

APPEAL TO THE OFFICE OF RAIL AND ROAD

IN THE MATTER OF TIMETABLING DISPUTE TTP 1064

BETWEEN

ABELLIO SCOTRAIL LIMITED

Appellant

and

NETWORK RAIL INFRASTRUCTURE LIMITED

Respondent

Notice of appeal of the determination of the Timetabling Panel in TTP1064

This is a notice of an appeal by Abellio ScotRail Limited ("**ASR**") under Part M of the Network Code in respect of a determination of the Timetabling Panel in TTP1064 (the "**Determination**"). The respondent to this appeal is Network Rail Infrastructure Limited ("**Network Rail**"). The Appeal concerns the decision by Network Rail to implement changes (the "**Changes**") to the Timetable Planning Rules applicable to ASR's operations on 3 February 2017 to take effect on the principal timetable change date in December 2017.

ASR is appealing the Determination because:

- (a) ASR believes the Determination is wrong (Network Code Condition M3.1.1(b)(i)); and
- (b) ASR considers that the failure of the TTP to consider the specific objections of ASR to the Changes makes the Determination unjust because of a serious procedural or other irregularity (Network Code Condition M3.1.1(b)(ii)).

ASR sets out below the details of its appeal and has attached evidence on which it wishes to rely in support.

1 SYNOPSIS

1.1 Network Rail has developed new Timetable Planning Rules, using a new UK-wide project methodology (known as Timetable Rules Improvement Programme ("**TRIP**") which relies upon its Observed Data Analytics tool ("**ODA**"). It has imposed the Changes generated on substantial parts of the Network in Scotland, and appears to intend further changes to the remainder of the Network in Scotland. ASR objected to the introduction of the Changes at this stage because it believes they are premature. The Changes proposed are not yet ready and not yet verified, and may therefore materially and adversely affect performance. The TTP agreed with ASR that Network Rail had not considered all the potentially relevant information in relation to the Changes but nonetheless upheld the Changes as a whole.

1.2 ASR's appeal can be summarised as follows:

- (a) ASR does not object to the principle of TRIP or ODA. It is wholly supportive of the development of a more efficient timetable, which will benefit customers and

operators alike. However, TPR 2018 (Scotland) (as defined in paragraph 3.1 below) is not ready for implementation. There are substantial flaws in the development process, including in the underlying data. ASR seeks only to ensure TPR 2018 (Scotland) is developed correctly, so that it results in optimal TPRs for all users of the railway and complies with the Decision Criteria.

- (b) ASR's performance is currently good. There is a substantial risk that if TPR 2018 (Scotland) is introduced prematurely then performance could suffer. Further, there is a risk that the Changes will in fact increase journey times and reduce capacity on the Network in Scotland. This would harm all users of the railway in Scotland.
- (c) Network Rail has not carried out any modelling of the Changes (even though Network Rail had stated it was an integral part of the process, and ASR offered to pay for modelling to be carried out). It is consequently not clear what impact Network Rail's proposed changes may have on routes, performance, passengers, and commercial considerations.
- (d) Network Rail carried out only a limited timetable impact study, which despite ASR's representations, was not expanded to cover a more useful, representative cross-section of services.
- (e) Network Rail's proposed changes in TPR 2018 (Scotland) are based on data taken from 2015. The timetable and routes in effect at that time have been substantially changed since that data was captured making it unrepresentative of current operations. In addition the data was captured at a time of poor performance making application to the current, well performing services, unreliable;
- (f) ASR's GPS data from 2015 indicates that some of the results from Network Rail's analysis were inaccurate for 2015 – let alone for use in TPR 2018 (Scotland).
- (g) In developing TPR 2018 (Scotland), Network Rail did not apply the Decision Criteria set out in the Network Code to each of the changes proposed in TPR 2018 (Scotland). If it had done so, it is likely the changes would not have been justified. Network Rail has attempted to argue that it applied the Decision Criteria at a higher (project) level. If it did so, this is not a substitute for complying with the Network Code Part D in applying the Decision Criteria to the actual changes proposed.
- (h) Ultimately, it is not appropriate, and there is no need, to implement TPR 2018 (Scotland) at the moment. ASR is performing well, and TPR 2018 (Scotland) has a number of fundamental issues which have not yet been resolved. ASR is happy to work with Network Rail to ensure TPR 2018 (Scotland) is developed properly (including modelling, accurate underlying data, and correct application of the Decision Criteria), so that it can be implemented and delivered to maximise benefit to all rail users in Scotland.

2 REQUEST FOR AN EXPEDITED PROCESS

- 2.1 ASR believes (and therefore requests) that that this appeal should be dealt with on an expedited basis under Network Code Condition M6. This appeal is an urgent matter which fundamentally affects the timetable scheduled to be implemented in December 2017.
- 2.2 If, as ASR contends, Network Rail has developed TPR 2018 (Scotland) incorrectly, the Changes should be overturned and the former rules reapplied. In that case, substantial revisions may be required to the timetable currently being prepared for December 2017 (on the basis of the Changes).

