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

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### **Determination No. NV8**

***Hearings held at Kings Cross on 6th and 12th September 2000***

1. The Network and Vehicle Change Committee was asked by North Western Trains Company Ltd (trading as First North Western (FNW)) to determine that, in the arrangements proposed within the Major Project Notice for the West Coast Mainline Modernisation PUG Phase 1, for the Manchester South re-signalling, Railtrack was expecting the Train Operator to suffer an unreasonable level of disruption to service. Specifically, that
  - 1.1. the works will require frequent disruptive weekend and weekday possessions between May 2000 and October 2001;
  - 1.2. a feature of the scheme is that, at its completion, lines previously paired by direction will instead be paired by route. As a consequence,
  - 1.3. the final implementation and commissioning is proposed to take place during a 16 day total blockade of all lines between Stockport and Slade Lane Junction from 0001 Sat. 22nd September 2001 - 0400 Mon. 8th October 2001: and
  - 1.4. between these dates there will be no alternative route available for FNW services from Stockport to Manchester Piccadilly, and substitute bus services will have to be provided.
2. In reviewing its locus and powers in relation to references of this sort, the Committee noted that:
  - 2.1. Track Access Condition D2.3 Major Projects is the only part of Track Access Condition D where the Industry Committee is the Network and Vehicle Change Committee rather than the Timetabling Committee.
  - 2.2. the jurisdiction of the Committee in respect of such a reference is governed by two sets of considerations, namely
    - 2.2.1. the framework of any reference is governed by the provisions of Track Access Condition G 6, but
    - 2.2.2. because of the provisions of Track Access Condition D2.4.6 (a), (b) and (c), where the implementation of the Major Project Notice is dependent upon implementing changes to the relevant Rules of the Plan or Rules of the Route, 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 the Rules of the Plan/ Rules of the Route that was not subject to a Major Project Notice.
  - 2.3. the purpose of a Major Project Notice (Track Access Condition D2.3.3) is to give notice of the *“proposed method of implementation for the proposed project, provided that:*
    - (a) *in deciding such proposed method of implementation, Railtrack shall have due*

*regard to the Decision Criteria; and*

*(b) it shall have taken into account any comments submitted to it pursuant to Condition D2.3.2”*

3. A Major Project Notice may be served as a complement to a Network Change, but is, in any case, to be resolved without prejudice to the provisions of Part G of the Track Access Conditions in respect of that Network Change, and the requirement to respect the provisions of Track Access Condition D2.4 in regard to Rules of the Plan/Rules of the Route.
4. The Committee noted that, in this reference, the method of implementation described in the Major Project Notice related to works that had been the subject of a separate Network Change notice, served in accordance with Track Access Condition G. The Committee noted that the parties had already appeared before the Committee in relation to issues of compensation arising out of this Network Change, and that this separate dispute had yet to reach its resolution.
5. The Committee noted that the Major Project Notice was dated 23rd June 2000 covered the 2001/2002 timetable period only, but that
  - 5.1. works were already in hand that were being undertaken within the Rules of the Route for 2000/2001, and had not been the subject of any earlier Major Project Notice;
  - 5.2. the Major Project Notice superseded an original Implementation Strategy that had been published (as part of the Network Change) in July 1999, and which had proposed an implementation that would not have concluded until April 2002; and
  - 5.3. Railtrack had been of the impression that all Train Operators had been unhappy with that original timescale, partly because of its relationship to the introduction of the Summer 2002 Timetable, and also because of the need, in the run up to the Commonwealth Games, to avoid disruption over a protracted period of works.
6. As a consequence Railtrack had convened a meeting of all affected Train Operators on 10th March 2000, to present a revised strategy, where the works would be largely complete and operational by October 2001. This revised strategy had subsequently been reflected in a Preliminary Major Project Notice issued on 28th April 2000, and then, following a further Review meeting with Train Operators on 13th June 2000, was issued as the Final Major Project Notice on 23rd June 2000.
7. The Committee noted that FNW
  - 7.1. had declined to attend the meeting held on 10th March 2000, giving as written grounds “Pending the resolution of our claim for compensation in respect of Manchester South, FNW will not consider any changes to the proposed implementation plan. I shall not therefore be attending the meeting on March 10th.”
  - 7.2. had been advised by letter of 16th March of the apparent consensus of all parties in attendance at the meeting supporting, with minor adjustments, the strategy expounded at that meeting;
  - 7.3. had written formally to object to the revised method of implementation on 4th May 2000, and followed that with a formal consultation response on 25th May 2000.

