



APPEAL BY SOUTH WALES AND WEST RAILWAY LIMITED UNDER PART D OF THE TRACK ACCESS CONDITIONS: DECISION BY THE RAIL REGULATOR

Background and purpose of document

1. On 7th March 1997, South Wales & West Railway Ltd ("South Wales & West") appealed to the Regulator⁽¹⁾ under Access Condition D5.2 against Decision No.32 of the Timetabling Committee set up under the Railtrack Track Access Conditions⁽²⁾. The Regulator sought representations from Railtrack PLC ("Railtrack") and CrossCountry Trains Ltd ("CrossCountry"), and these were received on 25 March 1997⁽³⁾ and 24 March 1997⁽⁴⁾ respectively.

2. At the request of South Wales & West, on 14 March 1997 the Regulator published an Interim Determination⁽⁵⁾ requiring Railtrack not to accept, without the Regulator's approval, any bids which would prevent it meeting South Wales & West's aspirations for train slots.

3. Following receipt of initial representations from the parties, the Regulator on 1 April 1997 asked each of the parties a number of questions⁽⁶⁾ to clarify points raised. An initial deadline of 9 April was set for responses but this was extended to 16 April at the request of South Wales and West. CrossCountry responded on 8 April 1997⁽⁷⁾; Railtrack on 15 April 1997⁽⁸⁾ and South Wales & West on 16 April 1997⁽⁹⁾. In addition, the Regulator's office obtained clarification of certain factual matters in bilateral telephone discussions with the parties.

4. The Appeal concerns a bid by South Wales & West to operate through services between Manchester and London Waterloo via Newport, Bristol and Salisbury (and vice versa); Manchester and Penzance via Newport, Bristol and Plymouth (and vice versa) and Liverpool and Portsmouth via Newport, Bristol and Southampton (and vice versa). These services ("the proposed services") are listed in Annex A.

(1) - (11) See Annex B



5. This document sets out:

- (a) the reasons the Regulator agreed to consider the appeal, the principal issues raised by the appeal and the reasons for the procedure adopted;
- (b) the Regulator's Decision on the appeal, and his reasons for that Decision;
- (c) comments on the relationship between the Regulator's reasons and the basis on which he approved the track access agreement;
- (d) observations by the Regulator on further issues raised and the approach he has taken;
- (e) the next steps the Regulator expects Railtrack to take in the timetabling process; and
- (f) the Regulator's Determination.

Annex B lists the documents referred to in this Decision document.

The reasons the Regulator agreed to consider the appeal, the issues raised by the appeal and the reasons for the procedure adopted

Regulator's agreement to consider the appeal

6. The appeal was against a Decision by the Timetabling Committee that South Wales & West's bid to operate the proposed services should be treated by Railtrack as a Non-Compliant Bid because, in the view of the Committee, South Wales & West did not have rights to operate the services in its track access agreement⁽¹⁰⁾ (the "access agreement"). Thus it was a matter covered by Condition D5.2 ("If Railtrack or any bidder is dissatisfied with any decision of the Timetabling Committee in relation to any matter referred to it under Condition D5.1"). South Wales & West's appeal was made within the timescales and according to the procedural requirements



set out in Condition D5. Furthermore, the Regulator considered that the appeal raised important issues for the industry, that it was not trivial or vexatious, and he was not aware of any reasons why the conduct of South Wales & West ought properly to preclude the appeal being proceeded with. He did not consider that he should decline the reference on any other ground and therefore determined that he was prepared to act on the appeal.

Principal issues raised by the appeal

7. The principal issues raised by this appeal are:

- (a) whether South Wales & West has the rights to the required quantum of slots;
- (b) whether South Wales & West has the right to link together train slots to form through services;
- (c) whether South Wales & West has the right to start and terminate services short of the start and end points specified in the access agreement; and
- (d) the relationship between these issues and the basis on which the access agreement was originally approved by the Regulator.

Appeal Procedure

8. Having regard to the fact that the issues raised by the appeal go to interpretation of the access agreement, against the background of the basis on which that agreement was approved in the first place, and having regard to the comprehensive nature of the submissions from the parties, their written responses to his questions and further exchanges referred to in paragraph 3, the Regulator concluded that he was able to reach his decision without the need for a Hearing involving the parties or any further representations from them.



9. The Regulator chose to regard CrossCountry as a party to the dispute since CrossCountry had originally disputed Railtrack's acceptance of the bid on the grounds that it required new access rights and therefore put Railtrack in breach of the provisions of Schedule 10 of CrossCountry's track access agreement.

