

TTP1772: Claimant GWR Sole Reference 25 09 2020.

1 DETAILS OF PARTIES

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

- (a) First Greater Western Limited, a company registered in England under number 05113733 having its registered office at Milford House, 1 Milford Street, Swindon SN1 1HL ("GWR") ("the Claimant"); and
- (b) Network Rail Infrastructure Limited, a company registered in England under number 2904587 having its registered office at 1 Eversholt Street, London, NW1 2DN ("Network Rail"); ("the Defendant").

1.2 It is possible that third parties may be affected by the Panel finding in any of the ways sought in this sole reference. The Hearing Chair (via the Secretary) should be aware already of these parties.

2 THE CLAIMANT'S' RIGHT TO BRING THIS REFERENCE

2.1 This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Condition 5.1.1 of Part D of the Network Code, viz:

"5 Appeals

"5.1 Appeal in accordance with the ADRR

"5.1.1 Where an appeal is expressly authorised by this Part D, a Timetable Participant may refer a decision for determination by a Timetabling Panel in accordance with the ADRR."

This dispute centres on a change to the Engineering Access Statement under Network Code Part D Paragraph 3.4 ("Network Rail Variations with at least 12 Weeks Notice")

The appeal is expressly authorised through the following paragraphs of Part D of the Network Code:

"3.4.5 All amendments to the Rules made pursuant to the procedure referred to in Condition D3.4.3 shall be subject to the appeal procedures in Condition D5 as if they were made pursuant to a procedure set out in this Part D."

"3.4.3 Network Rail shall include in the Rules a procedure to enable amendment of the Rules, following their finalisation in accordance with Condition D2.2. This amending power is without prejudice to the amending power referred to in Condition D2.2.7, and is to be utilised in order to facilitate changes which Network Rail considers necessary to take Restrictions of Use."

(The procedure referred to in Paragraph 3.4.3 is located in The Timetable Planning Rules.)

3 CONTENTS OF REFERENCE

This Sole Reference includes:-

- (a) The subject matter of the dispute in Section 4;
- (b) A detailed explanation of the issues in dispute in Section 5;
- (c) In Section 6, the decisions sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (d) Appendices and other supporting material.

4 SUBJECT MATTER OF DISPUTE

4.1 This is a dispute regarding the capacity and capability of the railway and on its ability to provide the journey opportunities passengers and the country require. It manifests itself in the way infrastructure maintenance, renewals and enhancement is undertaken, and concerns the ability of the operator to adjust given the effects of Covid and already committed major engineering work (at sites such as Bristol East) on its resources.

4.2 This dispute arises over the interpretation of:

(i) Conditions 3.4.3 and 3.4.4 of Part D of the Network Code, viz:

"3.4.3 Network Rail shall include in the Rules a procedure to enable amendment of the Rules, following their finalisation in accordance with Condition D2.2. This amending power is without prejudice to the amending power referred to in Condition D2.2.7, and is to be utilised in order to facilitate changes which Network Rail considers necessary to take Restrictions of Use."

“3.4.4 The procedure referred to in Condition D3.4.3: (a) must require that no amendment to the Rules may be made unless Network Rail has consulted with all Timetable Participants likely to be affected by the amendment; (b) must require that all decisions of Network Rail be made by application of the Decision Criteria in accordance with Condition D4.6; (c) may authorise changes to the procedure.”

(ii) Condition D4.6 of Part D of the Network Code which sets out the Decision Criteria, viz:

“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) the content of any relevant Long Term Plan and any relevant Development Timetable produced by an Event Steering Group;;

“(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;

“(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; and

“(l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.

“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 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.”

and

(iii) the process for changing the Engineering Access Statement defined in the Timetable Planning Rules National Section and in particular Paragraphs 2.4.5.2; 2.4.6.1; 2.4.6.2; 2.4.6.3; 2.5.2 and 2.5.3:

"2.4.5.2 Network Rail shall notify to all Train Operators affected details of the proposed change including a concise explanation of its reasons. Proposed changes to Engineering Access Statement shall be notified by Network Rail individually by email."

"2.4.6.1 Each Timetable Participant receiving notification of a proposed change in accordance with paragraphs 3.3.2 above will consider that proposal and respond to Network Rail within 10 working days from receipt of the notification, indicating:"

"2.4.6.2 its agreement to the proposed change or;"

"2.4.6.3 details of a counter-proposal and an explanation of its reasons ..."

"2.5.2 In reaching its decision, Network Rail shall have due regard to the Decision Criteria in Network Code Condition D 4.6."

"2.5.3 Network Rail will notify its decision to each affected Timetable Participant within 5 working days of the last date for receipt of responses under paragraph 2.4.6 above."

4.3 The Appendix contains detail of the Restriction of Use; and the correspondence between Network Rail and GWR.

5 EXPLANATION OF EACH ISSUE IN DISPUTE AND THE CLAIMANT'S ARGUMENTS TO SUPPORT ITS CASE

5.1 This concerns a request for an all day Restriction of Use at Paddington on Easter Day 2021 requiring GWR services to terminate from the west (and to start towards the west) at Ealing Broadway instead of Paddington. GWR and MTR customers will be required to use London Underground between Ealing Broadway and Central London. In addition access to GWR's key train depot at North Pole just outside Paddington will be closed.

