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## **TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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### **Determination in respect of reference TTP10** *(following a hearing held at Kings Cross on 9th June 2005)*

#### **The Panel**

**Colin Berry:** elected representative for Franchised Passenger Class, Band 1  
**Shaun Fisher:** elected representative for Franchised Passenger Class, Band 2  
**Simon Barrett:** elected representative for Non-Passenger Class, Band 2  
**Paul Richardson:** appointed representative of Network Rail

Panel Chairman: **Bryan Driver**

#### **The nature of the dispute and the Parties**

1. The Panel was asked by English, Welsh & Scottish Railway Limited (“EWS”) to determine that Network Rail Infrastructure Ltd (“Network Rail”) should allocate to EWS train Slots 1M48 and 1G02 in the June 2005 Timetable.
2. GB Railfreight Limited (“GBRF”) a party with a possible interest in the dispute, submitted a statement for the Panel, and attended the hearing.

#### **The nature of the dispute in relation to the jurisdiction of the Panel and consequential Directions to the Parties**

3. The appeal was made in accordance with Condition D5.1.1 of the Network Code, and therefore falls to be determined by a Timetabling Panel.
4. It relates primarily to the treatment of bids from EWS for Train Slots for 1M48 09:49 SX Mossend to Willesden PRDC (Princess Royal Distribution Centre), and 1G02 19:06 SX Willesden PRDC to Walsall. These Bids were originally made in December 2004, as Bids for the June 2005 Timetable, and Spot Bids for the intervening period between the commencement of traffic and the start of that Timetable. EWS asserts that these bids relate to traffic flows that are new to rail, but which cannot, as yet, commence to pass because of problems with obtaining access rights to use PRDC.
5. EWS Track Access Agreement, Clause 6.4.1 places on the Train Operator the obligation that *“In order that railway vehicles under the control of the Train Operator be promptly*  
*(a) accepted off the Network; and*  
*(b) presented onto the Network,*  
*ensure that in respect of each Nominated Location suitable access has been granted to it in relation to such location by the party which controls the relevant facility connected to the Network at the Nominated location”.*

6. The matter at the centre of the dispute relates to whether or not, in circumstances where the Train Operator cannot demonstrate that it has rights of access to an essential terminal, it can legitimately be “allocated” Train Slots, pending acquisition of those rights, given that
  - 6.1. in the eyes of the appellant (EWS) there is a wish to be assured that, when terminal access has been secured, Train Slots will still be available; and that
  - 6.2. for the respondent (Network Rail) any “allocation” of a Train Slot to one Train Operator, who is not yet in a position actually to operate services, potentially prevents its deployment to another operator, where otherwise there might be grounds.
7. Royal Mail’s Princess Royal Distribution Centre at Willesden
  - 7.1. was previously the hub for Royal Mail Railnet operations, for which the Train Operator was EWS;
  - 7.2. can only be accessed via tracks, the “Railnet Reception and Departure Sidings” (“the Railnet Sidings”), which are situated on land that is leased by EWS (“the EWS lease”), but which, for operational purposes, are controlled by co-ordinated actions by the Network Rail signaller at Wembley Central, and the Depot Supervisor at PRDC;
  - 7.3. is currently used for the despatch of a small number of Royal Mail services which are operated by GBRf, and for the storage under cover of the unused portion of the Class 325 train fleet;
8. Supervision of operations within the PRDC is vested with GBRf.
9. A material part of EWS’s pleadings depend on the fact that they are actively seeking rights of access to PRDC, and have lodged an application with the Office of Rail Regulation under S17 of the Railways Act 1993 with a view to obtaining a grant of access, and that, therefore, they have reasonable expectations of rights which should be reflected in any allocation of Train Slots. These proceedings have been protracted, and there is, in any case, at least in the mind of Network Rail, a doubt as to the extent to which the Office of Rail Regulation will ultimately determine access to terminal facilities, as opposed to just track.
10. Finally, EWS has asserted that because of the nature of rights that it enjoys over the EWS lease, it is in a position where it can achieve “technical” compliance with Clause 6.4.1, inasmuch as the Railnet sidings offer a nominal terminal clear of the Network sufficient to make a compliant bid/offer, adequate to secure the Train Slots in question. This assertion is contested by Network Rail on the grounds that any such Train Slot would relate to a service that cannot be put into effect.
11. The joint submission from the parties is expressed in terms that invite the Panel to opine on matters that lie outside its jurisdiction. In consequence, prior to the hearing, the Disputes Chairman set out the different issues raised by the reference, and issued the parties with the following Directions intended to enable the Panel to address the matters within its competence.