The Regulator's Decision on the appeal and his reasons

10. **The Regulator has decided that the appeal by South Wales & West should be upheld.** This means that South Wales & West has the right in its access agreement to operate the proposed services, albeit in some respects subject to Railtrack's Flexing Right, and Railtrack should not regard bids for the through services as Non-Compliant Bids. This does not however apply to the part of the services which operate between Salisbury and Waterloo (see paragraph 23 below). The Regulator bases this Decision on his assessment of the first three of the four principal issues set out in paragraph 7 above.

Does South Wales & West have the rights to the required quantum of slots?

11. The Regulator considers that South Wales & West has the rights in Table 1 of Schedule 5 of its access agreement to the quantum of train slots between Manchester/Liverpool and Cardiff; Cardiff and Portsmouth and Cardiff and Penzance that is required to operate the services (other than the Salisbury-Waterloo segment). South Wales & West stated in its original submission and repeated in its response to questions that it did have the rights in Table 1 of Schedule 5 of the access agreement to the required quantum of slots. This does not appear to be disputed by Railtrack. As noted in paragraph 23, special considerations apply to the Salisbury-Waterloo element of the proposed Waterloo services.

Does South Wales & West have the right to link together the train slots to form through services?

12. The Regulator considers that South Wales & West has the right, subject to Railtrack's Flexing Right, to seek to operate through services formed by linking together train slots which are listed separately in Table 1 of Schedule 5 of the access



agreement. These through services enable passengers to make through journeys without changing trains.

13. The Regulator considers that, subject to Railtrack's Flexing Right, there is no reason that South Wales & West should not be able to seek to operate through services additional to those to which it has Firm Contractual Rights in paragraph 3.4 and in Schedule 5 Table 2. The Regulator does not consider that the effect of paragraph 3.4 is to exclude the possibility of other through trains being provided; it is rather to make clear that specific provisions apply to those expressly mentioned in Table 2. Furthermore, Access Condition D2.7 explicitly allows a bid to specify the railway vehicles used for a train movement, and there seems no reason why an operator should not be able to specify that one train movement be formed from the rolling stock used for another train movement.

Does South Wales & West have the right to start and terminate services short of the start and end points specified in the access agreement?

14. The Regulator considers that South Wales & West has the right to start and terminate slots short of the start and end points by which they are identified in Table 1 of Schedule 5 of the access agreement. The Regulator notes that paragraph 7.2.1 of Schedule 5 of the access agreement contains a Firm Contractual Right to stop at key stations, and an additional right (subject to Railtrack's Flexing Right) to stop at additional stations. The right set out in paragraph 7.2.1(a) is to "stop at any or all of the key stations specified for that service in Table 2". This is however a *right* to stop if the operator seeks to do so, not an obligation to do so. There is no requirement that the operator stops at any key station, including those at either end of the relevant service and no reason why one should be implied. No distinction is made in the agreement between different types of key station. Therefore, since both Newport and Salisbury are key stations at which South Wales & West has rights for the relevant services to call, South Wales & West has the right to operate the slots in question, but start or terminate them at Newport rather than Cardiff, or at Salisbury rather than Portsmouth.



The relationship between the issues and the basis on which the Regulator approved the access agreement

15. The Regulator, in coming to his Decision, has considered it appropriate to review the basis on which he originally approved the access agreement. He believes the approach taken in this Decision, and the approach he took in approving the access agreement, are consistent and he considers it appropriate to explain why.

16. In most cases, Schedule 5 to passenger track access agreements (including that of South Wales and West), does not set out a "hard-wired" *timetable* for the services to be operated. Instead it sets out a series of *rights* to which the train operator is entitled. Many of these rights are Firm Contractual Rights, as defined in the Access Conditions. Firm Contractual Rights must be met by Railtrack if bids are made in accordance with the timescales and other requirements of the Access Conditions. Firm Contractual Rights were designed to give operators assurance they could meet their key commercial and franchise requirements.

17. Schedule 5 of an access agreement includes rights to quantum of train services. These may be Firm Contractual Rights, or as envisaged in paragraph 42 of the Regulator's Criteria for the Approval of Passenger Track Access Agreements⁽¹¹⁾, they may be contingent rights (ie rights subject to Railtrack's Flexing Right). In approving track access agreements the Regulator recognised the need for a statement of the maximum quantum of train services to which an operator was entitled, in order to avoid Railtrack's commitment to provide slots at the charges stated in the contract being open-ended.

