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## ***TIMETABLING COMMITTEE***

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### **Determination No. 93**

(following a hearing at Kings Cross on 11<sup>th</sup> January 2000)

*[Note: previous published determination was determination no.91]*

- 1 The Committee was asked by Great North Eastern Railway (GNER) to rule that Railtrack had exceeded its powers when flexing Bids for the Summer 2000 Timetable in respect of Trains SO 1S08 (0620 Doncaster - Glasgow), SX 1S21 (1100 London Kings Cross - Glasgow), and SO 1S21 (1100 London Kings Cross - Glasgow).
- 2 The Committee noted that the reference was brought in accordance with Access Condition D5.1.1(c), and fell within the jurisdiction of the Committee. However the Committee was concerned that, notwithstanding early warnings of the dispute, no papers had been produced for the Committee's consideration until the very last moment. This was particularly regrettable because the possible options proposed by the parties for the resolution of the dispute had potential direct impact upon three other Train Operators, English Welsh & Scottish Railway (EWS), Northern Spirit (NS), and ScotRail Railways (SRR).
- 3 The Committee noted that all three affected Train Operators had been invited to be represented at the hearing. EWS attended and made representations
  - 3.1 expressing its concern that Railtrack had, without EWS' prior consent, included extracts from its Access Agreement in respect of affected train services; this concern was noted.
  - 3.2 concerning the implications, for EWS, of a range of changes proposed by Railtrack to the running of 6N04 Lindsey Oil Refinery to Jarrow.
- 4 NS and SRR had declined to be represented; SRR had submitted a written commentary on some aspects of its interest in the case.
- 5 The Committee noted that the dispute arose because GNER alleged that Railtrack had exceeded its Flexing Right for the three trains in question. Railtrack conceded that this was the case, but alleged that the flexes in question could be justified as the appropriate exercise of its discretion, taking account of the Decision Criteria, and the nature of the rights of the other Train Operators on the routes in question.
- 6 The Committee considered the following to be the key matters of fact:
  - 6.1 In respect of SO 1S21, and SO 1S08, the offer gives published arrival times at Edinburgh and at Glasgow closely comparable to the equivalent trains in the Winter 1999 National Rail Timetable (NRT);
  - 6.2 In respect of SX 1S21 the offer gives a published departure time from Edinburgh 10 minutes later than the equivalent time in the Winter 1999 NRT,

although the published arrival time is proposed as only three minutes later than in that Timetable; the arrival time at Glasgow is 7 minutes later.

- 7 With regard to the rights of the parties, the Committee noted the following key features, on the basis of the information put before them:
- 7.1 GNER has clearly defined Firm Contractual Rights (FCRs) in respect of the quantum of trains to be run, and the thirty minute envelopes defining the departure times from Kings Cross. There is no explicit Journey Time protection on the services in dispute; however, there are effective maximum Journey Times, defined contractually by reference to point-to-point running times and the allowances shown in the Applicable Rules of the Plan.
  - 7.2 Railtrack enjoys the general Flexing Right as defined within the Access Conditions, but this is qualified, in GNER's Access Agreement, to be no greater than
    - 7.2.1 7 minutes affecting 1S08, and
    - 7.2.2 10 minutes affecting 1S21 (SX and SO).
  - 7.3 There is no explicit datum definition of the train times against which flex is to be assessed.
  - 7.4 There appeared to be confusion between all parties as to the precise definition of some allowances, and whether they derived from Engineering needs, pathing requirements, or were the consequence of Network Changes.
- 8 The Committee noted, to the extent that evidence was presented, the Firm Contractual Rights of the other Train Operators affected. In particular, Railtrack drew attention to the need, that had been uncovered, to insert an additional three minutes to one sectional running time for 6N04; this in turn imported a decisive adjustment to the running time for SX 1S21, leading to later times at Edinburgh and loss of a path beyond, via Midcalder Jct.
- 9 The Committee did not consider it appropriate to assess other factors affecting the detailed times of the trains in dispute, but did address the following matters of principle:
- 9.1 Railtrack's Flexing Right is defined as "*consistent with the Firm Contractual Rights (if any) of the Bidder*". In this case FCRs clearly exist for all the Train Operators, and therefore Railtrack's flexing right is constrained by those FCRs.
  - 9.2 To the extent that Railtrack may have acquiesced in the agreement (and submission for Regulatory approval) of Access Rights that may, in certain combinations, be mutually incompatible, then Railtrack must bear the responsibility for initiating the resolution of such conflicts by means of appropriate amendments to Access Agreements.
  - 9.3 In respect of trains where there had been previous tacit acceptance of a degree of flex exceeding that to which Railtrack is entitled, then this could reasonably be interpreted as a preparedness on the part of the Train Operator to accept some amendment to the Access Agreement. However, Railtrack is not entitled to presume that such acceptance in one Timetable would also apply in a subsequent Timetable; nor is it relieved of the responsibility, spelled out in

Access Condition D3.6, to consult properly in each and every instance where it has exercised a Flexing Right.

- 10 The Committee therefore determined that:
  - 10.1 GNER does have clear Firm Contractual Rights in respect of the three trains in dispute, and Railtrack is required to make offers that are in accordance with those Firm Contractual Rights;
  - 10.2 the present offers do not fulfil that requirement, although those in respect of SO 1S21 and SO 1S08 do broadly align with previous timetables;
  - 10.3 Railtrack must discharge the responsibility for ensuring that it honours, in its offers, the asserted FCRs of all Train Operators;
  - 10.4 to the extent that this process brings out areas where there may be potential conflicts between FCRs, Railtrack has the responsibility for resolving those conflicts by the exercise of Flexing Rights or by negotiating amendments to Agreements as appropriate;
  - 10.5 Railtrack should immediately re-examine, with all the Train Operators involved the timing arrangements offered for the GNER trains in dispute; for the Summer 2000 Timetable, taking account of the delays in presenting this reference, new offers should achieve the closest compliance with GNER's FCRs as is reasonably practical; for subsequent Timetables offers should achieve absolute compliance with GNER's FCRs;
  - 10.6 to the extent that this may imply the exercise of a Flexing Right as prescribed in Access Condition D3.6.2(b) then Railtrack is given the necessary authority; the Train Operators who might thereby be affected are, by the same token, given the right to refer any such flexing decisions as they may regard as unreasonable for consideration by this Committee;
  - 10.7 Railtrack and the Train Operators should, without delay, conduct a joint review of the content of the allowances affecting GNER services. This should be with a view properly to differentiating those that relate to engineering works, from others relating to pathing, performance allowances or to timing adjustments, or to the un-looked for consequences of Network Change;
  - 10.8 Railtrack should take care to ensure that the consequences of Network Changes are correctly understood, and, where appropriate, reflected in Rules of the Plan.

Bryan Driver,  
Chairman