



## **Determination by the Office of Rail and Road:**

**Appeals pursuant to Part M of  
the Network Code against a  
Determination of the  
Timetabling Panel of the  
Access Disputes Committee  
dated 20 November 2018  
(TTP1331 and TTP1376), by:**

- 1) GB Railfreight Limited –  
*Issues of jurisdiction  
ground***
- 2) DB Cargo (UK) Limited– *All  
grounds***

**13 March 2019**

## **Determination by the Office of Rail and Road:**

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## Introduction

1. This determination by the Office of Rail and Road (“ORR”) concerns the appeals made by GB Railfreight Limited (“GBRf”) and DB Cargo (UK) Limited (“DBC”) pursuant to Part M of the Network Code (“Part M”) against the determination of the Timetabling Panel of the Access Disputes Committee (“the TTP”) dated 20 November 2018 in respect of disputes reference TTP1331 and TTP1376 (“the Determination”)<sup>1</sup>.
2. The subject of GBRf’s appeal is its dissatisfaction with the TTP’s determination that it did not have jurisdiction to allow it to determine:
  - (a) issues relevant to the production of a New Working Timetable by Network Rail;
  - (b) points of principle raised by GBRf as to the ability of Network Rail to alter timetables and process requested Train Slots;
  - (c) matters concerning the contractual relationship between GBRf and Network Rail; or
  - (d) whether the actions of Network Rail involved a breach of the Network Code.
3. As part of this ground of appeal, GBRf submits that there is no lawful mechanism by which Network Rail is entitled to make unilateral changes to the New Working Timetable after D-26.
4. DBC has lodged its appeal in its capacity as a Timetable Participant. The subject of DBC’s appeal is that it is dissatisfied with the Determination on the basis that:
  - (a) the TTP erred in its Determination as to what constituted the New Working Timetable for the purposes of Condition D2.7.1; and
  - (b) the New Working Timetable is not capable of being unilaterally withdrawn and replaced with another timetable after D-26.
5. This determination sets out ORR’s conclusion on the above issues.
6. GBRf also appeals on the basis that it is dissatisfied with the TTP’s determination not to consider a number of disputed Train Slots on the basis that they were drawn from a superseded timetable. We will consider this ground of appeal separately before concluding our work on GBRf’s appeal.

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<sup>1</sup> Capitalised terms in this determination shall have the meaning given to them in the Network Code unless otherwise stated.

## Relevant Provisions of the Network Code

7. The Network Code<sup>2</sup> is a set of rules incorporated into, and forming part of, each access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail.
8. Part D sets out the rules under which the timetable for the Network is issued and revised. Part D also sets out the rules under which a Timetable Participant can appeal a decision for determination by the TTP in accordance with the Access Dispute Resolution Rules, which are also contained in the Network Code. Part M provides the process by which a party, dissatisfied with a decision of a TTP in relation to a dispute arising under Part D, can appeal the matter to ORR.
9. Part D imposes on Network Rail a general responsibility to establish a “*Working Timetable*” and sets out the process for revising the timetable and the respective roles of Network Rail and specified stakeholders (referred to as “*Timetable Participants*”). Condition D2.1.1 states that:

*“The Working Timetable shall show every train movement on the Network, including:*

- (a) *every Service;*
- (b) *every Ancillary Movement;*
- (c) *every Strategic Train Slot;*
- (d) *every International Freight Train Slot;*
- (e) *the times of:*
  - (i) *departure from origin and arrival at destination;*
  - (ii) *arrival at and departure from every intermediate stopping point;*
  - (iii) *such passing points, in accordance with the Timetable Planning Rules, as Network Rail (acting reasonably) considers appropriate; and*
  - (iv) *all relevant timing allowances.*

*The Working Timetable shall also include freight train planning publications and documents detailing platform arrangements.”*

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<sup>2</sup> <https://www.networkrail.co.uk/industry-commercial-partners/information-operating-companies/network-code/>

10. Condition D2.1.2 states that:

*“Network Rail shall re-issue the Working Timetable in revised form on two occasions in each year, after a consultation and revision process conducted by Network Rail in accordance with this Condition D2.”*

11. Condition D2.1.6 sets out what is meant by the New Working Timetable:

*“[...]The prior Working Timetable is then subject to a process of amendment under Condition D2 and during this period shall be referred to as the “New Working Timetable”. The timetable which the New Working Timetable becomes on a Timetable Change Date is the Working Timetable”.*

12. Condition D2.6.1 obliges Network Rail to compile the New Working Timetable between D-40 and D-26. Condition D2.6.2 further requires that Network Rail give all Timetable Participants access to the evolving draft of the New Working Timetable and consult with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable.

13. Condition D2.7.1 states that:

*“The New Working Timetable shall be published by Network Rail at D-26, subject only to variations made in the course of the appeal process described in this Condition 2.7.”*

14. Condition D2.7.2 states that:

*“Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it (other than in respect of International Freight Train Slots consulted under Condition D9.2), provided that an appeal is lodged within twenty Working Days of its publication. All such appeals shall be conducted in accordance with Condition D5.”*

15. Condition D3 sets out the process for varying either (i) the New Working Timetable, if it is before the Timetable Change Date, or (ii) the Working Timetable on an ad hoc basis. Timetable Participants may apply for such variations from D-26 and during the relevant Timetable Period. Amongst others, Condition D3 sets out:

- (a) the timeline for the planning of timetable variations (Condition D3.2);
- (b) the process for Timetable Participants to submit a written request, referred to as a “Train Operator Variation Request” to seek a Train Operator Variation after D-26 (set out in Condition D3.3);
- (c) the process for Network Rail to implement variations to the Working Timetable (Restrictions of Use) with at least 12 weeks’ notice, prior to the start of each Timetable Week (set out in Condition D3.4);

- (d) the process for Network Rail to implement variations to the Working Timetable (Restrictions of Use) with less than 12 weeks' notice, or otherwise outside the process described in Condition D3.4 (set out in Condition D3.5);
- (e) the process for Timetable Variations whereby all affected Timetable Participants and Network Rail have consented to a Timetable Variation (set out in Condition D3.6). In particular, Condition D3.6.1 states that:

*“Notwithstanding anything stated in the Condition D3, where Network Rail and all affected Timetable Participants have so consented in writing, a Timetable Variation may be made without the need for compliance with such of the requirements of this Condition D3 as are specified in the consent. Such a variation is referred to as a “Timetable Variation by Consent”;* and

- (f) the process for publication of Timetable Variations (Condition D3.7).

