

West Coast Train Limited's
Notice of Appeal to the
Office of Rail Regulation

The Timetable Disputes Panel of the
Access Dispute Resolution Committee
Determination in respect of Reference (in Part) TTP 337, 359, 382

(1) West Coast Trains Limited

And

(2) Network Rail Infrastructure Limited

(3) Northern Trains' Limited

1 PARTIES TO APPEAL

- (a) *West Coast Trains Ltd.* (Company number 3007940) whose Registered Office is at 'The School House', 50 Brook Green, London W6 7RR (WCTL)
(the Appellant);
 - (b) *Network Rail Infrastructure Limited* (Company number 2904597) whose Registered Office is at 'Kings Place', 90 York Way, London N1 9AG (Network Rail);
 - (c) *Northern Trains Limited*, whose Registered Office is at 'Serco House', 16 Bartley Wood Business Park, Bartley Way, Hook, Hampshire RG27 9UY (Northern Trains);
- (together referred to in this paper as the Respondents).

2 DOCUMENTS ENCLOSED

2.1 The following documents are appended to this Appeal:

- (a) Copy of the Joint Submission submitted to the Timetable Panel ("the Panel") for TTP 337, 359, 382 reference;
- (b) The determination in respect of reference TTP337, 359, 382 ("the Determination") and
- (c) An further supporting document, highlighting Extracts from other Industry based reports.

3 BACKGROUND

3.1 This Appeal has been brought about by WCTL through its intention to challenge the Determination that was established by the Access Disputes Timetable Panel, as a result of Dispute References TTP337, 359, & 382, following a Hearing on the 20th January 2011. Such Determination only relates to the first part of that Hearing¹, in conjunction with matters surrounding access through both Stockport and Macclesfield corridors, during three weekends in the summer of this 2011 year.

3.2 Dispute References TTP337, 359 & 382 were notified in three stages to the Secretary of the Access Disputes Committee on 26th February 2010, 23rd July 2010 and 20th December 2010 in accordance with established Industry arrangements and guidelines.

¹ The other dispute relative to the Coventry Corridor, has, following an interim Determination, since been resolved.

- 3.3 Such references relate to matters surrounding specific Rules of the Route (ROTR) proposals made by Network Rail in accordance with the Network Code Part D2 and Rules of The Plan (ROTP). These resultant outstanding items, followed resolution of numerous other ROU proposals that were, at that time, challenged by WCTL, but subsequently resolved through positive dialogue with Industry partners, all except for the aforementioned items. The remaining proposals were challenged by WCTL on the basis of the impact of the restricted access to the Very High Frequency (VHF) timetable serving the primary London to Manchester route on three Sunday Afternoons.
- 3.4 A joint reference document was submitted with Network Rail on the 12th January 2011 to the Committee Secretary and was copied to all interested parties' at the same time. As a result of this Northern Trains declared itself a Dispute Party on the same day, they, tendering a submission document by the 17th January 2011. All documentation was made available to all parties / persons involved, with the exception of redacted WCTL passenger load information, which was only made available to the *Chair* of the Timetable Committee.
- 3.5 Following the hearing and the *Chair's* Determination of the 1st February 2011, WCTL has taken the decision to move forward under the auspices of Network Code Part M2{a}, and appeal to the ORR on the grounds that the determination is both detrimental to WCTL Passengers and its Business, and contradictive of agreed accords between Network Rail, the Department for Transport (DfT) and WCTL.
- 3.6 Given the proximity of the ROU proposals under Appeal with the Informed Traveller timetable process, an early indication must be hereby provided, that timetable plans for the aforementioned weekends, will start being '*Bid for*', on Friday 18th February (Week 13). Therefore we would respectfully suggest, and whilst infringing upon those timescales relative to Network Code Part M4 and M5.2, and subject to the Respondents consent, that consideration be given by the ORR, of an expedited process, such that there is little or no impact to the Industry on the Informed Traveller process.
- 3.7 On this basis (Para 3.6 refers) WCTL would welcome if the Appeal could take the form of a re-hearing as opposed to a review of the original Determination. This is because of those timescales involved as outlined above, as well as those specific grounds upon which this Appeal is primarily based.
- 3.8 Also, for quantification and qualification purposes, WCTL would respectfully consider it prudent that all parties to the ORR hearing have the opportunity to make oral representations.
- 3.9 For the avoidance of doubt, this Appeal is only in relation to Stockport ROU's on Sundays in Engineering Weeks 13, 14 & 15 – 26th June, 3rd July and 10th July 2011; and has been brought about as a result of a Determination (resultant from such hearing), where WCTL was the '*Claimant*' party.
- 3.10 Any reference herein made to Part "D" of the Network Code, is relevant only to those Parts dated before the changes introduced as of 1st October 2010.

