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**TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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**Determination in respect of dispute reference TTP834**

*(following a hearing held at 1 Eversholt Street, London on 6 October 2015)*

**The Panel:**

Peter Barber                      Hearing Chair

Members appointed from the Timetabling Pool

Robert Holder                      elected representative for Franchised Passenger Class, Band 1  
Andy Smith                          elected representative for Franchised Passenger Class, Band 2  
Ian Kapur                              elected representative for Non-Passenger Class, Band 2  
Matthew Allen                        appointed representative of Network Rail

**The Dispute Parties:**

For Arriva Trains Wales ("ATW")

Chris Dellard                        Engineering & Access Planning Manager  
Chris Millar                          Head of Train Planning

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

Mark Hayles                         Timetable Production Manager – LNW Route  
Chris Pearce                         Customer Relationship Executive (Wales)  
Carew Satchwell                     Route Contracts Manager – LNW Route  
Roy Greenhalgh                      Customer Care Manager  
John Thurgood                        Operations Planning Project Manager (LTP) – LNW Route

Interested parties:

For First/Keolis Transpennine Ltd ("TPE")

Paul Headon                         Permanent Timetable Manager

For Northern Rail Ltd ("Northern")

Peter Warhurst                      Timetable Planning Manager  
Helen Cavanagh                      Head of Access & Industry Programmes

**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 in relation to 16 train services from North Wales to Manchester Piccadilly which ATW wishes to extend to Manchester Airport and start back from there (6 daily on Mondays to Fridays and 10 on Saturdays – the “**Airport Extensions**”) with effect from introduction of the December 2015 Timetable. ATW included the Airport Extensions in its Access Proposal submitted prior to the relevant Priority Date (6 March 2015) but, by e-mail on 17 March 2015 attaching a letter dated 18 March 2015, Network Rail advised that it was declining to include the Train Slots in the December 2015 New Working Timetable.
- 1.2 Network Rail had previously validated and offered ATW identical Train Slots for inclusion in the May 2015 Subsidiary Timetable, but the proposal had not been implemented, for reasons explored during this Panel hearing.
- 1.3 Despite discussions with Network Rail, ATW decided formally to notify its dispute of Network Rail’s decision on 24 June 2015. Further discussions took place but on 9 September 2015 ATW confirmed that a Panel hearing was required.
- 1.4 I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with Chapter H of the Access Dispute Resolution Rules (the “**Rules**”) to hear an appeal under the terms of Network Code Condition D5.
- 1.5 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”.
- 1.6 The abbreviations and other short form terms 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 and Road (formerly the Office of Rail Regulation)

“**PDNS**” means a Priority Date Notification Statement

“**Rights**” means Firm or Contingent Contractual Rights as defined in Part D of the Network Code, either granted or applied for in accordance with a train operator’s Track Access Agreement

“**Parties**” means the Dispute Parties and the Interested parties

“**Record**” means the Record of evidence given and arguments presented during the Hearing as set out at Annex 1 to this Determination

“**SOAR Panel**” means Network Rail’s Sale of Access Rights Panel

“**Timetable**” means the New Working Timetable publication for introduction in May or December of the relevant year as the context may require

“**TPRs**” means the Timetable Planning Rules

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

- 2.1 ATW initially applied for the Airport Extensions in August 2014 in its PDNS for the May 2015 Timetable. They were validated by NR as compliant with the TPRs and were included in the May 2015 Timetable, with certain services bid for by TPE and Northern modified by NR in consequence. TPE and Northern initiated respectively disputes TTP764 and TTP765 challenging these decisions of NR and these were set down for hearing together on 3 March 2015.
- 2.2 However, following further communication from ATW on 3 February 2015 apparently giving consent (but the exact meaning and intention of which is disputed between ATW and NR), on 10 February NR withdrew the Airport Extensions from the May 2015 Timetable. NR also reversed the related modifications to TPE’s and Northern’s

services; as a result TPE and Northern withdrew their disputes TTP764 and TTP765 shortly after close of business on 11 February.

- 2.3 On 13 February 2015 ATW started industry consultation on its proposed track access application for Rights for the Airport Extensions, still designated as commencing in the May 2015 Timetable and running through to the expiry of the ATW/NR Track Access Contract. On 5 March ATW reapplied for the Airport Extensions in its PDNS for the December 2015 Timetable. On 12 March NR replied to ATW's industry consultation setting out its reasons for declining to support the application for Rights.
- 2.4 On 17 March NR notified ATW that it declined to include the Airport Extensions in the December 2015 Timetable. On 24 April ATW responded to the issues raised in NR's reply to its Rights consultation. In June NR issued the formal Offer for the December 2015 Timetable excluding the Airport Extensions.
- 2.5 ATW notified its dispute of NR's decision on 24 June 2015. The dispute was registered by ADC as TTP834. ATW indicated that there was no requirement to expedite hearing of the dispute; as is customary, the raising of a formal dispute focuses attention for discussions between the train operator and Network Rail.
- 2.6 On 9 September 2015, ATW advised ADC that a Panel hearing would be required. A date was set for the hearing, together with the timescale for the submission (at my request) of sole reference documents by the Dispute Parties. The proposed Panel hearing was duly notified by ADC to other potentially interested parties.
- 2.7 ATW and NR provided sole reference written submission documents within the required timescales on 18 September and 25 September 2015 respectively.
- 2.8 TPE declared itself a Dispute Party on 14 September but decided on 25 September to withdraw from this status and to instead attend the hearing as an Interested party. Of other potentially Interested parties, only Northern wished to attend the hearing.
- 2.9 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 28 September 2015 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 to the Dispute Parties on 28 September 2015.
- 2.10 The Hearing of the dispute took place on 6 October 2015. The Dispute Parties made oral opening statements (written copies of which were provided to the Panel and all persons present at the Hearing), the Interested parties were invited to make opening remarks, and the Parties were then questioned by me and the other members of the Panel. Following and in the light of the Q&A the Dispute Parties were invited to make closing remarks including indicating any determination which would be satisfactory to both of them. After conferring with each other the Dispute Parties gave such an indication. The Record of evidence given and arguments presented during the Hearing, including the statements and remarks made on behalf of the Parties at the commencement and conclusion of the Hearing, is set out at Annex 1 to this Determination.
- 2.11 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.
- 2.12 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**

- 3.1 The version of the Network Code Part D in force from 29 June 2012 was applicable to matters to be determined in this dispute. The next version of Part D came into force on 13 July 2015 but did not contain changes which became relevant to this dispute.
- 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 D4.2, Decisions arising in the preparation of a New Working Timetable
  - 3.2.4 D4.6, The Decision Criteria

The relevant extracts are set out at Annexes 2 and 3 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 The Record at Annex 1 includes the full text of the opening statements at the Hearing by both Dispute Parties. These were in substance summaries of their respective prior written submissions.
- 4.2 ATW's principal submissions were as follows:-
  - 4.2.1 At and following the time of ATW's Access Proposal for the Airport Extensions in the December 2015 Timetable, ATW had a clear expectation of securing the Rights to operate these services. The relevant Train Slots had originally been bid for and validated in the May 2015 Timetable, notwithstanding that this required some contractually compliant flexing of other operators' services; they were removed from the May 2015 Timetable, ATW having consented to the removal but noted that it would bid again for the December 2015 Timetable; shortly after the removal ATW went out to industry consultation on its Section 22A application to ORR for Rights; shortly after that it included the Train Slots in its new Access Proposal for the December 2015 Timetable; NR then gave a negative response to ATW's consultation, to which ATW later replied in substance, making it clear that it would continue to work on its application for Rights. (ATW notes in its written sole reference submission that it is unsure whether NR's removal of the Train Slots from the May 2015 Timetable was an "official withdrawal" of the Train Slots.)
  - 4.2.2 NR's eventual rejection of ATW's Access Proposal for the Airport Extensions in the December 2015 Timetable was based entirely on NR's assertion that the December 2015 PDNS access proposal was not valid due to a lack of information regarding the expectation of rights for the paths. That assertion was made solely because NR itself had decided not to support ATW's known intended application to ORR for the relevant Rights. This latter decision was taken through NR's own internal processes, and particularly the deliberations of its SOAR Panel, on the grounds of concerns that, despite having been previously validated as being TPR-compliant, the Airport Extensions could have a wider impact on performance, service recovery and industry reputation.