- 7.4. had attended the multilateral review meeting on 13th June 2000, before referring the matter for dispute on 6th July 2000.
8. The Committee noted the magnitude of the works in Manchester South, and the strategic importance of West Coast Mainline Modernisation PUG Phase 1 and Phase 2 to the general health of the industry. The Committee were clear that that did not absolve Railtrack from any of its obligations to carry out scrupulously the provisions of Track Access Condition D 2.3 and 2.4 and Track Access Condition G. This obligation includes the need to enter into full dialogue with each affected Train Operator, to take full cognisance of representations made, and to ***“have due regard to the Decision Criteria.”***, in an effort to ensure that their actions have the widest measure of endorsement.
9. The Committee opined that an appeal against the provisions of a Major Project Notice cannot address the merits of the scheme that the method of implementation described in the notice is intended to serve; this end can be achieved by following through the procedures for Network Change as set out in Track Access Condition G. However, the Committee should consider, and determine, in those cases where it was alleged that the method of implementation proposed
- 9.1. did not take sufficient account of the disruption to the Train Operator’s services; and/or
- 9.2. did not appear to have been substantiated as paying “due regard to the Decision Criteria”, and that
- 9.3. in all cases it was empowered
- (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 Major Project” (Condition G6.5.3(a) as amended by Condition D2.3.5).*
10. The Committee gave careful consideration to the obligations placed upon the parties (in Track Access Condition D2.3), in respect of the processes leading up to the issue of a Major Project Notice, and whether Railtrack’s process could be seen as reasonable, or FNW’s behaviour as appropriate. In consequence the Committee asked itself,
- 10.1. was the meeting held on 10th March a formal part of giving Notice of a proposed Major Project, as required by D2.3.1? and/or did it constitute consultation as laid down by D2.3.2?
- 10.2. was an individual Train Operator, entitled to demand that such consultation be conducted on an exclusively bilateral level?
- 10.3. was a Train Operator that did not attend a multilateral consultation meeting, to which it had been invited, bound by the outcome of such a meeting?
- 10.4. was a multilateral meeting the context for reaching any sort of binding assent between parties bound by a bilateral agreement?

11. The Committee noted that the processes as laid down in Condition D2.3 are much less prescriptive than either those laid down for Timetable Change (D2.1) or for the review of Rules of the Route/ Rules of the Plan (D2.4). However, as adequate performance of D2.3 is deemed to preclude future appeal under D2.4.6(a,b,or c), the Committee was of the view that it should apply similar tests of reasonableness of standards of consultation as have been applied, in other cases, by the Timetabling Committee.
12. In this regard the Committee noted that D2.1 and D2.4 lay down timescales for Train Operators to make representations where proposals are unacceptable. Furthermore there has been recurrent advocacy of the benefits of participation, by all affected parties, in e.g. Timetable Conferences, or other multilateral meetings. Taking these considerations together the Committee concluded that
  - 12.1. Railtrack's processes for carrying out consultation, although appropriate in intent, were not sufficiently formalised, either in respect of the status of the multi-lateral meetings, or in respect of the steps taken to seek bilateral endorsement of the proposals from each Train Operator;
  - 12.2. FNW's behaviour, in absenting itself from a critical multilateral meeting, was reprehensible and indefensible, and could reasonably, had Railtrack fulfilled all its obligations under D2.3, have vitiated FNW's reference on this matter;
  - 12.3. Railtrack could take reasonable comfort from the support for its proposals offered by parties at such a multilateral meeting, but cannot construe that support as prior acceptance of the Major Project Notice in the form in which it is finally issued.
13. The Committee is required, in the context of considering Railtrack's "due regard for the Decision Criteria" to take account of
  - 13.1. the arguments advanced by the parties as to why any particular Decision Criterion should merit preference as compared with another,
  - 13.2. the extent to which it can be demonstrated that there has been a sensible attempt to consider and evaluate alternatives proposed by Train Operators; and
  - 13.3. the interpretations and precedents in relation to those criteria, embodied in previous determinations of Timetabling Committee, Network and Vehicle Change Committee and Access Dispute Resolution Committee, as appropriate.
14. The Committee considered that the fact that Railtrack's carrying out of consultation was in some ways defective, did not, of itself, mean that Railtrack's proposals were without merit. However, the Committee accepted that the scale of the disruption that would be experienced by a large proportion of FNW's passengers, and during a season of peak demand, was so great that it was incumbent upon Railtrack to demonstrate that
  - 14.1. any alternative method, or timing of this method, of implementation, had been fully evaluated, and that,
  - 14.2. paying "due regard to the Decision Criteria", the solution chosen was the best of those available.

