| **Reference to the Timetabling Panel** |
| --- |
| **TTP96** |
| **Claim by GNER in relation to train slots on the East Coast Main Line** |

**1                    DETAILS OF PARTIES**

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

(a ) Great North Eastern Railway Ltd whose Registered Office is at Sea Containers House, 20 Upper Ground, London, SE1 9PF, registration No2938984. (“GNER”), ("the Claimant"); and

(b) Network Rail (Infrastructure Ltd) whose Registered Office is at 40 Melton Street, London, NW1 2EE, registration No. 2904587 (“Network Rail”), (“the Respondent”).

(c) GNER Contact: Shaun Fisher, [redacted].

Network Rail Contact: Doug Thompson, [redacted]

**2                    THE PARTIES’ RIGHT TO BRING THIS REFERENCE**

2.1               This matter is referred to Timetabling Panel ("the Panel") for determination in accordance with Condition D5 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 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 as listed in Section 10.

**4                    SUBJECT MATTER OF DISPUTE**

4.1 This dispute regards offers of train slots. There are in effect 3 disputed offers:

* The offer regarding 1E02 0550 Edinburgh – Kings Cross and 1A17SO 0730 Newcastle – Kings Cross
* The offer regarding 1A30 1340 Leeds – Kings Cross, and 1A31 1405 Leeds – Kings Cross
* The offer regarding 1A46 1905 Leeds – Kings Cross

4.2 In respect if these 3 disputed offers:

 (a) The offer of train slots for 1E02 and 1A17SO

GNER alleges that:

i) Network Rail failed to apply Condition D2.1 of the Network Code in consulting and implementing a change to the Rules of the Plan.

ii) Network Rail did not adequately consult in accordance with D3.4.1 before seeking to flex a Train Slot. It is GNER’s position that had effective consultation taken place the need for flexing these trains and this dispute could have been avoided.

* + 1. The offer of train slots for 1A30 and 1A31

GNER alleges that:

i) Network Rail failed to apply Condition D2 of the Network Code in consulting and implementing a change to the Rules of the Plan.

ii) Network Rail did not adequately consult in accordance with D3.4.1 before seeking to flex a Train Slot. It is GNER’s position that had effective consultation taken place the need for flexing these trains and this dispute could have been avoided.

iii) The order of priority set out in Condition D3.2.3 has not been correctly applied.

iv) Network Rail failed to offer a train slot within the maximum journey time specified in Appendix 1 to Schedule 5 to GNER’s Track Access Contract.

v) Paragraph 12 of Schedule 5 of GNER’s Track Access Contract (also known as the modification clause) has not been interpreted correctly.

* + 1. The offer of a train slot for 1A46

GNER alleges that:

i) Network Rail did not adequately consult in accordance with D3.4.1 before seeking to flex a Train Slot. It is GNER’s position that had effective consultation taken place the need for flexing this train and this dispute could have been avoided.

ii) The order of priority set out in Condition D3.2.3 has not been correctly applied.

iii) Network Rail failed to offer a train slot within the maximum journey time specified in Appendix 1 to Schedule 5 to GNER’s Track Access Contract.

iv) Paragraph 12 of Schedule 5 of GNER’s Track Access Contract (also known as the modification clause) has not been interpreted correctly.

**5                    SUMMARY OF DISPUTE**

5.1 GNER has a Track Access Contract with Network Rail. GNER bid in accordance with the Network Code for train slots, which are expressed in GNER’s Track Access Contract as Firm Rights, including those involved in this dispute on the Priority Date.

5.2 1E02 and 1A17SO have been flexed to facilitate the operation of another Train Operator’s services. Whilst these bids have been flexed within the maximum journey time included in GNER’s Track Access Contract, GNER alleges that the reasons for the flex relate to the operation of trains not yet included in any Track Access Contract and as a result of Network Rail implementing a change to the Rules of the Plan without having followed the process in Network Code D2. The detail is included in 6.1.1 below.