4 SUMMARY OF APPEAL AND REMEDIES SOUGHT

- 4.1 This Appeal is relative to a Determination arising from three Network Rail LNW Rules of the Route [ROTR] Section 7 Restriction of Use (ROU) proposals, put forward by the Network Access Unit (now Engineering Access Planning) under the auspices of the 2011 ROTR process; as directed under Network Code D2.1.3 and the National Rules of the Plan 2011 (ROTP - Part 1.3.9). Supplemental issues (relative to TTP382), are items latterly proposed through the Confirmed Period Possession Plan (CPPP) process, under D2.1.10 of the Network Code and ROTP Part 3.5.
- 4.2 Such ROUs were either proposed in v. 1 of ROTR, formally submitted to TOC's in v.2 of ROTR, issued on 5th February 2010 (TTP337) and / or proposed in v.3 of ROTR, thence formally submitted through v.4 of ROTR, issued on 9th July 2010 (TTP359). Further subsequent changes under Network Code D2.1.10 and ROTP Part 3.5 have also occurred during 13th December 2010 (TTP382).
- 4.3 Following the above proposals and their consequential publications, WCTL made reference to the Access Disputes Timetable Committee, whereupon Network Rail and Northern Trains became associated Parties' to a hearing which was held on the 20th January 2011. The Chair published his Determination on 1st February 2011, finding in favour of Network Rail and Northern Trains. The Determination upheld the requirement for a 1630 finish time on each of the applicable Sundays' (Para 3.9 refers), finding against WCTL request for a 1300 finish; based upon Network Rail's correct application of Network Code Decision Criteria (Part D6).
- 4.4 The outcome of the Determination was based upon the *Chair's* conclusion that Network Rail, in evaluating all the Decision Criteria fairly, considered that the effects of public disorder caused by (but not exclusively linked to), those associated volumes of Northern Trains' passengers, travelling during those times when public disorder was far more likely to take place (i.e. Saturday nights), was of a greater importance than those issues relative to maintaining through long distance access opportunities, via both Macclesfield and Stockport stations on a Sunday afternoon. This having a consequential impact on WCTL passengers and staff alike, through both the potential for overcrowding and control issues, as well as the unnecessary provision of having to divert train services and the supply of long distance rail replacement shuttles.
- 4.5 WCTL appeals to the ORR against such Determination. This appeal is submitted pursuant to:
- (a) Condition D5.2 of the Network Code; and
 - (b) Part M of the Network Code.
- 4.6 Pursuant to Condition D5.2 of the Network Code, the ORR is considered to be the appropriate body to hear the appeal of disputes arising out of a TTP decision. This position is confirmed in Part M of the Network Code and WCTL cannot see any reason why this process should be departed from.

4.7 WCTL therefore respectfully considers that the ORR should hear the appeal. In particular, with regard to those Parts under Network Code M4.1, namely:

4.7.1 The resultant matter(s) in question, are of significant importance to the Industry not just in the short-term but going forward into the new Control Period;

4.7.2 The Appellant's reference is not frivolous or vexatious;

4.7.3 There are no issues raised relating to the conduct of the Appellant; and

4.7.4 It is appropriate for the matter(s) to be brought to a close by the ORR, in particular because of the ORR's knowledge of both:

(a) the issues in dispute; and;

(b) the longer term significance which the proposed possessions will have on the Industry.

which are distinct advantages that the ORR has, over any other potential appeal body.