- 4.2.3 NR was not entitled in principle to assert that ATW had no expectation of the relevant Rights, nor to maintain this as a procedural ground for denying the initial validity of ATW's bid, because the bid was technically compliant with the TPRs and satisfied all the procedural requirements of Condition D2.5.1.
- 4.2.4 NR's conclusion that ATW had no expectation of Rights was misconceived because founded on its opinion that the onus lay on ATW to adduce positive reasons for having an expectation, and in particular to inform NR of any specific progress with ATW's intended application to ORR for the relevant Rights, and that ATW had failed adequately to do so. On the contrary, the onus lay on NR to adduce substantial objective reasons for refuting the expectation of an obviously genuine and serious bidder such as ATW. In fact, so far from providing any such objective reasons, in the alleged absence of positive information from ATW NR's timetable planners had inappropriately formed their own subjective view, in reliance entirely on NR's own internal processes – consultation with route directors and submission to the SOAR Panel – which had directed that ATW's application for Rights should not be supported by NR.
- 4.2.5 Furthermore, even if (which ATW refuted) it had ever become relevant for NR to apply qualitative reasons for rejecting the bid, the grounds on which it had purported to do so, namely the concerns as to performance, service recovery and industry reputation, were themselves flawed. This was partly for a number of specific technical factual reasons itemised in ATW's written submission and its Appendices, and partly because the stated grounds were not based on any proper application of, or even an attempt to apply, the Decision Criteria.
- 4.3 The determination sought by ATW in its written submission was that Network Rail had not demonstrated any technical reasons for claiming that ATW had no expectation of rights and so should validate the requested Train Slots and include them in the December 2015 Timetable (the Rights for which would still be subject to approval by ORR).
- 4.4 The determination requested by ATW in its oral opening statement at the Hearing was that NR had incorrectly asserted that ATW had no expectation of Rights. At the end of the Hearing, following consultation with NR, as noted in the Record ATW indicated that it would be satisfied with a determination confirming as a matter of legal entitlement that NR should have included Train Slots for the Airport Extensions in the December 2015 Timetable, but without actually directing NR now to do so. Since the initiation of this dispute over the December 2015 Timetable ATW had included the Airport Extensions in its bid for the May 2016 Timetable; accordingly it would also now look for a direction that it was contractually entitled to them, subject to re-validation for TPR compliance and still subject to obtaining the Rights.
- 4.5 Network Rail's principal submissions were as follows:-
- 4.5.1 ATW's account of the chronology of events and decisions leading up to the dispute was broadly agreed, with the exception of some minor details as itemised in NR's written sole reference submission. Any suggestion, however, that NR's removal of the Train Slots in question from the May 2015 Timetable was other than an official withdrawal specifically requested by ATW, was refuted; the request was taken as contained in ATW's email to NR of 3 February 2015 saying: "It has been decided to allow Network Rail to remove the Manchester Piccadilly to Manchester Airport legs out of the timetable from May 2015. ...I have also been instructed to bid again for these validated paths for December 2015."
- 4.5.2 ATW's Access Proposal for the Airport Extensions for the December 2015 Timetable was initially not valid, and remained so, due to a lack of information regarding ATW's expectation of Rights for the relevant paths. As expressed in NR's written sole reference submission, "This dispute centres on Network Code [Condition] D2.4.1(a) where the Access Proposal submitted by ATW has not

adequately informed NR of the expectation of rights for the train path services requested." And further: "[ATW's Access Proposal] states in the table C2 that the additional extensions do not have any access rights. It does not though articulate where and when ATW expect to gain rights. NR sees this as a clear failure to meet the requirements of paragraph 2.4.1(a) of part D of the Network Code. The lack of information as to how they expect to gain rights when taken with the timeline of events regarding access rights for these services... leaves NR in a position where we do not expect them to be granted. The SOAR Panel has declined to support the application for rights for these services. ATW has decided to pursue a Section 22A application for rights but in the submission have not stated the progression of this."

- 4.5.3 NR's timetable planning team were aware of a decision of NR's SOAR Panel not to support the sale of the requested Airport Extensions. When submitting its Access Proposal for the December 2015 Timetable ATW also was aware that NR did not support the sale of the Rights. ATW's Access Proposal nonetheless gave no indication of the likelihood of ATW gaining Rights for the December 2015 Timetable nor otherwise regarding ATW's progress towards gaining Rights.
- 4.5.4 NR is aware that ATW went out to industry consultation on a Section 22A application for Rights. NR responded to this consultation explaining why NR did not support the sale of these Rights.
- 4.5.5 NR responded to ATW's Access Proposal for the December 2015 Timetable by stating that there was no expectation of Rights and that it therefore rejected the requested Train Slots for the Airport Extensions.
- 4.5.6 ATW responded five weeks after NR's rejection of the Train Slots stating that they would undertake further timetabling work and would re-engage with NR when they wanted to progress the matter further. Since then NR has heard nothing other than this referral of the matter to dispute.
- 4.5.7 In taking its decision NR asked itself the following questions:
  - (a) Does ATW have Rights? – No;
  - (b) Does NR wish to sell the Rights? – No;
  - (c) Did ATW advise NR regarding progress of its Section 22A application, therefore towards an expectation of Rights? – No.
- 4.5.8 NR's timetable planning team thus had no indication of firm Rights, nor of a clear expectation of Rights of ATW, and it had knowledge that NR (in the form of the SOAR Panel) was not supporting the sale of Rights to ATW. The timetable planning team therefore rejected ATW's Access Proposal for the Airport Extensions for the December 2015 Timetable on the basis that its Access Proposal was not valid, because there was no expectation of Rights.
- 4.5.9 There were several specific technical factual reasons justifying the concerns as to performance, service recovery and industry reputation taken into account by the SOAR Panel in reaching its decision not to support ATW's Section 22A application for Rights, all as itemised and explained at length and in considerable detail in NR's written sole reference submission. To take one particularly relevant example regarding performance risk (because it mentions the TPR): "...these extended services will reduce turnarounds at Manchester Airport and will therefore affect the robustness of the timetable. In order for these services to be extended the distance and time between services on the network has been reduced, the turnarounds have been reduced and the result is a timetable that although TPR compliant is less resilient to perturbation."
- 4.6 Network Rail in its written submission asked for a determination that ATW had failed to provide a valid Access Proposal in accordance with Condition D2.4.1 for the December 2015 Timetable in relation to the Airport Extensions.

- 4.7 NR in its oral opening statement at the Hearing did not make further mention as to the determination sought. As part of the discussion mentioned above in relation to ATW, at the end of the Hearing, following consultation with ATW, as noted in the Record NR indicated that, in view of the points discussed regarding the impact for train planners and passengers if ATW were to be put in a position to introduce the Airport Extensions in December 2015, NR and ATW had agreed that it would be sensible for them to work on introduction in May 2016, subject to the attainment of Rights. NR also noted that for the May 2016 Timetable NR would have to re-validate the identified Train Slots to check that they were still TPR-compliant or able to be made TPR-compliant.

## 5 Oral exchanges at the Hearing

- 5.1 After considering the written submissions 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. 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), 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 The Record at Annex 1 includes a full account of the Q&A during the Hearing, including incidental observations by the Panel and the Parties, and constitutes an integral part of this determination. The following is a summary of the main themes pursued during the Q&A.
- 5.3 We commenced by checking that we had correctly understood the chronology of events leading up to this dispute, including the relationship of these events and those surrounding the previous disputes TTP764 and TTP765 which had been withdrawn, these events having been narrated somewhat differently in the Dispute Parties' respective submissions. I am content that through the first part of the Q&A we established that the basic sequence of events was as I have recounted in paragraphs 2.1 to 2.4 above.
- 5.4 In the course of our examination of the chronology there was a particular difference of view between the Dispute Parties as to the meaning and intention of ATW's email to NR of 3 February 2015 quoted in paragraph 4.5.1 above, in the light of surrounding correspondence between different personnel of the two companies:
- 5.4.1 ATW contended that in that email they only meant suppressing putting the trains into the public timetable for May 2015; NR said it took the email as an instruction to take ATW's extensions out of the May 2015 Timetable altogether, and so returned the TPE and Northern trains to their original times before they had previously been flexed to accommodate ATW.
- 5.4.2 NR pointed out that there were actually two e-mails from ATW, using different words: one on 19 January expressly saying to suppress passenger publication, and the one on 3 February saying "It has been decided to allow NR to remove the [Airport Extensions] out of the Timetable from May 2015".
- 5.4.3 ATW accepted that the latter email had been badly worded for its intended purpose and could have been read as suggesting that the Airport Extensions be removed altogether from the May 2015 Timetable, but maintained nevertheless that it had not been intended to be a formal withdrawal of its Access Proposal and that in any event NR had not been legally entitled to remove the extensions from the May 2015 Timetable.

- 5.4.4 ATW stated it had still been their intention to seek the extensions and they therefore had proceeded with their Section 22A consultation on 13 February, still referring at that time to the May 2015 Timetable.
- 5.5 In the event the distinction between an intention of merely suppressing publication and of full withdrawal from the Timetable proved largely irrelevant in the circumstances of this case:
- 5.5.1 Asked how it had viewed ATW's Section 22A consultation which came on 13 February, NR said it had understood that ATW were seeking Rights for May 2015 but would otherwise accept December 2015. NR confirmed that, whether or not it had thought ATW's email of 3 February said to take the extensions out of the May 2015 Timetable, it had taken the Section 22A consultation as still indicating ATW's wish for rights from May 2015 and otherwise from December, and NR acknowledged that Firm Rights were not required before the Priority Date.
- 5.5.2 ATW confirmed that its Section 22A consultation had indicated its intention that the new Rights sought were to last to the end of its Track Access Contract and not just for the duration of the May 2015 Timetable period. Asked if its Supplemental Agreement proposal was still open and active, ATW said it had not yet been submitted to ORR but they would be doing so, and NR confirmed that it was in ORR's list of expected Supplemental Agreement submissions.
- 5.7 We then moved to the central issue of what actually constitutes an 'expectation of rights', both for the purposes of identifying a valid Access Proposal under Condition D2.4.1(a) and in relation to allocation of priority under Condition D4.2.2(d)(iii); and accordingly whether ATW should have been treated by NR as having such an expectation for the purposes of evaluating the initial validity of their bid for the Airport Extensions for the May 2015 Timetable. I am satisfied that this part of the Q&A, though at times somewhat circular as is apparent from the Record, established the following propositions:
- 5.7.1 Contrary to NR's apparent starting point, it was not incumbent on a genuine and bona fide Timetable Participant relying in its Access Proposal on an 'expectation of rights' rather than Firm Rights and/or Contingent Rights, by virtue of any provision of the Network Code or otherwise, at the time of its PDNS to substantiate positively that it had such an expectation, by pointing to some particular action taken or stage reached by it already in the regulatory process for applying for Rights.
- 5.7.2 In any event NR was unable to identify exactly what might have constituted such an action or stage, conceding that having already submitted a final Section 22A application to ORR was not a formal requirement for an expectation, but that it was difficult to pick out anything short of that but more than a mere stated aspiration, other than possibly some nebulous but somehow actively demonstrable intent to engage in the regulatory process towards obtaining Rights. For the purposes of this dispute NR maintained that a lack of such demonstrable intent was sufficiently indicated by its belief that ATW's Section 22A proposal was not being progressed at the time of the Access Proposal submission, coupled with the fact that NR had received no indication as to when it would be submitted or if it would be within the timescale for obtaining Rights for May 2015.
- 5.7.3 The above conclusion was bolstered by the fact that Condition D2.5.1, in listing the minimum ingredients of an Access Proposal in relation to each Train Slot bid for, omitted any reference to demonstrable proof of an expectation of Rights.
- 5.7.4 It followed that if NR saw fit to challenge a Timetable Participant's bona fide or otherwise serious expectation of rights, the onus would lie with NR to provide



some positive proof of the lack of such an expectation, rather than the other way round.