5.3 1A30, 1A31 and 1A46 have been flexed resulting in Network Rail not delivering within the Maximum Journey Times expressed as Firm Rights in GNER’s Track Access Contract. Network Rail has in GNER’s view incorrectly applied the Modification Clause included in GNER’s Track Access Contract as this clause can only be activated to prevent Network Rail breaching a Track Access Contract with Grand Central. No such Track Access Contract was in existence on the last day of the Finalisation Period. The ORR’s decision on 23 March 2006 indicated that ORR is only minded to grant GCR Firm Rights to a quantum of trains and with an expectation of up to 20 minutes flexing right between Northallerton and London. It is GNER’s position that there are other options open to Network Rail to comply with this expectation, other than through flexing GNER services.

**6             EXPLANATION OF EACH ISSUE IN DISPUTE WITH RESPONSE**

**6.1 General Approach**

GNER’s position:

In April 2005 GNER made an application for additional track access rights under S22a of the Railways Act. Grand Central had already made an application under S17 of the Act and Hull Trains also made an application under S22a of the Act. This finally resulted in ORR announcing its decision on 23 March 2006. The relevant issues for this dispute are the status of Grand Central Railway’s Track Access Contract and the Modification Clause in GNER’s Track Access Contract.

The ORR’s decision of 23 March 2006 stated in relation to Grand Central’s proposal,

#### “Grand Central

1. *• We will approve three firm rights each way (Monday to Sunday) for Grand Central to operate services between King’s Cross and Sunderland calling at York, Thirsk, Northallerton, Eaglescliffe and Hartlepool. These rights will take effect no earlier than December 2006.*
2. *• Grand Central’s access rights should enable a spread of services through the day, but otherwise contain a degree of flexibility at the discretion of Network Rail, subject to the exercise of the decision criteria in part D of the Network Code. In particular, we do not expect to approve weekday rights which entitle Grand Central to arrivals at King’s Cross before 10:10 or to departures from King’s Cross between 16:55 and 18:40. In addition, we expect the access rights to allow for approximately 20 minutes of pathing time between King’s Cross and Northallerton, and vice versa.*
3. *• Grand Central’s track access contract will have a minimum term of five years; however, given our current policy in respect of longer term access agreements, we will be prepared to consider whether this term should be longer if, for example, this is linked to investment in new rolling stock.*
4. *• We expect Grand Central to use 125 mph rolling stock with performance characteristics as good as that of HSTs;*
5. *• Grand Central’s access contract will contain an access charges review re-opener which will take effect from 1 April 2009.*
6. *• We expect Grand Central’s contract to contain provisions requiring its co-operation with the introduction of a standard hourly timetable on the ECML.*
7. *• Grand Central’s track access contract will be subject to it meeting the usual statutory and safety requirements. “*

In relation to GNER and the modification clause ORR stated.

1. “*4. Network Rail will:*
2. *• carry out the necessary timetabling work to accommodate Grand Central’s and Hull Trains’ new access rights from December 2006;*
3. *• discuss any necessary modifications to existing access rights with those operators whose contracts contain modification provisions, and then notify ORR by 30 June 2006 of the changes which need to be made;*
4. *• complete the timetabling exercise described above, and submit it to ORR as soon as possible and no later than 30 June 2006*.”

The Modification Clause in Paragraph 12 of Schedule 5 of GNER’s Track Access Contract states”

 “12. **Conflicting ECML Access Rights**

12.1 *Application of paragraph 12*

This paragraph 12 shall apply in respect of the Relevant Capacity Period in relation to all Service Groups described in this Schedule 5.

12.2 *Notice to be given by Network Rail*

If, prior to the Principal Change Date 2007, there are reasonable grounds for believing that it is necessary to make a modification to this contract to avoid Network Rail necessarily being in breach of any Grand Central Track Access Contract, Network Rail shall give notice to that effect to the Train Operator and ORR.

12.3 *Contents of notice*

A notice given under paragraph 12.2 shall contain:

(a) a statement of the circumstances which give rise to it;

(b) a statement of the likely extent, commencement and duration of these circumstances;

(c) the Proposed Modifications; and

(d) the reasons for the Proposed Modifications.

12.4 *Timing of notice*

A notice under paragraph 12.2 shall be given by Network Rail as soon as reasonably

practicable after Network Rail has, or should with the exercise of reasonable diligence have, formed the belief referred to in paragraph 12.2 and is reasonably able to make an informed assessment of the extent of any necessary modifications to this contract.