4.8 The ORR is politely asked to hear the Appeal and grant the relief requested in paragraph 6 below.

5 GROUNDS FOR APPEAL

5.1 The appeal is brought on the following bases:

5.1.1 That the *Chair* erred in his Determination in that, whilst taking cognisance of balancing matters 'of *hard fact* as well as *expressly*, the otherwise pertinent issue associated with Efficient Engineering Access (EEA), he nonetheless deemed EEA as "...*relative and important, but not decisive...*". WCTL considers that in view of the times of the possessions proposed, the services affected and passenger numbers involved, that EEA is decisive in the decision making process, primarily because of the obligation on Network Rail to adhere to such principles as agreed with the DfT, and thus a need to apply them appropriately.

5.1.2 That the *Chair* erred in his Determination in that, whilst taking cognisance that such a decision must be reached "...*on the basis of the legal entitlements of the Dispute Parties and upon no other basis...*", has not seriously taken into consideration that WCTL has a contractual obligation to the DfT through its Service Level Commitments (SLC), to deliver, a VHF timetable which is factored upon Network Rail, not only being able to deliver a timetable based around EEA applied principles, but also those Rights contained within its TAC. Furthermore Network Rail's Licence Conditions require it to comply with its duties to maintain & renew the Network, such that it satisfies its Customers (*WCTL*) and its Funders (*DfT / ORR*). Thus such Determination negates any entitlement by WCTL to maintain its contractual obligations with the DfT, whilst at the same time nullifying Network Rail's requirement to comply with certain of its Licence Conditions.

5.1.3 That the *Chair* also erred in his Determination, (despite reasoning that Network Rail had applied Decision Criteria fairly in particular criterion {a}), in that his decision was based on hard facts that may have disproportionately favoured one TOC over another on the basis of unsound passenger load figures, which were acknowledged as being less in number than WCTL; in parallel with associated public disorder situation(s) that could be otherwise managed affectively by both TOC's and Transport Police working together;

5.1.4 that the *Chair* erred in his Determination, in that he was not made aware of the full facts relative to those circumstances giving rise to risks associated with both the practicalities of undertaking works in this location at this time of year.

6 RELIEF AND DIRECTIONS SOUGHT

6.1 In relation to the three 16 hour Sunday possessions (0030-1630 Sun), proposed in engineering weeks 13, 14 & 15 of the 2011 ROTR, the ORR is respectfully requested to:

- (a) Direct that Network Rail, on reaching decisions based on its interpretation of a fair application of Decision Criteria, did not take into full consideration all those factors associated with EEA principles, and as such:
 - i) Failed to advocate its agreement with the DfT to deliver Access in accordance with the EEA agreement.
 - ii) Failed to meet its Licence conditions (Network Management – Condition 1);
 - iii) Failed to comply with those obligations set out in their 2009 Delivery Plan and 2010 Update (including Route Plans 'N/20' {and previously '18"});

- (b)
 - i) Direct that Network Rail start the possessions earlier at 2100 on Saturday night(s), to enable an earlier finish time of 1300or
 - ii) Direct that Network Rail re-plans the work to a more suitable time of year....or
 - iii) A combination of both parts i) and ii) above.

- (c) Direct that the *Chair* therefore erred in finding for the Respondents in the first instance and uphold this appeal thus enabling the possessions in Weeks 13, 14 & 15 to be amended to finish by 1300 on their constituent Sundays.

7 INTRODUCTION

7.1 Before expanding on the grounds of this appeal, some of the key procedural steps which apply to the planning of engineering works in association with the application of Decision Criteria need to be set out in the context of the original dispute.

7.2 *Part D of the Network Code*, entitled 'Timetable Change', sets out those procedures by which the Working Timetable, Rules of the Route and Rules of The Plan may be changed. At paragraph "L" of the preamble to Part D, it states (in part) the following:

"...In its capacity as manager of the Working Timetable", "Network Rail must have due regard to specified Decision Criteria when making decisions regarding proposed changes to the Working Timetable and to any application of Rules of the Route and the applicable Rules of the Plan. These criteria are to be weighed and balanced by Network Rail in light of the particular circumstances surrounding each decision"

7.3 The '*Decision Criteria*' are set out under Condition D6; by way of introduction to the specific criteria, Condition D6 states that *"...the Decision Criteria consist of the necessity or desirability of the following (none of which necessarily has priority over any other) "*. There then follows a list (numbered (a) to (o)) of the specific Decision Criteria.