**Extract from letter from Sir Anthony Holland to the parties (5<sup>th</sup> June 2005)**

**Reference TTP 10; EWS vs Network Rail: Princess Royal Distribution Centre, Willesden**

2. *“The issues of law appear to fall into the area of interpretation of, on the one hand the legal entitlements of the parties to the dispute, and on the other hand the latitudes they are allowed, as set out in each of:*
  - 2.1. *the EWS Track Access Agreement incorporating the Network Code (and in particular, Part D);*
  - 2.2. *the rights, if any, of either party in respect of Access to the Princess Royal Distribution Centre, Willesden (“PRDC”), and*
  - 2.3. *the rights, if any, of either party, in respect of the Railnet sidings in what is described as the EWS lease area.*
3. *The parties are reminded that the jurisdiction of the Timetabling Panel can only determine the rights and wrongs of the first of these three items; determination of the disputed rights of access to PRDC is properly a matter already before the Office of Rail Regulation, whilst adjudication of differences in respect of the EWS lease will be as provided in that lease.*
4. *That said, the matter before the Panel, that Network Rail has acted unreasonably in its discharge of its responsibilities, under Network Code part D, for the preparation of the Summer 2005 Timetable, is argued by reference to the other two matters. Thus*
  - 4.1. *Network Rail advances that its reasons for declining the bids for the two services in question relate to doubts about whether EWS will be granted access to PRDC, and the status of EWS’ use and occupancy of the EWS lease;*
  - 4.2. *EWS by contrast argues that whilst the current lack of access to PRDC is a valid reason why trains cannot operate, it does not preclude Network Rail, acting within its prerogatives within the Track Access Agreement, from making a provisional allocation of the bid for paths in the Summer 2005 Timetable, not least because the existence of the EWS lease is sufficient fulfilment of the terms of clause 6.4.1 of the Track Access Agreement.*

**Extract from letter from Sir Anthony Holland to the parties (5<sup>th</sup> June 2005)**

**Reference TTP 10; EWS vs Network Rail: Princess Royal Distribution Centre, Willesden (continued)**

5. *In practice it is the actions of Network Rail that are being challenged. In order that the Panel may reasonably adjudicate on the matter of the due operation of Part D, the parties need to declare to the Panel the positions they would adopt if either or both of the matters outside the competence of the Panel had been resolved. Thus*
  - 5.1. *what would Network Rail propose to offer were EWS to have been already granted a right of access to PRDC? What would EWS be seeking if that right were to have been formally rejected by Office of Rail Regulation? And/or*
  - 5.2. *what would Network Rail propose to offer were the lines on the lease NOT coloured orange? What would EWS be seeking if it were clear that the lines are coloured orange?*
6. *Given that the papers as submitted raise allegations of bad faith in the actions of the parties it is important for the Panel to know how each party would discharge the provisions of Part D, were there no other uncertainties. In particular, the Panel will seek confirmation that EWS has conformed to the duties laid upon it by Part D, and that Network Rail is not proposing to deny EWS even an “expectation of rights” (e.g. because it is currently actively in discussions to dispose of the paths in question to another train operator)”*