12.5 *Modification Criteria*

The Proposed Modifications:

(a) may only include modifications to this contract to the extent that they are necessary to avoid Network Rail necessarily being in breach of any Grand Central Track Access Contract; and

 (b) shall, having due regard to the Decision Criteria, provide the Train Operator with the best available alternative rights, being alternative rights which have the least

detrimental effect on the Train Operator.

GNER Position

At the time of submitting this dispute for resolution:

There is no Track Access Contract between Grand Central and Network Rail therefore the use of the modification clause is incorrect.

1. Network Rail have not discussed with GNER any necessary modifications to GNER’s existing Access Rights.

Therefore due process has not been followed and in any event to remove the current breach of GNER’s Firm Rights would require a modification which is in greater than “to the extent that they are necessary to avoid Network Rail necessarily being in breach of any Grand Central Track Access Contract”, due to the flexibility proposed by ORR in Grand Central’s future Track Access Contract.

It may be the case that Network Rail cannot implement the ORR’s decisions on ECML capacity allocation in this particular manner but it is not proven that it is impossible that the ORR’s decision cannot be implemented.

GNER believes notwithstanding the ORR’s decision of 23rd March 2006, it contends that its Services have not been developed in the manner set out in the Network Code and its Track Access Contract. Therefore this claim has merit.

Network Rail position:

The effect of GNER’s claim if acceded to would be to render the decisions of the ORR about allocation of capacity impossible to implement. The dispute is therefore “frivolous and vexatious” in the terms contemplated by Condition M4 and should not be entertained by the Panel because:

1. ORR would be likely to regard it as such in considering any appeal under Condition D5; and
2. In any event, Network Rail would be entitled to flex Bids in accordance with Condition D3.4.2 in order to give effect to directions of ORR when those directions are actually given.

Notwithstanding the above, Network Rail considers that due process has been followed. Network Rail was instructed on 23rd March 2006 to undertake a timetable exercise to establish the answers to the capacity issues raised by the three competing applications (See Appendix 1 – ‘Next Steps’ [instruction from ORR]). On 30th March Network Rail wrote to all interested operators advising them of the process that would be undertaken and stating out that at the conclusion of the exercise, the output would be incorporated into the production database for the Principal Change Date 2006 timetable (“December 2006 Timetable”) (See Appendix 2 [Network Rail letter]).

Network Rail put their most experienced and skilled ECML timetable planner on the task and Network Rail contends that the outcome (in terms of the resultant timetable) is the optimum that could be developed in the timescales. Throughout the exercise NR sought to minimise the amount of flex to other operators’ services. A daily dialogue with all operators took place. Throughout the exercise optioneering to find ‘best-fit’ paths was undertaken. Network Rail’s firm contention is that if the decision of the panel prevents the proposed flexing to GNER’s services, Network Rail would be unable to timetable Grand Centrals services in the December 2006 timetable.

**6.2 The offer regarding 1E02 and 1A17SO**

**6.2.1 Additional pathing time**

GNER position:

Additional pathing time has been inserted into 1E02 and 1A17SO. GNER understands this has been inserted to allow a 45 minute turn around of 1A60 0653 Sunderland – Kings Cross into 1N26 1127 Kings Cross - Sunderland. This turn around time is not included in the Rules of the Plan and has not been subject to the consultation process set out in Network Code D2.1.2, and no agreement is in place. The 45 minute turnround allowance applied by Network Rail to GCR’s services is that based on GNER services, which are typically 9 coach trains. The turnround allowance incorporates an element for performance, but also servicing activities (eg cleaning, watering, catering, passenger unloading, etc.). GNER believes that GCR propose to operate with 6 coach trains, two thirds the length of a GNER service. Servicing time is a function of how many vehicles are involved and what resources are deployed to undertake the relevant tasks. GNER has seen no evidence that such factors have been considered or debated. Still to date, Network Rail has made no formal proposal to change the Rules of the Plan, and in doing so not enabling GNER and other operators the opportunity to discuss this.

Network Rail position:

In developing the December 2006 timetable Network Rail was in a position where the exact nature of the services to be timetabled were unknown at the Development Commencement Date. Given the existence of the Grand Central Railway (GCR) Section 17 application and the Hull Trains and GNER Section 22a applications Network Rail was unable to progress the development of the timetable until such time as ORR had determined the rights to be approved for the timetable. Only on the date of the ORR decision (23rd March 2006) was Network Rail in a position whereby the timetable could be developed in accordance with the likely approval of rights by ORR, and in conjunction with the bids received at the priority date.

