

**Joint submission to Access Disputes
Panel or Timetabling Panel**

By

First ScotRail Limited

and

Network Rail Limited

TTP Reference 317

1 DETAILS OF PARTIES

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

- (a) First ScotRail Limited whose Registered Office is at 395 King Street, Aberdeen AB24 5RP ("[FSR]") ("the Claimant"); and
- (b) NR Infrastructure Ltd, whose Registered Office is at Kings Place, 90 York Way, London, N1 9AG ("NR" ("the Respondent"))

Contact Details

Correspondence to FSR should be address to Mike Price, First ScotRail, Atrium Court, 50 Waterloo Place, Glasgow G2 6HQ, Tel: [REDACTED], Email: [REDACTED]

Correspondence to NR should be address to Matt Allen, Network Access Unit Manager, Network Rail, Network Access Unit, City Exchange, 11 Albion Street, LEEDS, Tel: 0113 341 2230, Fax: 0113 341 2341, Mob: [REDACTED], Email: [REDACTED]

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 D 5.1.1. of the Network Code.

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; and
- (f) Appendices and other supporting material.

4 SUBJECT MATTER OF DISPUTE

- 4.1 First ScotRail Sleepers cannot be routed via the WCML on certain Sunday nights (weeks 8 to 23 except for weeks 9 and 22) in the May 2010 timetable rejected because Network Rail has imposed possessions in the ROTR.
- 4.2 At all stages of the time tabling process First ScotRail objected to these possessions and refuted Network Rail's right to take these possessions without due consultation via the Network Change Process under Part G of the Network Code. (First formal objection lodged on 20th March 2009 in response to V2 of the ROTR)
- 4.3 Network Rail remains of the view that the change in the packaging of the disruptive engineering access between Preston and Carlisle does not fit the criteria of a Network Change whereas, First ScotRail believe these possessions are Network Change. This matter was brought to ADP heading in October 2009 which ruled in favour of First ScotRail's view that the possessions were a Network Change (ADP40). Network Rail will be appealing this decision to ORR within the prescribed timescales and is currently preparing its submission.
- 4.4 First ScotRail believes that because no Network Change has been issued and there has been no consultation on the Network Change, it is a denial of First ScotRail's access rights to change the ROTR to prevent First ScotRail bidding for paths via the WCML because Network Rail have not met the requirements of Network Code Part G 10. before implementing the Network Change.. Network Rail contend that they can make such changes to the Rules of the Route, even if they do represent a Network Change which has not been consulted, as they believe they only need to consider the Decision Criteria when modifying the Rules of the Route.
- 4.5 The Part or Condition that the dispute relates to or is associated with is, G10.1, D2 and D 5.1.1
- 4.6 For the avoidance of doubt this dispute relates to a Network Rail decision on Rules of the Route which is referred to the time panel under D 2.1.7 and D5.1.1 (d)
- 4.7 Network Rail allege that FSR have failed to bring this issue to dispute at the earliest opportunity and there by prejudiced NR's position, however FSR believe they have responded correctly in accordance with the Network Code.

5 SUMMARY OF DISPUTE

- 5.1 Network Rail has asked the panel that "As these items have been in the access plan since version 1 Rules of the Route, advise First ScotRail that they should have brought this dispute to the attention of the timetable panel earlier and that it is wrong for First ScotRail on these timescales to now seek a determination from the

Panel applicable to Network Rail's application of the decision criteria" First ScotRail believes that it has responded appropriately to each NR proposal, including reference to the panel and has sought throughout to either agree Network Change or a method of mitigating the effects of the Network Change.and believes that the responsibility for delay in bringing matters to a head lies with Network Rail..

- 5.2 Network Rails position is that there has been no change in the maintenance policy. Network Rail believes that First ScotRail has brought this reference to TTP it has not implemented the Network Change process as determined by the Panel in ADP 40. However, Network Rail has not implemented the Network Change process as will be appealing the determination of ADP40 within the prescribed timescales where as First ScotRail believe that the decision to issue a Rules of the Route by Network Rail containing possessions which the ADP has determined are Network Change without following the due process laid out in Part G of the Network Code is a denial of their access rights.

