



Capacity Planning
Network Rail Infrastructure Limited
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Elder Gate
Milton Keynes
MK9 1EN

Catherine Williams
Deputy Director
Rail Markets & Economics
Office of Rail and Road
One Kemble Street
London
WC2B 4AN

22nd October 2019

Dear Catherine,

NOTICE OF APPEAL TO THE OFFICE OF RAIL AND ROAD ("ORR") IN THE MATTER OF TIMETABLING PANEL DETERMINATION TTP1520

1 Notice of Appeal

- 1.1 Under Condition 5.2.1 of Part D of the Network Code, Network Rail Infrastructure Limited (the **Appellant**, referred to as NRIL in this notice of appeal) is serving this notice of appeal in relation to paragraph 107 and paragraphs 108-109 of the determination of the Timetabling Panel of the Access Disputes Committee dated 14 October 2019 and served on 15 October 2019 in respect of TTP1520 (the **Determination**).
- 1.2 This notice constitutes NRIL's complete Notice of Appeal in accordance with Condition 3.1.1 of Part M of the Network Code (the **Notice of Appeal**).
- 1.3 Unless otherwise defined, the terms used herein adopt the definitions provided under the Network Code (the **Code**). References to Conditions in this Notice of Appeal are to Conditions of the Code.
- 1.4 The evidence in support of this Notice of Appeal, comprising:
- (1) a copy of the Determination (Annex 1); and
 - (2) a spreadsheet summarising the results of Network Rail's consideration of whether the Trains Slots (as defined in paragraph 3.2 below) can be accommodated (Annex 2),
- is attached to this Notice of Appeal.

2 Summary

- 2.1 NRIL appeals against paragraph 107 of the Determination on the basis that it constitutes the substitution of "*an alternative decision in place of a challenged decision of Network Rail*", a power of the Timetabling Panel which pursuant to Condition D5.3.1 "*shall only be exercised in exceptional circumstances*". There are no exceptional circumstances allowing the exercise of this

power, indeed the question of whether exceptional circumstances exist was not even considered in the Determination.

- 2.2 NRIL appeals against paragraphs 108 and 109 of the Determination on the basis that when overturning an NRIL decision the Timetabling Panel is entitled under Condition D5.7.1 to find NRIL liable to Freightliner in damages only in respect of a decision "*where it was made in bad faith or was unreasonable*". The Timetabling Panel made no such finding of bad faith or unreasonableness, indeed it did not even consider these issues. The basis on which has imposed an obligation to pay damages to Freightliner on NRIL is not therefore clear.

3 Facts and background

3.1 The facts and background are set out in the Determination.

3.2 Since the Determination NRIL has carried out further work to identify trains which would be directly or indirectly impacted when seeking to accommodate each of the eight Train Slots the subject of this dispute (the **Train Slots**) and identified the position as follows:

- (a) Train Headcode 4M86 can be accommodated for MSX subject to NRIL being able to make changes to train slots identified in page 1 of Annex 2;
 - (b) Train Headcode 4M93 cannot be accommodated for MO. Further flexes would result in a rewrite of the timetable at Birmingham New Street and there would be knock on consequences for these train slots to Manchester Piccadilly, Liverpool Lime Street and Glasgow Central, with journey times likely to be extended significantly. In effect it would require a recast of the entire December 2019 Working Timetable for the north west – see page 2 of Annex 2 for further detail;
 - (c) Train Headcode 4M93 can be accommodated for MSX if an identified non-compliance is maintained – see page 3 of Annex 2 for further detail;
 - (d) Train Headcode 4S88 can be accommodated for MO, TWThO and FO subject to NRIL being able to make changes to train slots identified on page 4 of Annex 2; and
 - (e) Train Headcode 4L90 can be accommodated for TWThO & FO subject to NRIL being able to make changes to train slots identified on page 5 of Annex 2.
- 3.2.2 The introduction of the December 2019 Working Timetable is now less than 12 Weeks away. The only basis under the Part D of the Code on which NRIL can now vary that Timetable is therefore by consent under Condition D3.6.1.
- 3.2.3 NRIL's experience in timetable planning indicates that it is extremely unlikely that it will be able to conclude Timetable Variations by consent with each of the Timetable Participants necessary to accommodate the Train Slots. The earliest opportunity at which NRIL can therefore be confident that the Train Slots can be included is in the May 2020 Working Timetable.