- 5.7.5 NR could have been assisted in the exercise of discharging this onus, had it become necessary, by availing itself of the right under Condition D2.5.2 to require any further information in respect of an Access Proposal that it reasonably considered necessary or beneficial to the preparation of the Timetable. In this case ATW was not at fault for not having provided any particular specific information regarding its expectation of the rights in question, because NR had not actually asked for any such information.
- 5.7.6 NR could be said here to have tried, in effect, to mount a positive challenge of ATW's expectation of rights, but unfortunately the challenge had been based principally on the contractually invalid ground of an asserted entitlement of NR to choose not to 'sell' rights. NR had been quite candid and explicit in this assertion, both in its written and oral submissions and now in the Q&A; for example, among other things NR stated expressly that in evaluating Access Proposals and operating the timetabling process it had to be "subjective rather than objective".
- 5.7.7 NR went on to observe that, though there had been a time when operators could apply for rights more freely, it now had a more congested network and therefore had to take into account more considerations, so that when it came to Condition D2.4.1 it could not just check whether a proposal was TPR-compliant. Even though it might not be part of the contractual Part D process, NR said it had other considerations - not only regulatory - where it decided that it did not want to sell rights.
- 5.7.8 This theme of an entitlement, or subjectively based discretion, of NR to decide not to "sell" rights was pursued throughout the Q&A. NR referred back to its opening statement in which, as noted above, it asked itself the question "Does NR wish to sell the Rights? -- No", and repeatedly relied on the decision of its SOAR Panel not to support the sale of Rights to ATW. NR seemed to want to emphasise its view that it must be willing to sell rights, even if paths have been validated, and that this meant a willingness after taking into account a whole variety of considerations. Asked where in the Network Code this requirement was to be found, NR replied that it was not in the Network Code in specific terms, but could be said to be within the Objective in Condition D4.6.1.
- 5.7.9 At this point postponing consideration of the Decision Criteria, I put it to NR that the position under the Network Code was actually the converse of what it had just suggested. I drew to NR's attention that the Network Code in Condition D4.2.2 specifically implied an overriding principle that it did not have the right to refuse an otherwise compliant Access Proposal; it said "Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it" etc. And I questioned again from where NR believed it derived the contractual entitlement not to sell an access right in cases where there is specific technical capacity (in the sense of TPR compliance) and no operational conflict.
- 5.7.10 NR declined to identify any such specific contractual entitlement but stated that in relation to Condition D4.2.2, there would be reason for great concern if it had to fill up the network and never turn anything down. It believed Condition D4.2.2 went back to Conditions D2.4 and D2.5, and NR's decision-making was then informed by the Decision Criteria. NR said it had to have an overview of its business and this was where the SOAR Panel came in; that Panel used the Decision Criteria in considering individual requests across the network. However, NR thought perhaps instead of saying "sell rights", it ought to be saying "support rights".

- 5.7.11 I explained that we were trying to understand the situation – including the role of the SOAR Panel – as it stood at a point in the process before the Decision Criteria came to be contractually applied. From NR’s answer, and from its own published remit and policy, it certainly seemed that the SOAR Panel was controlling the availability and sale of access rights. So we still wanted to understand, in answer to the previous question, where and on what basis it was provided contractually that NR could decide not to sell rights. We could understand how these matters at some stage became contractually linked to the Decision Criteria, but thought that in this case NR was operating contractually at different stages of the timetable development process than those involving the Decision Criteria.
- 5.7.12 As appears from the Record, NR again declined to suggest a contractual basis for deciding not to sell rights, instead noting in effect that NR had to take more performance considerations into account than just TPR compliance; at some point in the process NR said it had to consider its ability to meet its contractual obligations and its regulatory responsibilities. NR said the LNW Route was operated on a congested part of the network and the SOAR Panel considered these things with implicit guidance of the Decision Criteria and looked at the cumulative outcome of proposals.
- 5.7.13 I suggested this approach might be seen as NR in effect second-guessing or undermining ORR’s role in the process of taking a strategic view of capacity etc. NR denied this but said again that it was a very subjective area; NR had learnt lessons from other cases where NR had granted rights which ORR had not supported but, all in all, NR would not expect an application to ORR to be successful if not supported by NR.
- 5.7.14 Returning to NR’s previous assertion that ATW’s Access Proposal was not valid due to an alleged lack of information regarding the expectation of rights for the paths, we again asked NR on what contractual basis linked to expectation of rights it thought it could refuse acceptance of an Access Proposal which complied fully with the formal requirements of Condition 2.5.1 and where there was no requested information under Condition D2.5.2 outstanding. NR conceded that it had no answer to that. NR accepted that it had previously considered it was not a valid Access Proposal because ATW had no expectation of rights, but now thought this Timetabling Panel was correct and that the Proposal was valid against Conditions D2.5.1 and D2.5.2, as there was nothing outstanding which had been asked for.
- 5.7.15 I took it from NR’s last admission that it was now accepted that the lack of an actively proved expectation of rights was not a necessary condition to the initial validity of an Access Proposal. It therefore followed that, as submitted by ATW, NR had no legal entitlement to reject its Access Proposal on the ground of initial invalidity; and that there could be no determination, as requested by NR, that ATW had failed to provide a valid Access Proposal in accordance with Condition D2.4.1.
- 5.8 We turned finally to the issue of application of the Decision Criteria:
- 5.8.1 NR stated that it had not applied the Decision Criteria, because it believed it had not reached that point in its considerations, as it had not gone any further than the point of admitting an Access Proposal under Condition D2.4.1 in the process. At a later stage in the Q&A, following a further exploring of the expectation of rights issue which reached the same conclusion as previously, NR confirmed it had not considered the Decision Criteria to be contractually relevant to a consideration of ATW’s Access Proposal for the December 2015 Timetable, precisely because it had already concluded that ATW had no expectation of the relevant rights and its bid was therefore invalid.

- 5.8.2 Asked why, in that case, it appeared to have made a nod in the direction of the Decision Criteria in its submissions, NR's explanation was that this highlighted the role of the SOAR Panel in using the Decision Criteria to assess the saleability of rights at the start of their process. NR confirmed that the train planners did not use the Decision Criteria in this ATW matter.
- 5.8.3 When it was pointed out that the decision of the SOAR Panel was couched in terms of sale of access rights rather than availability of Train Slots (the latter being the proper contractual subject matter for the Decision Criteria), NR's Response was that the SOAR Panel needed to look at the position nationally and not take a slice-by-slice approach to the applicability of Part D. Asked if that meant it was now the position that NR sought to take an overall strategic view, whilst it was ORR which ended up taking the slice-by-slice view when awarding rights, NR explained that it now had the role of developing the network as System Operator under European law.
- 5.8.4 NR confirmed that in this light it was potentially fair to say, as I had suggested, that legal, contractual entitlements under Part D had not kept pace with developments in European law; the contracts still said it was the TPR as currently applying that should deal with concerns about degrading performance, but NR now had other wider considerations to take into account.
- 5.8.5 Having regard to what had been said concerning the contractual applicability of the Decision Criteria, we returned to looking at the merits of NR's stated reasons for rejecting what might otherwise have been a valid bid, i.e. congestion, impact upon performance in the area and reputational risk – the last of which appeared to be a concern about putting new services into the timetable then withdrawing them a short while afterwards.
- 5.8.6 In Q&A on this topic it soon became apparent that, whilst it might well have been possible to squeeze these reasons logically within one or more of the Objective and some of the Considerations of the Decision Criteria, (a) as a matter of fact, this exercise had not been done at the time of consideration by the SOAR Panel or otherwise within NR, and (b) as a matter of principle, there was actually no reason why it should have been done. The latter was because, quite apart from the bid validity issue previously discussed, the Decision Criteria would not have become relevant anyway unless there had been conflicting valid bids for the relevant Train Slots, of otherwise roughly equal merit – which in the case of ATW's Airport Extensions there were not.
- 5.8.7 On the contrary, NR's stated reasons for its rejection of the ATW bid were clearly those generated by the SOAR Panel, not undertaking NR's contractual consideration of the bid pursuant to the Network Code, but exercising the strategic, political and economic functions of NR as 'System Operator'. NR stated that the Department for Transport was telling franchised operators to get as many rights as they could whereas ORR was telling NR to negotiate more flexible rights and more quantum rights in order to get down to a more manageable position.
- 5.9 Wrapping up regarding the practicalities of various possible outcomes, we asked what was happening regarding ATW's services to Manchester Airport in May 2016. ATW replied that it was on hold pending the outcome of this Hearing. Asked what practicalities would be involved if the extended ATW services were now to be included in the December 2015 Timetable, NR said it would necessitate a rewrite of the timetable, with flexing of Northern and TPE services as had been done earlier in the year. The offered train times had already been advertised to the public, so that amending for ATW would affect passengers buying tickets right now. TPE commented that reservations were already open for advance purchase sales, and Northern noted that the new December timings had already been included in journey planners and they were already being affected by engineering works. Asked for a sense of the numbers of passengers involved with advance purchases at present, TPE thought they currently

would number perhaps around 300, and NR pointed out that this number would grow because it would take some three weeks to get the various systems changed.