18. The Regulator considers that within the rights to quantum, train operators are entitled to bid to operate services with characteristics (eg service intervals) which are different from those to which they have Firm Contractual Rights unless this is clearly prevented by the terms of the agreement. If an operator does so, Railtrack has to decide, in accordance with Part D of the Access Conditions, including having regard to the Decision Criteria, whether to accept, reject or flex the bid.



19. In essence therefore, Firm Contractual Rights to service characteristics other than quantum constitute a baseline entitlement, but within the overall entitlement to quantum, the operator can seek, subject to the Access Conditions requirements and Railtrack's Flexing Right, to operate with different service characteristics. The Regulator believes this is consistent with the charges contained in Schedule 7 of passenger track access agreements under which franchised passenger operators pay a substantial fixed charge for the right to operate services within the overall quantum. If the operator sought the rights to an additional quantum of services, or additional Firm Rights, the charges could be subject to adjustment.

20. These principles are critical principles of the access regime and associated charges. The Regulator is proposing to issue further guidance to promulgate to the industry his policy on these issues.

Observations on further related issues

21. The appeal raises a number of further related issues.

- (a) The relevance of the provisions of Schedule 10 of CrossCountry's Access Agreement.
- (b) The additional rights required by South Wales & West to operate the Waterloo-Salisbury element of the proposed services.
- (c) The nature of the evidence considered by the Regulator in reaching this Decision.
- (d) The detriment which all train operators might suffer were the Regulator to have rejected this appeal.
- (e) How these services are to be presented in published timetable information.



CrossCountry's Schedule 10 Moderation of Competition Protection

22. The effect of the Regulator's conclusion that South Wales & West has rights in its access agreement to operate the services (subject to operation of the timetabling procedure) is, given that South Wales & West's access agreement predates the coming into force of the moderation of competition protection in Schedule 10 of CrossCountry's access agreement, that CrossCountry's Schedule 10 is not relevant to the issue.

Waterloo Services

23. South Wales & West has stated that it wishes to seek to amend its access agreement to give it rights which enable it to operate the Waterloo-Salisbury element of the proposed services. Under section 22 of the Railways Act 1993, this will require the approval of the Regulator to be contractually valid. The Regulator understands that Railtrack may be prevented by Schedule 10 of other access agreements from granting new access rights to other operators to serve certain flows on, or involving stations on, this segment, and will require information as to how this issue has been addressed when any amendment is submitted for his approval.

The nature of the evidence used by the Regulator in reaching his Decision

24. The Regulator has been able to reach this Decision on the basis of the terms of the contract. He has not in this case relied on the evidence presented by South Wales & West concerning the intentions of the parties when they entered into the contract. Nor has he needed to have explicit regard in taking the Decision to the basis on which he approved the agreement. He does not however rule out the possibility of using either of these two types of evidence in the case of future appeals.

25. The Regulator also notes the point made in Appendix 2 to South Wales & West's submission that Railtrack appears already to have accepted bids for a number of through services which are in addition to the Firm Contractual Rights to through trains set out in Table 2 of Schedule 5. If not otherwise permitted, the fact that Railtrack accepted bids outside the terms of a track access agreement would



constitute an amendment requiring approval by the Regulator under Section 22 of the Railways Act if it were not to be void. It is not necessary for the purpose of this Decision to consider the rights of the parties as between themselves in such a situation. However if the parties make void amendments this cannot fetter the Regulator's discretion in considering any subsequent request for approval under section 22.

Implications for Train Operators

26. CrossCountry's representations and the Timetabling Committee's Decision focused on the point that the rights in question (other than to quantum) were not explicitly stated on the face of the contract. It is important to emphasise that access rights in the context of the Schedule 10 moderation of competition provisions are not the same as Firm Contractual Rights as defined by the Access Conditions. The Regulator considers that there are significant benefits, especially in terms of encouraging the use and development of the network, in an approach where train operators retain significant flexibility to key service characteristics (albeit subject to flexing by Railtrack in accordance with public interest decision criteria) within an envelope of rights.

27. The implication of an alternative approach is that many variations of service characteristics could not be achieved within the scope of existing access agreements. Under these circumstances such changes would require amendments under section 22 of the Railways Act or adjustments under the provisions of Schedule 7 and could involve the payment of additional access charges. The Regulator does not believe that such additional charges would generally be warranted and that they would represent an unreasonable detriment to the position of train operators. For these reasons, and notwithstanding CrossCountry's objection to the appeal, the Regulator considers the principle set out in paragraph 26 as likely to be in train operators' legitimate long term interest.



