
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of disputes referenced TTP371, TTP513, TTP514, TTP570 and TTP571

The Panel:

Clive Fletcher-Wood Hearing Chair

Members appointed from the Timetabling Pool

Robert Holder elected representative for Franchised Passenger Class, Band 1
Peter Warhurst elected representative for Franchised Passenger Class, Band 1 (for Band 2 until 1 April 2014)
Nick Gibbons elected representative for Non-Passenger Class, Band 1
Paul Hebditch appointed representative of Network Rail

Secretary

Tony Skilton Secretary, Access Disputes Committee

The Dispute Parties:

For Freightliner Ltd ("FL") and Freightliner Heavy Haul Ltd ("FLHH") - (together, "Freightliner")

Jason Bird Track Access Manager, Freightliner Ltd

Lead representative for Network Rail Infrastructure Ltd ("Network Rail")

David A Jackson Operational Planning Programme Manager -Governance (until 8 July 2013)
Shona Elkin Operational Planning Manager - Anglia, South East, Wessex, HS1 & Europe (from 8 July 2013)

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1 Introduction and jurisdiction

1.1 The abbreviations used in this determination are as set out in the list of parties above and in this paragraph 1.1.

"ADR Rules" means the Access Disputes Resolution Rules

"Secretary" means the Secretary of the Access Disputes Committee

"Website" means the website of the Access Disputes Committee

1.2 On 30 July 2010 Freightliner notified dispute with Network Rail in relation to Network Rail's decisions regarding the Version 4 of the Rules of the Plan applicable to the New Working Timetable Publication for 2011 (in effect, the subsidiary timetable for introduction in May 2011). The dispute was brought under Condition D2.1.7 of the Network Code as applicable at the time and the Secretary registered it as TTP371.

In notifying the dispute, Freightliner indicated intention to work closely with Network Rail in the hope of resolving all the issues without requiring a Timetabling Panel hearing.

- 1.3 On 27 July 2012 FL and FLHH notified disputes with Network Rail in relation to Network Rail's decisions regarding the Version 4 of the Timetable Planning Rules applicable to the New Working Timetable Publication for 2013 (in effect, the subsidiary timetable for introduction in May 2013). The disputes were brought under Condition D2.2.8(b) of the Network Code as applicable at the time and the Secretary registered them as TTP513 and TTP514 respectively.

In notifying the disputes, FL and FLHH indicated intention to engage in short time with Network Rail in the hope of resolving the issues and those previous Rules of the Route issues which had not been settled.

- 1.4 On 22 February 2013 FL and FLHH notified disputes with Network Rail in relation to Network Rail's decisions regarding the Version 2 of the Timetable Planning Rules applicable to the New Working Timetable Publication for 2014 (in effect, the timetable for introduction in December 2013). The disputes were brought under Condition D2.2.8 of the Network Code as applicable at the time and the Secretary registered them as TTP570 and TTP571 respectively.
- 1.5 With time passing and progress not having been made in addressing many of the issues (for various reasons but particularly because of inconsistent attention within Network Rail on account of staffing movements over the period from July 2010), Freightliner asked the Secretary to arrange a hearing by the Timetabling Panel. The Secretary appointed me as Hearing Chair on 12 March 2013.
- 1.6 After support had been obtained from the Parties for the disputes to be heard together, the Allocation Chair formally ordered on 17 April 2013 that this should be the case.
- 1.7 A significantly revised version of the Rules was introduced on 1 August 2010 and Part D of the Network Code received amendment after dispute TTP371 was notified. In the circumstances and having received agreement from the Parties, I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with Chapter H of the revised ADR Rules to hear an appeal under the terms of Network Code Condition D5.
- 1.8 In its consideration of the Parties' submissions, the Panel was mindful that, as provided for in ADR Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

2 History of this dispute process

- 2.1 The potential volume and complexity of the issues in dispute at the time of my appointment as Hearing Chair indicated a requirement for effective case management; accordingly, the Dispute Parties were called to attend a Directions Hearing to take place on 17 April 2013 preparatory to a provisional Panel hearing on 19 & 20 June 2013. My letter (dated 20 March 2013) setting out the arrangements for the Directions Hearing and explaining its purpose is posted on the Website. Subsequent Directions Letters and submissions from the Dispute Parties are also posted on the Website.
- 2.2 To inform the Directions Hearing, on 8 April 2013 Freightliner provided (as had been required) a Summary Note setting out the issues which remained unresolved; the issues were helpfully grouped appropriately to produce a list of 24 matters/items; these are listed in Appendix "A". One item was then settled prior to 17 April 2013 and withdrawn from dispute.

