



Office of Rail and Road
Abellio Greater Anglia Ltd
MTR Corporation (Crossrail) Ltd

By email and post (letter only)

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Date: 30 August 2016

Dear Sirs

NOTICE OF APPEAL UNDER PART M OF THE NETWORK CODE (TTP985)

1 NOTICE OF APPEAL

- 1.1. Under clause 3.1.1 of Part M of the Network Code, Network Rail Infrastructure Limited (the **Appellant**) is serving this notice of appeal in relation to paragraphs 6.7 and 7.1 of the determination of the Timetabling Panel of the Access Disputes Committee dated 17 August 2016 (the **Determination**) in respect of TTP985.
- 1.2. This notice constitutes the Appellant'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. On 23 August 2016, the Appellant sought an extension of time to formulate and serve the Notice Of Appeal. The Office of Rail Regulation granted this request, allowing an extension for the submission of the Notice of Appeal to 4 p.m. on Tuesday, 30 August 2016.
- 1.4. Unless otherwise defined, the terms used herein adopt the definitions provided under the Network Code (the **Code**).
- 1.5. The evidence in support of this Notice of Appeal, comprising a copy of the Determination of TTP985, and the submissions made therein by the Appellant, and the other two Dispute Parties, is attached to this notice as an exhibit.

2 SUMMARY

- 2.1. The Appellant wishes to appeal paragraphs 6.7 and 7.1 of the Determination, which provided that:

"6.7.1 *Network Rail's statement of case made it clear that it was seeking a ruling from the Panel, rather than having the question remitted back to Network Rail for*

reconsideration. The Panel therefore had to substitute its own application of the Decision Criteria for Network Rail's flawed application;

- 6.7.2 *Our decision reflects the Panel's view of which alternative provides a better opportunity for services to be maintained to provide the greatest benefit to passengers; of the additional costs which AGA would undoubtedly face if it could no longer stable its Class 321 at Platform 18; and the fact that the option of stabling MTR's Class 315 at Gidea Park might on occasion be even more beneficial than stabling it at Liverpool Street.*
- 6.7.3 *The Determination only relates to which Operator should have priority at Liverpool Street Platform 18 and does not direct MTR to select the Gidea Park option (which was not a matter on which we are entitled to make a Determination). We trust, however, that all Parties will consider the Panel's views on this point.*
- 6.7.4 *The Determination does, of course, only apply to the December 2016 WTT. If the circumstances were to remain unchanged this Determination would not bind a later Timetabling Panel, but it would be entitled to regard our Determination as persuasive. As successive WTTs are developed we get nearer the point at which MTR will cease to operate into Network Rail's station at Liverpool Street.";* and
- "7.1 *Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, my determination is that Network Rail shall withdraw its offer to MTR in respect of capacity for a standby train at Liverpool Street Platform 18 and instead offer the capacity to AGA for its Class 321 standby train."*

2.2. The Appellant believes that paragraphs 6.7 and 7.1 of the Determination are wrong and/or unjust because of serious procedural or other irregularities for the reasons set out in detail below, and summarised as follows:

- 2.2.1. contrary to Condition 5.3.1 (c) of Part D of the Code, the Determination is wrong and/or unjust due to a serious irregularity because the Panel substituted its own decision for that of the Appellant, when the Panel did not have power to do so, because there were no express, and/or no or insufficient implied "exceptional circumstances" so as to give power and/or jurisdiction to the Panel under Condition 5.3.1 to do so;
- 2.2.2. this Appeal is of importance to the industry as a whole because Condition 5.3.1 (c) should only be triggered in the required "exceptional circumstances" so as to ensure that Part D operates in the way in which it was intended, with a Panel only substituting its own decision for that of the Appellant in truly exceptional circumstances which are expressly laid out by a Panel in its Determination;
- 2.2.3. if left as it stands, the Determination will create a precedent which is likely to have a significant detrimental impact on the operation of Part D of the Code, in that the

Appellant's decisions are more likely routinely to be challenged simply so that a Timetabling Panel can be asked to substitute its own decision, rather than remitting the decision back to the Appellant;

2.2.4. the Determination is also unjust due to a serious procedural irregularity because the Panel misinterpreted paragraph 5.1 of the Appellants statement of case to mean that the Appellant was asking the Panel to substitute its own decision for that of the Appellant, when the Appellant was not in fact asking the Panel to do so. The Panel therefore proceeded on a false premise. The Panel failed to check with the Appellant or with any of the other Dispute Parties what was being asked of it; and

2.2.5. the Determination is also unjust due to a serious procedural irregularity because the Hearing Chair failed to record his decisions and conclusions reached with regard to Condition 5.3.1 (c), in failing to set out the "*exceptional circumstances*" which it was said gave the Panel power to substitute its own decision for that of the Appellant.

