
TIMETABLING COMMITTEE

Determination No. 232

(following a hearing at Kings Cross on 1st September 2004)

[Note: previous published determination was determination nos. 211, 212 and 213]

Brief Summary of dispute

1. The Committee was asked by Virgin Cross Country Trains (“VXC”) to direct Network Rail to withdraw, or amend proposals brought forward under Section 3 of the National Rules of the Plan (“Procedure for Altering Rules of the Plan/Rules of the Route other than through the Twice Yearly Process having effect from a Passenger Change Date.” (“PARTP”)). The proposals in question require the Rules of Route to be amended in order that four long-duration all-line blockades could be instituted to allow the renewal of switch and crossing (S & C) works on the Helsby lines at Warrington South.
2. The blockades are proposed for weeks 29 to 32 of 2004, (i.e. 4 weekends in October 2004) and require the diversion via Manchester of all affected VXC services to Scotland; VXC contended that the existence of its Firm Rights, together with the degree of disruption that would result to the travelling public, meant that it was entitled to insist that the works should not proceed, on the dates in question, the earliest of which was no more than a month from the date of this hearing.

The Committee’s standing in respect of the dispute

3. The Committee reviewed its jurisdiction in this case, being a reference made in accordance with paragraph 5.4 of PARTP, and found that, under its powers, as defined in Track Access Condition D5.5.3(a), it had the discretion
 - “(i) to direct [Network Rail] 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 [Network Rail] as to any Train Slots”.
4. The Committee considered that these powers were sufficient for it, having reviewed the evidence presented by the parties,
 - 4.1. to confirm whether or not Network Rail had acted in compliance with the procedures set out in Network Code Condition D and PARTP;
 - 4.2. to direct the Train Operator as to whether or not it was entitled to insist upon the running of certain services; and therefore
 - 4.3. to determine whether or not Network Rail could, within the interpretation of the Track Access Agreement and the Network Code (and any National Rules of the Route/ Rules of the Plan agreed in accordance with Network Code Condition D2.4), proceed with the desired blockades on the dates proposed.

5. In addition, Network Rail could be empowered, under Network Code Condition D4.7.2(c) to vary Train Slots already scheduled in the working timetable, whether those of VXC or another Train Operator, if such is necessary to give effect to the Committee's overall decision.

Summary of Evidence presented

6. The proposed blockades ("the Warrington South possessions") are
 - 6.1. Week 29: Acton Grange Jn and Winwick Jn BLOCKED 1330 Sat to 1800 Sun (disputed between 1330 Sat to 2200 Sat)
 - 6.2. Week 30: Acton Grange Jn and Winwick Jn BLOCKED 1330 Sat to 1800 Sun (disputed between 1330 Sat to 2200 Sat)
 - 6.3. Week 31: Acton Grange Jn and Winwick Jn BLOCKED 2330 Fri to 0500 Mon (disputed between 2330 Fri to 2200 Sat)
 - 6.4. Week 32: Acton Grange Jn and Winwick Jn BLOCKED 0600 Sat to 1800 Sun (disputed between 0600 Sat to 2200 Sat)
7. For VXC it was asserted that
 - 7.1. during the disputed periods all of VXC's hourly services that normally run North from Birmingham over the WCML, and for which it has uncontested Firm Rights, would be required to be diverted via Manchester. The feasibility of such diversions had not been proven.
 - 7.2. during some of the weekends in question there are blockades between Newcastle and Edinburgh. These will have the effects that GNER services will be diverted via Carlisle (with increased journey times), VXC services between Newcastle and Edinburgh will be cancelled, and the VXC stock deployed to substitute for the HST workings north of Edinburgh that GNER will be unable to resource because of the Carlisle diversions.
 - 7.3. there had been undertakings given by Network Rail that there would be no simultaneous blockades of ECML and WCML, and the blockades of ECML had only been agreed after all affected operators had been given assurances that there was no requirement for works to blockade the WCML on the affected weekends.
 - 7.4. as a consequence of the ECML blockades, and the extended journey times between England and Scotland, all journey enquiry systems based upon TSDB, and governed by quickest journey algorithms, will be diverting prospective passengers from ECML services to VXC WCML services. This will continue at least until such time as any affected VXC services have been retimed and the necessary information up-loaded to TSDB. Thereafter the routing will reflect the comparative journey times. In any event there is likely to be severe overloading of all services that do run.
 - 7.5. train planning resources available for preparing revised timetables for weeks 29 to 32 are as yet unidentified. The planning of some of the diversions via Manchester is complicated by the fact that all Virgin West Coast services to Scotland are terminating at Manchester Piccadilly, and services from London to Liverpool are

diverted to run via Manchester Piccadilly. There is no prospect of meeting even the 'T-4' obligations in respect of Informed Traveller for week 29, and possibly not for others.

