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

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### **Determination in respect of reference TTP210**

*(following a Hearing held at Central House, Euston on 8<sup>th</sup> May 2008)*

#### **The Panel**

**Steve Carter** (Eurostar) : elected representative, non-Franchised Passenger Class

**Robert Holder** (First Greater Western) : elected representative, Franchised Passenger Class, Band 2

**Nigel Oatway** (EWS) : elected representative, Non-Passenger Class, Band 1

**Colin Sweeney** : appointed representative of Network Rail

Panel Chairman: **Sir Anthony Holland**

#### **The Parties**

##### **For (Virgin) West Coast Trains Ltd ("WCTL")**

**Robert Hodgkinson** Commercial Operations Manager

**Tony Sadler** General Manager, Operations

##### **For London & Birmingham Railway Ltd ("London Midland" or "LM")**

**Mark Haslam** Forward Timetable Manager

##### **For First/Keolis TransPennine Ltd "TransPennine Express" ("TPE")**

**Philip Hassall** Resource Planning Manager

##### **For English Welsh & Scottish Railway Ltd ("EWS")**

**Nick Gibbons** National Planning Manager

##### **For Freightliner Ltd ("FLL")**

**Simon Barrett** Timetable Planning Manager

##### **For GB Railfreight Ltd ("GBRf")**

**Ian Kapur** Timetabling Manager

**Steven Turner** Head of Production

##### **For Network Rail Infrastructure Ltd ("Network Rail")**

**Matthew Allen** Network Access Unit Manager

**Simon Maple** Head of Programme Investment, West Coast

**Les McDowell** Strategic Possessions Manager – West Coast

**Dan Kayne** Legal Advisor

#### **Interested Party**

##### **For XC Trains Ltd ("XCT")**

**Graham Ward** Possession Planning Manager

## Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was presented with individual submissions from the six Train Operators, and a single counter-submission, addressing points made by all appellants, from Network Rail. All related to Network Rail's proposed programme of possessions deemed necessary for the works required to further the West Coast Route Modernisation ("WCRM") programme up to December 2008.
2. The overall context of the dispute arose from changes to Network Rail's strategy for delivering the WCRM implementation plan following
  - 2.1. severe possession overruns and failure to complete programmed works at Rugby between Christmas and New Year (2007-8) and
  - 2.2. the issuing, on 28<sup>th</sup> February 2008, by the Office of Rail Regulation ("ORR") of a Provisional Order under section 55 of the 1993 Railways Act, requiring Network Rail "to produce and deliver a plan" that must "demonstrate how Network Rail will deliver the Output", "set out milestones for the Delivery" and "take full account of the risks associated with achieving the Delivery, including....operational and timetabling resources to reduce the impact of possessions on operators".
3. In response to this Provisional Order:
  - 3.1. on 12<sup>th</sup> March 2008, Network Rail issued "**LNW ROTR Changes for WCRM enhancements (Proposal)**" ("**NAUM-13**"), a suite of proposed changes to the established Rules of the Route for consultation. Following the responses of the Train Operators, Network Rail made some changes and re-issued the proposals as
  - 3.2. "**LNW ROTR Changes for WCRM enhancements (Decision)**" ("**NAUM-30**") on 2<sup>nd</sup> April.
  - 3.3. on 2<sup>nd</sup> May, ORR, in a Press Release, stated "Network Rail has complied with the order it made on 28<sup>th</sup> February".
4. The Panel acknowledges its jurisdiction in cases that relate to the application of Network Code Conditions D2.1.1 to D2.1.8. In addition the Panel notes its distinctive responsibilities in respect of the procedures laid down in Conditions 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 to the Panel their dissatisfaction "*with any decision of Network Rail made under this Part D, including.....(a) the application by Network Rail of the Decision Criteria... and (d) any decision of Network Rail which may be referred to the relevant ADRR Panel under Condition D2.1.7, D2.1.11....*".
5. The Panel notes that in their respective submissions the parties make both generic points in relation to Network Rail's entitlement to propose, and seemingly insist upon, the programme of possessions, whilst the Train Operators also raise a number of objections to the detail of many of the individual possessions. Thus
  - 5.1. of the Passenger Train Operators
    - WCTL asks the Panel to determine that
      - "***In proposing these possessions (NAUM-30 applies), Network Rail have not applied Decision Criteria reasonably, and through such conduct, will adversely cause a material effect on the operations and business of WCTL;***

- ***In consideration of WCTL observations both here-in and in conjunction with the WCRM Delivery Plan, that the proposed possessions represent a plan that is both undeliverable in terms of the timescales (Informed Traveller) and undeliverable in terms of being contractually non compliant ...;***

and therefore that

- ***“Network Rail withdraw the NAUM-30 proposals and reconsider with appropriate Industry involvement, a new plan that can be delivered in accordance with due process, contractual obligation and commercial sensibility”.***

and furthermore that the Panel decide the following other issues –.

- ***“Those specific issues pertinent to the Individual items (possessions)...;***
- ***In light of those comments highlighted in Section 7.11 above<sup>10</sup>, that Network Rail, under their duty to provide ROTR information, are tasked with improving (with Industry contribution), the levels of engineering block information pertaining to ALL diversionary and transferable<sup>11</sup> routes, applicable to each Train Operator, such that they can with authority, definitively establish the total impact to their operations and business.”***

**LM** asks the Panel to determine

- ***“that Network Rail will instruct the relevant Network Rail Train Planning Centre(s) to oversee a review of the West Midlands and Coventry Corridor services on occasions that the Trent Valley Main Line is closed and services are diverted on ordinary weekdays, such that the effects of overcrowding and poor service performance are mitigated.***
- ***that in the case of Network Rail failing to agree a robust timetable to the agreement of London Midland, that London Midland reserves the right to not grant the block as proposed, and in the event of such a situation arising seek to have recourse to the Committee for a further determination.***
- ***that Network Rail alternatively plans the five weekdays (Monday 1<sup>st</sup> to Friday 5<sup>th</sup> September inclusive) to another occasion such that the work is not undertaken at a busy time for commuter and scholars traffic.”***

