
TIMETABLING COMMITTEE

Determination Nos. 242 and 244

(following a hearing at Kings Cross on 12th October 2004)

[Note: previous published determination was determination no. 232]

Brief Summary of dispute

1. The Committee was asked, in a submission made jointly in the names of both First Great Western (GWT) and First Great Western Link (FGWL) (the “First Group companies”) to determine that Network Rail, in its offer for the December 2004 Timetable, had not, in respect of a number of services, complied with the Train Operators’ rights and/or Bids; and that Network Rail should be directed to amend the December 2004 Timetable to remedy this situation.
2. The general position was that, with the acquisition, by First Group, of the FGWL franchise, there was scope to introduce a so-called “Wider Benefits” timetable, providing a service to the public in which the elements provided by FGW were complementary to those provided by FGWL. The First Group companies had evolved the Wider Benefits timetable over the course of the past 12 months, and it had informed the formulation of both the new Franchise Agreements, and the Timetable Bids for December 2004. The practical effect, in those instances where the First Group companies considered that their aspirations had not been met, was that whilst some of the issues raised related to FGW services, and some to FGWL (whence nominally two separate references), potential remedies were likely to affect both. For this reason, the parties considered that all the issues should be presented in a single submission, permitting the Committee to consider them at a single hearing.
3. The specific Issues before the Committee, and the remedies sought by the appellants, were six, namely
 - **Issue 1:** the irregular intervals between the six inter-peak departures from **Bedwyn to Paddington** in the offer should be changed to provide a regular hourly interval service.
 - **Issue 2:** the Train Slots, in the offer, for three **Paddington to Cheltenham** services, did not comply with the contracted **Maximum Journey Times** in the GWT Track Access Agreement. This issue was inextricably linked with **Issue 3**, which was that the **Reading stops** bid for these same Paddington to Cheltenham services had been improperly removed from the offer, and should be restored.
 - **Issue 4:** in the offer, one **Paddington to Greenford** return service has, on Wednesdays, been withdrawn, but should be re-instated.
 - **Issue 5:** the service from **Plymouth to Paddington** has been improved to provide an early morning arrival at 09:00 (and a three hour journey time); however, the existing service from Plymouth over the Berks and Hants, previously timed to arrive at 09:30 has now been scheduled, in the offer, for an 09:38 arrival. This should be amended to reinstate the 09:30 arrival.

- **Issue 6:** the timings, in the offer, of those services between Reading and Oxford that serve Didcot, and the timings of Bristol to London services serving Didcot are such that passengers from **Bristol to Oxford** have a 56 minute wait at Didcot. The departure time, from Didcot, of the Reading to Oxford service should be retarded to provide a connection.

The Committee's standing in respect of the dispute

4. The Committee noted that in every case the issue raised was one where the appellants were entitled, under Network Code D5.1.1, “*to refer the matter to the Timetabling Committee for determination*”.
5. The Committee decided that, in respect of each of the issues before it, it was required to determine on three complementary points, namely
 - 5.1. had the appellants established that they had the necessary rights to the paths and train specifications claimed? And, if so,
 - 5.2. was the offer made by Network Rail compliant with those rights, including taking account of the due application of the Decision Criteria? And, if not,
 - 5.3. what directions should be given as to the remedies to be applied, including in respect of timescales?

Issues of fact and contract considered by Committee: general considerations common to all Issues

6. The Train Operators' rights derive from the combination of their Track Access Agreements, and the extent to which they have asserted their contractual rights, or aspirations, through the timetabling process, in accordance with Network Code Condition D3.2. In these references, the Committee found as matters of fact that
 - 6.1. GWT rights are contained in the Track Access Agreement which was valid at the priority date and continues in force until April 2006;
 - 6.2. the rights held by the former Thames Trains Ltd, now become FGWL were contained in a Track Access Agreement which expires on 11th December 2004. Although there has been discussion between Network Rail and FGWL as to future Track Access Agreement, none has yet been agreed. FGWL has lodged a Section 17 application with the ORR.
 - 6.3. The Wider Benefits timetable has been the subject of much discussion between the First Group companies and the SRA, and has also been reviewed by the Strategic Access Planning Unit of Network Rail.
 - 6.4. A Wider Benefits timetable was notified, by the First Group companies, to the Timetabling Conference in February 2004.
 - 6.5. Network Rail is of the view that the Strategic Access Planning Unit was asked to consider, and advise the SRA on the feasibility of, two distinct versions of the Wider Benefits timetable, and that the version “notified” at the Timetabling Conference, was different again.
 - 6.6. The operative franchise agreements for GWT and FGWL appear to have been formulated in the expectation of the delivery of a Wider Benefits timetable. However, Network Rail

asserts that “*the terms of the Franchise Agreement were only shared with Network Rail at a late stage and so the ability of the timetable to reflect precisely the terms of the Agreement was impaired.*”

