

**THE OFFICE OF RAIL REGULATION'S SECOND DETERMINATION OF THE APPEAL BY THE WREXHAM, SHROPSHIRE AND MARYLEBONE RAILWAY COMPANY LIMITED ("WSMR") AGAINST DETERMINATION "TTP244" OF THE TIMETABLING PANEL OF THE ACCESS DISPUTES COMMITTEE IN RESPECT OF A JOINT REFERENCE BY WSMR AND NETWORK RAIL INFRASTRUCTURE LIMITED ("NR") REGARDING THE APPLICATION OF PART D OF THE NETWORK CODE AND THE TRAIN SLOTS OFFERED BY NR TO WSMR FOR THE DECEMBER 2008 FIRST WORKING TIMETABLE.**

*SECOND DETERMINATION:* The Office of Rail Regulation determines that NR is not liable to WSMR and that WSMR is not entitled to compensation as a result of NR's approach to the preparation of the December 2008 First Working Timetable for the reasons set out in paragraphs 32 - 34 and 48 - 57 below.

Unless otherwise stated, definitions used in this Second Determination are those set out in the First Determination dated 23 February 2009. A link to the First Determination can be found at: <http://www.rail-reg.gov.uk/server/show/nav.249>

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## **I Introduction**

1. This is the second determination (“Second Determination”) by the Office of Rail Regulation (“ORR”) of the appeal brought by WSMR on 29 September 2008 (“the Appeal”). The Notice of Appeal challenges the Timetabling Panel’s (“the Panel’s”) determination of reference TTP244 dated 23 September 2008 (“the Determination”). This Second Determination deals with NR’s potential liability to WSMR and WSMR’s potential entitlement to compensation as a result of NR’s approach to the preparation of the December 2008 First Working Timetable (“FWT”).

## **II Procedural Background to the Second Determination**

2. The factual and procedural background to this appeal are set out at paragraphs 1 to 19 of the First Determination and are not repeated here.
3. The First Determination, which primarily addressed the issue of ORR’s legal interpretation of the contractual provisions of the Code in relation to the preparation of the FWT, was issued on 23 February 2009.
4. In a letter to the Parties dated 24 February 2009, ORR set out its proposed procedure for determining the remaining issues arising out of the Appeal. A list of questions was attached to the letter, to which WSMR was requested to respond by 6 March 2009. NR was then to have an opportunity to provide representations on those responses by 20 March 2009. ORR indicated that it would provide the parties with further details if, on receipt of the written representations, it envisaged that an oral hearing would be necessary to clarify issues.

5. WSMR made a request by email on 3 March 2009 for an extension of time for submission of its responses to ORR's questions to 20 March 2009. NR raised no objection to the proposed extension and ORR granted it on 5 March 2009.
6. WSMR's responses were sent by email on 20 March 2009. NR then provided its representations on 3 April 2009. In those representations, NR stated that WSMR was unable to rely on allegations concerning the Base Timetable as a result of paragraph 46 of ORR's First Determination. ORR clarified this misunderstanding in a letter dated 24 April 2009 and informed NR that it would need to address WSMR's arguments regarding the use of the Base Timetable in the compilation of the FWT at the appeal hearing (the "Hearing").
7. In the same letter, ORR notified the parties that a Hearing would take place on 14 May 2009. On 11 May 2009, ORR received a letter from NR in which it stated that it would not be in a position at the Hearing to respond to questions relating to the calculation of losses WSMR claimed to have suffered. It submitted that, even if ORR were to reach a conclusion at the Hearing that NR was obliged in principle to pay compensation to WSMR, ORR should make no decision as to the quantum of any compensation; and that it would be sensible, in the first place, to see whether the quantum of that compensation could be agreed between the parties. Both parties agreed to this course of action at the Hearing, as set out in Paragraph 20 below. On 13 May 2009, ORR received a witness statement from Simon Pilkington of Network Rail and accompanying exhibits. ORR did not request witness statements and informed the parties at the start of the Hearing that it would not treat the statement any differently from the factual

representations made in the parties' submissions. It would not be read into the transcript at the Hearing but NR was entitled to refer to the statement when responding to questions from the ORR Panel and was informed that it should refer the Panel to any particular exhibited documents on which it wished to rely, so as to enable WSMR to have an opportunity to comment upon them.