- 2.3 The longer the delay in resolving which set of rules should form the basis of the December 2017 timetable, the less practicable it will be to implement that timetable effectively. ASR consequently requests that this matter be resolved as soon as practical in order to allow the preparation of the timetable to proceed by reference to the appropriate set of rules. ASR considers that a timetable could reasonably be set requiring a response from Network Rail under Network Code Condition M5 by close on 24 May 2017, with a hearing in front of the ORR panel to take place as soon as it can be convened thereafter. This should allow a decision as soon as possible after the T-26 timetabling date on 9 June 2017.
- 2.4 On the other hand, if ASR is wrong and Network Rail has developed TPR 2018 (Scotland) correctly, ASR must spend substantial time and investment:
- (a) mitigating the adverse impact of TPR 2018 (Scotland) to journey times, network capacity, and network efficiency;
 - (b) renegotiating with Transport Scotland the service level commitments ("**SLCs**") in its Franchise Agreement (and changes to the Journey Time Metric); and
 - (c) if necessary, putting in place additional staff and rolling stock which was not envisaged by Transport Scotland or ASR during the bid for the franchise but which would likely be required to satisfy TPR 2018 (Scotland).
- 2.5 In addition, (if ASR is wrong) it will be of benefit to Network Rail to establish this quickly, to enable it to focus on finalising the TPRs and developing the timetables for December 2017.
- 2.6 An expedited hearing is therefore to the benefit of both parties and to the industry (including passengers who will have certainty of available services the sooner the timetable is finalised), whatever the outcome of this appeal.

3 BACKGROUND

- 3.1 ASR issued sole reference TTP 1064 (tab B1) to the Timetabling Panel ("**TTP**") on 28 March 2017 in respect of the issue by Network Rail of version 2 of the 2018 Timetable Planning Rules (Scotland) ("**TPR 2018 (Scotland)**") (tab B6), which is to be implemented in December 2017.
- 3.2 In brief, ASR asserted that the revisions made to TPR 2018 (Scotland):
- (a) were made without necessary and/or sufficient consultation or regard to the responses provided by ASR;
 - (b) were made without sufficient (or alternatively, without accurate) analysis, modelling, and/or accuracy;
 - (c) were made without reference to or by incorrect application of the Decision Criteria set out in D4.6 of the Network Code or were based on or influenced by matters which are not included in the Decision Criteria;
 - (d) were contrary to the correct application of the Decision Criteria; and
 - (e) do not reflect the actual/proper operation of the Network (including/or the Network as Network Rail is required to provide and maintain it).

Consequently they should be overturned until such time as TPRs could be developed, verified and modelled and the Decision Criteria in Network Code D 4.6 applied to them.

- 3.3 A number of other Train Operating Companies ("**TOCs**") submitted sole references in respect of version 2 of the 2018 Timetable Planning Rules ("**TPR 2018**") (only ASR's

referred specifically to TPR 2018 (Scotland)). The TTP elected to join the proceedings¹ and identified four heads in the combined disputes:

- (a) Head A: Issues of principle relating to TPR 2018 and TPR 2018 (Scotland);
- (b) Head B: Points of detail flowing from and dependent on the issues of principle under Head A;
- (c) Head C: Detailed points relating to the New TPRs which were not related to the objections in principle under Head "A"; and
- (d) Head D: Other issues, including the Dispute (from DB Cargo and GBRf) relating to the alleged failure of Network Rail to comply with the Determination of an earlier Timetabling Panel and (from TfL) whether a Party can recover costs claimed to be abortive.

3.4 Heads A and B were to be heard first, and Network Rail was directed to submit an initial defence in respect of those heads only, with a defence for Heads C and D to follow. The Hearing Chair by letter of 31 March 2017 categorised ASR's reference as relating only to Head A. ASR responded on 10 April 2017 (tab B2), disagreeing with this limited categorisation and noting:

*"ASR's reference does deal with specific issues with the proposed TPR 2018 on parts of its network and consequently, depending upon the outcomes of the 20 April 2017 hearing and the nature of arguments presented by Network Rail and the other parties, may request that its submissions on such specific points of detail are heard at a later hearing 27 April and 8 and 16 May 2017."*²

3.5 Following receipt of Network Rail's submissions on 12 April 2017, the TTP changed its approach and, on 18 April 2017, informed the parties that it intended to hear the entirety of each TTP dispute in turn, starting with TTP1064 on 20 April 2017. No response was given to ASR's request to have any points of detail determined after the determination of the points of principle in line with the original timetable.

3.6 Network Rail's response to ASR is appended to this notice at tabs B3-5. It comprises:

- (a) an overarching response to issues raised by the TOCs in respect of Heads A and B (tab B3);
- (b) a witness statement from Matthew Allen, Head of Timetable Production at Network Rail (tab B4); and
- (c) appendices responding specifically to each TOC's reference (only Appendix 2, relating to ASR, has been appended here) (tab B5).

3.7 In addition, Network Rail advanced a number of procedural and technical legal points concerning the TTP's authority to take certain decisions and to award ASR's requested remedies, arguing amongst other things that the TTP can only overturn any decision by Network Rail (and revert to the status quo) in exceptional circumstances.

3.8 The TTP issued its written determination on 5 May 2017 (the "**Determination**") (tab B6).

4 THE DETERMINATION

4.1 In this section, references in brackets are references to paragraphs in the Determination.

¹ TTP1064, TTP1065, TTP1066, TTP1068, TTP1069, TTP1070, TTP1071, TTP1072, TTP1073, and TTP1075. TTP1064 was, after being argued in a hearing on 20 April 2017, separated from the joined proceedings formally by letter of 4 May 2017

² It is not suggested that ASR's reference contained any aspect relevant to Heads C and D as categorised. However, it clearly had aspects relating to Head B.

