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**TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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**Determination in respect of dispute reference TTP518**

*(following a hearing held at 1 Eversholt Street, London on 18 September 2012)*

**The Panel:**

Peter Barber                      Hearing Chair

Members appointed from the Timetabling Pool

Robert Holder                      elected representative for Franchised Passenger Class, Band 1  
Jason Lewis                          elected representative for Non-Franchised Passenger Class  
Nick Gibbons                        elected representative for Non-Passenger Class, Band 1  
Paul Thomas                         appointed representative of Network Rail

**The Dispute Parties:**

For Grand Central Railway Company Ltd ("Grand Central" or "GC")

Chris Brandon                      Head of Systems, Alliance Rail Holdings Ltd  
Chris Hanks                         Head of Development, Alliance Rail Holdings Ltd  
Jonathan Cooper                    Head of Compliance, Alliance Rail Holdings Ltd  
Ian Yeowart                         Managing Director, Alliance Rail Holdings Ltd

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Andy Lewis                         Operational Planning Project Manager – LNE Route  
Matthew Allen                      Operational Planning Manager – National  
Daniel Grover                        Customer Manager – First Hull Trains & Grand Central

For First Capital Connect Ltd ("FCC")

Paul French                         Head of Planning

**In attendance:**

Tony Skilton                        Secretary, Access Disputes Committee ("**ADC**")

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## 1 Introduction, Substance of Dispute and Jurisdiction

- 1.1 This dispute arises out of the bid and offer procedure conducted between Grand Central, an open access passenger operator, and Network Rail under Part D of the Network Code, in relation to the timetable for introduction in December 2012, for Grand Central service 1N90 0749 (SX) London Kings Cross to Sunderland.
- 1.2 The service was originally bid by GC in its Priority Date Submission Notice ("**PDNS**") to be changed from 0749 (as it was in the previous timetable) to 0820 which was within GC's Firm Contractual Rights ("**FCR**"). It was then formally offered by NR, and accepted by GC, at its current time of 0749 which was also within but at the outer limit of GC's FCRs.
- 1.3 Following the formal offer NR requested GC, as a matter of goodwill in order to accommodate a conflicting FCC bid requirement, to retime the service to 0748 which was outside GC's FCRs. GC initially accepted this request but subsequently withdrew its acceptance, considering FCC's bid for various reasons to be non-compliant with the Timetable Planning Rules ("**TPR**"), and not yet having received a formal revised offer from NR for the 0748 slot.
- 1.4 GC maintained its non-acceptance of the 0748 departure time and requested NR to retime the service. NR declined to offer an alternative departure time to that of 0748. GC then discovered service 1N90 posted as departing at 0748 in the Train Planning Statement ("**TPS**") published by NR on the internet as its latest version of the developing New Working Timetable for 2012. NR confirmed to GC that it proposed to include the service at 0748 in the New Working Timetable. GC asserted that this proposal was outside its FCRs and amounted to a decision by NR to retime service 1N90 in breach of the Network Code, which it wished to refer for dispute resolution in accordance with the Access Dispute Resolution Rules (the "**Rules**").
- 1.5 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 the Rules Chapter H to hear an appeal under the terms of Network Code Condition D5.
- 1.6 In its consideration of the Parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.7 The abbreviations used in this Determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

"**ORR**" means the Office of Rail Regulation

"**SX**" means Saturdays excepted, i.e. Mondays to Fridays

## 2 Background, history of this dispute process and documents submitted

- 2.1 GC notified its dispute of NR's apparent decision on 17 August 2012. The dispute was registered by ADC as TTP518 and, in the interests of efficiency, listed to be heard on the same day as previously consolidated disputes TTP493, 494 and 495, which involved the same Dispute Parties GC and NR and their respective representatives and raised analogous issues of compliance with Part D of the Network Code. The reference was duly notified by ADC to other potentially interested parties including FCC, setting a date for the hearing and timescales for the submission of sole reference documents by the Dispute Parties.
- 2.2 GC and NR provided sole reference documents within the required timescales by 28 August and 10 September 2012 respectively. On 7 September 2012 FCC declared itself a Dispute Party and on 10 September it also provided a sole reference document.

- 2.3 In its submission, GC referred to roles played in the timetabling process by its associated company Alliance Rail Holdings Ltd (“Alliance”) and provided various items of correspondence involving that company. Having considered the Dispute Parties' sole reference documents I issued a Directions Letter on 11 September 2012 requiring (in relation to TTP518 and also TTP493-5) clarification of the legal relationship between GC and Alliance and confirmation of the roles of GC and Alliance respectively in relation to the documents submitted by GC and the facts recorded in them.
- 2.4 GC submitted its response to the Directions on 12 September 2012, to the effect that Alliance was a contracted agent of GC tasked to undertake all its long term timetable development work; that both Alliance and GC were owned by Arriva PLC; and that Alliance was acting on behalf of GC in developing its timetable for December 2012. GC also included in its response (although not requested by the Directions) a chronology of events in relation to TTP518 and further supporting correspondence and other material, including GC's Section 22A application to ORR for its 27<sup>th</sup> Supplemental Agreement extending its current track access rights beyond their then due expiry in May 2012, and ORR's response dated 29 May 2012 indicating that it was "minded to approve" the application.
- 2.5 NR submitted its comments on GC's response on 13 September 2012. NR accepted Alliance's status in relation to GC, but were not able to confirm the accuracy of GC's chronology.
- 2.6 In accordance with Rule H18(c), following receipt of the Dispute Parties' submissions I reviewed them to identify any relevant issues of law raised by the dispute. On 14 September 2012 I confirmed to the other members of the Panel that I did not consider there to be any overarching issues of law arising out of the submissions; I noted that there were some issues of contract interpretation but these were issues of mixed fact and law which constituted the substance of the dispute to be determined. This was also advised the Dispute Parties on 14 September 2012.
- 2.7 The Hearing of the dispute took place on 18 September 2012. The Dispute Parties provided written and oral opening statements and were then questioned by me and the other members of the Panel. A transcription was made of the hearing proceedings, which included Declarations of Interest by members of the Panel.
- 2.8 At the conclusion of the hearing, having conferred with the other members of the Panel, I summarised the substance of my determination of the dispute, as confirmed at the end of this written Determination.
- 2.9 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarised in the course of this Determination.

### **3 Relevant provisions of the Network Code and other documents**

- 3.1 The version of the Network Code in force from 19 July 2011 was applicable to matters to be determined in this dispute until 16 March 2012, after which the version of the Network Code in force from that date became applicable.
- 3.2 The provisions of the Network Code in issue in this dispute are, principally, the following Conditions:
- 3.2.1 D2.4, Submission of Access Proposals by Timetable Participants – before and after the Priority Date at D-40
- 3.2.2 D2.5, Content of an Access Proposal

- 3.2.3 D2.6, Timetable Preparation – D-40 to D-26
- 3.2.4 D2.7, New Working Timetable Publication – D-26
- 3.2.5 D3.6, Timetable Variations by consent
- 3.2.6 D4.2, Decisions arising in the preparation of a New Working Timetable
- 3.2.7 D4.6, The Decision Criteria

The relevant extracts are set out at Annexes 1 and 2 to this Determination. References in this Determination to a numbered "Condition" are to that Condition of Part D of the applicable version of the Network Code.

