
A TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of references TTP194 and 195

(following a Hearing held at Central House, Euston on 21st February 2008)

The Panel

Colin Berry (First ScotRail) : elected representative for Franchised Passenger Class, Band 1

Robin Nelson (Freightliner) : elected representative for Non-Passenger Class, Band 2

Graham Owen (Eurostar) : elected representative for non-Franchised Passenger Class

Colin Sweeney : appointed representative of Network Rail

Panel Chairman: **Sir Anthony Holland**

The Parties

for (Virgin) West Coast Trains Ltd ("WCTL"); TTP194

Robert Hodgkinson Commercial Operations Manager

Tony Sadler General Manager, Operations

For English Welsh and Scottish Railway Ltd ("EWS"); TTP195

Nick Gibbons National Planning Manager

for Network Rail Infrastructure Ltd ("Network Rail")

Matthew Allen Network Access Unit Manager

Les McDowell Strategic Possessions Manager – West Coast

Dan Kayne Legal Advisor

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was presented with individual submissions from WCTL and EWS, and a single counter-submission, addressing both appeals, from Network Rail; all related to the circumstances surrounding Network Rail's actions in seeking, at short notice, for an extension of 26 hours to a previously agreed major Blockade.
2. Specifically, Network Rail had previously obtained, through the normal Rules of the Route procedures, agreement for an all lines Blockade of Rugby (and environs) commencing 2330 on Monday 24th December, and due to allow resumption of traffic at 0300 on Monday 31st December.
 - 2.1. On 12th December 2007, the Train Operators received a formal request for the Blockade to be extended by 26 hours, giving a resumption of traffic at 05:20 on Tuesday 1st January 2008. This request was formally contested by EWS and later by WCTL, the former by registering a dispute with the Access Disputes Committee, and the latter by initiating a challenge with the Office of Rail Regulation, followed by an appeal to the Access Disputes

Committee. Both appeals to the Access Disputes Committee were lodged in the timescales laid down by Network Code Part D, and would normally fail to be determined by a Timetabling Panel.

- 2.2. On 19th December, the Office of Rail Regulation, acting in relation to its powers as the Licensing authority for the Rail Industry, issued a statement giving Network Rail a basis for it to proceed with the extension to the Blockade, notwithstanding the objections of two Train Operators.
- 2.3. In the event Network Rail was not able to complete the works planned within the sought extension to the Blockade, and train services were not able to resume through Rugby before Friday 4th January, and then only on a layout more limited than previously intended.
3. The Panel acknowledges its jurisdiction in cases that relate to the application of Network Code Part D2.1.1 to D2.1.8 and to the operation of the National Rules of the Plan. In addition the Panel notes its distinctive responsibilities in respect of the procedures laid down in Network Code Part D2.1.9 to D2.1.11 and the associated Section 3 of the National Rules of the Plan (*“Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change Date”* henceforward referred to as *“PARTP”*). Network Code Condition D5.1.1 (d) empowers the Train Operators to refer their dissatisfaction *“with any decision of Network Rail made under this Part D, including...(d) any decision of Network Rail which may be referred to the relevant ADRR Panel under Condition D2.1.7, D2.1.11....”*.
4. The Panel notes that in their respective submissions
 - 4.1. WCTL asks the Panel to determine *“whether or not Network Rail*
 - a) *Adhered to the correct timescales and procedures associated with Part D of the Network Code (including nROTP) and therefore in breach of WCTL Track Access Agreement [sic];*
 - b) *Have not established, going forward, any precedents by taking such actions [sic];*
 - c) *Was in general breach of their respective position regarding the imposing of a possession that was not deemed a safety critical issue or operational emergency?*
 - d) *Was in breach of the ORR’s determination [TTP102].”*
 - 4.2. EWS asks the Panel *“to determine that Network Rail, in imposing the proposed extension of the pre-planned possession at Rugby, did so unilaterally and contrary to process set out in section 3 of the National Rules of the Plan and Part D of the Network Code and, therefore, acted without legal entitlement.”*
 - 4.3. Network Rail asks the Panel *“to determine that Network Rail acted reasonably and in accordance with its legal entitlements under the Network Code and ROTP, given the exceptional nature of the circumstances at Rugby”*.
5. The Panel notes further that WCTL has tabled an additional matter for consideration, namely that *“Whilst integrally linked with Informed Traveller deadlines, whether further protections are necessary within the ROTR planning process to ensure that this sort of imposing of possessions after T-12 never happens again (except for obvious safety reasons [sic])....”*
6. The Panel reminded itself that,
 - 6.1. as stipulated in the Access Dispute Resolution Rules, it must *“reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis”* (Rule A1.18).
 - 6.2. the entitlements of the parties in this instance are as laid down in