16. Condition D4.7.1 states that:

*“Save where expressly otherwise stated in this Part D, where Network Rail has announced a final decision in respect of any process regulated by the Part D, that decision shall be:*

- (a) *binding on Timetable Participants save to the extent that it is changed by an appeal authorised by this Part D;*
- (b) *binding on Network Rail save to the extent that:*
  - (i) *Network Rail is expressly permitted by any provision of this Part D to deviate from or amend that decision; or*
  - (ii) *a decision is changed by an appeal authorised by this Part D.”*

17. Condition D5.1.1 states that:

*“Where an appeal is expressly authorised by this Part D, a Timetable Applicant may refer a decision for determination by a Timetabling Panel in accordance with the ADRR”.*

18. Condition D5.2.1 sets out the right of Network Rail or of a Timetable Participant to refer a decision of the Timetabling Panel, taken under Condition D5.1, to ORR for determination under Part M.

19. Condition D5.3.1 states that:

*“In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail and Road (as the case may be) 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;*
- (b) *it may direct that a challenged decision of Network Rail shall stand;*
- (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.”.*

20. As noted above, Condition D5.1.1 of the Network Code provides for appeals to be made in accordance with the Access Dispute Resolution Rules (“ADRR”).

21. Chapter A, Rule 5 of the ADRR states that:

*“Each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis. Each and every Forum shall act in accordance with the law; and all its decisions, including its determinations and decisions on procedure, shall be in accordance with the law.”*

22. Chapter H, Rule 1 of the ADRR states that:

*“The purpose of a Timetabling Panel is to determine disputes referred to it by parties to an access agreement which incorporates Part D of the Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity including restrictions of use and train slots, in:*

*(a) such an access agreement; or*

*(b) the Access Conditions incorporated by reference in the access agreement in question...”.*

23. Chapter H, Rule 6 of the ADRR states that:

*“Subject to Rule H7 and 8, any dispute which is to be submitted to a Timetabling Panel under these Rules, shall proceed according to this Chapter H”.*

24. Chapter H, Rule 7 of the ADRR states that:

*“Following service upon the Secretary of the Notice of Dispute in relation to a Timetabling Dispute in accordance with Rule B2, any Involved Party may apply to the Hearing Chair for a ruling that:*

*(a) The dispute is not a Timetabling Dispute and should be referred to allocation in accordance with Rule B8; and/or*

*(b) Some aspects of the dispute or issues raised by the dispute are not matters of timetabling, timetable change and/or capacity allocation and are not properly*

*resolved by a Timetabling Panel and consequently should be reserved for determination by another dispute resolution process.*

*Any such application shall give the reasons relied upon by the applicant in support of the application and be made as soon as possible after the applicant has become aware that a Timetabling Dispute has been notified to the Secretary.”*

25. Chapter H, Rule 8 of the ADRR states that:

*“Upon an application being made in accordance with Rule H7 the Hearing Chair may give such directions as he determines are appropriate to resolve the application and, where appropriate, to remit the dispute or aspects of the dispute to allocation in accordance with Chapter B. Such directions may include, as appropriate, a direction on whether aspects of the dispute which are not referred to a Timetabling Panel should be resolved concurrently or sequentially with any TTP process.”*



## Background to the Determination

26. There were extensive revisions to the May 2018 Working Timetable during the May 2018 Timetable Period. Network Rail has submitted that, as a result of these revisions, there was limited capacity within Network Rail to prepare the December 2018 Working Timetable<sup>3</sup>.
27. As a consequence, on 8 June 2018 (which was D-26 for purposes of the December 2018 Working Timetable), Network Rail published a timetable that offered weekday trains only (the “D-26 Weekday Timetable”). Network Rail stated that it intended to issue the timetable for weekend trains at a later date, 6 July 2018 (which was D-22 for the purposes of the December 2018 Working Timetable). Network Rail issued a letter to industry, dated 8 June 2018, which accompanied the D-26 Weekday Timetable and in which Network Rail explained its intended approach<sup>4</sup>. In particular, the letter stated that:

*“As a result of the difficulties experienced in implementing the May 2018 New Working Timetable and the public and political pressure on the industry to avoid repeating that disruption, we ask you to consider the operational readiness required to deliver your original intentions as this offer would require and, if necessary, consider bidding service reductions back to Network Rail during the offer response period in order to deliver improved outcomes. It is intended that this will help reduce the risk of the operational difficulties experienced following the May 2018 New Working Timetable implementation. The manner in which such decrements should be managed in the timetabling process is set out in the operational procedure below.*

*In the meantime, Network Rail is continuing to engage in dialogue with the industry and government with regards to the steps to be taken to reduce the risks associated with future significant timetable changes, with an immediate focus on actions and other options for the December 2018 Timetable. I will write to you further on this matter in due course.”*

28. In its letter, Network Rail explained that it intended to publish and offer the timetable at the Principal Timetable Change Date in December 2018 in two parts in respect of: (i) the weekday timetable (SX Schedule – to be offered on D-26), and (ii) the weekend timetable (SO and SU timetables – to be offered on D-22). Below is the table, provided by Network Rail in its letter, which sets out the proposed dates for (i) Network Rail’s offer to Train Operators in respect of Train Slots, (ii) responses to the

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<sup>3</sup> Paragraph 3.6 of Network Rail’s Sole Reference Document

<sup>4</sup> Appendix 1 of Network Rail’s Sole Reference Document

offer by Train Operators, (iii) confirmation of responses processed by Network Rail, and (iv) the appeal period deadline:

<i>Timetable period</i>	<i>Network Rail offer</i>	<i>Operator response</i>	<i>Confirmation of responses processed by Network Rail</i>	<i>Appeal period deadline</i>
SX	D-26: 08/06/2018	D-24: 22/06/2018	D-22: 06/07/2018	03/08/2018
SO and SU	D-22: 06/07/2018	D-20: 20/07/2018	D-18: 03/08/2018	03/08/2018

29. Network Rail also stated that:

*“...in order to manage the operational risks around the introduction of the December 2018 Timetable, operators with significant changes are asked to consider whether a more measured introduction of planned new or significantly amended services would support the delivery of a more successful timetable change. It is Network Rail’s proposal that any decrement is achieved through dated cancellations and/or suppressing advertised services and does not involve re-timings or significant structural changes to the offered timetable. Operators are asked to confirm by 20/07/2018 (D20) any decrements from the original level of change that they want to implement, the details of which Network Rail suggests are worked upon collaboratively between 03/08/2018 (D18) and 14/09/2018 (D12). The dated cancellations and/or suppressed advertised services will be published and made available to passengers and freight end users by 14/09/2018 (D12).*

*We will be in touch in due course to provide a date for the issue of the Prior Working Timetable following further consultation via OPSG and relevant industry forums.”*

30. Network Rail engaged with Government and the industry about the December 2018 timetable change. There was a period of industry collaboration and consultation to analyse the preparedness of train and freight operators and Network Rail for the December 2018 timetable change. Concerns were identified about whether the D-26 Weekday Timetable could be successfully implemented.