4.2 The Determination (tab B6):

- (a) Records the submissions of the parties including the challenges raised by ASR (repeated at paragraph 3.2 above). In doing so it records that :
 - (i) ASR's challenge was that the specific Changes proposed for Scotland were premature and unreliable due to an absence of modelling and consideration of all the relevant data (including GPS data from On Train Monitoring Recorder ("**OTMR**")) rather than being a challenge to the underlying UK-wide project to update the TPRs in general (TRIP) (5.3);

but, by contrast:
 - (ii) (5.1) Network Rail's key message was to resist any suggestion that there was a widescale dispute about the TRIP programme, (and the ODA data within it). As such, Network Rail was concerned about alleged attacks on the TRIP programme to avoid that *"the baby should be thrown out with the bathwater"*;

In relation to the reliability of the Changes and Network Rail's failure to take account of GPS OTMR data:

- (b) Noted (5.4) that Network Rail had been provided with a list of items of concern with the proposed Changes, including GPS data which conflicted with the proposed changes, which had not been considered by Network Rail;
- (c) Noted (5.16) ASR's submissions that the data used by Network Rail (ODA) was potentially missing the principles of operational delivery (including in relation to dwell times) which affect the timetable. These could be improved by using GPS data from OTMR (which Network Rail had not used);
- (d) Noted (5.21) that Network Rail's ODA data was captured on routes that had changed under a former (poorly performing) timetable. The Panel regarded this (6.2) as a relevant important factor (although not determinative) It also noted ASR's submission that this may explain why the Changes proposed in Scotland differed in reliability from those taken elsewhere (together with the use elsewhere on the UK Network of modelling which did not take place in Scotland (5.23));
- (e) Gave guidance that (6.9.3) the Panel *"recognises and is concerned by the risk of any proposed changes to the TPRs derived from any flawed data affecting both performance and capacity in Scotland."*
- (f) Considered that (6.2) *"As TPRs need to be as accurate as possible, those drafting and/or amending them need to use all available sources of information that will assist in achieving accuracy."*
- (g) Provided guidance (6.9.1) that *"The Panel has a clear expectation that in the construction and amendment of TPRs all relevant sources of information should be used."*
- (h) Noted (5.27) that other operators' services in Scotland could be accommodated – during the hearing it was confirmed that this would be the case whether the Changes were accepted or not;

In relation to Network Rail's failure to undertake any modelling of the Changes

- (i) Noted (5.9) that:
 - (i) no modelling had been undertaken of the Changes,

- (ii) the ORR had previously criticised Network Rail for introducing changes in Scotland without modelling and
- (iii) the output giving rise to the Changes was potentially a very major timetabling change for the industry;
- (j) Provided guidance (6.9.2) that the panel "...clearly expects any requirements of the ORR to be acted upon to the extent that operational performance is expected to be affected by any changes to TPRs."
- (k) Noted (5.23) that Network Rail's TRIP process envisaged both modelling and use of real data and that (5.24) Network Rail accepted that modelling would be another data source to put into the mix of inputs into a very detailed process in order to decide what is best;

In relation to the failure to apply the Decision Criteria and the effect upon operational services:

- (l) Recorded (5.20) Network Rail's explanation of why it had not applied the Decision Criteria to the Changes;
- (m) Considered (5.18) that the Decision Criteria came into play in respect of individual decisions to implement changes rather than in relation to the use and conduct of the project to revise TPRs as a whole (TRIP). Similarly (6.2) it was open to an access beneficiary to challenge the incorrect application of the Decision Criteria to individual Changes (as ASR is doing in this appeal – see (a)(i) above);
- (n) Noted (5.10) ASR's submissions that the Changes would lead to additional resource requirements from ASR and a breach of the SLC in ASR's Franchise Agreement. Despite this, the Hearing Chair accepted (6.2) an assertion the Panel understood Network Rail to have made (5.12) that all current schedules can be made to work following the Changes and that all current operators can be accommodated. ASR does not consider this assertion is correct (for the reasons set out in paragraph 24 of the witness statement of Neil Sutton ("**Sutton**"));
- (o) Confirmed (6.5) that when applying the Decision Criteria:
 - (i) Network Code D4.6.3 requires Network Rail to identify those criteria which it regards as relevant and apply them to achieve the result which is fair and not unduly discriminatory; and
 - (ii) The commercial interests of any Timetable Participant and Network Rail are included within the Decision Criteria, all of which are given equal status in Condition D4.6.2;
- (p) Noted that ASR's performance was currently very good; and (5.7) that Network Rail was unable properly to forecast what performance benefit (or, as ASR submitted, possible detriment) would be obtained from making interventions in TPRs in such circumstances;

In relation to evidence of specific changes

- (q) Confirmed that (6.4) the Panel would have been unwilling to countenance any artificial increases in TPRs for which there was no justification, but had no evidence before it of any specific examples.
- (r) Rejected (5.4 and 6.7) ASR's request in line with the originally proposed process for the resolution of the joined disputes to provide evidence of specific changes in light of the findings of principle made at the first hearing;

In relation to the Legal Powers of the Panel and Hearing Chair

- (s) Rejected (6.1 and 6.8.4) Network Rail's submissions that the Panel had no power to overturn the Changes;
- (t) Adopted ASR's analysis of the legal powers (6.8.4) which includes the power to award all the remedies sought by ASR.

Nonetheless, the Hearing Chair determined that the decision of Network Rail to introduce the New TPRs (the "**Decision**") should stand.