#### **4 Submissions made and outcomes sought by Dispute Parties**

##### **4.1 Grand Central's principal submissions were as follows:-**

- 4.1.1 Alliance had been acting throughout as agent for GC in the preparation of the December 2012 timetable.
- 4.1.2 GC had brought this dispute on the basis of its interpretation of Condition D4.2.2, which states "each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant in the development of the New Working Timetable for December 2012". Accordingly GC believed NR to have been in breach of its Track Access Contract by not accommodating the Firm Rights set out in Schedule 5.
- 4.1.3 Alliance had submitted GC's PDNS on 2 March 2012 (the Priority Date, D-40, under Condition D2.4.4), containing the requirements for Grand Central services for Monday to Saturday for the December 2012 timetable. This dispute concerned specifically the bid for service 1N90, which had been bid as the 0820 London Kings Cross to Sunderland (SX) service. The PDNS requested that 1N90 be retimed from its current departure time of 0749 to depart Kings Cross at 0820. Both these times fell within the relevant departure time range set out in GC's Track Access Contract.
- 4.1.4 The 0820 proposal for 1N90 in GC's PDNS had been rejected by NR early in the timetable discussion process following the Priority Date. Instead, NR had indicated it would offer the 0749 departure that operated in the current timetable. GC had not challenged this. Subsequently during the discussion process, NR had asked GC to accept a flexing of the departure time to 0748. GC had rejected this request on the basis that it was outside its contractual departure time range.
- 4.1.5 NR had issued its formal offer letter to GC on 8 June 2012 (the date for publication of the New Working Timetable, D-26, under Condition 2.7.1). In that letter NR made a formal offer for service 1N90 to depart King's Cross at 0749.
- 4.1.6 On 18 July 2012, GC's timetable planner had attended a meeting with NR and other East Coast Main Line operators' representatives to resolve outstanding timetable issues, principally regarding platforming at Kings Cross. At that meeting, GC's representative from Alliance had been put under pressure to accept the flexing of 1N90 to depart at 0748 in order to avoid a Timetabling Dispute between FCC and NR. On 19 July 2012, NR had emailed Alliance requesting the retiming of the 0749 to 0748, stating that it was aware of GC's contractual right to run the 0749 service and therefore realised that an "element of goodwill" was being requested to facilitate the removal of a Timetabling Dispute with FCC.

- 4.1.7 GC had understood that NR's retiming request was made in order to allow FCC's service 3R54 (an Empty Coaching Stock ("ECS") working) to run compliantly behind GC's 1N90 between Welwyn Garden City and Woolmer Green. On 23 July 2012 GC had emailed NR agreeing to this change with the understanding that any solution to the issue would be fully compliant with the Timetable Planning Rules, noting that there remained issues of compliance with the TPR to be resolved, both for GC's service 1N90 and for FCC's conflicting service 3R54, and also for other affected services.
- 4.1.8 A further email exchange between GC and NR had showed that the solution proposed for 3R54 by retiming 1N90 was not fully compliant with the TPR in that it required the engineering allowance to be reduced by 1 minute. In GC's view it had also become apparent that the initial bid from FCC for its affected service 2P04 0736 Kings Cross to Peterborough was also non-compliant. This had led GC to withdraw its previous acceptance of the 0748 path, by email to NR on 27 July 2012. In that email GC had offered a further revised solution whereby 1N90 would be retimed to 0806, allowing a solution to be found for FCC and for GC to remain within its departure time range as set out in its Track Access Contract.
- 4.1.9 By successive emails of 10 August 2012 NR had rejected GC's proposal for an 0806 departure, noting that the solution previously communicated "now represents the best overall industry solution for the December 2012 period", and had subsequently confirmed that the path NR was proposing to offer GC for 1N90 (SX) for December 2012 was 0748. GC had replied to NR by email on 10 August 2012 that it awaited a formal revised offer, but maintained that the apparently proposed offer (of 0748) constituted a breach of contract as the offered time was outside the contractual departure time range.
- 4.1.10 As at the day of the Hearing, GC had received no further offer from NR, either by letter or an electronic offer (via a PIF format file). In GC's submission, therefore, the current situation regarding 1N90 was that the formal offer (as made on 8 June 2012) apparently remained as a departure at 0749. However, GC had since discovered service 1N90 posted in the TPS as departing Kings Cross at 0748. The dispute had been brought because the evidence suggested that this train would be timed by NR to operate at 0748.
- 4.1.11 GC also noted, in relation to NR's sole reference document for dispute TTP518, the following:
- 4.1.11.1 NR had initially complied with the Network Code Part D, paragraph 4.2.2, in particular (b) that "each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant". In this case, GC had exercised its firm right to a train slot between 0749 and 0820 between Kings Cross and Sunderland. The formal offer letter contained a train slot at 0749 and so this was compliant.
- 4.1.11.2 After D-26 (the Timetable Offer Date) NR had put pressure on GC to vary the 0749 to 0748. This had only been agreed by GC with the expectation that the paths offered to FCC would avoid a Timetabling Dispute with FCC and would be compliant with the Timetable Planning Rules.
- 4.1.11.3 Because the paths offered to FCC were not compliant with the Timetable Planning Rules, GC had withdrawn its agreement to alter to the 0748 path.
- 4.1.11.4 The proposed revision to the offer of the 0749 had occurred after D-26 and should have been dealt with as a variation to the New Working Timetable. In effect, the 0748 amendment by NR had not complied with the Network Code and was non-compliant with Condition D4.2.2 and with GC's exercised contractual Rights.

4.1.11.5 In its sole reference document, NR had stated that Grand Central did not currently have Access Rights to the 0749 departure. This was misleading because at the time of the Priority Date, GC held these Rights and exercised these Rights. Furthermore, an agreed application had been made to ORR (under Section 22A of the Railways Act 1993) for GC's 27<sup>th</sup> Supplemental Agreement to extend these Rights from May 2012 until the end of the contract. NR had agreed and supported the extension of these Rights. In addition, ORR had issued a "minded to" decision letter indicating that it would grant these Rights until the end of the contract.

4.2 The outcomes sought by Grand Central were determinations by the Panel and associated remedies as follows:

4.2.1 That NR was in breach of the Network Code by not accommodating an Exercised Firm Right of a Timetable Participant (GC).

4.2.2 That NR was in breach of the Track Access Contract held by GC by not offering a compliant path in line with the departure time ranges of the FCRs detailed in the contract.

4.2.3 That NR should offer (the best possible) compliant path in terms of the GC Track Access Contract and the Network Code.

4.2.4 That NR should utilise its flexing right to optimise the pathing options.

4.2.5 That NR should provide a compliant path for service 1N90 in the terms of GC's Access Rights, the TPR and the Network Code.

4.3 Network Rail's principal submissions were as follows:-

4.3.1 The dispute arose from the interpretation of Condition D4.2.2, in a claim that NR had failed to be consistent with the Exercised Firm Rights of GC as a Timetable Participant in the development of the New Working Timetable for December 2012. GC also believed NR to be in breach of its Track Access Contract with GC by not accommodating the Firm Rights set out in schedule 5.

4.3.2 The December 12 timetable change had seen some morning peak passenger services into King's Cross for FCC strengthened to 12 cars. There had been a significant amount of reworking to the unit balances and platform working as a result.

4.3.3 The December 2012 consequential timetable changes that had affected 1N90 0748 King's Cross to Sunderland were as follows:

4.3.3.1 New FCC rolling stock workings requested from December 2012 had meant 3R54 0751 Kings Cross to Royston would be formed at Kings Cross from part of an arriving service of 12 cars in length from King's Lynn (in the current Working Timetable this train was formed from an inward working service from Huntingdon of only 8 cars). FCC required 13 minutes at Kings Cross to allow the splitting of the 12-car length on arrival to allow 3R54 to be formed of 8 cars.

4.3.3.2 To ensure that 3R54 arrived at Royston in time to form the return working of 1R54 0834 Royston to Kings Cross, the latest this service could depart King's Cross was 0751.

4.3.3.3 To ensure the correct headway margins for departing services from Kings Cross could be maintained, a timetabling solution of departing 1N90 1 minute early from December 2012 had been identified. By retiming the GC Sunderland service to 0748, 3R54 could be retimed to 0751 with the 3 minute

headway from Kings Cross maintained. This would have permitted FCC's required 6 minute turnaround at Royston for 3R54 also to be maintained, in order to form the 1R54 0834 return journey to London.