2.3. The Appellant therefore asks the ORR:

2.3.1. to hear an appeal in respect of paragraphs 6.7 and 7.1;

2.3.2. to remove the substituted decision made by the Panel in those paragraphs;

2.3.3. in accordance with Condition 5.3.1 (a) of Part D of the Code, to give the Appellant the necessary and required "*general directions*" which (1) specify "*the result to be achieved but not the means by which it shall be achieved*", and (2) take into account the flaws in the Appellant's application of the Decision Criteria and decision making process, generally, as set out by the Panel in the Determination;

2.3.4. to remit the decision back to the Appellant for reconsideration in light of the ORR's general directions; and

2.3.5. to make such further orders pursuant to Condition 5.3.2 as it shall consider appropriate in order to provide the Dispute Parties with guidance as to the interpretation and application of such general directions.

3 FACTS AND BACKGROUND

3.1. On 4 July 2016 Abellio Greater Anglia Ltd (**AGA**) raised a dispute with the Appellant in relation to the Appellant's decisions regarding the New Working Timetable for December 2016. The dispute was brought under Condition D5.1 of the Network Code as applicable at the time and the Secretary registered it as TTP985.

3.2. AGA's issue was that the Appellant had not offered it the ability to stable a standby empty train at Liverpool Street Platform 18 during the period between the Monday to Friday

business peaks in perpetuation of existing arrangements; the capacity had instead been offered to another passenger operator: MTR Corporation (Crossrail) Ltd (**MTR**).

- 3.3. On 13 July 2016, the Appellant informed the Secretary that there was little likelihood of agreement being reached and that a Timetabling Panel hearing would be necessary in order to resolve the matter.
- 3.4. The hearing chair, Mr Clive Fletcher-Wood, was appointed on 15 July 2016, and the hearing took place on 5 August 2016.
- 3.5. At the hearing, so far as the Appellant can recollect, no reference was made to the Panel deciding whether to substitute its decision for that of the Appellant, or to any "*exceptional circumstances*" which would enable the Panel to do so. The Dispute Parties were not given any opportunity to comment on whether there were in fact any such "*exceptional circumstances*".
- 3.6. On 17 August 2016, the Determination was issued. In the Determination, the Panel found that the Appellant's consideration and application of the Decision Criteria was flawed. In particular the Panel found that:
 - 3.6.1. the Appellant had erred in regarding Public Performance Measures (**PPM**) as the only relevant criterion (paragraph 6.3);
 - 3.6.2. the Appellant had failed to consider all the relevant factors and to weight them correctly within criterion D4.6.2(c): maintaining and improving train service performance (paragraph 6.4.17);
 - 3.6.3. the Appellant had erred in giving a low weighting to criterion D4.6.2(f): the commercial interests of the Appellant and any other Timetable Participant (paragraph 6.5.3); and
 - 3.6.4. the Appellant had erred in considering that criterion D4.6.2(j), enabling operators of trains to utilise their assets efficiently, was not applicable (paragraph 6.6.1)
- 3.7. Having found that the Appellant's application of the Decision Criteria was flawed, the Panel considered the Decision Criteria itself and decided that, instead of remitting the question back to the Appellant to be reconsidered in light of the flaws highlighted in the Determination, it would exercise power under Condition 5.3.1 (c) of Part D of the Code, and substitute its own decision for that of the Appellant, as set out at 7.1 of the Determination. The Panel did this on the basis that "*Network Rail's statement of case made it clear that it was seeking a ruling from the Panel, rather than having the question remitted back to Network Rail for reconsideration.*"¹

