

***TTP2079: Sole Reference by the Claimant to a Timetabling
Panel in accordance with the provisions of Chapter H of
the ADR Rules effective from 1 August 2010
(and as subsequently amended)***

1 DETAILS OF PARTIES

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

(a) First Greater Western Limited whose Registered Office is at Milford House, 1, Milford Street, Swindon. SN1 1HL ("GWR") ("the Claimant"); and

(b) Network Rail Infrastructure Limited whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("Network Rail") ("the Defendant").

1.2 GWR believes any train or freight operating company operating in the sphere of influence of GWR may be affected by the outcome of this dispute.

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."

The appeal is expressly authorised through Condition D2.2.8 of Part D of the Network Code, viz:

"2.2.8 Subject to Condition D2.2.9 below, any Timetable Participant dissatisfied with any decision of Network Rail in respect of those Rules (including any decision to revise those Rules pursuant to Condition D2.2.7) is entitled to appeal against any part of it. Any such appeal shall be conducted in accordance with Condition D5 and must be made by a Timetable Participant: "(a) in respect of any decision to revise the Rules

pursuant to Condition D2.2.7, within five Working Days of receipt of Network Rail's decision; "(b) otherwise within fifteen Working Days of receipt of Network Rail's decision."

(Condition 2.2.9 provides a caveat to 2.2.8 where a Possessions Strategy Notice is relevant, viz:

"2.2.9 No appeal may be brought pursuant to Condition D2.2.8 in respect of any part of the Rules which conforms with any Possessions Strategy Notice which has: (a) not been appealed in the timeframe for appeal set out in Condition D6.4.1; or (b) has been appealed but has been finally determined by a Timetabling Panel or the Office of Rail Regulation."

There is no Possessions Strategy Notice relevant to this case so Condition 2.2.9 does not influence Condition 2.2.8 in this case.)

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 Chair 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 volume and disposition of Restrictions of Use. GWR believes EAS 2023 V4 is untenable because the industry is unable to provide a service to the public in accordance with it.

4.2 This dispute arises over the interpretation of:

- (i) Conditions D2.2.1 to D2.2.6 (which set out the method for developing the EAS) viz:

“2.2.1 Both the Timetable Planning Rules and the Engineering Access Statement (together referred to as “the Rules”) are revised on a bi-annual basis, each revised version being operative for the same Timetable Period as the Working Timetable to which they pertain. The Rules must be revised and updated, in accordance with the procedures described in this Condition D2.2, as a first stage in the preparation of a New Working Timetable.

“2.2.1 A The Rules shall permit the operation of International Freight Train Slots included in the applicable International Freight Capacity Notice.

“2.2.2 Between D-64 and D-60, Network Rail shall consult with Timetable Participants in respect of any proposed changes to the Rules.

“2.2.3 Following consultation in accordance with Condition D2.2.2, and not later than D-59, Network Rail shall provide to all Timetable Participants a draft of the revised Rules (the “Draft Rules”).

“2.2.4 Following distribution of the Draft Rules and by D-54 Timetable Participants may make representations to Network Rail in respect of any changes they propose or objections they may have to the Draft Rules provided to them in accordance with Condition D2.2.3.

“2.2.5 Following D-54 and by D-44, Network Rail shall consider the representations and objections made to it by Timetable Participants pursuant to Condition D2.2.4 and any changes to International Freight Train Slots reflected in the applicable International Freight Capacity Notice and may amend the Draft Rules. Not later than D-44, Network Rail shall issue the final revised Rules to all Timetable Participants.

“2.2.6 In preparing revised Rules, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.1 and to provide to Timetable Participants its reasons for making the revisions to the Rules.”

and (ii) Conditions D1.1.1; D4.1.1; and D4.6.1 to D4.6.4 (which set out how decisions concerning the development of the EAS must be made), viz

“1.1.1 In conducting the processes set out in this Part, decisions must be made by Network Rail in accordance with the principles set out in Condition D4.”

“4.1.1 In conducting the processes set out in Condition D2.2 by which the Rules are revised on a bi-annual basis (including the amendment process described in Condition

D2.2.7), Network Rail shall make all decisions by application of the Decision Criteria in the manner set out in Condition D4.6.”

“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)-(l) 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.”

4.3 This dispute is brought against the entirety of the Section 7 possessions for the 2023 EAS V4, Western Route, as the quantum of proposed access materially affects adversely the delivery of the GWR service such as to undermine critically the resourcing of both rail and road transport. This in turn destroys the market through amending permanently the perception of the rail product.

GWR requires a reduction in hours and volume of the Section 7 access in the region of 25% of that published to bring down to manageable levels given the emphasis on current challenges around crew and rail replacement services. At all stages of the EAS consultation process GWR has explained to Network Rail the severe situation such level of access produces but Network Rail has always failed to resolve or offer alternative solutions to this and has only now started discussing potential alternatives. Network Rail’s initiative to design CP7 engineering and its access in conjunction with GWR shows that it recognizes the impossible predicament the 2023 EAS produces for GWR, but still maintains it cannot change the CP6 workload.

The disruption in EAS 2023 is much higher than in previous years (even though the access charge has not risen but has rather dropped in real terms from £20m p.a. in 2022/23 to £14m p.a. in 2023/24. This is the charge levied on GWR to fund Schedule 4 compensation for Restrictions of Use thus the implication is that such an increase in damage was not foreseen at the time of the CP6 award. At this level it is not possible to supply sufficient road transport to provide a service to the public. The rail replacement issue is illustrated in the Appendices.