4.3 ASR believes the Determination is wrong for the following reasons:

| Reason | Relevant findings in the Determination – see paragraph 4.2 above |
|--|--|
| <p>(a) Network Rail did not consider data (including GPS data) and objections raised by ASR before implementing the Changes. As a result the consultation process was ineffective and the Changes introduced are unreliable.</p> <p>In line with the Panel's view that all available sources of information should be used, the Hearing Chair should have concluded that the Changes were unreliable and should not have been implemented until further verification could be undertaken;</p> | 6.2, 6.9.1, and 6.9.3 |
| <p>(b) Network Rail did not conduct any modelling, proposed changes based on unreliable historic data and did not take account of actual GPS and OTMR data.</p> <p>In line with the Panel's view that all available sources of information should be used and modelling should take place if ORR recommends it, the Hearing Chair should have concluded that the Changes were unreliable and should not have been implemented until further verification could be undertaken;</p> | 6.9.2 |
| <p>(c) Network Rail did not apply the Decision Criteria to the Changes as required by Network Code Condition D.</p> <p>The Hearing Chair appears (6.2) to have mischaracterised ASR's argument by seemingly suggesting ASR claimed that TRIP and/or ODA breached the Decision Criteria. ASR is not challenging the TRIP or ODA processes themselves. It is challenging the Changes made as a result of those processes, and asserts that it is the Changes themselves to which the Decision Criteria must be applied. As such, the Hearing Chair appears in fact to agree with ASR's argument, despite then applying incorrectly that finding to TTP1064.</p> <p>In line with the Panel's finding that Network Rail should apply the Decision Criteria to individual changes and the</p> | 6.5 |

| Reason | Relevant findings in the Determination – see paragraph 4.2 above |
|--------|---|
|--------|---|

fact that Network Rail did not do so, the Hearing Chair should have concluded that the Changes were unreliable and rejected them until a proper analysis of the Decision Criteria could be conducted;

- (d) A correct application of the Decision Criteria to the Changes should have considered the impact upon all relevant considerations including the Scotland RUS, the commercial interests of the parties (including ASR's ability to meet Transport Scotland's SLCs which represent government policy and the scope of the franchise award). Such a correct application should result in the Changes being rejected as set out in Appendix 2 of ASR's sole reference; 6.5

The Hearing Chair should have considered ASR's submissions in relation to each of the Decision Criteria and assessed whether the Changes were justified in light of those Decision Criteria. In doing so he should have noted that Network Rail's reasons for implementing the Changes at this time appear to be motivated by a desire to protect the UK-wide TRIP programme rather than assess whether the changes are ready and robust to introduce. Having conducted this assessment the Hearing Chair should have concluded that the Decision Criteria were not made out and the Changes should be rejected.

- (e) There is a risk that the proposals, if implemented prematurely and based on inapplicable historic data from a period when performance was poor may adversely affect current good performance; 6.9.3

In line with the Panel's concerns about damaging current good performance and ensuring changes are robust to ensure the proper operation of the Network the Hearing Chair should have rejected the Changes until their impact was properly modelled and assessed (as anticipated by Network Rail's own TRIP programme)

4.4 ASR believes that the Determination is unjust because of serious procedural or other irregularities because:

- (a) the Panel appeared to reject ASR's submissions as a result of the perceived absence of detailed objections to each change, despite ASR's request that these be dealt with after the points of principle and its explanation that individual objections are of limited value where Network Rail has not undertaken the necessarily analysis and modelling to justify its changes.

By changing the procedure for hearing the joined TTP references two days before the hearing, the TTP prevented ASR having its case fully heard. Network Rail was (as noted in the Determination) in possession of ASR's detailed

objections which go as far as it is possible to go without further analysis being undertaken by Network Rail. Sutton sets out (in Exhibits NS2 and NS4) examples of Changes where conflicting ASR GPS data exists and Changes which will result in extensions to journey times, including those which cause breaches to the SLCs in ASR's franchise.

- (b) ASR also objects to the TTP's finding (on the basis of its apparent understanding of Network Rail's oral submission and contrary to the evidence in ASR's reference and Network Rail's impact assessment) that all current schedules can be operated after the Changes. As set out in Sutton, paragraph 22, if this was understood to mean that current ASR service patterns and schedules can be maintained after the Changes, that is contrary both to Network Rail's Impact Study and to ASR's evidence of its SLC's being breached, both of which were before the Panel. ASR consequently considers the TTP's finding to be unavailable to it (and incorrect). Consequently a key finding on which the Determination was based was flawed.

4.5 ASR supports the Determination in relation to its analysis of the relevant powers of the Panel and Hearing Chair (as set out in tab B6, paragraph 6.8).

4.6 ASR requests that the ORR overrules the Determination and makes the directions and declarations requested in ASR's reference to the TTP and for ease of reference set out in paragraph 8.7 below.

5 THE IMPORTANCE OF APPROPRIATELY AND CORRECTLY DEVELOPING CHANGES

5.1 ASR does not object in principle to revising the timetable planning rules ("TPRs") where appropriate. It supports revisions to the TPRs and the resultant timetable to maximise capacity and efficiency on the Network, for the benefit of passengers and in accordance with the Decision Criteria set out in Part D of the Network Code.

5.2 However, revisions to TPRs should be justified and verified. If not – particularly if revisions are premature, without proper evidence and inquiry – there is a substantial risk that the revised TPRs could reduce capacity and efficiency, to the detriment of passengers.

5.3 In particular if TPRs are changed to introduce unjustified additional time into service operation (*it is noted that Network Rail confirmed at the TTP that some 70% of changes being made UK-wide had the result of **increasing** journey times*) this will have adverse effects including:

- (a) Reducing effective capacity on the Network (see example at Sutton, paragraph 34,);
- (b) Reducing the incentive on Network Rail and TOCs alike to improve performance by operational means (rather than simply relying on additional time per journey);
- (c) Unjustifiably reducing the payments to be made under Schedule 8 – again reducing the incentive on Network Rail and TOCs to improve performance. Network Rail cites this as a benefit to be taken into account in relation to the Decision Criteria (tab B3, page 19, paragraph 15). In this respect it is worth noting that ORR's Track Access Guidance Performance Regime states:

“However, the incentives provided by the regime can be undermined by non-routine changes to scheduled journey times. This could result in the train operator having to make extra payments to Network Rail under Schedule 8 that it would not have had to pay if those changes had not been introduced. For example, a material increase in a scheduled journey time would make it easier for Network Rail to meet its performance target and thus increase the bonus payments the train

operator has to pay to Network Rail. The opposite could apply where scheduled journey times are shortened and Network Rail may have to make extra payments to the train operator. In such circumstances, the recalibration of benchmarks might be appropriate.” (tab B9, paragraph 25)

5.4 As summarised below, Network Rail has not yet appropriately and correctly developed the Changes to the TPRs. The impact upon rail industry parties and the maximisation of public funds directed to the railway is consequently currently unknown but may be substantially adverse. These rule changes are consequently premature.

