
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP271

(following a hearing held at Central House, Euston on 28th April 2009)

The Panel

Shaun Fisher : elected representative for Franchised Passenger Class, Band 2.
Jonathan James: appointed representative of Network Rail
Robin Nelson: elected representative for Non-Passenger Class, Band 1
Graham Owen: elected representative for Non-Franchised Passenger Class

Panel Chairman: **Sir Anthony Holland**

The Parties

For West Coast Trains Ltd (WCT)

Robert Hodgkinson Commercial Operations Manager
Gary Steele Train Planning Manager
Susan Nichol Engineering Planning Manager

For Network Rail Infrastructure Ltd ("Network Rail")

Pauline McFarlane Senior Network Access Planner, Glasgow
Matthew Allen Network Access Unit Manager
David Kerr Integrated Planning Manager

Interested Party, in attendance

For First Scotrail Ltd (FSR):

Mike Price Head of Contracts
Dave Smith Short Term Timetable Manager

Interested Party, First/Keolis TransPennine Ltd ("TPE") not in attendance but submitted written representation

Brief Summary of the dispute

1. The Panel was asked by WCT to find that Network Rail had acted inappropriately, in respect of the application of the Condition D6 Decision Criteria, in determining the start and finish times for a 27hour Restriction of Use (“RoU”) between Carstairs and Law Junction, scheduled for Weeks 6 and 7 of Period C of the 2010 Rules of the Route. Specifically, WCT asserted that the commercial case for developing the Anglo-Scottish weekend travel market required that such a possession should finish by mid-afternoon Sunday, with the start time set for the corresponding earlier time on Saturday. This would allow for weekend travellers to set out on Saturday morning, and return on Sunday afternoon.
2. Network Rail noted the substance of WCT’s case, and acknowledged that for 4 other weekends in Period C, RoUs on other parts of the WCML within Scotland had been scheduled to allow WCT services to resume on Sunday afternoons. In respect of this contested RoU, however, WCT was neither the sole nor the decisive user of the portion of line in question. The section of line between Law and Lanark Junctions supported a half-hourly service between Lanark and Milngavie that was well patronised throughout Saturday, up to and including the last train. The service on Sundays over the same route is only hourly.
3. Network Rail had considered WCT’s representations, but had also taken into account arguments advanced by FSR (the Train Operator of the Lanark to Milngavie service), and TPE (Train Operator for North West England to Edinburgh and Glasgow services). It had therefore sought to balance the following considerations:
 - 3.1. WCT services to/from Glasgow can be diverted North of Carlisle via Dumfries and Kilmarnock (“the G&SW” route), with a journey time penalty of between 50 and 70 minutes, but this may also require the flex of other TOC/FOC services, notably the FSR passenger service;
 - 3.2. WCT services to Edinburgh can also in principle be diverted via the G&SW and Shotts, but the journey time penalty is very high;
 - 3.3. diversion of WCT services via the G&SW means that, North of Carlisle, electric traction cannot be used, requiring WCT to resort to one or more of
 - 3.3.1. diesel haulage of Pendolinos, with a further time penalty at Carlisle whilst locomotives are attached/detached (Network Rail having completed route clearance works on the G&SW route to enable this to happen);
 - 3.3.2. rostering of Class 221 “Super-Voyagers” to cover the feasible through services to Glasgow (and Edinburgh). These units would have to be taken from other WCT services thus causing further disruption elsewhere;
 - 3.3.3. rostering diesel powered stock to operate a Glasgow to Carlisle shuttle service via the G&SW, with a journey time penalty at Carlisle to allow passengers to connect with Anglo Scottish services that were truncated at Carlisle; and
 - 3.3.4. some element of bus replacement, or transfer to other services (e.g to serve Carstairs, Lockerbie and Motherwell), in combination with some or all of the above.
 - 3.4. whenever a 27 hour RoU is scheduled, WCT will need to provide alternative services for those passengers that would otherwise have travelled on the trains unable to run between Glasgow and Carstairs, and/or Carstairs and Carlisle, and that alternative provision would need to be provided by one or more of the expedients in 3.3 above;

