

1 DETAILS OF PARTIES

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

- (a) Grand Central Railway Company Limited, Company No. 03979826 whose Registered Office is at 1 Admiral Way, Doxford International Business Park, Sunderland ("GC") ("the Claimant"); and
- (b) Network Rail Infrastructure Limited, Company No. 2904587 whose Registered Office is at Kings Place, 90 York Way, London N1 9AG ("NR" ("the Respondent")).

This is a single party submission by XC Trains Limited (XC) on behalf of Grand Central and the contact is:

John Cherrington

Track Access and Possession Strategy Manager

Cannon House

Birmingham, B4 6BS

[redacted]

2 THE CLAIMANT'S RIGHT TO BRING THIS REFERENCE

2.1 With reference to Network Code Condition D2.2.8, this matter is referred to Timetabling Panel ("the Panel") for determination in accordance with Condition D5.1.2 of the Network Code and Section 3.5.4 of the 2013 Timetable Planning Rules.

3 CONTENTS OF REFERENCE

This Sole Reference 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 in Section 6;
- (d) In Section 7, the decisions of principle sought from the Panel in respect of
 - (i) legal entitlement and
 - (ii) remedies;

(e) Appendices and other supporting material.

4 SUBJECT MATTER OF DISPUTE

- 4.1 This dispute concerns the decisions published by Network Rail on 20th December 2012 to implement amendments to Restrictions of Use (RoUs) affecting the East Coast Mainline (ECML) route between Kings Cross and New Barnett published in the LNE Route Confirmed Period Possession Plan (CPPP) as item 15 in Week 1 and item 2 in Week 2. Although the Week 2 block was lifted on 15th January 2012, its removal does not affect the underlying principles that GC wishes to contest, in addition to the method of applying the Decision Criteria, and therefore reference will be made to it in this appeal.
- 4.2 GC is the train operating company providing long distance passenger train services, on the route between Kings Cross and Bradford/Sunderland. Significant volumes of GC's passenger journeys are made at weekends (see Section 4.4 below). The operation of weekend Working Timetable (WTT) services on this route is affected, to the detriment of approximately 2,830 passengers¹ and representing a risk to revenue that disproportionately affects GC as a non-franchised Operator with no guaranteed source of income. This is particularly relevant given the nature of this dispute which concerns path allocation during engineering disruption.
- 4.3 Network Rail's intention to implement changes to the RoUs published in the CPPP for weeks 1 and 2 will prevent GC from operating a reasonable service between London and Bradford/Sunderland throughout the day on Sunday 31st March 2013 (Week 1) and, prior to block being lifted, between 08.00 and 12.00 on Saturday 6th April (Week 2).
- 4.4 The planned RoUs currently prevent GC from operating 14 passenger services on Sunday 31st March 2013 (Week 1) and would have prevented 5 passenger services running on Saturday 6th April, which were included within the December 2013 WTT for Period D (see Appendices A and B) and in total comprise one fifth of GC's seven day service, or 100% of Sunday services and 30% of Saturday services.

¹ Figure based on average historical passenger loadings into and from King's Cross multiplied by the number of timetabled services on Sunday 31st March 2013.

4.5 This dispute arises over the application of the decision criteria as set out in the Network Code, Section D4.6 with regard to the NR decision to amend engineering access decisions published in the CPPP for timetable week 1 and previously Week 2, which will have an unduly detrimental impact on GC's ability to operate a "commercially viable" service under "market conditions" as set out in Section 2.21 of the *Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005* (ORR, 2006), with specific reference to:

a) The addition of RoUs affecting the Up Fast line in Week 1 and the No1 Fast/Down Fast in Week 2

b) NR's conclusions regarding the allocation of available capacity.

5 SUMMARY OF DISPUTE

5.1 Network Rail progressed the consultation for its Engineering Access Statement (EAS) 2013 in accordance with Network Code Condition D2.