15. The Committee noted that FNW was seeking that either the blockade be brought forward until late August 2001, or be spread over two or more periods. Given the hostility of the PTE to any blockade affecting the Christmas shopping period, then any alternative proposal would potentially have consequences for one or all of
  - 15.1. the end date by which the works would be complete,
  - 15.2. the duration of temporary signal arrangements, affecting the lines that, at the final completion of the scheme, will be signalled for movement in the opposite direction than at present
  - 15.3. contracts said to have been concluded with the suppliers of engineering services
  - 15.4. other Train Operators.
16. The Committee noted that
  - 16.1. in respect of contracts with suppliers of engineering services, the view had always prevailed in other determinations by the Timetabling Committee, that contracts let in anticipation of one outcome of a dispute did not preclude the Committee from determining directions that required those contracts to be re-negotiated; and
  - 16.2. the date for the completion of works (before the Summer 2002 Timetable), which appeared to be considered as fixed, was a function of contractual agreements between Railtrack and one Train Operator; no evidence had been brought to suggest that other Train Operators were required to subordinate their Rights and interests to allowing Railtrack to meet that other obligation.
17. The Committee determined that:
  - 17.1. there were significant defects in the manner in which the parties, both Railtrack and FNW had discharged their obligations for meaningful consultation and comment as required by D2.3.1 and D2.3.2.
  - 17.2. on the basis of the evidence presented to the Committee, Railtrack had failed adequately to justify that the proposed method of implementation using a 16-day Blockade in September 2001, was the appropriate method as compared with reasonable alternatives, having “due regard to the Decision Criteria” (D2.3.3), and therefore that
  - 17.3. the Committee was minded to find against Railtrack.
18. However, taking account of representations from the parties that there were still other consideration to be reviewed the Committee agreed to defer formalising its determination in order to allow
  - 18.1. Railtrack to review its options, including carrying out any further consultation with all affected Parties on any revised Major Project Notice to ensure that any eventual method of implementation does pay “due regard to the Decision Criteria”; and
  - 18.2. both Parties to take the opportunity to carry out a review of the technical merits of any reasonable options available.

19. The Committee agreed that it would hear the parties again at an early date in order to consider the outcome of Railtrack's response to the above 18.1, including any representations made as a result of 18.2. For the avoidance of doubt the Committee stated that
- 19.1. First North Western bore a share of the responsibility for the break down in the consultation process;
  - 19.2. if there is any question of the Committee being asked to take account of the outcome of a technical review, then the Committee will expect that such a review will have been conducted by an independent expert, appointed and funded in equal proportion by Railtrack and First North Western, and afforded equivalent freedom of access to both parties' papers and files;
  - 19.3. if the Committee is not satisfied that Railtrack's proposal, which may or may not still be for a 16-day blockade in September 2001, is substantiated in accordance with 18.1 above, then the Determination, as at 17.3 above, will be formally ratified as a direction in accordance with Track Access Conditions D2.3.5 and G.6.

Bryan Driver  
Chairman  
Network and Vehicle Change Committee