Published Timetable Information

28. This Decision is about rights to seek to operate the through services and have them included in the Working Timetable. The Regulator would expect that, if the bids to operate the services are accepted, Railtrack will in any timetable information produced under the Network Licence treat them as through services on the same basis as it treats similar through services.

Timetabling of the train services

29. The Regulator now requires that Railtrack consider the bid for the services as one which is compliant with the access agreement so as to make a decision on the bid which can be incorporated in the Passenger Timetable starting on 28 September.

30. In its answers to the Regulator's questions Railtrack states that:

"Subject to receiving directions from the Regulator in accordance with Condition D2.6.2 Railtrack would not envisage capacity constraints or other difficulties in accepting the South Wales & West bid".

The implication of this Decision is that Condition D2.6.2 is not relevant other than for the Waterloo - Salisbury segment. The Regulator therefore relies on the remainder of this part of Railtrack's submission as representing an assurance that Railtrack would expect to accommodate any bid for the services in accordance with the Decision Criteria (other than the Waterloo - Salisbury segment).

31. In considering a possible appeal by CrossCountry or another train operator were Railtrack to accept South Wales & West's bid for the services, the Regulator would be minded to note that in essence the issue is one of the detriment to the commercial interests of CrossCountry or such other train operator balanced against the benefits to passengers of the enhanced range of through services set out by South Wales & West. Given the very limited range of through services currently available on such flows as Manchester to Bristol and Plymouth, and Liverpool to Bristol and Southampton, the Regulator would, on the evidence presented thus far by the parties,



and on the assumption that significant changes to the current timetable are not proposed for the September timetable, expect that the Decision Criteria would favour South Wales & West being able to operate the services as proposed. The Regulator would however need to consider any new evidence or arguments which might be presented on any such appeal.

The Regulator's Determination

32. The Regulator directs Railtrack PLC to comply with the following direction:

Railtrack PLC shall produce the Passenger Timetable commencing on the second Passenger Change Date in 1997 on the basis that:

- the Bids by South Wales & West Railway Limited set out in Part 1 of Annex A are not Non-Compliant Bids, and
- the Bids by South Wales & West Railway Limited set out in Part 2 of Annex A are only Non-Compliant Bids in respect of that part of the Train Slots between Salisbury and Waterloo and cease to be Non-Compliant Bids to the extent that rights for such Train Slots are included in an Access Agreement to which South Wales & West Railway Limited are a party.

Words and phrases defined for the purpose of Part D of the Railtrack Track Access Conditions shall have the same meaning in this direction.

A handwritten signature in black ink, appearing to read "C. Brown".

CHARLES BROWN
DIRECTOR RAILWAY NETWORK GROUP

Duly Authorised by the Rail Regulator
21 May 1997



ANNEX A

Part 1

10.59	Saturdays Excepted	Manchester Piccadilly - Penzance
06.41	Saturdays Excepted	Penzance - Manchester Piccadilly
13.00	Saturdays Excepted	Liverpool/Cardiff - Portsmouth
06.00	Saturdays Excepted	Portsmouth - Cardiff/Liverpool
06.15	Saturdays Only	Penzance - Manchester Piccadilly
09.33	Saturdays Only	Manchester Piccadilly - Penzance

Part 2

07.58	Saturdays Excepted	Manchester Piccadilly - Waterloo
15.17	Saturdays Excepted	Waterloo - Cardiff/Manchester Piccadilly
06.59	Saturdays Only	Manchester Piccadilly - Waterloo
14.18	Saturdays Only	Waterloo - Manchester Piccadilly



ANNEX B - REFERENCED DOCUMENTS

- (1) Appeal by South Wales and West (7 March 1997)
- (2) Railtrack Track Access Conditions (1995) as amended, incorporating the Access Dispute Resolution Rules.
- (3) Representations by Railtrack PLC (25 March 1997)
- (4) Representations by CrossCountry Trains Ltd. (24 March 1997)
- (5) The Regulator's interim determination (14 March 1997)
- (6) The Regulator's questions to the parties (1 April 1997)
- (7) CrossCountry's response to the Regulator's questions (8 April 1997)
- (8) Railtrack's response to the Regulator's questions (15 April 1997)
- (9) South Wales & West's response to the Regulator's questions (16 April 1997)
- (10) Track Access Agreement between Railtrack and South Wales and West dated 11 December 1995
- (11) Criteria for the Approval of Passenger Track Access Agreements (Office of the Rail Regulator; Second Edition February 1995)