### III The Parties' Written Responses

#### WSMR

8. In the list of questions attached to ORR's letter dated 24 February 2009, WSMR was asked to provide full details of its bid for Train Slots in the December 2008 FWT. In summary, it informed ORR that:
  - (i) The normal process of bid and offer did not occur during the development of the December 2008 FWT as a result of NR's extraordinary workload levels at the time, compounded by long-term sickness and the resignation of key individuals in the West Midlands train planning team during the period.
  - (ii) According to NR's Timetable Development Dates, the relevant bid date was 21 January 2008 for "Submission of Aspirational Data" (this is actually referred to in the list of Timetable Development Dates as "Submission of 'Aspirational Bid' electronic data").
  - (iii) Excel spreadsheets (attached to its response to ORR at Appendix 1) used as the basis for discussion at meetings with NR in January 2008 '*could be considered as [WSMR]'s bid at this time*'.
  - (iv) WSMR's Priority Date Notification Statement dated 30 January also '*clearly states our desire to minimise our journey times*'.

- (v) NR had already declined to move other operators' trains on the basis that *'this would disrupt the development of the overall timetable in the West Midlands'*. Mark Laney of WSMR therefore *'continued to work within the parameters as declared by Network Rail.'*
  - (vi) WSMR regards the conduct set out at (v) as *'all part of [NR]'s use of the Base Timetable and view that it was for WSMR to persuade other Operators to agree to flex their rights.'*
9. WSMR was unable to confirm the extent to which Train Slots for which it bid differed from those which it was allocated in the FWT because it did not think that the timetable was issued. It stated that the only formal correspondence received was a letter dated 9 June 2008 and an email dated 11 June 2008.
10. In relation to flexing of slots, WSMR contends that the normal process of bid and offer with flexing did not occur. Its initial proposed bid presented verbally was rejected. *'Subsequent meetings, discussions and formal bids were conducted on the basis that WSMR was required to fit around the existing paths in the Base Timetable.'* WSMR regards this as the crux of its appeal.
11. WSMR does not allege that NR acted in bad faith. However, it bases its claim that NR is liable for the consequences of its decision in respect of the FWT offer pursuant to Condition D5.4 of the Network Code (the "Code") on its repeated statements that WSMR *'had to fit in with existing paths on the Base Timetable unless [it] sought and received the agreement of the other affected operators,'* which NR was not prepared to approach itself. WSMR alleges that these actions were unreasonable.

12. As a result of these actions, WSMR alleges that the journey times for the slots offered were longer than they would otherwise have been. It asserts that although the journey times were within the maximum contractual times, those contractual times were themselves excessive as they had been based on the even longer journey times contained in the initial timetable which came into operation on 28 April 2008.
  
13. WSMR does not accept NR's suggestion that, had it taken a different approach, '*in all probability the timetable produced would have been no different.*' It offered the following evidence in support of this contention:
  - (i) The pathing time of 1P01 0512 (3 hours 45 mins) indicates that this journey time is achievable for all WSMR trains. However, the remainder of WSMR's scheduled services have journey times of between 4hrs and 4 hrs 6 mins.
  - (ii) NR's unwillingness to flex a London Midland service in the "*indicative*' (ORR First Determination p.5) Base Timetable" resulted in the beneficial slots on the Chiltern route being no longer available.
  - (iii) On the basis of the late running of a particular train on 19 March 2009, WSMR suggests that a planned service from London to Wrexham can achieve a minimum of 3 hrs 36 mins. If a 7 min engineering allowance is added, 3hr 45 mins is an achievable average journey time.
  