## **The Parties’ response to the Directions**

12. In respect of the questions posed at 5.1 in the Directions letter
  - 12.1. Network Rail advised the Panel that it had identified Train Slots corresponding to 1M48 and 1G02, and that such slots would be deemed “strategic spares”, and would be “safeguarded”, but would not be allocated to EWS unless or until access to PRDC was confirmed; and
  - 12.2. EWS advised the Panel that, should access to PRDC not be forthcoming, it would withdraw all the bids for 1M48 and 1G02.
13. In respect of the questions posed at 5.2 in the Directions letter, the parties chose not to answer them directly. Instead the Panel was advised, by GBRf, of the operational complexities of gaining access to the Railnet sidings, and thence to PRDC. These operational considerations would remain a constant whatever the interpretation placed upon the terms of the lease, as would the fact that the EWS lease, and the Railnet sidings, do not embrace any facilities suitable for the loading or unloading of trains.

## **The Panel's findings of fact in respect of the Dispute**

14. The Panel found that
  - 14.1. EWS's bids for 1M48 and 1G02 did relate to a genuine traffic prospect: however, although the subject of discussions in relation to the inclusion of level 1 rights in a Supplemental Track Access Agreement, EWS's right to bid is solely a function of Spot Bid rights;
  - 14.2. Network Rail was not refusing to allocate the Train Slots to EWS because of any known prospective alternative user; however
  - 14.3. the bids and offers are both related to train movements passing into or out of PRDC, and not to an intermediate point such as the Railnet sidings; and
  - 14.4. the uncertainties about the lease, and the related operational considerations, were common factors that would have to be resolved, whether the Train Slots were allocated with effect from the commencement of the June 2005 Timetable, or at a later date if EWS's access to PRDC was confirmed. They have no decisive significance in relation to the matter in dispute, and no significance at all if EWS does not gain rights of access to PRDC.

## **The issues of contract raised by the Dispute**

15. The Panel found that, in relation to the EWS Track Access Agreement, there were two immediate matters to address:
  - 15.1. does EWS have any entitlement to have Train Slots allocated when it is not in a position to honour its obligations in respect of Clause 6.4.1? and
  - 15.2. does Network Rail, in the course of managing the Timetabling process in compliance with Network Code Part D, have either the right, or an obligation, to manage Train Slot allocation in a way that can at least provisionally allocate capacity for flows that enjoy only "*expectations of rights*"? Has Network Rail behaved appropriately in this instance?
16. The Panel found that the provisions in Network Code Condition D3.2.3, and the range of factors embraced by the Decision Criteria (Condition D6), all implied that Network Rail had the discretion to include all such Train Slots in the Timetable as might sensibly be expected to operate in the currency of the relevant Timetable. By contrast, a Train Operator, whilst it may reasonably expect to see evidence that Network Rail is catering for all realistic possibilities, has no entitlement to require Network Rail to make binding commitments, by way of allocation of Train Slots, when the Train Operator does not have the wherewithal to operate the service for which it has bid.
17. In respect of the proposition that changing the Bid, and any offers, by replacing "PRDC" with "Railnet sidings", would achieve technical compliance that would permit Network Rail to allocate the Train Slots in question, the Panel found that, because it would not be feasible to operate any service corresponding to such a bid, such an arrangement would be a contrivance such as has

elsewhere been condemned by the Regulator in his determination of the appeal in the case of *ttc132 (Network Rail Infrastructure Ltd vs Eurostar (UK) Limited*; 11<sup>th</sup> October 2002). In that determination the Regulator's findings were all predicated on the assertion that *"The working timetable is a timetable of real train movements, not fictitious ones. This is apparent from its purpose and the provisions of the network code which say how the timetable is made up"* (paragraph 68).

18. In the view of the Panel, the course of action taken by Network Rail could be seen as prudent, and commercially sensitive management of its responsibilities both to EWS and all other Train Operators; the contrivance proposed in respect of the Railnet sidings would be a case of a *"fictitious...train movement"* and therefore, given the requirement that this Panel *"be bound by any relevant decision of any superior tribunal"* (*Access Dispute Resolution Rules A1.17(b)*), to be rejected.

