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## ***NETWORK and VEHICLE CHANGE COMMITTEE***

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### **Determination NV60**

*Hearing held at Kings Cross on 17<sup>th</sup> August 2004*

*[Note previous published determination was determination nv71]*

#### **Brief Summary of dispute**

1. The Committee was asked by Freightliner Intermodal Limited (FIL) to direct Network Rail to withdraw or amend certain of the proposals contained in the West Coast December 2004 to December 2005 Major Project notice (MPN2005), in order that FIL's Firm Contractual Rights might be met. Two specific sets of works formed the basis of the reference, namely
  - 1.1. 4 weeks of 54-hour possessions of all lines between Farington Junction and Preston North Junction from 23:00 Friday to 05:00 Monday over the weekends starting on Friday 15<sup>th</sup> April; 22<sup>nd</sup> April; 29<sup>th</sup> April and 6<sup>th</sup> May 2005, in order to renew three key crossovers ("the Preston Works"); these blockages impact upon the pathing of three of FIL's Anglo Scottish Intermodal services (2 Down and 1 Up); and
  - 1.2. A complete blockade of the Weaver Junction to Allerton line, from 03:00 24<sup>th</sup> December to 03:00 30<sup>th</sup> December 2004, in order to renew and re-model Ditton Junction ("the Ditton Works"). During the course of the Ditton Works there will be no railborne access to the Ditton, O'Connors Intermodal terminal ("the Ditton Terminal"), and access to Garston Intermodal terminal will involve a significant diversion. In respect of the Ditton Terminal, the blockade to deliver the Ditton Works would prevent the running of FIL's last train into the terminal on 24<sup>th</sup> December, and the departure of two other outbound services scheduled before the line re-opens on 30<sup>th</sup> December.

#### **The Committee's standing in respect of the dispute**

2. The Committee noted that that the issues raised in respect of the Preston Works stemmed clearly and directly from the item that had first appeared in the Major Project notice, and that this understanding was the basis of the reference. In respect, however, of the Ditton Works the parties were not of one mind as to which of the Committees (Network and Vehicle Change Committee, or Timetabling Committee) should have the jurisdiction. This difference arose because the possessions for the Ditton Works had been variously amended, so that, at some point it appeared that the Rules of the Route would have changed significantly from what was originally in the Major Project notice. For Network Rail it was argued that, in these circumstances, the matter should be referred to the Timetabling Committee under Track Access Condition D2.1.6. FIL's view was that the work content for which the possessions were being sought still related to the original Major Project notice and therefore should continue to be dealt with by Network and Vehicle Change Committee as a reference made under Condition D2.2.4.

[All aspects of this case were initiated when the conditions in force were the Track Access Condition Part D dated 5<sup>th</sup> July 2003 (Pink Pages), and all extracts are referenced and described accordingly, references to Railtrack should be construed as applying to Network Rail];

3. The Committee, in considering the matter of jurisdiction in respect of the Ditton Works took account of the following factors

3.1. Although the information brought to the Committee's attention was very imprecise, it emerged, during the course of questioning, that the latest proposals differed only to the extent of a slight variation (2 hours) in the finishing time on 30<sup>th</sup> December, when compared with the initial Major Project notice item. However, it was noted that a previous amendment to MPN2005 had proposed material changes to both start and finish times: this amendment had subsequently been withdrawn. The principal issue remains that the Major Project notice works will result in some services not being able to access the Ditton Terminal.

3.2. Network Rail had chosen, thus far, to promulgate and progress its proposals through the medium of a Major Project notice, making use of Track Access Condition D2.2;

3.3. the parties had already reached agreement on the majority of that large number of items promulgated through the MPN2005, and originally disputed;

3.4. In relation to a Major Project, Track Access Conditions D2.2.4 and D2.2.5 provide that:

***“ 2.2.4 Right of appeal***

*If any Bidder is dissatisfied as to:*

*(a) any matter concerning the operation of the procedure in this Condition D2.2; or*

*(b) the method of implementation of the proposed Major Project as notified by Railtrack pursuant to Condition D2.2.3 and, in particular, the application by Railtrack of the Decision Criteria*

*it may, at any time prior to the date 30 days after the date on which it was notified pursuant to Condition D2.2.3 of the proposed method of implementation, refer the matter to the Industry Committee for determination.*

***2.2.5 Applicability of appeal procedure***

*Any matter referred to the Industry Committee for determination under Condition D2.2.4 shall be treated as a matter referred to that Committee under Condition G6.1 and the provisions of Conditions G6.2 to G6.7 (inclusive) shall apply to it mutatis mutandis save that:*

*(a) the reference in Condition G6.5.3(a)(ii) to "Network Change" shall be treated as a reference to "Major Project" ”*

3.5. Track Access Condition G6.1 is explicit that the Industry Committee in the case of references made under that Condition should be to the Network and Vehicle Change Committee.

