

1 DETAILS OF PARTY

1.1 The names and addresses of the party to the separate reference is as follows:-

(a) (Virgin) West Coast Trains Ltd. whose Registered Office is at 120 Campden Hill Road, London W8 7AR "[WCTL]" ("the Claimant"); and

(b) Correspondence address – Virgin Trains Commercial Department, Room 15, North Wing Offices, Euston Station, London NW1 2HS "[WCTL]".

2 THE PARTIES' RIGHT TO BRING THIS REFERENCE

2.1 This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Condition 3.5.4 of the National Rules of the Plan and D2.1.11 & D5.1 of the Network Code (England & Wales).

3 CONTENTS OF REFERENCE

The Parties have together produced this joint reference and it includes:-

- (a) The subject matter of the dispute in Section 4;
- (b) A summary of the issues in dispute in Section 5;
- (c) A detailed explanation of the issues in dispute prepared by the claimant with a paragraph by paragraph response from the respondent(s) in Section 6;
- (d) Any further issues raised by the respondent in Section 7;
- (e) The decisions of principle sought from the Panel in respect of legal entitlement and remedies in Section 8
- (f) Appendices and other supporting material.

4 SUBJECT MATTER OF DISPUTE

- 4.1 The imposing by Network Rail of an additional 26 hour possession {*extension*} at Rugby (All lines) at the end of an originally planned Christmas Blockade in December 2007. Note: this dispute does not cover any aspect associated with the further over-run that occurred on New Years Day through to the 4th January 2008.
- 4.2 Those Parts or Conditions that the dispute relates to and are associated with are D2.10, D2.1.11, D5.1 (and D6) and Sections 3.1, 3.4 & 3.5 of the National Rules of the Plan 2008 [nROTP].
- 4.3 For the avoidance of doubt this dispute unquestionably relates to only one of Principle and Precedent regarding NR's application of the Network Code. It does not relate to any matters of compensation that maybe payable as a consequence of the Restriction of Use, resultant from the consequential disruption caused on this day.**
- 4.4 Appendices A to F are attached and referenced against Section 6 below.

5 SUMMARY OF DISPUTE

- 5.1 Through the 2007-08 West Coast Route Modernisation [WCRM] Possession Strategy Notice [PSN] process and subsequent Rules of the Route [ROTR] procedures, WCTL originally agreed to the implementation of a 7 day Rugby Blockade (from 2330hrs 24/12/07 to 0330hrs 31/12/07). The disruption to WCTL services was such that, from the 27/12/07 to 30/12/07, all trains started / terminated at Birmingham International with a variety of onward southbound options {v.v.} dependant on other engineering works south of Milton Keynes.
- 5.2 Although a full explanation is detailed in the timeline of events encompassed below in section 6, put straightforwardly, WCTL received from NR, an initial proposal 9 weeks past the Informed Traveller deadline. This proposal to extend the Rugby Blockade (by 26 hours to 0520 on 01/01/08), thereby increased the disruption effect to WCTL services through**

Part 5.3 Cont....

to close of play on New Year's Eve evening, rather than the end of service, originally planned to take place on the 30/12/07.

5.3 This whole episode, from receiving the original proposal through to the last working day (28/12/07), upon which we received the *Final* Proposal, NR's methodology and application of the Network Code is considered by WCTL, to not only be confusing, but in direct breach of those conditions laid down by the Industry through the Network Code.

5.4 In summary, notwithstanding WCTL's inability to have its dispute heard by the ADRC in conjunction with this matter, (i.e. after the 28/12/07), simply because of the very fact that the possession was due to take place only 3 days there-after, NR imposed the possession without:

- a) Due regard to the Network Code [D2.1, D5.1 {& D6} and Section 3 of the nROTP apply]; and
- b) Imposing and implementing a possession before WCTL had had the opportunity to formally invoke the dispute process and consequently be represented, heard & determined through the ADRC dispute process.

6 EXPLANATION OF EACH ISSUE IN DISPUTE WITH RESPONSE

6.1. In view of the timescales within which to compile this response and the complexities surrounding those events leading up to the matter in dispute, it seems (having taken cognisance of the retrospective nature of the dispute) sensible to present a "*Timeline*" of those events as experienced by WCTL, accompanied as appropriate, with information pertaining to where WCTL consider the Network Code has been breached; (also with applicable appendices where deemed necessary).

6.2 In view of those timescales involved and with confusion over the formulation of the Joint Response within Network Rail, it has been ultimately necessary to provide a WCTL only paper, using an abridged version of the ADRC template.

6.3. Timeline of Events (items in **BOLD** relate specifically to the Dispute)

6th December 2007 (Thu) :

Having agreed to the original planned blockade through the formal 2007-08 PSN and ROTR / CPPP processes, the first intimation of any additional 24-26 hour requirement at Rugby over the Christmas/New Year period (24th or 31st December) was an *informal verbal request* from NR that afternoon. (Such approach actually followed a WCPB meeting to which ORR, DfT, NR & TOC's attended, and where NR categorically confirmed all was going to plan with the Rugby Project). WCTL understandably rebuffed this request.