**TPE** asks the Panel to determine

- ***“...that Network Rail has not applied the Decision Criteria correctly and has not paid due consideration to the Firm Rights of TransPennine Express. The Panel is requested specifically to determine:***
  - ***That the Line Speed Enhancements proposed between Preston and Penrith are not absolutely essential to the launch of the 2009 timetable on 13<sup>th</sup> December 2008 (the Principal Change Date) and that Network Rail should defer the possession strategy proposed to facilitate them until Engineering Period B 2009 (between 26<sup>th</sup> January 2009 and 22<sup>nd</sup> March 2009); or***
  - ***That the possession strategy proposed is unnecessarily restrictive and that Network Rail should deliver the Line Speed Enhancements between Preston and Penrith with a less disruptive possession strategy, which will allow TransPennine Express to consume more of its Firm Rights to services***

*between Manchester and the Lake District and Scotland over the summer period; or*

- *That Network Rail is to deliver the proposed possession strategy in a manner that avoids disrupting services in the summer period, particularly Weeks 19, 20 and 21.”*

Further more TPE seeks the following remedy:

- *“A determination that requires Network Rail to defer the possessions required to deliver the Line Speed Enhancements between Preston and Penrith until Engineering Period B 2009 (between 26<sup>th</sup> January 2009 and 22<sup>nd</sup> March 2009); or*
- *A determination that requires Network Rail to propose an alternative possession strategy to deliver the Line Speed Enhancements between Preston and Penrith, which will allow TransPennine Express to consume more of its Firm Rights to services between Manchester and the Lake District and Scotland; or*
- *A determination that requires Network Rail to propose an alternative possession strategy that avoids disruptive possessions during the summer period, particularly Weeks 19, 20 and 21”.*

## 5.2. of the Freight Train Operators

EWS asks the Panel to determine that

- *“by proposing a series of extremely intrusive possessions to block this major passenger and freight artery, Network Rail is imposing restrictions to the network that reduce EWS’s ability to serve its’ customers to an unacceptable level. The proposed capacity, length and diversionary restrictions effectively results in services, with Firm Contractual Rights, being unable to run or severely amended such that EWS will not be able to effectively serve its’ customers needs or requirements.*
- *EWS seeks that Network Rail be directed to repackage the works to be less intrusive than currently proposed.”*

FLL asks the Panel to determine that

- *“Network Rail, in its decisions regarding additional & altered possessions has not taken due consideration to responses from Train Operators as required in PARTP Section 3.5.1 and has not taken due regard to Decision Criteria in Network Code Condition D6 as required in PARTP Section 3.5.2*
- *...in respect of Rugby Possession Week 22 Network Rail is not entitled to take the additional hours, but keep to the previously agreed possession of 0300 Sat – 0600 Tue or to undertake this work during the Christmas/New Year period.*
- *...in respect of the Nuneaton 16 Day blockade Network Rail is not entitled to take the possession unless the blockade be reduced to a maximum of 9 days, and Network Rail has confirmed with FL that all FL’s services can operate and NR has advised what the timetable changes are on FL’s services.*

- *...in respect of the Nuneaton “Firewall Blockade” Network Rail is not entitled to take this possession.*
- *...in respect of the Crewe North – Preston Brook Tunnel Possessions Weeks 25, 26, 27, 28, 29 Network Rail is not entitled to take the possessions unless a later start time can be agreed.*

GBRf asks the Panel to determine

*“whether or not:*

- *Network Rail has complied with the Office of Rail Regulation's Provisional Order, issued on 28<sup>th</sup> February 2008, relating to the West Coast Route Modernisation programme and its consultation thereof.*
- *Network Rail is in breach of its Licence Condition No.7.*
- *Network Rail is in breach of its Licence Condition No.9.*
- *If Network Rail is found to have been in breach of either Licence Condition No.7 or No.9 or both, the Panel is asked to direct Network Rail to withdraw the current possessions as described in Appendix C, and to properly consult with train operating companies to reach agreement in laid down industry timescales and in accordance with its Licence Condition No.7 and 9.”*

5.3. Network Rail asks the Panel to determine that

- *Network Rail complied with sections 3.5.1 and 3.5.2 of PARTP in reaching its decision to proceed with the proposed possession plans that are set out in the Final West Coast Route Modernisation Decision document (NAUM-30) to complete the delivery of the WCRM Programme by December 2008.*
- *Recognising that the Panel is being asked to make a determination in relation to possessions which are scheduled to commence in week 9 of the Working Timetable (24 – 29 May), Network Rail wrote to the Panel Chairman on 17 April, copying in the Referring Parties, seeking an acceleration to the determination process to allow for either Network Rail, or any of the Referring Parties, to make any appeal to the ORR in advance of the planned possession commencement date. Network Rail proposed in that letter (and repeats here) that the Panel reaches a determination in relation to the proposed week 9 possession by close of business on 9 May 2008, separately from reaching its decision in relation to the other disputed possessions which Network Rail also requested were dealt with as quickly as possible having regard to the upcoming possessions.*

5.4. XCT was in attendance because it had resolved its disputes with Network Rail in respect of NAUM-30, and was committed to Network Rail completing all the works addressed in NAUM-30 in time for implementation of the proposed Timetable in December 2008. XCT wished the Panel to be under no illusions but that should the Panel determine in ways that would put the December 2008 implementation of the revised timetable (and a number of associated rolling stock transfers) in jeopardy, any delay would have a severe adverse impact upon XCT's ability to honour its franchise commitments.