3.6. The Major Project notice is not itself a contractually defined concept; it is the means by which Network Rail provides

*“each Bidder that may be affected by the project together with... such particulars of the proposed method of implementation of the project as are reasonably necessary to enable each such Bidder to evaluate the effect of the proposed project on its Services or the operation of its trains. In this Condition D2.2 the expression "method of implementation" means a statement containing a programme of possessions or other restrictions on the use of the track which would be required in order to carry out the proposed project in question.”*  
(Track Access Condition D2.2.1)

3.7. Such details are not themselves binding unless incorporated into the applicable Rules of the Route and/or the applicable Rules of the Plan; Track Access Condition D2.2.6 states

***Relationship with Part G and Condition D2.1***

*The provisions of this Condition D2.2 shall be without prejudice to:*

- (a) the provisions of Part G, if the proposed Major Project, once completed, would constitute a Network Change within the meaning of that Part; and*
- (b) the requirement to comply with Condition D2.1, to the extent that the implementation of the proposed Major Project in accordance with the method of implementation would require an amendment to the applicable Rules of the Route and/or the applicable Rules of the Plan.*

3.8. Although Timetabling Committee is the normal route for appeal for matters that relate to the Rules of the Route, Track Access Condition D2.1.6 excludes matters which have been the subject of Major Project procedures:

*No such reference shall be made in respect of any aspect of a Major Project which is within and consistent with its method of implementation established pursuant to Condition D2.3 and which has:*

- (a) ....;*
- (b) been finally determined by either the Industry Committee or the Regulator pursuant to that Condition; or*
- (c) been determined by the Industry Committee and is not the subject of an appeal to the Regulator pursuant to that Condition.*

3.9. In this case the reference by FIL had been in accordance with Track Access Condition D2.2.4, within the prescribed time-frame.

4. That said, the Committee wished to acknowledge, for the record, that it recognised that this point of jurisdiction had more than just a procedural interest for the parties; there is a significant difference in the nature of the determinations that the Network and

Vehicle Change Committee is empowered to make, as opposed to those for which the Timetabling Committee is empowered. Specifically

4.1. Network and Vehicle Change Committee is empowered by Track Access Condition G6.5.3(a)

- “(i) to direct the parties to the dispute to comply with directions which specify the result to be achieved but not the means by which it shall be achieved (“general directions”); or*
- (ii) to direct the parties to accept any submissions made by any party as to the relevant Network Change; ”*

4.2. By contrast, Timetabling Committee’s powers, as defined in D5.5.3(a), lack this symmetry:

- “(i) to direct Railtrack to comply with directions which specify the result to be achieved but not the means by which it shall be achieved (“general directions”); or*
- (ii) to direct the parties to accept any submissions made by Railtrack as to any Train Slots;”*

5. The Committee considered that all the foregoing factors, not least that the parties were agreed that the appeal in respect of the Ditton Works related to the possessions as described in the MPN as issued and without significant change, meant that it would be anomalous were FIL to lose the potential benefit of the wider discretions of the Network and Vehicle Change Committee in respect of the Ditton Works dispute, whilst retaining them in respect of the Preston Works dispute. The Committee therefore was content that it did have the jurisdiction to determine both the Ditton Works dispute and that regarding the Preston Works under Track Access Condition D2.2.4, and that such a determination would, under Track Access Condition D2.1.6, preclude further consideration by Timetabling Committee.

## **Summary of Evidence presented**

6. In respect of the Preston Works,

6.1. FIL

6.1.1. claimed that they held Firm Rights for the three trains (4L89 (Coatbridge to Ipswich), 4S88 (Ipswich to Coatbridge), and 4S83 (Tilbury to Coatbridge)) that are adversely affected by the Preston Works and form the basis of the dispute. A table of rights was presented in support of this claim. In addition FIL asserted that the Firm Rights in question were for trains hauled by electric traction, and conveying wagons and traffics that required up to W10 Structure gauge clearance. Network Rail did not contest the status of the Firm Rights claimed by FIL.

