

TP1625

Network Rail Infrastructure Limited

Sole Reference Document

1 DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows:-

- (a) First MTR South Western Trains Limited whose Registered Office is at 4th Floor Capital House, 25 Chapel Street, London, United Kingdom, NW1 5DH ("South Western Railway") ("the Claimant"); and
- (b) Network Rail Infrastructure Limited whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("Network Rail") ("the Defendant").

2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant's Sole Reference includes:-

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
- (b) A detailed explanation of the Defendant's arguments in support of its position on those issues where it disagrees with the Claimant's Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant's Sole Reference.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fall to be determined as part of the dispute;
- (d) The decisions of principle sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (e) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

Network Rail does not dispute South Western Railway's right to bring this dispute in accordance with Condition D5 of the Network Code.

The nature of the dispute in Section 4 of South Western Railway's Sole Reference Document relates to the impact of decisions taken by Network Rail during the drafting period of the 2020 Subsidiary New Working Timetable.

Network Code Condition D2.6.3 requires Network Rail to comply with the duties and powers set out in Condition D4.2 when compiling the New Working Timetable during the Timetable Preparation Period from D-40 to D-26. Network Condition D4.2.1 requires Network Rail to apply the Decision Criteria in Condition D4.6 when compiling the New Working Timetable.

The dispute arises in relation to whether or not Network Rail complied with its obligations in terms of Conditions D2.6.3, D4.2.1 and D4.6 when compiling the New Working Timetable.

It is Network Rail's position that it acted entirely in accordance with Part D of the Network Code when compiling the New Working Timetable and that, in particular, all decisions were made in accordance with the Decision Criteria set out at Condition D4.6.

4 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE

4.1 Issues where the Defendant Accepts the Claimant's Case

4.1.1 Network Rail accepts that South Western Railway submitted a Priority Date Notification Statement (PDNS) for the 2020 Subsidiary Timetable at D-40 on Friday 9th August 2019 (5.1.1 in South Western Railway's Sole Reference Document).

4.1.2 Network Rail accepts that the South Western Railway PDNS contained proposed changes to South Western Railway services between London Waterloo and Weymouth. Network Rail accepts that the CrossCountry PDNS contained proposed changes to CrossCountry services between Southampton Central and Bournemouth. Network Rail accepts that South Western Railway and CrossCountry worked together on these services prior to the submission of their respective PDNS (5.1.2).

- 4.1.3 Network Rail accepts that the Wessex Timetable Change Risk Assessment Group (TCRAG) held on Monday 23rd September 2019 approved the changes to the Sunday Main Line Timetable subject to the outcomes of risk assessments on the impact to track category, power availability and track circuit reliability (5.1.3).
- 4.1.4 Network Rail accepts that there was a Strategic TCRAG on Monday 17th June. (5.1.4).
- 4.1.5 Network Rail accepts that a letter was sent from Network Rail to South Western Railway on 25th October 2019 (D-29) stating that Network Rail will not support the sale of Track Access Rights that would be required for South Western Railway to operate the May 2020 timetable as bid via its PDNS (5.1.5).
- 4.1.6 Network Rail accepts that South Western Railway submitted a revised Access Proposal for the 2020 Subsidiary New Working Timetable to Network Rail on Monday 11th November 2019. Network Rail notes that South Western Railway would not require additional Track Access Rights to operate the May 2020 timetable in terms of its revised Access Proposal. (5.1.9)
- 4.1.7 Network Rail accepts that South Western Railway wrote to other timetable participants with interacting services on Wednesday 6th November 2019 informally requesting their co-operation (5.1.10).
- 4.1.8 Network Rail accepts that it was agreed between South Western Railway and Network Rail to prioritise the validation of the weekend services within the revised Access Proposal over the weekdays to limit the impact on Informed Traveller timescales. (5.1.12).
- 4.1.9 Network Rail accepts that the South Western Railway service enhancements were reviewed by the PMO and support was given to develop the timetable with these changes (5.2.3).

