TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP1610
(following a hearing held at 1 Eversholt Street, London, on 19 February 2020)

The Panel:

John Hewitt	Hearing Chair

Members appointed from the Timetabling Pool

Robert Holder	elected representative for Franchised Passenger Class, Band 2
Jason Bird	elected representative for Non-Passenger Class, Band 1
Hannah Linford	appointed representative of Network Rail

The Dispute Parties:

For First Trenitalia West Coast Rail Ltd. ("Avanti")

Mike Hoptroff	Head of Operational Planning & Engineering Access
Georgia Ehrman	Head of Commercial Timetable Development
Alex Grimes	Timetable Development Manager

For Network Rail Infrastructure Ltd ("Network Rail")

John Thurgood	Timetable Production Manager (North West & Central)
Matt Allen	Head of Timetable Production – Capacity Planning
Michelle Woolmore	Route Contracts Manager (North West & Central)

Interested parties:

West Midlands Trains Ltd

James Carter	Network Access Manager

Freightliner Heavy Haul Ltd.

Chris Matthews	Track Access Manager

Chiltern Railway Company Ltd.
Not represented.

Grand Central Railway Company Ltd

Chris Brandon	Business Development Manager

Arriva Rail North Ltd.

Kate Oldroyd	Asst. Timetable Planning Manager

Arriva Rail London Ltd.

Mark Walker	Strategic Planning Manager

Observing for professional development:

Patrick Lawless (XC Trains Ltd.); Paul Harris (Network Rail)

In attendance:

Tamzin Cloke	Committee Secretary ("Secretary")

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A Background and Jurisdiction

1. Dispute TTP1610 was raised by Avanti by service of a Notice of Dispute on 12 December 2019 in respect of Network Rail's decisions in relation to the Subsidiary Working Timetable Publication for 2020. The dispute was brought on the basis that Network Rail had flexed services in order to accommodate other operators with lesser Track Access rights in the New Working Timetable.

2. I was appointed as Hearing Chair on 20 January 2020 and I satisfied myself that the matters in dispute included grounds of appeal which may be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.

3. In its consideration of the Parties' submissions and its hearing of the Dispute, the Panel was mindful that, as provided for in ADR Rule A5, it should 'reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.

4. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 4 and as otherwise defined in this determination document:

   - "ADR Rules" mean the Access Dispute Resolution Rules and "Rule" is construed accordingly
   - Decision Criteria means Network Code Condition D4.6
   - "Chapter H" means Chapter H of the ADR Rules
   - "Part D" means Part D of the Network Code
   - ''TTP'' means Timetabling Panel

B History of this dispute process and documents submitted

5. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide Sole Reference Documents. The proposed Panel hearing was notified generally by means of the website and by email to those identified as potential interested parties by the Dispute Parties.

6. On 5 February 2019 Avanti served its Sole Reference Document, one day after the dispute timetable as issued by the Secretary.

7. On 12 February 2019 Network Rail served its Sole Reference Document in accordance with the dispute timetable as issued by the Secretary.

8. Freightliner Heavy Haul Ltd., Arriva Rail London Ltd., Arriva Rail North Ltd., Chiltern Railway Company Ltd., Grand Central Railway Company Ltd. and West Midlands Trains Ltd. declared themselves to be interested parties. All were represented at the hearing, save for Chiltern due to last minute unavailability.

9. On 17 February 2020 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that so far as there were any relevant issues of law, there were no issues of pure law, the issue being the proper construction of the relevant parts of the Network Code against the findings of fact that are determined.

10. The hearing took place on 19 February 2020. The Dispute Parties made opening statements, responded to questions from the Panel concerning various points and were given the

opportunity to make closing statements. The interested parties were given the opportunity to raise points of concern.

11. I confirm that the Panel had read all of the papers submitted by the Dispute Parties and I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of the dispute process, both written and oral, notwithstanding that only certain parts of such materials are specifically referred to or summarised in the course of this determination.

C Outcomes sought by the Dispute Parties

12. In its sole reference document, Avanti requested the panel to make certain determinations. These were slightly refined at the hearing and were that:

(a) Network Rail had not conducted itself in accordance with Condition D4.2.1 in respect of its decisions arising in the preparation of the May 2020 New Working Timetable;
(b) Network Rail had not conducted itself in accordance with the prioritisation of rights detailed in Condition D4.2.2;
(c) Network Rail's communication during the Timetable Preparation period regarding the changes had not satisfied Condition D2.6.2(b).

