
TIMETABLING COMMITTEE

Determination No. 95

(following a hearing at Kings Cross on 17th January 2000)

[Note: previous published determination was determination no.93]

- 1 The Committee was asked by Northern Spirit (NS) to rule that Railtrack had been incorrect, in relation to the Summer 2000 and Winter 2000 Timetables, to refuse to amend the manner of incorporating Performance Allowances into Train Slots, as requested by Northern Spirit.
- 2 The Committee noted that the *prima facie* issue is that NS has expressed the wish that, starting from the Summer 2000 timetable, it required performance allowances to be shown as advertised differential arrival times at stations rather than <> times on the approach. The matter at issue related to a provision in a bilateral agreement between the parties which states that “*Allowances can be either <> or adv[ertised] later or a combination of both except where specifically shown.*”
- 3 The Committee questioned the status of such a document, and its locus to determine such a dispute. However it noted that
 - 3.1 the Railtrack LNE Zone Rules of the Plan now includes, in relation to Timing Allowances, the text “*In most cases, it has been agreed with operators that to help pathing, performance allowance can be either moved within certain limits, or added to station dwell time with advertised differentials*”, and that this has the same effect as the words in the bi-lateral agreement;
 - 3.2 the dispute relates to the manner of formulating the offer to NS, and not to the content of the Rules of the Plan, and therefore
 - 3.3 is a matter which falls to be adjudged by the Timetabling Committee, as a reference in accordance with Access Condition D5.1.1.
- 4 The Committee also noted that
 - 4.1 there was disagreement as to whether the sense of “*Allowances can...*” is that it confers a right on NS to opt unilaterally for one convention or the other, or, as Railtrack contend, sanctions either convention, leaving the parties to agree which is the most appropriate in the specific circumstances;
 - 4.2 there had been, since 1992, a documented presumption, for the services now operated by NS, that “*where possible<> not to be used and station allowances increased by amount of performance allowance with advertised later arrival.*”; but that there was no evidence that this understanding had been given any contractual force, nor that it had been pursued, as a goal, with any great energy;
 - 4.3 NS had included a statement of their wishes in relation to the expression of allowances in their Declaration of Aspirations, but that

4.4 there had not otherwise been significant dialogue with Railtrack on this matter, between the date of that Declaration, and the issue of the Draft Timetable; the Draft Timetable had confirmed that NS's aspiration had generally not been met;

- 4.5 the dispute had originally been raised in connection with the Summer 2000 Timetable, but, given a lack of progress to that goal, was now being pursued by NS with a view to introduction in the Winter 2000 Timetable.
- 5 The Committee was at pains to establish that, whichever convention was adopted in regard to allowances, the effect, when translated into a workable timetable, would be neutral in respect of the calculation of any payments due under any Performance Regimes; this assurance was given by the Parties.
- 6 The Committee determined that
- 6.1 the verb “can” denotes capability only, and does not confer any implication of right or direction; there is an implication that preferences as to the manner of expressing allowances should be expressed and considered, but that this is not an issue where the views of either party should necessarily prevail over the other;
- 6.2 if the manner of expressing allowances is a characteristic of significance to NS in its Bid, then NS is entitled to express that, as an aspiration, in its Declaration, on or before the Priority Date;
- 6.3 Railtrack is required to address such a characteristic of NS’s bids in the same way as it is required to seek to fulfil any other characteristics of Bids; however, for the avoidance of doubt
- 6.3.1 NS is not entitled to look for such characteristics to be honoured as a matter of right;
- 6.3.2 Railtrack could reasonably be expected to ensure that, where a Bidder has expressed an aspiration in relation to a bid, that aspiration is taken into account by all who, within Railtrack, are responsible for the detailed preparation of the Timetable,
- 6.3.3 where a default aspiration as to a characteristic has been expressed by a Bidder, then Railtrack should normally be expected to give reasons in those instances that it proposes not to meet that aspiration.
- 6.4 Nothing in this determination should be construed as detracting from Railtrack’s responsibility for producing a workable Timetable, and for exercising its discretion, subject to the Decision Criteria, and the rights of challenge within Access Condition D, as to which characteristics of Bids can reasonably be met in such a timetable.
- 6.5 Finally, the Committee drew the Parties’ attention to Access Dispute Resolution Rule A5.11.7, and wished them to understand that it had considered whether the conduct of the parties, leading up to this reference, was so lacking in substance that there could be justification in raising an order for costs against the parties. However the Committee had decided, in this case, not to invoke this power.

Bryan Driver

Chairman