- 7.6. weeks 29 to 32 coincide with the first weeks of the accelerated Virgin West Coast Pendolino timetable when the whole Industry will be under close public and political scrutiny.
 - 7.7. failing any other possibility of abbreviating the duration of the possessions, VXC would advocate that it give up all Sunday services and that the possessions should be timed to end on Monday morning.
 - 7.8. the works in question at Warrington South have no benefit at all for any of VXC's services or passengers: VXC has no services that need to use the Helsby Lines.
 - 7.9. Network Rail, in seeking to impose these additional blockades to the detriment of VXC's Firm Rights, is acting beyond its contractual powers.
8. For Network Rail it was asserted that
- 8.1. the crossovers and slip crossing in question are due to be renewed as an integral part of the renewal of the Warrington South layout; the planned sequencing of the overall work programme requires that these renewals must precede others.
 - 8.2. the works were originally scheduled for October 2003, but could not proceed because of a major error in defining the possession limits of the necessary blockade. The requirements for Green Zone working on this site can only be met if both main running lines are within the possession.
 - 8.3. the S & C work at the location is already speed limited to 15mph; the state of all components is such that if it were not possible to proceed with renewal there would be an immediate need for a 5mph speed restriction and/or some restriction on the routes available. Such a speed restriction would have a direct impact upon all freight trains arriving or departing the Warrington Freight yards to or from the North, and joining or leaving the WCML. The extended time required to perform these movements would have a serious impact on performance of other services on the WCML, including those of VXC.
 - 8.4. because of the interlocking at the site there are no viable options for interim measures such as plain lining, or clamping of certain routes out of use, so that the works in question could be undertaken at different, later weekends.
 - 8.5. in weeks 29, 30 and 32 the timing of the start and finish of each of the possessions was currently dictated by the requirements of the EWS services to Fidlers Ferry Power Station, which normally resume at 1800 on Sunday. In week 31, when there is a requirement for an extended period of "wheels free" signalling commissioning, it has been possible to obtain the agreement of the power station that a period without traffic will be used to carry out due maintenance. The routing of the coal trains from Liverpool Bulk Terminal is affected by simultaneous works being undertaken at Ditton Junction.

Relevant precedents considered

9. Many issues similar to those raised by this reference had already been addressed in the context of Determination TTC 87, and were set out more fully in Determination NV13, namely that, in any process of consultation as to provisions that might be included in the “applicable Rules of the Route”, the Train Operator has the right to object to the proposal, on the grounds that, were it to accede to the proposal, it would put itself in the position where its Firm Rights were curtailed.

In Determination NV13 the Network and Vehicle Change Committee said,

“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.”

10. 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” (Network Code 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*

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.”

11. In the present circumstances of the proposed possessions at Warrington South, the Committee considered that it had to address the following questions:

- 11.1. Is a late notice Rules of the Route Section 7 possession anything different in kind from a proposal to amend the “applicable Rules of the Route” such as might be tabled before the Development Commencement Date?

- 11.2. Does a Firm Right that has, as a consequence of the timetabling process, been converted into a Train Slot, have the same, a lesser, or a greater claim to prevail against a proposal to amend the “applicable Rules of the Route” than a Firm Right at the start of the Condition D2.1 process?

- 11.3. Do the provisions of PARTP confer upon a proposal for changes to the “applicable Rules of the Route”, a greater, lesser or equivalent standing, as compared with the standing that such proposals have in the context of the operation of Condition D2.1?