Avanti further requested the panel to direct Network Rail to:
(a) provide evidence of both weighting and application of Decision Criteria for each flex;
(b) going forward, consult and agree with Timetable Participants its objectives for particular timetable development activities in advance of D-40 (in order to gain approval for any particular set of outcomes to be delivered at Timetable Offer);
(c) re-evaluate its decisions in respect of the WMT and HS2 Materials by Rail Access Proposals for May 2020, provide evidence it has done so. And remove consequential flex where necessary;
(d) compensate Avanti for any detrimental revenue impact from services that have been flexed as a result of decisions made in discordance with Part D of the Network Code, where it is not possible to remove the flex from the May 2020 timetable and where it was not possible for said timetable, guarantee the flex will be removed from the December 2020 timetable;
(e) give a declaration that in future Network Rail should apply the Decision Criteria to decisions as required by the Network Code Part D and provide an analysis of the application of the Decision Criteria to operators contemporaneously.

13. Network Rail asked the Panel to determine that: Avanti's claims be dismissed; that Network Rail had acted in accordance with Part D; Network Rail adequately consulted with Avanti; that Avanti was not entitled to compensation.

D Relevant provisions of the Network Code and other documents

14. The versions of the Network Code Part D and the ADR Rules dated 26 September 2019 were applicable to these dispute proceedings.

15. Conditions D4.1.1, D4.2.2 and D4.6 were particularly relevant and are appended in Annex "A".

E Submissions by the Dispute Parties

16. The gist of Avanti's grievance is that Network Rail had flexed a number (perhaps 49) of its services driving extended end-to-end and intermediate journey times. And that such extension of those journey times resulted in a deterioration of its service offer and the wider attractiveness of rail as a travel option. Avanti alleged that Network Rail had not had regard to the Decision Criteria when making its decision on each flex, had not consulted fully on each proposed flex, had not provided any (or any satisfactory) reasoning for each flex and that it in its allocation of Train Slots it had not accorded appropriate priority in accordance with D4.2.2(d).

17. The gist of Network Rail's case was that in context of a complex preparation of a new timetable, it denied it had failed to consult/communicate fully and that since it had been able to accommodate all Access Proposals for Train Slots submitted to it (albeit by flexing some services) D4.2.2(d) did not apply.

F The hearing

D4.2.2(d)

18. Given that D4.2.2(d) was pivotal to the outcome and progress of the appeal, and in the absence of any objections by the parties, the Panel decided that this issue should be determined as a preliminary issue.

19. It comes down to the proper interpretation of the expression '…all requested Train Slots …' as used in D4.2.2(d). Avanti contended that it should be construed to mean or read '…all requested Train Slots (as bid for in all Access Proposals...)' And that included the start and end times of each Train Slot as bid for. Avanti submitted that 'Train Slot' is a series of train movements, identified by arrival time and departure times at each of the start, intermediate and end points of each train movement, and that if a train is flexed away from the times sought, it is not compliant with the request made at D40, so that it is necessary to go through the priority process.

20. Network Rail submitted that such a construction was wrong and unworkable. It argued that it had a right to flex and that if it exercised that right and flexed a bid so as to accommodate and include all Train Slots bid for, then it had included all requested Train Slots. Neither party advanced any legal authorities as to the approach that should be taken to on the construction of written instruments. I have therefore applied the approach adopted by the Courts when carrying out such an exercise.

The definitive modern approach came from Lord Hoffman in *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, 912H - 913F when he set out the modern rules of interpretation.

'**The principles may be summarised as follows:**

1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
2. The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably

available to the parties and subject to the exception to be mentioned next, includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable person.

3. The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are inadmissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
4. The meaning which a document (or any other utterance) would convey to a reasonable person is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable person to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd. [1997] A C 749.
5. The rule that words should be given their 'natural and ordinary meaning' reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had…'

Those principles have been considered, approved, and to some extent refined, by the Supreme Court in a number of recent cases including:

Rainly Sky SA v Kookmin Bank [2011] UKSC 50;
Arnold v Britton [2015] UKSC 36; and
Wood v Sureterm Direct Ltd [2017] UKSC 24

I need not go into the details of each case. I have had regard to the learning to be had from them.

21. It is self-evident that the Code has developed over the years following full and detailed discussion within the industry and that the Code is incorporated into Track Access Contracts which are usually complex and drafted with great care and a good deal of professional input.

22. Access Proposals are umbrellas by which an operator seeks a range individual changes to train slots. Network Rail has the obligation to try and accommodate as many of those changes as may be possible. In doing so it is entitled to exercise its contractual right to flex.

23. In my judgment it is only when Network has exercised its contractual rights to flex and is still unable to accommodate all requested train slots that D4.2.2(d) is engaged. I find that accords with the words used and that it accords with commercial and practical common-sense. Given the detailed nature and drafting of the Code, I consider that if a tighter construction of the expression was intended, as argued for by Avanti, a different form of words would have been adopted. I can see no reason why the additional words or clarification suggested by Avanti should be implied.