14. WSMR has used this journey time and a journey time of 3h 48 mins to produce two forecasts of the resultant loss.

NR

15. In its Response, NR stated that the ordinary bid and offer process had taken place and that for practical purposes, WSMR's January 2008 Excel Spreadsheet was treated as its Bid. It stated that WSMR's initial bid had been rejected because it did not accord with the Part D definition of a Bid.
16. NR asserted that it had plainly flexed slots to accommodate WSMR's bid and stated that it had due regard to the Decision Criteria.
17. NR denied that a journey time of 3h 45 mins could be achieved if the rights of other operators were to be taken into account.
18. NR considered the information provided by WSMR regarding its losses to be insufficient but made various submissions on the methodology adopted. Since, as is set out below, the quantum of any alleged loss was not considered at the Hearing, those submissions are not set out in any further detail in this Second Determination.

**IV The Parties' Oral Submissions**

19. On 14 May 2009, the parties attended the Hearing before a panel of ORR representatives ("the ORR Panel").
20. At the outset, WSMR agreed with NR's proposal that, should ORR determine WSMR to be entitled to compensation from NR, the parties should seek to agree an appropriate level of compensation within one month of the issue of the Second Determination, failing which they would have the right to refer the issue back to ORR.

21. Accordingly, ORR did not pose questions concerning the potential quantum of compensation. The ORR Panel's questions at the Hearing focused on clarifying arguments and factual matters raised in the parties' written representations. The parties responded to further questions posed by the ORR Panel concerning the bidding process for the December 2008 Timetable, NR's treatment of WSMR's bid and the compilation of the FWT. Both parties had the opportunity to make any additional comments they deemed to be relevant. Their representatives were also requested to make submissions on their understanding of Condition D5.4 of the Code.
22. In the light of the responses received, WSMR was permitted to submit further documentary evidence after the Hearing of the information provided to NR as part of its Bid and examples to support its allegation that NR failed to apply the Decision Criteria correctly. WSMR's documentary evidence in relation to the Bid was received on 15 May 2009 and its examples of NR's alleged misapplication of the Decision Criteria were received on 27 May 2009. NR responded on 2 June 2009. NR was permitted to submit information relating to the minimum feasible journey time for WSMR services. This was received on 18 May 2009.
23. The transcript of the Hearing ("Transcript") was provided to the parties on 27 May 2009 and they have had the opportunity to correct typographical errors and infelicities of expression. A copy of the Transcript will be placed on ORR's website together with this Second Determination.
24. While certain parts of the submissions and evidence will specifically be referred to in the course of this Second



Determination, ORR has taken into account all the parties' written and oral submissions and evidence in reaching its decision.

## **V ORR's Consideration of the Appeal**

25. The detailed allegations made by WSMR have been set out in the First Determination and at paragraphs 8 to 14 above. In summary, the crux of WSMR's appeal rests on the allegations that it was required to fit its proposed paths around existing paths in the Base Timetable and that NR applied an incorrect approach to flexing.<sup>1</sup> It alleges that as a result, it received train slots with longer journey times than it would otherwise have been allocated.
26. This Second Determination sets out ORR's factual findings in relation to these allegations and then addresses the application of Condition D5.4 of the Code.

### **The Bidding Process**

#### **Evidence**

27. WSMR indicated at the Hearing that its assertion in written submissions that the normal bid and offer process had not taken place was based on an '*informal understanding*' that the normal process had not taken place.<sup>2</sup> WSMR also indicated that it remained uncertain as to the appropriate format and process for submission of bids<sup>3</sup> and stated that, while not intentional, the manner in which the timetable process was conducted was a barrier to new entrants<sup>4</sup>.

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<sup>1</sup> Transcript p.83, lines 3-12.

<sup>2</sup> Transcript p.11, line 20 – p.12, line 5.

<sup>3</sup> Transcript, p.10, lines 5-15; p.19, lines 8-14.

<sup>4</sup> Transcript p.10, lines 5-13.

