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Cc Paul Harris, Network Rail; Andy Doyle FTWCRL

30th April 2025

Dear Jonathan,

FTWCRL Representations of 11th April 2025 on Regulation 32 Appeal by Virgin Management Limited

We are writing in response to the above letter received from you by email on 15th April 2025.

We will address the points raised by section as presented in the initial letter, and where there is duplication, we will reference back to the relevant section in our response.

Section One: Introduction

No comments.

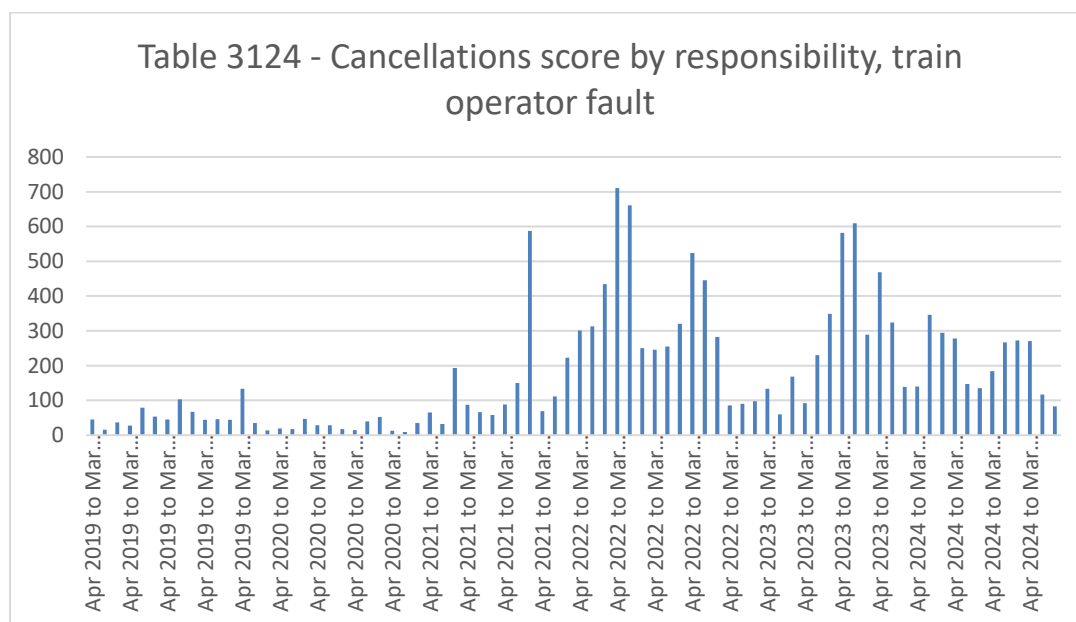
Section Two: Avanti West Coast (AWC)'s Timetable Step Up Strategy

We note the comments made in this section and would like to note the following:

1. We understand that AWC wish to utilise more electric rolling stock as part of this step up strategy. However, we have seen NR information that references power supply issues, the main focus of which we understand is at Bushey feeder station. From the NW&C Regional Investment Review Group (RIRG) information and minutes sent to us on 25th January 2025, a heat map presented shows that Euston to North Wembley and Crewe to Weaver Junction are considered "red" – with red identified as, "There are safety concerns, the asset is unable to accommodate more traffic without endangering people or reducing asset life considerably. There is a high likelihood of service affecting issues, and/or non-compliance against connection agreements under normal traffic conditions". We also note from the RIRG minutes that despite this, there is a "desire from Avanti and electric freight to introduce

electric fleet before the works are complete”, which we understand will be at the end of CP7 at the earliest. Has consideration been given to the obvious safety implications?

2. We understand the importance of reliable and highly performing service introduction. AWC assert that this is how the services have been introduced since the December 2022 timetable. The following graph (derived from ORR’s Table 3124) does not support this assertion, and we note the significant deterioration since Virgin operated the franchise. We also note from ORR’s Table 3184 that TOC on Self delay minutes increased by 57% between 2019/20 and 2023/24.



Source: ORR Table 3124 Column M

3. Noting that performance is of the highest importance and that NR are indicating that performance is a significant factor in selling capacity, we are concerned that ongoing concessions remain on the new Avanti fleet – we have been informed by NR that Avanti have bid for public book differentials (an important performance buffer) in recent timetables for their new fleet which would naturally flatter the performance results, and understand resolution of the Network Change is some way off. We also understand that there have been issues with the new fleet from a TASS (<https://www.railforums.co.uk/threads/progress-on-avanti-west-coasts-805-807s-hitachi-at300-sets.214752/page-95>) and bridge resonance (<https://wnxxforum.co.uk/viewtopic.php?f=16&t=31389&p=1006397>) perspective, both of which may cause ongoing performance issues until resolved
4. We note AWC’s confirmation that “FTWCRL has been clear and consistent that our current position regarding the relinquishment of access rights is temporary”. We will respond to this in Section 6.