6. The Panel noted that in a significant number of instances, the Possessions incorporated into NAUM-30, include, or expand upon Possessions which were first proposed in a Possessions Strategy Notice, or in the annual Rules of the Route, and which were made the subject of formal dispute proceedings at the appointed time. The Panel particularly noted that
  - 6.1. such earlier disputes had not been pursued to a conclusion; and that
  - 6.2. the proposals in NAUM-30 appeared to be predicated upon the presumption that what was now proposed was largely a programme of extensions to Possessions that had otherwise been deemed to be acceptable, and that
  - 6.3. this was not in fact the base case.
7. The Panel reminded itself that,
  - 7.1. 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).
  - 7.2. the entitlements of the parties in this instance are as laid down in
    - 7.2.1. Network Code Part D;
    - 7.2.2. National Rules of the Plan (July 2007 edition); together with
    - 7.2.3. any relevant amplification of the meaning of these provisions as contained in a determination of either a “*relevant ADRR Panel*” or the ORR;
  - 7.3. in respect of any question of remedy;
    - 7.3.1. “*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)
    - 7.3.2. Condition D5.3 states that “*any dispute 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;”*
  - 7.4. the terms of the Provisional Order under section 55 of the 1993 Railways Act (as amended) imposes upon Network Rail specifically the obligation to take “*full account of the risks associated with achieving the Delivery including...operational and timetabling resources to reduce the impact of possessions on operators*” and it was therefore incumbent upon Network Rail to produce an analysis of its proposals in terms of “*the impact of the possessions*” for operators.
  - 7.5. actions taken by any of the parties that the Panel finds to be at odds with any party’s entitlements, cannot by definition be deemed reasonable, and the Panel’s determination of entitlements, or of any prescription of remedy, must take this principle into account.

## **Some preliminary issues of definition; the relevant contractual provisions**

8. 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:

### **8.1. Network Code Part A provisions 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"*

### **8.2. 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.”*

**“D2.1.10 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].”*

**D2.1.11 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.”*

**D6. Decision Criteria**

*“The Decision Criteria consist of the necessity or desirability of the following (none of which necessarily has priority over any other)”*

The Panel’s consideration of the nature of the obligations represented by a need “to have due regard to the Decision Criteria” is set out at paragraphs 13.5 onwards below. However, for the avoidance of doubt, and given that “(none of [the Decision Criteria] necessarily has priority over any other)” the Panel notes that, at a recent amendment to the Network Code, a new criterion was introduced, into the list at position (b) and that the cross referencing of the important footnote to the Decision Criteria was not amended appropriately. The Panel wishes to record that it has interpreted the force of the footnote as if it had been amended as the editorial changes required, so that it should be understood as



*“In its consideration of paragraph (e) of this Condition D6 [which reads: “maintaining, renewing and carrying out other necessary work on or in relation to the Network”], Network Rail shall not be entitled to determine that its Restriction of Use of any part of the Network shall be as contemplated by any relevant maintenance contract by reason only of the terms and conditions of that contract. In this paragraph, “relevant maintenance contract” is a contract that Network Rail shall have entered into, or shall intend to enter into, with any person for the maintenance, renewal or the carrying out of any other work on or in relation to the Network.”*

### 8.3. 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 D2.1.10 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 15<sup>th</sup> 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 6<sup>th</sup> September 2006 in respect of possessions proposed for the night of 6<sup>th</sup>/7<sup>th</sup> 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. 2<sup>nd</sup> February 2008)**

### **The Contentions of the Parties**

9. In general terms the parties are agreed this is not a dispute where they have any disagreement over

9.1. matters of the quantification of compensation, or

9.2. the manner in which Network Rail has administered the scheduling provisions of PARTP.

10. That said, there is evidence that

10.1. Network Rail originally embarked on a consultation process which envisaged three possible Options, namely

- 10.1.1. Option A, persisting with the previously promulgated Rules of the Route, some elements of which were the subject of disputes duly registered with the Access Disputes Committee;
  - 10.1.2. Option B, amendments to the previously promulgated Rules of the Route, justified by reference to a perceived need to continue to work towards completion of sufficient elements of the WCRM to enable the introduction of the West Coast Trains Very High Frequency Timetable ("VHFT"), from December 2008; and
  - 10.1.3. Option C, amendments and additions to the previously promulgated Rules of the Route, but aimed at delivering sufficient elements of the WCRM to enable the introduction of the West Coast Trains Very High Frequency Timetable ("VHFT"), from May 2009.
- 10.2.** subsequently, Network Rail only introduced, through PARTP, proposals for amending the Rules of the Route to meet the requirements of Option B;
- 10.3.** there are divisions of emphasis between the representations from the Train Operators, as between
- 10.3.1. those who contend that the NAUM-30 proposal contains so many possessions imposing unreasonable restrictions on the Train Operators, as a consequence of focussing upon the December 2008 deadline, that it demonstrates that Option B is axiomatically undesirable, and that Option C should be pursued with the date for the introduction of the VHFT re-set to May 2009;
  - 10.3.2. that one TOC, WCTL, which has concerns as to whether there will be time and opportunity to deliver a robust and necessary driver training programme before December 2008
  - 10.3.3. those concentrating on aspects of specific possessions, where mitigation or adjustment could make the possession acceptable for inclusion into the Rules of the Route;
  - 10.3.4. those concerned that undertakings, or assessments that have been proffered by Network Rail in respect of the availability of alternative routes and/or capacity are unproven or appear undeliverable; and
  - 10.3.5. those advocating that certain possessions which, by virtue of their dates, cause particular hardship to Train Operators, relate to improvement works which are not in fact mission critical to the implementation of VHFT in December 2008, and therefore could reasonably be deferred to a later time.
- 11.** Network Rail, for its part, contends that
- 11.1.** *"West Coast Route Modernisation is a very important programme for the national rail industry"* (Network Rail opening statement, paragraph 1)
  - 11.2.** best utilisation of planning resources precluded detailed development of parallel Options B and C;
  - 11.3.** that there is no alternative, within the framework of a December 2008 target date, to the most contested possessions (the 16-day closure of Nuneaton, and the 50 hour weekend blocks between Crewe and Weaver Junction), because of a combination of factors relating to the forward commitment of resources, and the interdependence of various elements of work;
  - 11.4.** that it has complied with PARTP, and in particular has *"had due regard to the appropriate decision criteria"* (Network Rail opening statement, paragraph 21)., and therefore

- 11.5. Network Rail was within its rights to implement its proposed changes to the Rules of the Route to enable delivery of the Option B plan.

### **The Panel's findings in respect of general entitlements**

12. In view of the arguments presented to it, the Panel concluded that the key issues to be determined were:
- 12.1. which are the parts of the contractual matrix which define how the parties should deal with a perceived need to change or amend engineering programmes?
  - 12.2. which of those documents has the primacy to determine the latitudes available to the parties? and
  - 12.3. 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?
13. The Panel concluded that two documents are decisive in this matter, namely, Part D of the Network Code, and in particular Conditions D2.1, and D6, together with 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
- 13.1. 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 ORR. 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 ORR.
  - 13.2. Condition A1.1(h) 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 a Train Operator's 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*".
  - 13.3. 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").
  - 13.4. That said, PARTP
    - 13.4.1. 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

13.4.2. cannot be modified, other than by invoking afresh the relevant amendment procedure, Condition D2.1.10, which 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*”.