- 6.2.1. Network Code Part D;
- 6.2.2. National Rules of the Plan (July 2007 edition); together with
- 6.2.3. any relevant amplification of the meaning of these provisions as contained in a determination of either a "relevant ADRR Panel" or the Office of Rail Regulation;
- 6.3. in respect of any question of remedy;
 - 6.3.1. "The Panel shall (a) where the Access Conditions or Access Agreement require that a specific remedy be granted, grant that remedy accordingly ..." (Rule A1.19)
 - 6.3.2. Condition D5.3 states that "the Panel shall, in determining the matter in question, have the power:
 - 5.3.1 in determining the matter in question:
 - (a) to direct Network Rail to comply with directions which specify the result to be achieved but not the means by which it shall be achieved ("general directions");
 - (b) to direct the parties to accept any submissions made by Network Rail as to any Train Slots; and/or
 - (c) to specify the Train Slots and other matters which Network Rail should have determined in its decision made pursuant to this Part D, provided that a dispute panel shall only take any action under paragraph (c) above in exceptional circumstances;"
- 6.4. actions that are at odds with entitlements, cannot be deemed reasonable, either within the context of a Panel's determination of entitlements, or of any prescription of remedy.

Some preliminary issues of definition; the relevant contractual provisions

7. In relation to the provisions of the Track Access Contract and the operation of Part D of the Network Code, the Panel's attention was drawn to the following provisions as relevant to its determination:

7.1. Network Code Part A and definitions:

Condition A1.1 General Interpretation

(h) *Conflict*

In the event of any conflict of interpretation between this code and an Access Agreement (not including this code) the following order of precedence shall apply:

- (1) *this code; and*
- (2) *the Access Agreement"*

"Rules of the Route"

means rules regulating, for any part of the Network, each of the following matters:

- (a) *the location, number, timing and duration of any Restrictions of Use of any track or section of track, which enable inspection, maintenance, renewal and repair thereof or of any other railway asset or any other works in relation thereto; and*
- (b) *any alternative train routes or stopping patterns which may apply during any Restriction of Use referred to in paragraph (a) above;*

and, for the purpose of this definition, track shall be regarded as subject to a Restriction of Use if it has been temporarily taken out of service or its capacity otherwise affected for the purposes stated in paragraph (a) above;

“Rules of the Plan (part)

means rules regulating, for any part of the Network, the standard timings and other matters necessary to enable trains to be scheduled into the working Timetable applicable to that part of the Network, being rules which specify (amongst other matters):

(a).....(e)

(f) any Priority Dates referred to in Part D of this Code”

7.2. Network Code: Part D provisions

“D2.1 Review of Rules of the Route/Rules of the Plan

D2.1.5 Rules of the Route/ Plan Decision

- (a) Network Rail shall, following consideration of any representations, objections and alternative proposals made by affected Bidders in accordance with Condition D2.1.4, review the Preliminary Rules of the Route/Plan Proposal or, as appropriate, the Subsidiary Rules Revision and, having due regard to the Decision Criteria, decide what amendments if any should be made to the applicable Rules of the Route and the applicable Rules of the Plan.
- (b) Network Rail shall, no later than 4 weeks after the issue of the Preliminary Rules of the Route/Plan Proposal or, as appropriate, the Subsidiary Rules Revision, notify each Bidder which is likely to be affected by the applicable Rules of the Route or the applicable Rules of the Plan of the amendments it has decided to make pursuant to Condition D2.1.5(a) or, where no amendments are proposed, that fact.”

