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## **TIMETABLING COMMITTEE**

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### **Determination No. 132**

(following a hearing at Kings Cross on 30<sup>th</sup> November 2001)

*[Note: the previous published determinations were determination no.109/110 of 1<sup>st</sup> November 2000 and determination no.105/106 of 7<sup>th</sup> December 2000]*

1. The Committee was asked by Eurostar (U.K.) Ltd (EUKL) to rule that Railtrack had not acted appropriately, when, in preparing the Draft Timetable for 2002/3, it had declined to include any validated paths in respect of the Night Sleeper Services to Glasgow, Plymouth and Swansea.
2. The Committee noted that EUKL's current Track Access Agreement had been put in place before the Regulator received his powers under the 1993 Railways Act, but that, although the Track Access Agreement is therefore unregulated, it does incorporate the Track Access Conditions, and it does prescribe that disputes should be referred for resolution by the relevant Industry Committee. This dispute therefore is referred to the Timetabling Committee under Access Condition D5.1.1.
3. EUKL's case was that
  - 3.1. its Track Access Agreement gave rights to Train Slots for the services in question, both as regards quantum and "*expected Journey Time*";
  - 3.2. it had declared its wish to exercise the Firm Contractual Rights (FCRs) for the Train Slots in question, in compliance with Track Access Condition D2.1.2(a);
  - 3.3. in all previous timetables Railtrack had included validated Train Slots for these services in the Draft Timetable, but had then had the agreement of EUKL not to progress them into the final Timetable, and to allow other services to be booked into paths that would infringe on EUKL's rights;
  - 3.4. the Track Access Charge payable to Railtrack is a fixed charge which does not vary downwards to reflect that no trains are running on some routes;
  - 3.5. EUKL would be prepared to consider a surrender of rights that would permit the Train Slots in question to be left out of the Draft and subsequent Timetables, but would expect, in such circumstances, some corresponding abatement of Access Charge;
  - 3.6. there have been negotiations between the parties to permit EUKL to surrender some FCRs, and to benefit from an abatement of Access Charge.

4. Railtrack's case was that
  - 4.1. validated Train Slots had been incorporated into previous Draft Timetables, against the expectation that services would start to operate once the rolling stock provided had been accepted into service;
  - 4.2. it believed that EUKL had disposed of most of the rolling stock originally obtained for the Night Sleeper services, and that there was no realistic prospect of the services being operated in the currency of the Timetable in question, if at all;
  - 4.3. inclusion of validated paths into the Draft Timetable, when there was every prospect that they would not be the subject of bids in accordance with Track Access Condition D3, was an illogical encumbrance of the Timetabling process and merely served to interfere with the proper provision of Train Slots to meet the FCRs of other Train Operators.
5. The Committee noted that each party was seeking to take a stand on a matter of principle, which the other was seeking to erode; thus
  - 5.1. EUKL believed that it was entitled to insist on the application of the letter of Track Access Condition D2, because it was paying for Train Slots, and that Railtrack, in declining to include the Train Slots into the Draft Timetable, was trying to suspend EUKL's rights, and thus exceeding its powers; by contrast
  - 5.2. Railtrack considered that, whilst it had an absolute obligation to fulfil the FCRs of Train Operators in respect of trains that ultimately run, that task should not be made more difficult by the need to include Train Slots for trains that were not likely to run. It was its duty to try to avoid this complication, including by encouraging Train Operators to declare "*those Firm Contractual Rights that they do not intend to exercise*" in accordance with Track Access Condition D2.1.2(b).
6. That said, the Committee also acknowledged that, at the root of this dispute was a difference of views as to respectively the value, and the price paid, for the rights in question, and that any determination should focus the attention of the parties in that direction. The Committee therefore determined that:
  - 6.1. EUKL, as Train Operator, is entitled to expect that Train Slots, corresponding with any declaration (made under Condition D2.1.2(a)) of "*those Firm Contractual Rights that they intend to exercise*", will be included in the Draft Timetable;
  - 6.2. it is reasonable and responsible that Railtrack should wish to challenge the inclusion of such Train Slots, where, for whatever reason, it considers that there is a high probability that the Train Operator will not be in a position to run the trains;
  - 6.3. it is reasonable therefore, that Railtrack should expect that a Train Operator who is seeking to exercise rights under Condition D2.1.2.(a), in the knowledge that the trains are unlikely to run, to consider declaring that they "*do not intend to exercise*" those rights, as required by Condition D2.1.2(b);

- 6.4. in this particular case of an unregulated Track Access Agreement with a fixed Access Charge, it is unreasonable to expect that the Train Operator should be prepared to relinquish the exercise of Firm Contractual Rights, by declaring under Condition D2.1.2.(b), unless the Track Access Agreement, (or some negotiated variation to the Track Access Agreement (negotiated in accordance with due process)) provides for the abatement of Access Charges that would otherwise be payable;
  - 6.5. if Railtrack wishes to avoid, for reasons of practicality or economy, including in a future Draft Timetable Train Slots corresponding to the Firm Contractual Rights for EUKL's Night Sleeper services, then this reasonable aspiration should be addressed by seeking to negotiate terms such that EUKL has an incentive to have recourse to a declaration made in accordance with Condition D2.1.2(b).
7. If, having engaged in the above process, the parties cannot agree on matters of value, whether in relation to the 2002/3 timetable or future timetables, then it is the view of this Committee that the parties should first consider their options for resolving this difference in accordance with paragraphs 11.1 to 11.3 of the Track Access Agreement, or failing that, by seeking the guidance of the Access Dispute Resolution Committee.

Bryan Driver  
Chairman  
Timetabling Committee