7. The Committee also took account of the particular pressures on the Train Planning process arising out of decisions within the wider industry to implement the new West Coast Main Line service in September, combined with a move to a December Timetable Change date, major re-casts of the South West Main Line, and Cherwell Valley timetables, all as well as the introduction of the GWML Wider Benefits timetable. The Committee noted that
 - 7.1. the total national Train Planning resource had been put under considerable strain by having to deal with so many major revisions; the Timetable production process had not itself run to time, the Offer had been several weeks late, and this in turn had affected the timing of references to the Committee.
 - 7.2. there had been a widespread debate, leading to a broad national consensus, as to how the various major re-writes should be co-ordinated and prioritised.
 - 7.3. although no one Train Operator’s services are given any degree of priority over another, it had been considered appropriate, in the interests of the most efficient operation of the Network as a whole, that each of the re-writes was required to take account of the need for coherent, regular paths for long distance services such as Cross Country and Freightliner. It followed that any need to adjust those long distance paths would have potential implications for all the re-cast timetables.
 - 7.4. the Timetabling process, by its nature, relies in part on the energy with which each Train Operator champions, and defends its own particular interests. In addition, should the accommodation of specific aspirations require Network Rail to contemplate flexing the times of services of other operators, there is no inhibition on any Train Operator entering into a dialogue with those other Train Operators to facilitate that end.
8. The Committee considered what importance it should attach, in respect of its jurisdiction as the Timetabling Committee, to the extensive abstracts from the relevant Franchise Agreements that had been laid before it. It noted that, in the Decision Criteria “(*none of which necessarily has priority over any other*)” criterion (b) states the desirability of “*enabling a Bidder to comply with any contract to which it is party (including any...franchise agreement to which it is a party), in each case to the extent that Network Rail is aware or has been informed of such contracts*” (Network Code Condition D6(b)).
9. The Committee considered that whilst this provision required Network Rail to take the fullest possible cognisance of the GWT and FGWL Franchise Agreements, giving, as they do, the background justification for bidding for the Wider Benefits timetable, that should not imply that Network Rail take a lesser cognisance of the contractual obligations of other Train Operators (Freight or Passenger).
10. The Committee therefore considered that in reaching each determination as to the rights of the parties, and the extent to which they had been fulfilled in the Offer, it would need to take account of the magnitude of the timetable revision that had been worked up for the December 2004 Timetable, the extent to which there had been scope for all parties affected by the changes to make adequate representations in support of their own interests, and how

adequately, in the Committee's judgement, the parties had promoted and protected their own interests.

11. In respect of any determination in relation to a specific remedy sought, the Committee considered that, even were it to find that the Offer did not comply with asserted rights, it should weigh the magnitude of the non-compliance against the difficulties inherent in making further fundamental changes for implementation on and from 12th December 2004, before making any direction in respect of consequential changes.

The Issues in detail

12. The Committee was pleased to be advised that Network Rail had had further thoughts regarding the Greenford services (**Issue 4**), and that the proposed service reductions would not be made in the December 2004 Timetable.
13. Issues 1 (**Bedwyn**), 2 (**Cheltenham Journey Times**) and 3 (**Cheltenham Calling Patterns**), are all linked at the practical level, inasmuch as any direction given to modify a train path on one account would have an impact upon another. However, the nature of the rights enjoyed by the respective First Group companies is materially different in legal and practical force.