6 WHY TPR 2018 (SCOTLAND) SHOULD NOT BE IMPLEMENTED IN DECEMBER 2017

6.1 There is no operational need to implement the changes to the TPR 2018 (Scotland) in December 2017:

- (a) a timetable is in place which fulfils the funder’s objectives through the Service Level Commitment (“SLC”); and
- (b) performance is currently good – in the periods when ODA data was collected, the highest PPM value on the Argyle Line was 90.2%. For the same line, ASR achieved 94.1% in the most recent period for which ASR has data (Sutton, paragraph 26).

6.2 This change consequently does not have to be made urgently. Nonetheless, Network Rail appears to be seeking to implement a largescale change of TPRs across the UK Network at the same time, apparently prioritising implementing a uniform process (TRIP) concurrently over ensuring correct and viable TPRs.

6.3 The Changes may also be a step backwards:

- (a) there is a substantial risk that prematurely implementing TPR changes based on historic data without verifying against actual GPS and current observed observations could inhibit ASR’s current strong performance. Enforced different operational patterns with unrepresentative TPRs could result in poorer network response than currently experienced;
- (b) by reducing capacity in the timetable, ASR (and other operators in Scotland) will be unable to run as many trains as before;
- (c) performance targets may be undermined by the reduction of capacity in the timetable, which may also reduce incentives for genuine operational performance improvements; and
- (d) introducing the proposed changes appears to prevent ASR’s SLCs being met, contrary to the funder’s policy.

6.4 ASR has proposed to Network Rail and to the TTP that implementation of TPR 2018 (Scotland) is deferred to May 2018 in order to allow sufficient engagement between ASR and Network Rail to deal with the issues set out below (and, if appropriate, independent verification of the proposals). ASR considers this could and should primarily be dealt with by incorporating current ASR data to feed into and verify any changes to TPR 2018 (Scotland), complete modelling of the impacts of proposed changes, and properly applying the Decision Criteria. That has not yet been done.

6.5 Overall, therefore, TPR 2018 (Scotland) is not ready to be implemented because it:

- (a) is based on non-representative historic data;

- (b) is based upon data which is unreliable (including because of use of unreliable berth-offset data, without data cleansing and in reliance upon unrealistic driver behaviour – e.g. delays for green signals rather than proceed aspect)
- (c) does not reflect and has not been checked against ScotRail's OTMR data;
- (d) has not been modelled either for operation or impact (contrary to ORR recommendations and NR's own TRIP methodology); and
- (e) was imposed without consideration of or application of the Decision Criteria

Non-representative historic data

- 6.6 Network Rail appears to accept that the data it used is not perfect (tab B3, paragraph 53.1) and requires adjustment in light of other information (tab B3, paragraph 53.4; tab B4, 69.3). It is the first time this data has been applied in this way (tab B4, paragraph 62) and Network Rail appears to admit that it does not currently know why ASR and Network Rail data diverge, which "*could be a number of reasons*" (tab B5, paragraph 93).
- 6.7 TPR 2018 and TPR 2018 (Scotland) is based on the ODA, applied within the UK wide TRIP programme. ODA analyses real historic data from a variety of sources, including the Working Timetable, Train Descriptor feed, SMART, NETRAFF train formation data, historic performance, and existing planned values.
- 6.8 The ODA analysis which fed into TPR 2018 (Scotland) used data from several date ranges, as follows:
- (a) the West Coast Mainline analysis used data from December 2014 to October 2015;
 - (b) the North Clyde analysis used data from 7 March 2016 to 21 March 2016; and
 - (c) the Motherwell to Cumbernauld analysis used data from 7 March 2016 to 18 March 2016.
- 6.9 However, the data analysed by ODA for TPR 2018 (Scotland) is non-representative of ASR's current operation because:
- (a) the relevant timetables have been changed several times since that data was captured (Sutton, paragraph 27);
 - (b) Different routes are now in operation (Sutton, paragraph 28);
 - (c) Different operational approaches are now being taken following a concerted performance improvement plan (Sutton, paragraph 28); and
 - (d) performance has increased substantially as a result (Sutton, paragraph 26).
- 6.10 As such, the ODA analysis which has informed TPR 2018 (Scotland) is fundamentally flawed. Data relating to such a different operation will not yield reliable timings for the current operational characteristics as a different pattern of services and different degrees of experienced delay will have network effects which will distort other SRTs and headways. An example is given in Sutton, paragraph 31.