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

- 6.1 I turn to a consideration of the issues to which this dispute has given rise. In doing so I am taking into account, as previously noted, the parties' submissions prior to and at the hearing, including the oral exchanges on particular points of information during the hearing. It is these considerations that inform the conclusions of this determination.
- 6.2 In essence I conclude that, based on the evidence given and arguments presented at the Hearing (as appear from the Record) and on my own interpretation of the relevant sections of Part D of the Network Code, ATW has made out its case as expressed in its original written submission and as summarised in its oral opening statement at the Hearing.
- 6.3 NR's submissions, both written and oral, amount mainly to a series of repeated assertions that ATW had and still has no "expectation of rights", simply because one part of NR – the timetable planners concerned – has in effect been instructed by another part of NR – the SOAR Panel – that such is the case. The SOAR Panel has decided, for various operationally cautious but definitely non-contractual reasons, that NR should not support the sale of the relevant Rights to ATW. That decision – that lack of "support" – has been taken as absolutely determinative of the absence of an expectation of rights by the timetable planners (who are the operative part of NR for the purpose of performing this element of its contracts with the train operators), as if it were a binding ordinance, apparently without regard to contractual processes or considerations. As I noted in the Q&A, this amounts simply to Network Rail, obviously a single indivisible legal entity, talking to itself.
- 6.4 The conclusions from an analysis of the issues in this dispute mainly follow the structure and content of the propositions established in the Q&A. To sum up:
- 6.4.1 ATW's Access Proposal for the Airport Extensions for the December 2015 Timetable was a valid bid for those Train Slots. It had already been validated as TPR compliant by being accepted into the May 2015 Timetable and there were no other objective technical reasons for its rejection from the December 2015 Timetable. The decisions to be made by Network Rail – including any of NR's internal organs – in discharging its contractual and regulatory obligations within the rail industry are required to be objective, in accordance with the relevant contracts and regulations, not subjective – contrary to what was repeatedly maintained by NR's representatives in the course of this Hearing.
- 6.4.2 With regard to the increasingly opaque concept of an "expectation of rights" used both as a potential ingredient of an Access Proposal under Condition D2.4.1(a) and in relation to allocation of priority under Condition D4.2.2(d)(iii), I concluded that the onus is not on a genuine and bona fide Timetable Participant relying in its Access Proposal on an 'expectation of rights' rather than Firm Rights and/or Contingent Rights, by virtue of any provision of the Network Code or otherwise, at the time of its PDNS to substantiate positively that it has such an expectation, by pointing to some particular action taken or stage reached by it already in the regulatory process for applying for Rights. Clearly an already submitted Section 22A application to ORR is not a necessary constituent of an expectation, and NR was unable to identify any cogent stage in the process, short of an actual application.
- 6.4.3 Consequently if NR wished to challenge an obviously serious Timetable Participant's bona fide expectation of rights, I concluded that the onus would lie with NR to provide some positive proof of the lack of such an expectation, rather than the other way round.

- 6.4.4 With regard to NR's published processes and criteria for "selling" Rights, including its SOAR Panel, I drew to NR's attention that the Network Code in Condition D4.2.2 specifically implied an overriding principle that it did not have the right to refuse an otherwise compliant Access Proposal; this said "Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it" etc. In the absence of any suggestion otherwise from NR I concluded that there is nowhere whence it can derive any contractual entitlement not to sell an access right in cases where there is specific technical capacity (in the sense of TPR compliance) and no operational conflict. NR's vague references to the need for an overview of its business and consequent involvement of its SOAR Panel using the Decision Criteria in considering individual requests across the network bore no relationship to the contractual provisions of the Network Code and operators' track access contracts.
- 6.4.5 As to the formal requirements of an Access Proposal, NR conceded that where the formal requirements of Condition 2.5.1 had been complied with and where there was no requested information under Condition D2.5.2 outstanding, there would be a valid proposal. I concluded from this that it was now accepted that an actively proved expectation of rights was not a necessary condition to the initial validity of an Access Proposal.
- 6.4.6 With regard to the applicability of the Decision Criteria, it became clear that NR had rightly (there being a lack of relevance where a decision is not required between conflicting bids), but possibly for the wrong reason (insistence on a proved expectation of rights) not tried to apply them to the ATW timetabling decision. Instead NR had attempted a further justification for rejecting an otherwise valid bid by reference to the operational factors considered by the SOAR Panel – concerns about performance on congested infrastructure, impact on service recovery and reputational risk.
- 6.4.7 I concluded that whilst it could have been possible to require NR somehow to try to justify these factors by forcing them into the conceptual framework of the Decision Criteria, there was no point. Notwithstanding references to the SOAR Panel taking the Decision Criteria into account this exercise had not been done at the time of their consideration nor otherwise within NR, and nothing would be changed by doing it now. NR's stated reasons for its rejection of the ATW bid were those generated by the SOAR Panel; this was clearly not attempting to undertake NR's contractual consideration of the bid pursuant to the Network Code, but exercising the strategic, political and economic functions of NR as 'System Operator' under European law.
- 6.4.8 The fairest conclusion to draw in these circumstances, as NR confirmed, is that legal, contractual entitlements under Part D may not have kept pace with developments in NR's role under European law. The contracts still provide that it is the TPR as currently applying that should deal with concerns about degrading performance, but NR now believes it has other wider considerations to take into account.
- 6.5 The published terms of reference of the SOAR Panel (Annex 1 to NR's Access Rights Policy Version 1.0 dated 23 September 2015) are primarily "To authorise sales of track... access rights... including any decision not to sell rights when sought through the Section 17/22A process", and to that end to check or consider a wide range of issues and matters, including consistency with "policy and any regulatory considerations" and "performance and deliverability issues". However they nowhere mention contractual compliance with operators' track access agreements incorporating the Network Code (nor, for that matter, consideration of the Decision Criteria). A decision by NR to reject a train operator's bid for Train Slots which are available and TPR compliant, on the basis solely of a decision by the SOAR Panel (according to its terms of reference) that it does not wish to "sell" the relevant rights, is likely to constitute a breach by NR of that train operator's track access contract.

6.6 Finally I would refer to extracts from two precedent determinations of previous Timetabling Panels that I believe support my conclusions:

6.6.1 In TTP257 (heard on 20 January 2009):

Paragraph 24 states: "...the Panel finds that

24.1 Network Rail is expected, even in its treatment of Spot Bids to *maximise use of Network capacity. This includes flexing of Spot Bids to maximise remaining "white space"* (National Rules of the Plan 2.6.8);" (author's emphasis)

Paragraph 26 states: "...the Panel notes, and reminds Network Rail that

26.1 it is, for the purposes of the operation of Track Access Contracts, and the related Network Code and Rules of the Plan provisions, a single, indivisible legal entity;"

6.6.2 In TTP324 (heard on 29 March 2010) Paragraph 36.1 notes as follows:

"36.1 The Decision Criteria only come into any force in those circumstances explicitly contemplated by the Network Code, where there is the potential need for Network Rail to exercise its discretion in relation to possible conflicts of priorities, for example

36.1.1 As between the Firm Rights of two or more Train Operators...;  
or

36.1.2 As between the Firm Rights of any Train Operator and those of Network Rail.....

In either case, recourse is to be had to the Decision Criteria as providing the benchmark for deciding which of several permissible courses of action is the better justified. ***The Decision Criteria cannot be prayed in aid as a reason for initiating a new policy, or for circumventing provisions within the Track Access Contract.***" (My emphasis)

## 7 General guidance and observations

7.1 Rule H51(j)(iii) contemplates a dispute determination including guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy. I offer some such observations here.

7.2 If NR is to continue to exercise the residual discretion over granting access rights to train operators (in NR's own expression, the "sale" of rights) that it assumes to itself through the processes of the SOAR Panel and otherwise, and even if as suggested it is supported by ORR in this exercise, then it seems imperative that the contractual processes developed in Part D of the Network Code to govern the timetabling process be operated distinctly and without influence from NR's internal governance structures. There is opportunity at all times for NR (or others) to propose and consult the industry on future change to Part D if it believes there is benefit, and such change may prove necessary in order to align the contract with prevailing circumstances.

7.3 In their present form, the Part D processes do not confer a discretion on NR to determine whether it wishes to "sell" Rights at all, whether on general grounds of caution as to potential network congestion, service recovery or industry reputation, or in any way otherwise than on the basis of compliance with the TPR. It is the function of the TPR to denominate the configuration and technical characteristics of services, and of their relationship with each other, that can safely and productively be accommodated within the known existing capacity and other parameters of the Network.

7.4 If in NR's view the TPR are not by themselves fit for this purpose, then NR should initiate and operate the Network Code processes for changing the TPR accordingly. The concept of the TPR is to produce a robust timetable.

7.5 The SOAR is an appropriate internal Network Rail process to assess its views on the granting of access rights in the wider context of its stewardship of the network as a whole, but it cannot override the contractual obligations to which NR is subject for the time being.