Factors influencing, and reasons for, the Committee's decision

12. 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.
13. In respect of the circumstance of the current reference, the parties did not dispute that VXC has Train Slots that are underpinned by Firm Rights for all the trains that will be impeded by the Warrington South possessions. For the Warrington South possessions to proceed will require those Train Slots to be overridden, or otherwise declared as of a lesser priority than a proposal to amend the “*applicable Rules of the Route*” in accordance with PARTP. The Committee must therefore make a choice between two interpretations of the Track Access Agreement and Network Code.
 - 13.1. If the Committee were to acquiesce in a view that in these circumstances the Train Slots corresponding with the Firm Rights of VXC can be curtailed, or extinguished despite the Train Operator's opposition, then it would be entitled to concede to Network Rail the right to take the Warrington South possessions without further restriction.
 - 13.2. By contrast, if the Committee accepted the argument that Train Slots corresponding to Firm Rights always have a higher priority than a proposal to amend the “*applicable Rules of the Route*” then it cannot concede to Network Rail any contractual right to go on with the Warrington South possessions where VXC is not agreeable.
 - 13.3. In these second circumstances the Committee would be within its powers (indeed, would be required) to determine that Network Rail has no contractual authority for incorporating the Warrington South possessions in the “*applicable Rules of the Route*”, and denying VXC the Train Slots. In other words the Committee would be giving Network Rail the general direction that the Warrington South possessions should not proceed on the basis proposed, on the dates in question.
14. In other determinations, such as NV13 cited above, Committees, mindful of the need to run a railway which was never designed to be exclusively a function of the prevailing contracts (unleavened by any application of practical common sense), have sought to subject extreme decisions (such as a direction that the Warrington South possessions should not proceed) to some sort of tests of reasonableness. Such tests, in the case of the Warrington South possessions would include considerations of whether there was any safe alternative time for undertaking the works, or whether the impact on both VXC services and the travelling public could be alleviated were other works, such as those on the ECML, to be cancelled for the weeks in question.
 - 14.1. The Committee noted that several months had elapsed beyond the date (October 2003) originally scheduled for the works to proceed, before there had been any discussions with any affected parties as to a possible re-scheduling of the works to the dates now proposed. During that period of indecision commitments were made in respect of other works, including those on the ECML. The Committee was deeply dissatisfied that the Network Rail representatives before them, although representing corporate Network Rail, could give no evidence that any efforts had

been made to mitigate the effects of the late notice Warrington South possessions on VXC, including, for example, by the cancellation of ECML works. The failure properly to plan the possessions scheduled for October 2003 are not in any way a mitigating factor supporting any case for scheduling the Warrington South possessions in October 2004. This failure has been further aggravated by the time allowed to elapse before new proposals were made, and by Network Rail's programming of simultaneous closure of both East and West Coast Main Lines.

- 14.2. The Committee noted that, in the event of the possessions taking place, there would be a severe effect on planning processes and timescales. The volume of planning work required by VXC and Network Rail would affect the recovery of Informed Traveller and jeopardise the achievement of 'T-4' by the date required by the Office of Rail Regulation. Furthermore, the late planning for the possessions would result in very poor advice and customer service.

The Committee's determination

15. The Committee determined that

- 15.1. amendment of the "*applicable Rules of the Route*" could be achieved only by agreement of the parties or by determination of the Committee. If the Committee were to be satisfied that the circumstances so required, it might direct a Train Operator to accept a temporary curtailment of its Firm Rights and/or amendment of agreed Train Slots.
- 15.2. in this particular case, the condition of the track, (and in particular the switches and crossings) at Warrington South appeared to be so serious that it would not be prudent to defer the necessary works beyond the proposed dates for the Warrington South possessions. Furthermore,
- 15.3. were such a deferral to occur, it would be likely to lead to deferral of other works in the Warrington area, which would, in turn, be likely to affect overall WCML performance for a significant period of time. In these circumstances,
- 15.4. Network Rail should be permitted to proceed with the planned works at Warrington South and should be required to negotiate with VXC and other affected Train Operators to produce the most satisfactory alternative train plan possible in order to minimise detriment to customers.

A Footnote

16. The Committee registered its extreme displeasure and concern that Network Rail's failure to plan the works at Warrington South in accordance with proper timescales had placed the Committee in a situation where its decision as to whether or not the works should be permitted to proceed would, no matter which way the Committee decided, inevitably lead to significant customer disbenefits and consequential political damage to the industry, as illustrated in paragraphs 14.2 and 15.3 above.

Bryan Driver

Chairman of Committee