(Issue 1) Bedwyn to Paddington Up services; service pattern

14. In respect of **Bedwyn** services, FGWL has no agreed Firm Rights beyond 11th December 2004. However, the parties agree that they are in active discussion of the future form of rights, but have not as yet reached such agreement as is necessary to submit a S18 approach to the Office of Rail Regulation.
15. The Committee noted that this set of services operating in the inter-peak period had been the subject of another determination by the Committee in regard to the Summer 2004 Timetable (ttc203). That determination had focussed upon the diversity of rights held by the then appellant, Thames Trains Ltd, and the extent to which they were incorporated into a main, or supplemental Track Access Agreements. In that case, the Train Operator was asserting a right to a path which had operated in the past, but which Network Rail did not propose to agree to for the Timetable in question.
16. In its Determination ttc203 the Committee set out the following principles

- “*The Committee noted that, had TTL limited its declaration to a quantum of rights that did not depend, for its fulfilment, upon the agreeing, by Network Rail, of supplemental rights, then the case would have fallen to be determined on the merits of the Network Rail offer as compared with the asserted Firm Rights and the Decision Criteria. In this case, TTL had sought additional rights, over and above those in the base contract. In these circumstances the Committee acknowledges that the decision as to which service is allocated to an unqualified quantum right, and which bid is left unfulfilled, can only be Network Rail's. Where new rights, even only quantum rights, are sought, it is beyond the competence of this Committee to determine whether or not such rights should be granted.*
- *The Committee determined that, given that the parties were agreed that the offer made was compliant with the rights that do exist, then, in circumstances where no substantive rights existed, and where Network Rail has declared that it is not prepared to concede even expectations of such rights, there can be no grounds for the Committee to direct Network Rail to include a path for 1K29 in the offer for the 2004 Timetable.” (ttc203 paras 7and 8)*

17. According to the submission,

- “*FGWL in its current track access contract has firm right for six trains commencing at Bedwyn or Newbury as specified by the train operator to form an hourly interval (max 3' flex) from 11.xx to 16.xx departing from Reading in the Paddington – Newbury / Bedwyn service group. FG believes therefore that these services should therefore be associated with [Condition] D3.2.3 (b) (i.e. level two), and it indicated this in its Notification statement.*
- *The rights sought in the Section 17 application currently with the ORR include a 60 minute interval on Bedwyn – Paddington services throughout the day, with provision for maximum variation of + or – 3 minutes.”*

18. Network Rail, by contrast, was of the view that a regular hourly clock-face pattern of services from Bedwyn to Paddington had been made infeasible because of the major changes to the clock-face times of the generality of services in and out of Paddington, in order to deliver the Wider Benefits timetable. For this reason Network Rail asserted that it would not, of its own volition, enter into a new Track Access Agreement that imposed regular interval obligations in respect of the timings of the Bedwyn services.

19. The Committee considered that this created a situation very comparable with that addressed in ttc203; in this case, however,

- 19.1. there is every prospect that the parties will agree the quantum of services to operate, and therefore the Train Operator might be deemed to possess rights with the priority in Network Code Condition D3.2.3 (b); and,
- 19.2. short of a determination by the ORR, there is no prospect of these quantum rights being complemented by rights in respect of timing, and therefore it would be appropriate to conclude that there is no “*expectation of rights*” in respect of timing.

20. It follows therefore, in the view of the Committee, that, provided the offer made is compliant with that aspect of the Bid which is supported by an expectation of rights; it does not require to be compliant with matters for which there are no rights, or for which there is no expectation of rights. In the view of the Committee this was the case in this instance and therefore it would be appropriate to direct the Train Operator that it had received a compliant offer in respect of the Bedwyn inter-peak services.

(Issues 2 and 3) Paddington to Cheltenham Down services: journey times and Reading calls

21. In respect of the **Cheltenham** services (**Issues 2 and 3**) FGW presented evidence that it does have current Firm Rights in respect of quantum, and journey times in relation to stopping patterns, but not in relation to departure times, for all the services in question. Furthermore those rights had been duly asserted through the bidding process.
22. The Committee noted that there is a peculiarity in the formulation of the rights in Schedule 5, inasmuch as the Maximum Key Journey Times do not correlate directly with the number of stops made. In particular
 - 22.1. the Maximum Key Journey Time for a train calling at Didcot Parkway, Swindon, Kemble, Stroud, Stonehouse and Gloucester is 139 minutes. By contrast