At the Directions Hearing, I directed that a sole reference document should be provided by Freightliner by 10 May 2013 and, to allow time for a fully reasoned response, that Network Rail should reply by 7 June 2013; this would enable the Panel to prepare for the hearing.

- 2.3 When the sole reference document was submitted by Freightliner, the number of items in dispute had reduced to 21. A most helpful and comprehensive response was then submitted by Network Rail. The parties indicated that constructive dialogue was now taking place and there was every prospect of the issues being resolved within a further short space of time. On this basis, the Panel hearing was postponed and I proceeded to monitor progress of the discussions between the Dispute Parties.

3 Issues associated with Network Change

- 3.1 A point of principle had emerged concerning two items in dispute and which Freightliner regarded as arising solely because of a proposed amendment to the Timetable Planning Rules which would be the consequence of a Network Change (under Part G of the Network Code) which had not yet been agreed. These two items - identified as items 17 and 21 in Freightliner's submissions - related to the Paisley Canal line in Scotland and concerned Timetable Planning Rules put in place by Network Rail for the introduction of train operations following completion of a non-standard electrification scheme; Network Change had not been established because of complaint that Network Rail had not addressed possible operation of trains other than the electrical multiple units as currently operated by the local franchised operator.
- 3.2 Freightliner submitted to the Panel that Timetable Planning Rule changes related solely to a Network Change should not be implemented before the associated Network Change, even if they had been notified to operators beforehand. Having considered this submission, Network Rail agreed that the items in dispute had been solely the consequence of the proposed Network Change and withdrew them pending agreement (or otherwise) of the associated Network Change. Network Rail agreed with Freightliner's submission that Timetable Planning Rule changes arising solely from a Network Change should not be put into effect before the associated Network Change is implemented.
- 3.3 The Network Code is not explicit on this issue. Further, the Panel was unable to identify any existing authority deciding the point. The conclusion reached by the Dispute Parties concurred with the preliminary thinking of the Panel from reading the submissions in preparation for the hearing. I agreed with the suggestion by the Dispute Parties that a determination to record their agreement on this point would set down a useful precedent.
- 3.4 ADR Rule H21(d) stipulates that "an oral hearing lasting no more than one day shall be conducted"; it was therefore for consideration as to whether a determination issued without an oral hearing having taken place would be accepted as providing valid precedent. However, noting that the perceived volume and complexity in issue had already made it appropriate to allocate two days for a hearing, I took the view that - provided agreement is obtained from the appointed Panel members and the Parties - a determination could indeed be issued under the provision in ADR Rule H20 that "... the Hearing Chair may give directions as to any or all aspects of the procedures to be followed. The Hearing Chair shall have the power at any time to make or amend the procedure to be followed by the parties in the TTP." That is a very broad power, limited primarily by the obvious requirement to comply with the underlying Principles.
- 3.5 Recognising the multilateral nature of Access Contracts and the intention that any Resolution Service Party may wish to participate in an oral hearing, I decided that it would be appropriate to publish a Direction on the Website, saying that if the adjourned dispute were to be resolved without an oral hearing, the Panel was minded to issue a determination on this point regarding Network Change (paragraph 2.4 above) alone, at the request of the Parties and for the benefit of the industry; the Directions Letter (dated 24 June 2013) invited any Resolution Service Party which objected to this proposal or wished to comment upon it to make its views known. In addition to publishing the Directions Letter on the Website, the Secretary circulated it by e-mail using the contact details for Resolution Service Parties maintained for the purpose of ADR Rule H52. Three Resolution Service Parties responded, with no dissent expressed. My determination regarding this point is recorded below.

4 Other matters

- 4.1 I continued to monitor progress being made by the Dispute Parties towards resolution of the issues and on 30 April 2014 I held a further Directions Hearing; by this date, the number of issues remaining in dispute had reduced to 5. Informed by the Directions Hearing, on 1 May 2014 I issued a Directions Letter scheduling actions to be taken by the Dispute Parties towards ensuring clarity regarding their respective positions. Further directions were issued subsequently in the interests of effective case management.