5.2 Version 1 of the 2013 EAS, NR included RoUs affecting the Kings Cross to Holloway section of the ECML Route in weeks 52/1 (possession reference P2012/1538985) and Week 2 (possession reference P2012/1550350). GC indicated that both would be acceptable in terms of the minor impact on its services to/from Kings Cross. In Version 2 NR confirmed its intention to implement the previously published Week 52/1 and Week 2 ROU's together with an additional RoU (possession reference P2012/1580034) affecting the Wood Green to Hornsey section of the ECML in Week 1. The additional Week 1 RoU was required for works in connection with the Finsbury Park to Alexandra Palace (F2A) Project and, as there was no impact on GC services, GC accepted the additional RoU. See Appendix G for details of the possessions published in the final agreed EAS for 2013.

5.3 On 6th September 2012 all three RoUs were published in the LNE Route Draft Period Possession Plan (DPPP) document for weeks 1 to 4 and, following discussions with NR, the LNE Confirmed Period Possession Plan (CPPP) was published on 1st October 2012.

5.4 On 25th October 2012, at a meeting attended by XC on behalf of GC, Open Access Operators were advised that Single Line Working (SLW) to/from Kings Cross on Saturday 31st March due to a new method of Adjacent Line Opening (ALO) working would impose further capacity constraints. Therefore, the previously-agreed possession strategy, which had become significantly more disruptive to GC, would

have to be renegotiated with all Operators. NR also verbally advised that, in their view, correct application of the Decision Criteria would make it unlikely that Open Access Operators would be allocated any of the available capacity. When GC challenged this conclusion, we were informed it was based on a general internal exercise that had previously taken place (see Appendix E for the unflexible approach NR takes on the ECML) rather than a specific exercise for these works.

- 5.5 On 16th January 2013, whilst pursuing this appeal, GC was informed via email (Appendix C, date 17 January 2013 11:08) that ALO was not the reason for the additional RoU but that physical work would be taking place on the line. This recent information has altered the content of the dispute but not the nature thereof.
- 5.6 In order to formulate a thorough response and better understand the commercial viability implications of all options, GC asked NR, as per Sections 4.6.2, 4.6.3 and 6.3.2 of the Network Code, to provide details of how the Decision Criteria were applied, which factors were taken into account, in addition to details of the new standards applicable to ALO (Appendix C, date November 28, 2012 13:20). These documents, to date, have not been forthcoming and the full history of the exchange can be seen by reading upwards from the referenced email in Appendix C.
- 5.7 On 29th November 2013 NR submitted proposals for additional/extended access required by the projects in connection with previously published RoUs for week 1NR proposed to extend the times of F2A possession reference P2012/1580034 from '00.50 until 08.50 Sunday 31st March 2013' to '02.30 Friday 29th March until 02.30 Mon 1st April' and implement an additional RoU of the Up Fast Line to apply from '22.00 Saturday 30th until 02.30 Monday 1st April'. This additional RoU on the Up Fast line significantly reduced paths into Kings Cross due to the need for SLW on the Down Fast line. NR indicated that there would be capacity for 4 trains per hour and that Open Access Operators would not be allocated any of the available capacity, in favour of East Coast and First Capital Connect. The proposed changes to possession reference P2012/1580034 meant that it was not compatible with possession reference P2012/1538985 required for Thameslink Canal Tunnel works. Instead in Week 2 NR proposed to cancel the latter and extend the times of Thameslink Canal Tunnel possession reference P2012/1550350 from '23.30 Saturday 6th until 11.30 Sunday 7th April 2013' to '01.40 Saturday 6th until 03.00 Monday 8th April'. An additional RoU of the No1 Fast/Down Fast Line to apply from '01.40 Saturday 6th until 09.00 Sunday 8th April'

was also planned. This additional RoU on the No 1 Fast/Down Fast line meant a significant reduction in paths to/from Kings Cross, owing to SLW on the Up Fast line. NR indicated that there would be capacity for 4 trains per hour inbound in one hour and 4 trains per hour outbound the next. As with the week 1 proposal NR indicated that Open Access operators would not be allocated any of the available capacity in favour of East Coast and First Capital Connect.