Unreliable ODA analysis

- 6.11 ASR set out in paragraph 5.5 of its reference to the TTP the weaknesses in ODA. The ORR is referred to that paragraph for a more detailed review of those weaknesses, but in summary:

- (a) ODA does not take junction margins into account (a key component of TPRs, which would usually be reviewed alongside sectional running times ("**SRTs**"));
- (b) the data underlying ODA has not been cleansed, meaning it is affected by a number of factors, such as the activities of freight and other passenger TOCs, which make in an inaccurate representation of ASR's current operation;
- (c) the data is not split by routing, such that a single value is given for journeys from A to B even though that journey could take a materially different time depending on which running line a service takes;
- (d) ODA relies on accurate berth offset data; many of the offset values have not been reviewed for a number of years, and when audited have been found to be inaccurate for ASR's current operation. Further, Matthew Allen states that "*where a large number of berth offsets are not available via SMART, NR would generally not proceed with an ODA analysis of the TPRs in question*" (tab 4, paragraph 33.3.6);
- (e) the ODA analysis does not provide representative headway values for congested areas; and
- (f) the ODA analysis does not deal appropriately with platform reoccupation.

6.12 The weaknesses in ODA do not render it valueless. Instead, as considered in below, these known weaknesses can and should be offset through using modelling and other available data, such as that collected by OTMR.

No OTMR data

6.13 The values produced in this way do not reflect ASR's on-train OTMR data.

6.14 OTMR data includes GPS location data. ASR's GPS data was shared with Network Rail in November 2016 (see Sutton, paragraph 13). This data can be used to assess timings between start and stop points based upon the times at which the train starts moving and comes to a halt.

6.15 ASR has analysed the section running time ("**SRT**") changes proposed in TPR 2018 (Scotland) in the context of available OTMR GPS data, and produced a table showing where changes proposed are not supported by ASR's data. This analysis is included at Sutton, Exhibit NS2, and the process behind and results of this analysis are explained in detail in Sutton, paragraphs 16 - 19.

6.16 These inconsistencies demonstrate that the ODA analysis for ASR's operation has produced a number of observably flawed proposals which are not compatible with actual GPS on-train data. As the sample sizes indicate, in many cases large numbers of services have been recorded none of which match the proposed ODA outputs. It is not clear how these flawed results have been produced, but it is possible that the berth offsets used by Network Rail are incorrect, or have not been used at all.

6.17 As yet, neither Network Rail nor ASR has had an opportunity to verify the figures or establish the cause for the inconsistencies. Until such differences are investigated, modelled and resolved it is unsafe and inappropriate to implement them (and only then after consideration of the Decision Criteria in relation to them).

No modelled data

6.18 The ORR recommended performance modelling in its investigation report "*Network Rail's delivery of its regulated performance targets in Scotland 2014-15*":

"Our analysis of the December 2014 timetable has highlighted several avoidable operational planning errors and a number of tight timings. While better (and

earlier) modelling, prior to the introduction of the new electric services, would have helped maintain performance levels, our investigation has concluded that Timetable Planning Rules (TPRs) issues were significant in NR failing to achieve its 2014-15 PPM target." (tab B10, page 5)

- 6.19 Network Rail's summary of the TRIP process shows that modelling is to be used to validate non-sectional running time TPRs (such as junction margins and headways) (tab B11). It recognises that the use of modelling and ODA data is 'complementary' (tab B4, paragraph 25).
- 6.20 Matthew Allen states:
- "From the outset it was apparent that TRIP envisaged the use and application of both theoretical (modelled) data, and real-world data sourced from the rail network" (tab B4, paragraph 17).*
- 6.21 He goes on to state that explanations of the modelling to be used in TRIP are "*typically repeated, [...] with the results of model-based analyses relating to an operator's geography or operation.*" (tab B4, paragraph 22)
- 6.22 However, no modelling was used to develop TPR 2018 (Scotland) – even though Network Rail used modelling elsewhere on the Network (including for Southeastern, Greater Anglia, and Northern (tab B1, paragraph 5.7).
- 6.23 In failing to use modelling to develop TRIP 2018 (Scotland), Network Rail has failed to comply both with its own stated procedure and with ORR's recommendation. ASR therefore believes that TPR 2018 (Scotland) has been developed without sufficient and/or accurate modelling.
- 6.24 As a result, neither ASR nor Network Rail can have any visibility of the impact, viability, and reliability of TPR 2018 (Scotland). Until suitable modelling is undertaken the Changes are likely to be premature and it is unlikely to be possible to assess the Decision Criteria.

7 NETWORK RAIL'S FAILURE TO FOLLOW THE REQUIRED PROCESS

- 7.1 Network Rail has failed to follow due process in developing TPR 2018 (Scotland) by:
- (a) forcing through changes to the TPRs when data is contradictory, has not been verified, its impact is unknown, and further analysis (including modelling) is still required;
 - (b) failing to apply the Decision Criteria; and
 - (c) failing to take ASR's reasonable concerns into account, including failing to take into account challenges raised by ASR and data provided by it.

Forcing through changes to the TPRs when further data is still required

- 7.2 This is discussed in section 5 above.

Failure to apply the Decision Criteria

- 7.3 The process by which the TPRs and Engineering Access Statement are revised bi-annually is set out in D2.2 of the Network Code. Under D4.1.1, Network Rail is obliged to apply the Decision Criteria set out in D4.6 when conducting the processes set out in D2.2.
- 7.4 The application of the Decision Criteria is an important protection for access beneficiaries. Where firm rights are not included in a Franchise Agreement, they are a

necessary protection to ensure that required access is not removed preventing compliance with government policy as set out in the Franchise Agreements.