- 3.5. there is no alternative rail link allowing FSR services to serve Lanark during an RoU between Law and Lanark Junctions., and bus replacement services have to be provided.
- 3.6. practical experience of the Glasgow travel scene is that bus replacement of Saturday evening services can cause particular problems, in particular where
 - 3.6.1. it implies that an outward journey is by train and a return journey is by bus;
 - 3.6.2. it requires the use of transfer stations (Motherwell or Wishaw) that are not well-adapted to cater for bus-rail exchanges; and
 - 3.6.3. there has been any pretext (including end of season football matches) for jollification amongst riders.
- 3.7. If the hourly FSR Sunday service to/from Lanark is curtailed with bus replacement throughout the day, this does not give rise to problems in such acute measure.
4. Network Rail had also received some representations from TPE, whose general position was that its own services to Edinburgh and Glasgow were better suited by possessions permitting Saturday morning and Sunday afternoon travel.
5. On the basis of all the foregoing, Network Rail had concluded that the RoUs affecting the line between Law and Lanark Junctions in Weeks 6 and 7 should be scheduled to commence at 00:10 Sunday, and be surrendered at 04:30 Monday. This had been Network Rail's original proposal, and it had declared on 20th April 2009 that it would stand by its original decision.
6. Other 27 hour RoUs were originally proposed for blocking the route between Carlisle and Carstairs throughout the Sundays in Weeks 1 – 4 and Weeks 6 and 7 of Period C. These RoUs did not affect FSR services. In its 20th April decision, Network Rail advised that the RoU in Week 2 would not go ahead, and those in Weeks 1, 3 & 4 would be re-timed earlier to allow Sunday afternoon services to/from both Edinburgh and Glasgow. In Week 6, Network Rail proposed that the RoU between Lockerbie and Carstairs should be timed to align with that between Law and Lanark Junctions.
7. Week 5, being the May Day Bank holiday weekend in 2010, has further extended RoUs but these are not contested in the current dispute.
8. WCT invited the Panel to determine:
 - (a) ***“That the three Scottish all day Sunday possessions [i.e Law to Lanark Junctions, weeks 6 and 7, and Lockerbie to Carstairs week 6] are amended to reflect 1145 Sat to 1445 Sun timescales (or something very comparable)”;***
 - (b) ***“In the event that WCTL succeeds in getting the above possessions amended as part of this determination, that Network Rail (under Network Code 3.2.4(a) or 3.2.6(b) and nROTP Para 1.8.5/6 or 1.9.5/6 refer – dependent upon the date of publication of the applicable Determination) pragmatically consider such changes in the latter ongoing development phase of the First Working Timetable for 2010, especially taking cognizant [sic] of our Firm Track Access Rights”.***
 - (c) ***“Network Rail as part of their ‘7-Day Railway’ Vision, seriously review with greater TOC involvement & dialogue, the planning of such ad hoc Section 7 items, such that they are***

planned wherever possible into more Period Possession plans, in harmony with current EEA guidelines and principles”.

- (d) *“That Network Rail, as part of its ongoing remit to formalise EEA arrangements for the remainder of the WCML, are tasked with formalising these with Train Operators, such that they can be included as part of a National ROTP review”.*

9. Network Rail asked the Panel

9.1. *to direct WCTL to accept the possessions as confirmed on 20th April 2009 [i.e. Law to Lanark Junctions as 00:10 Sunday to 04:30 Monday]*

9.2. *to support [NRI’s position that] ... the EEA strategies remain as industry guidelines for the access planning development and that when work volumes and deliver[sic] methods are known the strategies are formally consulted and agreed annual [sic] via the Rules of the Route process.*

The jurisdiction of the Panel

10. The Panel was satisfied that the matter is one that should properly be heard by a Timetabling Panel, meeting under the terms of Network Code Part D, as all the matters in question arise because a *“Bidder is dissatisfied with ...decision[s] of Network Rail made under this Part D”*. However, the Panel also recognised that one possible outcome of its determination of the matter would be to require Network Rail to review and amend Train Slots already offered and accepted by other Train Operators.