28. As asserted by NR<sup>5</sup> and as agreed by WSMR,<sup>6</sup> NR spent considerable time meeting WSMR and discussing its bid. It was also agreed by the parties and is accepted by ORR that the compilation of the December 2008 FWT was an unusually complex exercise because it was implementing a number of different service changes for a number of different operators on a busy part of the network.
29. Mr Pilkington of NR stated clearly that there was no preferential treatment of certain operators over others.<sup>7</sup> He stated categorically that there was no departure from the normal process of submission of bids.<sup>8</sup> However, he acknowledged that there were some unusual aspects of the process of compilation of this particular timetable. One was that the preparation of the Base Timetable had been a particularly long and complex process which had commenced in 2006<sup>9</sup>. Another was that the likely content of franchised operators' bids for slots in the FWT was clear well in advance of the Priority Date because of the DfT's franchise specifications for most train operators, which were reflected in train operators' ultimate bids.<sup>10</sup> However, NR did state that the formal bids were nevertheless appropriately considered once submitted as there might have been minor alterations to certain aspects, such as stopping patterns.<sup>11</sup>
30. It is clear from NR's own evidence that there is no strictly specified form in which a bid must be submitted.<sup>12</sup> It is also clear from the evidence of both parties that no single 'Bid' was submitted by WSMR. At least one draft bid was produced before the Priority

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<sup>5</sup> Transcript, p.16, lines 11-14; p.59, line 20 – p.60, line 3

<sup>6</sup> Transcript, p.11, lines 20 - 22.

<sup>7</sup> Transcript, p.15 lines 18 – 19.

<sup>8</sup> Transcript, p.16, line 3.

<sup>9</sup> Transcript, p.14, lines 11-24..

<sup>10</sup> Transcript, p.13, line 20 – p.14, line 11.

<sup>11</sup> Transcript, p.18, lines 2-5.

<sup>12</sup> Transcript, p.19, line 16 – p.20, line 4.

Date and NR indicated that this would not be able to be accommodated in the timetable as it then stood. WSMR was informed by NR that the only available white space in that timetable was a path intended for potential freight use.<sup>13</sup> The documents which the parties agreed represented WSMR's finalised Bid reflected the information that WSMR had received from NR and requested slots in the path intended for potential freight use. Subsequent revised bids were also submitted and revisions continued even after the formal offer date on 11 July 2008.<sup>14</sup>

31. NR did not attempt to rely at the Hearing on alleged non-compliance of WSMR's bid with any formal requirements as grounds for not treating the information provided as a bid like any other.<sup>15</sup> On the contrary, it stated that the information received was sufficient to proceed and that it had at no stage returned to WSMR and informed them that the information was insufficient or non-compliant.<sup>16</sup> Further, WSMR was questioned by the ORR Panel on the elements set out in Condition D3.3 of the Code which are required to be included in a bid.<sup>17</sup>

### Findings

32. WSMR's evidence as to the extent of information submitted, with which NR agreed, indicated that all the compulsory elements of a bid (as set out in Condition D3.3 (a) – (d)) were satisfied.<sup>18</sup> Therefore, ORR finds that WSMR did submit a Bid which accorded

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<sup>13</sup> Transcript, p.21, line 24 - p.22, line 4; p.23, lines 7-9; p.48, lines 19-24.

<sup>14</sup> Transcript, p.76, line 1 – p.77, line 12..

<sup>15</sup> Transcript, p.21, lines 7-12.

<sup>16</sup> Transcript p.43, lines 17-24.

<sup>17</sup> Transcript, p. 29, line 8 – p.31, line 7.

<sup>18</sup> Paragraphs 44 – 47 of ORR's Determination dated 4 October 2007 of the appeal brought by NR against the interim determination ADP20 of the Access Disputes Panel in respect of a joint reference brought by NR and First Greater Western Ltd. set out the requirements for a valid bid in accordance with Condition D3.3 of the Code.

[http://www.rail-reg.gov.uk/upload/pdf/ADP20\\_determ.pdf](http://www.rail-reg.gov.uk/upload/pdf/ADP20_determ.pdf)

with the requirements of Condition D3.3 of the Code. Consequently, NR was under an obligation to consider the Bid, along with all other valid Bids, in accordance with the process set out in the Code.

33. ORR is satisfied that NR did not intend to and in fact did not create any barriers for new entrants in terms of the bidding procedure and does not find NR to have given any preferential treatment to existing operators over new entrants in that respect.
34. However, ORR accepts WSMR's evidence that its formal Bid was a sub-optimal bid as a result of informal indications from NR as to the extent to which it was possible to accommodate WSMR's bid on the timetable as it then stood.<sup>19</sup> This is considered further in Paragraph 53 below.