4.2 Issues where the Defendant qualifies or refutes the Claimant's Case

- 4.2.1 Network Rail accepts that there is no specific provision within Network Code Condition D4.2 which deals with a situation where Network Rail has indicated that it will not support the sale of additional track access rights. The sale of access rights and Part D of the Network Code are distinct processes that Network Rail is required to operate independently. Accordingly, it is entirely appropriate that issues which may arise in relation to the sale of access rights are not dealt with in Condition D4.2. The process under Part D of the Network Code is independent of the process for the sale of access rights and requires Network Rail to take decisions when compiling the New Working Timetable in accordance with the objective set out at Condition D4.6.1 and the criteria set out at Condition D4.6.2. Network Rail did so in this instance (5.1.6 in South Western Railway's Sole Reference Document).
- 4.2.2 Network Rail accepts that it continued to validate the additional and amended services as bid at D-40 up until the publication of the Subsidiary New Working Timetable at D-26. Network Rail was obligated to continue validating the Priority Date Notification Submission in order to discharge its obligations under Part D of the Network Code. Network Rail does not accept that Capacity Planning ignored the 25th October 2019 letter from their Southern Region colleagues. Following the letter being sent, and at the same time as working on the validation of the Priority Date Notification Submission as required by the provisions of Part D of the Network Code, Network Rail Capacity Planning worked with South Western Railway to write a Briefing Paper (Appendix C) for the PMO seeking industry endorsement (which was secured) to validate the revised Access Proposal by D-19. (5.1.7). Network Rail undertook this additional step, which it was not required to undertake in terms of Part D of the Network Code, in an effort to treat South Western Railway as reasonably and fairly as possible.
- 4.2.3 Network Rail accepts that at D-26, South Western Railway received from Network Rail a letter notifying South Western Railway of the publication of the Subsidiary Working Timetable for May 2020 containing paths for all bar seven schedules bid for by South Western Railway as part of their PDNS at D-40. Network Rail accepts that these seven schedules are not related to this dispute. Network Rail accepts that there was a table within the letter detailing how the May 20 PDNS work packages were included in the publication of the New Working Timetable. Capacity Planning were aware that Network

Rail would not support the sale of Access Rights. As noted at 4.2.1 above, this is a separate process to Part D of the Network Code. (5.1.8).

- 4.2.4 Network Rail accepts that South Western Railway received a response to the revised Access Proposal on Friday 3rd January. Network Rail accepts that there were non-compliances in what was sent to South Western Railway on Friday 3rd January however these have now been fixed and so the trains will run in compliant paths for May 2020. (5.1.11)
- 4.2.5 Network Rail does not accept that it informed South Western Railway that access rights would not be granted. Network Rail did inform South Western Railway that access rights would not be supported but that did not amount to a refusal of access rights. If South Western Railway interpreted the letter as a refusal, it was in error in doing so. It was open to South Western Railway to make a formal application for the sale of the required access rights, or to make an application to the ORR to have those rights determined. South Western Railway chose not to do so. Network Rail accepts that this occurrence is not covered in the Network Code Part D, but as explained above the Sale of Access Rights and Part D are distinct processes subject to separate contractual provisions. One process cannot pre-judge or influence the outcome of the other. In the event, South Western Rail's revised Access Proposal did not require any additional Track Access Rights. (5.2.1)
- 4.2.6 Network Rail accepts that the briefing paper in Appendix 4 is dated after South Western Railway received the letter from Network Rail and contains options for dealing with reversions of work packages between D-40 and D-26. Network Rail is unaware of any further developments needed to the paper as the paper has been endorsed by the PMO (5.2.4)
- 4.2.7 Network Rail accepts that at the Strategic TCRA meeting Network Rail shared an Invitation to Tender was to be put out to undertake performance modelling of the proposed May 2020 changes. Network Rail has not undertaken any performance modelling on the proposed May 2020 changes to date. Network Rail's letter of 25th October 2019 letter did not state that track access rights would not be granted, it simply stated that the sale of additional track access rights to South Western Railway would not be supported by Network Rail because of performance concerns. (5.2.5)

