

**Network Rail's Submissions to the
Timetable Panels TTP194 and TTP195
Hearing date: 21 February 2008**

Details of Parties

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

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

(b) English Welsh and Scottish Railways Ltd whose registered office is at Lakeside Business Park, Carolina Way, Doncaster, South Yorkshire, DN4 5PN ("EWS")

(c) Network Rail Infrastructure Ltd. whose Registered Office is at 40 Melton Street, Euston, London, NW1 2EE

1. Introduction

Network Rail has prepared submissions within this paper for both TTP194 and 195. The references are to be heard together and the fundamental issues raised by the referring parties are identical in that they both relate to the lawfulness of the actions taken by Network Rail in relation to the proposal for an alteration to the National Rules of the Plan ("ROTP") to extend the possession at Rugby over Christmas 2007 by an additional day.

It had been the parties' intention to submit joint papers to the Timetable Panel, however this had not been possible given the late arrival of the referring parties' submissions to Network Rail. As such, Network Rail may not have addressed each submission raised by the referring parties within this

document. Therefore, for the avoidance of doubt, where such issues remain unanswered, they should not be deemed to be accepted by Network Rail.

2. Background

(a) The placing of the works at Rugby in the context of the overall West Coast Route Modernisation Programme

The Strategy for the West Coast Route Modernisation Programme was published in June 2003, by the Strategic Rail Authority and updated in April 2004 and May 2006. This set out a series of clear objectives for the route and fixed the date for completion of the infrastructure works for the end of 2008. The West Coast Programme is now approaching 90% completion. The December 2008 timetable change will take advantage of the enhanced infrastructure to deliver a 20 minute frequency service between Manchester and London and between Birmingham and London and features significantly improved journey times on the West Coast route to all destinations. It also provides enhanced capacity for freight operators.

The timetable improvements will deliver significant benefits both to the travelling public and the rail industry as a whole. The £415m project at Rugby – of which the works over Christmas 2007 formed one of the major stages - is was one of the most complex projects in the West Coast Modernisation Programme and is fundamental to the delivery of the enhanced West Coast timetable in December 2008.

(b) A description of the engineering issues around the Rugby blockade

The Rugby scheme is both large and complex. The overall scale of the project is indicated by the following key quantities of works being delivered:

- 16 Solid State Interlockings (SSIs)
- 2 temporary Interlockings

- 34km of track and 5.1km of temporary track
- 92 point ends
- 280 OLE structures and 450 foundations
- 44km of overhead contact wire
- 8 bridges
- 2 new platforms

The complex and sequential nature of the works mean that if any key date deadlines are missed, the knock-on effect will require other key dates to be pushed back. The final programme of works at Rugby is scheduled for 29-30 November 2008, only two weeks prior to the timetable change date. There is therefore very little scope for slippage of any of the individual parcels of work.

The first major works at Rugby were planned as a 'six day' all line block from late pm on 24 December 2007 to early am 31 December 2007 and were vital to the overall scheme. Significant sequential preparatory works were needed to be undertaken in advance of the blockade at Rugby over Christmas 2007. Network Rail faced some setbacks during these preparatory works that increased the level of risk to the completion of the blockade in the planned timescales.

Delays to the weekend OLE works occurred as a consequence of very high winds over the weekend of 1-2 December 2007 which prevented cranes from lifting overhead line gantries in and out, and a failure of a set of points over the weekend of 24-25 November 2007 (which were removed as part of the scheme) severely disrupted engineering train movements.

This led to critical works being lost and meant that a number of work activities that had been scheduled to take place in earlier weeks would now have to be moved into the all lines blockade.

It became clear to Network Rail that, as a consequence of the lost works, it would not have been possible to complete all of the scheduled works within

the period of the planned blockade. Consideration was given to the following alternatives:

- (i) accelerating the works within the blockade to complete the works;
- (ii) De-scoping the works to fit the time available; and
- (iii) Rescheduling the works within industry process time frames.

Network Rail's preferred option was to accelerate the works within the blockade. However, despite offering considerable financial incentives, our contractors were of the opinion that it would not be possible to provide sufficient resources to complete the works within the period of the planned possession.

Therefore it was concluded that extending the existing possession (with as much notice as possible) would be the only way of minimising the disruption to users whilst seeking to complete the works and therefore to deliver the consequent benefits within the proposed timeframe.