Section 3: West Coast Partnership Development (WCPD) – Future Service Development

We note the comments made in this section and understand that no decisions by DfT have been made on the future service requirement and understand that the FTWCRL contract is likely to be



terminated during 2026. As HS2 is designed to increase capacity, we would anticipate that space could be made available for more open access (passenger and freight) services.

Section 4: Background on the ORR's Process on Competing Access Applications – May 2025

We have no substantive comments but note that the date of the Competing Access Applications probably refers to May 2024 rather than 2025.

Section 5: Letter by the Department for Transport on Live Open-Access applications

We note the comments made in this section and would like to note the following:

1. Our revised Form P application to ORR shows a healthy NPA ratio well in excess of the 0.3 guided in the letter from DfT; and
2. The funds available to the Secretary of State have not been clearly set out as part of the process and we note on page 9 that AWC believes that it has "acted in good faith as a good and efficient operator", citing J2 as the correct clause to use. If it were proven to be the case that J2 was not the correct clause then there may be grounds for DfT to challenge whether AWC has acted efficiently and potentially have contractual recourse to recover any lost funds resulting from this breach.

Section 6: Part J of the Network Code

We note the comments made in this section and would like to note the following:

1. There are several references to the "agreed Part J relinquishment process". We understand this to be referring to the J2.1 process and would note that just because that was agreed with Network Rail (as with other operators), it does not necessarily follow that the process was the correct one to follow.
2. AWC has confirmed that "FTWCRL has been clear and consistent that our current position regarding the relinquishment of access rights is temporary" and "in application of our temporary surrender, we used condition J2.1.1". The Network Code drafting in Part J2.1.1 refers to surrendering access rights where there is "no current or foreseeable reasonable ongoing commercial need". J2.1.1 could only be used in our opinion where there was a unilateral and unsolicited decision by FTWCRL to surrender rights on a permanent basis, noting that "part or parts of...access rights" would not seem to cover a temporary surrender. Part J2.3. would seem more appropriate to engage in discussions over a temporary surrender.
3. AWC has confirmed that it had been clear and consistent, seemingly over many months and years, which suggests there must have been ongoing discussions with Network Rail. It must therefore follow that these formed part of a Relevant Enquiry under J2.3 which should then have led to us being consulted as set out in J2.6.1 as "other persons whom it has reason to believe intend to become operators of trains" having submitted our requests for access in May 2024. This process was not followed.



4. The rights in question were awarded for use from December 2023. It would follow that the rights were intended for use from that point, or else a future date would presumably have been agreed. It would seem that most of the reasons cited for failing to use the rights were pre-existing and understood at the time the rights were granted and should not be an allowable reason for non performance of the contract. Therefore, a Failure to Use would seem the correct process to follow.
5. In pointing to J4.3.1, AWC asserts that certain periods could be disregarded so long as “such period of non-use is a) attributable to non-economic reasons beyond the Part J Access Beneficiaries control; and b) is temporary in nature”. AWC appears to rely on limb a) in its letter citing “non-economic factors beyond our control” and identifying industrial action and driver training as the main causes, despite these issues pre dating the award of the rights. The EU Glossary definition would suggest that industrial action would however fall within a definition of economic activity and therefore would not be a valid exclusion under J4.3.1. ([https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Economic_activity#:~:text=An%20economic%20activity%20takes%20place,products%20\(goods%20or%20services\).](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Economic_activity#:~:text=An%20economic%20activity%20takes%20place,products%20(goods%20or%20services).))

Sections 7&8: Driver Training

We note the comments made in this section and would like to note that we have never accepted that there were non-economic factors beyond FTWCRL control. We merely noted that our own bid plans were robust in identifying driver recruitment and training needs and trusted that the Department for Transport evaluation of FTWCRL's bid was equally robust in this area.

Sections 9&10: Regulation 32 Response and Conclusions

As these merely restate previous information, we have no further comments.

Conclusion

We remain of the view that the J2.1.1 process was the wrong one to follow and a Failure to Use process under J4 should have been followed by NR.

Yours sincerely,

Phil Whittingham
Rail Consultant
Virgin Group