4.3 Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination

- 4.3.1 The role of the Wessex TCRA is to assess the effects of proposed significant timetable changes and determine any mitigation measures to be applied. It informs Network Rail and operators as to any timetable changes that would not be acceptable from a risk perspective and identifies owners and timescales for any mitigation measures. It does not routinely discuss performance issues. There are representatives at the meeting from the Wessex Route (Safety, Operations, Maintenance etc), Capacity Planning and Operators. The Wessex TCRA has no direct authority over the process carried out under Network Code Part D however the outputs are factored into decisions taken by Network Rail in line with the requirements of Condition D4.6. Outside of the Part D process, the recommendations from the TCRA are one of the inputs into the decision by Network Rail as to whether to sell access rights.
- 4.3.2 No performance modelling of the proposed May 2020 changes has been undertaken. Performance modelling of both May 2019 and December 2019 was undertaken and was shared with South Western Railway. The results showed that a small improvement in performance was forecast for May 2019 with a larger improvement forecast for December 2019. While the modelling forecast that performance would improve in the May 2019 timetable the actual performance has deteriorated. It was this that led to Network Rail notifying South Western Railway that the sale of Access Rights would not be supported for May 2020. The concern was as additional services being added would result in a further deterioration of performance. It was entirely reasonable for Network Rail to have that concern. This was accepted by South Western Railway. This sustained deterioration in performance was not known about at the time of TCRA.
- 4.3.3 In response to the 25th October 2019 letter from Network Rail to South Western Railway, the Managing Director of South Western Railway sent an email reply on 5th November 2019 (Appendix B) saying that the rationale for Network Rail not supporting the access rights associated with the proposed changes for the May 2020 timetable is clear. The email also agreed that South Western Railway were disappointed with the current levels of train service performance.

- 4.3.4 Capacity Planning is part of the System Operator business unit at Network Rail which is separate from the Regions/Route businesses. Each business unit has its own Managing Director who reports into the Chief Executive. Neither has authority over the other.
- 4.3.5 The revised Access Proposal for the 2020 Subsidiary New Working Timetable from South Western Railway was received by Network Rail on Monday 11th November 2019. Network Rail did not request this from South Western Railway. The decision to submit the revised Access Proposal was taken entirely at the discretion of South Western Railway. It was under no obligation to do so. Under Condition D2.4.4 for revised Access Proposals received after D-26, Network Rail shall incorporate them in the New Working Timetable as far as reasonably practicable, taking into account the complexity of the Access Proposal including any reasonably foreseeable consequential impact on the New Working Timetable and the time available before the end of the Timetable Preparation Period. The revised Access Proposal from South Western Railway contained 2,850 changes. Therefore, it was not reasonably practicable to include the revised Access Proposal in the publication of the New Working Timetable only 4 days later. As such, in order to comply with D2.7.1 Network Rail published the New Working Timetable at D-26 based upon the Priority Date Notification Statements.
- 4.3.6 The Sale of Access Rights and Part D are distinct processes. Paragraph 7.2 of TTP834 says:

“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, even if as suggested it is supported by the 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”

It is clear from this determination that Network Rail is obliged to deal with timetabling and access rights processes independently. The procedure to be followed in terms of Part D of the Network Code must be followed "without influence" from procedures relating to the sale of access rights. Therefore, even though South Western Railway were informed that the Sale of Access Rights would not be supported, Network Rail

was still compelled to follow the required procedures in terms of Part D, which included offering the New Working Timetable at D-26. Network Rail complied fully with its obligations in relation to Part D, both in relation to South Western Railway's PDNS and its subsequent revised Access Proposal.

- 4.3.7 In the 5th November 2019 email from South Western Railway to Network Rail, South Western Railway said that whilst they would send in a revised bid, they reserved the right to continue to seek access rights for their original May 2020 bid. Ultimately, notwithstanding that it had reserved its rights to seek additional access rights, South Western Railway took the decision to submit a revised Access Proposal. Once it had done so, Network Rail was obliged to deal with that in accordance with the procedures under Part D. As noted at Paragraph 4.3.5 above, it did so.
- 4.3.8 South Western Railway did not dispute the publication of the May 2020 New Working Timetable that was sent on 15th November 2019.
- 4.3.9 Having published the New Working Timetable, Network Rail was not able to amend other operators services post D-26 without their consent which was not gained from CrossCountry.
- 4.3.10 As part of the recommended approach for dealing with the revised Access Proposal, it was recommended that there was a South Western Railway representative in Milton Keynes throughout the process who is authorised to make decisions on the flexes and amendments required in order to expediate the plan. Over the seven weeks there was a South Western Railway representative in Milton Keynes only on 3 days.
- 4.3.11 The only relief which the Timetable Panel can grant is that set out in Part D paragraph 5.3.1. Part D Paragraph 5.3.1 provides that:

"In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail Regulation (as the case may be) may exercise one or more of the following powers:

(a) it may give general directions to [NR] specifying the result to be achieved but not the means by which it shall be achieved;

(b) it may direct that a challenged decision of [NR] shall stand;

(c) it may substitute an alternative decision in place of a challenged decision of [NR] provided that the power described in (c) above shall only be exercised in exceptional circumstances.”

