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## **ACCESS DISPUTES COMMITTEE**

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Office of Rail Regulation (Attn. Ian Williams)

From: Disputes Chairman  
Access Disputes Committee  
Central House  
14 Upper Woburn Place  
London WC1H 0HY

Ref: ADC/TTP210

Date: 12 May 2008

Dear Colleague

**TIMETABLING PANEL HEARING TTP210 RELATING TO OPERATORS' APPEALS AGAINST NETWORK RAIL'S FINAL WEST COAST ROUTE MODERNISATION DECISION DOCUMENT (NAUM-30)**

1. The volume of material presented to the Panel in relation to the totality of the issues raised by NAUM-30 has required careful deliberation, and will merit a carefully documented determination. I believe that our original objective of producing that comprehensive determination by Monday 19 May remains an achievable goal.
2. That said, I have also undertaken to advise the Parties of the Panel's decision in respect of the two groups of week 9 possessions so that, if any Party wishes to initiate appeal proceedings against that determination, it can do so without delay.
3. The main conclusions of the Panel in this respect can be summarised as follows:
  - 3.1. 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 Date ('PARTP') provides Network Rail with a means of getting a further opportunity to request access when it is apparent that the Rules of the Route (as negotiated through the provisions of Network Code Condition D2.1) do not provide adequate opportunities for Network Rail to carry out specific works. It should be remembered that PARTP is a document that Network Rail has authored and produced in accordance with the provisions of Conditions D2.1.10 and D2.1.11 and is included in Section 3 of the National Rules of the Plan.

- 3.2. On any occasion that PARTP is invoked, the practical implication is that the affected Train Operators are being asked to accept a curtailment of their Firm Rights, as compared with those apparent at the conclusion of the Review of the Rules of the Route/Plan.
- 3.3. It follows that, when invoking PARTP, Network Rail is in the posture of suppliant, needing to convince affected Train Operators that it
  - 3.3.1. has considered every option in relation to minimising the scale of detriment to the Train Operators; and that it
  - 3.3.2. has workable proposals for ensuring that all its client TOCs' operational needs are, to the best achievable extent, protected, or supported by alternatives.
- 3.4. PARTP, as a means of amending or supplementing the Rules of the Route or Rules of the Plan, is a granular process, requiring the consideration and justification of each individual proposed amendment.
- 3.5. The structure of the Decision Criteria provides the necessary prompt for how this consideration of the individual amendment should be addressed, bearing in mind that the goal should initially be that the parties (Network Rail and any affected Train Operator) agree that the solution proposed represents the best balance between their competing interests. The obligation on Network Rail in PARTP to "*have due regard to the Decision Criteria*" is not discharged, if the client TOC's priorities in relation to the Decision Criteria have not been explicitly considered.
- 3.6. Evidence of due regard to the Decision Criteria is likely to be manifested in adequately documented exchanges clarifying the issues of key importance to each party, and in proposals relating to what facilities/alternative services will still be available to the Train Operator.
- 3.7. Taken overall, the presumption in relation to a process that serves to allow one party to contractual arrangements to re-open matters that have previously been concluded, must be that it is the party re-opening the issue that must make the case for change. The corollary for that is that if the case is not made, then the change is not admitted, and the possessions to which that change relates are not to take place.
- 3.8. The Panel considers that this position is the only one consistent with guidance previously given, both by other Panels and by the Office of Rail Regulation in its judgement on the appeal against TTP102.
4. In relation to the two blocks of possessions proposed for Week 9, the Panel is satisfied that it has been given information on why Network Rail considers them warranted, and the use to which they would be put. However it would appear that the Train Operators have been given very little clear information, and fewer undertakings as to the facilities and capacity that will be available to continue to serve customers during the time of the proposed possessions. In particular the Train Operators, both Passenger and Freight, have major unanswered concerns regarding the feasibility of providing any adequate weekday service with both Nuneaton and Rugby blocks in force.
5. In such circumstances the Panel considers that it does not have the information that would justify it finding that the relevant amendments to the Rules of the Route should be accepted. It therefore finds that whilst those possessions for which there is established agreement should proceed, those which depend upon the disputed amendments to the Rules of the Route (as contained within NAUM-30) should not. The precise implications of this determination, as the Panel understands the information put before it, is as attached.
6. The Panel is seeking to formulate, in its full determination, declaratory guidance as to how, in future, and in relation to the later dated amendments to the Rules of the Route in this case, the necessary information, and "*due regard for the Decision Criteria*" might be discharged.

Yours sincerely

Sir Anthony Holland  
Panel Chairman for TTP210

  
Committee Secretary

Attached: Determination in relation to Week 9 possessions

## Determination in relation to Week 9 possessions

- 1.1. 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
  - 1.1.1. 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
  - 1.1.2. closure of access via Nuneaton prevents W10 access to Lawley Street and Hams Hall freight terminals; and
  - 1.1.3. no plan has been offered to all affected Train Operators explaining what capacity is available on alternative routes, and how it is proposed such available capacity will be allocated, and translated into Train Slots.
  - 1.1.4. the proposed amendments to the Rules of the Route to extend the possessions should not be permitted.
- 1.2. 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
  - 1.2.1. 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;
  - 1.2.2. 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
  - 1.2.3. the earlier start time frustrates the running of key overnight freight services; and
  - 1.2.4. no plan has been offered to all affected Train Operators explaining what capacity is available on alternative routes, 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
  - 1.2.5. 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;
  - 1.2.6. 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
  - 1.2.7. the proposed amendments to the Rules of the Route to extend the possessions should not be permitted.