6.1.2. asserted that they had been given to understand that the possessions would still have left the Goods lines open for the passage of trains, including electric trains, and that this should remain the case if the Preston Works are to proceed.

## 6.2. Network Rail

6.2.1. described the Preston Works as renewals of key, and life-expired, crossovers directly affecting the Fast and Slow lines. However, to carry out the works required all Overhead Line Equipment to be switched off, to enable regular movements of materials across the Goods lines between the site of works and the preparation sites.

6.2.2. advised that an alternative route to and from Coatbridge during the Preston Works was available for electrically hauled services via the East Coast Main Line, but that such services would be confined to a maximum W9 Structure gauge clearance.

6.2.3. advised that FIL had been offered the opportunity for the three trains in question to be passed through the possessions, via the Goods lines, at broadly the scheduled times, but that this would be conditional on the trains being diesel hauled through the electrically isolated sections.

6.3. FIL noted the option of diesel haulage through the Preston Works, but contended that this would still not fulfil the entirety of its Firm Rights, and was concerned that this would require it to incur additional costs in procuring the necessary alternative diesel traction. It was FIL's contention that, because it believed that such costs were not recoverable from Network Rail under the terms of its Track Access Agreement, this was adequate grounds for the Committee to determine that the Preston Works should not be allowed to proceed.

7. In respect of the Ditton Works, neither party's submissions were clear, and some of the evidence required the Committee to seek significant clarification. In the joint submission reference was made to disruption of access to all of Seaforth, Garston and the Ditton terminals. It appeared at the hearing that

7.1. there had been much discussion over the exact times of the Ditton Works, but that the Committee was asked to base its determination on a proposal for the blockade to start at 03:00 on 24<sup>th</sup> December, and to continue until 05:00 on 30<sup>th</sup> December 2004;

7.2. there were no affected services to Seaforth;

7.3. no details were advanced of any services to the Garston Intermodal terminal which could not adequately be serviced by the diversionary route proposed, but

7.4. three services to/from the Ditton Terminal would not be able to operate.

8. In respect of their differences therefore the parties made the following submissions.

8.1. FIL presented evidence that they held Firm Rights for a number of services to and from the Ditton Terminal and asserted that three (one arrival on 24<sup>th</sup> December, and 2 departures after the Christmas shut down at the terminal) would be affected by the proposed closures. However, FIL did not offer any clarification as to

8.1.1. (beyond a table produced by Network Rail) which precise services were affected, and where their arrival and departure times sat, as compared with the proposed possession;

- 8.1.2. whether the services were confirmed for the days in question,
- 8.1.3. the nature of the traffic concerned and whether this imposed further operating constraints, or
- 8.1.4. whether there had been active consideration given to any re-adjustments to timings, or to making use of road delivery from an adjoining intermodal terminal (e.g. Garston).

## 8.2. Network Rail

- 8.2.1. gave details of the works to be undertaken which were driven by the advanced decay of the substructure, and which therefore could not reasonably be delayed, both because of the impact of TSRs on train running (with an ultimate risk of closure to parts of the route), and also because a six-day blockade was the minimum required to undertake the work, and Christmas provided the only sensible time for such a blockade.
- 8.2.2. advised that in renewing the formation they were also making changes to the Junction layout which constitute a Network Change. These changes were therefore to be handled through the medium of a Network Change notice, which would enable FIL to claim any relevant compensation in accordance with the provisions of Condition G2.2. However, no Network Change notice had yet been published.
- 8.2.3. was prepared to explore further a possibility that trains could, exceptionally, be worked in or out of the Ditton Terminal between the completion of physical track works and the commencement of testing/commissioning. However, this opportunity would arise on 28<sup>th</sup> December 2004, and the requirement thereafter was for 36 hours of uninterrupted “wheels free” commissioning, during which it would be impracticable to make any such exceptional movements.