- 5.8 On 11th December XC responded to NR on behalf of GC and formally declined its proposals to amend Week 1 possession reference P2012/1580034 and Week 2 possession reference P2012/1550350 on the grounds that NR had failed to justify the additional RoU on the Up Fast Line and, in accordance with best practice and expectations under Section 2.16 of *Guidance on Appeals*, ORR (2006), GC expected NR to devise and evidence an alternative method of work to permit ALO on the Up Fast line as originally envisaged and agreed. Subsequent to the information of 16th January 2013, GC would still expect NR to evidence their use of the Decision Criteria (D6, Network Code) and, additionally, justify the removal of ALO working that has led to a backlog of work on the line and the subsequent decision to have an additional RoU in Week 1.
- 5.9 On 20th December 2013 NR published its decision to implement the changes to Week 1 possession P2012/1533034 and Week 2 possession reference P2012/1550350 albeit with a much reduced RoU affecting the No1 Fast/Down Fast line in the latter instance. This reduced the impact on Saturday services to that outlined in Section 4.4 of this document but left 100% of GC services unable to run on Sunday 31st March 2013.
- 5.10 On 27th December 2012 XC registered a formal appeal on behalf of GC with regard to the NR decisions regarding amendments to Week 1 CPPP item 15 and Week 2 CPPP item 2.
- 5.11 On 4th January 2013 NR invited Operators to a meeting on 15th January 2013 to agree the amended timetables required in connection with RoUs on the ECML between Peterborough and Kings Cross in Weeks 1 and 2.
- 5.12 On 15th January 2013 NR cancelled the Week 2 possession under dispute.
- 5.13 On 16th January 2013 GC was informed that the additional RoU in Week 1 was not due to the removal of ALO working but to physical work being carried out on the line. GC is

still waiting to hear whether this change in circumstance will allow the passage of GC diesel services between work.

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

- 6.1 GC's objection to NR's decision to change RoUs in weeks 1 and 2 is made on the basis that GC believes reasonable access should be provided to allow a service to operate on the routes between Sunderland/Bradford and Kings Cross that is consistent with the level of demand for these services. Historical passenger counts for the past four months show GC services operating, on average, at 70% seating capacity upon entering and leaving Kings Cross. This includes 16% of services that were operating at 90% or higher capacity, including those at more than 100%.
- 6.2 Owing to the nature of services run by GC, interchange for customers at Peterborough as offered by NR, would reduce GC's ability to provide competitive, viable alternatives for customers to Sunderland, Hartlepool and Eaglescliffe. All services would involve interchange at Peterborough, in addition to extended journey time, which have both been demonstrated in internal and external (*Rail passengers' experiences and priorities during engineering works*, Passenger Focus, 2012) passenger surveys to be unacceptable and act as a deterrent to passengers. GC services would be reduced in competitiveness to those on a par with current non-GC services operating from the same station and remove the market conditions that enabled GC to feasibly operate under an Open Access agreement. Only Hartlepool customers would be worse off taking non-GC services (these would add a 60 minute time increase and 1 additional interchange – figures taken from published timetables for the relevant dates on 16th January 2013). A similar situation exists in the North West, with GC only remaining competitive at Brighouse (1 to 2 additional interchanges, 60 minutes extended journey time). All of these figures are before any engineering time is added to schedules. As an Open Access operator GC needs to consistently meet and exceed passenger operational expectations to retain commercial viability.
- 6.3 Under Section D4.6.2 (b), (d) and (e) of the Network Code, GC believes travellers have a right to expect a reasonable range of options for travel into London, particularly in the North East where franchised alternatives impose more time increases and interchange penalties than those on the North West route. GC believes a reasonable compromise

and aspiration is to run three services into and from King's Cross. Due to proposed diversions and existing GC resources, allowing GC to run a service between the North East and King's Cross would alleviate some passenger expectation and demand.