31. A number of potential alternatives to the D-26 Weekday Timetable were considered, including rolling over all operators’ May 2018 timetable slots until May 2019, and developing a hybrid timetable, whereby “low-risk” operators would proceed with their D-26 Weekday Timetable slots and “high-risk” operators would have their May

2018 timetable rolled over (the “Hybrid Timetable”). These options were discussed with industry representatives<sup>5</sup>.

32. On 20 June 2018 Network Rail made a recommendation to the Secretary of State that the Hybrid Timetable should be implemented (this was followed up in writing on 22 June 2018). The Hybrid Timetable would include a timetable for both weekday and weekend trains. Network Rail stated that it considered that the Hybrid Timetable represented the most realistic approach for the industry to de-risk the December 2018 timetable change. The Secretary of State endorsed this approach on 9 July 2019. The Hybrid Timetable was implemented on 9 December 2018<sup>6</sup>.

33. In its Sole Reference Document, Network Rail stated that when compiling the Hybrid Timetable:

*“The decision as to which operators would continue with their D26 offered timetable and which would have their May 2018 timetable rolled over was undertaken on a risk profile basis:*

- (a) *Operators whose D26 timetables were considered high risk or dependent on major infrastructure upgrades would be rolled over;*
- (b) *Freight operators and CrossCountry had to be rolled over because of the risk associated with the long-distance and cross-route nature of their operations and their interactions with other operators*

*It was accepted by Network Rail that some limited changes would be required to the rolled over operators’ May 2018 timetables. In this process the particular interests of freight operators and CrossCountry would be recognised. As a result, Network Rail asked the rolled over operators to provide their key changes needed to implement the Hybrid Timetable, and considered these in order of priority.”<sup>7</sup>*

34. On 22 June 2018, GBRf served a Notice of Dispute (“TTP1331”) regarding Network Rail’s decision (offer) made on 8 June 2018 in respect of the D-26 Weekday Timetable. On 23 August 2018, GBRf served a further, second Notice of Dispute (“TTP1376”) regarding Network Rail’s Hybrid Timetable which Network Rail stated had replaced the D-26 Weekday Timetable.

35. On 11 October 2018, the Allocation Chair ordered that the two disputes be heard together on the grounds that they concerned the same or similar subject matter and that it would be in the interests of efficient and fair resolution to do so. Both TTP1331 and TTP1376 appeals were heard by TTP on 8 November 2018. In its

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<sup>5</sup> Paragraph 3.12 of Network Rail’s Sole Reference Document

<sup>6</sup> Paragraphs 3.13 and 3.14 of Network Rail’s Sole Reference Document and paragraph 3.7 of Network Rail’s Response to GBRf’s Appeal to ORR

<sup>7</sup> Paragraph 3.15 and 3.16 of Network Rail’s Sole Reference Document

Determination, issued on 20 November 2018, the TTP stated that GBRf sought the following outcomes of principle and specific determinations from the TTP:

- (i) *“A determination that the Train Slots offered by Network Rail at D-26 (on 8 June 2018) and subsequently withdrawn were contractually binding on Network Rail. GBRf sought a determination that the Train Slots revoked by Network Rail be included in the December 2018 Timetable.*
- (ii) *As a matter of principle, did Network Rail have authority to alter the due date of D-26, without prior authority under Condition D2.7 by publishing a subsequent New Working Timetable after D-26?*
- (iii) *A determination that Condition D4.2.2 required Network Rail to consider all Access Proposals and that rejection is only an option where there is no timetabling solution. GBRf sought a determination that Network Rail give further consideration to including the requested Train Slots in the December 2018 Timetable.*
- (iv) *A determination that Train Slots requested by GBRf on the Priority Date, but not processed by Network Rail, be included in the December 2018 Timetable.*
- (v) *A determination that Train Slots where amendments were requested by GBRf be included in the December 2018 Timetable.*
- (vi) *A determination that Train Slots offered by Network Rail at D-26 or 17 August 2017 be compliant with applicable Train Planning Rules and or other Train Slots.*
- (vii) *A determination that disputed Train Slots listed in Appendix D to GBRf’s Sole Reference Document be offered by Network Rail to GBRf in a compliant manner for the December 2018 Timetable.”<sup>8</sup>*

36. Network Rail contested GBRf’s submissions, set out above, and sought determinations from the TTP that:

- (i) *“A determination that the Panel does not have jurisdiction or power on appeal under Condition D2.7.2 to address points of principle relating to the issue of the New Working Timetable. The Panel’s jurisdiction relates to the determination of disputes relating to the contents of the New Working Timetable and the allocation of capacity made within it and not issues relating to the production of the New Working Timetable.*
- (ii) *A determination that the D-26 Weekday Timetable had been replaced by the Hybrid Timetable which is now the New Working Timetable. The*

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<sup>8</sup> Section C, paragraph 16 of the Determination

*Panel has no jurisdiction to hear disputes relating to the D-26 timetable because it is no longer the New Working Timetable; and*

- (iii) *A determination that the issue of a Hybrid Timetable by Network Rail at D-16 was not a breach of contract or a breach of the Network Code by Network Rail.*<sup>9</sup>

## The Determination

37. The TTP's findings in its Determination were as follows:

*“80. The Hybrid Timetable replaced the D-26 Weekday Timetable issued on 8 June 2018. The Hybrid Timetable issued on 17 August 2018 is the New Working Timetable effective from 9 December 2018.*

*81. As a result of paragraph 80 above, any disputes as [sic] the contents of the D-26 Weekday Timetable can no longer form part of any relevant dispute before the Panel.*

*82. The Panel's jurisdiction is defined by Condition D5.3.1 which does not authorise the Panel to determine points of principle or allow the Panel to make a determination as to disputed issues relevant to the production of the Hybrid Timetable or matters of alleged breach of contract.*

*83. Network Rail is directed to carry out an urgent review of Train Slot 0E05GA for inclusion in the New Working Timetable for December 2018. If Network Rail considers the application of the Decision Criteria to be appropriate, then the reasoning is to be communicated to GBRf in writing.”<sup>10</sup>*

38. In its analysis, the TTP stated that:

*“A central issue in this determination was the jurisdiction and powers of the Panel as a result of an appeal under Condition D2.7. Condition D2.7.1 requires the New Working Timetable to be published by Network Rail at D-26, subject only to variations made in the course of the appeal process described in Condition D2.7. Network Rail published at D-26 a Weekday Timetable but did not formally offer weekend Train Slots.”<sup>11</sup>*