24. For these reasons I prefer Network Rail's construction. The question of priority does not fall for consideration. Accordingly, the Panel did not require to consider the nature and import of the rights of WMT and MbR that may have impacted on the decisions to flex some of Avanti's services.

Terms of settlement

25. The thrust of Avanti's case was that there had been insufficient consultation and that it was not aware of the reasons for many of the flexes in issue. The ideal outcome it sought was for Network Rail to re-evaluate the contentious flexes and if any remained to give reasons for them. That process might lead to Avanti having the opportunity to make suggestions that might lead to yet further improvements.

26. As the hearing progressed it began to emerge that Network Rail was not now averse to undertaking such a review or re-evaluation. There was some discussion about how that might work, who might be involved and what powers the Panel had to issue directions in connection with it.

27. The powers of the Panel under D5.3.1(a) are limited but the parties have a much wider scope to agree a detailed way forward should they wish to do so. The hearing was adjourned over an extended lunch break to enable the parties to have a discussion.

28. When the hearing resumed the parties informed the Panel that they had compromised the issues between them and had arrived at an agreed way forward as follows:

Step 1 *– NR and Avanti WC have agreed to review the list of 49 train slots that Avanti have identified are in dispute. By Friday 21st Feb 20*

Step 2 *– NR to confirm and agree with Avanti WC the root cause of the journey time extension and need for NR to use its flexing right. By Friday 28th Feb 20 (NR to travel to Avanti WC)*

Step 3 *– Avanti WC to provide feedback to NR which of the 49 trains slots they would like to be further reviewed. By Tuesday 10th Mar 20*

Step 4 *– NR, Avanti and any other interested operators to review the timetable planning graphs and tables and look for alternative flex options. By Wednesday 18th Mar 20*

Constraints in this area:
i) A train slot cannot be removed (without consent),
ii) access proposals with altered calling patterns cannot be altered (unless by consent),
iii) flex to fix historic TPR non-compliances cannot be removed

Step 5 *– When alternative flex options have been identified, NR will need to lead on applying the Decision Criteria (D4.6). This is to be done by:*

NR deciding which considerations are relevant
Writing out to the impacted operators and asking for additional information on the impact on their business for the relevant considerations (timebound period of responses)
By Wednesday 25th Mar 20

NR to review the feedback and make its decision
By Friday 27th Mar 20

Step 6 *– altering the timetable:*

Where possible the alternative flexing option to be added into May 20
Where possible the alternative flexing option included into Dec 20

By Tuesday 31st Mar 20

Developing the timetable for Dec 20: NR and Avanti have agreed to pilot / pioneering new method of consultation:

Continue with the weekly exchange of the changes spreadsheet
Weekly feedback from Avanti on the proposed flexes outlined in the changes spreadsheet to NR
Changes that Avanti do not support to be escalated within NR to a specialist or manager and steps 4 and 5 above to actioned prior to D26

It was noted that Step 6 (Dec 20 element) is "subject to the timetable landscape remaining the same".

29. There was some discussion about the effect of the above agreement and its impact on the proceedings. The Panel can note what the parties say they have agreed, but the Panel was constrained by D5.3.1(a) and was not empowered to issue specific directions along the lines agreed. Given that both parties had given ground in arriving at a compromise settlement there is some merit in the proposition that the parties have arrived at a binding agreement which may be specifically enforceable if a court considered that to be an appropriate remedy. Further, when Network Rail issues its decision pursuant to Step 5, if some or all of the flexes remain in dispute and Avanti considers that in arriving at those decisions Network Rail did not properly comply with specific aspects of the Code, it will be open to Avanti to appeal those decisions.

30. On that basis the way forward for the present dispute was for the Panel to note that Avanti withdrew its appeal in the light of the agreed terms of settlement.

Accordingly, the Panel is not required to make any formal determination on the issues raised in the appeal, nor is it required (or able) to exercise any of its powers under D5.3.

Remaining issues

Past consultation

31. Notwithstanding the above Avanti requested the Panel to express a view that Network Rail had not acted in accordance with the Network Code during the preparation for May 2020. It had in mind D2.6.2. Avanti explained the reason for the request was: 'to inform how we work together'.

32. The parties have agreed a detailed process of how they will work together going forward. The Panel declines to express a view on how the May 2020 process was conducted. That is now a sterile exercise. Network Rail denies that it failed to follow the Code as regards the level of consultation. It is unnecessary for the Panel to express a view, in any event it could not usefully do so on the limited evidence put before it. Even if, as a result of the agreed steps to be undertaken as set out above give rise to all or some of the disputes flexes being changed, that does not mean that the original decisions taken by Network Rail on the basis of the information then before it, were wrong decisions. The panel bears in mind that compiling the timetable is a complex process but despite that complexity and the technology that goes into the work, the process is an art and not a science. There was a consensus at the hearing to the effect that if you gave the same problem to five different planners you will get five different outcomes, all of which would be in the range of what is reasonable.