## **8 Determination**

8.1 Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, I **DETERMINE** as follows:

8.1.1 As a matter of legal entitlement: Network Rail has not demonstrated any technical reasons for claiming that ATW had no expectation of rights for the December 2015 Timetable; accordingly ATW was entitled to have its Access Proposal accepted by NR for, and therefore to have been granted, the inclusion of the Train Slots for the Airport Extensions in the December 2015 Timetable, subject to continued due compliance with the normal exigencies and processes of the Network Code governing the preparation of the Timetable and subject in particular to the eventual attainment, prior to operation, of Rights for the services in question.

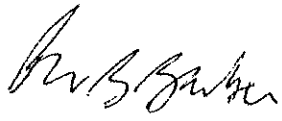
8.1.2 As a matter of legal entitlement: ATW is entitled to have its Access Proposal accepted by NR for, and therefore to be granted, the inclusion of the Airport Extensions in the May 2016 Timetable, subject to continued due compliance with the normal exigencies and processes of the Network Code governing the preparation of the Timetable and subject in particular to (a) revalidation of the services in question for continued compliance with the TPR, (b) application of the priority and other rules for decisions arising in the preparation of the Timetable as set out in Condition D4.2, and (c) the eventual attainment, prior to operation, of Rights for the services in question.

8.1.3 As a matter of remedy: mindful of the potential impact on significant numbers of advance purchase passengers and the disruption involved changing systems published information at relatively short notice before the Timetable change date in December 2015, and having regard to the agreement as to remedies reached between the Dispute Parties at the conclusion of the Hearing, I make no direction as to the inclusion of the Train Slots for the Airport Extensions in the December 2015 Timetable.

8.1.4 As a matter of remedy: I direct NR to include the Train Slots for the Airport Extensions in the May 2016 Timetable, subject to the same matters as are set out in paragraph 8.1.2 above.

8.1.5 As a matter of legal entitlement: under the Network Code as presently constituted and incorporated in Timetable Participants' Track Access Contracts, NR is not entitled to reject an otherwise contractually compliant Access Proposal other than in accordance with the relevant provisions of the Network Code for the time being in force.

8.2 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.

A handwritten signature in black ink, appearing to read 'Peter Barber', written in a cursive style.

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

**20 October 2015**



## Annex 1 to Timetabling Panel determination of reference TTP834

### RECORD OF EVIDENCE GIVEN AND ARGUMENTS PRESENTED DURING THE HEARING

#### Record of oral evidence given and arguments presented by the Parties during the hearing of dispute TTP834 on 6 October 2015

***Note: This Record is not designed to be a verbatim account of the proceedings but is intended to be a note of the evidence given and arguments presented to the hearing. It has been compiled from notes taken by the Access Disputes Committee Secretary at the hearing and has been approved by the Hearing Chair and Panel Members as being substantially accurate to the best of their recollection.***

Abbreviations used in this Record:

|          |  |
|----------|--|
| ATW      | - Arriva Trains Wales  |
| Northern | - Northern Rail  |
| NR       | - Network Rail   |
| ORR      | - Office of Rail Regulation (Office of Rail and Road from 16 October 2015) |
| SOAR     | - Sale of Access Rights  |
| TPE      | - First/Keolis Transpennine  |
| TPR      | - Timetable Planning Rules   |
| WTT      | - Working Timetable  |

Opening statement by ATW:

This reference has been brought by ATW under Condition D2 of the Network Code. This follows NR's decision not to include Train Slots between Manchester Piccadilly and Manchester Airport in the December 2015 Timetable.

We argue in our submission paper that ATW had at the time, and continues to have, a clear expectation of securing the track access rights to operate these service extensions. The service extensions were listed in ATW's Access Proposal which was submitted on the Priority Date.

In NR's submission paper they argue that ATW has not adequately informed them of the expectation of rights for the paths requested. ATW does not agree with this as NR has been fully aware of ATW's intentions since last December. This was when Chris Pearce, our Customer Relationship Executive, took our track access proposals to the London North Western Route's SOAR Panel. During this time there were many discussions with NR, including at the companies' monthly Directors' Liaison meetings.

The SOAR Panel's unwillingness to support ATW's track access proposals led us to prepare a Section 22A draft application for track access rights which we sent out for consultation in February this year. NR responded to the consultation and when we replied to their comments we made it clear that we intended to continue to work on our Section 22A application. Again this demonstrates that NR was fully aware of our expectation of securing the necessary rights.

In paragraph 4.1 of its submission paper NR refers to the May 2015 Timetable. The circumstances surrounding the publication, and subsequent withdrawal, of the paths in the May 2015 Timetable are not themselves material to this dispute but these references to the May 2015 Timetable process are included to demonstrate NR's early and continued awareness of ATW's intention to seek track access rights for these service extensions.

NR makes a point of the fact that ATW has not yet provided it with a revised timetable proposal for its consideration. This was alluded to in an email from ATW to NR in March. This further timetable work is solely to help support the overall industry business case. It is not ATW's intention to materially alter the timings of ATW's or other operators' trains as originally offered by NR for the May 2015 Timetable. That aside, ATW believes that it is NR, and not ATW, that has the duty to thoroughly evaluate whether or not it could meet ATW's expectations of rights, including the impact on the Working Timetable, and having due regard to the Decision Criteria. We do not believe that NR had explored all reasonable possibilities for accommodating ATW's Access Proposal before rejecting it. Operators rely on NR to determine the technical feasibility of meeting their aspirations for Train Slots having due regard to the Decision Criteria; NR has not explained to what extent it has done this.

In summary, we ask the Panel to determine that NR has incorrectly asserted that ATW has no expectation of access rights. ATW has demonstrated its clear expectations at each stage: it provided NR with information to inform the SOAR Panel; it consulted NR on its Section 22A application; and it submitted a fully compliant Access Proposal.

#### Opening statement by Network Rail:

This dispute centres on ATW's rejected Access Proposal for the December 2015 Timetable. NR's view is that this Access Proposal is not valid due to the lack of information regarding the expectation of rights for the paths into Manchester Airport. The paths sought through the Access Proposal were therefore rejected on this basis.

The Access Proposal from ATW showed that they had no firm rights for the requested extended paths. The timetable planning team were aware of an earlier decision by NR not to support the sale of the requested access rights for the paths into Manchester Airport and the Access Proposal gave no indication of the likelihood of ATW gaining rights for the December 2015 Timetable.

NR is aware that ATW submitted a s22A application for rights to industry consultation, to which we responded explaining why NR does not support the sale of these rights.

When the Access Proposal was submitted for the December 2015 Timetable ATW were aware that NR did not support the sale of rights and ATW gave no indication regarding progress towards gaining rights.

NR responded to the Access Proposal on 18 March with a letter stating that there was no expectation of rights and therefore rejected the paths.

ATW responded to NR on 24 April, five weeks after the paths were rejected, stating that they would undertake further timetabling work and would re-engage with NR when they

wanted to progress the matter further. Since then, NR has heard nothing other than this referral of the matter to dispute.

In taking the decision, NR asked the following questions:-

Does ATW have rights? Answer: No.

Does NR wish to sell the rights? Answer: No.

Did ATW advise NR regarding progress of the s22A application following industry consultation, i.e. towards an expectation of rights? Answer: No.

Without any indication of firm rights or a clear expectation of rights, and with knowledge that NR was not supporting the sale of rights, the timetable planning team rejected the Access Proposal for extended paths into Manchester Airport for December 2015 on the basis that the Access Proposal was not valid in relation to the extended paths, because there was no expectation of rights.

Opening remarks by TPE:

We believe the determination stated as sought in ATW's written submission to the Panel is different from that requested by them in the opening statement we have just heard.

Opening remarks by Northern:

We have nothing we wish to say at this stage.

Questioning by the Hearing Chair and Panel Members and answers by the Parties:

Q1 We wish first to check that we have understood the chronology of events correctly. Are we right in understanding that ATW emailed in February saying it would allow NR to withdraw the proposed service extensions from the May 2015 Timetable; that after that ATW put out its consultation for rights commencing with the May 2015 Timetable; then NR responded to ATW's consultation; then in April ATW replied to NR's response; then nothing happened until the formal Offer in June and registration of this dispute; and then nothing further occurred until ATW asked in September for a Panel hearing?

A1 (NR) That's agreed.

(ATW) In our February email we only meant suppressing putting the trains into the public timetable for May.

(NR) We took ATW's February e-mail as an instruction to take ATW's extensions out of the WTT so we returned the TPE and Northern trains to their original times before they were flexed to accommodate ATW. There were two e-mails from ATW: one on 19 January from Chris Dellard saying to suppress passenger publication and one on 3 February from Mike Thomas. They used different words.

(ATW) It is our understanding that NR was not legally entitled to remove the extensions from the WTT.