7th December 2007 (Fri) :

We received *informal verbal advice* (from the WCRM project team) clarifying that NR had found a method of working that no longer required any additional 24-26 hour requirement at Rugby.

10th December 2007 (Mon):

Following an e-mail sent to Network Rail [See Appendix A] highlighting our concerns about a possible over-run, we received *informal verbal advice* (from the WCRM project team) that NR did indeed now require an additional 24-26 hour possession on the 31st December 2007. WCTL took away such advice to investigate the feasibility (bearing in mind Informed Traveller timescales would now be severely breached) with a view to discussing it further at the monthly 1:1 NR meeting the following day.

11th December 2007 (Tue):

WCTL informed NR at the 1:1 meeting, that we would accept the additional extended possession proposal, subject to NR agreeing to proposals for managing the closure. WCTL set a deadline of 0900 on Wed 12th December (which was the latest time that could be accepted in terms of re-planning/diagramming & re-marketing a whole day's services in such short timescales). In good faith WCTL started the re-planning process, although there were no guarantees that this could be completed in the timescales.

12th December 2007 (Wed) – Part 1:

WCTL were informed by NR that they would not accept the management proposals set by WCTL the day before. A new deadline was set (1200) to enable further Executive Level discussions to take place, whilst the re-planning process continued. No agreement was subsequently reached between parties, and although re-planning was suspended, contingency planning in the eventuality of such 'over-run' was started.

12th December 2007 (Wed) – Part 2:

In parallel with such discussions, that same morning a *proposal* was received [under the direction of Network Code Condition D2.1.10 and Section 3.1 of the nROTP], from NR's National Access Unit (NAU) [See Appendix B] detailing the requirement for an additional 26 hour possession with accompanying reasons for the late requirement. NR specifically stated that they required the consultation period to be reduced to 2 Working Days (Fri 14th December); when the nROTP Part 3.4.2 (v.v. Network Code – D2.1.10) quite clearly stipulates a 10 Working Day response period. WCTL immediately responded rejecting the proposal [also see Appendix B] based on the disruption likely to be caused to its business, inability to re-plan in the timescales and in particular, not being able to inform those 4000+ booked (reserved) passengers (at that time) that they no longer had through journey capability.

13th December 2007 (Thu):

WCTL sent e-mail to the ADRC Secretary outlining their concerns with the process being adopted by NR in view of their breach of D2.1.10. and its perceived view of the best way forward in lieu of an anticipated final decision from NR on Friday 14th December, [See Appendix C]. Another TOC in parallel informs NR of their need to re-propose the possession request on the basis of the required (*initial*) consultation period being 10 days [nROTP Part 3.4.2].

14th December 2007 (Fri) Part 1:

The anticipated *re-proposal* (amending the 2 working day response period to 10 working days) is received from the NAU but in the format of an *Informal Decision* notification letter [See Appendix D].

Although this *Informal Decision* notification letter, (which immediately followed the expiry of the 2 vice 10 working day consultation period), quoted an extension for another 10 working days, it was in fact deemed by WCTL (due in part, to its statement of intent regarding taking the possession and in view of the stipulated deadline being the last working day before the possession itself) as NR's final notification letter. It was therefore WCTL intention to formally dispute this '*Decision*' to the ADRC, prior to receiving the formal notification letter due on or after the 28/12/07.

So, taking WCTL's understanding of the events, TOC's were actually given 10 working days (under D2.1.11b) to refer their disputes to the ADRC, but only 2 days (under D2.10 / nROTP 3.4.1&2) to consider the effect to their business and operations. Furthermore, irrespective of the content above, following receipt of their final notification on the 28/12/07, WCTL would still not have been given opportunity, prior to the implementation of the additional possession, to appeal within the permitted five working days, as contained under D2.1.11b.

As previously indicated, NR had already made their decision to formally extend the possession (under nROTP Part 3.5.3), irrespective of the fact that TOC's would not be given the full opportunity within which to formally dispute, hold a hearing and have determination(s) set pertaining to the appropriate issue(s). Furthermore part of NR's decision was primarily based upon their own judgement of the longer term impact to WCTL customers – a decision made with no input from WCTL – See Appendix E under the WCTL Managing Director's

comments to NR as examples of the concerns being expressed by WCTL at that time.

