
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference TTP68

(following a hearing held at Central House, Euston on 19th October 2006)

The Panel

Nick Gibbons: elected representative for Non-Passenger Class, Band 1

Colin Pratt: elected representative for Franchise Passenger Class, Band 2

Simon Taylor: elected representative for Franchise Passenger Class, Band 3

Adrian Thear: appointed representative of Network Rail

Panel Chairman: **Bryan Driver**

The nature of the dispute, the Parties, and the jurisdiction of the Panel

1. The Panel was asked by Direct Rail Services Limited (“DRS”) to rule that proposals tabled by Network Rail Infrastructure Ltd (“Network Rail”) for the Rules of the Route 2007, should be amended, or withdrawn, because of the impact of proposed possessions on weekend freight services between Grangemouth and Daventry, and Grangemouth and Aberdeen.
2. The dispute divides into two parts, vis
 - 2.1. *“the disruptive affect[sic] of possessions required to undertake the S&C renewal at Grangemouth Jn and the cancellation of the Anglo Scottish services between West Midlands and Scotland, and internal services between Grangemouth and Aberdeen”;* and
 - 2.2. *“the volume of disruptive possessions planned between Grangemouth and Aberdeen and the number of occasions this prevents their 7 day a week WH Malcolm/ASDA services from operating”*
3. The disputed possessions have been proposed and consulted by Network Rail in accordance with the provisions of Network Code Condition D2; DRS is appealing to the Panel in pursuit of its rights in Condition D2.1.7, and a Timetabling Panel is in such instances a *“relevant ADRR Panel”*.
4. The Panel noted, in the course of its deliberations, that the S&C renewal at Grangemouth Jn, and the renewal works at Montrose had been the subject of Network Change Notices under Condition G of the Network Code, and that there was a difference of view between the parties as to whether that procedure had, in each case, been carried out appropriately in respect of the interests of DRS. The Panel made clear to the parties that
 - 4.1. issues about the application of Part G of the Network Code, and in particular matters in relation to possible compensation payable, do not fall within the competence of a Timetabling Panel, and would not be addressed; however,
 - 4.2. all possessions required to deliver works, including Network Change, do fall to be incorporated within the Rules of the Route and therefore are properly the concern of the Panel.

The sequence of events

5. DRS has worked, with Network Rail, and with its principal partner (W.H.Malcolm) to develop distribution services on Rail serving major supermarkets in Central and North East Scotland. During 2006 these services have been increased and DRS' Track Access Contract (as approved by the Office of Rail Regulation) now contains Level 1 rights for operation on 7 days per week between Grangemouth and Aberdeen, and 6 days per week (SX and SUN) between Grangemouth and Daventry.
6. The service is based around the use of low platform wagons conveying containers 45ft long, by 8ft 9inches high by 8ft 2.5 inches wide between Daventry and Grangemouth and the contracted equipment specification is for W9 loading gauge. Between Grangemouth and Aberdeen (via Larbert) the contracted equipment specification is for W7 loading gauge. An element in both services is that traffic has been won from road, and some of the traffic is of a perishable nature.
7. Seven-day week operation in Scotland was commenced during 2006 after finalisation of the 2006 Rules of the Route; the Panel was advised that some 15 events during the 2006 timetable had prevented one or other of the services operating, but as these were events that had been arranged before the services were increased to 7 days per week, these interruptions had been accepted as inevitable by DRS' customers.
8. The issue for 2007 was that there were to be continuing frequent occasions when all scheduled weekend services would be unable to run, and DRS were concerned that these interruptions would lead to a loss of confidence on the part of its customer, with the traffic reverting thereafter to road.

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

9. The Panel found that the works in question, and the impact that they had upon DRS' services were as follows:
 - 9.1. issue 1; Grangemouth Jn renewal/remodelling - complete blockage preventing access to Grangemouth terminal
 - 9.1.1. weeks 47 and 51 (0050 Sat to 0440 Mon): cancellation of 1 down and 1 up Daventry service, and 2 down and 2 up Aberdeen services;
 - 9.1.2. week 52 (0050 Sun to 0440 Mon): cancellation of 1 up Daventry service, and 1 down and 1 up Aberdeen services;
 - 9.2. issue 2; other works affecting the Grangemouth to Aberdeen services; these include
 - 9.2.1. Montrose S&C renewal: and piggy-backed plain line renewals associated with the Mossend to Elgin re-gauging Scheme (funded by Scottish Executive)
 - 9.2.1.1. weeks 48 and 49 (0005 Sat to 0500 Tues): cancellation of 3 down and 3 up Aberdeen services; and
 - 9.2.1.2. week 50 (0045 Sun to 0515 Mon): cancellation of 1 down and 1 up Aberdeen services;