39. In establishing jurisdiction, the TTP first considered whether the D-26 Weekday Timetable or the Hybrid Timetable was the New Working Timetable:

*“The Panel was satisfied that the D-26 Weekday Timetable has been replaced by the Hybrid Timetable in exceptional factual circumstances due to difficulties arising*

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<sup>9</sup> Section C, paragraph 17 of the Determination

<sup>10</sup> Section I, paragraphs 80-84 of the Determination

<sup>11</sup> Section H, paragraph 68 of the Determination

*with the operation of the May 2018 Timetable. The Hybrid Timetable is the New Working Timetable. The Panel accepted, as submitted by GBRf, that the New Working Timetable had not evolved by a consideration of Part D which would normally be the first consideration. The Panel was satisfied that Network Rail was entitled to produce a Hybrid Timetable by reference to its obligation under its Licence, in the various Track Access agreements to which it is a party and under the Network Code at Chapter D.*

*Network Rail was in breach of Condition D2.7.1 and the position may be that GBRf may have further remedies for breach of contract in an alternative dispute forum. However, an investigation as to the process whereby the Hybrid Timetable evolved would require the involvement of a significant number of industry parties and a consideration of substantial complex facts. The Panel was satisfied that it did not have the jurisdiction, or the appropriate structures in place, to undergo such an investigation.”<sup>12</sup>*

40. The TTP then considered its jurisdiction and powers set out under the Network Code and considered that *“In any event, clear guidance is given by Condition D5.3 as to the powers of the Panel”*.<sup>13</sup> On that basis, the TTP stated that it was satisfied that the powers set out in Condition D5.3.1:

*“...do not extend to allow the Panel to determine:*

- (a) issues relevant to the production of the New Working Timetable;*
- (b) the points of principle advanced by GBRf; or*
- (c) matters of contract, namely whether the D-26 Weekday Timetable is contractually binding on the Dispute Parties or a breach of the Network Code.”<sup>14</sup>*

41. On the basis of the above, the TTP concluded that *“...any dispute as to the contents of the D-26 Weekday Timetable, or the process as to how the Hybrid Timetable came into effect, cannot be the subject of any relevant dispute before the Panel”*.<sup>15</sup>

42. Having concluded that the Hybrid Timetable was the New Working Timetable, the TTP concluded that it was no longer required to consider GBRf’s schedule of 63 disputed Train Slots (submitted as part of GBRf’s appeal to the TTP) because they

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<sup>12</sup> Section H, paragraphs 71 and 72 of the Determination

<sup>13</sup> Section H, paragraph 73 of the Determination

<sup>14</sup> Section H, paragraph 74 of the Determination

<sup>15</sup> Section H, paragraph 75 of the Determination

were drawn from the D-26 Weekday Timetable and this was not within the TTP's jurisdiction<sup>16</sup>.

43. The TTP stated that, by the conclusion of the hearing, there remained only three disputed Train Slots which related to the Hybrid Timetable and which were therefore within its jurisdiction. The TTP concluded that Network Rail had rejected two of those slots for valid reasons<sup>17</sup> and that the remaining slot disputed by GBRf (Train Slot 0E05GA) was supported by Firm Rights which Network Rail had failed to consider as part of the reasons for its rejection. The TTP directed Network Rail to conduct an urgent review of Train Slot 0E05GA for inclusion in the New Working Timetable for December 2018<sup>18</sup>.

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<sup>16</sup> Section H, paragraph 76 of the Determination

<sup>17</sup> Section H, paragraph 77 of the Determination

<sup>18</sup> Section H, paragraph 78 of the Determination

## ORR's handling of the appeal

44. On 27 November 2018, GBRf and DBC both served separate notices under Condition M3.1.1 on ORR that they wished to challenge the Determination. GBRf submitted that the TTP had erroneously determined that it did not have jurisdiction to determine its appeals to the TTP (TTP1331 and TTP1376) and that it did not need to consider the disputed Train Slots on the basis that they were drawn from a superseded timetable. GBRf and DBC both submitted that there was no mechanism for Network Rail to replace the New Working Timetable after D-26. In its notice of appeal, GBRf requested that ORR deal with its appeal on an expedited basis.
45. GBRf served its notice on Network Rail, DBC and Freightliner Limited ("FL") by e-mail. DBC and FL were interested parties in TTP 1331 and TTP 1376. DBC served its notice on Network Rail, GBRf and FL by e-mail.
46. Following receipt of the above notices, ORR wrote to the parties on 4 December 2018 to advise them that it was minded to hear the appeals. In that letter, ORR requested that:
  - (a) the parties provide representations on whether ORR should hear the appeals by 13 December 2018;
  - (b) in the event it wished to oppose the appeal, that Network Rail serve notice on GBRf, DBC, ORR and the other parties by 11 December 2018 and that it attach supporting evidence on which it wished to rely, in accordance with Condition M5;
  - (c) Network Rail provide its view on GBRf's request for the appeal to be dealt with on an expedited basis by 11 December 2018; and
  - (d) Network Rail provide an update on the status of the services which GBRf considered to be in dispute.
47. On 5 December 2018, Network Rail responded to ORR. In its response, Network Rail requested that it first have the opportunity to make representations on why ORR should not hear the matter. Network Rail requested that ORR extend the time limit under which a decision would be taken to be commensurate with the deadline for service of its Respondent's Notice. Network Rail also sought confirmation from ORR that it would not take a final decision until a reasonable time after it had seen Network Rail's submissions on the subject. On 6 December 2018, ORR confirmed in a letter to all parties that it would extend the deadline for representations to 10:00 on 13 December 2018 and that it would subsequently make a decision on whether to hear the appeals.