### **Compilation of the FWT**

#### Evidence

##### *Use of the Base Timetable*

35. NR's evidence was that while the Base Timetable 'informed a great deal of the content' of the FWT, a number of changes were made to certain parts of the timetable.<sup>20</sup> Many of those changes were in areas where WSMR's services did not run.<sup>21</sup> However, Mr Pilkington of NR stated that changes were made to accommodate WSMR.<sup>22</sup> He referred to a consideration of a number of alterations to services on three corridors within the West Midlands (the Coventry Corridor at the south end, the Stour corridor at the top end and the section through Aston and Bescot).<sup>23</sup> The specific

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<sup>19</sup> Transcript p.22, lines 6-12.

<sup>20</sup> Transcript, p.44 lines 9-24.

<sup>21</sup> Transcript, p.44, lines 12-16.

<sup>22</sup> Transcript p.15, lines 22-24.

<sup>23</sup> Transcript, p.105, lines 19-22.

example was given of the period around 17.00 when the paths of two London Midland services were moved and stopping patterns were adjusted in order to allow WSMR a slot from Stechford to Coventry.<sup>24</sup>

36. Mr Pilkington was questioned about the reference in his witness statement that services through the corridor between Rugby and Stafford via Birmingham 'had to be effectively set in stone.'<sup>25</sup> He explained that this was meant in practical terms: a series of slots with complex calling patterns necessary to connect with other services often cannot be altered even slightly in a way that continues to satisfy the train operators' contractual rights.<sup>26</sup> For example, attempts to move trains to accommodate a crossing movement at Aston Junction '*would have compromised the contractual rights in a number of ways for another operator.*'<sup>27</sup> NR also explained the difficulty with making adjustments to certain other parts of the timetable, such as that which covers the Cross City trains.<sup>28</sup>

*Use of the right to flex*

37. As set out in paragraphs 61 and 64 of the First Determination, NR has the right, pursuant to Condition D3.4 of the Code, to flex the train slots allocated to train operators, provided that such flexing is carried out within the contractually-defined bounds in individual operators' contracts and in a manner which is consistent with the Decision Criteria.
38. WSMR pointed to the fact that it was required to approach other operators to ask their permission to flex as evidence that NR did not

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<sup>24</sup> Transcript p.31, lines 12-17.

<sup>25</sup> Transcript p.24, lines 1-7.

<sup>26</sup> Transcript p.46 line 16 – p.47, line 3.

<sup>27</sup> Transcript, p.23 lines 14-24.

<sup>28</sup> Transcript, p.25, line 17 – p.26, line 14.

seek to accommodate its bid as required by the Code. Mr Laney's oral evidence actually indicated that this process of approaching operators was not instigated by NR but was a widespread practice among train operators.<sup>29</sup> WSMR stated that it took place because NR would not flex slots unless the train operator had agreed to do so.<sup>30</sup> WSMR further indicated that the reason proffered by NR for its inability to flex certain slots was that the particular train operator would not agree to do so and that this was consistent with the wording of Mr Pilkington's witness statement, which he referred to at the Hearing on this point.<sup>31</sup>

39. However, NR's evidence was that this process took place because in almost all cases, the flexing which was required went beyond the scope of what NR was permitted to do under the Code and involved alteration to the train operators' contractual rights.<sup>32</sup> In general, Mr Pilkington confirmed that if an operator did refuse to permit a slot to be flexed, NR would still go on to check whether the operator's refusal was based on the potential breach of its contractual rights.<sup>33</sup> Mr Pilkington also cited a current situation (not connected with the December 2008 timetabling decisions) which demonstrated that NR was prepared to flex an operator's train slot where it had the right to do so, even if that operator disagreed with NR.<sup>34</sup>

40. WSMR gave evidence that it did not recall NR citing the issue of potential breach of contractual rights at the time.<sup>35</sup> It also pointed to the fact that, on the face of an email from Central Trains which was

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<sup>29</sup> Transcript p.32, line 21 – p.33, line 2.

<sup>30</sup> Transcript p.33, lines 3-6.

<sup>31</sup> Transcript, p.42, line 9 – p.43, line 1.

