
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP317

(following a hearing held at 1 Eversholt Street on 17th December 2009)

The Panel

Chris Dellard: elected representative for Franchised Passenger Class, Band 3
Rob Holder : elected representative for Franchised Passenger Class, Band 2
Jonathan James: appointed representative of Network Rail

[Nigel Oatway (elected representative for Non-Passenger Class, Band 2) was appointed to the Panel, but was prevented from attending at the last moment. In compliance with ADR Rule E1.43, the Panel was quorate with the remaining three members.]

Panel Chairman: **Bryan Driver**

The Parties

For First Scotrail Ltd (FSR):

Dave Smith Short Term Timetable Manager

For Network Rail Infrastructure Ltd ("Network Rail")

Matthew Allen Network Access Unit Manager
Chris Hassell Acting Customer Relations Executive for FSR

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked by FSR to find that 14 proposed regular Sunday/Monday Double Line Blockages (DLBs) of the West Coast Main Line (WCML) between Preston and Carlisle should not be incorporated into the Confirmed Period Possession Programme (CPPP) commencing on 23rd May 2010. The Restrictions of Use would apply for each weekend in Period D (i.e Weeks 8 to 22: May 23rd til August 31st), except in the Bank Holiday Weeks 9 and 22. The effect of these Restrictions of Use would be that the FSR Sleeper services between London and Scotland would all require to be diverted via the East Coast Main Line (ECML), and therefore
 - 1.1. no Sleeper service would be provided for passengers wishing to join or alight at the normal booked stops at Watford Jct., Crewe, Preston or Carlisle; and
 - 1.2. FSR would incur additional costs, including significant extra out-payments to its Haulage sub-contractor.
2. These disputed Restrictions of Use were first proposed in the Rules of the Route Version 1 for the 2010 Timetable: FSR formally registered its objection to that proposal. Network Rail then included the proposals un-revised in each subsequent version of the Rules of the Route up to V4, and FSR formally objected each case. FSR's objections to Versions 2 and 4 were registered with the ADC Secretary as matters potentially to be heard by a Timetabling Panel.

3. FSR subsequently elected to stay any hearing under Part D of the Network Code (in relation to its objections to Rules of the Route V4), in order to make the case that the circumstances requiring the particular Restrictions of Use should be deemed to be Network Change, and subject to formal consultation by Network Rail, as prescribed in Part G of the Network Code.
4. FSR's case for Network Change was heard by an Access Disputes Panel on 14th October 2009, and Determination ADP40 was issued on 19th November. This determination found in favour of FSR :

"I therefore determine that what the parties have described as "the change to the maintenance policy for the West Coast Main Line requiring FSR to regularly divert over the East Coast Main Line" constitutes Network Change.

I further determine that Network Rail should issue the appropriate Network Change notice with effect from the date on which the new possessions regime was introduced". [ADP40 paragraphs 32 and 33]
5. In the course of the ADP40 hearing it was made clear that both parties understood that FSR's motive in pleading that *"the maintenance policy for the West Coast Main Line requiring FSR to regularly divert over the East Coast Main Line"* be deemed Network Change, related primarily to whether FSR should be compensated for the incremental costs it would incur. Equally both parties conceded, and Network Rail actively advocated, that determination of the eventual content of the Rules of the Route should be progressed in accordance with the procedures laid down in Network Code Part D; any determination of a Part G matter could inform, but could not pre-dispose, the issues that might arise in a reference made under Condition D5.1.
6. In this instance the Panel noted that in the protracted delay between the hearing for ADP40 and the ultimate publication of the Determination, the due date for the publication of the CPPP for the first weeks of the May 2010 Subsidiary Timetable arrived; as the CPPP contained the same proposals for DLBs between Preston and Carlisle that FSR had previously objected to in Rules of the Route Versions 2 and 4, FSR had filed a further formal objection as a Bidder *"dissatisfied with any decision of Network Rail made under this Part D"* [Condition D5.1.1]. Between the registering of TTP317 and the date of the hearing, Network Rail had advised the Committee Secretary that it had lodged an appeal with the Office of Rail Regulation against Determination ADP40, and the Secretary had established that a decision by the ORR on whether or not to accept the appeal was not imminent.
7. In the circumstances the Panel acknowledged that
 - 7.1. there remained a need to determine whether or not the disputed DLBs should be deemed to be part of the Rules of the Route to be included in the detailed arrangements in the CPPP;
 - 7.2. determination of such matters arising out of the operation of Part D of the Network Code *"shall, unless there are compelling reasons relating to the subject matter, be allocated to the Timetabling Panel"*; and that, given that the issues raised in ADP40 were now to be resolved in another place,
 - 7.3. there was no impediment to a Timetabling Panel determining the Timetabling merits of the disputed DLBs, by reference to the respective entitlements of the parties in FSR's Track Access Contract.
8. FSR therefore invited the Panel to determine:
 - (a) ***"That Network Rail may not implement the proposed possessions prior to issuing the Network Change Notice and carrying out due consultation"***;
 - (b) ***."that FSR is entitled to be granted paths via the West Coast Main Line in the ...May 2010 Timetable, or via those diversionary paths which were previously used, this only in order to facilitate maintenance in the manner that historically applied on the WCML"***

9. **Network Rail** asked the Panel to determine that

9.1. "Network Rail has correctly applied the Decision Criteria in implementing the engineering access plan as detailed in the V4 2010 Rules of the Route and subsequent Confirmed Period Possession Plans and First ScotRail must now comply with those Rules"

Some preliminary issues of definition; the relevant contractual provisions

10. The Panel reminded itself that,

10.1. 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).