The power of the Timetable Panel does not extend to compensating South Western Railway for detrimental revenue impact and it therefore has no jurisdiction to order compensation against Network Rail.

4.3.12 In any event, no such compensation is payable. Network Rail is not in breach of the Track Access Agreement, whether in relation to any of the issues raised in South Western Railway's appeal or otherwise. There being no breach by Network Rail, there therefore is no entitlement to compensation

4.3.13 In any event, Network Rail did not act in bad faith or unreasonably in relation to any of the matters complained of by South Western Railway. Accordingly, in terms of Condition D5.7, the Panel has no power to direct payment of compensation.

4.4 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant

4.4.1 Network Rail adhered to Network Code Condition D2.6.3 and acted in accordance with the duties and powers set out in Condition D4.2 by publishing the New Working Timetable on Friday 15th November 2019 at D-26. South Western Railway did not dispute the publication of this New Working Timetable.

4.4.2 In preparing the New Working Timetable Network Rail accommodated South Western Railway's aspirations for revised timings as submitted in its PDNS. Notwithstanding that, South Western Railway took the decision to submit a revised Access Proposal. Network Rail was unable to amend the South Western Railway services back to their December 2019 times as requested in the revised Access Proposal due to the confirmed changes to the CrossCountry services. To do so would have required CrossCountry to agree to flex their services, which it did not.

4.4.3 Due to the timing and size of South Western Railway's revised Access Proposal it was not reasonably practicable to accommodate it in the New Working Timetable that was offered on Friday 15th November at D-26.

- 4.4.4 The Sale of Access Rights and Part D are distinct processes. Network Rail is obliged to operate them independently of each other. Network Rail's letter advising that it would not support Access Rights did not amount to a refusal of the additional access rights which South Western Railway wanted, nor did it compel or require South Western Railway to submit a revised Access Proposal. Network Rail's support, or lack of support, for additional access rights requests does not allow Network Rail to disregard its obligation under Part D of the Network Code, in particular the obligation to publish a New Working Timetable at D-26.
- 4.4.5 Network Rail Capacity Planning did not ignore the letter from the Managing Director, Network Rail Southern Region. Network Rail worked with South Western Railway to agree revised timescales and how to jointly work through the revised Access Proposal that South Western Railway informed Network Rail that they would submit for May 2020. Therefore, in working with South Western Railway to implement the proposed way forward Network Rail acted pragmatically and reasonably in line with D4.2.2.

5 DECISION SOUGHT FROM THE PANEL

- 5.1 Network Rail asks that the Panel determine that it has adhered to Network Code Condition D2.6.3 and has acted in accordance with the duties and powers set out in Condition D4.2.
- 5.2 Network Rail asks that no order is given to Network Rail to compensate South Western Railway for any revenue loss as a result of extended journey times.
- 5.3 Network Rail asks that the Panel observe that Network Rail did not display disregard for Part D but instead worked with South Western Railway in a pragmatic and reasonable way to plan a timetable that was best for the industry.
- 5.4 Network Rail notes in South Western Railway's response to the Directions requested that South Western Railway are content to rely on the TTP's Observations and Guidance on the matter of whether Network Rail's Southern Region and Capacity Planning worked in a coherent manner. Network Rail is supportive of this approach

6 APPENDICES

The following are contained in the appendices at the end of the document

A – Timeline of Events

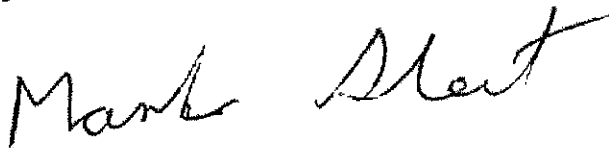
B – Email from Managing Director, South Western Railway to Network Rail dated 5th November 2019

C – Briefing Paper submitted to the PMO seeking endorsement to proceed with the revised Access Proposal

7 SIGNATURE

For and on behalf of
Network Rail Infrastructure Limited

Signed

A handwritten signature in black ink that reads "Mark Sleet". The signature is written in a cursive style with a long horizontal stroke at the end of the word "Sleet".

Print Name
Mark Sleet

Position
Timetable Production Manager
Network Rail