<sup>32</sup> Transcript p.33, lines 11-13.

<sup>33</sup> Transcript p.68, lines 7-10.

<sup>34</sup> Transcript p.35, line 12 - p.36, line 12.

<sup>35</sup> Transcript p.33, lines 15-19.

discussed at the Hearing, there was no reference to breach of contractual rights.<sup>36</sup>

41. However, Mr Pilkington strongly disagreed with Mr Hamilton's suggestion that it was very unusual for contractual rights to be considered in NR's approach to timetabling<sup>37</sup> and with the suggestion that, in some instances, the proposed flexing of slots for which WSMR were required to seek permission was within the operators' contractual rights.<sup>38</sup> Mr Pilkington also indicated, by reference to one specific service referred to by Mr Thwaites in his email, that the proposed change would have breached the operator's contractual rights.<sup>39</sup>

42. Further, NR indicated that bids for slots which exceeded the scope of an operator's contractual rights were treated sympathetically provided there was white space and there was no effect on other operators. Mr Pilkington cited the example of NR's accommodation of WSMR's request that its first train from Wrexham arrive just before 09.00 when its contractual rights entitled it to a slot arriving between 09.00 and 10.00.<sup>40</sup>

*Application of the Decision Criteria*

43. Since train slots can only be flexed in a manner consistent with the Decision Criteria, it follows that in certain cases, application of the Decision Criteria could militate against flexing a train slot. WSMR's evidence at the Hearing was that NR never cited application of the Decision Criteria as the reason for inability to flex at the time.<sup>41</sup>

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<sup>36</sup> Transcript p.69, lines 3-13.

<sup>37</sup> Transcript p.34, lines 7-10.

<sup>38</sup> Transcript p.35, lines 2-11.

<sup>39</sup> Transcript p.31, line 22 – p.32, line 15.

<sup>40</sup> Transcript p.45 lines 13-21.

<sup>41</sup> Transcript p.37, line 20 – p.38, line 10.

44. However, Mr Pilkington indicated that even where an operator agreed to its slots being flexed, NR would go on to consider as many variables as possible, including the Decision Criteria.<sup>42</sup> He acknowledged that it could not confirm that on each occasion WSMR would have been informed that this was the reason for a refusal to flex.<sup>43</sup> However, he stated that to be the reason and further asserted that where it had the ability to flex operators' slots in a manner consistent with their rights, it would have explored the possibility of doing so, bearing in mind the Decision Criteria.<sup>44</sup>
45. NR identified some of the Decision Criteria which it considered in its original Respondent's Notice.<sup>45</sup> In its oral evidence, NR eventually identified several Decision Criteria which it would have considered to be relevant to the flexing of slots to accommodate WSMR's bid, including passenger loadings on the Cross City services, use of other companies' resources and overall use of capacity.<sup>46</sup>
46. WSMR has sought to suggest that the Decision Criteria which applied in WSMR's favour were not accorded the same weight as the other Decision Criteria, cited by Mr Pilkington, which militated against flexing.<sup>47</sup> Its examples provided after the hearing focused on the Cross City services: WSMR suggested that NR could have moved the Duddleston stop from one service to another, for example. However, it did not refer to any specific Decision Criteria which might support this change being made.

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<sup>42</sup> Transcript p.63, line 22 – p.64, line 1; p.68, lines 11-24.

<sup>43</sup> Transcript p.38, line 16 - p.39, line 13.

<sup>44</sup> Transcript, p.61, line 23 – p.62, line 3.

<sup>45</sup> [Respondent's Notice](#), paras 10.4.5 – 10.4.7.

<sup>46</sup> Transcript, p.57, line 10 – p.60, line 8

<sup>47</sup> Transcript, p.85 lines 6-18.



47. NR rejected the suggestion that it had failed to apply the Decision Criteria correctly or at all both at the Hearing itself and in its post-hearing written response to WSMR's examples. It stated that the suggested change by WSMR (moving the Duddeston stop from one service to another) would have caused 'significant and unacceptable' disruption at Birmingham New Street, for example, and would have been likely to have necessitated a rewriting for the entire day as London Midland would be likely to want a consistent pattern for the day.