11. The Panel reminded itself that,

11.1. *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).*

11.2. the entitlements of the parties in this instance derive from

11.2.1. the Track Access Contract of WCT (and those of other affected parties);

11.2.2. compliance with the processes and obligations set out in Network Code Part D;

11.2.3. compliance with the processes and obligations set out in the Rules of the Plan, in particular the procedural guidance given in the “National Rules of the Plan” relating to formulation of Draft and First Working Timetables;

11.2.4. any relevant amplification of the meaning of these documents, and the obligations that they impose on the parties, as may be contained in a determination of either a *“relevant ADRR Panel”* (persuasive authority) or the Office of Rail Regulation (binding authority);

11.3. in respect of any question of remedy;

11.3.1. Rule A1.19 prescribes that *"The Panel shall (a) where the Access Conditions or Access Agreement require that a specific remedy be granted, grant that remedy accordingly; or (b) where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Panel, exercise that discretion in accordance with any requirements and criteria set out in the Access Conditions and Access Agreement after due consideration of all remedies and orders that could properly be made"*.

11.3.2. **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;"

11.3.3. In relation to these powers of *"the dispute panel"* the Panel noted that any determination it might make could have a material bearing upon the options opened to Network Rail under the terms of Condition D 4.7, and D4.7.2(c) in particular

"4.7 Variation of scheduled Train Slot

4.7.1 *Once a Bidder is deemed to have accepted a decision of Network Rail under Condition D3.2.8 or D4.6.2 or Network Rail has accepted a Bidder's Bid in accordance with Condition D3.2.7 or D4.5, both the Bidder and Network Rail shall, subject to Conditions D3.4.2, D4.4.2 and D4.7.2, be bound by that decision.*

4.7.2 *A Train Slot scheduled in the Working Timetable may be varied by Network Rail:*

- (a) in accordance with the procedures provided for in Condition D2.1.10, D4.5.3 or D4.8; or*
- (b) by agreement between Network Rail and the Bidder (provided that every other affected party has also agreed in writing); or*
- (c) in order to give effect to a decision of the relevant ADRR panel or the Office of Rail Regulation as provided for in Condition D5."*

Some preliminary issues of definition; the relevant contractual provisions

12. The procedures to be followed in the formulation of the Rules of the Route, the Draft Timetable and the First Working Timetable and the formulation of the Spot Bids are covered variously in Condition D4, and the National Rules of the Plan. Part D of the Network Code was re-issued on 1st September 2008. The National Rules of the Plan for 2010 was re-issued on 27th February 2009, and all quotations relevant to this case are from these versions of these two documents (unless otherwise noted).

Network Code : Condition D

DEFINITIONS

"First Working Timetable" means the version of the Working Timetable in respect of which Network Rail gives notice pursuant to Condition D3.2.7, as that version may be amended in accordance with Condition D3.2.9;

"Flexing Right" means a right, exercisable by Network Rail, either

- (a) pursuant to Condition D3.4.1 or D4.4.1, to vary a Bid or to define in detail the content of a Train Slot or series of Train Slots in any way within and consistent with the Firm Rights (if any) of the Bidder; or
- (b) pursuant to Condition D3.4.2 or D4.4.2, to vary a Train Slot previously scheduled in the relevant Working Timetable or a Bid as the case may be;

National Rules of the Plan (Network Rail National Rules of the Plan 2010 Version:2.0 National Final Proposal for Principal Change Date: 27 February 2009)

"1.8 Preparation of the Draft Timetable"