During the development of the timetable Network Rail held a number of multi-lateral meetings where, amongst other things, turn around times at Kings Cross were discussed. Both Hull Trains and First Capital Connect expressed concern that a sub 45 minute turn around for services from Sunderland would import undue performance risk. It was generally agreed that in the absence of a specific turn around value for services from Sunderland, then the most appropriate proxy would be to use the agreed turn around value for other services from the north east (Newcastle), this being 45 minutes.

Network Rail disputes the contention that it is not entitled to flex a service to provide a robust turn around if that turn around is not specifically mentioned within the Rules of the Plan. Network Rail contends that the flexing of GNER’s services was appropriate application of the Decision Criteria set out in the Network Code paragraph D6 and particularly (a), (c) and (j).

* + 1. **Consultation**

GNER position:

Network Rail did not adequately consult before seeking to flex these train slots. It is GNER’s position that had effective consultation taken place the need for flexing this train and this dispute could have been avoided.

GNER only became aware of the flexing to 1E02 and 1A17SO by receiving a copy of the Network Rail report to the ORR of 30th June 2006.

Network Rail position:

In line with the ORR determination and directions for the development of the Dec 06 ECML timetable (issued on the 23rd March 2006) Network Rail wrote to all affected operators (on the 30th March 2006) detailing how the development of the timetable would be taken forward. In this letter Network Rail stated its intention to hold a series of multi-lateral meetings for the purpose of advising on the progress of the timetable development and discussing changes and amendments required to enact the ORR determination.

In respect of 1E02 and 1A17SO, all parties were aware of the need for services to be flexed to accommodate Grand Central’s trains. Throughout the development Network Rail consulted all operators on the potential impact on their services. Furthermore all operators were aware that until performance analysis had been undertaken further flexing of services may be necessary. The turn around times at Kings Cross were flagged at an early stage to be a critical performance issue. Operators were advised that a decision could only be made at the very end of the timetable process when the timetable was complete (and could thus undergo performance simulation). Given the nature of the exercise being undertaken and the time constrains imposed upon it, Network Rail contends that reasonable consultation took place.

**6.2.3 Priorities**

GNER position:

In addition it is GNER’s view that Network Rail has incorrectly applied the Decision Criteria in flexing GNER’s trains as by giving priority to 1A60 and 1N26 they have not taken into account the interests of all users of the railway.

Network Rail position:

In respect of 1E02 and 1A17SO Network Rail believes that it has correctly applied the relevant provisions within the Decision Criteria in the optimum way, and that with regard to the specific criteria:

Criterion (a) - Network Rail has flexed 1E02 and 1A17 SO within their contractual entitlements in respect of enabling the development of the network for the carriage of goods in the interests of all users of the railway. The level of flex applied to 1E02 and 1A17SO is within the contractual entitlement of these trains therefore it is reasonable for Network Rail to take advantage of this flexibility to satisfy this factor within the Decision Criteria.

Criterion (f) - The application of the flex to 1E02 and 1A17SO does not take these trains out of the rights contained in the TAC and therefore cannot be deemed to be a ‘material deterioration of the service pattern’.

Criterion (j) - The determination by the ORR of the 23rd March is based partly upon the satisfaction of this criterion in so much as Grand Central have bid to operate services on the basis of ‘promoting competition in final markets’. Network Rail has taken reasonable steps, in accordance with this part of the Decision Criteria, to ensure reasonable access to the Network by new operators of trains without breaching the contractual entitlements of others.

For the above reasons Network Rail contends that it has considered the ‘best interests of all users’ in satisfying not only the Grand Central services bid for at the priority date but also the determination and direction given to Network Rail, in respect of the Grand Central services, on the 23rd March 2006.