## **Issues of fact and law considered by Committee**

- 9. The Committee was of the view that the key issue in this reference, as so often in other circumstances, was that, whilst the Train Operator has Firm Rights to run all of the trains in question, the operation of those trains depends upon Network Rail continuing to fulfil its obligation to maintain the Network in a fit condition.
- 10. In these cases, there has been no contention from FIL that either the Preston Works or the Ditton Works are not necessary, or that they are being undertaken in a way that is generally in disregard of the interests of Train Operators, and FIL in particular. The decision therefore that is sought by FIL, namely that Network Rail be directed to withdraw or amend its proposals, requires pragmatic consideration of whether or not there are alternative methods of working which would permit all its trains to run, and all tracks to be maintained to the standards required. For the Committee, this sort of consideration is made more difficult, in this instance, by the grudging way in which the parties have produced the few necessary but relevant facts.

11. The Committee is seized of its duty, as laid down in Access Dispute Resolution Rule A1.1 that *“The purpose of the Committee is to discuss and, if possible, settle by agreement, disputes which are referred to it by Industry Parties and which arise out of or in connection with ...an Access Agreement...”* and considers that that duty lies in determining:
  - 11.1. who has which rights in terms of entitlements to run trains or take possessions;
  - 11.2. who has which obligations in respect of duties to enable those rights to be honoured; and
  - 11.3. where the two are not fully compatible, what is the most appropriate way of reconciling the difference, taking account of the interests of both parties (and other Industry Parties).

### **Relevant precedents considered**

12. The Committee noted that the matter of the rights of Network Rail to introduce, whether through the Rules of the Plan/Rules of the Route change processes (Track Access Condition D2.1), or through the Major Project processes (Track Access Condition D2.2), engineering possessions that frustrate the delivery of the Firm Rights of Train Operators has been the subject of numerous previous references and determinations. In each case the point at issue has been that, whereas a Train Operator’s Firm Rights are defined as subject to *“the applicable Rules of the Route or the applicable Rules of the Plan”* it is open to the Train Operator to challenge the content of proposed Rules of the Route or Rules of the Plan, and, if upheld, so prevent them from becoming *“applicable”*.
13. These various precedents were expressed in Determination NV13 (“NV13”), in terms of the issue of the rights of the Train Operator, which stated that:
  - “19 *In the circumstances... of the case in question, 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.”*
14. In the same determination, the Committee implicitly acknowledged that any consideration of the overall interest of the Industry that requires attribution of varying weights to the “Decision Criteria” (Track Access Condition D6) ought, in respect of individual time limited instances, to be subject to a test of reasonableness. The text of NV13 therefore continues
  - “However, 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.*

20. *The Committee therefore determined that*

20.1 *Railtrack was within its powers as under a Major Project Notice (...) to propose that ... . However, such a proposal, if challenged by a Train Operator whose Firm Contractual Rights 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.”*

## **Factors influencing, and reasons for, the Committee’s decision**

15. In any consideration of the Track Access Conditions, and in the formulating of any determination, the Committee is entitled to expect that the parties will act in good faith as required by Track Access Condition A1.5, in particular as regards “conducting any discussions or negotiations arising out of the application of these Access Conditions or exercising any discretion under them”. Furthermore, the fact that such “discussions or negotiations” are envisaged has a bearing on the possible scope of any determination.
16. In respect of the circumstance of the current reference,
  - 16.1. the parties did not dispute that FIL has Firm Rights for all the trains that will be impeded by either the Preston Works or the Ditton Works. Therefore, the Committee could have justification, if it were so minded, for including in its determination, a direction that one or both of the Preston Works and the Ditton Works, as currently planned, shall not proceed.
  - 16.2. the Committee considered that, before it could include such a direction in its determination, it should apply tests of reasonableness to the implications of such a decision, taking into account
    - 16.2.1. the effect on Network Rail’s capability to honour its obligations to other Industry Parties (and indeed to FIL), if the Preston Works, or the Ditton Works, did not proceed as currently proposed, as compared with
    - 16.2.2. the scale of hurt to FIL, if alternative arrangements have to be made for the services that will be affected if either the Preston Works or the Ditton Works do proceed as proposed.
17. From the vague and incomplete information presented by the parties in respect of the Ditton Works, the Committee formed the view that,
  - 17.1. were it to direct that the Ditton Works should not proceed, the consequence, for FIL and any other relevant Train Operator, would be growing restrictions on the use of the route, and the potential requirement for an equivalent length of possession during the Christmas 2005 period (or earlier);
  - 17.2. there appeared to be alternative means of conveying containers to or from the Ditton Terminal, (e.g. by road, possibly from Garston, or by making use of the train service window on 28<sup>th</sup> December 2004), and the Committee was not given any evidence that such short term alternatives had been evaluated, or, if they had been evaluated, why such proposals were not acceptable;