- 6.4 GC believes that an appropriate response to the restrictions on the use of ALO was for NR to devise an alternative method of working that allows GC to operate its agreed level of service. Instead NR unreasonably chose to 'bolt on' additional Fast Line access to previously agreed RoUs and in doing so made its decision without properly considering the impact of GC being able to "supply customers on competitive terms" (Section 2.21, *Guidance on Appeals* (ORR, 2006)). In the absence of documentation to the contrary, GC considers that NR has failed to examine "all options for accommodating the applicant's request" (Section 2.16, *Guidance on Appeals* (ORR, 2006)).
- 6.5 Further, in its decision to implement additional RoUs affecting the Fast lines in weeks 1 and 2 NR has failed to fulfil its obligation set out within Section 1.0 of the Introduction to the Engineering Access Statement 2013, to have the "aim of achieving the optimal balance between access to the network for train operations and access for maintenance, renewal and enhancement work"
- 6.6 As a result of the planned additional RoUs the capacity available for all services running to and from King's Cross on Sunday 31st March 2013 has been significantly condensed.
- 6.7 NR's subsequent decision to allocate the remaining capacity to franchised operators means that GC will be unable to operate through services between Sunderland/Bradford and London with passenger and commercial consequences outlined, in Sections 6.1 and 6.2 in particular, of this document.
- 6.8 In the absence of the relevant documentation (Appendix C, date November 28, 2012 13:20 and subsequent emails), GC infers that the greatest weight in the Network Code Decision Criteria (Section D4.6) has been given to allocating capacity to those who can convey the most passengers through the affected area. Whilst there is some logic to this argument, it reduces the choice to 'big trains vs. little trains', ignores the complexity and nature of the Decision Criteria (in particular parts (a), (b), (d), (e) and (j) (Section D4.6.2, *Ibid.*) and unfairly discriminates against Open Access Operators who, by their

nature, may have more limited access to resources in terms of rolling stock, crew and route capabilities (diversionary signing and restricted scope for station stops).

- 6.9 In adopting this approach NR has failed to take account of the compromise ability of GC to operate 10 car rather than 5 car trains and so provide extra passenger carrying capacity.
- 6.10 The impact of the planned amendments to the RoUs is therefore that no access is available for GC to operate services between Peterborough and London for all of Sunday in Week 1 and, under the original plans, the morning of Saturday in Week 2 with subsequent negative impact on GC's competitive capabilities.
- 6.11 NR has not provided any evidence to demonstrate to GC that they have applied the Decision Criteria in the process of scheduling these RoU's. However, GC believes that the following interpretation would apply to the application of the Decision Criteria to this case:
- (a) maintaining, developing and improving the capability of the Network;

GC has confirmed support for the Thameslink and F2A projects (see exchanges throughout Appendix C), recognising the need for NR to undertake these works in order to achieve the aims of improving the capability of the network.

However, GC has not been provided with any evidence to demonstrate that the proposed RoUs could not be re-packaged into an alternative series of RoUs that would minimise overall disruption from the works. NR has neither invited any dialogue with GC as to the optimum way of packaging these works, nor until 15th January 2013 (see Appendix C, all emails for 15th January 2013), has NR demonstrated any evidence to show that alternative options for the timing and/or packaging of the works has been considered. GC's contention is that we have been provided with no evidence to demonstrate why an alternative and overall less disruptive means of scheduling these RoUs would compromise NR's ability to maintain and improve the capability of the Network.

- (b) that the spread of services reflects demand;

The RoU in the format that it is currently proposed prevents GC from operating a reasonable spread of services between Sunderland/Bradford and King's Cross to match demand for these services that is evident from historic passenger count data as shown in Appendix E.