3. The Notification Process

(See also the timeline appended to this paper)

Following further loss of critical time over the weekend of 8-9 December 2007 relating to OLE structures, rail installation and tamping, Network Rail confirmed to WCTL that they wished WCTL to consider a 26 hour possession extension for 31 December 2007, until start of service on 1 January 2008, to cover the shortfall in the preparation work.

By 11 December 2007, WCTL expressed that they would conditionally accept the additional possession dependent upon the level of compensation which Network Rail would be prepared to pay. Network Rail did not accept the proposed level of compensation sought, but on 12 December 2007, did confirm that it would compensate WCTL fully in accordance with the provisions of Part G of the Network Code.

Accordingly on 12 December 2007, in light of the failure to reach agreement and given the urgent time pressures involved, Network Rail's Network Access Unit ("NAU") published the proposal for the additional day's possession (as permitted by 3.3.1 of the ROTP) to all train operating companies in an attempt to get a response from interested parties as soon as possible. The email, timed at 09:32, stated:

Week 40 – MD101 – Rugby (Proposal)

Dear All,

I have been approached by colleagues in the WCRM project for an extension of 24hrs to the Rugby Christmas all lines BLOCKADE. The late request is due to late completions with overhead line design and approval, and loss of critical work in weeks 35 & 36 due to adverse weather conditions and failure of vital infrastructure at Rugby North Jn.

Please could I seek your support for the following short notice possession amendment (proposed alterations marked in bold) [there followed a list of the amendments]

This email is in accordance with Access Condition D2.1.10 and relates to Section 3.1 of National Rules of the Plan being the Procedure for Altering Rules of the Route or Rules of the Plan other than through the Twice-Yearly Process Having Effect from a Passenger Change. I look forward to receiving your support for the above proposal by Friday 14th December 2007.

Such a procedure is envisaged by section 3.1 of the ROTP which is designed to allow amendments by industry parties, at short notice, to alter the ROTP.

In section 3.1.3, the ROTP recognises that there will be circumstances that arise which although not safety related, are considered to be so significant

that the timescales outlined in the alteration procedure can, and ought to be, accelerated. Network Rail submits that the events described above were of such a significant and exceptional nature that this was one of the rare occasions that an expedited procedure was considered to be appropriate, taking into account the implications on the deliverability of the December 2008 timetable had we failed to complete the planned works.

Therefore, the NAU notification of 12 December requested that the Train Operators respond to Network Rail with any objections to the proposal within 2 working days. In light of the critical nature of the works described above and given the limited time available, Network Rail considered that any such objections would have to be so fundamental that 2 working days would be sufficient time to register them. Network Rail's concern was that had it done nothing for the 10 working days that would have been afforded, this would have been to the detriment of users as the final notice would not have been issued until at least 28 December, just 3 days before the planned date of use. Informing passengers with 2 weeks notice rather than 3 days notice was seen to be a very important consideration.

In the event, WCTL immediately rejected the proposal and the following day (13 December 2007) EWS responded by email at 14:07 and requested the full 10 day consultation period to consider the matter citing ROTP 3.4.1.

Consequently, Network Rail sent the following email out to train operators at 14:55 on 14 December 2007.

"Week 40 - MD101 - Rugby (Informal Decision)

Dear All,

Further to my e-mail dated Wednesday 12th December an operator has asked for the full 10 working days to respond to this request. Therefore in accordance with this proposal you have until Friday 28th December to respond to Network Rail.

Network Rail is grateful for the feedback received so far from operators and the information on how this late notice request affects operators' timetabling arrangements over the Christmas period. The Rugby Project have sought the 26hr extension as a result of issues with:

- the late approval of Overhead Line design,
- adverse weather conditions preventing crane work in recent weekends
- failure of infrastructure at Rugby North Jn.

The work planned in the extension is critical to the completion of the infrastructure necessary to run train services after the signalling commissioning. The Rugby Project seeks to deliver the delayed overhead line works within the existing Christmas block, but will use the extension to allow the 'wheels free' Signalling Commissioning to be successfully completed.

Given the particular circumstances of this situation we consider that there is an overwhelming case to proceed with the extended possession on the basis that it is in the longer term interests of passengers, freight users and the industry (even taking into account the realistic worst possible impact on any operator that has yet to respond). In that case we feel that it is desirable to provide information as soon as possible. Therefore, by this letter we informally give you advance warning that once the 10 working days have elapsed we will be formally notifying you of our decision to go ahead with the extension of the blockade to 0520 Tuesday 1st January 2008.