“D2.1.9 Implementation pending outcome of determination

Notwithstanding the provisions of Conditions D2.1.7 and D2.1.8, but subject to Condition D2.1.10, Network Rail shall be entitled to implement (in particular for the purposes of developing the Working Timetable to be implemented on the next succeeding Passenger Change Date) any aspect of the applicable Rules of the Route or the applicable Rules of the Plan which has been referred for determination pursuant to that Condition, pending the outcome of that determination.”

“2.1.10 Procedure for amendment of the Rules of the Route/Plan and amendment of scheduled Train Slots

Network Rail shall include within the Rules of the Plan a procedure to enable amendment of the Rules of the Route and the Rules of the Plan and consequential amendment of scheduled Train Slots other than as provided for in the foregoing provisions of this Condition D2.1. Notwithstanding the provisions of Condition D2.1.9, **Network Rail shall not be entitled to implement any change to that procedure until any appeal against any such change has been determined pursuant to Condition D5 [emphasis added].**”

2.1.11 Contents of amendment procedure

Each of the procedures proposed by Network Rail pursuant to Condition D2.1.10:

- (a) shall provide that no amendment shall be made to the applicable Rules of the Plan or the applicable Rules of the Route or that no revision shall be made to an accepted Bid (as the case may be) unless:
 - (i) Network Rail shall have consulted, to the extent reasonably practicable, with each Bidder likely to be affected by the amendment or revision (as the case may be); and
 - (ii) due regard shall have been had to the Decision Criteria; and
- (b) shall be deemed to have been accepted by each such Bidder unless any such Bidder shall, within 7 days of the relevant procedure being sent to it, have referred any aspect of it to the relevant ADRR panel for determination in accordance with Condition D5."

7.3. Other contractual documents and definitions:

"National Rules of the Plan; Section 3 Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change Date ("PARTP")

Introduction

- 3.1.1. *This Procedure has been devised in accordance with Network Code Condition D 2.1.10 to provide a means of altering Rules of the Route and/or Rules of the Plan other than through the twice-yearly process having effect from the Passenger Change Dates. It supersedes the interim arrangements included within certain Train Operators' Track Access Agreements and within certain Regional Rules of the Route and Rules of the Plan documents.*
- 3.1.2. *This procedure will be used by Network Rail to add, substitute or delete engineering access opportunities contained within Rules of the Route. All possessions so agreed will be regarded as being within Rules of the Route. Network Rail is committed to the achievement of the Informed Traveller deadlines resulting in details of amended train services being available 12 weeks before the date of operation, consequently, wherever possible, Network Rail will consult with Train Operators regarding possessions and other capacity restrictions which are disruptive to agreed train paths in sufficient time to allow details of those disruptive possessions to be included in a Confirmed Period Possessions Plan which will be published 26 weeks prior to the start of each 4-week period.*
- 3.1.3. *Where a need arises to amend Rules of the Route/Plan to cater for urgent safety requirements or other emergency situations, all parties concerned will co-operate in accelerating the normal timescales in this Procedure commensurate with the urgency of the circumstances..*

3.2. Changes Initiated by Train Operators

3.3 Changes Initiated by Network Rail

- 3.3.1 *Network Rail may propose changes to any part of ROTR/P.*
- 3.3.2. *Network Rail shall notify to all Train Operators affected details of the proposed change including a concise explanation of its reasons. Proposed changes to ROTR*

arising before publication of the Draft Period Possessions Plan shall be notified by Network Rail in a single coordinated document to be issued each 4 weeks.

3.4. Response by Train Operators

3.4.1. Each Train Operator receiving notification of a proposed change in accordance with paragraphs 2.3 or 3.2 above will consider that proposal and respond to Network Rail within 10 working days from receipt of the notification, indicating:

3.4.1.1. its agreement to the proposed change or

3.4.1.2. details of a counter-proposal and an explanation of its reasons or

3.4.1.3. in the case of ROP items such as section running times, a request that a joint investigation is carried out.

3.4.2. Any Train Operator whose response is not received by Network Rail within 10 working days will be deemed to have agreed to the proposed change and will forfeit any right of Appeal.

3.5. Decision by Network Rail

3.5.1. Network Rail shall give due consideration to responses received from Train Operators in accordance with paragraphs 4.1 and 4.2 above and shall decide which changes, if any, should be made to ROR/P[sic].