¹ Paragraph 6.7.1 of the Determination

- 3.8. In fact, this was wrong. Paragraph 5.1 of the Appellant's statement of case stated the following: "*Network Rail is asking the panel to uphold our decision to offer Platform 18 to MTR to stable at London Liverpool Street between the peaks. In this instance Network Rail do not feel it is appropriate for the panel to find error with Network Rail's processes, but not rule on who should be allocated the capacity. Network Rail is asking the panel that unless AGA have adequately demonstrated that they should have been awarded the capacity to stable in Platform 18 then Network Rail's decision should remain.*" (emphasis added).
- 3.9. This wording did not expressly or impliedly ask the Panel to substitute its decision for that of the Appellant. It sought for the Appellant's decision to be upheld. The Panel did not check that the Appellant actually wanted to the Panel to substitute its decision for that of the Appellant, nor did the Panel check whether any of the other Dispute Parties wanted the Panel to substitute its own decision for that of the Appellant. There is no other wording in any of the Appellant's submissions on which the Panel could conceivably have relied in order to believe that the Appellant wanted that substitution to take place.
- 3.10. The Panel did not give any other reason for substituting its own decision for that of the Appellant. The Panel did not set out, either expressly or impliedly, any "*exceptional circumstances*", nor did the Panel make reference to Condition 5.3.1 (c) and the requirement for such exceptional circumstances to be found in order for that substitution to be made.

4 GROUNDS OF APPEAL

Importance to the industry: Determination is wrong because Condition 5.3.1 (c) of Part D of the Code should only be exercised in exceptional circumstances and there were none

4.1. Condition 5.3.1(c) of Part D of the Code states:

"In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail Regulation (as the case may be) may exercise one or more of the following powers...

(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."(emphasis added)

4.2. This wording is very plain as to what is required: exceptional circumstances (emphasis added).

4.3. The reason for that is that Part D involves the "*responsibility of [the Appellant] to establish a timetable for the Network*"². The Appellant makes the relevant decisions as to any Working

² Condition D 1.1.1

Timetable by applying the Decision Criteria, so giving the Appellant the final say in assessing what the Working Timetable should be, in accordance with its defined Objective of sharing out "... *capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services*"³. The Appellant applies the Decision Criteria, and its decision is then final (see Condition D 7.1), so that the Network can efficiently be run with all users and providers being clear as to the Working Timetable which will apply.

- 4.4. Accordingly, if an appeal is brought, the Panel can only do one of three things: "(a) ...give general directions to [the Appellant] specifying the result to be achieved but not the means by which it shall be achieved; (b) ...direct that a challenged decision of [the Appellant] shall stand, or (c)...substitute an alternative decision in place of a challenged decision of [the Appellant] provided that the power in (c)...shall only be exercised in exceptional circumstances."⁴
- 4.5. In exercising its power under Condition D 5.3.1 (c) of the Code, the Panel made no reference as to why the circumstances of TTP985 were exceptional, so the conclusion must be drawn that there were no such circumstances. As such the Panel did not have any power to substitute its own decision under Condition D 5.3.1 (c) of the Code.
- 4.6. The Appellant has considered whether the Panel treated what it considered to be the Appellant's request for a substituted decision as an exceptional circumstance. However, the Appellant submits that even if such a request had in fact been made, that should not, on its own, constitute an exceptional circumstance. There is no basis for concluding that such a request would constitute an exceptional circumstance. If it were possible to trigger Condition D 5.3.1 (c) by making such a request, this would commonly be done, and the circumstances would not, as the Conditions require, be exceptional.
- 4.7. So far as the Appellant is aware, there is no previous decision of a Timetabling Panel as to what constitutes "*exceptional circumstances*". The Appellant submits that such circumstances are likely to turn on their own facts. At the least, any Timetabling Panel purporting to rely on this should set those circumstances out very clearly, both by raising this as a potential outcome at the relevant Hearing (so that the Dispute Parties all have an opportunity to comment on whether or not the circumstances are in fact exceptional), and then by setting out the circumstances clearly in the determination itself.
- 4.8. In order to bring clarity to this point, the Appellant would welcome the ORR's guidance on the triggering of exceptional circumstances in relation to Condition 5.3.1 (c) of the Code.
- 4.9. This Appeal is of importance to the industry as a whole because Condition 5.3.1 (c) should only be triggered in the required "*exceptional circumstances*" so as to ensure that Part D

³ Condition D 4.6.1

⁴ Condition D 5.3.1

operates in the way in which it was intended, with a Panel only substituting its own decision for that of the Appellant in truly exceptional circumstances which are expressly laid out by a Panel in its Determination

- 4.10. If left as it stands, the Determination will create a precedent which is likely to have a significant detrimental impact on the operation of Part D of the Code, in that the Appellant's decisions are more likely routinely to be challenged simply so that a TTP determination can be asked to substitute its own decision, rather than remitting the decision back to the Appellant.