5.2 GWR rejected the request.

5.3 The chronology of the formal request, comment and decision is as follows

5.4 A 19 08 20 Network Rail request for new abnormal Restriction of Use Easter Day 2021 (requiring passenger train turnrounds at Ealing Broadway) for Safer, Faster Isolations; Decommissioning of OOC point work; Crossrail Depot drainage; and Crossrail rewiring which is said to require a 24h all line block and was not completed at Christmas 2019;

5.5 The 19 08 20 Network Rail note requested a response by 02 09 20 so that a decision could be made on 04 09 20 (later changed to advise this would be 09 09 20). National TPR 2.4.6.1 states tocs will "respond to Network Rail within 10 working days from receipt of the notification". In this case this is 03 09 20;

5.6 The 19 08 20 Network Rail traffic remarks stated that all day GWR to terminate / start Ealing Broadway; and that no access to North Pole Depot was available;

5.7 The 19 08 20 Network Rail note did not give reasons other than to say 24h was required for wiring. It did not say why Easter day was chosen. National TPR 2021 (Network Rail website 24 09 20) 2.4.5.2 states, " Network Rail shall notify to all Train Operators affected details of the proposed change including a concise explanation of its reasons.";

- 5.8 A 27 08 20 GWR note declined the request. It suggested that instead, "the best opportunity now exists to utilise the proposed revised 2021 timetable, that has thinned Saturday night and Sunday morning service provision and that the ability to gain overnight all line blocks should now be more attainable. It stated that it could not accept the request because, "it is apparent the significant changes in travel patterns together with the crew impact implications caused by the extensive driver training necessitated by Bristol East remodelling" means GWR will "no longer be able to accept any all-day all line blocks at weekends on the London to Reading corridor for the foreseeable future." National TPR 2.4.6.3 states that a toc declining the request shall offer an alternative and explain its reasons;
- 5.9 A Network Rail note 09 09 20 (within National TPR 2.5.3 timescales of five working days post deadline for receipt of toc comments) advised that it was going ahead because it had the support of other train operators; that Easter Day was one of the lightest days for traffic in the year; and that this was likely to remain the case in the Covid situation as leisure destinations were in the main closed on that day;
- 5.10 There is no requirement in the National TPR for Network Rail to provide a reason for its decision which nevertheless must have been taken (National TPR 2.5.2) with due regard to the Decision Criteria;
- 5.11 A Network Rail Decision email also 09 09 20 confirms that the request will be taken;
- 5.12 Timetable Panel Hearing discussion appears to support the view that in order to consider fully all the material factors involved in assessing the impact on the various options on the Decision Criteria Network Rail must ascertain from the operator the circumstances surrounding any comment made in response to a request with a view to identifying whether these factors are substantial enough to require a rethink.
- 5.13 In this case GWR advised Network Rail that it was unable to provide sufficient resource to cope with the requested Restriction of Use and move the numbers of passengers likely to be on offer. Whilst Easter Day traffic has been light over the years this appears to be changing. On Easter Day last year for instance 792 people travelled on the 11.27 Paddington - Penzance and 544 on the 11.03 Paddington - Bristol. The current Covid epidemic has had a profound effect on GWR's ability to undertake crew training. GWR now has a significant backlog of training due to the impact of the

epidemic. Together with Network Rail colleagues we have done well to maintain the momentum that we have on a variety of major projects. Because of staff turnover and a lack of safe training facility Covid has eaten into the numbers of drivers competent enough to cover weekends during a period when drivers are also being required to cover long term works such as Bristol East. Network Rail did not ascertain from GWR the extent of its concern in this regard even though GWR had indicated in its response to the request that it just could not cope anymore with an all day blockade. The situation is such that trains are being suspended from the Dec 2020 timetable on Mondays to Fridays and at weekends through lack of resource.

5.14 GWR does not believe that Network Rail's decision was made with full available consideration of the Decision Criteria, and that the decision to implement the Restriction of Use is therefore not valid. In addition in GWR's view if Network Rail had reviewed the circumstances thoroughly it would have considered that the work should in the industry's overall interest (as per the Decision Objective) be accomplished in a different way.

5.15 GWR proposed an alternative method of ensuring the work was undertaken using already but recently planned extended overnight regular Restrictions of Use.

6 DECISION SOUGHT FROM THE PANEL

6.1 The Claimant sets out the outcome it is seeking from the Panel's determination, differentiating between

- (a) the matters of principle
- (b) specific conclusions deriving from those matters of principle.

6.2 Principle

A determination is sought that agrees GWR's view that Network Rail in this case provided insufficient resource into its consideration of the Decision Criteria; and that as result the decision to implement the request is not valid. In addition, that thorough consideration would result in a decision to undertake the work in a different manner.

6.3 Specific Conclusion

Network Code Part D 5.3.1 states that, "In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail and Road (as the case may be) may exercise one or more of the following powers: (a) it may give general directions to Network Rail 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 Network Rail shall stand; (c) it may substitute an alternative decision in place of a challenged decision of Network Rail; provided that the power described in (c) above shall only be exercised in exceptional circumstances."

GWR would like a determination in connection with D 5.3.1 (a) that provides for Network Rail seeking an alternative solution for undertaking the work.

GWR would like a determination in connection with D 5.3.1 (c) that the decision published on 09 09 20 regarding the Restriction of Use should have withdrawn the request. GWR believes exceptional circumstances apply in that it is the once in one hundred years event of the epidemic that has caused the problem.

6.4 No Remedy is sought.

6.5 No other decision is sought from the Hearing Chair.

7 APPENDIX

1. Request, Comment and Decision correspondence; and
2. Decision formal notice.

8 SIGNATURE

For and on behalf of First Greater Western Limited

Signed
Robert Holder

Print Name
Robert Holder

Position
Network Access Manager

25 09 20