- 7.5 Notwithstanding this, Network Rail failed to apply the Decision Criteria to the changes it made to the existing TPR to produce TPR 2018 (Scotland). Mr Allen admitted that Network Rail does not explicitly consider or apply the Decision Criteria when making changes to the TPRs:

"There is not, to be abundantly clear, a written 'checklist' document for each potential revision (or decision not to proceed with a revision), through which an individual within NR has identified and weighed each decision against the Section 4.6.2 Considerations, but these are matters which relevant personnel at NR are fully aware of and are at the forefront of NR's whole approach to revisions. I understand from my timetable production managers that the express 4.6.2 Considerations themselves are not a regular feature of conversations with operators at that level, and it would be rare for queries or objections from operators on proposed values to make express reference to any one or more of the 4.6.2 Considerations, but the criteria are more likely to be expressly referenced as matters escalate further up the management chain." (tab B4, paragraph 84)

- 7.6 He also stated:

"Ultimately, every TPR value is intended to reflect the capability of the infrastructure accurately – where it does not it is challenging to reduce delay due to specification error and indeed to meet the Objective. So, accuracy is the starting point for any revision." (tab B4, paragraph 85)

- 7.7 NR tried to justify this failure by:

- (a) **asserting that the Decision Criteria had been applied to the TRIP methodology as a whole³, and implying that this largely, if not completely, met the requirement in D4.1.1 to apply the Decision Criteria;**

Whether or not the methodology and overall aims of TRIP complied with the Decision Criteria is not the issue here. It is a requirement of the Network Code, for good reason, that the Decision Criteria be applied to all decisions made including the changes proposed, not just to the underlying methodology (Network Code D4.1). A change is not automatically justified because an overarching methodology has been vetted against the criteria.

- (b) **asserting that Network Rail had decided on its own separate questions instead of applying the Decision Criteria, namely:**

- (i) ***"is the planning value reflective of the capability of the infrastructure?"***;
- (ii) ***"will the revised values cause a breach of an operator's agreed track access agreement with [Network Rail]?"***;
- (iii) ***"impact on performance"***; and
- (iv) ***"any impact on the operator, identified to [Network Rail] through the consultation process and impact assessments"***. (tab B4, paragraph 87)

The obligation (Network Code D2.2.6) obliges Network Rail to apply the Decision Criteria. These have been formulated in light of the needs for the

³ *"the TRIP methodology is plainly in accordance with the Decision Criteria as set out in the Defence and in Mr Allen's witness statement"* (tab B5, paragraph 71)

functioning of the industry, the delivery of policy and funded objectives and (indirectly) the ORR's regulatory obligations in approving the Track Agreement (s4 Railways Act '93). Network Rail cannot replace them with its own questions.

- (c) **reliance upon performance outweighing all other considerations (apparently meaning those other criteria did not need to be considered) (tab B5). In its Response Network Rail states:**

"By making realistic assumptions about actual running times [...] [Network Rail] is taking steps to maintain and improve train service performance and ensure that journey times are as short as reasonably possible".

One criterion does not automatically outweigh all others and does not relieve Network Rail of considering all the Decision Criteria. Equally important criteria include (amongst others) maintaining, developing and improving the capability of the Network and ensuring that the spread of services reflects demand (both of which are not obviously assisted by changes which force an operator to breach SLCs).

Further, Neil Sutton explains (Sutton, paragraph 33) that basing revisions to TPRs on data from a poorly performing network will result in longer journey times. Although Network Rail argues that it has made its changes by focusing on performance, the practical effect of basing TPR 2018 (Scotland) on data obtained during a period of poor performance is that any improved performance as a result of TPR 2018 (Scotland) is likely to stem from the implementation of longer journey times.

This is contrary to the Decision Criteria and the funders' objectives. See for example:

"3.226 The Secretary of State and Scottish Ministers" HLOSs both note the importance of reducing journey times where strategic opportunities present themselves. There are several initiatives planned for CP5 (including the Edinburgh to Glasgow Improvements Programme and investments in the Great Western, East Coast and Midland Main Lines) that will cut journey times across borders, and between key cities.

3.227 In our outputs consultation we said it is important that performance improvements must not be achieved simply at the expense of journey times. [...]" (tab B16)

- 7.8 Network Rail goes on to state in its defence:

"NR would not invest approximately £11.6m and the TOCs and FOCs would not heavily engage with a two year process if the TRIP methodology and the overall aims of TRIP did not comply with the Decision Criteria." (tab B5, paragraph 71)

Obviously, the amount of money and length of time spent on a process does not indicate in any way that a process was compliant.

- 7.9 As such, in producing TPR 2018 (Scotland), Network Rail has failed to apply the Decision Criteria correctly or at all.

- 7.10 It is also important to note that the changes do not have the support of Transport Scotland, do not support the Route Utilisation Strategy and do not reflect the policy objectives of the funder as set out in the SLCs for which the franchise was bid. Passengers do not benefit by increases to journey times and reductions in services arising from reduction in effective capacity from such changes.

- 7.11 ASR set out in Appendix 2 of its reference to the TTP an analysis of the Decision Criteria which indicated that TPR 2018 (Scotland) should not have been approved as is (tab B1, pages 19-23). ASR refers the ORR to that analysis as part of its appeal.

Failure to take ASR's concerns into account

- 7.12 ASR has analysed Network Rail's Timetable Impact Study (tab B13) against the SLCs ASR is contracted to deliver under its franchise agreement with Transport Scotland in respect of journey times. The process behind and results of this analysis are explained in detail in the Mr Sutton's statement (Sutton, paragraphs 21-24). In summary the implementation of TPR 2018 (Scotland) in its current form will result in increased journey times for certain journeys within ASR's operation which will in many instances, the extended journey time would exceed the relevant SLC by between one and six minutes.

- 7.13 Certain instances of proposed extended journey times result in further complications, in addition to contravening ASR's SLCs:

- (a) the extended journey time means there is insufficient time to attach, detach, or turn around units for a subsequent service using the same train;
- (b) the proposed extended journey time would be incompatible with the diagram for that particular unit meaning that new units may be required to reflect an extended journey time, which will result in a loss of capacity elsewhere and/or a substantial unanticipated cost to ASR;
- (c) a worsening of the Journey Time Metric (which is explained in Sutton, paragraph 23(g)).
- (d) increased staff costs as more 'turnover crews' will be required to meet the extended journey times.