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

10.2.1. the Track Access Contract of FSR;

10.2.2. compliance with the processes and obligations set out in Network Code Part D, and in particular Condition D2.1 **Review of the Rules of the Route/Rules of the Plan**

10.2.3. 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);

10.3. in respect of any question of remedy;

10.3.1. ADR 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"*.

10.3.2. **Condition D5.3** of the Network Code 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;"

10.3.3. 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.*

Network Code Part G (May 1997 edition: i.e. that in force at the time of Network Change consultation at the commencement of the WCRM project, and at the publication of Proposed G1 Network Change: Weaver Junction to Carlisle; Rationalisation of Emergency Ground Frame, Abolition of selected Crossovers (Ref NC/G1/2008/LNW/401) dated 1st August 2008):

2.1 Obligation to give notice of response

The Train Operator shall give notice to Network Rail if it considers that:

- (a) *one or more of the following conditions has been satisfied:*
 - (i) *the implementation of the proposed change would necessarily result in Network Rail breaching an access contract to which that Train Operator is a party;*
 - (ii) *Network Rail has failed, in respect of the proposed change, to provide sufficient particulars to that Train Operator under Condition G1.2;*
 - (iii) *the implementation of the proposed change would result in a material deterioration in the performance of that Train Operator's trains which cannot adequately be compensated under this Condition G2; or*
- (b) *it should be entitled to compensation from Network Rail for the consequences of the implementation of the change.*

Any notice of the kind mentioned in paragraph (a) above shall include the reasons for the Train Operator's opinion. Any notice of the kind mentioned in paragraph (b) above shall include a statement of the amount of compensation required and the means by which the compensation should be paid, including any security or other assurances of payment which Railtrack should provide. Any such statement shall contain such detail as is reasonable to enable Railtrack to assess the merits of the Train Operator's decision

Network Code Part G (May 2009 edition: these paragraphs are unchanged from the May 1997 edition, except for the substitution of the term Access Beneficiary, for Train Operator at the places indicated.)

2.2 Amount of compensation

Subject to Condition G2.3, and Condition G2.4.1, the amount of the compensation referred to in Condition G2.1 shall be an amount equal to the amount of the costs, direct losses and expenses

(including loss of revenue) which can reasonably be expected to be incurred by the [Train Operator] Access Beneficiary as a consequence of the implementation of the proposed change.

2.3 Benefits to be taken into account

There shall be taken into account in determining the amount of compensation referred to in Condition G2.1:

- (c) subject to Condition G2.4.2 the benefit (if any) to be obtained or likely in the future to be obtained by the [Train Operator] Access Beneficiary as a result of the proposed Network Change; and*
- (d) the ability or likely future ability of the [Train Operator] Access Beneficiary to recoup any costs, losses and expenses from third parties including passengers and customers.”*

Network Code Part G (May 2009 edition; this provision is new to this version of the Network Code and gives force to the revisions to Schedule 4 in the Template Track Access Agreements)

2.4 Restrictions of Use

2.4.1 The amount of the compensation referred to in Condition G2.2 shall exclude the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change.

2.4.2 The benefits taken into account in determining the amount of the compensation for the proposed change under Condition G2.3 shall exclude the benefit (if any) to be obtained or likely to be obtained by the Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change (with that exclusion including any compensation payable to that Train Operator in respect of that Restriction of Use under its Access Agreement”

Specific provisions of the FSR Track Access Contract

12. The FSR Sleeper services are scheduled to operate every night, except Saturday, between London Euston and Glasgow and Edinburgh, and London Euston and Aberdeen, Inverness and Fort William, with corresponding Southbound services. The service pattern was devised in advance of rail privatization, and has not undergone any significant modification since then. The contractual framework for these services supports the following specific aspects of the service:
 - 12.1. between Euston and Scotland, each service totals 16 vehicles, is formed of portions including sleeping, seating and catering vehicles, and is specified to be hauled by electric traction.
 - 12.2. In Scotland
 - 12.2.1. the Northbound Edinburgh/Glasgow service splits, and the Southbound service is merged, at Carstairs Junction, with electric traction available to either destination;
 - 12.2.2. the other Northbound service splits into three portions at Edinburgh, each portion being worked on to its respective destination behind a diesel locomotive; in the Southbound direction the portions are re-coupled at Edinburgh.
 - 12.3. Coaching stock is leased by the franchisee, but haulage, including provision of Electric and diesel locomotives and train –crew is subcontracted to DB Schenker.
13. Within Schedule 2 of the FSR Track Access Contract,
 - 13.1. the Main Routes for **Group 5 First ScotRail Overnight Anglo-Scottish Routes**, are defined as London Euston to Carlisle,(2.1) Carlisle to Glasgow Central (2.2), Carlisle to Edinburgh Waverley (2.3), and Edinburgh Waverley to Aberdeen, Inverness and Fort William (2.4 –2.6).