48. On 13 December 2018, Network Rail made representations on the appeals to ORR and the parties (the “Response Notices”). In the Response Notices, Network Rail stated that:
- (a) DBC’s appeal should not proceed on the basis that it did not have standing to appeal the Determination;
  - (b) ORR should decide that both appeals should not proceed to it;
  - (c) alternatively, ORR should uphold the Determination; and
  - (d) In relation to the Train Slots, for the reasons it set out, it had no status update to provide.
49. On 13 December 2018, ORR wrote to DBC requesting that it respond on why it had standing to bring the appeal. On 18 December 2018, DBC replied to ORR setting out its submissions on why it had standing and Network Rail also wrote to ORR on the same date in reply to the submissions made in DBC’s letter.
50. On 19 December 2018, ORR wrote to the parties, confirming its decision that GBRf’s appeal would not be dealt with on an expedited basis and its decision that DBC had standing to bring an appeal. ORR requested that GBRf and DBC provide further details of the remedies they were seeking by 4 January 2019.
51. On 4 January 2019, GBRf and DBC wrote to ORR with the remedies they requested for their respective appeals.
52. On 9 January 2019, Network Rail wrote to ORR with its responses to the remedies proposed by the parties.
53. On 15 January 2019, ORR wrote to the parties, confirming that it was minded to hear the appeals. ORR responded to Network Rail’s representations that it submitted in relation to ORR’s suitability to hear the appeal, in particular Network Rail questioned whether ORR could properly act as arbiter in these appeals, due to its prior involvement in the events that led to the creation of the Hybrid Timetable. In its response, ORR set out the extent of its involvement around the introduction of the Hybrid Timetable and stated that it did not consider itself to be tainted by actual or apparent bias. ORR also stated that it was wholly satisfied that it could proceed to determine the appeals impartially on the basis of the provisions of the Network Code and the legal entitlements of the parties. In its letter ORR also gave GBRf and DBC an opportunity to make further representations on ORR hearing the appeals following ORR’s prior involvement. GBRf and DBC replied on 16 and 17 January 2019 (respectively). Neither raised any objection.
54. On 18 January 2019, ORR wrote to the parties confirming that it had received no further representations objecting to ORR hearing the appeals and that it had decided to hear the appeals. ORR’s letter also outlined the proposed process for the

appeals, and requested that the parties provide any representations on the process by 21 January 2018. The proposed process was that:

- (a) ORR would first consider: (i) whether the TTP was correct in determining that TTP1331 and TTP1376 were outside its jurisdiction, and (ii) if not, whether the Hybrid Timetable properly took effect as the New Working Timetable.
- (b) GBRf and DBC should provide any reply to the Response Notices which they wished to make to ORR and Network Rail by 31 January 2018.
- (c) If appropriate ORR would make a determination on these issues (in respect of one or both appeals) at this point.
- (d) Depending on ORR's conclusions on the above issues, ORR would then consider the issues raised by GBRf in relation to whether particular Train Slots requested by it should have been included in the New Working Timetable. ORR stated that it would notify the parties and make further directions in relation to ORR's procedure for determining these issues at that point and that ORR would give the parties an opportunity to comment on that procedure.

- 55. ORR also clarified in its letter that, *“Under Condition M7.1 of the Network Code, every appeal will be limited to a review of the decision of the lower tribunal unless ORR considers that, in the circumstances of an individual appeal, it would be in the interests of justice to hold a re-hearing”*.
- 56. The letter noted that the appeal would be limited to a review of the Determination of the TTP, in accordance with Condition M7.1.1. If ORR determined that it would be in the interests of justice to hold a re-hearing of any part of the appeal, ORR would communicate this to the parties and make any appropriate directions, after first considering any representations the parties wished to make.
- 57. Network Rail made representations on ORR's proposed process on 21 January 2019. It requested clarification on how any re-hearing would work. ORR responded on 30 January 2019 stating, amongst other things, that it did not intend to hold an oral hearing at that stage, but that it would keep the process under review.
- 58. On 29 January 2019, GBRf wrote to ORR with its further representations, and DBC sent its further representations on 31 January 2019. Network Rail was given a short opportunity to respond to new points raised and did so on 6 February 2019.
- 59. On 11 February 2019, ORR wrote to the parties confirming that it did not require any further information on whether the TTP was correct in determining that the appeals were out of its jurisdiction, or whether the Hybrid Timetable properly took effect as the New Working Timetable. This determination sets out our conclusion on these two issues.

## GBRf's appeal in relation to the Determination

60. GBRf's Notice of Appeal, dated 27 November 2018, states that GBRf wished to appeal two distinct elements of the Determination:

- (a) issues of jurisdiction which, GBRf considered, wrongly prevented TTP from determining:
  - (i) issues relevant to the production of a New Working Timetable by Network Rail;
  - (ii) points of principle raised by raised by GBRf as to the ability of Network Rail to alter timetables and process requested Train Slots;
  - (iii) matters concerning the contractual relationship between GBRf and Network Rail;
  - (iv) whether the actions of Network Rail involved a breach of the Network Code<sup>19</sup>; and
- (b) the TTP's failure to consider GBRf's schedule of 63 disputed Train Slots because the TTP considered that they were drawn from a superseded timetable<sup>20</sup>.

61. GBRf submitted that the TTP had misconstrued the provisions of Condition D5.3.1 and that the TTP had adopted a wholly unnecessarily narrow and restrictive view as to its own jurisdiction<sup>21</sup>. GBRf made the following specific points on the TTP's jurisdiction:

- (a) Chapter H, Rule 1 of the ADRR gives the TTP a very wide remit in relation to the nature of the disputes referred to it. GBRf submitted that the matters which the TTP declined to rule on due to a lack of jurisdiction were "...*firmly within the jurisdiction of a Timetabling Panel*"<sup>22</sup>.
- (b) Condition D5.3.1 "[...] *contains nothing whatsoever to limit the jurisdiction of the Panel as provided by the definition of its purpose in Chapter H Part 1 of the Network Code*"<sup>23</sup>.
- (c) Condition D5.3.1 describes the powers available to the TTP and not the extent of its jurisdiction<sup>24</sup>.

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<sup>19</sup> Paragraph 4.1 (a) – (d) of GBRf's Notice of Appeal

<sup>20</sup> Paragraph 4.2 of GBRf's Notice of Appeal

<sup>21</sup> Paragraph 8 of GBRf's Notice of Appeal

<sup>22</sup> Paragraph 7 of GBRf's Notice of Appeal

<sup>23</sup> Paragraph 9 of GBRf's Notice of Appeal

<sup>24</sup> Paragraph 10 of GBRf's Notice of Appeal

- (d) GBRf considers that the issue of the TTP's jurisdiction is an issue of importance both in relation to this appeal as well as for the industry as a whole, particularly in the context of future appeals referred to the TTP<sup>25</sup>.
62. GBRf submitted that the TTP had erred in finding that Network Rail was entitled to produce a Hybrid Timetable to replace the D-26 Weekday Timetable, and GBRf submitted the following specific points:
- (a) There is no lawful mechanism by which Network Rail is entitled to make unilateral changes to a New Working Timetable after D-26, except as provided for in Condition D2.7.1<sup>26</sup>.
  - (b) GBRf disputed the Determination, which stated that Network Rail "...was entitled to produce a Hybrid Timetable by reference to its obligation under its Licence in the various Track Access agreements to which it is a party and under the Network Code at Chapter D". GBRf submitted that the TTP did not identify any such obligation, whether it exists, or how it overrides Part D of the Network Code<sup>27</sup>.
  - (c) GBRf did not consider that an investigation into the process whereby the Hybrid Timetable was produced was necessary, despite the TTP's finding to the contrary, in circumstances where the timetable had been produced in a manner that breached Condition D2.7.1<sup>28</sup>.
63. GBRf submitted that it is not seeking to undo the entirety of the December 2018 timetable, or seeking any substantial rewriting of it. GBRf submitted that it is seeking a fair and legal resolution of issues relating to its Train Slots. There was no merit in the suggestion that its complaints would, if upheld, lead to significant network disruption<sup>29</sup>. GBRf further submitted that it is concerned that in circumstances where Network Rail ignores Access Proposals, or fails to process them adequately, GBRf will be left without any effective right of appeal or effective remedies "...if the Panel shrinks from the responsibility of making orders under D5.3.1(c)"<sup>30</sup>.
64. In addition to its requested remedy around Train Slots (not covered in this determination), GBRf stated that it sought a remedy from ORR that provided guidance on the correct application of Part D of the Network Code. GBRf submitted