**13.5.** The Panel found that

13.5.1. 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;

13.5.2. Network Rail may make use of PARTP to “*propose changes to any part of ROTR/P*”. However, PARTP does not contain any explicit provisions enabling Network Rail to propose a suite of possessions as a package, or a strategy, as opposed to requiring each amendment to the Rules of the Route to be proposed, justified and agreed on an individual basis;

13.5.3. PARTP provides for formal consultation with Train Operators on each proposal; this consultation may proceed on a multilateral basis, but as with the full Review of the Rules of the Route process, cannot reach a conclusion before each Train Operator has individually accepted each individual proposed amendment to the Rules of the Route. Furthermore it places two mandatory duties on Network Rail, namely

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 [emphasis added] decide which changes, if any, should be made to ROR/P[sic].*

3.5.2 *In reaching its decision, Network Rail shall [emphasis added] have due regard to the Decision Criteria in Network Code Condition D6.”*

13.5.4. requires any disputes to be referred for determination to a Timetabling Panel.

14. The Panel noted that there is, on the face of PARTP, no explicit duty laid upon Network Rail that it should state its reasons for the decisions taken in accordance with PARTP 3.5.2. The Panel was advised that in a contractual matter of this nature, the so-called Wednesbury reasonableness test applies, such that a duty to take account of specified considerations, (in this case the representations of Train Operators, and the Decision Criteria, as well as the terms of the Provisional Order by ORR referred to earlier at 2.2.2) carries with it a duty to give details of the rationale by which the responsible party (in this case Network Rail) has discharged that duty. Given this principle the Panel concluded that,

**14.1.** any challenge to one of Network Rail's decisions from a Train Operator, resulting in a reference to a Timetabling Panel, must focus substantially upon the merits of that rationale;

**14.2.** where there is no exposure of that rationale, there is scope for construing the decision as capricious, and/or unfounded as well as not complying with the legal obligation to give reasoned decisions;; and therefore

**14.3.** any determination upholding a decision where that rationale had not been explicitly exposed, would itself be liable to criticism as capricious, and/or unfounded, as well as breaching the Wednesbury principles.

15. Taking all these factors together the Panel found that in relation, therefore, to the question posed at 12.2 this series of references has to be judged within the context of the application of PARTP, all the time noting that

**15.1.** each proposal, if accepted, will become incorporated into the “*applicable Rules of the Route*”, and that, in consequence

- 15.2. the Firm Rights of every Train Operator will become subordinate to such revised “*applicable Rules of the Route*”, and that
- 15.3. PARTP has the absolute primacy in this instance, and that it is PARTP that defines the latitudes available to the parties.
16. In reaching this general conclusion the Panel is taking the view that the need for Network Rail to comply, to the letter, with the provisions of PARTP, is not compromised by either the provisional order issued by the ORR on 28<sup>th</sup> February, or by its Press Release on 2<sup>nd</sup> May. Indeed the Panel considers it unthinkable that either document could have been predicated upon any assumption other than that Network Rail, in meeting the requirements of ORR’s order, had to comply with the due operation of all relevant contractual processes. Nevertheless the Panel had two concerns in this context namely that:
- 16.1. .the Press release of 2<sup>nd</sup> May 2008 stated that “Network Rail has complied with the Order made (by ORR) on 28<sup>th</sup> February” which, as will be realised from 7.4 as a statement was either unknown in all the detail or at least arguable as this determination indicates and;
- 16.2. there is an unfortunate overtone to an objective observer of ‘pre-determination’ in the context of the role of the ORR.
17. Turning therefore to the specifics of this case, a large part of the proposals for amendments to the Rules of the Route will have the effect of erasing significant numbers of Train Slots that have been Bid for and Offered on the basis of the Rules of the Route previously agreed (or in some instances, previously referred to the Disputes Secretary and still awaiting determination). In such circumstances the Panel considers that the responsibility is upon Network Rail to justify each proposal, and to demonstrate, “*with due regard to the Decision Criteria*”, why each amendment to the Rules of the Route, and the consequential changes to Train Slots strikes the most appropriate balance between the interests of Network Rail and Train Operator, bearing in mind also the terms of the Provisional Order referred to in 2.2.2.
18. The Panel considers that the essence of the Decision Criteria is that they provide the basis by which disputing parties can initially assess the degree of their difference, and where it might be mitigated. In the absence of evidence of such dialogue, and with the formalisation of any such dispute, the same Decision Criteria provide the Panel with practical tests of the reasonableness of the behaviour of the various parties, given that many of the criteria relate as much to the duties of the parties to each other, as they do to their respective rights.

### **The Panel’s findings in respect of the week 9 possessions**

19. The Panel noted the specific request from Network Rail that it give urgent consideration to determining the merits of the proposals for two groups of possessions scheduled for the weekend of the Late Spring Bank Holiday (and succeeding “normal weekdays”). In respect, therefore, of these two most immediate proposals the Panel finds that it should address the issues raised from two standpoints, namely;
- 19.1. Are there any special considerations within PARTP, in particular entitling Network Rail to take, and enforce, last minute decisions? and
- 19.2. Which of the representations of the Parties, having due regard to the Decision Criteria, is ostensibly the more reasonable?
20. The Panel noted that Section 3.1.3 of PARTP 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.*”. However, as has been tested in relation to TTP102, and in words endorsed by ORR “ *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 2008, in Appeal against TTP102). However that facility has to be the subject of tests of reasonableness, which must relate directly to the terms in which Section 3.1.3 is expressed.