3.5.2. In reaching its decision, Network Rail shall have due regard to the Decision Criteria in Network Code Condition D6.

3.5.3. Network Rail will notify its decision to each affected Train Operator within 5 working days of the last date for receipt of responses under paragraph 4.1 above

3.5.4. Any Train Operator, if it disputes Network Rail's decision, may Appeal to a Timetabling Panel and any such Appeal will be dealt with as though it had been made in accordance with Network Code Condition D2.4.6. [sic; should be "D2.1.7" in relation to Part D dated 15th October 2007]. Any Appeal must be referred to the Access Disputes Secretary in accordance with the timescales shown in Condition D5.1.2 (i.e. within 7 calendar days of notification by Network Rail of its decision except at Christmas when the period is increased to 14 days." **National Rules of the Plan 2008 Timetable**; published May 2007 (advised as unchanged at July 2007)

TTP102: this matter was the subject of a hearing by a Timetabling Panel, and subsequently of a Office of Rail Regulation appeal hearing. In the following extracts, as they relate to this case, the findings of the Timetabling Panel are shown in normal italics, and **those of the ORR in bold**.

18. The Panel considered that this Section 3.1.3 does not directly empower Network Rail to take any specific action. Network Rail is still accountable for conducting an orderly process, for making a decision, and for accepting that that decision can be tested, where appropriate, before a Timetabling Panel. In compliance with [Condition] D2.1.9, Network Rail has the right to implement a proposal in respect of the Rules of the Plan/ Rules of the Route (and the disputed possessions fall into this category), even when "referred for determination", "pending the outcome of that determination".

19. As had previously been found by the Timetabling Committee, in determination ttc212, Section 3.1.3 "creates an obligation that falls as onerously upon Network Rail as it does upon the Train Operator. It offers the facility by which the parties may, **by agreement** [emphasis added], dispense with the normal laid down periods for proposals and responses. It does not create any right, for either Network Rail or the Train Operator, to

circumvent the need to reach agreement through a process of consultation, or to impose one point of view". (Determination TTP102; hearing on 6th September 2006 in respect of possessions proposed for the night of 6th/7th September)

"Application of Section 3.1.3

18. The material question for the Panel was, first, whether the disputed possessions were urgent safety requirements for the purpose of Section 3.1.3 and, secondly, whether the application of this provision entitled Network Rail to adopt its proposal

19. ORR finds that the Panel erred in its assessment of the application of section 3.1.3, as it focused on the circumstances prevailing at the time of the hearing, namely the imminence of the "red flag deadline" (closure of the line on safety grounds) and the apparent lack of available alternatives within that timeframe. Those elements were irrelevant to determining whether the proposed possessions constituted urgent safety requirements. ORR, therefore, concluded that the Panel took account of irrelevant considerations, which distorted its determination.

20. The Panel found that Section 3.1.3 did not empower Network Rail to take any specific action but merely created a facility to dispense, through consultation, with the normal time periods. ORR has no objection to the finding nor to the Panel's reasonableness test.

21. However, ORR concludes that the Panel went too far in determining that Network Rail was entitled to decide which of the options to adopt. First, Network Rail may only do so in co-operation with the Train Operators; secondly, it may only do so within the framework of the PARTP. ...

...25. Although the Panel appears to have considered the safety of the line, which is listed as one element in Criterion D6(a) of the Decision Criteria ..., it appears to have concentrated on that element exclusively without reference to the other pertinent criteria. None of the Decision Criteria has priority over the others. Further, the Panel does not appear to have considered whether Network Rail took due account of EWS and FHH's business concerns. Section 3.1.3., which operates only so as to accelerate the timescales involved in the consultation process, does not remove the requirement for Network Rail to take all of these considerations into account.