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<sup>25</sup> Paragraph 11 of GBRf's Notice of Appeal

<sup>26</sup> Paragraphs 13 and 14 of GBRf's Notice of Appeal

<sup>27</sup> Paragraph 15 of GBRf's Notice of Appeal

<sup>28</sup> Paragraph 16 of GBRf's Notice of Appeal

<sup>29</sup> Paragraph 18 of GBRf's Notice of Appeal

<sup>30</sup> Paragraph 28 of GBRf's Notice of Appeal

that it believed Network Rail's interpretation of its obligations to be too narrow and, in some cases, erroneous<sup>31</sup>.

## DBC's appeal in relation to the Determination

65. In DBC's Notice of Appeal, dated 27 November 2018, DB Cargo submitted that:
- (a) The TTP had erred in describing the Hybrid Timetable as the New Working Timetable and that the New Working Timetable is in fact the timetable published by Network Rail on 8 June 2018 at D-26, pursuant to Condition D2.7.1<sup>32</sup>.
  - (b) The New Working Timetable is defined in Part D of the Network Code and is not capable of being unilaterally withdrawn and replaced with some other timetable(s) such as is the case with the Hybrid Timetable<sup>33</sup>.
66. DBC requested, in the event ORR disagrees with the above and in order to provide clarity for the industry, that ORR ascertain how the TTP was able to conclude that the Hybrid Timetable is the New Working Timetable by reference to the legal entitlements of the parties<sup>34</sup>.
67. DBC set out the following specific issues in its Notice of Appeal:
- (a) That the Determination issued by the TTP should be reached in accordance with the requirements of ADDR Rule A5 and "*on the basis of the legal entitlements of the Dispute Parties and on no other basis*" and that, in respect of TTP1331 and TTP1376, those legal entitlements arise from Part D of the Network Code and the relevant track access agreements<sup>35</sup>.
  - (b) That, in its Determination, the TTP determined that the Hybrid Timetable was the New Working Timetable, despite Part D of the Network Code not including provisions allowing Network Rail to withdraw a New Working Timetable, once issued at D-26, and replace it at any time with another timetable<sup>36</sup>.
  - (c) That, under Rule H51k of the ADDR, the Hearing Chair was required to set out in the Determination "*the reasons for those decisions and conclusions (including any relevant legal principles or rules of law applied)*"<sup>37</sup>. DBC submitted that it wished to have further explanation on Network Rail's obligations under its

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<sup>31</sup> GBRf's submission on remedies, dated 4 January 2019 (by email)

<sup>32</sup> Paragraph 18 of DBC's Notice of Appeal

<sup>33</sup> *Idem*

<sup>34</sup> Paragraph 19 of DBC's Notice of Appeal

<sup>35</sup> Paragraphs 6 and 7 of DBC's Notice of Appeal

<sup>36</sup> Paragraph 18 of DBC's Notice of Appeal

<sup>37</sup> Paragraph 12 of DBC's Notice of Appeal

Licence, its various Track Access agreements and Part D of the Network Code<sup>38</sup>.

68. DBC also submitted that the TTP's "[...] conclusions are made even more confusing by paragraph 72 in which the Timetabling Panel states that Network Rail was in breach of Condition D2.7.1"<sup>39</sup> and that this appeared to contradict the determination that the Hybrid Timetable is the New Working Timetable. DB Cargo submitted that it considered that "[...] the timetable issued by Network Rail on 8 June 2018 at D-26 is the New Working Timetable not the Hybrid Timetable that was issued over two months later"<sup>40</sup>.
69. DBC further submitted that:
- (a) If the Determination is left unchallenged, it could create a precedent whereby the New Working Timetable issued at D-26 can subsequently be replaced by Network Rail at any time with a new timetable<sup>41</sup>.
  - (b) The Determination reduces the ability of DBC to rely on the provisions of Part D to provide certainty and stability in respect of the development of timetables if such provisions can be overridden without the agreement of Timetable Participants<sup>42</sup>.
70. DBC seeks a remedy in relation to the proper interpretation of the Network Code regarding the New Working Timetable and that the relevant passages of the Determination are struck out<sup>43</sup>.

## Network Rail's response to the appeals

71. In response, Network Rail opposed the appeals and submitted that the TTP's Determination was correct.
72. In relation to GBRf's appeal, Network Rail stated that the TTP was correct to determine that it did not have jurisdiction to decide the specific issues and points of principle raised in GBRf's Notice of Appeal on jurisdiction<sup>44</sup>.
73. Network Rail also submitted that any appeal would be limited to a review of the TTP's decision, that there is no basis for the Appeal to be anything other than a review of

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<sup>38</sup> Paragraph 13 of DBC's Notice of Appeal

<sup>39</sup> Paragraph 14 of DBC's Notice of Appeal

<sup>40</sup> *Idem*

<sup>41</sup> Paragraph 15 of DBC's Notice of Appeal

<sup>42</sup> Paragraph 16 of DBC's Notice of Appeal

<sup>43</sup> DBC letter to ORR on remedies sought, dated 4 January 2019

<sup>44</sup> Paragraph 1.8.2.1 of Network Rail's Response to GBRf's Appeal to ORR

the Determination, unless ORR considered it to be in the interests of justice to hold a re-hearing<sup>45</sup>.