- 1.8.1 *Following the Priority Date Declarations, Network Rail will prepare a project plan for the Preparation of the Draft Timetable....*
- 1.8.2 ..
- 1.8.3 ..
- 1.8.4 *Train Operators may introduce new or changed aspirations up to the Capacity Request Deadline, but inclusion of those aspirations in the timetable will be subject to a test of practicability which will take into account the complexity of the new aspirations, any knock-on effects on other services and the time available to undertake the work. This assessment will be the responsibility of the lead Train Planning Manager within Network Rail and decisions will be subject to appeal.*
- 1.8.5 *Where conflicts arise between the aspirations of different Train Operators or with the Rules of the Route/Plan, Network Rail will resolve those conflicts by agreement between the parties wherever possible, otherwise by according priority in accordance with the priority levels set out in accordance with the priority levels set out in Part D of the Network Code and by application of Decision Criteria."*

1.8.6

1.9 Finalisation of the First Working Timetable

1.9.5 *Train Operators may introduce new or changed aspirations during the Finalisation Period, but inclusion of those aspirations in the timetable will be subject to a test of practicability which will take into account the complexity of the new aspirations, any knock-on effects on other services and the time available to undertake the work. This assessment will be the responsibility of the lead Train Planning Manager within Network Rail and decisions will be subject to appeal. This period of the timetabling process is intended to be used for error correction and fine tuning, so Train Operators should not expect to be able to introduce significant changes at this late stage."*

"Network Rail October 2007 Strategic Business Plan Supporting Document Seven Day Railway

EEA on West Coast Main Line from December 2008

The rationale for introducing this regime is that the passenger revenue which our industry will earn from running the extra trains made possible by shorter possession hours will more than compensate for the extra costs arising from carrying out engineering work within the constraints of EEA [Efficient Engineering Access].

B. from December 2009

EEA will apply...the ROTR possession hours will be:

Carlisle Law Jn

Sun/Mon to Fri/Sat nights: No possessions

Sat/Sun night: 9hr, all lines blocked, 40 wks/yr

Also Sat to Mon: 27hr, all lines blocked, 10 wks/yr"

[Although this was presented to the Panel as a contractual document as between Network Rail and the Department for Transport, and not part of the Track Access Agreement, the arguments of the parties represented it as a document to which each party expected the other to comply in the course of applying the provisions of Condition D of the Network Code, and the National Rules of the Route/Plan.]

The Contentions of the Parties

13. WCT argued its case by reference to the investment that had gone into the WCML, and the consequential implementation of the Virgin High Frequency Timetable (VHF). WCT cited, as major factors supporting its view,

13.1. the need, now that the West Coast Route Modernisation programme had been completed, to grow anew the market for weekend travel, which growth depended upon being able to offer a robust service at either end of the weekend.

13.1.1. The ability to run reliably a schedule of frequent trains on a Sunday afternoon was of crucial significance in creating confidence in the market. The current (20th April 2009) proposals in respect of the Period C 2010 RoUs implied that WCT would be able to offer Sunday afternoon services to and from Glasgow and Edinburgh, on Weeks 1 to 4 and 8, but not on Weeks 5, 6 and 7. In addition late Saturday and early Sunday scheduled services would be able to operate in Weeks 2 and 8, but not otherwise;