Taking this into account and the impact this proposal has to operators, Network Rail believes that the right thing is therefore to start the timetable re-planning works and inform the public and freight customers of this disruption".

Given that Network Rail was of the view that there were overwhelming cases for the extension and giving as much notice as possible, it felt that it was important to inform train operators of this giving them the opportunity to challenge this decision if they wanted.

Consequently, WCTL wrote to ORR the same day (14 December) citing this email and seeking the ORR's intervention. On 18 December, the ORR wrote to Network Rail indicating that WCTL had requested that it make an order under s55(2) of the Railways Act, to prevent Network Rail from imposing the extension of the possession whilst the ORR investigates the matter.

Network Rail responded to the ORR with detailed submissions on 19 December and WCTL also wrote to the ORR the same day outlining further representations. The ORR wrote to Network Rail the same day confirming its decision. The letter stated:

"I confirm that we have decided that it is not appropriate to make the provisional order suggested by Virgin Trains. After careful consideration of the information available to us, and taking the potential short and longer-term consequences into account, we have concluded that to make such an order would not be acting in a manner best calculated to protect the interests of users and railway services".

Network Rail submits that this decision confirms (at least implicitly) that its actions were fair and reasonable in the circumstances taking into consideration the industry's best interests.

Finally, on 28 December, NAU sent the following email to all industry consultees (including WCTL and EWS) which brought the notification process to a formal conclusion.

Week 40 – MD101 – Rugby (Informal Decision)

Dear All,

Further to my e-mail dated Friday 14th December outlined below are the confirmed details for the extension to the Rugby all lines Christmas/New Year BLOCKADE.

Paragraph 3.5 of the ROTP

Ultimately, the ROTP provides that the final decision as to whether to alter the ROTP falls to Network Rail in accordance with paragraph 3.5. In reaching its decision, Network Rail is required to (a) give due consideration to the responses received by the Train Operators and (b) have due regard to the Decision Criteria in Network Code Condition D6.

Due Consideration to Train Operators (ROTP 3.5.1)

Network Rail recognises that any short notice possession will always be disruptive to users. In proposing a 2 working day response time, Network Rail was expressing to the Train Operators that this was a matter of the utmost urgency. In light of the timescales involved, meant that waiting up to 2 weeks for the responses from Train Operators and considering those responses before taking any decision, would not be neither reasonable nor practicable. Network Rail's overriding consideration was to serve the best interests of passengers and freight users.

Had Network Rail waited until 28 December 2007 before taking any action, there would have been insufficient time to give notice to customers planning to use the network that day. This would have prevented the generation of a robust train plan and would have reduced the period of advance notice to rail users of the disruption to their travel plans.

As stated above, any objection from a Train Operator would have had to be of such a fundamental nature that it would render Network Rail's overwhelming decision redundant and could not be resolved by means of the established compensation mechanisms within the industry which Network Rail had already undertaken to apply (certainly in WCTL's case).

As referred to in NAU's email dated 14 December 2007, Network Rail had taken in to account the feedback received from operators on how they considered the proposal would affect their timetabling arrangements. Whilst having regard to the business interests of the Train Operators, none of those consulted raised any issues which were considered by Network Rail to be so fundamental that they ought to supersede the decision which Network Rail had reached. The Train Operators still had the opportunity to raise further objections throughout the consultation period, although given the nature of the objections raised to date, it was unlikely that any further objections would alter Network Rail's decision.

It is important to understand the relationship between Part D of the Network Code and the ROTP. 1.1.2 of the ROTP states that the timetable planning process for the Permanent Timetable is governed by Part D of the Network Code. In the event of a conflict, the Network Code takes precedence over Track Access Agreements with individual Train Operators and Rules of the Route/Plan.

Although there is no conflict as such between the two sets of rules in this case, there are important variances. The requirement to give due consideration to Train Operators arises out of the obligations imposed by Network Code Part D2.1.11 which sets out what the contents of an amendment (to the PARTP) procedure must contain. It states at 2.1.11(a)(i) that Network Rail shall have consulted, to the extent reasonably practicable (emphasis added) with each Bidder (i.e. Train Operator for current purposes) likely to be affected by the amendment. Given that the ROTP were devised in accordance with D2.10, (and therefore implicitly incorporating the requirements of D2.11) the requirement to give due consideration to the Train Operators (ROTP3.5.1) must be read in conjunction with the obligation in D2.11 to consult only to the extent reasonably practicable.