4.3.3.4 This request had been originally put to GC during the 12 week preparation period of the New Working Timetable via the flexing spreadsheet used by NR to communicate changes out. The request had in turn been rejected by GC, and 3R54 had been offered to FCC departing Kings Cross at 0752 with only a 5 minute reversal at Royston. FCC had objected to this in its response to the New Working Timetable. No solutions had been evident after the offer of the New Working Timetable.

4.3.3.5 This had been revisited post-offer during the meeting on 18 July which primarily was for Kings Cross platforming. NR had asked again if GC would reconsider the 0748 retiming, which, in turn, would facilitate the retiming of 3R54 to 0751, which, in turn, would facilitate a 6 minute turnaround for FCC at Royston. NR did make it clear at the time there was an element of goodwill involved in this. After further discussions GC reluctantly agreed to amend its service to 0748.

4.3.3.6 However GC, on viewing the timetable solution proposed by NR for 3R54, did not agree with it on the basis that it was not TPR-compliant and subsequently withdrew its agreement to the change to 0748. NR did not believe that the timetable solution planned for December 2012 had a material impact or imported a performance risk into the timetable. NR therefore had proceeded on the basis that the 0748 service was the best industry solution, which would allow GC to run a service and also allow the subsequent FCC requirements to be put in place, to run a service compliantly and to address the 6 minute turnaround at Royston.

#### Issues where NR accepted GC's case

- 4.3.4 NR confirmed that from the start of the December 2012 timetable 1N90 0749 Kings Cross to Sunderland had been altered to depart London at 0748. This action had been taken as a result of dialogue with GC after the offer of the New Working Timetable and had been intended to allow the resolution of a New Working Timetable offer response from FCC.
- 4.3.5 NR confirmed that the retiming of 3R54 was in breach of the TPR. This FCC schedule was 1 minute of engineering allowance short approaching Royston in order to facilitate the 6 minute turn round requested by FCC, prior to forming 1R54 0834 Royston to Kings Cross. NR's preferred timetabling solution would have been to retime 3R54 with the correct engineering allowances (2 minutes engineering allowance approaching Royston), however this would have meant the turn around time at Royston to form 1R54 would be only 5 minutes. While a 5 minute turn around time would have been compliant with the TPR, FCC had advised that the minimum turn round they could accept would be 6 minutes (the timing of 3R54 with a 5 minute turn round had been the topic of an FCC lodged dispute - TTP496 – which had been withdrawn by FCC (on 26 July 2012)).

#### Issues where NR qualified or refuted GC's case

- 4.3.7 NR did not believe that Network Code Part D Part 4.2.2 was relevant to this dispute, since the change to the timings for 1N90 had been negotiated with GC and was not an instance of NR exercising a flex in connection with the preparation of the New Working Timetable. NR had suggested during the timetable preparation period the 1 minute flex of 1N90, but this had been rejected by GC, and the New Working Timetable had been offered with the GC 1N90 service departing at 0749 and the FCC 3R54 service departing Kings Cross 0752. This meant the turn around time at Royston for the next working of the units from 3R54 would have been insufficient for FCC.

- 4.3.8 NR had written to GC on 19 July 2012 seeking its support for the 1 minute retiming of 1N90. This had been subsequently agreed on 23 July 2012, with a request to NR to reduce the amount of pathing time in 1N90 for the December 2013 timetable. Upon receipt of GC's confirmation of support for the retiming of 1N90, NR had offered FCC the timetabling solution for 3R54 and resolved a New Working Timetable outstanding offer response issue for FCC.
- 4.3.9 On 26 July following a review of the latest timetable information GC withdrew its support for the retiming of 1N90. A proposal for an 0806 departure for 1N90 provided by GC did not offer a workable solution, and resulted in several irresolvable conflicts. This solution had been looked at again by NR after its offer and solutions still could not be found. Clashes with this retimed schedule at 0806 were identified with:
- 4.3.9.1 Headway margin clashes with 1T03 and 2C05 in the Digswell Junction area; and
- 4.3.9.2 A clash with 4L87 in the Doncaster area.
- 4.3.10 GC did not currently have Firm Contractual Rights to a 0749 departure. Its rights to one under Schedule 5 of its Track Access Contract expired in May 2012. A 27th Supplemental Agreement that would restore its rights to a 0749 departure had not yet been formally approved by the ORR.

Issues not addressed by GC that NR considered should be taken into account as material

- 4.3.11 The schedule of 3R54 0751 Kings Cross to Royston was not short of allowances within its schedule. From December 2012 for the 45 mile journey between Kings Cross and Royston the train had 2.5 minutes of pathing time and 1 minute of engineering recovery time. Timetable Planning Rules would normally require just 2 minutes of engineering allowance only. While the solution NR had included in the December 2012 timetable was not entirely in line with the definition of the TPR, from a practical point of view the schedule for 3R54 0751 Kings Cross to Royston was sufficiently robust not to present a performance problem. NR accepted that perhaps 1 minute of the pathing time should have been planned as engineering time. It was not an uncommon practice to split engineering time to assist in providing a robust path.
- 4.3.12 In connection with the construction of the Hitchin Flyover, NR was currently reviewing engineering allowances between Kings Cross and Cambridge. Analysis indicated that the existing allowance was overly generous or needed to be split. To make best use of capacity the current thinking was towards spreading engineering allowance over the journey of the train (small numbers of minutes but often), instead of lumping larger numbers of minutes into the schedule of the train at destination.

Why NR considered the arguments raised above taken together favoured NR's position

- 4.3.13 GC's Track Access Contract did not currently contain any right to a 0749 departure from Kings Cross from the start of the December 2012 timetable, however NR acknowledged that GC had an outstanding application with the ORR to renew the current rights.
- 4.3.14 The 0748 departure offered the most performance robust solution to this problem for the December 2012 timetable period. NR had indicated that it would look to return the 0748 departure to 0749 or a later time as part of future timetable work. The introduction of the 12 car FCC operations would provide an improved level of seating capacity for a greater number of passengers during the morning peak on the GN route into London.
- 4.3.15 The retiming of 1N90 by 1 minute was in line with NR's 'Objective' (in Condition D4.6.1) to make decisions which shared capacity in an efficient and economical



manner in the overall interests of all users. This decision was supported by Considerations (g), and (j) (in Condition D4.6.2).

4.3.16 Overall in the December 2012 Timetable offer NR had delivered numerous journey time improvements for GC.

4.4 NR sought the following outcome from the Panel's Determination:

4.4.1 That it was correct to have asked GC to retime 1N90 and, following GC's initial agreement, to have offered FCC the preferred timetabling solution for 3R54, and that the timings now published in the December 2012 New Working Timetable should remain accordingly.

4.4.2 There were no other remedies or issues to be determined.

4.5 FCC's principal submissions were as follows:-

4.5.1 FCC was not in dispute with Network Rail regarding TTP518. Until quite recently, FCC had not realised that this dispute existed or that FCC was being mentioned by Grand Central as a possible affected third party.

4.5.2 From GC's sole reference document it appeared that the case rested upon the status of the path for 1N90 0749 Kings Cross to Sunderland and its relationship with an FCC Empty Coaching Stock service, the 3R54 0751 Kings Cross to Royston.

4.5.3 Due to the 2013 Train Planning Rules which required a 3 minute headway between trains, negotiations had occurred between NR and GC to retime the 1N90 0749 Kings Cross to Sunderland to depart at 0748. This had permitted a compliant 3 minute headway to apply between 1N90 and 3R54. As a result of GC's agreement, a satisfactory 3R54 path had then been offered by NR to FCC, and this position still applied. This conformed to the spirit of the Network Code D1.1.8 which referred to mutual collaboration between NR and Timetable Participants to ensure timetable efficiency. The fact that this also put 1N90 one minute outside of Grand Central's Track Access Contract Departure Range had been noted and appreciated by FCC.