- 17.3. if the objection were one that solely, or largely, boiled down to a matter of incremental cost to FIL, this was a matter which could properly be addressed under the provisions of [Network Code] Condition G2.2, as and when Network Rail publish its intended Network Change notice; and that
- 17.4. Network Rail should publish its Network Change notice without delay, in order that, should there still be any matters which the parties cannot resolve between themselves, they can be brought back to this Committee under the provisions of Condition G6.
18. In respect of the Preston Works, the Committee considered that, on the basis of the limited information that it had been given,
  - 18.1. FIL has rights to operate the trains in question with electric traction, and will be prevented from so doing by possessions that are not yet part of the “*applicable Rules of the Route*” ;
  - 18.2. the penalty to FIL of being required to diesel haul three trains for the purposes of passing them through the possession on each of four weekends, is a real one in terms, both of quality of service, and potential incremental costs to FIL; however
    - 18.2.1. it is probably much less significant than the penalty in either regard, of the services either being cancelled, or running over the ECML, and
    - 18.2.2. in proportion to the scale of the Preston Works, and their significance for all Train Operators, that penalty is not such as reasonably to warrant the Committee determining that the Preston Works should not proceed.
  - 18.3. Network Rail cannot, as of right, set aside FIL’s Firm Rights, but is not precluded from engaging in “*discussions and negotiations*” with a view to convincing FIL that it should accept a “*temporary curtailment*” (e.g. diesel haulage) of its rights, sufficient to allow the works to proceed;
  - 18.4. it would be reasonable to expect that FIL should be prepared to engage, in good faith, in such “*discussions and negotiations*” and to respond reasonably to any proposition from Network Rail.

## **The Committee’s determination**

19. The Committee therefore determined that
  - 19.1. it would re-affirm the principle that, where Firm Rights exist and have been duly asserted, the Train Operator cannot be directed to “*abandon its claim to those rights*”. This is a given in any future “*discussions or negotiations*” between the Train Operator and Network Rail.
  - 19.2. subject to the parties acting in compliance with paragraph 19.5 below, the potential scale of penalty that would be suffered by FIL, were the Preston Works to proceed requiring three trains per weekend to be diesel hauled, is not sufficient cause to warrant directing Network Rail to “*accept the submission made by [FIL] as to the relevant Major Project*”.

- 19.3. subject to the parties acting in compliance with 19.5 below, the potential scale of penalty that would be suffered by FIL, were the Ditton Works to proceed requiring three trains to be cancelled, or worked to alternative locations , is not sufficient cause to warrant directing Network Rail to “*accept the submission made by [FIL] as to the relevant Major Project*”,
- 19.4. Network Rail should without delay publish the Network Change notice in respect of the Ditton Works and engage in the consultations procedures laid down in Condition G of the Network Code;
- 19.5. it would “*direct the parties to the dispute to comply with directions which specify the result to be achieved but not the means by which it shall be achieved (“general directions”)*”; specifically that they should meet, in good faith, to discuss and agree a method of delivering both the Preston Works and the Ditton Works, that
  - 19.5.1. satisfies the requirements of FIL’s customers;
  - 19.5.2. permits the Preston Works and the Ditton Works to proceed to the schedules currently proposed and
  - 19.5.3. holds FIL reasonably harmless.
- 19.6. The parties shall be required to report to the Committee Secretary on the progress of these discussions by 17<sup>th</sup> September 2004, and, failing any mutually satisfactory agreement, the parties are invited to resubmit their differences to the Committee. In such circumstances the Committee reserves to itself the right to revisit its conclusions in respect of any of the issues addressed in this determination.
20. For the avoidance of doubt any such discussions will be without prejudice to the issue of the Network Change notice and the rights of any other parties in respect of the Ditton Works, or, in either case, to compliance with the procedures for achieving any necessary amendments to the Rules of the Route.

Bryan Driver

Chairman