21. In relation to this case, the disputed proposed amendments to the Rules of the Route do not "cater for urgent safety requirements or other emergency situations": they arise to redress perceived failings in past planning and delivery of the WCRM project. The Panel considers that this is not a sufficient precondition to trigger Section 3.1.3 of PARTP, and so requires that "all parties concerned will co-operate in accelerating the normal timescales in this Procedure commensurate with the urgency of the circumstances". That said, the Panel notes and commends the fact that all parties have nevertheless sought to progress necessary dialogue in a timely way.
22. In respect of the Week 9 possessions on which an early decision is requested, these fall into two groups, namely
  - 22.1. Atherstone and Armitage Jct (and lines radiating from Nuneaton ("the Week 9 Nuneaton possessions")); and
  - 22.2. Blisworth and Shilton, Daventry South and Hilmorton, and Rugby South Junction and Coventry South Jct, ("the Week 9 Rugby possessions"); however
  - 22.3. some of the issues raised by the Train Operators relate to the fact that it is proposed that these adjoining possessions should operate simultaneously.
23. In respect of "the Week 9 Nuneaton possessions", these will block all routes, North - South and East - West, through Nuneaton:
  - 23.1. these were originally proposed, in a Possession Strategy Notice, as for 0030 Sat 24<sup>th</sup> May to 0530 Tue 27<sup>th</sup> May and were subsequently proposed (in October 2007) for extension to 0030 Sat 24<sup>th</sup> May to 0530 Wed 28<sup>th</sup> May. NAUM-30 proposes to extend this to 05:30 Thursday 29<sup>th</sup> May.
  - 23.2. WCTL accepted the October proposal: EWS and FLL both put the 05:30 Tuesday to 05:30 Wednesday portion into dispute (TTP168 and TTP169 respectively). Both cite concerns at the problems of moving "normal week-day traffic" over the available diversionary route. FLL in addition cite that closing access via Nuneaton severs any W10 route to Hams Hall and Lawley Street Container depots.
  - 23.3. all three operators dispute the further extension of 24 hours to 0530 Thursday.
  - 23.4. Network Rail propose that alternative train plans should be based upon that operated on Tuesday 25<sup>th</sup> March 2008: WCTL report that that timetable only delivered 61% "Time to 10" arrivals on 25<sup>th</sup> March 2008. EWS queries the effectiveness, and allocation of the 2.5 freight paths per hour in this alternative train plan, combined with incomplete W10 route provision, and the reduction of train length available over the Coventry Corridor (84SLU as compared with 118SLU via the Trent Valley).
24. In respect of "the Week 9 Rugby possessions", which will block all movement through Rugby station area and junctions
  - 24.1. these were originally proposed in a Possessions Strategy Notice (to which Network Rail's final response to this was issued on 6<sup>th</sup> October 2006) as from 16:00 Sat 24<sup>th</sup> May to 03:00 Tuesday 27<sup>th</sup> May. There were apparently no objections to these proposals.
  - 24.2. In October 2007, Network Rail proposed extensions at both ends of the possession to 03:00 Sat to 05:30 Wednesday. EWS objects to a start time before 07:00 as it prevents the passage of two critical trains with Level 1 Rights and booked for electric traction (6X66



20:00 FO Mossend to Wembley (pass Rugby 04:28) and 4023 03:39 SO Trafford Park to Dollonds Moor (pass Rugby 06:28)). Past practice, which has been acceptable for EWS, has been for a single line for diesel haulage only to be made available through Rugby for the passage of these two trains. An 03:00 start will also affect a number of other EWS services.

- 24.3.** In NAUM-30 the proposed finish time is further extended to 05:30 Thursday. This interruption to "normal weekday services" is disputed by EWS, which queries the effectiveness, and allocation of the 2.5 freight paths per hour in the proposed alternative train plan, combined with incomplete W10 route provision, and the reduction of train length available over the Coventry Corridor (84SLU as compared with 118SLU via the Trent Valley).
- 24.4.** EWS, FLL and GBRf have also queried the measures that are proposed by Network Rail to assure that where freight services are diverted onto other alternative routes there is in practice adequate alternative capacity, and/or that other operators are ready to concede some adjustments to their services to accommodate.
- 24.5.** At the hearing, Network Rail and EWS variously advised that alternative train plans for these possessions had in fact, been uploaded to TSDB on 5<sup>th</sup> May 2008. In verifying this statement, it was found that the alternative train plans were not complete (as Network Rail had thought) and that, furthermore, EWS had received a number of Train Slots timed to operate via Rugby during the early hours of Saturday and on Tuesday and Wednesday (i.e. running through the contested All Line Blocks).
25. The Panel notes Network Rail's description of the works that are to be undertaken in the Week 9 Nuneaton and Rugby blocks, including the array of arguments as to why the Rules of the Route should be amended to suit the needs of the engineering programmes. The Panel considers it to be unacceptable that the affected Train Operators have not been given adequate details of precisely how Network Rail propose to mitigate the impact upon the Firm Rights that the proposed amendments to the Rules of the Route would infringe.
26. On the basis of the information that has been put before it, the Panel finds that the Train Operators have not been given sufficient exposure of Network Rail's rationale as to why it considers that, (*"having due regard to the Decision Criteria"*), the specific amendments to the Rules of the Route, necessary to permit the possessions, are justified, and their impacts upon Train Operators adequately mitigated. The Panel finds further that, in the absence of both such rationale, and practical evidence (e.g. in the way of train planning information) that the interests of Train Operators have been sufficiently considered and safeguarded, it would not warrant a determination that either possession should be included in the *"applicable Rules of the Route"*. Therefore the Panel finds in the cases of
- 26.1.** the extension of the Week 9 Nuneaton possessions beyond 05:30 on Tuesday 27<sup>th</sup> May;  
AND
- 26.2.** the extension of the Week 9 Rugby possessions before 16:00 Saturday, or the extension beyond 03:00 Tuesday;
- 26.3.** **neither** extensions should be permitted to proceed.

### **The Panel's findings in relation to possessions other than in Week 9: general considerations**

27. The Panel has responded to Network Rail's particular pressing request that it determine the issues in respect of the Week 9 possessions, and has accordingly issued an interim decision in a letter dated 12<sup>th</sup> May 2008. However, the Panel, at the hearing on 8<sup>th</sup> May, was given details of many other proposals within MAUM-30 that are disputed by one or more Train Operators.