34...ORR has some sympathy for the predicament in which the Panel was placed and the pressure it evidently felt under to find a pragmatic solution in advance of the expiry of the dispensation, four days later. However, it is unfortunate that Network Rail's communication failures were permitted to dictate the outcome of the dispute in the circumstances of this case. The Panel could have avoided creating the impression that Network Rail was allowed to disregard the PARTP with impunity. The Panel...could then have made a declaratory ruling, taking account of the circumstances as at the material time, to the effect that Network Rail had no legal entitlement to impose the possessions unilaterally and without regard to the requirements of the PARTP." (ORR Determination of appeals by EWS and FHH in respect of TTP102. 2nd February 2007

The Panel's findings in respect of facts

8. In general terms this is not a dispute where there are differences between the parties as to the sequence of events, and the "facts" of the case, which can be summarised as follows;
 - 8.1. as of the beginning of December 2007, all parties were planning for a full Blockade of Rugby station area to enable the completion of a programme of works relating to track,

signalling and Overhead Line (OLE) works. The Blockade would commence after the last service on 24th December, and lines would be re-opened for traffic in the early morning of Monday 31st December; this Blockade had been planned and incorporated into the Rules of the Route in conformity with due processes as laid down in Part D of the Network Code;

- 8.2. the work planned for the Christmas blockade depended in part upon the completion of certain other preparatory works in other earlier agreed possessions;
- 8.3. not all previous works were completed in accordance with plans however, and Network Rail did not advise Train Operators that there were any potential implications for the Christmas blockade;
- 8.4. between 6th and 12th December various messages passed between different levels of management in Network Rail and WCTL, giving conflicting information as to whether or not a 26 hour extension of the Christmas Blockade (to finish on the morning of 1st January 2008) would be needed. The practical effect of such an extension for the parties to this dispute would be
 - 8.4.1. for WCTL, the severance of all services between Northampton and Birmingham International, resulting in all passengers requiring to be transported in replacement bus services and imposing up to 2 hours longer end to end journey time.
 - 8.4.2. for EWS, the cancellation of a number of "first services after the Christmas break", including all services to Daventry International Freight Terminal, with no alternative means of serving the affected customers.
- 8.5. Network Rail only finally confirmed that an extension would be needed on 10th December, on which date WCTL also confirmed that, notwithstanding some earlier preparedness to entertain the proposal, it would now reject it.
- 8.6. on 12th December, the National Access Unit (NAU) of Network Rail issued a notice formally proposing to extend the blockade over the 26 hours to 05:20 on January 1st. This formal notice stated that
 - 8.6.1. *"This email is in accordance with Access Condition D2.1.10 and relates to Section 3.1 of National Rules of the Plan being the Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change"*. And asserted that
 - 8.6.2. ***"Please note that due to the very late notice of this request the period of industry consultation has been reduced to two days."*** (in other words that answers would be needed by Friday 16th December).
- 8.7. EWS responded to Network Rail, stating that *"EWS will not respond to this proposal by tomorrow as it is only a two day response period. We need to have sufficient time to consult with our individual Business Units before we can respond. EWS will respond within the Industry agreed deadline of 10 working days as laid out in the National Rules of the Plan section 3.4.1"*. [i.e. EWS committed to giving a response by Friday 28th December]
- 8.8. Network Rail therefore responded by accepting that EWS could insist on a period of up to 10 days to respond to such consultation, (i.e. until 28th December), but at the same time stated *"by this letter we informally give you advance warning that once the 10 working days have elapsed we will be formally notifying you of our decision to go ahead with the extension of the blockade to 0520 Tuesday 1st January 2008"* In the event EWS gave its formal response (that the extension of the possession proposed was unacceptable) on 20th December.

- 8.9. Meanwhile,
- 8.9.1. both WCTL and EWS had taken action to protect their respective rights to refer the matter in dispute to a "*relevant ADRR Panel*", and
 - 8.9.2. formal disputes were duly lodged within laid down timeframes
- 8.10. WCTL sought the intervention of the Office of Rail Regulation, with a view to having the ORR declare that, were Network Rail to proceed with the extension to the Blockade it would be in breach of its Licence; after various meetings and exchanges of details regarding the engineering issues at stake, the ORR wrote to Network Rail, on 19th December stating "*I confirm that we have decided that it is not appropriate to make the provisional order suggested by Virgin Trains. After careful consideration of the information available to us, and taking the potential short and longer-term consequences into account, we have concluded that to make such an order would not be acting in a manner best calculated to protect the interests of users and railway services*".
- 8.11. On 28th December Network Rail confirmed that, notwithstanding the representations it had received from both WCTL and EWS the Blockade extension on 31st December would take place.
- 8.12. The Blockade at Rugby continued in force throughout December 31st 2007. In the event it was not given up on January 1st, in accordance with the extension that had been sought, and traffic through Rugby was not able to resume until January 4th 2008.