- 13.1.2. The provisions of the Efficient Engineering Access strategy (EEA) (which proposed 10 27hour RoUs per annum for the needs of the WCML between Carlisle and Law Junction) should be construed to best suit the needs of the long-distance traveller and WCT, rather than local services;
- 13.2. WCT's past experience, which meant that it was not confident that an adequate number of viable Train Slots for diversions over the G&SW could, in fact, be provided. Part of the rationale for seeking a formal determination of this matter at this comparatively early stage was to ensure that Network Rail could actually offer Train Slots to meet WCT's needs, if the Week 6 and 7 RoUs were confirmed as to the timings proposed on 20th April 2009. WCT was concerned that if the matter were not addressed until after the Capacity Request Deadline, commitments made to other Train Operators in the preparation of the Draft Timetable would frustrate provision of adequate replacement services to WCT;
- 13.3. even if Train Slots were deliverable over the G&SW, WCT was of the view that it could not roster the necessary number of "Super Voyager" sets to deliver the number of services needed on a full Sunday of disruption unless it was to cancel another WCT Service Group, in this instance the London – Chester services. WCT wished if possible to avoid diesel hauling of Pendolinos, the use of a Glasgow to Carlisle Shuttles or buses, because of the delays and inconvenience to passengers inherent in all such measures;
- 13.4. because of the scale of disruption that WCT passengers had experienced at weekends over the past 8 years, two weekends of major disruption to the Sunday afternoon market would shake passenger confidence, and threaten the re-growth of the weekend market;
- 13.5. whilst not denying the need to provide for the local travel market, and accepting that provision of bus replacement services on a Saturday afternoon and evening implied potentially challenging operating conditions, such disruption would not threaten the long term of that particular market to the degree that it might affect the WCT market.
14. Network Rail argued that
- 14.1. it was content to be judged against the criteria contained in the EEA. However, it should be noted that
- 14.1.1. the EEA is not part of any contract with individual Train Operators, nor does it specify the start and finish times for any quota of RoUs;
- 14.1.2. in practice, Network Rail is setting out to match the start/finish times for the more substantial RoUs to the commercial interests of individual Train Operators. Where, as in relation to possessions between Law and Lanark Junctions, two Train Operators had irreconcilably different aspirations as to the start/finish times to apply, Network Rail was responsible for determining which was the best (or "least worst") solution, by reference to the Decision Criteria (Condition D6).
- 14.1.3. in Network Rail's view setting the times for the RoU between Law and Lanark Junctions in Weeks 6 and 7 at 00:10 Sunday to 04:30 Monday was fully compliant with the EEA.
- 14.2. it had demonstrated within the joint submission that it had reviewed the cases made by both FSR and WCT against the Decision Criteria, and that its decision to support the times for the Week 6 and 7 RoUs that best suited FSR was reasonable, just as its decisions to change the times of the RoUs in Weeks 1-4 were an appropriate response to the aspirations of WCT and TPE (and where FSR was not affected).

- 14.3. the workload to be undertaken in the two RoUs between Law and Lanark Junctions, in particular the complete renewal of 780 yards of plain line, requires the complete occupation of both tracks for the full 27 hours, and cannot be interrupted for, as an example, the passage of trains under Single Line Working. This option had been considered and deemed infeasible;
- 14.4. as a consequence of the conclusion of both the Annan to Gretna re-doubling, and the re-institution of the Lugton Loop, Network Rail is prepared to make a firm commitment to WCT that it can offer an hourly path in each direction over the G&SW route on the two Sundays. FSR has offered to accept any adjustments that might be necessary to its Sunday services to enable this commitment to be delivered. Network Rail draws attention further to the fact that it has carried out clearance works necessary to allow safe passage of WCT stock, including diesel hauled Pendolinos, over the G&SW.

The Panel's findings of entitlement in respect of the Dispute

15. The starting point for the Panel's considerations is that responsibility for best use of the Network, and for ensuring that it is the most efficiently renewed and maintained is, subject only to the overall approval of the Office of Rail Regulation, the exclusive responsibility of Network Rail. To find therefore against Network Rail, the Panel would have to be satisfied that Network Rail had failed in the execution of one of the procedures to which it is contracted through the Track Access Agreements and the Network Code, or that it had frustrated a specific right of one or other Train Operator, or that it had made a capricious decision which did not take into account either the facts of the case, or the guidance embodied in Condition D6, the Decision Criteria.
16. The Panel found that, on the basis of the arguments and evidence presented, Network Rail and the Train Operators had all complied with the provisions of both Condition D of the Network Code, and the National Rules of the Plan; there were no issues of procedure that might need to influence its determination.
17. The Panel noted and understood the motives of WCT in seeking to have this matter addressed early, because of its concerns about the operation of Condition D during the Timetable Finalisation Period. The Panel considered that
 - 17.1. this dispute relates to the firming up of the Rules of the Route; WCT is entitled to pray the detail of its Firm Rights in aid of an argument that a specific possession should not be granted. However, once a final decision has been reached (including as a consequence of any recourse to the appeal procedures in Condition D5), any translation of the Firm Rights into Train Slots is subject to the Rules of the Route.
 - 17.2. to the extent that WCT's concerns related to a fear that, due to the provisions of Condition D3.2.6, and National Rules of the Plan 1.9.5, it might be prevented from achieving a satisfactory pattern of (diverted) Train Slots, because of commitments made to other Train Operators, it (the Panel) would need to bear in mind that Condition D4.7.2 c) conferred upon Network Rail the right to vary Train Slots "*in order to give effect to a decision of the relevant ADRR panel or the Office of Rail Regulation as provided for in Condition D5*".
18. The Panel considered the standing of the EEA document, and found that
 - 18.1. it has no contractual force within the context of the individual Track Access Agreements; however
 - 18.2. the objectives that it is intended to fulfil have significant industry support; and