4.5.4 However, having initially agreed to this, GC had since, for whatever reason, chosen to recant its co-operation regarding the earlier retiming of 1N90 which, if agreed, would revert FCC's 3R54 back again to non-compliance with the TPR. GC's rationale for this objection appeared to be on the grounds of unacceptable flex to 1N90, quoting Network Code D4.2.2, even though the flexing issue was clear when its original agreement had been given.

4.5.5 The corroborating reason for GC's about turn appeared to be that it had identified that NR had subsequently offered FCC a path for 3R54 which did not use the full 2 minutes engineering allowance approaching Royston, as indicated in the 2013 National Timetable Planning Rules. Only one minute had been deployed. NR had ably demonstrated why this was a practical solution within paragraphs 6.3.1 and 6.3.2 of NR's sole reference document. Naturally, FCC subscribed to this view, whilst noting that engineering allowances approaching Royston were not particularly a geographical concern of GC.

4.5.6 FCC wished to explain why 3R54 0751 Kings Cross to Royston was such a crucial train and, again, wished to highlight that NR's sole reference document, as indicated within its paragraphs 5.2 and 5.3, accurately outlined the situation. In the New Working Timetable for 2013, FCC would accomplish the third and final stage of its secured agreement with the Department for Transport to implement the Great Northern Route High Level Output Statement capacity

enhancement scheme which would introduce the final phase of 12-car operation on the route and complete the goal of 6,500 extra peak-time seats to and from the capital since December of 2010.

- 4.5.7 Because of this, altered and additional 12-car workings had caused FCC's morning peak unit diagrams to change. As a result, the 1T51 0551 Kings Lynn to Kings Cross train due 0737, itself a 12-car, would now split at Kings Cross to form two return trains, of which the front portion would be the 3R54 0751 Kings Cross to Royston. For operational reasons, a minimum of 13 minutes had to occur before 3R54 could depart Kings Cross circa 0751, a path which it was locked into on the East Coast Main Line in order to ensure an operationally minimum compliant turnaround to form 1R54 0834 Royston to Kings Cross. This was a train which regularly conveyed almost 300 passengers. Essentially, any worsenment to the path of 1R54 0834 Royston to Kings Cross would significantly and adversely affect other services, most immediately 1B81 0720 ex Lincoln and 1A09 0715 ex Leeds to Kings Cross, both from Stevenage onwards, thus impacting on the back end of the morning peak period and jeopardising the journeys of hundreds of customers. This, for an argument concerning the pros or cons of the non-deployment of one minute of engineering allowance in an off-route ECS, seemed considerably disproportionate.
- 4.5.8 In conclusion, FCC reaffirmed its alignment with NR's submission and believed that Network Code Part D4.6 Decision Criteria (b), (c), (d), (f) and (j) had been correctly applied in this instance, and that it was in the industry's interest that this position should be maintained. FCC sought the Panel to endorse this.

4.6. FCC sought the following determination:

- 4.6.1 That Network Rail should maintain the mutually agreed offer for 3R54 0751 Kings Cross - Royston whilst revisiting the application of all Operators' timetable rights to find a mutually compliant resolution for 1N90 0749 Kings Cross - Sunderland, including the application of timetable flexing rights, as reflected within Network Code Part D and the Decision Criteria within.

## **5 Oral exchanges at the Hearing**

- 5.1 After considering the written submissions and statements of the Dispute Parties as listed in section 2 above, and having heard the Parties' further oral submissions in their opening statements as summarised in section 4 above, I and the other members of the Panel questioned the Parties' representatives to clarify a number of points arising out of their submissions. In line with the practice adopted at previous Timetabling Panel Hearings, although the individuals' answers to questions were not taken as sworn evidence (in common with the Parties' written submissions, statements and further information provided), I consider that we are entitled and indeed (in the absence of any indication to the contrary) obliged to accept them as true and accurate statements. Accordingly I have taken them into account in reaching this Determination.
- 5.2 As a preliminary I wished to dispose of the issue (at least for the purposes of TTP518), of the position of Alliance versus Grand Central, on which I had sought clarification in the Directions letter and had received a response and comments from both GC and NR. All the Parties now confirmed their assent to the proposition that, for the purposes of TTP518, all relevant correspondence and interaction regarding the timetabling process had been made solely by Alliance acting as agent for Grand Central, the rights holder under the relevant Track Access Contract; and that there was no qualification to that proposition as regards Alliance's capacity to act on behalf of GC or the possibility of Alliance being considered to have been acting in its own right, or otherwise. In consequence it was accepted for the purposes of TTP518 that Alliance and GC were to be regarded as one and the same, and that, in order to simplify the proceedings,

reference need be made only to GC as the Dispute Party, notwithstanding that some actions had been taken by Alliance as agent on behalf of GC.

5.3 I then proposed that the Panel should explore and clarify the issues and arguments raised by the Parties' submissions and documents as follows:

- With respect to the sequence of offers, acceptances and revocations of various paths for GC's service 1N90 incorporating different departure times, that had taken place in the course of the timetabling process - what were the contractual rights in accordance with the Track Access Agreement incorporating the relevant parts of the Network Code Part D, in determining the priority and status of bids made?;

- If there proved to have been conflicting rights in terms of contractual priority, as between GC and other Timetable Participants, including FCC – what would have been the appropriate application of the Decision Criteria to resolve the conflict?;

- If appropriate to take into account, what alternative solutions might have been available and appropriate to deal with the problems encountered in pathing FCC's conflicting service 3R54?; and

- Whether there was asserted to be some source or justification of an obligation on NR in administering the timetable process, which might properly be accepted as overriding or going outside the strict contractual rights and obligations of the parties to that process.

5.4 In summarising the oral exchanges below I have grouped them as much as possible by reference to those issues and arguments raised, though the actual questions and answers at the time did not necessarily follow this pattern precisely.

The matters dealt with and clarified accordingly were as follows.

5.5 Contractual status of events during the timetabling process

5.5.1 We explored first with GC what was the contractual status of that sequence of events consisting of, first, the offer by NR at D-26 of 0749 which appeared from the submissions to have been accepted by GC, then agreed by GC to be departed from, which agreement was then revoked. GC confirmed its assertion that the offer by NR of 0749 at D-26, was a firm contractual offer compliant with the timetable process and was accepted by GC.

5.5.2 Asked as to the contractual effect of what followed in terms of the request to retime 0749 which was first agreed to and then revoked, GC referred to Condition D2.7.1 which states that: "The New Working Timetable shall be published by Network Rail at D-26 subject only to variations made in the course of the appeal process." GC considered what had happened was that first an offer had been made by Network Rail and then subsequently something had been done to fudge or vary that offer. GC therefore believed that what had been done after D-26 was not actually part of the process but sat outside that process – it amounted to a variation by consent but the consent had been withdrawn. Under some pressure at the Platforming Workshop held on 18 July GC had agreed to move to a 0748 departure, in the expectation that the solution that would be offered by NR (to accommodate FCC's problem with 3R54) would be fully compliant with the TPR. GC did not express that caveat at the time, but there was an email exchange with NR soon afterwards in which GC queried whether the details of the path offered for 3R54 were fully compliant, and NR's responses caused GC to conclude that it was not.

5.5.3 GC acceded to the suggestion that its initial agreement to the proposed retiming amounted to, if anything, a proposed Timetable Variation by Consent under Condition 3.6.1. On that basis GC considered that such consent could be revoked. GC also confirmed that it regarded its consent as having been

given impliedly, if not expressly, subject to the condition that what was being consented to was itself compliant. GC later confirmed it regarded the post-offer platforming meeting at which it initially gave its consent to the retiming, as being outside Part D and therefore as relying on all Timetable Participants consenting to post-offer variations to fill in the missing detail of paths offered.