The Contentions of the Parties

9. The Parties were agreed that the reference to the Panel did not relate to any matters of the quantification of compensation, or to any of the circumstances prevailing after the extended Blockade was not lifted on 1st January 2008. Taking into account all of the written submissions, opening statements and additional evidence drawn out by questioning of the Parties, the Panel acknowledged that the point at issue could be summarised as follows:
- 9.1. for WCTL, that Network Rail, in imposing the 31st December Blockade was in breach of the procedures set out in the National Rules of the Plan, in particular the Procedures for Altering ROTP/R, that allows the dispute and appeal process to run its course;
 - 9.2. for EWS, that Network Rail was not entitled to act outside the terms of National Rules of the Plan Section 3, and that that document did not permit Network Rail to act as it had in imposing this possession unilaterally, and in despite of the declared opposition of the Train Operators;
 - 9.3. for Network Rail, that
 - 9.3.1. "*its actions were fair and reasonable in the circumstances taking into consideration the industry's best interests*".
 - 9.3.2. that this perception was sustained, at least by implication, by the decision of the Office of Rail Regulation in its letter of 19th December; and that, in any case,
 - 9.3.3. Network Rail was within its rights to act as it had, because all its actions were in accordance with the provisions of National Rules of the Plan paragraph 3.1.3, and Network Code D2.1.10.

The Panel's findings in respect of entitlements

10. In view of the arguments presented to it, the Panel concluded that the key issues to be determined were:

- 10.1. which are the parts of the contractual matrix which define how the parties should deal with the need to change or amend engineering programmes?
 - 10.2. which of those documents has the primacy to determine the latitudes available to the parties? and
 - 10.3. what is either party, Network Rail, or Train Operator, actually entitled to do on its own behalf, or obliged to do for its counter-party?
11. The Panel concluded that two documents are decisive in this matter, namely, Part D of the Network Code, and in particular Condition D2.1, and the National Rules of the Plan, and in particular Section 3 "PARTP". These two documents are inter-dependent, and it is this inter-dependence which determines which has primacy in relation to the circumstances of this case. Thus
- 11.1. Conditions D2.1.1 to D2.1.7 prescribe the process and timescales for the annual (and intermediate) review of the whole corpus of Rules of the Route/Rules of the Plan, both National and in respect of Territory, Region or Route. This **process** is, by virtue of its inclusion in the Network Code, directly subject to the scrutiny and approval of the Office of Rail Regulation. However, the process only has significance to the extent that it results in the "*applicable Rules of the Plan or the applicable Rules of the Route*" documents which, whilst not directly subject to Regulation, have *de facto* Regulated status; they depend upon the agreement of the Train Operators, which agreement can be tested through the Access Dispute Resolution process, up to and including Part M appeal to the Office of Rail Regulation.
 - 11.2. Condition A1.4 stipulates that "*In the event of any conflict of interpretation between this code and an Access Agreement (not including this code) the following order of precedence shall apply: (1) this code; and (2) the Access Agreement*". One practical exemplification of this is that the Rules of the Plan/ Rules of the Route acquire their contractual standing from the operation of Part D, whilst the status of Firm Rights, which derive from a Schedule 5 of a Track Access Contract, are explicitly subject to "*the applicable Rules of the Plan or the applicable Rules of the Route*".
 - 11.3. Conditions D2.1.1 to D 2.1.7 serve to empower only the "*applicable Rules of the Plan and Rules of the Route*". Where those "*applicable Rules*" require intermediate amendment, Condition D2.1.10 requires and empowers Network Rail to devise, and to obtain the agreement of Train Operators, for a structured and disciplined amendment procedure. This is the basis for *Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change Date* ("PARTP").
 - 11.4. That said, that PARTP
 - 11.4.1. must contain certain stipulated provisions that are prescribed within Condition D2.1.11, in particular requirements that Network Rail should consult "*to the extent reasonably practicable*" with Bidders "*likely to be affected by the amendment or revision*" and to have "*due regard to the Decision Criteria*"; and
 - 11.4.2. cannot be modified, other than by invoking afresh the relevant amendment procedure, Condition D2.1.10, which uniquely requires that "*Network Rail shall not be entitled to implement any change to that procedure until any appeal against any such change has been determined pursuant to Condition D5*".
 - 11.5. The Panel noted that the National Rules of the Plan did not appear to have been recently reviewed, as they still contained cross-references to Conditions that had been revised or renumbered in successive editions of the Network Code.

