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## **TIMETABLING COMMITTEE**

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### **Determination no. 191**

(following a hearing at Kings Cross on 23<sup>rd</sup> December 2003)

*[Note: previous published determination is determination no 189]*

1. The Committee was asked by Freightliner Heavy Haul (FLHH)
  - 1.1. to clarify certain aspects of the way in which the Part D provisions should have been operated in respect of Bids for Anglo Scottish Coal flows, and
  - 1.2. to issue directions to Network Rail, such that paths are found within the Winter Two 2003 Timetable, sufficient to fulfil FLHH's perception of its rights, specifically for
    - 1.2.1. throughout paths between Ayrshire coal loading points and English Power Stations, over the G&SW route; and
    - 1.2.2. paths between Lanarkshire coal loading points and English Power Stations, over the Beattock route.
2. The appeal was brought in accordance with Track Access Condition D5.1 ("white pages"), and generally fell within the jurisdiction of the Committee to resolve. The Committee noted that there had been a previous occasion when FLHH had sought to dispute Network Rail's proposals for the Winter One 2003 Timetable, in respect of these traffics, but that that appeal had been lodged in a manner which meant that it could not be adjudicated upon.
3. The Committee found that, as matters of fact,
  - 3.1. FLHH held rights in respect of Anglo-Scottish Coal traffics under its Track Access Agreement dated 20<sup>th</sup> June 2003. Those rights are limited, as to quantum, by the cordon caps approved by the Regulator of 2 trains per day per direction through Gretna Green, and 4 trains per day per direction through Carlisle.
  - 3.2. FLHH's Track Access Agreement incorporates the Track Access Conditions; in particular, the provisions of Part D Timetable Change, governing the processes that have to be complied with before rights can be transformed into timetable paths, apply in full.
  - 3.3. At the Priority Date FLHH had not been in possession of an approved Track Access Agreement in respect of the flows in question. FLHH had not made any declaration of rights in respect of these flows, not even in compliance with Condition D2.1.2(c) "*other rights which they intend to exercise or wish to negotiate*". As a consequence, for the duration of the 2003 Timetable, all Bids in relation to these flows had only the low priority, relative to other Bids, set out in Conditions D2.1.4(c) and D3.4.1(d).

- 3.4. A Bid had been made for flows, some of which corresponded with the rights as subsequently approved, for inclusion within the Winter Two 2003 Timetable; this Bid had been made in compliance with Part D.
  - 3.5. Network Rail admitted that this Bid had not, for reason of “*administrative error*”, had not even been progressed in accordance with the timescales laid down for handling a Bid of this level of priority. It had required FLHH to make special representations to cause any attention to be paid to this Bid.
  - 3.6. Other discussions in respect of another Train Operator’s agreements had resulted in a declaration, by Network Rail, that a certain number of previously used freight paths over the G&SW route would not be allocated, but would be retained by Network Rail to cater for subsequent Spot Bids. This declaration was also made to other Train Operators. FLHH had interpreted this advice as giving it some reasonable expectation that it would be enabled to operate the services desired, during the Winter Two 2003 Timetable. Subsequently, FLHH discovered that this was no longer to be the case, the majority of the paths in question having been allocated to another Train Operator, but with no advice given to FLHH as to their change of status.
  - 3.7. As at the date of the hearing, FLHH has been offered 2 paths per day per direction, between Falkland Junction and the Power Stations, but no assurances have been given in respect of the necessary paths between Falkland Junction and the coal loading points. No paths have been identified, or offered, in relation to the services sought over the Beattock route. Network Rail is nevertheless continuing to work towards fulfilling any further coal rights as can be achieved before, or during, the Winter Two 2003 Timetable.
  - 3.8. During the Winter One 2003 Timetable, FLHH has been able to operate some coal services, but only on the basis of Spot Bids, and only where cancellation of other services has made paths available.
  - 3.9. The necessary Priority Date declarations have been made by FLHH for the 2004 Timetable. Network Rail is in discussion with FLHH, and others, to ensure that the Timetable is constructed in a way that permits the fulfilment of all the relevant, and asserted, rights for coal services.
4. The Committee was told that FLHH
    - 4.1. maintained that the continuing uncertainty over what paths would or would not be available was hampering its business planning;
    - 4.2. contended that Network Rail should have sought to include in the Winter Two 2003 Timetable any paths for which rights were included in the Track Access Agreement the subject of a Section 18 Application, and approved on 20/06/2003; and that
    - 4.3. because there had been failures, on the part of Network Rail – including the delay in progressing the Winter Two Bids, the lack of response to the Bid, and the failure to pass on to all operators affected the decision regarding paths for Spot Bids, - its Bids in respect of the coal services should be deemed as accepted; this by analogy with the provisions of D3.5.2.

5. The Committee recorded that
  - 5.1. it was the responsibility of each individual company, Train Operator or Network Rail, to ensure that those managers that it entrusted with managing its commercial interests, had the knowledge of all the relevant contractual provisions. In this case the Track Access Conditions, which are an integral, and overriding, part of the Track Access Agreement, provide clear procedures for the management of the Timetabling process. Of necessity, they are drafted on the basis that any organisation that does not comply with their provisions, must accept the consequent penalties, and constraints, on their business.
  - 5.2. the joint submitting of a Track Access Agreement, for approval under Section 18, does not relieve the Train Operator of its responsibilities for complying with the provisions of Track Access Condition Part D Timetable Change;
  - 5.3. the provisions of D2.1.4(c) provide scope for any Train Operator to secure its options in respect of traffics as yet unrealised. FLHH's failed to take advantage of this provision, and the low priority of its subsequent bids resulted from this failure. Furthermore FLHH failed to pursue Network Rail when it did not receive the appropriate offers;
  - 5.4. Network Rail's "*administrative error*" should be deemed to impose on Network Rail an obligation to seek to furnish paths no worse than might have been provided had that "*administrative error*" not occurred. This is not to imply that paths sought should be accorded any higher priority than that accorded by the provisions of D2.1.4(c);
6. The Committee determined that Network Rail should continue its efforts to make an offer in respect of FLHH's Bid for the Anglo-Scottish Coal Services reasonable requirements. In this respect, Network Rail is directed that where some material benefit for FLHH can be achieved by minor flexing of an accepted offer, this determination should be construed as giving that right in accordance with Track Access Condition D 3.7.5(c). However, any exercise of such a flexing right should be understood as creating a ground for appeal, for the Train Operator affected, under D5.1.1(c).

Sir Anthony Holland

Chairman