28. In respect of these other disputed possessions arising out of NAUM-30, the Panel considers that, as a general principle, Network Rail has not set out to provide the Train Operators, or this Panel, with sufficient information, including how it had due regard to the Decision Criteria in making its decisions in each case, to enable either the Train Operators, or this Panel, to make appropriate balanced judgements as to whether or not the proposed amendments to the Rules of the Route should reasonably be made under the provisions of PARTP.
29. The Panel reminds Network Rail that, when invoking the provisions of PARTP, it is upon Network Rail that falls the burden of demonstrating the good and sound reasons as to why Train Operators should acquiesce in changes, potentially to their detriment, to Rules of the Route or Rules of the Plan that have previously been agreed. Although, for reasons of convenience, there may be some procedural overlap in the ways in which agreement is sought for changes to the Rules of the Route, as compared with the procedures used to operate the Supplemental Timetable Revision process (Condition D4.8), the fundamental difference is that Condition D4.8 relates to the execution of agreed possessions, whereas PARTP is an "upstream" process in which Network Rail has more the status of suppliant, seeking to introduce changes, for example, new or extended possessions. In particular, if Network Rail does not convince either the Train Operators, or a subsequent dispute Panel, of the case for proposed changes to the Rules of the Route, Network Rail is not entitled to implement those changes or to introduce them into the Condition D4.8 Supplemental Timetable Revision process.
30. The Panel was told that the programme of proposed amendments to the Rules of the Route was so interdependent that a determination, by the Panel, that one proposal should not be adopted, might pose such problems with executing works that relied on other related proposals, that the overall intention of NAUM-30, that the VHFT be implemented in December 2008, would be rendered unachievable (This proposition was referred to at the hearing as the "house of cards" argument). That said, no arguments were presented on behalf of Network Rail to support any contention that PARTP entitled Network Rail to propose, and/or implement changes to the Rules of the Route that could not be justified to the individual Train Operator, at the level of the individual amendment. The Panel therefore decided that the discharge of its own terms of reference to "*reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis*" (Rule A1.18), meant that it could give credence to such strategic considerations only to the extent that they are argued (and accepted by Train Operators) in fulfilment of PARTP 3.5.1 and 3.5.2, in relation to the individual proposals.
31. In relation to all the disputed elements of NAUM-30, the common theme for all the disputing Train Operators is that each Network Rail proposal unduly disrupts the short term ability of the Train Operator to meet its customers' needs (passengers or freight) and that the Train Operators have not been given adequate assurance in relation to the measures proposed to mitigate that disruption, in both the short and medium term. The Panel considers that, for it to be able to make balanced judgements about the acceptability of proposed changes to the Rules of the Route, it needs confirmation that Network Rail and the affected Train Operator have shared information on the following:
- 31.1. the extent of the contractual commitments between Train Operators and their contracting customers, and an appreciation of the acceptable limits of potential disruption;
  - 31.2. the opportunities to pass during a disruption, traffic with special requirements (e.g. requiring access to specific terminals, loading gauge or length );
  - 31.3. the measures Network Rail proposes to preserve key requirements, including, but not limited to (and taking into account the terms of the Provisional Order referred to in 2.2,2)
    - 31.3.1. safe journey opportunities to/from school for school-children in term-time;
    - 31.3.2. access to maintenance depots;

- 31.3.3. alternative through routes for electric traction;
  - 31.3.4. alternative through routes for W10 gauge intermodal traffic; and
  - 31.3.5. access to freight customer terminals;
- 31.4.** an indication of the scale of the available capacity for diverted traffic on alternative routes, together with the extent, if at all, to which Network Rail depends for the delivery of that alternative capacity upon modifications to the Train Slots of other Train Operators not otherwise affected by the amendments to the Rules of the Route.
32. In setting these guidelines for its consideration of other elements within NAUM-30 the Panel is not adopting a stance that implies that nothing can or should be determined in relation to the acceptance of a proposed amendment to Rules of the Route unless the consequences of that proposed amendment have been translated into a fully timed and validated timetable draft. Indeed the Panel considers that such a proposition would have unwarranted resource implications, and would in many instances be disproportionate to the changes proposed. However the Panel does consider that, to be able to respond to proposals made by Network Rail under PARTP
- 32.1.** Train Operators do need to be advised in at least broad terms, of the numbers, for example, of proposed available train slots per hour and the allocation of those train slots as between each passenger and freight operator,
  - 32.2.** in many instances a professional train-planning judgement will give a reasonable degree of assurance upon which decisions could be based and considered by Train Operators; but that
  - 32.3.** where Network Rail gives comfort on the basis of such professional judgements, it should understand that it is thereby committing itself in due course to produce a practicable train plan which delivers the substance of those judgements.
33. In broader terms, evidence of mitigation proposals, is a material part of any explanation as to why, having due regard to the Decision Criteria, Network Rail should have concluded that some of the Decision Criteria should have been judged more persuasive than others.

### **The Panel's findings in relation to possessions other than in Week 9: specific considerations**

34. The Panel has identified the following proposals as having elements in common, in the remainder of NAUM-30:
- 34.1.** Weeks 15 to 19 Preston Fylde Junction to Lancaster South Junction All Blocked for Line Speed enhancement works including re-railing and renewals of crossings;
  - 34.2.** Weeks 18 to 21 Oxenholme to Penrith, All Blocked for Line Speed enhancement works
  - 34.3.** Week 21; Denbigh Hall North Junction to Hanslope Junction: All Blocked for installing switched and crossings as part of the Milton Keynes re-modelling;
  - 34.4.** Weeks 10 to 24: weekend All lines blocked in the Rugby Station area, commencing 10:00 Sat to 0935 Sun; of these
  - 34.5.** Week 22: (August Bank Holiday) All Lines Blocked at Rugby from 01:30 Sat to 05:30 Wednesday 27<sup>th</sup> for OHLE and critical signalling commissioning work; this interacts with
  - 34.6.** Weeks 22 to 24: 16 day blockade of Nuneaton and Trent Valley lines for purposes of replacement of S&C, signals, and OHLE, and for the commissioning of Trent Valley signalling (re-scheduled from an earlier date);