4 Grounds of Appeal

4.1 Paragraph 107 of the Determination

4.1.1 Paragraph 107 of the Determination includes the following statement: "*Network Rail is directed to include the eight Freightliner Train Slots under dispute at a Timing Load of 1600 tonnes...in the New Working Timetable which will be implemented in December 2019...as soon as reasonably practicable... and, in any event from no later than the first day of the week for each particular Train Slot on or after 1st April 2020...*".

- 4.1.2 Condition D5.3.1 provides: *"In determining any appeal pursuant to this Part D, any Timetabling Panel...may exercise one or more of the following powers: (a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;... (c) it may substitute an alternative decision in place of a challenged decision of Network Rail; provided that the power described in (c) above shall only be exercised in exceptional circumstances"*.
- 4.1.3 The direction in paragraph 107 (summarised in paragraph 4.2.1 above) in effect constitutes the substitution of an alternative decision of the Timetabling Panel in place of NRIL's challenged decision. It therefore constitutes an exercise of the Timetabling Panel's power under Condition D5.3.1(c).
- 4.1.4 Relying on the ordinary and natural meaning of the word "decision", the dispute might be characterised in outline as follows: NRIL made a "decision" not to include the eight disputed Freightliner Train Slots in the December 2019 Working Timetable, Freightliner appealed against NRIL's "decision" to the Timetabling Panel and the Timetabling Panel made a "decision" that the eight Freightliner Train Slots should be included in the December 2019 Working Timetable.
- 4.1.5 Paragraph 107 of the Determination is in effect a decision that the disputed Train Slots should be included in the Working Timetable as set out by the Timetabling Panel.
- 4.1.6 As set out in paragraph 4.1.2 above, pursuant to Condition D5.3.1, the Timetabling Panel has the power to substitute an alternative decision in place of NRIL's decision only in exceptional circumstances. No such exceptional circumstances are identified by the Timetabling Panel in the Determination, the existence of exceptional circumstances was not discussed by the Dispute Parties at the hearing and nor do any such exceptional circumstances exist.
- 4.1.7 It is NRIL's position that the Timetabling Panel should have approached the exercise of its powers under Condition D5.3.1 as it did in the determination in respect of TTP1122. In TTP1122 the Timetabling Panel considered a situation in which XC Trains Ltd (XC) contested NRIL's decision to re-time 7 of its train services. Paragraph 6.13 of that determination states: *"Having reached the conclusion that on the basis of currently available information a proper application of the Decision Criteria was in favour of XC for five of the seven services in contention, the Panel had to review Condition D5.3.1 to decide on the remedy. It could comply with D5.3.1(a) by giving 'general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved' but could only 'substitute an alternative decision in place of a challenged decision of Network Rail' under D5.3.1(c) if 'exceptional circumstances' had arisen. Clearly it could not be credibly submitted in this dispute that exceptional circumstances had arisen entitling the Panel to substitute its own decision under D5.3.1(c), and thus no such submission was made by any of the Dispute Parties. This appeal must therefore be determined in the context of Condition D5.3.1(a)".* The Timetabling Panel therefore went on to direct NRIL to reconsider its decision in respect of each of the seven trains. It expressly did not direct NRIL to include any of the contested services despite the fact that it had established that it would be possible for NRIL to do so.
- 4.1.8 By analogy with TTP1122, it is NRIL's position in respect of TTP1520 that the Timetabling Panel should have determined that NRIL should reconsider its decision in respect of the eight Train Slots that form the subject matter of the dispute.
- 4.1.9 As set out in paragraph 3.2 above, NRIL is therefore in the position that it will be in breach of the Determination if the Train Slots are not included in the December 2019 Working Timetable by no later than the first relevant day of the week for each particular Train Slot on or after 1 April 2020 but it now has no right to direct their inclusion and experience indicates that it will not be successful in securing consent to do so from all relevant Timetable Participants.