- 13.2. there are 47 diversionary routes listed, which can be subdivided into
- 13.2.1. alternative electrified routes e.g via Northampton, or via West Midlands) that may add to the running time but do not require any change of traction throughout;
 - 13.2.2. other West Coast routes , eg. via Manchester, via Settle, or via Kilmarnock, which require a change to diesel haulage;
 - 13.2.3. alternatives within Scotland using the standard diesel traction; and
 - 13.2.4. 7 routes added in 2005, specifically to facilitate the West Coast Route Modernisation project (WCRM), granting rights to use the ECML main electrified route via the North London Line, York, Newcastle and Berwick to Edinburgh (or sections thereof combined with other EC alternatives, not all of which are electrified).

14. Within Schedule 5, the calling patterns for the FSR sleepers South of Edinburgh/Glasgow are :

Service	Regular Calling Pattern	Additional Stations
London to Edinburgh/Glasgow	Watford Jct, Carlisle, Carstairs, Motherwell	Preston (to pick up stores - not for public use) Warrington (crew change - not for public use)
London to Aberdeen/Inverness/ Fort William	Watford Jct, Crewe, Preston, Carstairs	Carlisle (crew change - not for public use) Edinburgh (loco and crew change - not for public use)

15. The **Service Level Commitment** from the Scottish Franchise Authority (as published on the Transport Scotland website) lays down conditions
- 15.1. in 1. SERVICE PATTERN MONDAY TO FRIDAY, in respect of earliest departure times and latest arrival times for all throughout Sleeper journeys, but in 2. CALLING PATTERN does not stipulate any stopping points between London and Edinburgh/Glasgow;
 - 15.2. in 4. SERVICE PATTERN SUNDAYS, there are no stipulations in respect of latest acceptable arrival times either in London or Scotland; furthermore,
 - 15.3. at 4.1.8 *"the Franchisee may propose changes to the calling pattern and timings, for approval at the sole discretion of the Authority"*

16.

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

EEA [Efficient Engineering Access] 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.

B. from December 2009

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

Preston - Carlisle Law Jn

Mon/Tues to Fri/Sat nights: No possessions
Sat/Sun night: 9hr, all lines blocked, 40 wks/yr
Sun/Mon night: 7hr, all line blocked, 10 wks yr
Also Sat to Mon: 27hr, all lines blocked, 10 wks/yr”.

[These parameters for the Restrictions of Use on various sections of the WCML were derived from work undertaken by the Sustainability Strategy Steering Group in 2006. Although they have some standing as between Network Rail and the Department for Transport, they are not part of the FSR Track Access Agreement. They are a benchmark for the scale and nature of the Restrictions of Use Network Rail considers necessary for the proper maintenance of the WCML, and therefore seeks to incorporate into the Rules of the Route].

The Evidence laid before the Panel

17. The Joint Submission of the parties, incorporating

Annex1 – ADP40 Determination;

Annexes 2 to 5 – FSR’s responses to Versions 1,2,3 and 4 of Rules of the Route: letters to Joe Warr, Network Access Planner, Network Access Unit, Leeds ;

Annex 6 – “Justification for the Possessions”; Letter dated 12th June 2010 (unsigned), with extensive appendices, from Territory Delivery Planning Unit, LNW Territory to Joe Warr, Network Access Unit Leeds (i.e internal Network Rail correspondence)

Annexes 7 and 8 – Network Rail responses to FSR’s objections to Version 1 and Version 4 replies, providing justifications for 14 proposed 6 Hr Sun/Mon DLBs between Preston and Carlisle

Annexes 9 and 10 – Notes of Telephone conferences of 22nd May and 2nd June 2009, FSR and Network Rail, rehearsing arguments in respect of timing and/or number of Restrictions of Use, and past practices and associated compensation.

18. Opening statements (also supplied in hard copy) from FSR and Network Rail, followed by questioning of company representatives by the Panel. As a consequence of this questioning the Panel asked for (in compliance with its duties under ADR Rule A1.3 (c) “A Panel shall...where appropriate take the initiative in ascertaining the facts and law relating to the dispute;..”), and obtained

18.1. an extract from FSR Track Access Contract Schedule 5 **Table 4.1 Calling Patterns for Service Group HA11: Anglo-Scottish Overnight**, services 551 London – Glasgow and Edinburgh; and 553 London – Aberdeen/Inverness/Fort William;

18.2. details of the Service Level Commitment for Sleeper Services, as published on the Transport Scotland website; and

18.3. **Proposed G1 Network Change: Weaver Junction to Carlisle; Rationalisation of Emergency Ground Frame, Abolition of selected Crossovers (Ref NC/G1/2008/LNW/401) dated 1st August 2008**: together with

18.3.1. Appendix A: Reasons for proposed Change: and

18.3.2. responses from West Coast Trains, EWS, and DRS Ltd; and

18.3.3. confirmation from FSR that it had made no formal response to the proposal.