From the evidence provided to GC, NR has not adequately considered the extent to which the proposed RoUs creates disruption to GC's commercial viability. From the very limited extent to which NR have made their decision-making process transparent in relation to these RoUs, it seems that NR only determined how to allocate the severely reduced level of capacity resulting from these RoUs between the users of the route rather than balancing the Decision Criteria as a whole.

GC's contention in relation to this criterion is that NR should have undertaken a wider review of the proposed packaging of the works involved to identify jointly with all passenger and freight operators whether an alternative package of RoUs could be identified that would allow the spread of train service operated to better meet the passenger and freight demand.

(c) maintaining and improving train service performance;

GC does not believe that this criterion is directly relevant to considerations in this case.

(d) that journey times are as short as reasonably possible;

As outlined in previous sections, the proposed works would restrict GC to a minimum of terminating services at Peterborough. This would impose a series of arduous interchange penalties and journey time increase on passengers with a minimum of 1 interchange for all passengers, plus wait time, reducing their travel choice considerably and unreasonably.

(e) maintaining and improving an integrated system of transport for passengers and goods;

By not allocating capacity to GC to Kings Cross NR has reduced the availability of an integrated system of transport for passengers at the following stations who will no longer have a direct route to London:

Sunderland	Bradford Interchange
Hartlepool	Halifax
Eaglescliffe	Brighouse
	Mirfield
	Pontefract

- (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;

The proposed RoUs prevent GC from operating a direct service by rail between Sunderland/Bradford and London King's Cross for which there is considerable demand as evidenced in Section 6.1. This is to the detriment of the commercial interests and viability of GC as outlined in Sections 6.2 and 6.11.

- (g) seeking consistency with any relevant Route Utilisation Strategy;

GC does not believe that this criterion is relevant to considerations in this case. We recognise that the ECML enhancements programme is an established part of the ECML RUS and NR's Strategic Business Plan. We are not challenging the requirement to undertake these works, merely the packaging of the disruption and the principles underlining the subsequent allocation of capacity.

- (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;

GC does not believe that this criterion is directly relevant to considerations in this case.

- (i) mitigating the effect on the environment;

GC does not believe that this criterion is directly relevant to considerations in this case.

- (j) enabling operators of trains to utilise their assets efficiently; and

The proposed RoUs prevent GC from making efficient use of rolling stock and traincrew resources as outlined in various sections of this document.

- (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.

GC does not believe that this criterion is directly relevant to considerations in this case.

7 DECISION SOUGHT FROM THE PANEL

7.1. The Panel is asked to determine that:

Network Rail be directed to adjust the combination of Restrictions of Use on the ECML on Sunday 31st March and Saturday 6th April, or otherwise increasing/readjusting capacity to allow 3

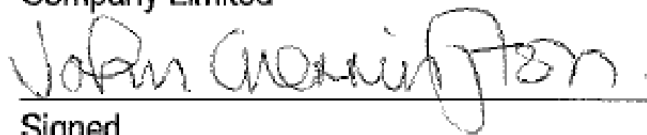
GC services into and 3 GC services from King's Cross, currently envisaged due to traincrew route knowledge compatibility with diversions (Appendix C, 17 January 2013 12:44), as services to Sunderland. This should include the unit stabled overnight from the previous day, in each instance, forming the first service north of the morning and the last service south in order to allow overnight stabling to achieve a full timetable the following day and GC to supply its customers on competitive terms.

In addition, GC is seeking to recover full costs for preparing this dispute and damages in relation to time spent negotiating with NR on the timetable, which has necessarily diverted resources away from other work and been compounded by the lack of negotiation outlined in Section 6.11 (a).

8 SIGNATURE

The Claimant

For and on behalf of Grand Central Railway
Company Limited



Signed

JOHN CHERRINGTON

Print Name

Position

Track Access and Possession Strategy
Manager XC Trains Limited

9 APPENDICES AND ANNEXES

See separate attachments