- 22.2. the Maximum Key Journey Time for a train calling additionally at Reading, as well as at Didcot Parkway, Swindon, Kemble, Stroud, Stonehouse and Gloucester is 135.5 minutes.
23. The difference in these Maximum Key Journey Times, it was suggested by the appellants, derived from the actual timings of past services. In the present case, GWT had bid for three services to Cheltenham, departing Paddington at 10:xx, 12:xx and 15:xx, with a requirement that each train call at Reading, as well as Didcot Parkway, Swindon, Kemble, Stroud, Stonehouse, and Gloucester, and complete its journey within 135.5 minutes.
24. Network Rail, in its offer had removed the Reading stop from each of these trains, and also, in the case of those offered at 10:36 and 12:36, timed them for a journey time of 136 minutes. The Committee concluded that such offers were not compliant with the bid because
- 24.1. the Reading stops had not been incorporated into the three trains, and
- 24.2. the maximum journey times, whilst compliant with the stopping patterns in the offer, are not in every case compliant with the stopping patterns bid for.
25. The Committee heard representations from Network Rail that the three xx:36 trains had originally been bid for either an xx:18 or an xx:48 departure time. Such departure times were, however, at odds with other changes made in fulfilment of the principal aims of the Wider Benefits Timetable; in particular, the cumulative effect of all the changes, as they affected Reading, was that, if these Cheltenham trains were to be timed such that they could call at Reading, it would be at the expense of proposed (and bid for) Down services to Bedwyn. The parties agreed that there had been discussion, leading to agreement, that, given no other available option, the need to accommodate the Bedwyn service, even though as yet unsupported by rights, should take precedence over the Cheltenham service (for which Firm Rights existed). The parties were also agreed that, at this stage in the timetabling process, there were no obvious ways to achieve full compliance with the Cheltenham bids, unless Network Rail were prepared, or directed, to make nationwide adjustments to the Cross Country and Freightliner service paths.
26. In these circumstances, and taking account of the consultations described, the Committee considered that, whilst Network Rail was in breach of its contract with FGW in respect of the stopping patterns for the three Cheltenham services, the breach was not such that the proportionate remedy would be to direct Network Rail to undertake a further retiming of the December 2004 Timetable.

(Issue 5) Arrival time of 05:44 Plymouth to Paddington service at Paddington

27. GWT presented evidence that, in past timetables, when this service had been the earliest arrival in Paddington, it had traditionally arrived at 09:30. A new, accelerated service leaving Plymouth at 06:00 was timed to arrive in Paddington at 09:00, and the 09:30 arrival had been put back to 09:38. GWT was pressing that the arrival time of 09:30 be restored.
28. Network Rail advised the Committee that the deceleration of the 09:38 arrival arose, in part because of the time allowance needed in the Taunton area to permit the faster train to overtake, and also because other re-timings in the Reading area required the Plymouth train to follow services that it had previously preceded. GWT asserted that there were means by which the earlier arrival time could be re-instated, but conceded that these depended on a Cross Country service reverting to a slot no longer available, and other adjustments to main line services.

29. The Committee noted that the Plymouth services in question are a function of rights as to quantum, but not, in any case, as regards to timing window. Furthermore, the Train Operator has been consulted in respect of the relative priority to be given to the three hour journey time of the new service, and the arrival time of the 05:44, and has accorded the 06:00 departure the higher priority. Given this consultation, and given that there are no rights of GWT that have not been complied with in the Offer, the Committee was of the view that there were no grounds for directing Network Rail to make further adjustments, and good grounds for directing the Train Operator to accept the Offer.

(Issue 6) Bristol to Oxford connections at Didcot

30. The Committee noted that, at the initiative of the SRA, a through Oxford Bristol Oxford service had been withdrawn from the First Group companies' franchise obligations, and the service withdrawn from the timetable. As a consequence of all the other re-timings within the Wider Benefits timetable, passengers from Bristol for Oxford were faced with a wait from an xx:28 arrival to an x1:24 departure. The First Group companies submitted that this connection should be improved by an appropriate later re-timing of the xx:24 departure for Oxford.
31. The Committee noted that the offers as made, for the services affected, comply with all rights, and all bids made, and that that there are no unfulfilled contractual rights. The Committee therefore declined to direct Network Rail to make further adjustments to these services.