4.2 Forest Gate Junction to Stratford

- 4.2.1 One item - identified as item 8 in Freightliner's submissions and relating to the Forest Gate Junction to Stratford section of route in East Anglia - concerned Network Rail's desire to increase junction margins at Stratford in connection with freight trains (together with additional allowances for approach control) and to increase Sectional Running Times.
- 4.2.2 Freightliner asserted that the changes to the Timetable Planning Rules had been introduced by Network Rail without consultation and seemingly in response to minutes of delay being accrued. An underlying reason appeared to be the cumulative effect of infrastructure schemes in the area over a number of years, in particular the working interface between the Liverpool Street and Upminster IECs. Freightliner's Firm Contractual Rights had not been infringed but Freightliner was concerned that capacity for new or amended freight services had been eroded. Further, Freightliner considered Network Rail's reported methodology and investigation surrounding delay causation to have been inadequate, whilst - in the absence of any recognized accurate modeling tool - assumptions made in deriving allowances for approach control were somewhat subjective and applied the lowest common denominator from a significantly varying range of driving techniques; Freightliner considered that the proper course of action would have been for Network Rail to address poorly performing technique through the train operators concerned.
- 4.2.3 Freightliner believed that Network Rail had failed to properly apply the Decision Criteria , specifically (using the version published as Condition D4.6 of the Network Code, issued on 29 June 2012) the following of the Considerations listed in Condition D4.6.2:-
- (a) maintaining, developing and improving the capability of the Network;
 - (b) that the spread of services reflects demand;
 - (d) that journey times are as short as reasonably possible;
 - (f) the commercial interests of Network Rail or Timetable Participant of which Network Rail is aware;
 - (g) seeking consistency with any relevant Route Utilisation Strategy; and
 - (j) enabling operators of trains to utilise their assets efficiently.
- 4.2.4 Freightliner considered that instead, the entire weight of Network Rail's decision was based on Consideration (c), which is "maintaining and improving train service performance".
- Freightliner further suggested that despite the route being part of a major freight artery, Network Rail had not evaluated the need for reserve capacity to be kept available as required by paragraph 4 of s21 of the Railways Infrastructure (Access and Management) Regulations 2005.
- 4.2.5 On the basis of the statements presented, including frank admissions on the part of Network Rail, it was clear to the Panel that Network Rail had failed to consult adequately and to comply with the Network Code when wishing to introduce Rules of the Plan/Timetable Planning Rules changes.
- 4.2.6 It may well be that there had been some unanticipated cumulative effect of individual items of Network Change on the Forest Gate Junction to Stratford section of route over recent years which is now giving Network Rail cause for concern regarding performance delivery, but there had not been demonstrated any contractual entitlement to revise the Timetable Planning Rules (with the consequent potential for reduction in capacity). The Panel felt, however, that it was not likely to be productive for a hearing to seek to determine the number of associated points at the level of detail arising from the Parties' submissions.
- 4.2.7 It is not the function of a Panel to punish any party but unilateral changes to the Timetable Planning Rules which have not been subject to proper consultation cannot simply be endorsed by a Panel, as that will risk fossilising possible reductions in the capacity of the Network. Whilst recognising the importance of performance, the Panel was conscious of the need for determinations to seek to deliver all the objectives of the Network Code, including those related to capacity, whilst in particular ensuring that the contractual rights of Access Parties are respected.

4.2.8 As Network Rail had accepted that the required consultation had not taken place, the Panel proposed that the Timetable Planning Rules should be restored to those which applied prior to introduction of the December 2012 Timetable (as was sought by Freightliner), but only from the introduction of the New Working Timetable Publication for 2016 (effective from December 2015). Therefore existing services and those currently in the Timetable planning process would not be affected, but Network Rail would need to revert to the earlier Rules unless in the meantime opportunity is taken to carry out the required consultation if changes to the Timetable Planning Rule are indeed still considered justified.

4.2.9 On 22 July 2014 I issued Directions inviting the Parties to accept the proposal in paragraph 4.2.6 above as the way forward without the need for an oral hearing of the issue. In response, the Parties accepted that this was an appropriate way of dealing with the outstanding issues between Forest Gate Junction and Stratford on the Liverpool Street to Seven Kings section of the East Anglia route. I have determined accordingly (see below).