- 18.3. by their nature any such statement of guidelines will inevitably be taken into account in any objective assessment of the reasonableness of Network Rail proposals; that said
- 18.4. the RoUs in dispute in this case appear to conform to the letter of the relevant part of the EEA for the WCML.
19. The Panel noted that no arguments or evidence has been submitted by any party to enable it to make judgements as to the potential costs, or compensation that might be incurred or avoided by one or other Train Operator dependent upon the Panel's decision. Equally, no party had suggested that the works to be undertaken in the Weeks 6 and 7 RoUs between Law and Lanark Junctions are not necessary, or should not proceed. Instead the Panel has heard arguments that focussed, for WCT (and, mildly, for TPE), on issues of which types of travel should be afforded priority in engineering planning, and which markets might have their growth stunted by disruption; and for Network Rail/FSR, on the operational problems of conveying Saturday evening crowds on bus replacement services.
20. The Panel noted that it was made privy to some data (based upon actual traffic counts of, in each case, a single day) as to likely numbers of passengers using either FSR or WCT services in Scotland, that would be affected dependent upon which start/finish times were finally determined for the Week 6 and 7 possessions. The Panel noted further that the total numbers of passengers affected in either case were roundly equivalent, and concluded that they did not constitute a persuasive argument for either party's case.
21. The Panel noted the analysis presented at paragraph 6.9.8 of the joint submission, where were set out the respective views of the parties (Network Rail, WCT and FSR), in respect of the weights each accorded to different of the D6 Decision Criteria. It considers that this analysis supports a view that, in this case, the decisive considerations, of those put before it, relate to the desirability, and feasibility, of minimising the numbers of passengers that are required to make additional transfers between services or between rail and buses, and that therefore Network Rail's assessment that the RoUs between Law and Lanark Junctions should run from 00:10 Sunday to 04:30 Monday, rather than the alternative canvassed by WCT, is reasonable and proportionate..
22. Finally the Panel noted that
- 22.1. WCT was arguing against any diversions on Sundays via the G&SW, on the basis of previous experience where Network Rail had not been able to offer more than an inadequate number of such paths, because of commitments made to other Train Operators;
- 22.2. during the course of the hearing Network Rail gave firm undertakings that it would be able to offer WCT hourly Sunday paths via the G&SW, with an extension of journey time of no more than 70 minutes, and that on the Sundays concerned WCT services South of Carlisle would be run "Fast Lines" throughout;
- 22.3. FSR had given undertakings that it would accept any necessary adjustments to its Sunday G&SW services to enable Network Rail to furnish WCT with hourly paths;
- 22.4. there did not appear to have been a sufficiently clear exchange between Network Rail and WCT as to what Sunday G&SW Train Slots could actually be provided in this instance. and that in any case
- 22.5. Network Rail's powers and discretions to make any necessary changes to Train Slots would potentially be enhanced by the issuing by the Panel of a determination;

- 22.6. whereas it may not be a sensible use of Train Planning resources to require Network Rail in every instance, to carry out full planning exercises to demonstrate that diversion Train Slots can be made available, where, as in this specific case, Network Rail, on the basis of other information and experience is prepared to commit to a standard of alternative provision, then Network Rail is to be encouraged to make that commitment at the earliest realistic date, and so enable timetable and resource planning to commence earlier.