7.4 The Chair identified in his Determination that Network Rail's decision making process was where:

a) *".....The starting point is that responsibility for best use of the Network, and for ensuring that it is the most efficiently maintained and renewed, subject only to the overall approval of the ORR, is the exclusive responsibility of Network Rail.....to find against Network Rail there would have to be either a failure in execution of one of the procedures, an unreasonable frustration of a specific right of a Train Operator, unreasonably putting a Train Operator at a disadvantage, or (significant here) that Network Rail have 'made a decision..... which did not take into account either the facts of the case, or the guidance embodied in the Condition D6 of the Decision Criteria..." (Determination Para 10.1 partly refers).*

The Chair continues.....

b) *".....in my judgement, Network Rail were justified in scoring Decision Criteria (a) in favour of their decision primarily on the public order grounds as set out above. Similarly, Network Rail were, in my judgement, justified in overall evaluating the decision, on the basis of all criteria, in favour of Sunday afternoon possessions. This is so, having taken into account all relevant factors including the EEA provisions, that more passengers overall are affected on a Sunday, that the number of affected passengers on Saturday evening was fewer than in the Joint Submission, that the Decision Criteria grid was unduly optimistic in Network Rail's favour" (Determination Para 10.6 partly refers).*

c) The Chair finishes with:

".....The conclusion I have come to is that Network Rail have correctly applied the Decision Criteria. They have taken into account relevant factors, including having due regard to the Decision Criteria. They have applied their knowledge of the facts, including experience of the consequences of previous work on the WCML and the consequences of previous possessions. The Decision that they have come to is the outcome of that proper consideration. The Decision is reasonable, proportionate, experience based and results from having due regard for the Criteria...."
(Determination Para 10.8 refers).

- 7.5 WCTL considers that despite the *Chair*, agreeing with both WCTL and Network Rail, that the application of Decision Criteria must be applied evenly or not at all, but that the application (in this case) is more relevant to criterion part {a} above all else, does also state that it would be pertinent to the overriding situation where he would otherwise have to find against Network Rail, if they had either frustrated the rights of WCTL, put us at a disadvantage or had not taken into account all the facts of the case in association with a fair application of Decision Criteria.
- 7.6 In the context of Para 7.5 above, WCTL considers that all of these higher considerations have not been taken into account appropriately. WCTL does consider that its rights have been frustrated; WCTL also considers that the fact that the rights have been frustrated has put us at a disadvantage; and that, despite applying all the Decision Criteria *reasonably*, it has not taken all the facts into consideration; primarily because of the inconsequence of EEA in its deliberations. In fact not only does Network Rail have an obligation to the Industry in applying EEA robustly, but that EEA does indeed form part of Decision Criteria – (Part {c})².
- 7.7 The *Chair* also makes reference to the fact that Network Rail have applied their knowledge of all the facts and that their experience of previous WCML work gives credence to their decisive requirement for a 1630 finish on each Sunday in terms of the ROU proposals. The fact that Network Rail are aware of the service level requirements of WCTL (as well as other long distance TOC's in the area – e.g. Trans Pennine Express (TPE) and Arriva Cross Country) as well as the essentiality and obligation in applying EEA principles, highlights here, that they have **not** taken into consideration previous works or previously planned ROU's; (we allude to measures where works north of Crewe are now planned to allow Anglo-Scottish services to run after 1100 on Sundays; or two track railway combinations south of Crewe which primarily always finish by 1200 Sundays, as being two key examples).
- 7.8 Issues challenging the application of Decision Criteria are explored more fully in the '*Grounds for Appeal*' in section 8 below.

² Part "c" of Decision Criteria state: *".....enabling a Bidder to comply with any contract to which it is party (including any contracts with their customers and, in the case of a bidder who is a Franchise Operator, including the franchise agreement to which it is a party), in each case to the extent that network rail is aware or has been informed of such contracts...."*