The Committee's determinations in summary

32. In making each of the detailed determinations in this reference, the Committee wished to emphasise that, where it made a direction that a Train Operator should accept the offer made as fulfilling the letter of the existing rights, this did NOT imply that
- 32.1. the Train Operator was being discouraged from including in the contents of future bids qualitative improvements to existing services, whether within the scope of existing rights, or requiring revisions to agreements. Equally
- 32.2. Network Rail is not relieved of the duty to exploit the capacity of the Network, and the scope offered by the Decision Criteria, to achieve the most efficient and customer friendly service patterns.
33. The Committee therefore determined as follows.
- 33.1. In respect of Bedwyn services, FGWL has no agreed Firm Rights beyond 11th December 2004. However, the parties agree that they are in active discussion of the future form of rights, but have not as yet reached such agreement as is necessary to submit a S18 approach to the Regulator. For the purposes of this determination the Committee concluded that, as regards the quantum of rights for the Bedwyn Service, there was the prospect of agreement, and that therefore the Train Operator might be deemed to possess rights with the priority in Network Code Condition D3.2.3(b). This is not the case in respect of any pattern of services, where Network Rail has been clear that it does not propose to agree, of its own volition, to any limitations on the timings in each hour to meet the quantum of services. Therefore the Committee finds that

- 33.1.1. the offer made is compliant with the expectation of rights in respect of quantum;

33.1.2. there is no requirement for it to be compliant in respect of specific timings or pattern of timings; and

33.1.3. the Train Operator is directed “*to accept the submission made by Network Rail as to [the] ... Train Slots*” (Network Code Condition D5.5.3(a)(ii)).

33.2. In respect of the Cheltenham services (Issues 2 and 3) FGW does have Firm Rights in respect of quantum, and of journey times in relation to stopping patterns, but not in relation to times. The rights have been duly asserted through the bidding process and the offer made is NOT fully compliant in the following respects

33.2.1. three trains bid for a Reading stop have not been timed for such stops; and

33.2.2. the maximum journey times, whilst compliant with the stopping patterns in the offer, are not in every case compliant with the stopping patterns bid for.

33.3. In respect of all of these three issues the possibilities for remedy are limited, in respect of the December 2004 Timetable, given that the problems derive from a combination of Network wide re-timings of VXC and FL services, as well as a major re-specification of the FGW and FGWL services. Although some of the immediate problems might be soluble/might not have arisen had some of the VXC re-timings not been undertaken, it is not feasible to contemplate the degree of disruption, to the whole Network, that would be implicit in any attempt further to retime these services. Furthermore, the Committee takes account of the dialogue between the parties in respect of an alternative proposal improving the Cheltenham service but at the expense of further detriment to the Bedwyn service, and the conclusion reached that the solution now proposed was a least bad compromise. The Train Operator is therefore advised that the Committee is not prepared to direct Network Rail to make further modifications to the offer in respect of these three trains for the December 2004 Timetable.

33.4. That said, and for the avoidance of doubt, Network Rail is directed that

33.4.1. in respect of the Cheltenham services, any future Timetable must demonstrate full compliance with any compliant bids; and,

33.4.2. in respect of the Bedwyn service, whatever the future Track Access Rights, the Train Operator is not precluded from bidding for as near a regular pattern as is deliverable, and neither is Network Rail precluded from using its considerable powers, including in relation to the offers made to other Train Operators, to seek to provide the most regular service pattern possible.

33.4.3. in either case, if other adjustments to the Timetable provide scope for the First Group companies’ aspirations to be met more fully, without compromising the service to other Train Operators, this opportunity should be exploited.

33.5. The Committee notes that Network Rail proposes to re-instate the Greenford services in question for the December 2004 Timetable and will introduce new proposals for a future Timetable.

33.6. In respect of the arrival times for the morning Plymouth services services, the Committee finds that the offer for the December 2004 Timetable is compliant with the substance of FGW’s rights in respect of Quantum, and that there are no rights in respect of timings

with which it is not compliant. The Train Operator is therefore directed “*to accept the submission made by Network Rail as to [the] ... Train Slots*” (Network Code Condition D5.5.3(a)(ii)). Again the Committee considers that this determination in this instance should not prevent the attempt being made to achieve an arrival before 09:30, for the 05:xx from Plymouth, in any future timetable.

33.7. In respect of the connections at Didcot between services from Bristol, and services to Oxford, the Committee finds that, while such connections might well be desirable, they are not a matter of Right. Furthermore, the poor connections in this instance are in part due to the re-timing of services to and from Bristol. The Train Operator is therefore directed “*to accept the submission made by Network Rail as to [the] ... Train Slots*” notwithstanding the impact of the present proposals upon connections.

Bryan Driver

Chairman of Committee