- Q2 (to ATW) Do you agree that the e-mail of 3 February could be read as suggesting that the extensions be removed from the WTT?
- A2 (ATW) It could be read that way but it was not intended to be a formal withdrawal of the Access Proposal.
- Q3 Was there any other discussion between you?
- A3 (ATW) Nothing that was documented.
- (NR) Because we took the e-mail dated 3 February as instruction to remove the extensions from the WTT, we sent confirmation on 10 February with the F3 prints. Nothing came back from ATW to say we had misunderstood their intention but 3 days later – on 13 February - there came an e-mail from ATW saying they were progressing a s22A application.
- Q4 (to NR) Why did you adjust the TPE and Northern trains?
- A4 (NR) They had been flexed to accommodate the ATW extensions so we decided to return them to how they had been bid.
- Q5 (to ATW) Your e-mail of 13 February was still in relation to the May 2015 Timetable?
- A5 (ATW) Yes.
- Q6 (to ATW) So the e-mail on 3 February was incorrect?
- A6 (ATW) We accept it was badly worded, it was still our intention to seek the extensions. We therefore proceeded with the s22A consultation.
- Q7 (to NR) How did NR view the s22A consultation which came on 13 February for the May 2015 Timetable?
- A7 (NR) We understood they were seeking rights for May 2015 but would otherwise accept December 2015.
- Q8 (to NR) So whether or not you thought ATW's e-mail of 3 February said to take the extensions out of the May 2015 WTT, you took the s22A consultation as still indicating their wish for rights from May 2015?
- A8 (NR) Yes, and otherwise from December. As we could not support the application for May, we replied accordingly.
- Q9 (to NR) Firm rights are not required before the Priority Date, are they?
- A9 (NR) No.
- Q10 (to ATW) Are we correct to understand that your s22A application indicates intention that the new rights would last to the end of your Track Access Contract and not just for the duration of the May 2015 Timetable period?

- A10 (ATW) Yes.
- Q11 (to NR) In relation to the e-mail of 3 February, how would it have been established within NR as to what it was that ATW wanted NR to do?
- A11 (NR) We suppose that the person receiving the e-mail read it as requesting the action which he did and he was satisfied regarding his correctness when there was no adverse response from ATW.
- Q12 (to NR) Would you expect a compliant Access Proposal to be supplied by ATW following withdrawal of the trains between Manchester Piccadilly and Manchester Airport, i.e. adjusting the paths back to how they were?
- A12 (NR) Yes, that makes sense. It would make things clear.
- Q13 (to NR) The e-mail sent to Mike Thomas in ATW on 10 February with the F3 prints says "I've been asked to start/terminate the Manchester Airport - Llandudno trains at Manchester Piccadilly". In clear contractual terms, was this saying that the e-mail from Mike Thomas on 3 February was taken as withdrawing the extensions from the May 2015 WTT?
- A13 (NR) Yes.
- (ATW) We have a well established template format which is used for Variation requests; that format was not used by us here.
- Q14 (to ATW) If approved by ORR, you expect the content of the proposed Supplemental Agreement to continue to the end of your Track Access Contract?
- A14 (ATW) Yes.
- Q15 Is that Supplemental Agreement proposal still open and active?
- A15 (ATW) It has not yet been submitted to ORR but we will be doing so.
- (NR) We can confirm that it is in ORR's list of expected Supplemental Agreement submissions.
- Q16 (to Northern and TPE) Why did you bring Timetabling Disputes - TTP764 and TTP765, which were subsequently withdrawn - in relation to the inclusion of ATW's extended trains in the New WTT Publication for May 2015?
- A16 (TPE) Our Train Slots were reverted to what we had both applied for so we were able to withdraw our disputes. Our disputes were about the application of the Decision Criteria by NR - the Offer accommodated ATW's services whilst flexing ours and extending some of our journey times. The disputes were about use of the Decision Criteria in the exercise of NR's flexing rights and not about priority of rights.
- Q17 (to ATW) You lodged this Timetabling Dispute on 24 June and asked on 9 September for a Panel hearing to be arranged. What happened in between those dates?

- A17 (ATW) We had been undertaking timetabling work ourselves to provide information to support the industry business case.
- Q18 (to ATW) Was there any correspondence between the Dispute Parties, i.e. yourselves and NR?
- A18 (ATW) No.
- Q19 (to ATW) Any discussions?
- A19 (NR) We are not aware of any.
- (ATW) The matter was raised in routine discussions between train planners; there are some informal Minutes of those meetings.
- (NR) There have been various changes of personnel within the relevant team; we are unable to confirm or deny just now that there were discussions. We have not got the Minutes here.
- Q20 (to ATW) So you were yourselves doing further work on the Timetable?
- A21 (ATW) No, not exactly. NR had already validated the paths. We were working on the business case, covering such matters as revenue abstraction from other operators.
- Q21 (to ATW) Was this information intended to inform discussions with ORR and did you discuss it with other operators?
- A21 (ATW) Yes, and there was some sharing of the information to alleviate their concerns regarding revenue. We have not yet shared the information with NR.
- Q22 (to ATW) Has anything else been shared with NR during this time?
- A22 (ATW) No.
- Q23 (to NR) Has anything changed since May to affect your decision regarding the December 2015 Timetable?
- A23 (NR) No, and if the December 2015 Timetable was to look like the May 2015 which included the extended ATW services, we would expect concern again from Northern and TPE about the application of the Decision Criteria in relation to flexing and journey time extensions.
- (TPE) We would certainly have commercial concerns and we would also have an issue regarding conflict with journey time commitments in our Franchise Agreement. There has been a tightening of journey times required by the Department for Transport since shortly prior to the May Timetable.
- Q24 (to TPE) Was there a better way to get ATW's trains onto the graph for May 2015 or was it your view that ATW's trains should not be included?

- A24 (TPE) We are not sure about the graph as we are not aware of any other work being done on the subject.
- Q25 (to NR) We turn now to the issue of whether ATW had an 'expectation of rights', both for the purposes of identifying a valid Access Proposal under Condition D2.4.1(a) and in relation to allocation of priority under Condition D4.2.2(d)(iii). You seem to be saying that expectation of rights is in effect something that the Timetable Participant must demonstrate has been substantiated somehow and you also seem to take it as an ingredient of the required content of an Access Proposal under Condition D2.5.1. How do you think you can get expectation of rights substantiated by a Timetable Participant within the lead time involved in compiling the WTT? In this instance, would you have expected to see the s22A application actually submitted to ORR?
- A25 (NR) The s22A proposal was not being progressed at the time of the Access Proposal submission and we had received no indication as to when it would be submitted or if it would be within the timescale for obtaining rights for May 2015.
- We have to be subjective rather than objective. There was a time when operators could apply for rights more freely but NR now has a more congested network and we have to take into account more considerations, so when it comes to Condition D2.4.1 we cannot just check whether a proposal is TPR-compliant.
- Q26 (to NR) So what do you say that an expectation of rights means in this context? You seem to say it is more than just an operator saying "we have an expectation of rights".
- A26 (NR) Even though it may not be part of the contractual Part D process, we have other considerations - not only regulatory – where we decide that we do not want to sell rights. We expect to see ORR taking an interest and for progress to be seen between the operator and ORR; in this case, we have not seen any progress.
- Q27 (to NR) So setting aside those other considerations, are you saying that some demonstrable level of interaction with the regulatory process for granting rights is necessary before you would consider there to be a legitimate expectation of rights? Do you expect to see that an application has been made to ORR?
- A27 (NR) Yes, or at least movement towards doing so.
- (ATW) At the time, we were just consulting with the industry and there was time to progress the formal application; we had a full expectation of rights.
- (NR) We need to differentiate what is an aspiration for rights rather than an expectation of rights. We say that ATW only had an aspiration.
- Q28 (to NR) So you do seem to be saying that the operator must have made a formal application to ORR?
- A28 (NR) Not necessarily - it is subjective. But if we had known that such an application had been made and ORR seemed minded to grant it, then we would have put the trains into the Timetable.

Panel Critically, we are not evaluating ATW's expectation of rights at that time but NR's view of ATW's expectation.

(NR) Then it comes back to ATW's Access Proposal saying that at that time they did not have the rights.

Q29 (to ATW) But are we correct in understanding that informal consultation for the rights started on 13 February and that the Access Proposal was submitted on 6 March?

A29 (ATW) Yes. Industry consultation is a necessary step before we are allowed to make application to ORR.

Q30 (to NR) And are we to understand that you are not saying that you must have seen an actual application to ORR?

A30 (NR) We do not have a definition of expectation of rights.

Q31 (to NR) So with consultation on rights having started, what gave you confidence that ATW did not have an expectation of rights, no matter how low that expectation might be?

A31 (NR) We have indicated the three questions we asked ourselves in our opening statement; it was by that means that we concluded that ATW had no expectation of obtaining the rights.

Q32 (to NR) So with all that had gone before, how did you reach that decision about the December 2015 Timetable?

A32 (NR) There had still been no application to ORR to gain the rights. This marries up with criteria in our internal assessment process.

The converse is that if an operator has applied for rights, we would have to offer it paths.

Panel In that situation you would have had to consider your offer in terms of priorities.

Q33 (to NR) Can we still take it then that you are not asserting that an application does in all cases require to have been submitted to ORR? It is a bit nebulous and we seem somewhat to be going round in circles, but your standpoint of what is required to constitute an expectation has appeared overall to lie somewhere on the spectrum between at one end an operator having a mere stated aspiration and at the other end the operator having actually made a full formal application to ORR?

A33 (NR) Yes.

Q34 (to ATW) And ATW would say they had started consultation so they were positioned somewhere in that area of development of the proposition?

A34 (ATW) Yes.

Q35 (to NR) You also say you must be willing to sell rights, even if paths have been validated, and that that means a willingness after taking into account a whole variety of considerations. Where is this requirement to be found in the Network Code?