19. Both parties made frequent reference to “the EEA” but did not table any document to support those references. The extract cited above at paragraph 16 is included at the initiative of the ADC

Secretariat for the benefit of other Industry Parties not party to this dispute, but with a potential interest in its outcome.

The Panel's findings in respect of facts

20. Since the start of the WCRM project there have been frequent occasions when FSR, and its predecessor, have registered disputes against proposed changes to the Rules of the Route because of the effect on the Sleeper services, but prior to commencing work on the upgrading of the line North of Preston, these were generally resolved without the need for a formal determination, with trains being diverted over the diversionary routes in the original Track Access Contract, or being worked past midweek work sites, under Single Line Working (SLW) conditions. Exceptionally there had been occasional diversions via ECML.
21. The parties were agreed that experience had shown that diversions involving use of diesel traction were generally unsatisfactory because of
 - 21.1. the additional time required to change locomotives;
 - 21.2. the additional running time directly related to alternative routes;
 - 21.3. difficulties with providing train-crews with relevant knowledge, and
 - 21.4. difficulties with providing diesel locomotives with sufficient capacity to meet the "hotel power" requirement for each full train (for air-conditioning, heating and refrigeration of catering equipment) in all weather conditions.
22. Other than by diverting over the ECML there is no alternative electrified route available when a DLB is put in place between Preston and Carlisle. For this reason, and specifically to facilitate the WCRM, FSR and Network Rail signed a Supplemental Track Access Agreement giving FSR rights of Track Access, when necessary, to route the Sleeper services via the ECML. These additional rights of Access gave the option for all Southbound services to be combined at Edinburgh, and then hauled by electric traction throughout to Euston, albeit with a need for a reversal in North London. Comparable arrangements applied to the reciprocal Northbound services.
23. When used, an ECML diversion involves FSR in significant additional out-payments for Haulage, and denies service to passengers to/from Watford Jct, Crewe, Preston and Carlisle. It also gives FSR problems with catering supplies as the Sleepers are planned to be re-provisioned at Preston. FSR has no facilities for re-provisioning a train worked over the ECML.
24. Sunday/Monday DLBs between Preston and Carlisle have been programmed in Timetable years 2007 (16 occasions), 2008 (16 occasions) 2009 (14 occasions) and are now programmed for 14 further occasions in 2010. (Annex 6 of Joint Submission)
25. Given that WCRM works were all part of a major Network Change, and subject to the provisions of Part G, then, under the terms of the applicable versions (i.e. May 1997) of Part G, FSR was paid appropriate compensation by Network Rail for such ECML diversions in Timetable years 2007 and 2008.
26. With the completion of WCRM, and the implementation the Very High Frequency Timetable for the 2009, payment of compensation for ECML diversions lapsed. In the expectation that the 2009 DLBs were to enable WCRM "loose ends" to be addressed, FSR accepted the Restrictions of Use in the 2009 Rules of the Route and the associated ECML diversions, for which no compensation was paid.
27. The proposal for 14 more DLBs in the 2010 Rules of the Route, together with the advice that similar numbers of DLBs would be proposed for subsequent Timetable years, is at the root of the arguments mooted in ADP40, it being FSR's contention that WCRM has resulted not just in a change in the physical track layout and capability, but also in a need for changed maintenance practices which

imply that FSR will be subject to a greater incidence of disruptive Restrictions of Use than it experienced prior to WCRM.

The Contentions of the Parties

28. The Panel considered that the arguments of the Parties could be summarized as follows.
29. **FSR** argued its case by reference to the fact that it had not required to divert Sleeper services over the ECML before the WCRM works, and that the Restrictions of Use now proposed for the 2010 and subsequent Timetables will mean that
 - 29.1. all potential weekend passengers to or from the North West stations would lose the ability to use Sleeper services to make return weekend trips to Scotland during the summer months of 2010; and that
 - 29.2. FSR's costs will increase significantly whilst its revenue is decreased.
30. FSR had accepted such Restrictions of Use and diversions as part of achieving the WCRM project, and had been compensated for the disruption and increased costs caused. Now that WCRM had been achieved, something which brought no direct benefit to FSR's Sleeper services, FSR asserted that Network Rail was not entitled to propose or implement Restrictions of Use that would prevent FSR from serving some of its markets, and leave FSR in a net worse off position.
31. FSR considered that it was entitled to retain Train Slots over the WCML, and that it was not reasonable to expect it to accept dis-benefits only to allow other WCML users to benefit. It conceded that it had been in discussions with Network Rail, as well as pursuing Network Change through ADP40, and was of the view that, if there were a way of leaving it net no worse off it would in principle accept both DLB Restrictions of Use and the ECML diversions. However
32. timing the Restrictions of Use to coincide with all the summer weekends when there was most demand for weekend trips, was the worst possible choice for FSR, and consideration should be given to timing them to another Period.
33. **Network Rail** argued that
 - 33.1. the Review of Rules of the Route process in Condition D2, entitled it to propose such Restrictions of Use as it deemed necessary to undertake maintenance and renewals, subject only to giving due consideration to the Decision Criteria;
 - 33.2. limited availability of on-track plant and staff meant that it was not feasible to undertake all necessary activity in Saturday/Sunday DLBs: Sunday/Monday DLBs enabled it to have access to staff and plant at a time of lesser demand, and to address problems that may have been uncovered by the work already scheduled to Saturday/Sunday Restrictions of Use;
 - 33.3. certain activities could no longer be carried out without blocking both lines and therefore the scope for carrying out most works during mid-week night time Restrictions of Use had largely disappeared. However, the net impact of substituting Sunday/Monday DBLs for midweek SLW operations was that whilst, during the weeks in dispute FSR's 4 Sunday sleeper services were adversely affected, 35 other WTT services benefited, and that
 - 33.4. this was a good enough reason for seeking a determination from the Panel that the Restrictions of Use should be incorporated into the Rules of the Route and thus into the CPPP, irrespective of any decisions regarding compensation, whether from the appeal against ADP40 or any other source.