6 EXPLANATION OF EACH ISSUE IN DISPUTE WITH RESPONSE

6.1 ISSUES by Claimant. Response to Network Rail's proposals and decisions.

- 6.1.1 Copies of First ScotRail's response to each of the 4 versions of Rules of the Route are attached. Following version 1 it can be seen that First ScotRail sought to understand the reasons for the proposed possessions. However it should be noted that First ScotRail first raised this matter with the ADC Secretary on 20th March 2009 following Version 2. of Rules of the Route when they were aware that this was an on going change to the maintenance arrangements on the WCML which would have a long term and material affect on First ScotRail's overnight business..
- 6.1.2 Throughout the process Network Rail assured First ScotRail it would deal with its issues and a dispute was unnecessary. Only when a proposal to Network Rail's claims panel (the detail of which we are unaware of) was rejected were we told that they would not be able to make us an offer to resolve the dispute. They also informed us they disagreed with our view that this was a Network Change. Because of this First ScotRail immediately raised the dispute over whether the works constituted Network Change with the ADP. First ScotRail were surprised that Network Rail failed to respond to the panel's decision, even refusing to issue a notice of Network Change conditional on an appeal. Hence the current dispute over denial of First ScotRail's access rights.
- 6.1.3 It should be noted that the minutes of hearing ADP 40 record as question 17 "Is there still an outstanding Rules of the Route dispute in place for these possessions" and Network Rail's answer is recorded as "Yes."

6.1.4 First ScotRail believe it is unreasonable for Network Rail to claim it is too late for any change of plan when they have been aware of First ScotRail's firm stance since version 2 of RoTR. It cannot be just that Network Rail should be able to turn issues into a fait accompli by merely delaying a dispute.

Issue 2 by claimant

6.3 Network Rail's decision on version 4 of Rules of the Route.

6.3.1 The panel is asked to note that the material effects of FSR not getting its paths via the WCML and being diverted via the ECML are as follows

- i) Trains omit calls at Carlisle, Watford Crewe and Preston
- ii) First ScotRail's haulier charges £16,000 for the diversion of the 4 trains via the ECML in accordance with our contract.
- iii) The journey time and staff hours are extended.
- iv) Schedule 4 of First ScotRail's Track Access agreement is a template Franchised Passenger Operator's agreement and provides no compensation for rail diversions of trains.

6.3.2 If Network Rail is allowed to deny First ScotRail's bids for paths via the WCML on the given Sundays, they will have effectively been allowed to implement a Network Change, which is not required for safety reasons or due to a competent authority, contrary to the requirements of Network Code Part G 10.1. This will deny FSR its access rights.

6.3.3 First ScotRail has sought to agree ways in which Network Rail could remove the material effects of the Network Change or to fast track a Network Change notice. However Network Rail is adamant that despite the ruling of the Committee they will not comply with its ruling and will at some future date appeal.

6.4 Response by Respondent.

6.4.1 Condition D2 sets out the consultation process leading to the establishment of the Rules of the Route which govern the entitlement of Network Rail to possessions for the purpose of carrying out engineering works on the network. In relation to application of the decision criteria Network Rail considers condition D6 clauses a), c), d), e), h) and l) are applicable for the planned Sun/Mon possessions in period D of the 2010 Rules of the Route between Preston and Carlisle. Network Rail can confirm an alternative route via the ECML is available for the FSR sleepers.