- A35 (NR) It is not in the Network Code in specific terms but it could be said to be within the Objective in Condition D4.6.1.
- Q36 (to NR) Before moving on to consider the Decision Criteria, including the Objective and the Considerations, we would like to put to you the proposition that the position under the Network Code is actually the converse of what you have just suggested. The Network Code in Condition D4.2.2 specifically implies an overriding principle that you do not have the right to refuse an otherwise compliant Access Proposal; it says "Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it" etc. And supplementary to that, we would like to ask on what contractual basis in your Opening Statement you set out the question "Does NR wish to sell the rights?" From where do you derive the contractual entitlement not to sell an access right in cases where there is capacity and no operational conflict?
- A36 (NR) In relation to Condition D4.2.2, there would be reason for great concern if we have to fill up the network and never turn anything down. We believe Condition D4.2.2 goes back to Conditions D2.4 and D2.5, and our decision-making is then informed by the Decision Criteria. NR must have an overview of its business and this is where the SOAR Panel comes in; that Panel uses the Decision Criteria in considering individual requests across the network. However, perhaps instead of saying "sell rights", we ought to say "support rights".
- Northern and TPE have said they are concerned about getting extended journey times and we are also concerned about performance on this congested part of the network.
- Q37 (to NR) But we are trying to understand the situation – including the role of the SOAR Panel – as it stands at a point in the process before the Decision Criteria come to be contractually applied. From what you now say, and from its own published remit and policy, it certainly seems that the SOAR Panel is controlling the availability and sale of access rights. We need to understand, in answer to the previous question, where and on what basis it is provided contractually that NR can decide not to sell rights. We can understand how these matters at some stage become contractually linked to the Decision Criteria, but do you see that in this case NR was operating contractually at different stages of the timetable development process?
- A37 (NR) The process involved two parts of NR. One part was asking "do we want to do this?" and another part was answering. One of the parts has to talk to the Route, which has the knowledge regarding performance, etc.
- Q38 (to NR) Does this not just amount to NR talking to itself? How is the reliance of one part of NR upon another reflected in the contractual provisions?
- A38 (NR) At some point in the process NR has to consider its ability to meet its contractual obligations and its regulatory responsibilities. The LNW Route is operated on a congested part of the network and the SOAR Panel considers these things with implicit guidance of the Decision Criteria and looks at the cumulative outcome of proposals.
- Q39 (to NR) Is that not what the TPRs do?
- A39 (NR) We cannot fill up the network with TPR-compliant trains.

- Q40 (to NR) Is that not the ORR's decision?
- A40 (NR) Yes, but that brings us back to expectation of rights when we are planning services.
- Q41 (to NR) Is that not second-guessing ORR or undermining ORR's role?
- A41 (NR) No. We have learnt lessons from other cases where ORR has granted rights which we have not supported. It is a very subjective area. In this ATW case, the application has not gone forward from ATW so potentially it will not be successful.
- Q42 (to NR) The last dated piece of evidence before us is ATW's reply to NR dated 24 April. Is that not evidence of intention to put an application to ORR? Surely it is difficult for NR to refute that as an indication of expectation of rights?
- A42 (NR) Yes, but we would have expected to have seen an application made to ORR very quickly after that. ATW said on 24 April "we will be in touch" but nothing has been heard.
- (ATW) Our further timetable work was in response to points from other stakeholders. We knew that NR had validated and offered compliant Train Slots earlier in the year so we knew they were available. Our effort was on matters such as revenue.
- Q43 (to ATW) So what delayed the process?
- A43 (ATW) Consultants were appointed for some of the work; it took them longer than expected and their output was only received in recent weeks so we are now in a position to move forward to ORR.
- Q44 (to NR) So with this knowledge of a potential s22A application about to go in to ORR for these rights now, would you say that ATW does not have expectation of those rights and will not be successful now?
- A44 (NR) We would not expect the application to be successful if not supported by NR.
- Q45 (to NR) And is that based on recent experience?
- A45 (NR) Having learnt that the timetabling work done by ATW was in response to other operators and has been focussed on revenue analysis, we do not think rights would be granted by ORR without NR support.
- Q46 (to NR) You say in your Opening Statement "this Access Proposal is not valid due to the lack of information regarding the expectation of rights for the paths". Condition D2.5.1, which deals with the required content of an Access Proposal, does not expect a Timetable Participant to state anything about expectation of rights and there is no mention of rights anywhere in Condition D2.5. It appears to us that the pro forma table has been completed correctly in accordance with Condition D2.5.1. A bid that is compliant under Condition D2.5.1 assumes some priority. If compliant at the point when submitted, surely an Access Proposal must be accepted?
- A46 (NR) But Condition D2.5.2 says that we can ask for further information.

- Q47 (to NR) If information was required under Condition D2.5.2 but not provided, then the Access Proposal could be non-compliant. Has ATW not supplied any information which you have asked for?
- A47 (NR) We have no answer to that. We have stated that we considered it was not a valid Access Proposal because ATW had no expectation of rights. We now think the Panel is correct and that the Proposal was valid against D2.5.1 and D2.5.2 as there is nothing outstanding which was asked for.
- Q48 (to NR) Let us turn then to the issue of application of the Decision Criteria. Setting aside the question of whether or not the Access Proposal was formally valid in the sense of being compliant, at any point of the process of making your decision not to put ATW's requested extension paths into the New WTT Publication for December 2015, did you consciously apply the Decision Criteria, and if so, how?
- A48 (NR) No we did not apply the Decision Criteria, because we believed we had not reached that point in our considerations, as we did not go any further than the point of admitting an Access Proposal under Condition D2.4.1 in the process.
- Q49 (to NR) So how did the issue of actually assessing whether or not ATW had an expectation of rights come into the equation? On whom is the evidential burden to demonstrate whether or not the operator has an expectation of rights within the meaning of Condition D2.4.1? Which comes back to the question of what, if any, information does a Timetable Participant have to put forward to show that it has some reasonable expectation of obtaining rights. Is it for operators to show some sort of positive proof or is it for NR to negate it by saying "you have not done enough to demonstrate your position"?
- A49 (NR) The burden of proof is a difficult question because, as we have seen, there is no definition of expectation of rights, so this hearing is probably setting down some case law. NR believes the onus is on the operator because it is the operator who applies for the right, who fills in the Form P to ORR and who initiates matters when seeking to acquire or change rights. NR would prefer to be able to support an operator when it wants to obtain or change rights.
- Q50 (to NR) So what does that mean NR thinks it may actually require in order to have confidence regarding an operator having an expectation of rights?
- A50 (NR) An agreed approach to ORR or evidence of the operator working to address issues raised by NR in relation to the desired rights.
- Q51 (to NR) And therefore, why in this case is NR saying that ATW had no expectation of rights?
- A51 (NR) Because for May 2015 there had already been discussion with ATW but our points had not been addressed or discussed further with us, and we also knew that other parties were concerned about the proposal: therefore we could not support ATW and we considered that any application for rights would not succeed.

Further, the paths were rejected by us so we considered this in its own right to be sufficient basis for concluding that ATW had no reasonable expectation of rights; it all came to an end with ATW saying they would come back to us but nothing being heard.

Panel The reason for asking these recent questions was to see if there might be any residual reason for impugning the initial validity of the Access Proposal to support rejecting it, by reference to an implied requirement for expectation of rights under Condition D2.4.1. If NR is not able to reject the Access Proposal because it is not valid from the word "go" as failing to meet the expressly listed requirements under Condition D2.5.1, then we believe that an initial rejection cannot be valid for any other reasons.

(NR) Yes, and that brings us back to our opening position about expectation of rights.

In terms of the process, we would expect to have an agreed approach with the operator in relation to any concerns we have expressed. If we get to the stage of the form being put out for consultation regarding a s22A application, we believe the onus is upon the applicant to address any concerns which have been raised and show that to the ORR. So if a proposal has gone out to consultation and we do not see our concerns addressed within it, we take the view that there can be no expectation of rights.

Q52 (to NR) But for the May 2015 Timetable, NR offered the paths to ATW so why not for December 2015?

A52 (NR) For May, NR had not made the decision not to sell the paths. We had, however, articulated our concerns in January.

Q53 (to NR) So what changed?

A53 (NR) ATW had not shown attention to our concerns.

Q54 On what date did NR respond to ATW about May 2015?

A54 (NR) 12 March.

Q55 And when did NR turn down the proposal for December 2015?

A55 (NR) 17 March.

Q56 (to NR) You describe a process of developing rights by agreement with an operator. Would that activity not put an expectation into the operator's mind of obtaining those rights? And whether it results in a s17 or s22A application, NR would still be a consultee?

A56 (NR) Yes.

Q57 (to NR) How, during your preferred collaborative process, would you reckon to counter your concerns about reputation?

A57 (NR) We would discuss it as matters progress.

- Q58 (to NR) But notwithstanding that this was a technically valid bid, you still took the view that NR can scotch the idea of someone applying through s17 or s22A by NR not supporting it? Are you saying that because you say "no", there can be no expectation of rights?
- A58 (NR) No, on occasion we have been to the SOAR Panel and the matter has been decided differently.
- Q59 (to NR) You say you had raised concerns with ATW before 12 March?
- A59 (NR) Yes, back in January. They finally came back fully on 24 April.
- Q60 (to NR) But you had taken the trains out of the May Timetable on 17 March?
- A60 (NR) Yes.
- Q61 (to NR) So by 17 March you had formed the view that "we do not want to sell the rights and we will oppose the application so they will not get the rights"?
- A61 (NR) But we had had no visibility of any progress.
- Q62 (to NR) So on 17 March you said you were not accepting the Access Proposal but only 5 days earlier you were still working with ATW on a s22A application. What happened in the meantime to change your mind so quickly? Your letter dated 18 March attached to your e-mail of 17 March said that it was an incomplete Access Proposal in that ATW had no expectation of rights; it thereby indicated it was not a technically valid Access Proposal. It therefore seems in effect that through the substance of that communication and the way NR put it, it was saying "we do not think you have an expectation of rights because your application for rights is not supported by us" – and that was irrespective of the possibility that they might get them from ORR?
- A62 (NR) If we see no application by the operator to ORR and we see no indication about the matter from ORR, we have to take a view. If we cannot support it, we consider that the operator will not obtain the rights. But also in this case, we did not know the progress being made with development of the s22A application.
- Q63 (to NR) But ATW only went out to consultation on 12 March?
- A63 (NR) We had to take a view on progress with the s22A application.
- Q64 (to NR) Is it correct that for a s22A application, an operator does not have to first reply to you about your concerns?
- A64 (NR) Correct, but it can help if they do work with us.
- Q65 (to NR) What would it have taken for ATW to satisfy your reputational point?
- A65 (NR) ATW submitted its Access Proposal on 5 March and we responded on 17 March. The timetable preparation period is 14 weeks long and we concluded that this aspect was final so far as NR was concerned. We have to have regard for the accuracy of the public timetable and its publication timescale.