- 7.14 ASR set out in Appendix 1 of its Reference an overview of the background to TPR 2018 (Scotland). That overview demonstrates that:

- (a) ASR requested that Network Rail use greater time periods in its Timetable Impact Study, in order to incorporate a greater selection of services. Apart from an additional hour in the off-peak, this request was rejected;
- (b) despite this limited study, ASR found a number of conflicts in the timetable, and identified these to Network Rail by email on 4 January 2017 and at a TPRs meeting on 5 January 2017. These were rejected;
- (c) ASR provided GPS data which contradicted a number of the proposed changes in November 2016. This appears never to have been considered by Network Rail; and
- (d) following ASR working through these conflicts with Network Rail, Network Rail updated version 2 of the Timetable Impact Study to address a particular conflict identified in relation to minimum turnaround times at Milngavie. However, Network Rail's solution only works when there is not a West Highland service departing from Queen Street – which there is not during the limited time periods assessed for the study, but there is in reality.

Overall Network Rail failed to take ASR's concerns into account.

- 7.15 Implementation of TPR 2018 (Scotland) was therefore premature, not developed by reference to ASR's actual, current operation, and will result in unnecessary and inappropriate impacts on ASR's operation. Network Rail is obliged by Decision Criterion D4.6.2(f) to consider these matters in developing TPR 2018 (Scotland) and has not done so.

8 CONCLUSION AND REQUEST FOR DETERMINATION

- 8.1 The revisions made to TPR 2018 (Scotland):
- (a) were made without necessary and/or sufficient consultation or regard to the responses provided by ASR;
 - (b) were made without sufficient (or alternatively, without accurate) analysis, modelling, and/or accuracy;
 - (c) were made without reference to or by incorrect application of the Decision Criteria set out in D4.6 of the Network Code or were based on or influenced by matters which are not included in the Decision Criteria;
 - (d) were contrary to the correct application of the Decision Criteria; and
 - (e) do not reflect the actual/proper operation of the Network (including/or the Network as Network Rail is required to provide and maintain it).
- 8.2 Network Rail has incorrectly conflated consultation in relation to TRIP and ODA with consultation for TPR 2018 (Scotland). Consultation in relation to TRIP and ODA is not relevant here. Consultation was for TPR 2018 (Scotland) was insufficient, and Network Rail had insufficient regard to ASR's concerns.
- 8.3 The TRIP and ODA outputs which informed TPR 2018 (Scotland) did not involve sufficient analysis or modelling. ASR's GPS and OTMR data was not taken into account to test the outputs. Further, despite Network Rail's own stated TRIP procedure and ORR's recommendation that modelling is to be taken into account, it was not undertaken for TPR 2018 (Scotland).
- 8.4 Network Rail claims to have applied the Decision Criteria to the introduction of TRIP and ODA. Whether it has or not – application of the Decision Criteria to the overarching programme is not relevant here. The Decision Criteria must be applied to the changes proposed in TPR 2018 (Scotland); the outputs from TRIP and ODA may be used to satisfy the Decision Criteria. If (which is outside the scope of TTP1064) TRIP and ODA themselves met the Decision Criteria, it cannot be taken that their outputs will inherently also meet the Decision Criteria.
- 8.5 Ultimately (as shown by ASR's GPS and OTMR data, and indicated by the use of non-representative data in ODA), TPR 2018 (Scotland) does not reflect ASR's actual operation, which under the current TPRs is performing well above the national PPM average and the good performance of which is jeopardised by TPR 2018 (Scotland).

Request for Determination

- 8.6 ASR requests that the ORR overrules the Determination and makes the directions and determinations set out in section 6 of its reference to the TTP in TTP1064, and which for ease of reference are set out in paragraph 8.7 below.
- 8.7 ASR requests that the ORR:
- (a) directs Network Rail that TPR 2018 (Scotland) be cancelled and not apply (or order that TPR 2018 (Scotland) is so cancelled);
 - (b) declares that:
 - (i) Network Rail has not correctly applied the Decision Criteria;
 - (ii) there remain a number of significant unaddressed issues raised by ASR regarding the methodology employed to utilise ODA data for TPR 2018 (Scotland) and that further jointly specified methodological work should

be undertaken to address these issues, taking account of alternative and more relevant data, including that provided by ASR;

- (iii) work undertaken by the TRIP team in Scotland has not been modelled to validate the values, and prove the data is correct and that such modelling should be undertaken;
 - (iv) no performance modelling has been undertaken to demonstrate a performance improvement, and that such modelling should be undertaken; and
 - (v) the Timetable Impact Study independently undertaken is too limited to demonstrate that all ASR's Firm Access Rights can be accommodated;
- (c) gives general directions to Network Rail specifying the result to be achieved in connection with TPR 2018 (Scotland), including the objective of the revisions to the TPRs, the appropriate level of assessment and modelling involved (including by reference to ORR guidance), and where relevant the appropriate assumptions to take. Such directions to include a direction to identify Timetable Planning Rules which where possible allow Access Beneficiaries to comply with Franchise Agreements and SLCs; and
- (d) or, as appropriate, deems the relevant timescales for the preparation of a working timetable to amount to exceptional circumstances and substitute its own decision in connection with TPR 2018 (Scotland).

9 SIGNATURE

For and on behalf of Abellio ScotRail Limited

Signature:

Name:

Position:

Date: