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## **TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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### **Determination in respect of reference TTP95A**

*(following a hearing held at Central House, Euston on 8<sup>th</sup> September 2006)*

#### **The Panel**

**Simon Barrett:** elected representative for Non-Passenger Class, Band 2

**Graham Owen:** elected representative for Non-Franchised Passenger Class

**Mark Pawson:** appointed representative of Network Rail

**Andrew Pennington:** elected representative for Franchised Passenger Class, Band 3

Panel Chairman: **Bryan Driver**

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

1. First Greater Western Ltd (FGW) asked the Panel to find that Network Rail Infrastructure Ltd (Network Rail) should provide two Train Slots per hour for an aspirational train service between Reading via Redhill and Gatwick in the December 2006 Working Timetable.
2. The Panel noted that the dispute was brought under the provisions of Network Code Condition D5.1.1(b) “ *the acceptance or rejection by Network Rail of any bid*”, and therefore was properly a matter for a Timetabling Panel.

#### **The Panel’s findings of fact in respect of the Dispute**

3. FGW had bid, in accordance with the provisions and timescales laid down in Network Code Part D, for Train Slots corresponding to a regular two trains per hour (2Tph) service between Reading via Redhill and Gatwick.
  - 3.1. FGW stated that this level of service had been a commitment that it had given when bidding for the Greater Western Franchise.
  - 3.2. FGW stated that at the time of making the commitment in respect of its franchise bid it was aware that Firm Rights existed for one Train Slot per hour, but not for a second.
  - 3.3. Network Rail stated that it had been aware of the ambitions of FGW, at the time of its franchise bid, in respect of an increased frequency service for the Reading via Redhill to Gatwick service. However, no commitments had been given as to the feasibility of such a proposal.
  - 3.4. FGW’s Track Access Contract still did not incorporate Firm Rights to more than One Train Slot per hour between Reading via Redhill and Gatwick.
4. The main challenges associated with the operation of a through Reading via Redhill to Gatwick service relate to the need for trains to reverse at Redhill, and for the provision of Train Slots that fit in with the established pattern of services on the Redhill-Gatwick section of the Brighton Main Line.

There are also problems associated with the allocation of suitable platforms, at Gatwick, for a service turnaround involving passengers with a larger than usual allocation of luggage, and, at Redhill, for the reversal of direction.

5. The Brighton Line Route Utilisation Study, and the associated debates and consultations within the Industry, had suggested changes that would have significantly affected the level and mode of utilisation of the Redhill-Gatwick section of the Brighton Main Line. However, no decisions had been taken on the adoption of the findings of this study, nor on the ways in which Firm Rights might in future be available to the range of Train Operators currently operating over the line.
6. Network Rail had carried out extensive studies in an attempt to identify practicable ways to cater for a second train per hour to meet FGW's aspirations; the Panel was given evidence to support the contention that this exercise had been allocated significant Train Planning resources, (Network Rail estimated approximately 300 man-hours). Network Rail had concluded that none of the options considered delivered robust Train Slots compliant with the Rules of the Plan, for a second hourly service from Reading to run beyond Redhill to Gatwick, and that therefore
  - 6.1. Network Rail was not prepared to offer any Train Slots corresponding to FGW's aspirational bid in respect of a second hourly service, on the grounds that it had not been able to identify any technically feasible and robust path; and therefore that
  - 6.2. Network Rail would oppose any application, by FGW, for any amendment to its Track Access Contract, to give it Firm Rights in relation to the December 2006 Timetable for a second hourly service from Reading to run beyond Redhill to Gatwick.

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

7. The Panel considered the points made by FGW in respect of the commitments that it carried under its Franchise Agreement in respect of the frequency of service between Reading and Gatwick. The Panel noted FGW's contention that Decision Criterion Network Code D6(b) acknowledged "*the necessity or desirability of...*" "*..enabling a Bidder to comply with any contract to which it is party (including...the franchise agreement to which it is a party)...*". The Panel found that this obligation to a third party does not, of itself,
  - 7.1. confer upon the Bidder any rights of Access that are not already incorporated into a Track Access Contract that has been approved by the Office of Rail Regulation;
  - 7.2. require Network Rail to act in any way that might be to the detriment of the performance enjoyed by other Train Operators, particularly those with approved and documented Firm Rights, and
  - 7.3. provide any means of getting round, or over, physical limitations within the track layout that preclude the plotting of an appropriate Train Slot.
8. The Panel found that Condition D3 grants a clear status to aspirational bids in respect of the development of a specific Working Timetable, and sets standards in respect of how Network Rail should treat them:
  - 8.1. Condition D3.2.3 "*priorities in compiling the First Working Timetable*" sets out that bids for Trains Slots that are not supported by Firm Rights (D3.2.3(a)), or which do not correspond to Train Slots supported by Firm Rights that have reached their term, but are expected to be

renewed (D3.2.3(b), shall, provided that they have been notified “on or prior to the Priority Date in accordance with Condition D3.2.1(c)”, be dealt with as a third tier of priority.

- 8.2. This status derives from the presumption that where there are no rights, there are assumed to be “*expectations of rights*”, i.e. that Network Rail is carrying out a technical assessment to confirm the feasibility of conceding rights.
- 8.3. Network Rail is placed under specific obligations in respect of the thoroughness of any evaluation that it may be required to undertake to establish whether or not it can meet “*expectations of rights*”.

8.3.1. Condition D3.2.2 requires that the Working Timetable

8.3.1.1. “*includes ...the Train Slots shown in the Base Timetable, together with the additions, amendments and deletions requested by Bidders...so far as reasonably practicable taking into account the complexity of those changes, including any reasonably foreseeable impact on the Working Timetable...and having due regard to the Decision Criteria*” (Condition D3.2.2(c)); and

8.3.1.2. “*in Network Rail’s opinion is capable of being brought into operation*” (Condition D3.2.2(a)).