- 34.7.** Week 22 9 day Blockade at Stoke
- 34.8.** Week 23: All Blocked at Bletchley 06:00 Sat start is out of step with 07:00 start at Rugby for passage of Southbound freight services
- 34.9.** Weeks 25 to 29: Crewe North Junction to Preston Brook and Weaver Junction to Ditton East Junction,
35. The Panel finds that most of the objections raised by the Freight Train Operators relate to uncertainty about the available capacity on diversionary routes, the means by which access will be maintained to specific locations, or through routes preserved in relation to services requiring W10 route clearance, or particular train length, or electric traction. These concerns are particularly acute in relation to the proposals for extended possessions at Rugby over the August Bank Holiday weekend, which affects services at both the earlier start and later finish to the possession. In this case some of the opposition is based on scepticism that diversion of services for the "normal working day" of Tuesday 26<sup>th</sup> August will be achievable because the Nuneaton blockade will prevent alternative access to the West Midlands via Nuneaton and Water Orton.
36. That said, the Panel considers that, in many of these instances the dialogue between Network Rail and the Train Operators is not yet in a state of finality. In particular, there is evidence that the basis of objection relates to uncertainty, which would be clarified, if not resolved, with the full exchanging of information as indicated at paragraph 31 above. The Panel notes the adjustments that have already been made, or are under consideration to solve specific problems (e.g. access to the Imerys plant at Cliffe Vale during the Week 22 Blockade at Stoke).
37. In general terms, in relation to the proposed amendments to the Rules of the Route that have been disputed by the Freight Train Operators, the Panel finds that Network Rail has not produced sufficient information on the train planning implications of the proposals to convince the Panel that the possessions should be endorsed. However, given the time still available, and the proportion of the objections raised that relate to uncertainty, or to efforts not yet concluded to solve individual problems, the Panel considers that it would be premature to determine that Network Rail's proposals in these instances should not be permitted to proceed.
38. The Panel has already made the distinction between the output and function of PARTP as compared with the Supplemental Timetable Revision process laid down in Condition D4.8. However, the Panel suggests that in these instances where confirmation of proposals made under PARTP depends on a clear understanding of the train planning issues involved, it would be reasonable to require Network Rail to have clarified its detailed intentions by T-14, so that there is an opportunity for Train Operators still to dispute Network Rail's decisions. The analogy with Condition D4.8 should not however be over emphasised given that such Condition D4.8 disputes relate to the impact on individual train slots of possessions already in "*the applicable Rules of the Route*"; the resolution of PARTP disputes has to be a pre-condition of those proposals being incorporated into "*the applicable Rules of the Route*".
39. In relation to the objections tabled by Passenger Train Operators, the Panel draws a distinction between the generalised concern of WCTL in relation to the frequency of needing to provide Replacement Bus Services, and also concerns at the difficulties involved in organising a robust Driver Training regime for the VHFT commencing in December 2008, and the more particular concerns of LM, TPE and XCT.
40. In relation to WCTL's concerns, the Panel does not possess sufficient detail of whether or not preparation of a satisfactory Driver Training programme has been possible. In view of its general perception that the justification of possessions under PARTP should be at the granular level, the Panel considers that final debate about such a training programme may be valid background to individual decisions, but the overall planning of a programme is downstream of what is otherwise decided. Otherwise in relation to WCTL's case the Panel perceives that the

December 2008 deadline that is argued to justify the PARTP proposals is essentially to honour commitments to WCTL. As such the Panel, whilst recognising that the short notice of many of the proposals poses problems in relation to Informed Traveller deadlines, does not consider that WCTL's arguments alone would warrant a determination that the possessions should not proceed.

41. In relation to LM the Panel notes the particular concern that the 16 day Nuneaton Blockade will cause significant disruption to local West Midlands services, and that in particular, during the second week this will cause problems to school services. The Panel notes a commitment given during the hearing, and confirmed formally subsequently, as to how this particular problem should be dealt with through the Passenger Handling Group, and considers this to be the appropriate response to the issue
42. In relation to the case made by TPE in respect of the weekend possessions proposed over Shap during Weeks 20 and 21, the Panel noted the following points:
  - 42.1. when NAUM-30 was first proposed, TPE was in the process of concluding terms with the organisers of the Edinburgh Fringe Festival to provide sponsorship for the event. The weekends of Weeks 20 and 21 would be potentially the peak travel weekends for the festival, therefore, engineering works and replacement Bus services would not sit well with rail sponsorship;
  - 42.2. by Network Rail's own assessment of the benefits that the works to be undertaken in these possessions would deliver was that the running time gains would be 90 seconds in the Up direction and 22 seconds in the Down. TPE contended that such gains, if not realised, would not be critical to the delivery of the VHFT. Network Rail agreed with this assessment and, during the course of the hearing, agreed to propose alternative dates for these possessions in 2009;
  - 42.3. TPE sought, and received from Network Rail the assurance that on weekends of Weeks 20 and 21, TPE services from Manchester via Wigan to Edinburgh would not be subject to diversion or interruption.
43. In relation to the comments made by XCT that it was depending for the well-being of its franchise on a successful implementation of the VHFT in December 2008, the Panel found that, this was not a matter for its direct concern. However, it would expect that Network Rail, in any decisions made "*having due regard to the Decision Criteria*" would seek to argue in support of such agreements or concessions that it had made to XCT. That said, the Panel did not depart from the general principle upon which this determination is founded that PARTP proposals have to be argued and justified at the detail level. An overall plan, or commitments to other parties, may assist Network Rail to reinforce already sound justifications; they cannot serve as the prime justification when the individual proposal brings evident dis-benefit to Train Operators.