- 5.5.4 GC raised a further possible argument that, because of the pressure it said had been put upon its representative at the platforming meeting to save difficulty within the industry by consenting to this particular retiming, GC's consent could be said to have been obtained under duress. However it declined to proceed further in that direction when I mentioned that further evidence would be needed in order to substantiate a legal argument of duress.
- 5.5.5 After some confusion as to the nature of the specific non-compliance complained of by GC, it was confirmed that, as stated in the submissions, it was principally the non-compliance of the FCC 3R54 path with the TPR in allowing only 1 rather than the required 2 minutes engineering allowance in approaching Royston. It appeared that the purpose of this was to allow TPR-compliant headways between 1N90, 3R54 and preceding service 2P04 across a key bottleneck, Welwyn Viaduct. These headways in turn were predicated on permitting 3R54 to depart Kings Cross at 0751 in order to have a 6 minute turnround at Royston rather than the 5 minutes minimum required by the TPR.
- 5.5.6 GC maintained that even if that non-compliance did not have a specific practical effect on a particular service of GC, nevertheless it was entitled to require NR to stick to the Rules in dealing with other train operators, not least because GC itself had had its aspirations set back in seeking a number of other improvements for the timetable in December 2012, many of which had been rejected on the basis that there were non-compliances with the TPR. Yet GC had found that, in effect, the Rules had been bent for somebody else but not for GC, and this amounted to a departure from even-handedness. GC wanted to see the Rules applied fairly, but felt that they had not been.
- 5.5.7 This was the context, GC said, in which it had declined to facilitate a path offered to FCC which proved to be non-compliant, and in which it had therefore revoked its previous consent to a retiming of 1N90 outside its FCRs. That retiming, despite being just one minute, had a significant financial impact for GC. The decision to consent to it had been made with the best intentions and with goodwill, as requested by NR, but in the expectation of facilitating others in playing by the Rules, where GC itself had already been disadvantaged in accepting that it had to play by the Rules. The bottom line for GC was that it would have been impacted negatively by moving from 0749 to 0748.
- 5.5.8 Some time was spent by the Panel exploring the possibilities of accommodating the conflicting requirements of FCC through alternative compliant solutions, by somehow splitting engineering allowances or changing train sequences. The burden of GC's argument remained, however, that the path which had actually been offered to FCC, to facilitate which path GC had initially consented to vary outside its FCRs its own already firmly offered path 1N90, had been actually non-compliant at the time it was offered. This had been clearly noted in GC's email to NR revoking its consent.
- 5.5.9 Asked how it had learned from NR that it intended to maintain the retiming of 1N90 at 0748, despite GC having revoked its consent, GC said it had appeared in a PIF file on the TPS following a further sequence of email correspondence with NR. GC had questioned NR whether this constituted an offer and was told that it did not.
- 5.5.10 GC maintained that at the time of the Priority Date at D-40, and at the offer of the 0749 departure at D-26, its bid for 0749 had priority under Condition D4.2.2(d)(ii), being a Firm Right in force at the Priority Date but which would

expire prior to or during the Timetable Period (in this case, in May 2012). That Right had subsequently been agreed by NR in a Supplemental Agreement to continue for the December 2012 timetable period, and ORR recently had proceeded as far as confirming that it was 'minded to' approve the agreement, subject only to agreeing text for some reopeners common to all Track Access Agreements. There was therefore no issue of a lack of priority for the bid which founded the firm offer of an 0749 departure for 1N90.

- 5.5.11 We then explored the same contractual issues with NR. First we sought to clarify some of the terminology being used. Much mention had been made in the submissions and previous discussion of the possibility that NR had, or should have, applied 'flex' to the various bids and other requirements of Timetable Participants in order to resolve conflicts between them. NR confirmed that in this context the term 'flex' was being used loosely to mean a general pragmatic adjustment to aspects of a bid in order to reconcile differences. It was not here being used in the contractual sense, as 'Flexing Right' was defined in Condition D1.1.11, to mean varying a bid "in any way within and consistent with the Exercised Firm Rights of the relevant Timetable Participant". That was why NR had switched to using the expression 'retiming' to express, for example, the change of 1N90 from 0749 to 0748. Discussion of 'flexing' that service had therefore not been intended to suggest that it was within GC's FCRs; on the contrary, it had always been acknowledged that it was not.
- 5.5.12 Revisiting what had previously been proposed by GC as the contractual status of the various events and communications that had occurred, NR accepted the analysis that, first, a firm offer for 0749 had been made to and accepted by GC as at D-26. NR also accepted that it followed that GC's subsequent initial agreement to retime to 0748 constituted a Timetable Variation by consent under Condition D3.6, and that such consent could in principle be revoked in appropriate circumstances, at least before it became cemented by a further firm offer of the varied time. Generally in such circumstances NR felt it would just ask for a reason for the revocation and look to see whether it could go back to an alternative solution and which was the best overall industry way forward in terms of making best use of the available capacity and delivering the best service that NR could.
- 5.5.13 In the circumstances of this case NR also accepted the proposition that a Condition D3.6 Timetable Variation by consent, outside the normal time-limited timetabling process of offer and acceptance, might be said to have been impliedly, if not expressly, conditional on it serving a particular purpose, namely to facilitate a compliant offer/path to another party. NR acknowledged that anything it did in the process ought to be TPR-compliant and did not dissent from the proposition that a failure in this respect might amount to a breach of the Condition.
- 5.5.14 NR pointed out that in this case the reasons for not following "in absolutely black and white" the TPR, and therefore for making a non-compliant offer to FCC were, firstly, that NR understood the importance of the FCC's 12-car operations on the GN route into London and the massive benefit that had to a lot of peak-time users. So NR believed it had an obligation there to make sure it made best use of the capacity in terms of delivering the commitments that NR had through the HLOS for FCC. Apart from that, there was the fact that overall the schedule for 3R54 still had sufficient time to cater for risks in terms of recovery because of engineering, albeit shown slightly differently in terms of the time the allowance had in it. This would not materially change the performance and the reliability of the times that NR would be providing on the East Coast Main Line at that part of the day. However NR acknowledged that this view pushed it into a "grey area".
- 5.5.15 As regards the mechanism for communicating a revised offer to a train operator outside the main timetabling dates, NR said it would normally be published in a

series of 'F3s', paper prints of the train schedules, and sent to relevant operators, with email backup. In this case, NR recognised, the reversion to a retiming of 1N90 to 0748 following GC's revocation of its acceptance had not been formally included in an F3 print sent to GC; instead NR had incorrectly used an email to make it sufficiently clear where things stood. So NR accepted that a formal offer of the reversion to 0748 had not been made to GC.

5.5.16 Asked what status the post-offer platforming meeting (which was when the request to retime 1N90 had been made) had in the contractual process, NR considered it counted as a series of Timetable Variations by consent under Condition D3.6.1. It was in effect a change made by consent with all the relevant people round the table. NR acknowledged that this was not necessarily in the spirit of the Network Code, which required a "belt and braces" result on D-26. However it was simply not practical to resolve all the detail of inwards working of trains at the larger stations before the offer date, and in practice NR had to rely on the professional judgement of the train planners to cross the Ts and dot the Is in this respect.

5.5.17 Finally as regards the contractual position, NR accepted that GC had an expectation of Rights for the December 2012 timetable which was currently with ORR for sign-off, and that expectation included an 0749 path supported by NR.

#### 5.6 Available alternative solutions to pathing problems for FCC's conflicting service 3R54

5.6.1 As previously noted, at various points of the oral exchanges with the Parties some considerable time was spent in analysing the various non-compliances of NR's offer to FCC and the possibilities of meeting FCC's conflicting requirements through alternative compliant solutions. This ultimately proved somewhat fruitless, as it eventually proved possible to dispose of the principal issue in dispute in the light of the contractual position between GC and NR, without the need for prescribing a route to accommodating FCC's conflicting requirements. Nonetheless it may be illustrative of the process gone through, as well as helpful for future reference, to summarise the discussion in this regard and its consequences for the dispute.