**6.3 The offer regarding 1A30 and 1A31**

**6.3.1 Additional pathing time**

GNER position:

Additional pathing time has been inserted into 1A30 and 1A31. GNER understands this has been inserted to allow a 45 minute turn round of 1A62 1230 Sunderland – Kings Cross onto 1N28 1650 Kings Cross - Sunderland. This turn around time is not included in the Rules of the Plan and has not been subject to the consultation process set out in Network Code D2.1.1, and no agreement is in place. The 45 minute turnround allowance applied by Network Rail to GCR’s services is that based on GNER services, which are typically 9 coach trains. The turnround allowance incorporates an element for performance, but also servicing activities (eg cleaning, watering, catering, passenger unloading, etc.). GNER believes that GCR propose to operate with 6 coach trains, two thirds the length of a GNER service. Servicing time is a function of how many vehicles are involved and what resources are deployed to undertake the relevant tasks. GNER has seen no evidence that such factors have been considered or debated. Still to date, Network Rail has made no formal proposal to change the Rules of the Plan, and in doing so not enabling GNER and other operators the opportunity to discuss this.

Network Rail position:

In developing the December 2006 timetable Network Rail was in a position where the exact nature of the services to be timetabled were unknown at the Development Commencement Date. Given the existence of the GCR Section 17 application and the Hull Trains and GNER Section 22A applications Network Rail was unable to progress the development of the timetable until such time as ORR had determined the rights to be approved for the timetable. Only on the date of the ORR decision (23rd March 2006) was Network Rail in a position whereby the timetable could be developed in accordance with the likely approval of rights by ORR, and in conjunction with the bids received at the priority date.

During the development of the timetable Network Rail held a number of multi-lateral meetings where, amongst other things, turn around times at Kings Cross were discussed. Both Hull Trains and First Capital Connect expressed concern that a sub 45 minute turn around for services from Sunderland would import undue performance risk. It was generally agreed that in the absence of a specific turn around value for services from Sunderland, then the most appropriate proxy would be to use the agreed turn around value for other services from the north east (Newcastle), this being 45 minutes.

Network Rail disputes the contention that it is not entitled to flex a service to provide a robust turn around if that turn around is not specifically mentioned within the Rules of the Plan. Network Rail contends that the flexing of GNER’s services was appropriate application of Network Code paragraph D6 and particularly (a), (c) and (j).

**6.3.2 Consultation**

GNER position:

Network Rail did not adequately consult before seeking to flex these train slots. It is GNER’s position that had effective consultation taken place the need for flexing this train and this dispute could have been avoided. At the 12th May meeting, GNER disagreed verbally with the flexing of 1A30 and 1A31. In addition, such flexing was only discussed as an option and not as the final solution.

GNER only became aware that such flexing to 1A30 and 1A31 was the final solution by receiving a copy of the Network Rail report to the ORR of 30th June 2006.

Network Rail position:

In line with the ORR determination and directions for the development of the Dec 06 ECML timetable (issued on the 23rd March 2006) Network Rail wrote to all affected operators (on the 30th March 2006) detailing how the development of the timetable would be taken forward. In this letter Network Rail stated its intention to hold a series of multi-lateral meetings for the purpose of advising on the progress of the timetable development and discussing changes and amendments required to enact the ORR determination.

In respect of 1A30 and 1A31 the degree of flex applied to these trains, and the reasoning for its application, was discussed at the meeting held on the 12th May and is noted in the minutes (See Appendix 4). GNER were in attendance at this meeting; the minutes record that no dispute was raised in respect of these flexes at the meeting. Network Rail therefore contends that in respect of 1A30 and 1A31 the principle of Network Code D3.4.1 was followed in so much as discussion and notification of the proposed flexing took place at the meetings attended by GNER.

**6.3.3 Priorities**

GNER position:

GNER believes its priority for these paths is under Network Code 3.2.3. (a) (first order) whereas the proposed Grand Central services 1A62 and 1N28 have priority under Network Code 3.2.3. (c) (third order).

Network Rail position:

Network Rail developed the Dec 2006 timetable in accordance with the decision issued by the ORR on the 23rd March 2006. The decision states that Network Rail will:

* Carry out the necessary timetabling work to accommodate Grand Central and Hull Trains new access rights;
* Discuss any necessary modifications to existing rights with those operators whose contract contain modification provisions, and then notify ORR by the 30th June 2006 of the changes which need to be made;
* Complete the timetabling exercises described above, and submit it to ORR as soon as possible and no later than the 30th June 2006.

In addition ORR determined that they “will approve three firm rights each way for Grand Central…”. As such although Grand Central were not in possession of firm rights at the priority date there was a clear direction from ORR that firm rights would be in place by the time of the operation of the timetable. Having timed other operators services Network Rail had then to determine the ‘necessary modifications’ required to facilitate the operation of these services on the basis of the applicability of the modification provisions contained within the GNER TAC.

Network Rail contends that once the ORR had issued its decision, the modification notice procedure within GNER’s Track Access Agreement which facilitates the implementation of that decision should be regarded as an expression of a contingency outside the control of GNER. Therefore, GNER’s rights in this respect could no longer be considered as “Firm” in the sense used in Part D. This means that GNER’s bids in this respect were not of higher priority than GCR’s.

**6.3.4 Maximum Journey Times**

GNER position:

In addition GNER has a Firm Right to a maximum journey time for these trains as follows:

| Train | Maximum Journey Time | Timetable Offer Journey Time |
| --- | --- | --- |
| 1A30 | 145 | 151 |
| 1A31 | 134 | 135 |

Network Rail position:

In respect of 1A30 and 1A31 Network Rail agrees that the journey time offered for these services does not meet the maximum journey times expressed as Firm Rights in GNER’s TAC. Network Rail contends that this was necessary to comply with ORR’s decision and justifiable on the same basis as set out in 6.3.3 above. In addition Network Rail notified the ORR of the modifications required in its paper to ORR of the 30th June 2006. It was therefore reasonable of Network Rail to include these modifications in the timetable offer of the 7th July in anticipation of the modification notice being issued.

**6.3.5 Conflicting ECML Access Rights (“Modification Clause”)**

GNER position:

It is GNER’s understanding that Network Rail has taken this course of action in anticipation of applying the Modification Clause included in Paragraph 12 of Schedule 5 of GNER’s Track Access Contract. In GNER’s view this is incorrect as:

a) The use of the modification clause requires a change to GNER’s Track Access Contract and the approval of ORR which has not been sought

 b) The use of the modification clause is inadmissible as currently there is no Track Access Contract in existence between Network Rail and Grand Central. The ORR’s decision dated 6th April 2006 also indicated that such a Track Access Contract would be for firm quantum rights and with an expectation of up to 20 minutes flex between Northallerton and Kings Cross.

Network Rail position in response to 6.3.5 a) and b);

As stated above Network Rail has developed the timetable in accordance with the ORR decision of the 23rd March 2006 and justifiable on the same basis as set out in 6.3.3 above. Had Network Rail acted differently then the timetable could not have been developed in accordance with ORR’s decision. The likely upshot of developing the timetable without the backstop of the modification provision and its impact on the status of GNER’s rights would have been a failure to find paths for the GCR services which ORR has stated it will approve firm rights for from December 2006.

c) GNER submits that in any event the use of the modification clause in this case has not been to the minimum extent necessary to prevent Network Rail from breaching its future Track Access Contract with Grand Central as there are other solutions available to Network Rail, either by altering departure times from the point of origin or by applying flexing rights up to 20 minutes between Northallerton and Kings Cross. Instead, Network Rail has flexed GNER services.

Network Rail position in response to 6.3.5 c):

Network Rail accepts that the ORR decision determined the degree to which GCR’s rights were to be firm; however Network Rail is bound by the Network Code to develop the paths in accordance with the priority date notification statement supplied by the bidder (having due regard to the level of priority). ORR stated that the GCR access rights should ‘..allow for approximately 20 minutes of pathing time between Kings Cross and Northallerton’, in addition the rights were to ’…contain a degree of flexibility at the discretion of Network Rail’ in relation to the departure times of these services. Network Rail and GCR have been through a number of iterations of the service in an effort to path these trains with the minimum possible impact on other operators. To this end a number of changes have been made, such as pushing the 1630sx departure from Sunderland back to 1730sx and moving the 0811sx bid departure back to 0804sx. It is Network Rail’s contention that in the time available between ORR’s decision of the 23rd March and the 7th July the offered timetable represents the best fit of all services, taking into account the flexibility contained within ORR’s determination and the modification provision, that could be achieved in that timescale.

**6.3.6 Decision Criteria**

GNER’s position:

In addition it is GNER’s view that Network Rail has incorrectly applied the Decision Criteria in flexing GNER’s trains as by giving priority to 1A62 and 1N28 they have not taken into account the interests of all users of the railway.

Please see GNER position in 6.2.1 regarding turnaround allowance and servicing.

Network Rail position:

In respect of 1A30 and 1A31 Network Rail considered the Decision Criteria in respect of assessing the paths developed for the GCR services 1A62 and 1N28. Mindful of the potential use of the modification provision, and based upon a required 45 minute turn around time at Kings Cross it was deemed necessary to flex these two GNER services to ensure that a sufficient level of robustness existed at Kings Cross to mitigate the impact of any late running that may be experienced. The 45” turn around value was used to address concerns raised by senior managers and ‘on the ground’ operational teams within Network Rail and comments received from Hull Trains and First Capital Connect regarding the operational capability of the timetable had a lesser turn around value been used. As such it was determined that the flex of 1A30 and 1A31 was a valid use of the modification provision and as such was compliant with the Decision Criteria when considered in conjunction with the GCR services.

For the above reason Network Rail contends that it has considered the ‘best interests of all users’ in satisfying not only the Grand Central services bid for at the priority date but also the determination and direction given to Network Rail, in respect of the Grand Central services, on the 23rd March 2006 and the services bid for by GNER at the priority date.

**6.4 The offer regarding 1A46**

**6.4.1 Consultation**

GNER position:

Network Rail did not adequately consult before seeking to flex these train slots. It is GNER’s position that had effective consultation taken place the need for flexing this train and this dispute could have been avoided.

GNER’s disagreed with the flexing of 1A46, and reference to this being outside of its Maximum Journey Time is minuted at the 23rd June meeting.

Network Rail position:

Please see the response given in relation to 1A30 and 1A31 (paragraph 6.3.2 above). In the case of slot 1A46, the relevant meeting was held on 23 June.

**6.4.2 Priorities**

GNER position:

In addition GNER’s priority for this path is under Network Code 3.2.3. (a) (first order) whereas 1A63 has priority under Network Code 3.2.3. (c) (third order).

Network Rail position:

Please see the response given in relation to 1A30 and 1A31 (paragraph 6.3.3 above).

**6.4.3 Maximum Journey Time**

GNER position:

In addition GNER has a Firm Right to a maximum journey time for this train as follows:

| Train | Maximum Journey Time | Timetable Offer Journey Time |
| --- | --- | --- |
| 1A46 | 153 | 154 |

Network Rail position:

Please see the response given in relation to 1A30 and 1A31 (paragraph 6.3.4 above)

**6.4.4 Conflicting ECML Access Rights (“Modification Clause”)**

GNER position:

It is GNER’s understanding that Network Rail has taken this course of action in anticipation of applying the Modification Clause included in Paragraph 12 of Schedule 5 of GNER’s Track Access Contract. In GNER’s view this is incorrect as:

a) The use of the modification clause requires a change to GNER’s Track Access Contract and the approval of ORR which has not been sought.

Network Rail position in relation to 6.4.4 a) and b):

Please see response given to 1A30 and 1A31 dispute (paragraph 6.3.5 above).

b) The use of the modification clause is inadmissible as currently there is no Track Access Contract in existence between Network Rail and Grand Central. The ORR’s decision dated April 6 2006 also indicated that such a Track Access Contract would be for firm quantum rights and with an expectation of up to 20 minutes flex between Northallerton and Kings Cross.

c) GNER submits that in any event the use of the modification clause in this case has not been to the minimum extent necessary to prevent Network Rail from breaching its future Track Access Contract with Grand Central as there are other solutions available to Network Rail, either by altering departure times from the point of origin or by applying flexing rights up to 20 minutes between Northallerton and Kings Cross.

Network Rail position in relation to 6.4.4 c);

Please see response given to 1A30 and 1A31 dispute (paragraph 6.3.5 above).

**6.4.5 Decision Criteria**

GNER position:

In addition it is GNER’s view that Network Rail has incorrectly applied the Decision Criteria in flexing GNER’s trains as by giving priority to 1A63 1730 Sunderland – Kings Cross they have not taken into account the interests of all users of the railway.