- Q66 (to NR) Did not the situation in March ring any alarm bells for you to do more work before the Offer date?
- A66 (NR) Put like that it seems that we decided the matter in a short time but discussions had been going on between us for many weeks before this.
- Q67 (to NR) Does it not still come down to the fact that you seem to be saying that because ATW did not keep actively engaged in dialogue with you confirming that they were going ahead with their s22A application, you therefore somehow became entitled to deny their expectation of securing rights?
- A67 (NR) We assumed, whether rightly or wrongly, that they were working on the concerns raised by ourselves or others.
- Q68 (to NR) And that led you to conclude that they had no expectation of rights?
- A68 (NR) We made the decision in good faith.
- Q69 (to NR) We have somehow reverted from considering the Decision Criteria to discussing expectation of rights. In case we are wrong regarding the issue of initial validity dependent on expectation of rights, can we now return to looking at your stated reasons for otherwise rejecting what might have been a valid bid, i.e. congestion, impact upon performance in the area and reputational risk – the last of which appeared to be a concern about putting new services into the timetable then withdrawing them a short while afterwards. For such reasons to be contractually appropriate for rejecting or deprioritising an otherwise valid bid, they must fall within the Decision Criteria. So if you did mention the Decision Criteria during your discussions with ATW, how was your rejection expressed within the terms of the Decision Criteria at that time, and if this was not done then, how do you now express your reasons?
- A69 (NR) Reputation is not clearly within the Decision Criteria but it is an important matter anyway. Regarding performance and journey times, we do not think we discussed them with ATW at the time but we are satisfied that performance falls within the Decision Criteria. The area concerned is a very busy part of the railway network and we have to meet targets set by ORR for Control Period 5.
- Q70 (to NR) What are the consequences of not meeting performance targets?
- A70 (NR) Fines; some of significance have already been levied for Control Period 4. As a company we are reducing the number of delay incidents but consequential delays are going up because the network is so much busier; we think this is covered by Consideration (c) of the Decision Criteria. Manchester Piccadilly is the third ranking performance problem area nationally for secondary or reactive delay. Also, by flexing, we would be extending journey times for some other operators.

By increasing delay in the Manchester area, consequential delays can spread North, South, East and West; please see Appendix H of our submission, where we have shown performance figures in the Manchester area over a period of time.

- Q71 (to NR) The Decision Criteria are usually brought into play only when comparing competing valid bids. However, it would still be interesting to learn your views regarding the other Decision Criteria "Considerations", please. Let us remember that we are exploring the Decision Criteria to discover whether or not they are contractually applicable to an otherwise valid and non-conflicting bid, after considering the issue of validity based on expectation of rights. It is a matter of achieving the Objective, informed by applying the Considerations all together.
- A71 (NR) Meeting ORR's targets is within Consideration (c) and within the overall Objective in Condition D4.6.1, which could also cover reputation.
- (ATW) Other Decision Criteria which are relevant could be (j) and (b), with (d) also for passengers from North Wales.
- Q72 (to NR) Even if the Decision Criteria are relevant in substance, how do you say they are contractually relevant to this case; at what stage in the process do you think it was incumbent upon you to apply them?
- A72 (NR) We believed, because there was no expectation of rights, that the Decision Criteria were not contractually relevant.
- Q73 (to NR) If you did not consider the Decision Criteria to be contractually relevant, why mention them in paragraph 4.7 of your submission to this hearing? The implication from that is that you did use the Decision Criteria, or at least think you should have used them.
- A73 (NR) The mention highlights the role of the SOAR Panel in using the Decision Criteria to assess the saleability of rights at the start of their process. The train planners did not use the Decision Criteria in this ATW matter.
- Q74 (to NR) But the decision of the SOAR Panel was couched in terms of sale of access rights rather than availability of Train Slots?
- A74 (NR) The SOAR Panel needs to look at the position nationally and not take a slice-by-slice approach to the applicability of Part D.
- Q75 (to NR) So is it the position now that NR seeks to take the overall strategic view, whilst it is ORR which ends up taking the slice-by-slice view when awarding rights?
- A75 (NR) NR has the role of developing the network as System Operator under European law; not every EU country has a regulator like Great Britain so under European law it is the System Operator that has to make decisions like these.
- Q76 (to NR) So is it fair to say that legal, contractual entitlements under Part D have not kept pace with developments in European law?
- A76 (NR) Potentially. The contracts says it is the TPRs as currently applying that should deal with concerns about degrading performance, but NR has other wider considerations to take into account.

- Q77 (to NR) Are you saying that the Manchester Piccadilly to Airport route is pretty much chock-a-block so anyone wanting extra services cannot expect them even if they are TPR compliant?
- A77 (NR) Yes - we are thinking of declaring it "congested infrastructure". Interventions are planned to alleviate the situation, such as extra tracks at places along the route and an extra platform at the Airport station.
- Q78 (to NR) But is it not already intended that the future new Calder Valley service will be an additional user of the route?
- A78 (NR) Yes, but that is dependent upon the Ordsall Chord being built.
- Q79 When do the current Northern and TPE Track Access Contracts end?
- A79 (Northern) The present franchise runs to December 2016. There is currently a s17 application with ORR for a 10 year Track Access Contract for the new franchise; this includes certain journey time protections.
- (TPE) Our position is similar to Northern's.
- (NR) The Department for Transport is telling franchised operators to get as many rights as they can whereas ORR is telling us to negotiate more flexible rights and more quantum rights in order to get down to a more manageable position.
- Q80 What is happening regarding ATW's service to Manchester Airport in May 2016?
- A80 (ATW) That is on hold pending the outcome of this hearing.
- Q81 What practicalities would be involved if the extended ATW services were to now be included in the December 2015 Timetable?
- A81 (NR) It would necessitate a re-write of the timetable, with flexing of Northern and TPE services as done earlier in the year. The offered train times have already been advertised to the public so amending for ATW would affect passengers buying tickets right now.
- (TPE) Reservations are already open for advance purchase sales.
- (Northern) The new December timings have already been included in journey planners and they are already being affected by engineering works.
- Q82 Can we have a sense of the numbers of passengers involved with advance purchases at present?
- A82 (TPE) In their hundreds currently, perhaps around 300.
- (NR) This number would grow because it would take some 3 weeks to get the various systems changed.



(Northern) Many of the trains in the Manchester area, including those to and from the Airport involved in this dispute, will also be affected by major ongoing works at Farnworth Tunnel, with additional STP (Short Term Planning) variations.

(NR) Also, we would not want to publish trains until we know the outcome of ORR's consideration of a s22A application.

(Northern) We are comfortable with the Slots as offered to us by NR in the December 2015 Timetable Offer.

The Chairman called an adjournment at this point to enable the Dispute Parties to consider their respective positions and remedies sought, having regard to what had emerged in the Q&A so far.

Closing remarks (following adjournment)

By NR: In view of the points discussed regarding the impact for train planners and passengers if ATW were to be put in a position to introduce the service extensions in December 2015, we have agreed that it would be sensible for NR and ATW to work on introduction in May 2016, subject to the attainment of rights.

By ATW: We acknowledge that there is not a lot of time before starting the December 2015 Timetable and not a lot of time to put an application through ORR, so it is now appropriate to focus on May 2016.

Q83 (to ATW) So do you still want a determination from this hearing - which might confirm as a matter of legal entitlement that NR should have included Train Slots for your extended service in the New WTT Publication for December 2015, but without actually directing NR now to do so?

A83 (ATW) Yes.

Q84 (to ATW) With regard to the May 2016 Timetable, what would you now look for being expressed by way of a remedy or direction, subject to obtaining rights?

A84 (ATW) So far as we know, some Slots are still available so we would expect to have them and would like the determination to say that we are contractually entitled to them.

(NR) We would have to re-validate to check if the identified Slots are still TPR-compliant or able to be made TPR-compliant.

Panel: The determination may give ATW a level of priority for May 2016 which is slightly above some subsequent bid.

(ATW) The trains are already in our bid for May 2016.

(Northern) In the process of incorporating the ATW Slots into the May 2016 Timetable, we would seek that NR works with Northern and TPE to see what the optimum outcome might be.

(TPE) We would expect that the determination might confirm a technical error by NR but to indicate that integration of ATW's extended services into the May 2016 Timetable be progressed as part of the normal timetable development process which has already started.

Following a further adjournment the Hearing Chair closed the hearing by giving the parties an outline of the intended decision.

## Annex 2 to Timetabling Panel determination of reference TTP834

### EXTRACTS FROM THE NETWORK CODE, PART D

#### 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.

## 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 3 to Timetabling Panel determination of reference TTP834

### EXTRACT FROM THE NETWORK CODE, PART D

#### 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.