5.6.2 We considered in some depth the reason for FCC's apparent need for a 6 rather than 5 minute turn round at Royston. NR explained that it was in order to accommodate an operational requirement arising from an agreement that FCC had with its drivers for reversing an 8-car set which stipulated a minimum of 6 minutes between arriving and forming the next train back out. An offer of only 5 minutes for 3R54 would have given FCC trouble in resourcing and managing that Empty Coaching Stock train back out of Royston, which FCC asserted, for all sorts of other reasons, was essential to a whole follow-on of services.

5.6.3 NR speculated that FCC might have been able to deal with this by providing a second driver – in order not to be resourcing the train with one man who had to walk between two ends, it could put on a second person to drive back. This possibility had not been explored. Similarly NR thought FCC had a traincrew agreement mandating a 13 minute turn round at Kings Cross to enable the splitting of a 12-car train. The 13 minute requirement was not in the TPR, but NR agreed with the Panel that FCC, had it wanted, could have proposed a change to the TPR by consulting and applying in accordance with the normal procedures and timescales.

5.6.4 There was an adjournment for FCC to check whether the TPR did indeed provide only a 5 rather than 6 minute turnaround time at Royston. On resuming it was confirmed that it was indeed 5 minutes, so that the offered 6 minutes was inconsistent with the TPR requirement in the sense of being more than was necessary to comply. FCC asserted nevertheless that it was unable to avail itself of the two driver solution due to a lack of resources.

- 5.6.5 The possibility was also canvassed of changing the sequence of the three relevant trains over Welwyn viaduct, 1N90, 3R54 and 2P04, another FCC stopping service to Peterborough. FCC felt this also was impractical due to required turn round times at Peterborough, but when pressed, acknowledged that if it obliged to balance the difficulties for 3R54 with those of 2P04, it might prefer to find a way of dealing with the latter.
- 5.6.6 FCC were challenged further as to the absolute need for a 13 minute turn round at Kings Cross but confirmed that this was the requirement of the traincrew agreement currently in place. There appeared to be a general aspiration to try to reduce it in future, but nothing immediate. FCC acknowledged that it had not yet had occasion to test the actual timing required to split a 12-car train at Kings Cross.
- 5.6.7 Having explored a range of possible solutions to the various FCC conflicting requirements, the Panel was left with the impression that perhaps not all permutations had been as fully developed as they might have been, such as a requirement to deploy more traincrew to overcome turnround issues. Instead the GC path retiming had been pursued as the way out, notwithstanding its consequent effect on GC.
- 5.6.8 NR even suggested that if it were to offer FCC a compliant 5 minute turnaround, this might somehow throw a focus on other breaches of the TPR that it might have condoned with FCC or other operators at Kings Cross which they might otherwise be minded not to bother about. Anybody that potentially used Kings Cross could have an interest in any breach that NR had of TPR running out of Kings Cross. The next time NR started looking at the timetable it would have a different focus about how it approached the task - it might cause NR to have a very black and white view about how it managed turn rounds at somewhere like Kings Cross, and NR could choose to unpick some of the breaches that currently existed for other operators at Kings Cross in terms of turn round. That possibility was not a reason for not offering FCC a contractually compliant pathing, but might change a behaviour in something going forward that could have quite a wide impact.
- 5.7 Contractual effect of NR pragmatism in administering the timetable process, as possibly overriding contractual rights and obligations of the parties
- 5.7.1 Much had been said at various stages, in both the submissions and the oral exchanges, to suggest a sense of obligation felt by NR to be generally pragmatic in administering the timetable process, possibly to the extent of overriding or going outside the strict contractual rights and obligations of the parties to that process. We invited NR to comment on this, to the point of justifying the existence of such an obligation if it wished to.
- 5.7.2 NR had already acknowledged not following "in absolutely black and white" the TPR, and therefore having made a non-compliant offer to FCC in order to accommodate its requirements, believing it had an obligation to make best use of the capacity in terms of delivering commitments through the High Level Output Statement for FCC. However, asked if it contended that there was a contractual reason or justification for departing from the TPR in accommodating an operating requirement for 6 minutes versus 5 minutes turnaround time, NR preferred the proposition that, although it was not contractual it was just a sensible, practical result which in some sense overrode the technical contractual entitlements. NR conceded that it would find it hard to point to a clause under Part D of the Network Code that specifically allowed it to breach the timetabling of trains in connection with the TPR. NR nonetheless considered it did have a responsibility to make sure it used the capacity on the network sensibly and evenly for all users, and that the product at the end of that was robust and reliably delivered, which was what NR thought it had done in this case.

- 5.7.3 NR formulated a further argument that the 6 versus 5 minutes issue was probably more about best use of the industry resources, having regard to the extra cost that possibly it would have left to FCC, with the only solution of putting an extra driver on a train or rebalancing the whole of the 12-car sets in and out of Kings Cross, which probably was not very practical. So a second line of defence was based on how NR was effectively and efficiently using the resources available to the industry. NR maintained that this complied with an obligation derived from the Decision Criteria.
- 5.7.4 Asked if this proposition meant entering into a consideration of the Decision Criteria before or at the same time as determining what were the Parties' Firm Rights, NR considered that it did. NR noted that it had been having an interesting experience around Rights and the use of Decision Criteria, probably in timescales that it would never normally use them. For example, in the other cases for today's Panel hearing (TTP493, 494 and 495), NR had indeed used the basic principle of the Decision Criteria to understand the trade-off between which operation got the 1608 path coming out of Kings Cross. However, NR acknowledged that, from a contractual point of view, this was probably not the right thing to use because it was to be expected that the Rights would have been established before going into the realms of Part D, and the Decision Criteria were there to support parties through the Part D process and applications of Rights and new Access Proposals.
- 5.7.5 I specifically offered NR the opportunity to make the argument, if it wished to, that there was some other form of legal interpretation of its obligations under both the contractual and the wider regulatory matrix which manifested itself as a legal right to act in a manner in some sense overriding the strict, narrow, technical, contractual rights under the Track Access Agreement and the Network Code. The only thing NR could think of to rely on in that respect was its Licence commitments to make best use of maintenance renewals, capacity, reliability and so on.
- 5.7.6 I noted that if NR did wish to advance that legal argument it would be necessary to come up with some evidence to support it, and would be afforded the opportunity and the time to do that if required. At the end of the hearing when invited again to pursue the argument and produce supporting evidence, NR declined to do so.
- 5.7.8 On this issue GC in its closing statement noted that, whilst it understood the need to make the most efficient use of the capacity, the Rules, when followed, were designed to facilitate this. Track Access Contracts were then agreed based upon the correct interpretation and application of the Rules.

## **6 Analysis and consideration of issues and submissions**

- 6.1 I turn to a consideration of the commercial and legal issues which this dispute has given rise to, in the order addressed during the oral exchanges as listed in paragraph 5.3 above. In doing so I am taking into account, as previously noted, the parties' submissions prior to and at the Hearing, the oral exchanges on particular points of information during the Hearing, and the further information provided prior to the Hearing by the parties at my direction. It is these considerations that inform the conclusions of this Determination.
- 6.2 Contractual status of events regarding service 1N90 during the timetabling process
- 6.2.1 It is common ground between the Parties in this dispute that NR made GC a valid and firm offer at D-26 for 1N90 at 0749 in accordance with the timetabling process for December 2012; that the appropriate level of priority had been accorded to the bid; that the offer was within the exercised FCRs of the bidder,



after proper exercise of NR's Flexing Right (in its contractual sense) and was otherwise compliant with, among other things, the TPR; that the offer was duly accepted by the bidder, GC; and that GC's relevant FCRs will be extended by ORR to cover the December 2012 timetable period by approval of GC's 27<sup>th</sup> Supplemental Agreement pursuant to a S22A application in which NR has already concurred.