- 9.2.2. Commissioning of Stirling-Alloa-Kinross (funded by Scottish Executive) and Larbert Jn re-signalling:
- 9.2.2.1. week 6 (0020 Sat to 0445 Tue): cancellation of 3 down and 3 up Aberdeen services;
- 9.2.2.2. weeks 7 and 8 (0020 Sat to 0445 Mon): cancellation of 2 down and 2 up Aberdeen services;
- 9.2.2.3. week 9 (0030 Sat to 0445 Mon): cancellation of 2 down and 2 up Aberdeen services, plus 1 up Daventry.
- 9.3. In addition, plain line renewals Greenhill Upper to Larbert Junction (weekends 41 and 42) will require 4M30 (SUN) Grangemouth to Daventry to run via a reverse at Larbert.
- 9.4. Cumulatively Aberdeen services are reduced, by the proposals, on 6 consecutive weekends (weeks 47 to 52) and then again, after an interval of 5 weeks without interruption, for another 4 consecutive weekends. Daventry services are cancelled on three weekends
10. *“Network Rail [had] evaluated a number of diversionary options for DRS traffic when routes carrying their traffic were disrupted – unfortunately these proved to be of limited benefit, mainly due to restrictions on the Forth and Tay Bridges as container sizes would be required to reduce to 8ft 5”. DRS investigations have concluded that no such small containers are in existence. ... Network Rail offered to meet with DRS/WH Malcolm to discuss their concerns and to explain the need for the disruption to their services as currently proposed”.* The Panel was advised that no such meeting had taken place.
11. The dispute had first been advised to the ADC Secretary in accordance with the timescales prescribed in Condition D, and had been scheduled for a hearing on 6th September. The parties had subsequently sought for the hearing to be deferred in the expectation that the matter in dispute might be resolved. In the event the parties were unable to identify any measures that had been addressed during the intervening six weeks.

The Parties' contentions

12. The parties were agreed that the works proposed were all necessary, the point of difference being that
- 12.1. Network Rail contended that the method of working, and resultant schedule of possessions proposed, was the most appropriate given the need to balance the interests of all Train Operators against the availability of works resources, and the obligations to the Scottish Executive (the source of some funding);
- 12.2. DRS contended that a works schedule that required so many, and frequent, cancellations to its services, potentially put its business at risk and was therefore, by definition, unacceptable. Furthermore the problem was exacerbated by the fact that there is no alternative route between Grangemouth and Aberdeen that is currently cleared for W7 gauge trains. As the Equipment specification in the rights for these services specify W9 (Daventry) and W7(Aberdeen) loading gauge, the occasions when no such route was available should be kept to a minimum.

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

13. The Panel noted that all of the trains affected by the proposed Restrictions of Use benefited from Level 1 rights in the DRS Track Access Contract. The Panel noted that such Level 1 rights
 - 13.1. were unusual in respect of services operating on Saturday, or Sunday;
 - 13.2. are still subject to the “*applicable Rules of the Route*”, once those have been finalised; and that
 - 13.3. whilst they may define the time of departure (within a determined flexing envelope), that greater precision, as compared with Level 2 rights, does not give Level 1 rights a greater degree of “immunity” or standing, as compared with other freight rights, or as compared with the Track Access rights of other Train Operators, in relation to proposals to amend the Rules of the Route.
14. The Panel noted that a case law had been developed in respect of the relative standing of Firm Rights and proposals to amend Rules of the Route over numerous hearings before the predecessor Timetabling Committee, and that the principles adduced had been summarised in Timetabling Panel determination no.1 (May 2005) “TTP01”, both in respect of the general issue of rights vs Rules of the Route, and the more specific issue of the obligation to provide routes to adequate clearance.
15. On the more general issue, TTP01 had stated that:
 12. *“The Panel noted that the issue of the relative priority of Firm Rights and proposals for possessions (whether in Rules of the Route, or Major Project notices) has been addressed in a number of previous determinations of both Network and Vehicle Change Committee and Timetabling Committee. In the view of the Panel, these past determinations had evolved the following general principles.*
 - 12.1. *Train Operators' rights to run trains are predominantly long term;*
 - 12.2. *Network Rail's obligation to supply Train Operators with a secure Network is ongoing; it cannot always be delivered without interruption to services, and the relevant Parts of the Network Code, and the specific schedules in the Track Access Agreements are framed to permit reasonable interruptions, and to determine if, and how, Train Operators are to be compensated for the impact upon their operations;*
 - 12.3. *the normal process for planning such matters is as set out in Part D of the Network Code ;*
 - 12.4. *where the proposed engineering works / “proposed method of implementation of the project” will have the effect that a Train Operator will be frustrated, for the duration of the Timetable, from running a service for which valid rights are held, this is likely to be seen as a reasonable ground for challenging the proposal and causing it to be modified;*
 - 12.5. *where the duration of the possessions is only part of a Timetable, then any determination reflects an assessment of the nature, and force of the rights enjoyed on both sides, tempered by considerations of whether there are a number of options for delivering the balance of rights, and whether that balance is the best met by the tabled proposal.*