In terms of what was reasonably practicable in these circumstances, Network Rail's position is that in undertaking an accelerated consultation process, thereby giving others the opportunity to disagree and approach the ORR requesting its intervention (which they did – see above), it satisfactorily discharged that obligation.

Due regard to the Decision Criteria in Network Code D6 (ROTP 3.5.2)

Network Rail took due account of Condition D6 – Decision Criteria both in the initial planning of the possessions and then in the decision to extend the possession into 31 December 2007.

Throughout, Network Rail's over-riding concern was to minimise the disruption to users and the impact on operators. This required Network Rail to balance the requirement to minimise the period of planned disruption to the travelling public against the risk of engineering overrun.

Once it became clear that completion of the works in the planned timescales would not be possible, Network Rail considered its approach in the context of Condition D6, and the decision taken accords in particular with paragraphs D6 (e) and (o). The benefits that are to be derived from the December 2008 timetable would have been put in jeopardy should the Rugby possession have failed to be completed and in Network Rail's view, the impact of this on the rail industry outweighed the short term, but none the less significant, disadvantage of the planned overrun. Also failure to deliver the work at Rugby during the Christmas 2007 period would have driven the need for more intrusive possessions early in 2008, outwith recognised holiday periods which would have resulted in an increased level of disruption to rail users.

4. The Panel Determination TTP102 and the associated ORR Appeal

Both referring parties have sought to rely (to varying degrees of accuracy) on the decision reached by this Panel in respect of TTP102 and the subsequent ORR appeal determination. In this case, there is limited value in referring to

either the TTP102 or ORR appeal decisions other than in relation to the broad principles which are adopted. In that regard, the ORR states that the material question is whether Network Rail complied with PARTP (Procedure for amending Rules of the Plan) when proposing the possessions. Network Rail does not disagree with this and has provided its position as to compliance with PARTP above.

In addition, there are a number of further reasons why the decision in TTP102 and the ORR determination are of limited value in the current case:

- 4.1 The facts giving rise to the dispute are very different from the current dispute;
- 4.2 The ORR did not hold a re-hearing of the dispute but merely ruled on specific issues raised by the appeal parties; and
- 4.3 The considerations of the Panel and the subsequent overturning of some of the Panel's decisions by the ORR are based on different premises than the current dispute.

For example, the Panel in TTP102 was critical of the reasonableness of the conduct of Network Rail based on the facts of the case. It is therefore misleading as far as the current matter is concerned for EWS to refer to an extract from the ORR determination which makes reference to Network Rail having acted unreasonably in the circumstances and the Panel had not taken this into consideration. Such a statement regarding Network Rail's conduct has no bearing on this case and should be disregarded (see 6.1.3 - 2nd bullet of EWS paper).

5. The Reasonableness of Network Rail's Behaviour

Network Rail's conduct in relation to the Rugby works is another key area of distinction from the decisions described in paragraph 4 above. One of the criticisms levelled at Network Rail in those decisions was that it failed to

promptly notify the relevant Train Operators of the specific nature of the problem until it was so close to the proposed possession date that the Panel had little alternative but to sanction the works. A review of the chronology in this case demonstrates that Network Rail responded both openly and fairly given the obvious time constraints.

Paragraph 1(b) above describes the problems faced on the Rugby project over the weekends preceding the works. It was only after the further engineering delays during the preparatory works over the weekend of 8-9 December that Network Rail fully appreciated the need to request an additional day to the Rugby possession. Once this decision had been made (11 December 2007), steps to communicate this to the wider industry were swift, the email from the NAU being sent first thing on 12 December 2007, triggering the process of alteration to the ROTP. There is no suggestion that Network Rail was seeking to hide any information from the Train Operators.

Given the immediate action taken by Network Rail, it is submitted that it took all appropriate steps to manage the situation as efficiently as possible. As such, Network Rail's actions were entirely reasonable. It gave detailed consideration to this difficult issue, weighed up and balanced the interests of both customers and end-users and came to a conclusion which it knew would cause some short term disruption in the interests of longer term benefits (a point noted and supported by the ORR in its letter of 19 December 2007).