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

34. 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, exclusive to Network Rail. That said, the Panel must satisfy itself that Network Rail had not, in making any specific proposal
 - 34.1. failed in the execution of one of the procedures to which it is contracted through the Track Access Agreements and the Network Code,
 - 34.2. unreasonably frustrated a specific right of the Train Operator,
 - 34.3. unreasonably put one Train Operator at a disadvantage, in order to advantage others, or
 - 34.4. 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.
35. The Panel found that, based on the arguments and evidence presented, Network Rail and FSR had both complied with the provisions of Condition D2 of the Network Code.
36. The Panel considered therefore that it had to base any determination upon the following considerations
 - 36.1. to what do FSR's Firm Rights reasonably entitle it?
 - 36.2. with the addition of ECML routes to FSR's rights, what entitlement does this confer on Network Rail to propose Restrictions of Use that require the Sleeper services to divert via the ECML? Whilst it is noted that the facility now exists for Routes for diversion to be added to Track Access Contracts at short notice where novel diversion becomes necessary, does this imply that there are no restraints upon Network Rail's ability to plan on the basis that the Train Operator can always divert?
 - 36.3. in the 2007 and 2008 Timetables, Network Rail accepted that FSR was entitled to be compensated for ECML diversions. In circumstances where Network Rail contend that compensation is no longer payable for ECML diversions (other than the relatively low amounts eligible through the current Schedule 4 of the Track Access contract), has the entitlement to introduce Restrictions of Use that require such diversions changed? If so, in what way?
 - 36.4. Have there been other changes that impact upon the relative entitlements of the parties?
 - 36.5. To the extent that it is not possible to fulfil both sets of entitlements, to what extent do the Decision Criteria inform which party has the stronger case?
37. The Panel considered these questions and concluded that
 - 37.1. FSR is entitled to bid for 4 overnight Sleeper services to run over the WCML, and to call at the WCML stations identified in Schedule 5 (see paragraph 14 above). This right is only impaired where Network Rail, at the conclusion of the Review of Rules of the Route process (Condition D2.1), has obtained the agreement of affected Train Operators (or received an appropriate Determination by a disputes body) that Restrictions of Use should be established within the "*applicable Rules of the Route*". The Panel is satisfied that, as at the time of this hearing,
 - 37.1.1. the 14 X 6 hr Sunday/Monday DLBs are still in dispute, and therefore do not have established status as part of "*the applicable Rules of the Route*"; but that
 - 37.1.2. Condition D2.1.9 empowers Network Rail to implement its Rules of the Route decision (e.g. to allow it to proceed with other planning) pending dispute determination. For all practical purposes, this means that were this Panel to determine against the introduction of these DLBs, they may still be implemented unless Network Rail elects

not to appeal to the Office of Rail Regulation against that determination, under Part M and within the limited timescales prescribed in Condition D5.2.

- 37.2. The section “Diversions Routes” in the Track Access Contract serves to record that the Train Operator has permission to use the listed alternatives in order to maintain a service, in an emergency, or in circumstances where it has been agreed or determined, in the terms contemplated in Conditions D2.1.4 to D2.1.7 that Restrictions of Use should be incorporated into the “*applicable Rules of the Route*” which would prevent the operation of a service over the Main Routes;
- 37.3. Inclusion of alternative routes within a Track Access Contract do not entitle Network Rail to treat diversion of services onto a Diversions route as an “easy option” to enable it to propose disruptive Restrictions of Use. Where the use of a Diversions route explicitly frustrates the ability of a Train Operator to exercise its Firm Rights over its Main Routes, and therefore, as in the present instance, in relation to the Regular Station Calls in England, it would be reasonable for there to be a presumption that
- 37.3.1. such an action should only be a last resort, and
 - 37.3.2. there should be a way of managing the situation for passengers and for train operations..
- 37.4. In the current case, the Panel has to take account of the fact that there is no realistic alternative available for enabling passengers who might wish to join a train at Crewe, to catch a train that is actually running via York. However the Panel also notes that,
- 37.4.1. FSR’s agreement to diversions in previous years shows that both the issues referred to in 37.3.2 are capable of being managed. Its agreement to divert if suitable compensation is forthcoming supports the view that such diversions can be managed in future
 - 37.4.2. for any one day of diversions, FSR attaches greater significance to the additional operational costs involved in running via York, than it does to losing one night’s receipts from the English Calling stations.
 - 37.4.3. FSR does however express concern that its business with the English Calling stations would be affected in the long term, if, as is the case in the current proposal for Period D they consistently received no Sunday/Monday service...
38. Network Rail has to be in a position that, if challenged, it can demonstrate that the Restrictions of Use it proposes for incorporation into the “*applicable Rules of the Route*”. take the appropriate “*due regard to the Decision Criteria*” as required by Conditions D2.1.3 and D2.1.5). In relation to the Decision Criteria, the Panel concluded, after an item by item assessment that, of the 15 possible criteria 7 had no bearing upon the case, 6 favoured Network Rail (some only marginally) and 2 FSR (if the impact on FSR alone amongst operators was considered). On this basis it would not be appropriate to conclude that Network Rail had applied the criteria unfairly.