12. In relation therefore to the question posed at 10.2 above, provided that the PARTP has indeed been drafted, consulted and implemented in accordance with the procedural directions within Condition D2.1 (and there has been no allegation that this is not the case), the Panel must conclude that PARTP has the absolute primacy in this instance, and that it is PARTP that defines the latitudes available to the parties.
13. The Panel considered therefore the scope of PARTP, and the obligations and entitlements it conferred in relation to the principal allegation of the Train Operators, namely that Network Rail had sought to impose a particular course of action, through an abuse of PARTP's provisions in relation to consultation and giving "*due consideration to responses received from Train Operators*" (PARTP paragraph 3.5.1). In particular the parties were at odds as to the effect of paragraph 3.1.3 of PARTP, which states that "*Where a need arises to amend Rules of the Route/Plan to cater for urgent safety requirements or other emergency situations, all parties concerned will co-operate in accelerating the normal timescales in this Procedure commensurate with the urgency of the circumstances.*"
14. The Panel found that,
 - 14.1. this matter had been to some extent considered in both the Panel and the ORR findings in respect of TTP102. As the ORR observed "*The Panel found that Section 3.1.3 did not empower Network Rail to take any specific action but merely created a facility to dispense, through consultation, with the normal time periods. ORR has no objection to the finding...*" (paragraph 20 of ORR conclusions of February 2007);
 - 14.2. any such facility has to be the subject of tests of reasonableness, which must relate directly to the terms in which paragraph 3.1.3 is expressed. In relation to this case, this implies considering whether
 - 14.2.1. the essential pre-condition ("*to cater for urgent safety requirements or other emergency situations*") has been fulfilled, and, if so, whether
 - 14.2.2. the short response times sought were "*commensurate with the urgency of the circumstances*".
15. The Panel concluded that it needed to assume that the PARTP, as currently drafted, reflects the conclusions reached as a result of Network Rail properly carrying through to a conclusion the processes prescribed by Condition D2.1 (including resolution of any disputes); in other words, that the text chosen by the drafters of PARTP reflected the agreed intentions of the industry, and that it had been the intention of all parties that PARTP would normally be complied with to the letter. It would then follow that any derogations from the provisions of PARTP would only be justified in the exact circumstances, (very narrowly) defined in paragraph 3.1.3.
16. The circumstances where the wording of paragraph 3.1.3 contemplates "*accelerating the normal timescales*" are very precise, namely "*to cater for urgent safety requirements or other emergency situations*". The Panel had no difficulty in concluding that the circumstances relating to the extension to the Rugby Blockade do not qualify on either count;
 - 16.1. as at the time of the discussions between the parties there was no suggestion that the layout over which trains were currently operating was in any way inadequate or potentially unsafe; and
 - 16.2. there was no basis for determining that a situation which, avowedly, owed its urgency to failures in past planning and delivery of identified necessary preparatory works should reasonably be labeled any kind of emergency.
17. Nevertheless, Network Rail, in furtherance of its argument that the Train Operators could reasonably be compelled to take precipitate action, has sought to demonstrate that "*in the*

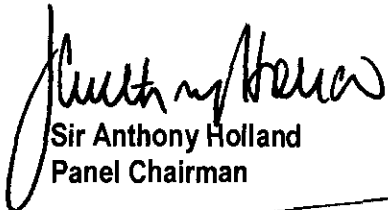
circumstances of this case", allowing a Train Operator 2 days to respond to a proposition, is consultation *"to the extent reasonably practicable"*.