8 GROUNDS FOR APPEAL

8.1 Appeal Ground 1a - Network Rail's due regard to D6 Decision Criteria (Part 'c') - EEA

- 8.1.1 WCTL has already made important reference to EEA within this appeal on the grounds that it should have formed a '*decisive*' element to the determinative outcome of the aforementioned hearing.
- 8.1.2 As background information, In preparing for Control Period 3 the ORR had sought information pertaining to the ability for Network Rail to improve its efficiencies by reducing unit costs through longer possessions and effective use of resource. The Strategic Rail Authority (SRA), at the time, was tasked to develop proposals with Network Rail for a range of EEA strategies. Following a number of pilot studies the results were put to the industry in early 2005. The industry consensus was (at that stage), that more conclusive and productive results were needed. To help achieve the consensus necessary to introduce acceptable industry wide EEA strategies, an EEA Steering Group was set up by the ORR to look at Network Rail's engineering work efficiencies including optimisation of possessions. Three working groups were established, underpinned by three pieces of research, two funded by the ORR, including looking at the cost benefit analysis of shorter vs. longer possessions and one by the DfT looking at Sustainability.
- 8.1.3 In terms of the WCML, there was an Industry acceptance that there had to be measures or mechanisms put in place to ensure that those benefits gained from infrastructure improvements (as well as ensuring that a continuing return was made as a result of the huge financial outlay made by the DfT in relation to the WCML project), was maintained going forward once the upgrade was completed. The setting up of the WCML Sustainability Strategy Steering Group (SSSG) helped provide the motivation to achieve such aim, whilst at the same time ultimately providing influential information that suggested for busy routes with high revenue, particularly at weekends (i.e. WCTL), there would be real benefit for the industry as a whole, for shorter possessions.
- 8.1.4 The resultant outcome of the SSSG foci was a recommendation, (based on a joint TOC/FOC & Network Rail approach to planning maintenance & renewal (M&R) activities), that resulted in a financial premium to the Rail Industry as well as considerable economic benefit to the nation. However, such recommendation and the possible benefits that could be obtained, would only be achieved by adopting a proposal that sought to balance Network Rail's need to maintain the WCML whilst minimising (wherever possible), disruption to train services. A number of objectives were put in place, primarily focussing on the level of service frequency (VHF) required by the DfT, balanced against those efficiencies and unit cost reductions (primarily but not exclusive of, M&R activities), within which Network Rail had to achieve over the WCML. The SSSG work / outputs were then eventually subsumed into Network Rail's national EEA strategy in conjunction with ongoing business plan objectives (7-Day Railway Strategy) for the next Control period (CP4).

- 8.1.5 This newly enhanced WCML EEA regime was subsequently agreed upon between Network Rail and the DfT, based upon those Service Level Commitments required to deliver Virgin's VHF timetable from December 2008. The rationale for introducing such a regime, being that the additional passenger revenue made possible through running more services because of shorter ROU's, would offset any extra costs arising from carrying out engineering work within the constraints of EEA. The regime introduced in Dec 2008 was on a staged basis, firstly covering mainline routes between London, Crewe and Manchester via the West Midlands, but then on to Liverpool and north of Preston a year later.
- 8.1.6 The purpose in providing such a relatively detailed set of historical notes relating to EEA's inception, is to impress, within this appeal, that EEA is very much an agreed and permanent feature of Network Rail's 7-Day Railway and engineering strategy, as well as forming the basis upon which the DfT measures its return on the investment put into the WCML upgrade. It underpins ongoing delivery of the VHF timetable inclusive of journey times, which is itself dependant upon access being maintained on core routes between critical time-bands.
- 8.1.7 As most recently encompassed in Network Rail's 2010 Delivery Plan Update (Route "N" Plan, page 18 refers) "*....One of the most important features of the current timetable is that a weekday train frequency and journey time operates on the routes south of Crewe and {to} Manchester, **all day on Saturdays and from 1200 on Sundays**....*"; EEA is now very much, well and truly established across the WCML, including those core routes to Manchester.
- 8.1.8 In his deliberations, the *Chair* has concluded that whilst EEA is relevant and important, it is not *decisive*, and therefore not central to his Determination. WCTL disagrees, and appeals on the basis that, as a 'Bidder' we are unable, because of the current engineering ROU times (0030 -1630 Sun), to comply with our contract (SLC), to which we are party with the DfT. Despite Network Rail assessing this part of Decision Criteria and evidencing that *all* affected TOC's would nonetheless have their SLC contracts impacted upon, and thus forming '*a level playing field*' situation, their decision was taken to go with an "*...overall balance of train services that best fits the terms of the TOC's franchise commitments....*"; Such considerations did not take into account its requirement to abide to its EEA obligations.
- 8.1.9 WCTL therefore asserts that Network Rail's decision making process was flawed, and as such, appeals against the basis upon which the Determination was established. WCTL maintains that the ROU's should be reversed back to within EEA timescales.