- 6.4.2 Network Rail does not consider that its access arrangements can amount to a change to the Network. The reason that Network Rail has never processed its engineering access strategies between Preston and Carlisle via the Network Change channel is because there has been no change to maintenance policy or standards and therefore this does not in Network Rail's view fit within the definition of Network Change pursuant to Part G.
- 6.2.3 However, Network Rail does recognise the determination of the Panel in ADP40, but is also aware of its right to appeal the matter to the ORR. Similarly, it notes that it is entitled to apply for an interim order from the ORR which would have the effect of staying the ADP40 Determination. It is for this reason that Network Rail does not consider that this TTP panel can find in favour of FSR.
- 6.4.4 First ScotRail have indicated that they believe their right to appeal to the timetable panel is laid out in condition D5, the Network Rail position is that the arguments put forward by First ScotRail remain focused around the change in the disruptive engineering access constituting a Network Change. Network Rail does not make same linkage between Part G, determination ADP40 and condition D5 that First ScotRail has alluded to. There have been many occasions when an engineering access plan has been agreed during the development of the Rules of Route for delivery of schemes that are Network Change activities when the final sign off of the Network Change is still completed.
- 6.4.5 The referral to dispute does not fit the criteria set out in D5.1.1. First ScotRail have not queried Network Rail's application of the decision criteria, First ScotRail are incorrectly stating that we have rejected their bid, this is not an issue of flexing rights but is an issue about the decisions that Network Rail has taken under condition D2.1.
- 6.4.6 Network has re-programmed existing maintenance activities for the Preston to Carlisle section of the West Coast Main Line into alternative engineering access windows which are in line with the Efficient Engineering Access (EEA) regime introduced in December 2008 as outlined in the 2006 Sustainability Strategy Steering Group (SSSG) document. The West Coast SSSG document outlined the possessions required to maintain and renew West Coast Main Line after the conclusion of the West Coast Route Modernisation project, for the continuing delivery of the upgrade outputs.
- 6.4.7 The EEA programming of engineering access between Preston and Carlisle has reduced the possession hours on the line from an annual total of 1248 hours midweek one line BLOCKED with single line working to an annual total of 84 hours Sun/Mon double line BLOCKED. The removal of the midweek night single line working has delivered journey time and performance improvements for approximately 35 WTT trains. In contrast, the Sun/Mon double line BLOCKED possession affects 6 WTT trains (4 sleepers and 2 intermodal

freight services). In line with panel determinate TTP271, (paragraph 23.4), Network Rail considers that the principles set out in the EEA statement are to inform the deliberations for the ROTR consultation process.

6.4.8 A 2010 Rules of the Route period D timetable period block necessitates the Sun/Mon sleepers in weeks 9 to 22 to be diverted via the East Coast Main Line. The trains have not been rejected, however as part of the development and in accordance with condition D3.2.2 & D3.2.3 will in the subsidiary working timetable formally offer the sleeper services routed via the East Coast Main Line.

7 ANY FURTHER ISSUES RAISED

7.1 N/A.

8 DECISION SOUGHT FROM THE PANEL

8.1 The Panel is asked to determine:

First ScotRail is seeking the panel to direct that

- (a) That Network Rail may not implement the proposed possessions prior to issuing the Network Change Notice and carrying out due consultation.
- (b) That FSR is entitled to be granted paths via the West Coast Mainline, or those diversionary paths which were previously used.

Network Rail requests the panel to direct that

- (c) That, as these items have been in the access plan since version 1 Rules of the Route, First ScotRail ought to have brought this dispute to the attention of the timetable panel within the time limits prescribed in Part D of the Network Code and that First ScotRail is now out of time to appeal the Rules of the Route.
- (d) Alternatively, that Network Rail has correctly applied the Decision Criteria in implementing the engineering access plan as detailed in the V4 2010 Rules of the Route and subsequent Confirmed Period Possession Plans and First ScotRail must now comply with those Rules.

8.2 That FSR shall be granted paths via the West Coast Mainline in the December/May 2010 timetable, or via those diversionary paths which were previously used, this only in order to facilitate maintenance in the manner that historically applied on the WCML..

9 APPENDICES AND ANNEXES

Annex 1 ADP 40 Decision

Annex 2 First ScotRail's response to Version 1 of Rules of the Route.

Annex 3 First ScotRail's response to Version 2 of Rules of the Route.

Annex 4 First ScotRail's response to Version 3 of Rules of the Route.

Annex 5 First ScotRail's response to Version 4 of Rules of the Route.

Annex 6 Justification for the Sun/Mon possessions

Annex 7 Network Rail's response to FSR V1 ROTR Reply

Annex 8 Network Rail's response to FSR V4 ROTR Reply

Annex 9 Notes of telephone conference call 22nd May 2009

Annex 10 Notes of telephone conference call 2nd June 2009

10 SIGNATURES

For and on behalf of First ScotRail Limited

For and on behalf of Network Rail

Signed

Signed

Print name Mike Price
Position: Contracts Advisor

Print name Matt Allen
Position: NAU Manager

Date: _____

Date: _____