18. The Panel finds that this, and comparable arguments, cannot be sustained because they confuse the function of Condition D2.1.11, which serves to specify what the PARTP should achieve, with what the PARTP actually states. Whilst Condition D2.1.11 requires that the concept of *"to the extent reasonably practicable"* should be addressed, it is the words actually in the resulting PARTP which give effect to that concept. In other words, when the drafters of PARTP included, at paragraph 3.4.1, a time span within which a Train Operator can respond to a proposal, that time span (*"10 working days"*) corresponded to an agreed assessment of how *"to the extent reasonably practicable"* should be defined.
19. If Network Rail wished to propose that *"to the extent reasonably practicable"* should be defined and understood differently, then its only recourse would be to propose an amendment to PARTP, to be progressed in accordance with Condition D2.1.10, and not to be implemented *"until any appeal against any such change has been determined pursuant to Condition D5"*.
20. The Panel could find no provision in PARTP, or elsewhere, which conferred upon Network Rail a contractual right to determine what it would do, and to advise affected Train Operators, even *"informally"*, without regard to representations that might be received.
21. Finally, the Panel considered the proposition, advanced by Network Rail, that the intervention by the Office of Rail Regulation, gave an implicit *imprimatur* to allow Network Rail to proceed in despite of the provisions of the Rules of the Route/Rules of the Plan/PARTP. The Panel found that it had some sympathy for the predicament in which the Office of Rail Regulation was placed and the pressure it evidently felt under to find a basis for allowing Network Rail to proceed with the full programme of work contemplated for the Christmas Blockade, even though it was not possible to achieve that objective without considerable extra detriment to the Train Operators' customers. However, the Panel was determined that its consideration of the obligations that the National Rules of the Plan impose upon the parties should be based upon the provisions of the contractual documents, as they bear upon the circumstances of this case. The Panel was well seized of the potential risk of otherwise creating the impression that Network Rail was allowed to disregard the PARTP with impunity.

The Panel's Determination:

22. For all the foregoing reasons therefore, the Panel determines that
 - 22.1. **a failure by Network Rail to complete preparatory works should not constitute for Train Operators an "emergency situation" such as contemplated in PARTP 3.1.3;**
 - 22.2. **Network Rail's entitlement to modify the Rules of the Plan/ Rules of the Route is limited to the discretions set out explicitly in PARTP. PARTP as currently drafted, must be assumed to reflect the wishes of the larger rail industry; as such it does not confer on Network Rail any entitlement within the contract structure of Track Access to impose change unilaterally, and without the prescribed consents of affected Train Operators;**
 - 22.3. **in respect of the actions taken by Network Rail in promulgating, and implementing the extension to the Rugby Christmas Blockade until the morning of Tuesday 1st January 2008, these actions have no basis of justification within the explicit terms of the Track Access Contract and associated document, and therefore must be adjudged to be actions breaching the Track Access Contracts of the appellant Train Operators.**

23. By way of clarification, and for the avoidance of doubt, the Panel offers the following guidance to the parties to this dispute;
- 23.1. PARTP represents the translation into practical processes of certain duties and obligations imposed upon the parties by the Network Code; to the extent that, as in paragraph 3.1.3, it contemplates some derogation from its general applications, it should be understood that that derogation only relates to narrowly defined pre-conditions, and does not imply that PARTP is merely a basis for negotiation;
 - 23.2. any non-compliance with PARTP is a breach of a contractual obligation unless preceded by formal amendment of PARTP in accordance with Condition D2.1.10;
 - 23.3. it might assist those involved in the detail planning of engineering works if they were asked to consider that compliance with PARTP is an obligation that exists to protect the customers of Train Operators from unwarranted and short term disruption, and that, in that regard, PARTP is to be treated with the same deference in relation to the Track Access Contract, as Railway Group Standards are in relation to engineering matters;
 - 23.4. there is a case for Network Rail, or perhaps a Train Operator that considers that the current form of PARTP works to its disadvantage, to initiate a review of the National Rules of the Plan, and PARTP in particular, not least to re-align it with the latest configuration of the Network Code. Such a review should ensure that any changes proposed are given significant prominence and are consulted upon to the fullest "*extent reasonably practicable*". The process for such a revision is contained within Condition D2.1 of the Network Code, and does not require other specific sanction;
 - 23.5. the Panel has not sought to address the question posed by WCTL at paragraph 5 above, but considers this might be an input to the review suggested above.
24. 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.


Sir Anthony Holland
Panel Chairman

28th January 2008