as this determination does not refer directly to any of the issues raised by First North Western (FNW), Arriva Trains Northern (ATN), Freightliner Ltd (FL) and English Welsh & Scottish Railway (EWS), it is because they are expected to be resolved by the parties, and, to the extent that that agreement is not achieved, the parties retain the right to return to this Committee.

Tony Holland

Chairman