The Panel's Determination

23. The Panel therefore determined, that, in respect of each of the issues raised by the parties, as follows:

23.1.

“That the three Scottish all day Sunday possessions [i.e Law to Lanark Junctions, weeks 6 and 7, and Lockerbie to Carstairs week 6] are amended to reflect 1145 Sat to 1445 Sun timescales (or something very comparable)”;

and

“to direct WCTL to accept the possessions as confirmed on 20th April 2009 [i.e. Law to Lanark Junctions as 00:10 Sunday to 04:30 Monday]”

The Panel directs WCT to accept Week 6 and week 7 RoUs in Period C 2010, between Law and Lanark Junctions, for the times confirmed on the 20th April 2009, that is between 00:10 Sunday and 04:30 Monday. This direction is made absolutely conditional upon Network Rail

23.1.1. making available during the weekends in question those hourly Train Slots in either direction over the G&SW to the number required for diversionary purposes by WCT, and not extending Carlisle to Glasgow running times by more than 70 minutes; and

23.1.2. ensuring that there are no other engineering works affecting the running of WCT (and TPE) services over the WCML south of Carlisle on the Sundays in question.

- 23.2. The Panel does not make the same direction in relation to the start and finish times for the Week 6 possession between Lockerbie and Carstairs, as it would not wish to inhibit the parties (in this case Network Rail, WCT and TPE) from making adjustments that might better suit the Sunday afternoon Edinburgh market.

23.3.

“In the event that WCTL succeeds in getting the above possessions amended as part of this determination, that Network Rail (under Network Code 3.2.4(a) or 3.2.6(b) and nROTP Para 1.8.5/6 or 1.9.5/6 refer – dependent upon the date of publication of the applicable Determination) pragmatically consider such changes in the latter ongoing development phase of the First Working Timetable for 2010, especially taking cognizant [sic] of our Firm Track Access Rights”.

the Panel finds that this contingency is not fulfilled, but draws the parties' attention to the force of this determination in relation to the applicability, in relation to the specific weeks and locations that are the subject of this hearing, of Condition D4.7.2;

23.4.

“Network Rail as part of their ‘7-Day Railway’ Vision, seriously review with greater TOC involvement & dialogue, the planning of such ad hoc Section 7 items, such that they are planned wherever possible into more Period Possession plans, in harmony with current EEA guidelines and principles”

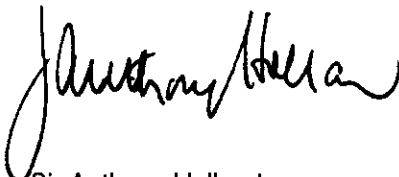
That Network Rail, as part of its ongoing remit to formalise EEA arrangements for the remainder of the WCML, are tasked with formalising these with Train Operators, such that they can be included as part of a National ROTP review”.

and

the EEA strategies remain as industry guidelines for the access planning development and that when work volumes and deliver[sic] methods are known the strategies are formally consulted and agreed annual [sic] via the Rules of the Route process.

The Panel considers that these propositions are not mutually exclusive, but supports the view that the principles set out in an EEA statement will inform the deliberations prescribed in Condition D2 ***“Consultation Process to establish the Rules of the Route/Plan”*** but will not override, or substitute for them.

24. For the avoidance of doubt, the parties should understand that
- 24.1. if Network Rail fails reasonably to deliver on the undertakings given to the Panel, and reflected in 22.1 above, WCT shall be entitled to require Network Rail to re-open consultation on the timings and substance of those Week 6 and Week 7 RoUs between Law and Lanark Junctions, including, if necessary, renewed reference to a Timetabling Panel for determination pursuant to Condition D5.1; and
 - 24.2. should any Train Operator be dissatisfied with any flexing decision by Network Rail made in accordance with Condition D4.7.2(c), and as a consequence of this determination, the Train Operator concerned may refer that decision to a Timetabling Panel for determination pursuant to Condition D5.1.
25. 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

12th May 2009