#### **The Panel's Determination:**

44. **For all the foregoing reasons therefore, the Panel determines that**
  - 44.1. **it endorses the contention of all parties that this dispute should be determined by reference to the operation of PARTP;**
  - 44.2. **operation of PARTP within Section 3 of the National Rules of the Plan is subject to the provisions of Network Code Part D. In particular the process**
    - 44.2.1. **is given standing by the provisions of Condition D2.1.10.**
    - 44.2.2. **stipulates that in reaching its decision "Network Rail shall have due regard to the Decision Criteria in Network Code Condition D6";**

- 44.2.3. requires any disputes to be referred to the Access Disputes Secretary.
- 44.3. PARTP does not provide any context by which individual proposed changes to the Rules of the Route/Plan can be assessed, for the purposes of dispute resolution, on any basis other than each on its individual merits. In particular, although, as in this reference, the existence of some form of overall delivery plan may provide the Panel with useful background information, that plan does not provide any basis of justification for implementing any particular change to the Rules of the Route that cannot be justified on its individual merits, with due regard to the Decision Criteria;
- 44.4. the fact that the delivery plan at the centre of this dispute has been produced as a consequence of the issuing by the Office of Rail Regulation of a Provisional Order under Section 55 of the Railways Act, and the subsequent public acknowledgement by the ORR that the plan produced has fulfilled the terms of that Order, in itself a matter of doubt, is not any confirmation that that plan, in its detailed application, necessarily complies with all the provisions of the Network Code and the relevant Track Access Contracts. In particular, the Panel does not consider that the issuing of that Order and the subsequent compliance with its terms, in any way constrains its discretions in determining this case by reference to PARTP and, in particular, the merits of the specific arguments advanced in relation to each individual proposed change to the Rules of the Route;
- 44.5. 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 rail industry; as such it does not confer on Network Rail any entitlement to impose any change unilaterally, and without taking account of the representations of affected Train Operators or having had due regard to the Decision Criteria;
- 44.6. insufficient, imperfect, or late planning of WCRM engineering programmes in the past does not mean that the provisions of PARTP Section 3.1.3 in relation to *"urgent safety requirements or other emergency situations"* apply, nor that there is a requirement that *"all parties concerned will co-operate in accelerating the normal timescales in this Procedure commensurate with the urgency of the circumstances"*; that said, the Panel notes and commends the fact that all parties have nevertheless sought to progress necessary dialogue in a timely way;
- 44.7. the Panel considers it is not required or qualified to comment on the merits or desirability of implementing the VHFT by any given date, nor on the effectiveness of the programme of possessions proposed for delivering the works necessary for that timetable, other than in responding to any argument that one date favours a particular Decision Criterion as justifying a particular judgement on an individual amendment to the Rules of the Route
- 44.8. in relation to the determinations in respect of individual amendments to the Rules of the Route that the Panel is asked to make, it considers that it should adopt a different approach to the two sets of Week 9 possessions as compared with those possessions which, it is proposed, should take place at later dates. In the former case the Panel considers that it is appropriate for it to determine whether Network Rail has adequately justified, by its application of PARTP, whether or not the Week 9 possessions are admissible. In the other cases, where the parties are not already moving towards common agreement, there is time for all parties to review whether they have sufficient understanding of their own and their counter-parties positions to inform a determination, *"having due regard to the Decision Criteria"*

**44.9. in relation to “the Week 9 Nuneaton possessions”(Sat 24th May to one of Tuesday 27th, Wednesday 28th or Thursday 29th May) the Panel finds that**

**44.9.1. all parties are agreed that a 00:30 Sat to 05:30 Tues possession (first proposed in a PSN) is acceptable and may go ahead; WCTL has also accepted that the possession may go on to 05:30 Wednesday (proposed in October 2007). This extension is opposed by EWS and FLL. All three operators oppose a further extension to 05:30 Thursday, including because**

**44.9.2. closure of access via Nuneaton prevents W10 access to Lawley Street and Hams Hall freight terminals; and**

**44.9.3. no plan has been offered to all affected Train Operators explaining what capacity is available on alternative routes, for the purposes of operating normal weekday services for both freight and passengers, and how it is proposed such available capacity will be allocated, and translated into Train Slots.**

**44.9.4. the proposed amendments to the Rules of the Route to extend the possessions should not be permitted.**

**44.10. in relation to “the Week 9 Rugby possessions”(Sat 24th May to one of Tuesday 27th, Wednesday 28th or Thursday 29th May) the Panel finds that**

**44.10.1. the parties are agreed that a 16:00 Sat to 03:00 Tues possession (first proposed in a PSN) is acceptable and may go ahead;**

**44.10.2. later proposals for extensions both forwards (crystalising to an 00:30 start on Saturday) and backwards (to an 05:30 finish on Thursday) are disputed, in particular because**

**44.10.3. the earlier start time frustrates the running of key overnight freight services; and**

**44.10.4. no plan has been offered to all affected Train Operators explaining what capacity is available on alternative routes, for the purposes of operating normal weekday services for both freight and passengers, and how it is proposed such available capacity will be allocated, and translated into Train Slots. Furthermore, as the Panel was advised, during the course of the hearing**

**44.10.5. Network Rail has offered, and uploaded to TSDB, paths for freight services to operate through Rugby on both the Saturday morning, and during Tuesday and Wednesday;**

**44.10.6. in the face of such a lack of co-ordination within Network Rail, and in the absence of any evidence that Network Rail made its decision in accordance with PARTP by having due regard to the Decision Criteria for the specific proposals, the Panel considers it would be inappropriate to conclude that a case has been made for extending the possessions beyond the already conceded (16:00 Saturday 24th May to 03:00 Tuesday 27th May), and therefore**

**44.10.7. the proposed amendments to the Rules of the Route to extend these Week 9 possessions should not be permitted.**

**44.11. in relation to the possessions between Preston and Carlisle in Weeks 20 and 21, the Panel notes with approval Network Rail's recognition that the works proposed for those two possessions can be undertaken at a later date, and that therefore TPE, and other relevant Train Operators, can have the benefit of un-interrupted access**

between Manchester via Wigan to Carlisle, during the first two full weekends of the Edinburgh Fringe festival, and therefore, the Panel finds that these two possessions should be struck from the programme;

44.12. in relation to the other possessions, details of which were put before the Panel, and which are addressed in general terms at paragraphs 34 to 43 above, the Panel considers that it is not reasonable for any party to seek a determination of the merits of any proposal to amend the Rules of the Route using PARTP before Network Rail shall have supplied the Train Operators with further information structured to achieve the aims set out in paragraphs 31 to 33 above. The Panel anticipates the possibility that the supply of such information may permit the parties to agree a significant proportion of the proposed amendments to the Rules of the Route as set out in NAUM-30. However, and for the avoidance of doubt, pending compliance with the guidance given above regarding information, justification and agreement of individual proposals, the amendments to the Rules of the Route set out in NAUM-30 do not have the endorsement of the Panel, and therefore, do not have the status to be incorporated into the applicable Rules of the Route".

45. 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

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19th May 2008