8.1 Cont. Appeal Ground 1b – Network Rail's due regard to D6 Decision Criteria (Part 'c') - TAC."

- 8.1.10 WCTL is also of the opinion that, following a previous determination of TTP352, where upon Network Rail were deemed to have been non-compliant with WCTL Schedule 5 rights, (as a result of occasions where proposed ROU's had not been the reasons for such changes in Journey times), the inability to maintain it's current London to Manchester (v.v.) rights as a consequence of these possession times in dispute, is another example of Network Rail being non-compliant with our TAC.

- 8.1.11 The fact that, between 1300 and 1600 on each of the aforementioned Sundays, means we have no ability to operate services to those calling patterns, quantum, clockface and journey times permitted within our TAC Schedule 5, as a result of necessary diversions (via Styal and/or/ Alsager) and / or cancellations or services starting / terminating short, otherwise essential to maintaining WCTL expectation of a fully optimised VHF timetable, is a breach of WCTL Rights.
- 8.1.12 In view of Network Rail's duty to consider (in parallel with our own SLC obligations to the DfT as highlighted above), its own obligations to WCTL through compliance with our TAC, then once again they can be shown not to have comprehensively evaluated as part of their reasonable application of Decision Criteria, the inability to comply with WCTL TAC.
- 8.1.13 We therefore deduce that in a similar *vein* to Part 8.1 above, that Network Rail's decision making process was flawed, and as such, we appeal against the basis upon which the Determination was established. WCTL again maintains that the ROU's should be reversed back to within EEA timescales

8.2 Appeal Ground 2 - Network Rail's Licence Obligations

- 8.2.1 Network Rail has an obligation to the Secretary of State under Section 8 of the 1993 Railways Act, to comply with those Conditions relative to its Licence to be *the* 'operator of the network'.
- 8.2.2. In its capacity as being *the* 'operator of the network', Network Rail must comply with such Conditions including those that relate to 'Network Management'; this includes a responsibility to "*....operate and maintain, renew and replace, improve, enhance and develop the Network, in each case in accordance with 'best practice' and in a timely, efficient and economical manner....*". Such responsibilities need (in part) "*.....to satisfy the reasonable requirements of persons providing services relating to railways and funders, including potential providers or potential funders, in respect of: i) the quality and capability of the network....*". (*Licence Condition Part 1.1 refers*)
- 8.2.3 Whilst Network Rail has to carry out such obligations to the extent necessary in having reasonable regard to both circumstance and practicality, it is nonetheless required, to comply with those conditions set out in its Licence – part of which relate (under Network Management) to both Planning and Delivery Plan requirements.
- 8.2.5 WCTL concludes that, in order to satisfy its reasonable requirements and those of its funders, which therefore incorporates the VHF timetable and those rights that underpin it (i.e. the SLC and TAC), Network Rail, through their disregard of the contractual importance of EEA to the overall dispute, and consequentially the lesser importance given to such issue by the *Chair*, have NOT therefore satisfied WCTL reasonable requirements.

- 8.2.6 Furthermore, Network Rail in order to comply with its duties to operate the Network, must prepare and provide to the ORR on a regular basis, its plans, strategies and other documents necessary to demonstrate its compliance with those duties required of it, (i.e. to operate the network). One of the primary aspects of this licence condition is that, which relates to Network Rail's 'Delivery Plan'. This Delivery Plan, amongst other facets, gives an indication to the Industry about how Network Rail are progressing with such 'operation of the network' and those financial accountabilities that underpin such operation. (*Licence Condition Part 1.6 refers*)
- 8.2.7 Part of Network Rail's Delivery Plan, accords to the ongoing provisions associated with its 7-Day Railway Strategy and Access arrangements on a route by route basis. A primary and integral element to achieving its 7-Day Railway objective is the embodiment of an EEA strategy within which Network Rail can deliver over a Top 20 set of routes³, full timetable access including at weekends.
- 8.2.8 As WCTL contends that EEA is integral to the delivery of the operation of its services in conjunction with those rights expressed within its SLC, and that in conjunction with the strategy that forms part of Network Rail's 2009 Delivery Plan and 2010 update, (which co-incidentally have not been rejected by the ORR (*Licence Condition 1.9 refers*)) and which is definitively expressed in the supporting Route documentation (Route 'N' – Pages 18 & 19 refer), we consider that if the Determination is upheld in its current form, then this would constitute a breach of Network Rail's Licence conditions. This is in relation to firstly not being able to satisfy the reasonable requirements of WCTL and its passengers, and secondly for dismissing such an integral element (EEA) of the Delivery Plan in the course of its deliberations, which has consequently already been approved by the ORR through the Delivery Plan process.
- 8.2.9 WCTL therefore appeals to the ORR on the basis that this is, a considered breach of Licence conditions and that, despite the assessment made by Network Rail in deciding that a 1630 finish time on each Sunday was fair & reasonable, (combined with the resultant decision by the *Chair*), it does not satisfy our reasonable requirements, and as such the ROU finish times should be drawn back to finish at 1300.