6. Conclusion

The ROTP together with the Network Code outline the procedure which Network Rail (or a Train Operator) ought to adopt in formulating a proposal to alter the ROTP. Ultimately, that decision rests with Network Rail in any event, having regard to the Train Operator's interests and the requirements of the Decision Criteria stated in the Network Code. In that regard, Network Rail was not in breach of its contractual obligations for the following reasons:

- 6.1 Network Rail discharged its obligations under the Network Code and the ROTP. Firstly it notified the train operators of the proposed extension to the possession, secondly it gave consideration to the operators' responses to the extent reasonably practicable and finally it reached its decision having regard to the Decision Criteria stipulated in Part D of the Network Code.
- 6.2 Additionally, the Network Code at Part D and the ROTP recognise that such unusual and exceptional cases do arise from time to time and therefore they explicitly provide Network Rail with the option of accelerating the normal timescales to accommodate such circumstances. Without this exception to the ordinary timescales, there would be no alternative but to apply the standard timings which, as those who drafted PARTP clearly recognised, could lead to unjust outcomes. That flexibility exists within the terms of PARTP, allows Network Rail to take action which it deems reasonable having regard to the industry at large with a longer term view.

In this case, Network Rail originally proposed an acceleration of the timescales, a proposal which was rejected by one or more of the train operators.

- 6.3 Given that one or more of the Train Operators objected to the accelerated procedure, Network Rail, by its email of 14 December, accordingly gave the operators 10 working days to respond pursuant to 3.4.1 of the ROTP. The formal notification was then given on 28 December 2007.
- 6.4 By alerting the operators to the overwhelming case to proceed with the extended possession in its email of 14 December, Network Rail gave the train operators ample opportunity to raise any objections to the proposal through the timetabling process. However, rather than seek to expedite the TTP process either directly or through the ORR, WCTL

took the decision to raise the matter with the ORR as a network licence breach.

- 6.5 Network Rail's decision was taken with the longer term interests of the industry at large in mind. The appropriateness of this decision was confirmed by the ORR in its letter to Network Rail dated 19 December.

7. Decision sought from the Panel

The Panel is requested to determine that Network Rail acted reasonably and in accordance with its legal entitlements under the Network Code and ROTP, given the exceptional nature of the circumstances at Rugby.

Network Rail

15 February 2008

APPENDIX

CHRONOLOGY OF EVENTS LEADING UP TO THE CHRISTMAS BLOCKADE

DATE	WEEK	EVENT
27/28 October 30 October	31	T - 8.
24/25 November	35	521 points fail - lost work.
27 November 28 November		T - 4 Informal discussions commence with Operators re an additional day's possession.
1/2 December	36	High winds prevent lifts - lost work
6 December		West Coast Ops Group - 15th/31st December possession proposal discussed. 31st preferred by Operators.
6 December		West Coast Project Board - Access raised as an issue for RuN, but no discussion re 31st December. Focus was on alternatives.
7 December		Advice to Virgin that 31st December not required. Alternatives were being considered.
8/9 December	37	Further work lost.
10 December		Confirmation given that 31st required. No satisfactory alternative available. Virgin set deadline of 09.00 12th December to agree compensation for additional possessions in 2007 and 2008, including agreement for 31st December 2007.
11 December		Meeting NR/Virgin to discuss possessions/compensation. No agreement reached. NR reiterated the need for the possession.
12 December		08.38 No agreement reached, NR reiterated the need for the possession. ¹ 09.32 NAU published the proposal as a formal request and sought to obtain agreement in 2 days. 10.52 Virgin extended deadline to 12.00. 12.00 No agreement reached. 12.20 NR reiterated to need for the possession. ²
13 December		EWS stated that they required 10 working days to respond to possession request (to 28 December).
13 December		Further confirmation to Virgin of need for the possession. ³
14 December		NAU published informal decision to take the 31st December possession (following 2 days notice period).
15/16 December	38	
17 December		Project Readiness Review undertaken incorporating revised hand back time (1 Jan '08).
18 December		Bill Emery letter to Iain Coucher.
19 December		Peter Henderson response to Bill Emery.
19 December		- Bill Emery response to Peter Henderson. - NR Press statement to provide information to passengers on extended possession.
28 December		NAU published formal decision for possession on 31st December.

¹ A summary of the status at 08.30 12 December is attached

² E-mail attached

³ E-mail attached