- 6.2.2 It also appears to be common ground that, after D-26, NR requested GC to accept a retiming of 1N90 to 0748; that GC initially accepted the request; that this acceptance amounted to a Timetable Variation by consent under Condition D3.6.1; that GC subsequently revoked its acceptance (by email dated 27 July 2012); that NR did not prior to or after that revocation make a firm offer to GC of the retimed path by the accepted process of recording and sending it in an 'F3' print; but that the retimed path nevertheless had now been included in the New Working Timetable by being published in the TPS.
- 6.2.3 I accept GC's contention that, in the circumstances of NR's request, GC's acceptance was given for the purpose of, and therefore impliedly conditional on, facilitating the making of an offer by NR to FCC of a path for 3R54 that accommodated FCC's particular requirements in a way that was compliant and consistent with, among other things, the relevant provisions of the TPR and also that did not afford more than the minimum time required by the TPR in any aspect.
- 6.2.4 The 3R54 path offered to FCC was strictly non-compliant with the TPR in that it included only 1 rather than the required 2 minutes engineering allowance in approaching Royston. It was also inconsistent with the TPR requirement in the less strict sense that it allowed 1 minute more than the 5 minute minimum turn round time at Royston. It therefore failed to satisfy the condition on the basis of which GC's consent to a retiming had previously been given; and this non-compliance and inconsistency vitiated GC's consent.
- 6.2.5 I accept GC's contention that it is immaterial that the non-compliance and inconsistency did not have a direct effect on GC. GC felt it had played by the Rules despite sometimes being disadvantaged by them, and it was entitled to expect other participants to do likewise, particularly where favouring what turned out to be a non-compliant path had been requested as a matter of goodwill in order to accommodate another's commercial requirements.
- 6.2.6 The contractual position therefore is that the firm offer of an 0749 path for 1N90 validly made and accepted at D-26 has not been superseded or invalidated by any later valid offer or binding agreement of an 0748 path.

### 6.3 Application of Decision Criteria, if relevant

- 6.3.1 It follows from the above that the Decision Criteria have no place in determining the rights of the Parties in this dispute. Having concluded that a valid offer for 1N90 at 0749 was made and accepted in accordance with the timetabling process, and that that offer was not in effect displaced by any of the various subsequent events nor by the apparently conflicting requirements of FCC or any other Timetable Participant, it is clear that there arose no stage at which the Decision Criteria might become relevant for application in order to resolve a conflict.
- 6.3.2 NR suggested that it had been appropriate for it to have regard to the Decision Criteria in a somewhat indistinct and amorphous way in trying generally to make decisions at all stages that optimised the use of the industry's resources. However NR conceded that this did not amount to a contractually valid or binding justification for applying an analysis based on the Decision Criteria, in a general sense, to the competing merits, if any, of GC's and FCC's conflicting requirements. Under the contractual timetable process those conflicting

requirements fell to be resolved by a mechanism and at a stage before the Decision Criteria became relevant.

6.4 Available alternative solutions to pathing problems for FCC's conflicting service 3R54

- 6.4.1 Since the central issue in this dispute is the contractual status of the events during the timetabling process, and since it has proved possible to determine that independently of considerations affecting FCC's requirements, it is inappropriate for the Panel to attempt to analyse all the relevant possible permutations with a view to directing a solution that will accommodate FCC whilst giving due weight to GC's contractual rights. That is NR's prerogative and obligation. As recorded above, in the oral exchanges at the Hearing the Panel undertook some analysis of the various non-compliances of FCC's offered paths in an exercise designed to explore the options for resolution that might be available, and it is hoped this may be helpful in framing a way forward between FCC and NR.
- 6.4.2 It appears from the discussion that the issue of engineering allowances at least needs to be looked at, as this presently seems to be applied in a somewhat inconsistent way.
- 6.4.3 FCC's difficulty in large measure arose from the need to satisfy commercial arrangements agreed with its traincrew. Whatever the commercial pressures on one Timetable Participant, they are always unlikely to take precedence over the contractual rights of another.

6.5 Contractual effect of NR pragmatism in administering the timetable process, as possibly overriding contractual rights and obligations of the parties

- 6.5.1 In the course of the Hearing we spent some time looking at this issue, in light of the number of points in NR's submissions where it appeared to be acknowledging that it had dealt with matters not strictly in accordance with the applicable contract procedures, mostly as laid down in the Network Code, but at the same time to consider that this was not fundamentally a problem as long it could be shown to have had the best interests of the industry as a whole at heart. Without wishing in any way to diminish NR's enthusiasm for optimising the operation, maintenance and development of the network and generally for achieving the purpose of its Licence as well as the Objective of the Decision Criteria, on the evidence of this dispute it can fairly be said that NR could sometimes do with paying closer attention to the detailed process requirements of its contracts. If these are perceived to be inoperable in practice, or too complicated, or to act as a brake on efficiency, or otherwise to be not fit for purpose, then the process for change should be initiated to make them fit for purpose and reasonably operable at a day to day level.
- 6.5.2 Instances arising in this dispute of a somewhat relaxed approach to the contract procedures are noted in section 5.7 above. This was the reason for my inviting NR to make a positive argument, if it wished, that there exists some overriding legal principle or other justification for departing from the strict requirements and procedures of the contract (much of which content has in any case been imposed by regulation in the interest of the industry as a whole and its customers rather than agreed between the parties). As previously noted, NR declined to pursue this argument or seek to support it with further evidence or precedent. As a result NR failed to make any case in response to those points raised by GC where its answer was, in essence, "We may have been a bit lax in implementing the contract, but please conclude with us that this did not really matter so long as we were trying to arrive at a robust practical solution in the interests of the industry as a whole." Unfortunately it does matter, and NR is likely to get the same result if it continues to come to Timetabling Panels with this response to train operators.

## 7 Determination

- 7.1 Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, **I DETERMINE** that:
- 7.1.1 Grand Central's bid on 2 March 2012 for a path at 0820 (SX) - which, after due consultations, was flexed within Grand Central's Firm Contractual Rights to constitute Network Rail's offer on 8 June 2012 of a path at 0749 (SX) and was accepted as such by Grand Central - for service 1N90 from Kings Cross to Sunderland was compliant with Grand Central's Firm Contractual Rights under its Track Access Contract, was not contractually overridden by any other bid backed by Rights of a higher Priority, and was not capable of being retimed by Network Rail after the Timetable Offer Date to to a departure time outside Grand Central's FCRs without GC's consent.
- 7.1.2 Service 1N90 as offered and accepted at 0749 (SX) therefore should stand and be included in the December 2012 Working Timetable.
- 7.2 I have considered the consequences of that decision as regards the possibility of providing a remedy for FCC's operational situation but have concluded, having regard to the variety of operational permutations available, that it would be inappropriate and ineffective to direct a particular solution; it will be appropriate for FCC and Network Rail to work together to try to arrive at a satisfactory outcome.
- 7.3 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.



**Peter Barber**  
**Hearing Chair**

**17 October 2012**

## Annex 1 to Timetabling Panel determination of reference TTP518

### EXTRACTS FROM THE NETWORK CODE, PART D (19 JULY 2011 AND 16 MARCH 2012 VERSIONS)

#### 2.3 Timetable consultation – D-55 to D-40

2.3.6 Not later than D-45 Network Rail shall provide to the Timetable Participants a copy of the Prior Working Timetable. If any changes are made to the Prior Working Timetable as a result of the appeal process under Condition D2.7, then Network Rail shall notify these changes to Timetable Participants as soon as reasonably practicable.