74. In relation to the TTP's jurisdiction, Network Rail submitted the following general comments and specific responses to GBRf's Notice of Appeal:
- (a) The TTP has jurisdiction to determine specific capacity allocation disputes arising from the contents of the New Working Timetable and has expertise in dealing with such disputes<sup>46</sup>.
  - (b) The TTP necessarily needed to determine what the New Working Timetable was and was correct in determining that the New Working Timetable was the only timetable that could form a relevant basis of complaint as this was the timetable that took effect on 9 December 2018. No other timetable could "affect" a Timetable Participant, and therefore form the basis of an appeal under Condition D2.7.2. Any dispute as to the D-26 Weekday Timetable was "otiose" because that was not the timetable that was to be brought in to operation on 9 December 2018 and so no one could be "affected" by it<sup>47</sup>.
  - (c) The TTP does not have jurisdiction under Condition D2.7.2 to consider the points of principle put forward by GBRf, including whether or not Network Rail has complied with its contractual obligations. Network Rail further submitted that "*These were not specific disputes arising from part of the contents of the New Working Timetable, but rather a wholesale complaint about the procedure that resulted in the publication of the Hybrid Timetable.*"<sup>48</sup> Network Rail considers that limitations on the TTP's jurisdiction to consider the points of principle raised by GBRf are demonstrated by its powers, set out at D5.3.1. The TTP does not have jurisdiction to make "[...] *sweeping determinations of complex legal and factual questions relating to the production of the New Working Timetable, or in this case, the Hybrid Timetable*"<sup>49</sup>. Network Rail further submitted that the TTP's findings on jurisdiction were consistent with a previous determination and that it would not be in the interests of justice to determine otherwise<sup>50</sup>. Network Rail disagreed with GBRf's description of the powers available to the TTP under Condition D5.3.1. Network Rail submits that the provisions of this condition provide for the TTP to "*perform its role in certain narrow, clearly delineated ways, directly related to the adjudication of specific disputes about capacity allocation*"<sup>51</sup>.

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<sup>45</sup> Paragraph 1.9 of Network Rail's Response to GBRf's Appeal to ORR

<sup>46</sup> Paragraph 3.3.3 of Network Rail's Response to GBRf's Appeal to ORR

<sup>47</sup> Paragraphs 3.3.4 - 3.3.5 and 3.9 of Network Rail's Response to GBRf's Appeal to ORR

<sup>48</sup> Paragraph 3.3.6 of Network Rail's Response Notice to GBRf's Appeal to ORR

<sup>49</sup> Paragraph 3.10 of Network Rail's Response to GBRf's Appeal to ORR

<sup>50</sup> Paragraph 3.11 of Network Rail's Response to GBRf's Appeal to ORR

<sup>51</sup> Paragraph 3.18.5 of Network Rail's Response to GBRf's Appeal to ORR

- (d) ORR cannot make a determination on issues that the TTP did not determine because the TTP decided that they did not have jurisdiction because: (i) the material required to do so was not before the TTP and will not be before the ORR, and (ii) the appeal procedure does not have the structures in place to permit the ORR to make such determinations<sup>52</sup>. Network Rail also submitted that if the findings of the Determination on the TTP's jurisdiction were overturned it would be illogical and not in the interests of justice, because "[...] *the TTP would then be forced to consider matters (i) which are not within its sphere of expertise or jurisdiction; (ii) for which it does not have the structures in place to make a proper determination; and (iii) which it has already recognised it is not well placed to decide.*"<sup>53</sup>
- (e) The Hybrid Timetable was the culmination of a process of industry collaboration, not a unilateral decision<sup>54</sup>. Network Rail did not consider that it was in breach of contract and that it was entitled to act as it did in light of its responsibility under the Network Code to produce the Working Timetable, the conditions of its licence and the obligations as to the standard of Network Rail's performance of its contractual obligations under clause 4 of its track access agreements<sup>55</sup>.
- (f) Contrary to the submissions of GBRf, Chapter H, Rule 1 of the ADRR is intended to be a general description of the role of the TTP once its jurisdiction has been established and does not provide the basis of its jurisdiction<sup>56</sup>.
- (g) GBRf referred its dispute to the TTP under Condition D2.7.2 and the TTP's jurisdiction to hear the dispute is based exclusively on the provisions of D2.7.2. As a result the TTP is empowered only to hear disputes against a decision of Network Rail as to a part of the New Working Timetable<sup>57</sup>.
- (h) Network Rail accepted the potential importance of questions raised by GBRf in its Notice of Appeal regarding the legal basis for Network Rail to issue or subsequently alter, a New Working Timetable after D-26. However, Network Rail submitted that the TTP was not the correct forum for such questions to be considered<sup>58</sup>.

75. On the basis of the above, Network Rail requested that the ORR should not overturn the TTP's Determination on jurisdiction.

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<sup>52</sup> Paragraph 3.15 of Network Rail's Response to GBRf's Appeal to ORR

<sup>53</sup> Paragraph 3.14 of Network Rail's Response Notice to GBRf's Appeal to ORR,

<sup>54</sup> Paragraph 3.3.8 of Network Rail's Response Notice to GBRf's Appeal to ORR

<sup>55</sup> Paragraph 3.3.9 of Network Rail's Response Notice to GBRf's Appeal to ORR

<sup>56</sup> Paragraphs 3.18.1 - 3.18.2 of Network Rail's Response Notice to GBRf's Appeal to ORR

<sup>57</sup> Paragraphs 3.18.3 and 3.18.4 of Network Rail's Response Notice to GBRf's Appeal to ORR

<sup>58</sup> Paragraph 3.18.6 of Network Rail's Response Notice to GBRf's Appeal to ORR



76. In its response to DBC's Notice of Appeal, Network Rail repeated a number of points made in response to GBRf's appeal and also stated that its position was that:
- (a) The TTP was correct to treat the Hybrid Timetable as the New Working Timetable, rather than the D-26 Weekday Timetable<sup>59</sup>.
  - (b) GBRf appealed to the TTP on the basis of Condition D2.7.2 which only provided a right of appeal in relation to the New Working Timetable.
  - (c) In order to have any jurisdiction to consider the timetable due to take effect on 9 December 2018, the TTP therefore had to treat the Hybrid Timetable as the New Working Timetable. The TTP was correct in its decision and its decision was the only way that would have permitted it to take decisions as to capacity allocation in relation to the December 2018 timetable, the Hybrid Timetable.
  - (d) The TTP was correct to determine that it did not have any jurisdiction to decide contractual issues, including as to whether the process that had led to the development of the New Working Timetable had been compliant with the Network Code. The TTP did not make any decision on the contractual questions raised by DBC and it is therefore not possible for ORR to review any such decision on appeal<sup>60</sup>.
77. Network Rail submitted the following specific points on DBC's challenge to the TTP's decision that the Hybrid Timetable is the New Working Timetable:
- (a) The TTP is limited to hearing challenges relating to decisions made in relation to parts of the New Working Timetable<sup>61</sup>.
  - (b) No one can be "affected" by a timetable that is not going to be implemented and that a Timetable Participant can only be affected by a timetable that is to be implemented<sup>62</sup>. In particular, DBC submitted that "*Any dispute as to the D26 Weekday Timetable was and is otiose because that was not the timetable that was to be (and was) brought into operation on 9 December 2018 and so no one could be "affected"*"<sup>63</sup>.
  - (c) The TTP was correct to accept that the Hybrid Timetable was the New Working Timetable<sup>64</sup>.