The Panel’s consideration of remedies, and other contributory factors

38. Before finalising its determination, on the comparatively straightforward issue of the operation of Condition D2.1, the Panel considered that it had to acknowledge that this particular case has a number of features that differentiate it from other Condition D2 cases, namely
- 38.1. the FSR Sleeper services have, to the extent possible, operated unchanged throughout the duration of the WCRM upheavals, and are planned to continue so to operate in future;

- 38.2. operationally and commercially the FSR Sleeper services have little in common with any other franchised services ;
 - 38.3. the enhanced capability of the upgraded WCML does not have any apparent benefits for the Sleeper services, but
 - 38.4. the Sleeper services are the principal obstacle to Network Rail obtaining DLBs deemed necessary for the maintenance of a high speed railway, and
 - 38.5. the Sleeper services do not “fit” the principles of the revised Template Schedule 4 compensation regime introduced in 2009, largely because there is no sensible basis for providing for even “virtual” replacement bus services when the ECML diversion is in force.
39. The Panel is therefore sympathetic to the perception that there is an intrinsic inequity that FSR is being asked to accept un-aided the costs of diversions that benefit Network Rail and other Train Operators but have no benefit to FSR’s business. In relation to the implementation of EEA, there is something intrinsically paradoxical in a set of standards, aimed at the “Seven Day Railway”, whose only impact on FSR is to reduce a section of its service from a Six Day Railway to a Five Day Railway.
40. Given that this case resolves essentially into an issue of funding of the additional costs to FSR for operating diversions over the ECML, the Panel would offer the following points for the consideration of the parties:
- 40.1. there appears to be a connection between the need for these diversions, and the fact that the capacity of the section of line between Preston and Carlisle to deal with any activity requiring SLW (in particular planned engineering work) has been reduced by the elimination of a critical number of emergency ground-frame operated crossovers as a consequence of **Proposed G1 Network Change: Weaver Junction to Carlisle; Rationalisation of Emergency Ground Frame, Abolition of selected Crossovers (Ref NC/G1/2008/LNW/401) dated 1st August 2008**. That said, the impact of that Network Change is not immediately obvious from the consultation document issued, anymore than the current status of the change (i.e. current or completed) is clear from the Network Rail website. However, the Panel suggests that FSR may have misdirected itself in not challenging this proposal more fully.
 - 40.2. the arrangements for compensation payable under Schedule 4 of the Passenger Track Access Agreement have been changed since April 2009, to encompass compensation for “*any Restriction of Use in connection with the implementation of the proposed change*” [Condition G2.4], leaving compensation claimable under Condition G2.2 to relate solely to “*an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by the [Train Operator] Access Beneficiary as a consequence of the implementation of the proposed change*”. [Condition G2.2: emphasis added]. This potentially requires Train Operators to submit all Network Change proposals to ever more searching scrutiny, and to protect their interests by seeking clarification of anticipated effects of any proposed change.
 - 40.3. This Panel is not empowered to weigh up whether or not compensation is or might be payable to FSR, whether “*as a consequence*”, or “*in connection with*” a Network Change, but notes that there is the potential for another place to consider such a question whether in relation to
 - 40.3.1. the WCRM,
 - 40.3.2. the circumstances contemplated in ADP40; or
 - 40.3.3. the abolition of emergency crossovers under **NC/G1/2008/LNW/401**, or
 - 40.3.4. the scope for a bespoke version of Schedule 4 to address the particular issue of Sleeper diversions.

41. As for the standing of the EEA document, the Panel found that
 - 41.1. it has no contractual force within the context of the individual Track Access Agreements; however
 - 41.2. the objectives that it is intended to fulfil have significant industry support; and
 - 41.3. 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.
42. That said, the Panel was reminded by the AD Secretariat that the ORR, in its determination of the appeal of TTP102, had cautioned Panels against allowing their judgement in respect of the contractual entitlements of parties to be swayed, or constrained, by pragmatic considerations of railway operations. There is in this case a possible implication that Network Rail, by the combination of EEA and removal of crossovers, has created circumstances where there is no alternative to what it proposes, whether it is entitled to or not. Indeed
43. it appears unlikely that FSR will ever again be offered Train Slots to operate its Sleeper services over the WCML for 6 days per week for more than 75% of any Timetable Year. If this is really the case, then it is important that Network Rail gives careful consideration to FSR's views as to whether the DBL's should better be scheduled for Winter Sundays rather than the high Summer, or indeed whether they should be distributed through the year.