### **The Panel's findings and Determination**

19. The Panel concluded that

- 19.1. It was satisfied as to the good faith of the parties insofar that

- 19.1.1. EWS, in bidding for paths for services between Mossend and PRDC (1M48), and between PRDC and Walsall (1G02) was seeking to meet the declared needs of an identified customer; and

- 19.1.2. Network Rail, in including appropriate paths for 1M48 and 1G02, in conformance with EWS's bids, within the June 2005 Timetable, as "strategic spare slots", and in its other declarations to the Panel, had demonstrated its preparedness to operate the services in question, and to agree appropriate rights of Track Access.

- 19.2. There could be no question of any actual train operations in fulfilment of EWS's bids unless or until the rights of access for an EWS service to PRDC had been confirmed. This right of access is currently disputed, and there can be no certainty as to when this dispute might be resolved. However,

- 19.3. on the basis of the declarations by the parties, it is clear that

- 19.3.1. if the matter of access to PRDC is resolved in EWS's favour then Network Rail will confirm the Train Slots to enable services to commence operations, and

- 19.3.2. if EWS is denied access to PRDC, then EWS will withdraw the bids for 1M48 and 1G02, and the matter will lapse.

- 19.4. although EWS's proposals may have an impact upon the use currently made of PRDC (e.g. for vehicle storage), there appear to be no grounds for considering that EWS is aspiring to operate services which, in railway operating terms, are incompatible with any other services currently operating from PRDC; nor has Network Rail expressed any reservations about the practicality of the proposed services given that EWS obtains the relevant right of access to the PRDC; by contrast

- 19.5. the arguments advanced regarding the status and utility of the sidings in the EWS lease area, and the expressed opinion that a path to or from that location might achieve nominal [technical] compliance with the provisions of the EWS Track Access Contract Para 6.4.1 are not helpful. The Panel is of the view that the use of such an artifice would compromise the integrity of the timetabling process, (and would be at odds with the findings of the Regulator in respect of the appeal against Timetabling Committee Determination ttc132)
  - 19.5.1. EWS would in effect be making a bid, in the sure knowledge that such a service would never run, and
  - 19.5.2. Network Rail would be allocating capacity when it had sure knowledge that such services could not operate.
20. Taking all of the foregoing into account, the Panel therefore determined that
  - 20.1. EWS has no entitlement to the inclusion into a timetable of a Train Slot which cannot, for reasons of lack of access rights to a key terminal, operate at any defined future date;
  - 20.2. Network Rail, in the discharge of its responsibilities for the efficient management of the Timetabling process in accordance with the provisions of Part D of the Network Code, can, and does, exercise its discretion in the securing of Train Slots against identified traffic prospects and “expectations of rights” in accordance with Condition D6(h);
  - 20.3. in the matter of the Train Slots corresponding to 1M48 and 1G02, Network Rail has behaved responsibly, and in a manner appropriate to the circumstances of the case, by incorporating the slots into the June 2005 timetable, and by its declaration that it considers that the status of the slots is that they are “safeguarded” for the time being against an expectation that EWS will resolve the disputed terms of access to PRDC; and that therefore
  - 20.4. the Train Slots in the June 2005 Timetable corresponding to 1M48 and 1G02 should not, at this stage in the Timetabling process, be “allocated” to EWS in any more formal sense than has already been achieved.
21. In making this determination, the Panel proffered the Parties the following guidance;
  - 21.1. the delays that had been experienced in the preparation of the submission document to the Panel, and the failure to meet the [extended] deadline set for its circulation to Panel members appeared to suggest that there had not previously been sufficient dialogue between the parties to reach a proper understanding of their points of difference; in the view of the Panel, had there been such dialogue the parties would conceivably have had more confidence in each other’s intentions. Therefore
  - 21.2. it would be reasonably responsible for
    - 21.2.1. EWS to give Network Rail a regular progress report on the course of its S17 case in respect of access to PRDC; and

21.2.2. Network Rail to engage in immediate dialogue with EWS should it become apparent that the current status of the Train Slots corresponding to 1M48 and 1G02 is liable to change.

22. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

Bryan Driver

Panel Chairman