Appendix F1 is a comparison of the number of possessions and possession hours contained in this EAS and previous years' EAS. It will be noted that a high level was also experienced a couple of years ago, but this was driven by the major Bristol East works which untypically did not have a large effect on road transport requirement. In addition Covid and technological effects on working patterns and labour availability, as well as Road Transport Regulation changes have only now begun to affect delivery. Western Region Section 7 of 2023 EAS V4 is particularly harmful at weekends and in busy periods particularly in Devon and Cornwall. Possessions associated with the Bristol West Junction replacement and the Devon and Cornwall re-signalling are particularly problematic. GWR has proposed alternative dates for this access.

There is also considerable increase in two track timetable requirements between Reading and London which whilst not affecting road transport to any great extent is a continuous source of aggravation for customers and planners.

In addition, overall the access levels would prove to be a real challenge to maintain T-12 bidding timescales which in turn will affect stock and crew planning. This will lead to instability of information for customers. It is not clear whether Network Rail's train planning team realise the potential implications on their ability cope with workload and late bids.

4.4 The appendix includes a timeline of access discussion and documents to support this.

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

5.1 GWR does not believe that the decisions taken by Network Rail have been taken in accordance with the Decision Criteria (including its Objective).

5.2 The Decision Criteria has a number of factors which bear different weightings depending on circumstance but which in all cases must lead to a solution meeting the objective which "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)".

5.3 GWR believes that decisions taken in accordance with the Decision Criteria (including its Objective) would have led to:

- essential work along with a significant element of desirable work for the period of 2023 EAS v4 still being able to be undertaken;

- passengers accommodated comfortably and safely including through the use of road replacement service;
- passengers not unnecessarily deterred from travelling; and the market not being destroyed;
- improved revenue accruing to the industry and reduced cost to the industry; and
- a more standard timetabling arrangement.

5.4 In order to do this the possessions regime would be amended from Network Rail's drafts, proposals and decisions to a sustainable level and structure.

5.5 There is precedence that shows that whilst it is impractical to develop for each Restriction of Use a grid of decision criteria / objective consideration during drafting, proposing and deciding, the general principles need to be held in mind and any comments from train or freight operators received during consultation must be tested against the objective and its criteria. It appears that Network Rail's planning and final decisions were not supported in this way. The only reason received in late held meetings was that the work had to be undertaken in CP6 to retain funding so this was the last chance.

5.6 GWR has suggested deferring work into a properly funded and realistically planned CP7. GWR has also offered suggestions to maintain parcels of work within 2023 EAS v4 but in a less damaging spread of possessions.

5.7 Precedence (Virgin WC v Northern regarding revenue loss v drunken behaviour whilst awaiting and whilst on road replacement services) is also available that emphasises the need to choose the most pressing DC when it is critical to do so (e.g. when it cannot be solved as in the drunken travellers or (in this TTP2079) in the inability to provide road transport), and always to meet the objective.

5.8 GWR believes a review of the Decision Criteria (including its Objective) would not have resulted in the decision made to have such a high volume of damage contained in the 2023 EAS v4 for Western Region.

6 DECISION SOUGHT FROM THE CHAIR

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

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

6.2 Principle

A determination is sought that the planning regime required by the Network Code insists that the Decision Criteria (including its Objective) and train operator concerns are considered before a decision is made concerning the EAS made under Condition D2.2 of the Network Code; and

A determination is sought that the Decision Objective and its Criteria are such that that the criterion that the spread of services reflects demand weighs heavily in the case of TTP2079 such that it is paramount in the consideration of the Decision Criteria leading to that decision.

6.3 Specific Conclusion

A determination is sought that a decision under D2.2 is not valid unless accompanied by sound Decision Criteria and Objective implications wherever an operator has provided comments;

A determination is sought that the 2023 EAS V4 does not fulfil this requirement; and

A determination is sought that a route regarding rectification of the 2023 EAS to meet this requirement be considered and implemented. A 25% Reduction in the level of possessions will achieve this.

It is GWR's belief that exceptional circumstances apply. Uniquely the 2023 EAS V4 is incapable of being implemented.

6.4 No financial remedy is sought.

6.5 No other decision is sought from the Hearing Chair.

7 APPENDICES

Appendix A: Timeline of discussions - *partially redacted as agreed by the Chair*

Appendix B: Road Replacement Presentation to Alliance Board - *redacted in full as agreed by the Chair*

Appendix C: Crew Implications;

Appendix D: Crew Impact;

Appendix E: Schedule 4 Supplement to the Fixed Charge;

Appendix F1: A Comparison of possessions levels by EAS year;

Appendix F2: Internal GWR email showing numerical comparison and effect - *partially redacted as agreed by the Chair*

Appendix F3: Example NR/GWR Alliance Scorecard Period 4 f23 showing workload full - *redacted in full as agreed by the Chair*

Appendix F4: CP7 Workload NR/GWR meeting planned to avoid problems similar to those emerging in final year CP6 - *redacted in full as agreed by the Chair*

Appendix F5: CP6 Remaining Workload NR/GWR meeting - *redacted in full as agreed by the Chair*

Appendix F6: CP6 Remaining Workload NR/GWR meeting - *redacted in full as agreed by the Chair*

Appendix F7: Email GWR to Nr Outlining Proposals to Rearrange Workload - *partially redacted as agreed by the Chair*

8 SIGNATURE

For and on behalf of First Greater Western Limited

Signed
Robert Holder

Robert Holder
Network Access Manager
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