Application of the Decision Criteria

33. Avanti also raised the application of the Decision Criteria to each and every flex in dispute. Network Rail acknowledged that D4.1.1 provided that in conducting any process in D2.2 it shall make 'all decisions' by the application of the Decision Criteria. Those criteria are set out in D4.6.2 which sets out the framework by which the Objective set out in D4.6.1 is to be achieved.

    Arguably on a literal interpretation, D4.1.1 requires each and every flex decision to be the subject of the application of the Decision Criteria. Avanti argued that Network Rail had (and still has) the obligation not only to apply the Decision Criteria to each such decision and to give a full account of how it had applied it and what weighting(s) were applied.

    Network Rail submitted that the Decision Criteria is an entrenched part of its culture and that its planners have the Decision Criteria in mind when making flex decisions but do not go through or document a formal or detailed application of the criteria. It argued that there is not sufficient time in the process to enable this to occur and that it is disproportionate bearing in mind the May 20 NWTT concerned circa 18,000 schedule changes bid at D40 and in developing the NWTT it made circa 12,000 changes.

34. The Panel was not unsympathetic to the observations made by both parties. But, the Panel did not consider it was appropriate for it to make any observations or determinations on how the parties should conduct themselves going forward.

    On the face of it D4.1.1 obliges Network Rail to apply the Decision Criteria to 'all decisions' but there do appear to practical reasons why Network Rail is unable to do so in regard to every decision it has to make. Questions of proportionality arise. That might have a consequence that technically Network Rail is in breach of the Code and hence potentially in breach of a Track Access Contract, but whether any loss or damage might flow from such a breach will be fact sensitive on a case by case basis.

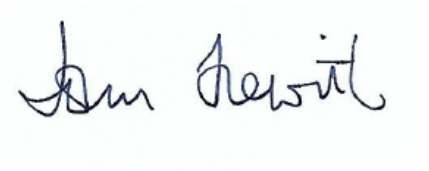
35. In these circumstances and given the wide application of the Code to the industry, this Panel with its limited jurisdiction is not the right or convenient forum for a debate on the apparent conflict. The Panel considers that an industry wide discussion on wider reform of Part D of the Code is likely to be a preferable and convenient forum in which to consider any substantive changes that might helpfully be introduced.

G Determination

36. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is that the appeal is deemed withdrawn, the parties having agreed terms of settlement.

37. No application was made for costs.

I confirm that so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



John Hewitt
Hearing Chair
04 March 2020

Annex A: extracts from the Network Code, D4.1, D4.2.2 and D4.6

4.1 Decisions concerning the Rules

4.1.1 In conducting the processes set out in Condition D2.2 by which the Rules are revised on a bi-annual basis (including the amendment process described in Condition D2.2.7), Network Rail shall make all decisions by application of the Decision Criteria in the manner set out in Condition D4.6.

4.2.2 Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:

(a) a New Working Timetable shall conform with the Rules and the applicable International Freight Capacity Notice applicable to the corresponding Timetable Period;

(b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;

(c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right;

(d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority:

(i) first to:

(A) the Firm Rights of any Timetable Participant that will subsist during the whole of the Timetable Period and which have been Exercised; and

(B) any rights Network Rail has for Network Services included in the Rules;

(ii) second to Firm Rights of any Timetable Participant, that were in force at the Priority Date but will expire prior to or during the Timetable Period and which have been Exercised, provided that Network Rail considers (acting reasonably) that new Firm Rights, substantially the same as the expiring rights, will be in force during the Timetable Period;

(iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided Network Rail considers (acting reasonably) they will be

Firm or Contingent Rights in force during the Timetable Period;

(iv) fourth to any:

(A) rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date but before D-26 in accordance with D2.4 and D2.5. Where more than one set of rights or expectation of rights are so notified, capacity is to be allocated in the order in which Access Proposals containing details of the rights (or expectations thereof) are submitted to Network Rail; and

(B) Strategic Paths contained in the Strategic Capacity Statement.

4.6 The Decision Criteria

4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the

Objective").

4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below ("the Considerations") in accordance with Condition D4.6.3 below:

(a) maintaining, developing and improving the capability of the Network;

(b) that the spread of services reflects demand;

(c) maintaining and improving train service performance;

(d) that journey times are as short as reasonably possible;

(e) maintaining and improving an integrated system of transport for passengers and goods;

(f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;

(g) seeking consistency with any relevant Route Utilisation Strategy;

(h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;

(i) mitigating the effect on the environment;

(j) enabling operators of trains to utilise their assets efficiently;

(k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates; and

(l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.

4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and

Network Rail. Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.

4.6.4 The Objective and the Considerations together form the Decision Criteria.