Network Rail position:

In respect of 1A46 Network Rail found itself in a position whereby a significant performance risk existed between York and Doncaster as a result of the bid for 1630 Sunderland – Kings Cross GCR path. This performance risk was significant as the timetable showed 5 services passing Marshgate Junction from Temple Hirst Jn within a 15 minute period - this was non-compliant with Rules of the Plan which stipulates minimum 4 minute headway on that section. To resolve this, the GCR service was retimed as a 1730 departure from Sunderland. Whilst this resolved the potential congestion problem at Doncaster it had the effect of requiring the flex of 1A46 adding 7 minutes to its journey time and thereby exceeding the maximum journey time expressed in GNER’s TAC. In determining the course of action to be taken to resolve this problem Network Rail considered the impact on operators as a result of the 1630 path (Freightliner, Northern, Virgin XC and GNER) against the level of impact generated by the 1730 path (GNER only). The decision to retime the GCR service to a 1730 departure from Sunderland was therefore considered to be the most appropriate solution and in line with the principles of the Decision Criteria.

As such Network Rail believes that it behaved entirely appropriately in this case and contends that the Decision Criteria were correctly applied.

**7                    ANY FURTHER ISSUES RAISED**

GNER Position:

GNER considers that even if it may be the case that Network Rail cannot implement the ORR’s decisions on ECML capacity allocation in this particular manner, it is not proven that it is impossible that the ORR’s decision cannot be implemented.

GNER believes notwithstanding the ORR’s decision of 23rd March 2006, it contends that its Services have not been developed in the manner set out in the Network Code and its Track Access Contract. Therefore this claim has merit.

The absence of any consideration of the other elements to turnround allowance (eg servicing activities) and the use of the turnround for the 9 coach GNER service as a proxy for the shorter 6 coach GCR service is an illustration that the statement “allocation of capacity being impossible to implement” is not valid.

ORR’s 23 March 2006 determination says of GCR’s rights “*These rights will take effect no earlier than December 2006”*, not **from** December 2006. In effect, the time constraints that Network Rail says it developed the timetable under where those of an artificial construct of its own making. As such, Network Rail could have developed the December 2006 timetable in accordance with the timescales set out in the Network Code and stated that the earliest that the additional rights could be accommodated was at a later timetable change date.

Network Rail Position:

Network Rail contends that the effect of GNER’s claim if acceded to would be to render the decisions of the ORR about allocation of capacity impossible to implement. The dispute is therefore “frivolous and vexatious” in the terms contemplated by Condition M4 and should not be entertained by the Panel because:

1. ORR would be likely to regard it as such in considering any appeal under Condition D5; and
2. In any event, Network Rail would be entitled to flex Bids in accordance with Condition D3.4.2 in order to give effect to directions of ORR when those directions are actually given.

**8                    DECISION SOUGHT FROM THE PANEL**

8.1              GNER requests:

* + 1. In respect of 1E02 and 1A17SO that Network Rail has not followed due process and the flex should be removed returning the paths to their position in the June 2006 timetable as specified in GNER’s Priority Date Notification.
		2. In respect of 1A30, 1A31 and 1A46 that Network Rail has not followed due process. In addition Network Rail has not complied with GNER’s Firm Right to a maximum journey time for these trains. Network Rail is instructed to remove the flex, returning these paths to their position in the June 2006 timetable as specified in GNER’s Priority Date Notification.

8.2               Network Rail requests:

  (a) The Panel is asked to refuse to hear the claim on the basis that it is vexatious or frivolous in that it is a clear attempt by the Claimant to subvert the legitimate decision of ORR in the exercise of its powers under Section 4 of the Railways Act, and as such should not be entertained.

 (b) Failing this, Network Rail requests that the Panel reject the requests made by the Claimant on their merits for the reasons set out in Section 6 above.

**9                    SIGNATURES**

For and on behalf of GNER For and on behalf of Network Rail Infrastructure Ltd (“Network Rail”)

Signed Signed

Print name Print name

Position: Position:

Date: Date:

**10                 APPENDICES AND ANNEXES**

Appendix 1 - ORR Decision on ECML applications 23rd March 2006

Appendix 2 - Letter from Network Rail to all affected operators (30 March 06)

Appendix 3 - Timeline for Developing ECML Timetable (30th March 2006)

Appendix 4 - Minutes of ECML Capacity Meeting held on 12th May 2006

Appendix 5 - Minutes of ECML Capacity Meeting held on 23rd June 2006