4.1.10 This is in NRIL's view an illustration of the need for the stipulation in D5.3.1 that the Timetabling Panel may only substitute an alternative decision in place of NRIL's challenged decision in exceptional circumstances; it avoids NRIL being needlessly in breach of determinations in circumstances where this can only be established following further detailed work being carried out by NRIL.

4.2 Paragraphs 108 and 109 of the Determination

4.2.1 Paragraph 108 of the Determination includes the statement: "*Network Rail is directed to pay to Freightliner compensation in respect of its breaches of contract...Such compensation shall be calculated on the basis of the principles of English law governing damages for breach of contract...*" and goes on to set out what the compensation should cover. Paragraph 109 details how such compensation should be agreed or determined.

4.2.2 Condition D5.7.1 provides: "*Where a decision of Network Rail is overturned on appeal, Network Rail shall only be liable to any Timetable Participant in damages in respect of that decision where it was made in bad faith or was unreasonable*".

4.2.3 Condition D5 is entitled "Appeals" and makes clear that a reference for determination by a Timetabling Panel is an "appeal". For example, Condition D5.1.1 provides: "*Where an appeal is expressly authorised by this Part D, a Timetable Participant may refer a decision for determination by a Timetabling Panel in accordance with the ADRR*" and Condition D5.3.1 refers to: "*In determining any appeal pursuant to this Part D, any Timetabling Panel...may...*".

4.2.4 The Determination therefore constitutes an instance of a decision of NRIL (see paragraph 4.1.4 above regarding what constitutes NRIL's "decision") being overturned on appeal. In the circumstances, therefore, NRIL should be liable in damages in respect of its decision only if it was made in bad faith or was unreasonable.

4.2.5 The Timetabling Panel makes no finding of bad faith or unreasonableness in the Determination. Indeed, the Determination includes a number of instances in which the Timetabling Panel notes that NRIL acted in good faith (see for example paragraph 70 and paragraph 99). Furthermore, Freightliner did not seek such a remedy.

4.2.6 The basis on which the Timetabling Panel felt able to determine that compensation was payable by NRIL to Freightliner is not clear from the Determination.

4.2.7 In NRIL's view, the appropriate remedy for Freightliner if and to the extent that it suffers loss as a result of a breach of the provisions of its Track Access Contract, is to pursue a claim for breach of contract according to the dispute resolution provisions of the Track Access Contract. Given that this contractual route to compensation is open to Freightliner it is inappropriate for the Timetabling Panel to make a determination in relation to damages.

5 **Decisions Sought**

5.1 The Appellant submits that this Notice of Appeal should proceed to appeal as it raises matters which are of significant importance to the industry. Both the appeal against paragraph 107 and the appeal against paragraphs 108-109 raise issues which, if allowed to stand, create a precedent which will have a significant detrimental impact on the operation of Part D,

5.2 The grounds outlined in Condition M4.1 of Part M of the Code do not apply.

- 5.3 With regard to paragraph 107, the Appellant requests a finding that the direction that NRIL must include the Train Slots is quashed and NRIL is instead directed to reconsider its decision as set out in section 4.1 above.
- 5.4 With regard to paragraphs 108 and 109, the Appellant requests a finding that these paragraphs should be removed from the Determination on the grounds set out in section 4.2 above.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'M. Haque', with a long horizontal line extending to the right.

Muzaher-ul Haque
Timetable Production Manager
Network Rail

cc. Network Rail
Freightliner
ADC Secretary