The Panel's Determination

44. The Panel therefore determined, in respect of each of the issues raised by the parties, as follows:
 - ***“that FSR is entitled to be granted paths via the West Coast Main Line in the May 2010 Timetable, or via those diversionary paths which were previously used, this only in order to facilitate maintenance in the manner that historically applied on the WCML”***
45. The Panel agrees that FSR retains, by virtue of the terms of its Track Access Contract the right to bid for, and be granted Train Slots corresponding to a six day service over the WCML, unless it has agreed to (or been directed to accept) Restrictions of Use that would be incompatible with such paths. It is the Panel's understanding that, as at the time of the hearing no such agreement had been reached, and that any determination (subject to Appeal) was in the hands of the Panel itself.
46. The Panel is concerned that the impact upon FSR of the 14 DLBs proposed for Period D is, if the cost is to be borne exclusively by FSR, disproportionate, and is in effect a *de facto* subsidy to other Train Operators. This alone is not viewed by the Panel, however, as being powerful enough to support First ScotRail's position that the Restrictions of Use should be rejected.
 - ***“Network Rail has correctly applied the Decision Criteria in implementing the engineering access plan as detailed in the V4 2010 Rules of the Route and subsequent Confirmed Period Possession Plans and First ScotRail must now comply with those Rules”.***
47. The Panel considers that Network Rail's arguments in support of the disputed DLBs may substantiate its view that they facilitate the delivery of Network Rail's maintenance responsibilities; it is even possible that Network Rail cannot contemplate any alternative strategy. If that is the case, it is a function of Network Rail's discharge of its past responsibilities, and does not of itself create an entitlement for Network Rail to set aside FSR's Firm Rights to a Sunday/Monday service via the WCML.
48. Nevertheless it is the view of the Panel that the Restrictions of Use proposed for the May 2010 Subsidiary Timetable Rules of the Route and associated Confirmed Period Possession Plan, i.e a programme of 14X 6hr DLBs between Preston and Carlisle, is justifiable by reference to the Decision Criteria, and should be established within the Rules of the Route.

49. If however the parties can agree to a rescheduling of such DLB's to weekends less detrimental to FSR's business, they shall not be precluded from so doing by the terms of this determination, subject always to taking into account the need to meet Informed Traveller timescales, and to make best use of the Short Term Planning process.

- ***"That Network Rail may not implement the proposed possessions prior to issuing the Network Change Notice and carrying out due consultation"***

50. The Panel finds that FSR's principal objection to the DLBs, namely the scale of financial penalty it is now to carry (a penalty that in Timetable Years 2007 and 2008 was met by Network Rail), is not a ground for determining that Network Rail is not entitled to establish the disputed possessions and require FSR services to be diverted over the ECML. The potential remedies for this situation are known to the parties, but any determination of the absolute merits of such solutions is beyond the competence of a Timetabling Panel.

51. The Panel draws the parties' attention to the fact that any determination in another place that may require a modification to the Rules of the Route or to the allocation of Train Slots will require to be dealt with under the short term planning process; compliance with Informed Traveller timescales requires bids for diversions to be lodged by the first week in February 2010.

52. 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.