### Findings

#### *Use of the Base Timetable*

48. ORR considers it unfortunate that NR has at times used expressions which might imply that it considered the Base Timetable as 'fixed' for the purposes of the compilation of the FWT. ORR can therefore understand why WSMR may have been unclear as to NR's approach in this regard. However, having considered all the evidence, ORR is satisfied that NR did in fact adopt an approach towards use of the Base Timetable in the compilation of the FWT which accorded with the approach set out in paragraphs 51 – 62 of the First Determination. The evidence before ORR was sufficient to indicate that NR used the Base Timetable as the starting point for the FWT but did regard slots to be moveable and to be subject to its right to flex.

#### *Use of the right to flex*

49. ORR considers it regrettable that NR failed to explain clearly to WSMR the basis upon which and the process by which it applied its right to flex WSMR's and other operators' slots. However, having

considered all the evidence, ORR is satisfied that NR has not misunderstood the extent of its power to flex or improperly delegated its role in deciding whether or not to flex to train operators. Although a practice has developed whereby operators approach each other directly in relation to timetable development (including flexing), ORR accepts NR's evidence that it ultimately ascertains what the scope of operators' rights permit and flexes against operators' wishes where that is permissible and appropriate. It also accepts NR's evidence that in relation to the December 2008 FWT, NR did consider flexing and did in fact flex certain other operators' slots within the scope of their contractual rights.

*Use of the Decision Criteria*

50. ORR considers it regrettable that it has taken several rounds of written submissions and extensive oral submissions for NR to clarify its application of the Decision Criteria in its timetabling decisions in compiling the December 2008 FWT. This is evidence which was within NR's knowledge and which it should have found straightforward to set out fully at the earliest opportunity.
  
51. However, ultimately NR adequately countered WSMR's specific examples of alleged misapplication of the Decision Criteria and provided general evidence which indicated that the Decision Criteria were correctly considered. Therefore, ORR is, on balance, satisfied that to the extent that flexing remained within the bounds of train operators' contractual rights and accorded with the Decision Criteria, NR endeavoured to accommodate WSMR's requested services by exercising that right.

52. Further, ORR has applied its own expertise in assessing and verifying the evidence provided by the parties as to whether, applying the appropriate considerations outlined above, WSMR's bid could have been treated differently so as to result in the granting of more favourable train slots.
53. In the light of all the evidence, reflected in the findings above, ORR finds that WSMR has failed to establish a basis for suggesting that its Bid should have been treated differently or that it should have been awarded more favourable train slots. Although ORR accepts that the Bid itself was not an optimal bid,<sup>48</sup> it follows from the findings above and its own verification of the evidence that if the formal Bid could not have been treated differently, so as to result in the granting of train slots with shorter journey times than those actually offered, any 'optimal' bid could not have been satisfied in any event.
54. Therefore, ORR does not consider it necessary to make any findings on the evidence provided by both parties as to the minimum feasible journey length which would comply with the Rules of the Route and the Rules of the Plan.

**Condition D5.4**

55. WSMR's claim for compensation was brought pursuant to Condition D5.4 of the Code, which provides that:
- Network Rail shall not be liable for the consequences of any decision made by it which is implemented in a Working Timetable where, as a result of a reference under this Condition D5 in respect of that decision, that decision is subsequently overturned, unless that decision is unreasonable or has been made in bad faith, in which case the making of that decision shall be*

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<sup>48</sup> See para 34 above.

*deemed to have been a breach of Network Rail's obligations under this Part D.*

56. However, it should be clear from the findings above that ORR has not found it necessary in this instance to overturn NR's 'decision implemented in a Working Timetable', namely the allocation of train slots in the December 2008 FWT to WSMR, and that there is therefore no need to consider whether such a decision is unreasonable.
57. Accordingly, no liability on the part of NR pursuant to this Condition arises and it is not necessary for ORR to comment further on the submissions made by the parties in relation to the construction of this clause. It is also not necessary for the parties to consider the question of compensation.