³ London to Manchester via Stoke, Macclesfield or Crewe, Wilmslow forms one of these Top 20 routes.

8.3 **Appeal Ground 3 – TTP337, 359 & 382 – “Conclusiveness of the Evidence provided – Northern Trains Ltd.”**

- 8.3.1 WCTL provided in support of its case, a detailed set of information about passenger loadings over those routes concerned, namely loadings at Stockport and Macclesfield. Due to the confidential nature in view of the ongoing West Coast Refranchising process, such information had to be redacted and thus only viewed by the *Chair*. This in itself slightly weakened our case as the remaining members of the *Panel* would not have been able to consider the specific values involved, (when set against Northern Trains' data) and thus would only be able to make a subjective assessment of the dispute going forward.

- 8.3.2 Nevertheless, the information provided was still of sufficient qualitative detail, to provide all members with an appreciation of the high numbers of passengers involved and consequently disrupted. Without prejudice to those EEA issues explained above, the *Chair* deemed that Network Rail were justified in their decision to apply for ROU's that finish at 1630 on each Sunday despite reasoning that WCTL passenger numbers would be higher, and that more passengers overall would be affected / disrupted. (*Determination Paras 9.6.3 & 10.6 refer*).
- 8.3.3 As can be ascertained throughout the Determination, there was a clear difficulty in balancing the needs of WCTL and Northern Trains in respect to the disruption to each of their train services, resources and passengers. In the end, the justification for making a decision quite literally '*boiled down to*' an issue over Public Order concerns. WCTL contend that irrespective of the British Transport Police's (BTP) anxieties, there is still an expectation on the Train Operator to manage such events accordingly.
- 8.3.4 WCTL considers that such concerns combined with the inability of the *Panel* to see the detailed volumes of WCTL passengers actually disrupted, may have swayed them to consider the BTP concerns to be of a higher relevance than necessary. All Train Operators have had to deal with, including ourselves, (particularly during Bank Holidays), Public Events where large volumes of people (who have the capacity to cause Public Disorder), have had to use rail replacement alternatives. Examples such as Liverpool during previous August Bank Holiday pop festivals and the routine Football and Rugby traffic flows disrupted each winter / spring weekend, all bring very similar disorder possibilities which the duly TOC's manage. Indeed as the *Chair* points out in his deliberations, he did not assume that the BTP would find the situation each Saturday night as unmanageable. (*Determination Para 9.5.3 refers*).
- 8.3.5 Putting aside the vagaries of the fact that Northern Trains' passenger load figures for the Saturday evening (which in total are less than those of WCTL affected on Sunday afternoons), were incomplete and that some of the services (x13) could be diverted via alternative routes, there is still no reason why Northern Trains would not be able to manage such disruption in accordance with previous experience. Their issue regarding lower availability of rail replacement vehicles on Saturday evenings is never normally an issue, and when one considers the primary disorder loci, would be on journeys out of Manchester later in the evening, then the volumes of actual passengers likely to cause disorder would be significantly less than that originally purveyed, and therefore manageable.
- 8.3.6 WCTL therefore appeals to the ORR on the basis that those facts supplied by Northern Trains', that went to supporting the decision making process of both the *Panel* and *Chair*, 'were not substantive enough or of sufficient merit, to warrant a determination based purely Public Disorder issues. On this basis there is no logical counter reasoning why the ROU's should not finish at 1300.