13. Whilst Rule A1.18 requires that “The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other”, the legal entitlement to any train service is a function of not just the formulation of the train specification in [Schedule 5 of a track access contract], but also the extent to which all parties have complied, and with what diligence, with the procedures for consultation and debate incorporated in the Network Code. In effect
- 13.1. the legal entitlements of Train Operators are a fusion of the documented expression of their Firm Rights , and their active compliance with the procedures by which those rights can be exercised, implemented and protected; and
- 13.2. the legal entitlement of Network Rail to a degree of latitude in curtailing the benefits enjoyed by the Train Operators is, by the same token, a function of being able to demonstrate that the curtailment sought is a reasonable minimum, in proportion to other considerations.
14. In short, where absolute legal considerations are in conflict, the issue of proportionality is an overarching aspect of the procedures” (TTP01 paragraphs 12 to 14).
16. In the present case, the Panel was more convinced that Network Rail had been “able to demonstrate that the curtailment sought is a reasonable minimum, in proportion to other consideration”, than it was that DRS had achieved “their active compliance with the procedures by which those rights can be exercised, implemented and protected”.
17. In respect of the issue of the gauge clearance of alternative, diversionary routes, the Panel noted that this had also been addressed in TTP01, where the conclusion reached had been as follows:
- “The Panel therefore concluded that, whilst the desirability of developing traffics to W10 Gauge, and the need to ensure that such traffics can pass at all times, may appear commercially self-evident, it does not form part of the legal entitlements enjoyed by the Freight Train Operators in the case when the WCML is unavailable. Nevertheless, the effort made by all parties, in particular by Network Rail, to ensure that, in as many instances as possible, diversionary routes, adequate in both capability and capacity, are made available, is to be applauded and encouraged. Such effort does not however confer any additional legal rights or obligations on any party.”*
- “The Panel therefore, on the basis of the information laid before it, determined that, in all those cases where objectors have sought to modify or curtail possessions on the sole ground that the possession would not allow W10 gauge traffic to be conveyed on services that would be diverted as a result, such objections do not have the legal substance for the Panel to direct that Network Rail should be required to modify those possessions to meet those objections. To the extent therefore that those possessions have not been contested on any other grounds, the Panel determines that Network Rail should be entitled to incorporate them into the “established” Major Project notice.”** (TTP01 paragraphs 37 and 38)
18. In the case of the DRS services to Aberdeen, the matter is slightly different inasmuch as the Parties have agreed to a specific reference to the gauge clearance to apply to these movements in the Equipment Characteristics column of entry in the Train Operator’s schedule of rights. In the Panel’s view, this does not fundamentally change the position taken in TTP01 as regards diversionary routes. Just because, between Grangemouth and Aberdeen, there is no viable alternative route gauged to the required clearance, this cannot mean that there can therefore be no occasions when the W7 route is blocked for essential works. It would however be appropriate for gauge to be included in the range of considerations to be considered in assessing the reasonableness of the proposed possessions.

The Panel's Determination

19. The Panel concluded that DRS's services would indeed be adversely affected by the Restrictions of Use proposed by Network Rail in respect of the Rules of the Route for 2007. The question therefore for the Panel was whether, in the light of all the circumstances presented to it, the disruption was of a scale to which Network Rail could reasonably claim to be entitled.
20. On this last assessment the Panel was satisfied that
 - 20.1. the works in question were all of some degree of urgency, and most, in particular those relating to the renewal/re-modelling of Grangemouth Junction, and Mossend-Elgin Freight re-gauging, were of direct long-term benefit to DRS in the service of its customers;
 - 20.2. the nature of the works was such that possessions were required of such durations that any form of 7 day service (freight or passenger) would require to suffer some level of disruption;
 - 20.3. the timing of the works appeared to have a degree of acceptance by all other affected Train Operators;
 - 20.4. there was clear evidence that, in preparing its programme of works, Network Rail had sought in all possible circumstances to consolidate work to concurrent times and that the number of disruptive events affecting DRS services would be fewer in 2007 than in 2006, and that
 - 20.5. there appeared to be a willingness for Network Rail to consider practical opportunities for specific services to be worked through possessions, where the works programmes permitted, and/or there was no other practicable route.
21. By contrast, the Panel was not satisfied that DRS, having asked for a considerable period of adjournment before bringing the matter for hearing, and having been offered, by Network Rail, the opportunity of constructive tri-partite talks with its customer, had properly explored (or if it had done so, had not adequately set out for the information of the Panel) the extent to which adoption of alternative methods of working might have further reduced the number of occasions upon which it would not be able to provide services to its customers.
22. Taking all of the foregoing into account, the Panel therefore determined that it had not been given sufficient cause for determining that the possessions in question should not be included in the "*applicable Rules of the Route*" for 2007, and that therefore Network Rail should be allowed to proceed on the basis that the disputed possessions should form part of the Rules of the Route for 2007.
23. For the avoidance of doubt, the Panel wished Network Rail to take into account that, although it had the Panel's support for including the particular Restrictions of Use in question in the 2007 Rules of the Route, this did not relieve it of the duty of assisting DRS in meeting, where practical, its customer's needs for seven day service. In particular Network Rail should not relax its efforts in respect of seeking opportunities to pass suitable trains through possessions, particularly where there is no alternative route with the appropriate gauge clearance, or to serve alternative depots or transshipment points.

24. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

Bryan Driver

Panel Chairman