#### 2.4 Submission of Access Proposals by Timetable Participants – before and after the Priority Date at D-40

2.4.1 A Timetable Participant shall set out its requirements in respect of the New Working Timetable in a written proposal, to be referred to as an "Access Proposal" where:

- (a) it wishes to exercise any Firm Rights and/or Contingent Rights and/or any expectation of rights to obtain Train Slots in respect of the relevant Timetable Period, where those rights were not exercised to obtain Train Slots in the Prior Working Timetable; and/or
- (b) it wishes to make changes to any Train Slot in the Prior Working Timetable; and/or
- (c) it wishes to set out its requirements in response to a notification by Network Rail under Condition D2.4.6.

2.4.2 Where a Timetable Participant does not intend using a Train Slot, which is included in the Prior Working Timetable, in the relevant Timetable Period, it shall notify this fact to Network Rail in writing by D-40 or as soon as practicable thereafter.

2.4.3 Access Proposals may be submitted to Network Rail during the period up to D-26. However, Timetable Participants shall submit their Access Proposals (and any revised Access Proposals) as early as reasonably practicable prior to D-26 in order to facilitate optimal planning of the New Working Timetable by Network Rail and to ensure optimal consultation between Network Rail and all Timetable Participants.

2.4.4 Access Proposals submitted by D-40 ("the Priority Date") are given priority in the compilation of the New Working Timetable in certain circumstances set out in Condition D4.2. Access Proposals submitted after the Priority Date but by D-26 will be incorporated by Network Rail into the New Working Timetable as far as reasonably practicable, taking into account the complexity of the Access Proposal including any reasonable foreseeable consequential impact on the New Working Timetable and the time available before the end of the Timetable Preparation Period, and in accordance with the principles set out in Condition D4.2.

- 2.4.5 Any subsequent or revised Access Proposal submitted by a Timetable Participant shall amend an Access Proposal submitted earlier where it sets out different requirements to the earlier submitted Access Proposal regarding the manner in which a right is to be exercised. In such case the date on which the subsequent or revised Access Proposal is submitted will be treated, for the purposes of Condition D4.2.2, as the date of notification of the relevant right.
- 2.4.6 Where a Timetable Participant has:
- (a) submitted an Access Proposal which cannot be accommodated in the New Working Timetable; or
  - (b) a Train Slot in the Prior Working Timetable which cannot be accommodated in the New Working Timetable; or
  - (c) submitted a proposal purporting to be an Access Proposal but which is defective or incomplete,
- 2.4.7 Network Rail must notify the Timetable Participant of this fact, as soon as possible after it has become aware of it, so that the Timetable Participant has the opportunity to submit a further Access Proposal under Condition D2.4.1(c).

## **2.5 Content of an Access Proposal**

- 2.5.1 Each Access Proposal shall include as a minimum in respect of each Train Slot, save to the extent that Network Rail expressly agrees in writing to the contrary:
- (a) the dates on which Train Slots are intended to be used;
  - (b) the start and end points of the train movement;
  - (c) the intermediate calling points;
  - (d) the times of arrival and departure from any point specified under paragraphs (b) and (c) above;
  - (e) the railway vehicles or Timing Load to be used;
  - (f) any required train connections with other railway passenger services;
  - (g) the proposed route;
  - (h) any proposed Ancillary Movements;
  - (i) any required platform arrangements at the start, end and all intermediate calling points;
  - (j) any relevant commercial and service codes; and
  - (k) the proposed maximum train speed and length and, in relation to a freight train, the proposed maximum train weight.
- 2.5.2 Where an Access Proposal has been submitted by a Timetable Participant, Network Rail shall be entitled to require any further information in respect of that Access Proposal that it reasonably considers to be necessary or beneficial to the preparation of the New Working Timetable.

## **2.6 Timetable Preparation – D-40 to D-26**

- 2.6.1 During the Timetable Preparation Period (D-40 to D-26) ("Timetable Preparation Period"), Network Rail shall compile the proposed New Working Timetable.
- 2.6.2 Between D-40 and D-26:
- (a) all Timetable Participants shall have access to the evolving draft of the New Working Timetable either:
    - (i) by way of "read-only" remote computer access or such other electronic means reasonably requested by a Timetable Participant ; or
    - (ii) to the extent that a Timetable Participant does not have the required systems to facilitate remote computer access, by read-only computer access upon attendance at such of Network Rail's offices specified by Network

Rail;

- (b) Network Rail shall consult further with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable, and shall continue to answer enquiries and facilitate and co-ordinate dialogue as stated in Condition D2.3.4.

2.6.3 In compiling the New Working Timetable, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2.

## **2.7 New Working Timetable Publication – D-26**

2.7.1 The New Working Timetable shall be published by Network Rail at D-26, subject only to variations made in the course of the appeal process described in this Condition D2.7.

2.7.2 Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it, provided that an appeal is lodged within twenty Working Days of its publication. All such appeals shall be conducted in accordance with Condition D5.

2.7.3 Where a Timetable Participant has enquiries or requires further information from Network Rail regarding the published New Working Timetable, Network Rail shall respond fully and promptly and where possible, taking into account the nature of the enquiry or information requested and the date this is received by Network Rail, so as to enable a Timetable Participant to comply with the timescales in Condition D2.7.2.

## **3.6 Timetable Variations by consent**

3.6.1 Notwithstanding anything stated in this Condition D3, where Network Rail and all affected Timetable Participants have so consented in writing, a Timetable Variation may be made without the need for compliance with such of the requirements of this Condition D3 as are specified in the consent. Such a variation is referred to as a “Timetable Variation by Consent”.

## **4.2 Decisions arising in the preparation of a New Working Timetable**

4.2.1 In compiling a New Working Timetable in accordance with Condition D2.6, Network Rail shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in this Condition D4.2.

4.2.2 Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:

- (a) a New Working Timetable shall conform with the Rules applicable to the corresponding Timetable Period;
- (b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;
- (c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right;
- (d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority:
  - (i) first to:
    - (A) the Firm Rights of any Timetable Participant that will subsist during the whole of the

- Timetable Period and which have been Exercised; and
- (B) any rights Network Rail has for Network Services included in the Rules;
- (ii) second to Firm Rights of any Timetable Participant, that were in force at the Priority Date but will expire prior to or during the Timetable Period and which have been Exercised, provided that Network Rail considers (acting reasonably) that new Firm Rights, substantially the same as the expiring rights, will be in force during the Timetable Period;
  - (iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided Network Rail considers (acting reasonably) they will be Firm or Contingent Rights in force during the Timetable Period;
  - (iv) fourth to any:
    - (A) rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date but before D-26 in accordance with D2.4 and D2.5. Where more than one set of rights or expectation of rights are so notified, capacity is to be allocated in the order in which Access Proposals containing details of the rights (or expectations thereof) are submitted to Network Rail; and
    - (B) Strategic Paths contained in the Strategic Capacity Statement.

## Annex 2 to Timetabling Panel determination of reference TTP518

### EXTRACT FROM THE NETWORK CODE, PART D (16 MARCH 2012 VERSION)

#### 4.6 The Decision Criteria

- 4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services (“the Objective”).
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the “Considerations”) in accordance with Condition D4.6.3 below:
- (a) maintaining, developing and improving the capability of the Network;
  - (b) that the spread of services reflects demand;
  - (c) maintaining and improving train service performance;
  - (d) that journey times are as short as reasonably possible;
  - (e) maintaining and improving an integrated system of transport for passengers and goods;
  - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
  - (g) seeking consistency with any relevant Route Utilisation Strategy;
  - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
  - (i) mitigating the effect on the environment;
  - (j) enabling operators of trains to utilise their assets efficiently; and
  - (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates.
- 4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in the light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.
- 4.6.4 The Objective and the Considerations together form the Decision Criteria.