## **VI CONCLUSION**

58. It should be emphasised that the Code sets out a clear set of obligations and rights on the part of NR and train operators which govern the timetabling process. While ORR has no wish to see parties embroiled in unnecessary bureaucracy, it is clear that the process for the development of the 2008 FWT was conducted with considerable informality and, in some instances, disregard for the formal contractual processes. This has led at the very least to confusion on the part of WSMR as to its rights and NR's obligations and to a lack of transparency as to the process at various stages.
59. As infrastructure manager and the entity controlling the timetabling process, NR has a particular responsibility to ensure that the process operates properly and with due regard to the interests of all parties. NR's operation of an informal, iterative,

collaborative compilation process for this complex timetable appears to have been adopted with good intentions, but it is not clear to ORR that the timetabling process has been conducted in a way which accords in all respects with the Code as agreed by all parties and approved by ORR. This has led to dissatisfaction on the part of WSMR as to its position and has precipitated a dispute which has taken the parties, the Panel and ORR some considerable time to resolve.

60. While ORR is satisfied that WSMR's position was ultimately unaffected by the process adopted in this instance, this may not always prove to be the case. At the very least, NR's approach leaves its timetabling decisions vulnerable to challenge. The following informal aspects of the process, in particular, should be addressed:

(i) Informality in the format, timing, notification and consideration of bids.

The confusion as to the procedural requirements in relation to bidding which has arisen in the present case could be avoided by ensuring that there is a level of uniformity in the format in which bids are presented and that the requirements are made known.

Further, NR should ensure that bids are considered and responses are made in accordance with the formal timetabling processes set out in the Code. As stated at paragraph 63 of the First Determination, there is no obligation on NR to optimise bids since the timetabling process is underpinned by the assumption that the bids submitted by bidders will be optimised bids. Indications of acceptance or rejection of submitted information before the Priority Date have the potential to undermine this process if

they lead to the submission of what the individual train operator regards as a 'compromised' bid.

(ii) Informal discussions between train operators concerning flexing.

The common practice of negotiation between operators as to flexing is not provided for in the Code and appears to be unnecessary save in cases where the proposed flexing is outside the scope of NR's right to flex under the Code and involves alteration to a particular operator's contractual rights. It would therefore be more appropriate for NR first to ascertain both the scope of the relevant train operator's contractual rights and whether the proposed flex is consistent with the Decision Criteria so as to confine approaches by operators to those cases where they are actually necessary.

NR should also ensure that the basis of its decisions as to whether or not to flex certain train slots is clear to train operators.

(iii) Issue of Timetables

In the course of oral evidence on the bid and offer process, it became clear that no draft timetable was issued in May 2008.<sup>49</sup> Further, it was unclear whether NR issued a full version of the FWT at the time formal offer letters were sent on 11 July 2008.<sup>50</sup> While these are not allegations relied upon by WSMR and in any event have no causal link with WSMR's assertion that it should have received train slots with shorter journey times, it must be emphasised that issue

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<sup>49</sup> Transcript p.78, line 14 – p.79, line 18.

<sup>50</sup> Transcript p.70. line 21 – p.71, line 2; p.77, line 13 – p.78, line 2.

of these timetables is a requirement pursuant to Conditions D3.2.5 and D3.2.7 of the Code. It is a requirement which enables train operators to make an informed decision as to whether to pursue an appeal of a timetabling decision within the permissible time frame.

61. If NR or WSMR does not consider the procedure as set out in the Code to be practical, there are processes which can be used to initiate change. Unless and until such processes are used, the procedure set out in the Code should be followed in its entirety. This will ensure that a transparent decision-making process is operated which leaves parties clear as to their respective positions and which is not at risk of being impugned.
62. ORR determines the aspects of the appeal outlined in paragraph 1 above, which, as set out in paragraphs 73 and 74 of the First Determination, remained to be considered in this Second Determination, in the manner set out at paragraphs 32 – 34 and 48-57 above.

63. In the absence of any request from either of the parties, the parties' costs should lie where they fall.

A handwritten signature in black ink, appearing to read 'B Kogan', written in a cursive style.

**Brian Kogan**  
**Deputy Director, Railway Markets & Economics**  
**Duly Authorised by the Office of Rail Regulation**  
**26 June 2009**