Serious procedural irregularities: the Panel misinterpreted the Appellant's statement of case, failed to clarify that with the Dispute Parties and failed to give reasons for its decision

- 4.11. As set out above, the Panel purported to exercise its power under Condition D 5.3.1 (c) of the Code and to substitute its decision for that of the Appellant on the basis that "*Network Rail's statement of case made it clear that it was seeking a ruling from the Panel, rather than having the question remitted back to Network Rail for reconsideration.*"⁵

- 4.12. However, this is not the case. The Appellant's statement of case states, at paragraph 5.1:

"Network Rail is asking the panel to uphold our decision to offer Platform 18 to MTR to stable at London Liverpool Street between the peaks. In this instance Network Rail do not feel it is appropriate for the panel to find error with Network Rail's processes, but not rule on who should be allocated the capacity. Network Rail is asking the panel that unless AGA have adequately demonstrated that they should have been awarded the capacity to stable in Platform 18 then Network Rail's decision should remain." (emphasis added)

- 4.13. It is certainly not clear from this paragraph, or, indeed any of the Appellant's statements of case, that the Appellant wanted the Panel to substitute its decision for that of the Appellant. This is because the Appellant did not seek such a ruling.

- 4.14. The Appellant's intention when drafting paragraph 5.1 of its statement of case was to request that the Panel did not base its decision on the Appellant's application of the Decision Criteria, flawed or not. The Appellant wanted the Panel instead to focus on whether or not AGA had adequately demonstrated why it should have been awarded the capacity to stable at Platform 18.

- 4.15. The Appellant submits that, before the Panel exercised its power under Condition D 5.3.1 (c) of the Code it should have, at the very least, checked that the Appellant wanted its decision to be substituted for that of the Panel. Had this occurred, the Appellant would have made it clear that this was not its wish. Furthermore, the other Dispute Parties could also have made their position plain with regard to this issue. This constitutes a serious

⁵ Ibid

procedural irregularity, in failing to ensure what the Appellant and the other Dispute Parties were submitting should happen, and permitting them an opportunity to comment on this. The Panel therefore proceeded on a false premise, that the Appellant wished the Panel to substitute its own decision.

- 4.16. The Determination is also unjust due to a serious procedural irregularity because the Hearing Chair failed to record his decisions and conclusions reached with regard to Condition 5.3.1 (c), in failing to set out the "*exceptional circumstances*" which it was said gave the Panel power to substitute its own decision for that of the Appellant.

5 DECISION 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 as outlined above. The grounds outlined in Condition M 4.1. of Part M of the Code do not apply.
- 5.2. The Appellant requests that the ORR removes the substituted decision made by the Panel in paragraphs 6.7 and 7.1 of the Determination on that grounds that:
- 5.2.1. it is wrong and/or unjust due to a procedural irregularity because the Panel did not have the power under Condition D 5.3.1 (c) of the Code to substitute its own decision for that of the Appellant because there were no express, and/or no or insufficient implied "*exceptional circumstances*" so as to give power and/or jurisdiction to the Panel under Condition 5.3.1 to do so;
- 5.2.2. the Determination is also unjust due to a serious procedural irregularity because the Panel misinterpreted paragraph 5.1 of the Appellants statement of case to mean that the Appellant was asking the Panel to substitute its own decision for that of the Appellant, when the Appellant was not in fact asking the Panel to do so. The Panel therefore proceeded on a false premise. The Panel failed to check what was being asked of it with the Appellant or with any of the other Dispute Parties; and
- 5.2.3. the Determination is also unjust due to a serious procedural irregularity because the Hearing Chair failed to record his decisions and conclusions reached with regard to Condition 5.3.1 (c), in failing to set out the "*exceptional circumstances*" which it was said gave the Panel power to substitute its own decision for that of the Appellant.
- 5.3. The Appellant requests that, in accordance with Condition 5.3.1 (a) of Part D of the Code, the ORR gives the Appellant the necessary and required general directions which (1) specify the result to be achieved but not the means by which it shall be achieved, and (2) take into account the flaws in the Appellant's application of the Decision Criteria and its decision making process, generally, as set out by the Panel in the Determination.

5.4. As part of the ORR's general directions, the Appellant requests that the ORR directs that (i) the decision be remitted back to the Appellant for reconsideration in light of the general directions (as requested at 5.3 above) and (ii) makes such further orders pursuant to Condition 5.3.2 as it shall consider appropriate in order to provide the Dispute Parties with guidance as to the interpretation and application of such general directions.

Please acknowledge receipt of this Notice of Appeal.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'S Williams', followed by a period.

Sian Williams, Legal Counsel

Network Rail