8.4 Appeal Ground 4 – “Risks involved with the Works required

- 8.4.1 WCTL were invited to a meeting in Birmingham with Network Rail in August of last year to discuss ways forward to possibly resolving this dispute. Those attending the meeting from Network Rail comprised of Delivery Unit and S& C maintenance personnel who were experienced in the workstreams relevant to these ROU's taking place, during the forthcoming weekends to which this dispute relates.
- 8.4.2 It was explained to WCTL that the main focus of the works was to undertake S& C Tamping activities on the junctions at Edgeley (No.1) and Stockport / Heaton Norris. Such activities we know, from experience, are susceptible to weather conditions particularly if the ambient air temperature exceeds 18°C. We have reason to believe following these and other discussions that undertaking such works in the height of summer, when temperatures in reality are potentially at their highest, is indeed a risk that Network Rail have not, to date, factored into this dispute.
- 8.4.3 We would question that if such concerns had been incorporated as part of Network Rail's evaluation process during the dispute, (and consequently at the hearing), whether the *Chair* would have been moved to be more exploratory in his questioning of Network Rail, both with regards to their work activities and risks. Such approach may have instigated a different evaluation of the overall need to undertake the works during the height of the summer, at a time when, as Northern Trains through the auspices of the BTP, highlight effectively, that the public disorder issues (and complimentary rail replacement and crowd control issues, should they be proven to exist), are likely to be more prevalent in the height of summer rather than at a quieter and cooler period like the Autumn.
- 8.4.4 On this basis, WCTL look to the ORR to take these facts into consideration when appraising the overall merits of this appeal.

9. CONCLUSION(S)

- 9.1 WCTL has sought to appeal to the ORR because of those principals at stake as a result of the determination of TTP337, 359 & 382. The principles surrounding EEA are of the utmost importance to WCTL, as they fundamentally underpin those rights, contractual with the DfT, that enable it to operate its day to day business effectively and with certainty.
- 9.2 The very fact that the *Chair* has sought not to take the EEA strategy, now enshrined in Network Rail's Delivery Plan, as being a *decisive* factor in his Determination, proves to us that Network Rail did not, by default, import more value into the *Chair's* appraisal of those issues at the centre of this dispute. Indeed it could be considered that Network Rail inconspicuously undervalued the fundamental affect that EEA could have otherwise had during his deliberations and assessment, as there was no *specific* mention of EEA in any correspondence, Joint Response or Opening Address to the Panel at the Hearing.

- 9.3 Whilst we appreciate it is always difficult to apply a fair & reasonable application of the Decision Criterion, it is nonetheless, Network Rail's responsibility to ensure that primary factors, (in this case the inability of a Bidder ('WCTL') to comply with its contract with the DfT), is given equal weighting to those deterministic elements such as Public Disorder, Rail Replacement difficulties etc. (i.e. *Determination Para 10.1, refers*)
- 9.4 Furthermore, Network Rail under this current Regulatory Control Period, are committed to achieving a regulated Network Availability output of 37% for passenger train operators. To enable them to do this, their Delivery Plan has imported a number of additional commitments & remedies in conjunction with ministerial and DfT approval, namely the introduction of Route Categorisation proposals (Top 20 – see Para 8.27 above), the 7-day Railway initiative, improved Asset Management and enhanced planning activities. Such EEA principles and outputs support a number of these objectives. Therefore, Network Rail, in not encompassing EEA expressly into their evaluations and application of Decision Criteria, have not only breached their licence conditions in not satisfying those requirements of WCTL, but effectively are also in contravention of their obligations to the DfT.
- 9.5 Indeed, when combined with other mitigating evidence such as that outlined in part 8.4 above, suggests the Chair did not have complete visibility and thus a full understanding of the facts, that could have otherwise directed him to give equal leverage to those contractual requirements as well as just the more physical issues.
- 9.6 WCTL therefore respectfully request that the ORR overturn the decision of the *Chair*, consequently upholding this appeal, thereby permitting the ROU's to finish at 1300 on each of the aforementioned Sundays.

Robert Hodgkinson
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West Coast Trains Ltd.
09th February 2011