14th December 2007 (Fri) Part 1 Cont:

In detail to that already outlined above, this proposal/decision therefore breached the Network Code in four distinct areas:

- i) Disregard of Condition D2.1.10 (*Part 3.4.1&2 of the nROTP*) in terms of timescales and procedures for consultation – the condition stipulates 10 working days from receipt of an initial proposal primarily to allow the TOC’s to establish the effect on their business and operations ~ the original 2 days was not contractually sufficient;**
- ii) Disregard (at that time) to Condition D2.1.11a (*Part 3.5.2 of the nROTP*) in terms of knowingly imposing a possession without balanced regard to our response; which effectively highlighted the fundamental affect to WCTL’s business, operations and passengers; (Section 7 also refers)**
- iii) Disregard of Condition D2.1.10 / D2.1.11b / D5.1.1d in terms of knowingly implementing a possession despite such actions not being permitted until a hearing and determination had been undertaken and determinations set.**
- v) In conjunction with the above four issues, there was a further disregard by NR, to the ORR’s determination, set in February 2007, following an appeal under TTP102 by EWS & Freightliner, which resulted in NR being prohibited *{forthwith}* to impose possession(s) without due consultation, regard and agreement with TOC’s.**

14th December 2007 (Fri) Part 2:

WCTL Executive Board informs Network Rail of its intention to refer the whole matter to the ORR. WCTL informally notifies the ORR requesting an investigation into those events leading up to the anticipated decision by Network Rail to impose the possession; one of which contained reference to the disregard of a TOC's ability, prior to the extended possession taking place, to make appropriate representations to the ADRC through the correct Network Code process(es).

17th December 2007 (Mon):

The ORR is met by the WCTL Executive (following an unsuccessful Executive meeting between NR and WCTL) with a view to suspending the additional closure as a direct result of NR's perceived breach of Licence and Network Code.

18th December 2007 (Tue):

WCTL: The ORR writes to Network Rail requesting reasons for the additional possession requirement and to WCTL for additional information.

19th December 2007 (Wed):

WCTL: NR responds to the ORR, and following receipt of the additional information from WCTL, ORR rules that the additional possession for the long term good of the Industry needs to go ahead. WCTL therefore initiate contingency planning procedures by, suspending reservations (for the third time), formalising emergency train service timetables, arranging replacement bus services, alerting both staff and media and updating its website. WCTL Executive respond to the ORR outlining its disappointment and the reasons for requesting a formal investigation into the events both leading up to and during this event.

20th December 2007 (Thu):

WCTL continue to work on contingency plans for the 31st December closure.

21st December 2007 (Fri) Part 1:

WCTL formally lodged its dispute with the ADRC Secretary, setting out its reasons for doing so, in accordance with Network Code conditions D2.1.11b / D5.1.1d [See Appendix F]. This also being within the due timescale (28/12/07) stipulated in the '*Informal Decision*' letter, received from NR. It would have been at this point* (without prejudice to the outcome of other TOC's responses) that NR would have had to suspend implementation of the possession following receipt of our own dispute letter.

21st December 2007 (Fri) Part 2:

WCTL served notice on Network Rail due to its actions (with one specific reference to their disregard to the procedures set out in the Network Code) being in breach of its Track Access Agreement.

22nd to 27th December 2007 inc

Not Applicable to the dispute.

28th December 2007 (Fri):

WCTL received the Final notification* from NR [See Appendix G] confirming that their decision was to go ahead with the additional.

* Note that the letter was still titled confusingly, '*Informal Decision*'

7 FURTHER ISSUES RAISED

7.1.1 Whilst NR needs to have due regard to specified Decision Criteria when making decisions regarding proposing changes to the Working Timetable and ROTR, these Criteria must be weighted and balanced in the context of those circumstances surrounding its decisions. Although we would have originally disagreed with NR's position regarding their application of

Decision Criteria had the opportunity presented itself, prior to the possession occurring, the correct application of Decision Criteria is, we believe no longer an issue for this hearing.

7.1.1 Cont....

Our issue is related (and only related to) the fact that due process was not adhered to and consequently we were not given, in advance of the possession taking place, the opportunity to have all our considerations and concerns heard (by the ADRC), one component of which would have been related to NR's application of Decision Criteria.

8 DECISION SOUGHT FROM THE PANEL

8.1 The Panel is asked to determine whether or not Network Rail

- a) **Adhered to the correct timescales and procedures associated with Part D of the Network Code (including nROTP) and therefore in breach of WCTL Track Access Agreement;**
- b) **Have not established, going forward, any precedents by taking such actions;**
- c) **Was in general breach of their respective position regarding the imposing of a possession that was not deemed a safety critical issue or operational emergency?**
- d) **Was in breach of the ORR's determination [TTP102].**

8.3 The Panel is asked to decide the following other issues:

8.3.1 Whilst integrally linked with Informed Traveller deadlines, whether further protections are necessary within the ROTR planning process to ensure that this sort of imposing of possessions after T-12 never happens again (except for obvious safety reasons.

10 APPENDICES AND ANNEXES

[redacted - please contact the Secretary]