Bryan Driver
Panel Chairman

23 December 2009

Annex to Timetabling Panel determination of reference TTP317

Decision Criterion	Evidence	Judgement	Weighting
(a) sharing the capacity, and securing the development, of the Network for the carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services having regard, in particular, to safety, the effect on the environment of the provision of railway services and the proper maintenance, improvement and enlargement of the Network	With Full Network Sleepers via WCML and Very High Speed / Frequency WCML Service. High Network availability for majority of trains suiting the business. NR paper (Annex 6 to the Hearing) shows this is seen as efficient (with regard to availability of Network) method of delivering essential maintenance. Network Change LNW/401 cites improved reliability from removal of S&C previously enabling SLW.	In favour of majority of passengers and freight users and majority of tocs / focs both with regard to paths and to maintenance.	Material, Essential. NR's decision fits this DC.
(b) seeking consistency with any current Route Utilisation Strategy which is either (i) published by the Strategic Rail Authority or the Department for Transport before 31 May 2006, or (ii) established by Network Rail in accordance with its Network Licence	No evidence of inclusion in RUS save that a WCML RUS is currently in production and it has EEA quoted as baseline information, but this is not relevant as gaps / options / strategy has not been determined or published.	Neither consistent nor inconsistent with RUS. No evidence either way.	Irrelevant; Optional.
(c) enabling a Bidder to comply with any contract to which it is party (including any contracts with their customers and, in the case of a Bidder who is a franchisee or franchise operator, including the franchise agreement to which it is a party), in each case to the extent that Network Rail is aware or has been informed of such contracts	Franchise Agreement does not require the Sleeper to call in England. FSR is likely to comply still, even if the SLC required calls in England as the SLC is for the permanent plan and is generally seen to be overridden by Rules of the Route so long as the TOC has used its rights to challenge RoR so far as it can. The TOC may be required to challenge change to the permanent timetable so should challenge removal of the intermediate calls and the journey time extension. Given the existence of previous diversions, passengers with tickets are likely to be catered for in accordance with the conditions of travel.	FSR complies if it challenges. If RoR is confirmed as per NR's decision then its decision is consistent with this DC.	Material. NR's decision is consistent with this DC.
(d) maintaining and improving the levels of service reliability.	Network Change LNW/401 cites improved reliability from removal of S&C previously enabling SLW. NR paper (Annex 6 to the Hearing) shows this is seen as delivering essential maintenance. Informed Traveller timescales imply the advertised offer for these dates will be reliable, even more so if the paths are in the May Timetable permanent plan as is indicated by NR in its submission.	In favour of majority of passengers and freight users and majority of tocs / focs.	Material. NR's decision fits this DC.
(e) maintaining, renewing and carrying out other necessary work on or in relation to the Network	NR paper (Annex 6 to the Hearing) shows this is seen as efficient (with regard to availability of Network) method of delivering essential maintenance.	In favour of majority of passengers and freight users and majority of tocs / focs.	Material; Essential. NR's decision fits this DC.
<i>(In its consideration of paragraph (d) but should be (e)) of this Condition D6, Network Rail shall not be entitled to determine that its Restrictions 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 which 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)</i>			
(f) maintaining and improving connections between railway passenger services	Direct service to and from Stations in England normally served by the sleeper is lost. Quality of connectional opportunities unlikely to be maintained or improved. Alternative of revised access on West Coast for all users may worsen connections at other parts of day including a greater number of opportunities / passengers.	Not clear. This is really designed for the permanent plan and is probably designed to avoid connections being broken where the timetable for one operator is planned in isolation and with blinkers on. For numbers of passengers on FSR trivial, for those passengers affected on other tocs may be a material number, and for those passengers affected on FSR likely to be material.	Overall, not material.

Decision Criterion	Evidence	Judgement	Weighting
(g) avoiding material deterioration of the service patterns of operators of trains (namely the train departure and arrival frequencies, stopping patterns, intervals between departures and journey times) which those operators possess at the time of the application of these criteria	There is only evidence of change to 2 intermodal services amongst other operators' services and these have been accepted. There is change to FSR but there was change on a similar number of dates when the decision was taken so the only change is the packaging together in the summer. FSR says this is a material change as the summer has higher demand. NR says it can plan the 14 at any time of the year.	14 occasions is no detriment. Packaging in the summer is.	Material. Decision to package is not consistent with the DC.
(h) ensuring that, where the demand of passengers to travel between two points is evenly spread over a given period, the overall pattern of rail services should be similarly spread over that period	This is designed for timetable planning over a timespan, eg not having a service with 5 minute / 55 minute intervals when 30 minute / 30 minute interval can be accommodated.	Irrelevant.	Irrelevant.
(i) ensuring that where practicable appropriate provision is made for reservation of capacity to meet the needs of Bidders whose businesses require short term flexibility where there is a reasonable likelihood that this capacity will be utilised during the currency of the timetable in question	This is likely to be for freight flows or for events traffic for passenger operators.	Irrelevant.	Irrelevant.
(j) enabling operators of trains to utilise their railway assets efficiently and avoiding having to increase the numbers of railway assets which the operators require to maintain their service patterns	This costs more implying assets are not used efficiently or that more assets are required, but does not imply the industry actually requires or locomotives or drivers. May cost more buses / traincrew hours if the alternative applies.	Is not consistent with the DC if the DC is taken to apply to such circumstances rather than the permanent plan. Material to FSR which is fighting the decision on the basis of this point. Not material to NR - has indicated it will keep RoR the same even if it pays compensation.	Material to FSR.
(k) facilitating new commercial opportunities, including promoting competition in final markets and ensuring reasonable access to the Network by new operators of trains	No evidence that new opportunities are thwarted.	Irrelevant.	Irrelevant.
(l) avoiding wherever practicable frequent timetable changes, in particular for railway passenger services	Diverting increases timetable change but packaging reduces it. The alternative would require timetable change for more services.	Consistent with DC.	Trivial. NR is consistent with DC.
(m) encouraging the efficient use of capacity by considering a Bidder's previous level of utilisation of Train Slots	for freight services. Freight has accepted the Rules.	Irrelevant.	Irrelevant.
(n) avoiding, unless absolutely necessary, changes to provisional International Paths following issue of the applicable Rules of the Plan	No effect.	Irrelevant.	Irrelevant.
(o) taking into account the commercial interests of Network Rail and existing and potential operators of trains in a manner compatible with the foregoing	This means try to avoid individual parties losing financially and try to avoid the industry as a whole losing financially. It also says this is not a stronger DC than the others because it has to be in a matter "compatible with the foregoing). This is likely to be least damage to the industry. Passenger revenue lost by FSR is likely to be less than revenue lost to the industry if the alternative is taken of either poorer infrastructure or greater damage to other tocs / focs. Compensation to FSR and payment to DBS from FSR is within industry transfer. NR has said it will not alter its decision if it has to reimburse FSR so the decision is in NR's commercial interest.	Consistent with the DC.	Material. NR is consistent with the DC.