8.3.2. Condition D3.2.4 “*Development of the Draft Timetable*” extends the obligation to “*new aspirations*”, and requires that Network Rail “*shall incorporate each new aspiration into the Draft Timetable in accordance with the priorities set out in Condition D3.2.3...*” “*so far as reasonably practicable taking into account the complexity of the new aspirations, including any reasonably foreseeable consequential impact on the working timetable*” (Condition 3.2.4(b)).

9. The Panel did NOT find that any of these obligations implied that any aspirational Bid should inevitably progress through the Timetabling process, and the subsequent agreement, and approval by Office of Rail Regulation, of a new, or amended Track Access Contract. Instead the Panel concluded that

- 9.1. aspirational bids should be processed as “*expectations of rights*”, for as long as it takes to establish the feasibility of offering practicable Train Slots to meet those aspirations, at which point the Bidder could reasonably anticipate being able to reach agreement with Network Rail on appropriate terms for Firm Rights;
- 9.2. where Network Rail has concluded that it is not prepared to make an offer against “*expectations of rights*”, then it is open to the Bidder to appeal to a Panel, under Condition D5.1.1(b); in such a case
- 9.3. a Panel might find that Network Rail has not explored all reasonable possibilities, and therefore should still entertain the Bidder’s “*expectations of rights*”, and seek to include a Train Slot corresponding to the aspiration underpinning the “*expectation of right*”; however
- 9.4. a Panel has NO authority to direct Network Rail to convert any “*expectation of rights*”, into Firm Rights, as this is a matter for the parties subject to the approval of the Office of Rail Regulation; by the same reasoning

- 9.5. if Network Rail has reasonably concluded that a Train Slot corresponding to the “the *expectation of right*” is NOT “*capable of being brought into operation*”, and the Panel finds in support of Network Rail’s conclusion, then Network Rail and the Panel are effectively concurring that
- 9.5.2. the Bidder should no longer, for the purposes of the aspiration in respect of the Timetable in question, have an “*expectation of right*”, and therefore
- 9.5.3. Network Rail is entitled to exclude that aspiration from the Working Timetable.
10. In the view of the Panel, where Network Rail has reasonably decided that it will not support a Train Operator in seeking a specific Firm Right, the matter can only be progressed further by the parties, subject to the approval of the Office of Rail Regulation, and therefore falls outside the jurisdiction of a Timetabling Panel.

### **The Panel’s Determination**

11. The Panel found that
- 11.1. in respect of a second train per hour between Reading via Redhill and Gatwick, FGW’s bids were aspirational; as such they fall to be dealt with as “expectations of rights” rather than Firm Rights, and are properly accorded a lower priority in respect of the operation of Network Code D3.2.3;
- 11.2. Network Rail has demonstrated that it has evaluated options with a thoroughness that can reasonably be judged to fulfil the requirements set down in Condition D3.2.2(c) by seeking to include in the base Timetable “*the additions...requested by the bidders ...so far as reasonably practicable taking into account the complexity of those changes, including any reasonably foreseeable consequential impact on the working timetable, and ...having due regard to the decision criteria*”;
- 11.3. Network Rail has demonstrated that it has evaluated options with a thoroughness that can reasonably be judged to fulfil the requirements set down in Condition D3.2.4(b) that “*Network Rail shall, so far as reasonably practicable taking into account the complexity of the new aspirations, including any reasonably foreseeable consequential impact on the working timetable*”;
- 11.4. Network Rail, as a consequence of those efforts, has concluded that, taking into account all its commitments to other Train Operators, there is no reasonable basis for manipulating the timetable within the constraints of the applicable Rules of the Plan, to permit the allocation to FGW of a prospective Train Slot for the purposes of operating a second hourly service from Reading between Redhill and Gatwick, and that therefore
- 11.5. Network Rail would oppose any application by FGW to the Office of Rail Regulation to have its aspirations for a second hourly Reading via Redhill to Gatwick service translated into a Firm Right in respect of the December 2006 Timetable.
12. The Panel therefore concluded that
- 12.1. Network Rail is the party with the ultimate authority to determine the technical feasibility, within Network Code Part D, of meeting the aspirations of a Train Operator not in possession of a relevant Firm Right, subject only to the rights of appeal set out in Condition D5;

- 12.2. Network Rail has fulfilled all of its responsibilities to FGW in respect of its proper administration of the provisions of Network Code Part D, in relation to FGW's aspirations to operate a second hourly Redhill to Gatwick service during the December 2006 Timetable;
  - 12.3. No evidence has been presented that contradicts Network Rail's conclusion that no Train Slot compliant with Rules of the Plan can be provided within the 2006 Timetable for a second hourly Reading via Redhill to Gatwick service
  - 12.4. in terms of the operation of priorities within Network Code Part D, the effect of this conclusion by Network Rail should reasonably be that FGW can no longer claim that it has "expectations of rights" in respect of a second hourly Reading via Redhill to Gatwick service.
13. The Panel therefore determined that,
- 13.1. where Network Rail has demonstrably complied with the provisions of Network Code Part D, and has reasonably concluded that there should be no "expectations of rights" the issue in question becomes one for FGW to raise, through an application for rights, with the Office of Rail Regulation; as such
  - 13.2. the issue becomes one that lies beyond the scope of the provisions of Network Code Part D, and therefore one where the Panel has no jurisdiction that would enable it to find in favour of the position brought by FGW.
14. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

Bryan Driver

Panel Chairman