4.3 Other items

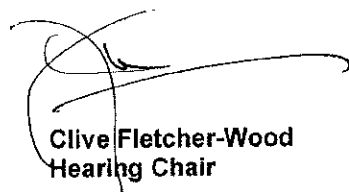
4.3.1 It was pleasing that on 5 December 2014 Freightliner reported that all the other issues had been settled.

5 **Determination**

Having considered carefully the submissions and notwithstanding agreement reached between the Dispute Parties, and based on my analysis of the legal and contractual issues, **I DETERMINE** that:

- 5.1 a Timetable Planning Rule change related solely to a Network Change should not be put into effect before the associated Network Change is implemented; and
- 5.2 the Timetable Planning Rules applying between Forest Gate Junction and Stratford in the Liverpool Street to Seven Kings section of the East Anglia route should be restored to those which applied prior to introduction of the December 2012 Timetable, but only from the introduction of the New Working Timetable Publication for 2016 (effective from December 2015).

I confirm that, so far as I am aware, this Determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Clive Fletcher-Wood
Hearing Chair

8 December 2014

APPENDIX "A"

Individual matters/items in dispute at 8 April 2013

Item No.	Issue
1	East Anglia Section 5.2 Headways EA1310 Camden Road West Jn to Richmond
2	East Anglia Section 5.2 Headways EA1320 Camden Road West Jn to Stratford
3	East Anglia Section 5.2 Headways EA1330 South Acton Jn to Old Kew/New Kew Jns
4	East Anglia Section 5.2 Headways EA1410 Upminster to West Thurrock Jn
5	East Anglia Section 5.2 Headways EA1530 Coldham Lane Jn to Haughley Jn
6	East Anglia Section 5.2 Headways EA1540 Chippenham Jn to Ely Dock Jn
7	East Anglia Section 5.2 Headways EA1580 Ely North Jn to Trowse Jn
8	East Anglia Section 5.3 Junction Margins and Station Planning Rules EA1010 Liverpool Street to Seven Kings: Stratford
9	East Anglia Section 5.3 Junction Margins and Station Planning Rules EA1011 Seven Kings to Ipswich: Manningtree
10	East Anglia Section 5.3 Junction Margins and Station Planning Rules EA1011 Seven Kings to Ipswich: Ipswich Yard
11	East Anglia Section 5.3 Junction Margins and Station Planning Rules EA1161 Bishop's Stortford to Ely North Jn: Cambridge
12	East Anglia Section 5.3 Junction Margins and Station Planning Rules EA1161 Bishop's Stortford to Ely North Jn: Ely
13	East Anglia Section 5.3 Junction Margins and Station Planning Rules EA1162 Ely North Jn to King's Lynn
14	East Anglia Section 5.3 Junction Margins and Station Planning Rules EA1440 Westerfield Jn to Felixstowe Town EA1460 Felixstowe Beach Jn to Felixstowe Beach
15	Western Section 5.3 Junction Margins and Station Planning Rules GW105 Fordgate to Penzance
16	Western Section 5.3 Junction Margins and Station Planning Rules GW200 Didcot to Heyford

APPENDIX "A" (Continued)

Individual matters/items in dispute at 8 April 2013 (Continued)

<u>Item No.</u>	<u>Issue</u>
17	Scotland Section 3.3 Areas with non-standard electrification
18	Scotland Section 5.2 Headway Values SC011 Law Jn to Uddingston Jn via Holytown
19	Scotland Section 5.2 Headway Values SC023 Motherwell to Newton via Hamilton
20	Scotland Section 5.2 Headway Values SC099 Whifflet to Rutherglen East Jn
21	Scotland Section 5.2.2 General Capacity Constraints
22	Scotland Section 5.3 Junction Margins and Station Planning Rules SC003 Carstairs South Jn to Haymarket East Jn
23	Kent Section 5.3 Junction Margins and Station Planning Rules SO310 Hither Green to Rochester Bridge Jn via Sidcup: Gravesend
24	Kent Section 5.3 Junction Margins and Station Planning Rules SO310 Hither Green to Rochester Bridge Jn via Sidcup: Strood