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<sup>59</sup> Paragraph 1.9.4.1 of Network Rail's Response Notice to DBC's Appeal to ORR

<sup>60</sup> Paragraphs 1.9.4.2 and 5.14-5.21 of Network Rail's Response Notice to DBC's Appeal to ORR

<sup>61</sup> Paragraph 4.2 of Network Rail's Response Notice to DBC's Appeal to ORR

<sup>62</sup> Paragraph 4.4 of Network Rail's Response Notice to DBC's Appeal to ORR

<sup>63</sup> Paragraph 4.5 of Network Rail's Response Notice to DBC's Appeal to ORR

<sup>64</sup> Paragraph 4.7 of Network Rail's Response Notice to DBC's Appeal to ORR

- (d) The TTP did not have jurisdiction to decide whether the Hybrid Timetable was the New Working Timetable that had been reached through compliance set out in the Network Code and that this required a legal and contractual analysis<sup>65</sup>.

78. In response to DBC's challenge to the contractual basis of the Hybrid Timetable, and that the New Working Timetable is not capable of being unilaterally withdrawn and replaced with another timetable, Network Rail submitted that this constituted an attempt to revive the "points of principle" raised by GBRf in TTP1331 and TTP1376<sup>66</sup>. These points of principle relate to the development and publication of the Hybrid Timetable and whether Network Rail was entitled to do so. Network Rail submitted that the TTP had no jurisdiction to make findings on those points<sup>67</sup>.

79. Network Rail further submitted that DBC had requested ORR to ascertain how the TTP was able to conclude that the Hybrid Timetable is the New Working Timetable, by reference to the legal entitlements of the parties in order to give a clear understanding for the industry. Network Rail submitted that there is an inherent illogicality to DBC asking ORR to ascertain the reasoning of another decision-making body. Network Rail further submitted that DBC was not asking ORR to review the decision of an appeal but to undertake a separate exercise of analysis<sup>68</sup>.

80. In response to the remedies sought by DBC, Network Rail stated that:

- (a) It considered that, despite DBC's statement that it was not seeking to appeal the directions in the Determination in respect of GBRf's access proposals, Network Rail considered that if DBC's appeal were successful, this would be the inevitable effect.
- (b) If DBC were successful in its appeal, it would follow that:
  - (i) The TTP did not in fact have jurisdiction to consider GBRf's access proposals as related to the Hybrid Timetable and was incorrect in making a determination in relation to them;
  - (ii) The TTP did have jurisdiction to consider GBRf's access proposals as related to the D-26 Weekday Timetable and was incorrect in not making any determination in relation to them; and
  - (iii) As a result, the TTP would only have jurisdiction in relation to a timetable that has not, and will not, be implemented. However, the TTP would not have jurisdiction to make decisions as regards the Hybrid Timetable which has been implemented and is running at present. Such a situation would be absurd. This would mean that the TTP's determination on the Hybrid

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<sup>65</sup> Paragraph 4.8 of Network Rail's Response Notice to DBC's Appeal to ORR

<sup>66</sup> Paragraph 5.2 of Network Rail's Response Notice to DBC's Appeal to ORR

<sup>67</sup> Paragraph 5.3 of Network Rail's Response Notice to DBC's Appeal to ORR

<sup>68</sup> Paragraphs 5.24 – 5.26 of Network Rail's Response Notice to DBC's Appeal to ORR

Timetable would have been *ultra vires*, and its decision not to consider the D-26 Weekday Timetable Train Slots will be shown to be impermissible.<sup>69</sup>

## GBRf's and DBC's reply

81. In reply to Network Rail's Response Notice<sup>70</sup>, GBRf stated that Chapter H, Rule 1 of the ADRR provides for a very wide remit for the TTP and that the TTP is able to determine matters other than solely relating to decisions on allocating capacity. GBRf submitted that the TTP has a broad remit under the Network Code and that the TTP had jurisdiction to determine how the Timetable was produced, implemented and the issues that arose from this.
82. GBRf further submitted that the offer of Train Slots at D-26 is contractually binding and may not be withdrawn without consent and that such consent was neither requested nor granted.
83. In reply to Network Rail's Response Notice<sup>71</sup>, DBC also referred to the wide scope, afforded by Chapter H, Rule 1 of the ADRR, for the TTP to determine any type of dispute that arises out of or in connection with issues of timetabling. DBC stated that, given the provisions contained in Chapter H, Rule 1 of the ADRR, and that no Involved Party had applied under Chapter H, Rule 7 of the ADRR, meant that the TTP did have jurisdiction to determine TTP1331 and TTP1376. DBC argued that its view was further supported by Chapter H, Rule 6 of the ADRR, which states that, subject to Chapter H, Rules 7 and 8 of the ADRR, any dispute which is to be submitted to the TTP under the Rules shall proceed according to Chapter H of the Rules. DBC submitted that "*ADR rules H7 and H8 allow Involved Parties after the Notice of Dispute is served to apply to the Hearing Chair for a ruling if they consider that the dispute (or some aspects of it) is not a Timetabling Dispute. Upon receipt of such application, the Hearing Chair may give such directions as he/she determines are appropriate and, if necessary, to remit the dispute (or aspects of it) to allocation in accordance with Part B of the ADR Rules.*"<sup>72</sup> DBC submitted that it disagreed with the Determination's and Network Rail's narrow interpretation of jurisdiction to determine TTP1331 and TTP1376.
84. DBC stated that it is clear from the timetable development process set out in Part D of the Network Code that the New Working Timetable forms a stage in the timetable development process, with obligations on Network Rail to carry out actions by key

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<sup>69</sup> Paragraphs 6 – 11 of Network Rail letter to ORR dated 9 January 2019

<sup>70</sup> GBRf letter to ORR, dated 29 January 2019

<sup>71</sup> DBC letter to ORR, dated 31 January 2019

<sup>72</sup> DBC letter to ORR, dated 31 January 2019, page 2

milestones. The Hybrid Timetable did not follow that process and was developed under processes outside of Part D.

85. DBC also confirmed that it was not seeking to overturn the Hybrid Timetable for December 2018, but to ensure that the approach taken does not occur again.

## **Network Rail's rejoinder**

86. Network Rail submitted a rejoinder to DBC's reply<sup>73</sup>, in which it replied to the new points raised on Chapter H, Rules 7 and 8 of the ADRR. Network Rail submitted that:
- (a) Neither DBC nor GBRf had made any reference to Rules 7 or 8 before the TTP Hearing Chair.
  - (b) In any event, Network Rail's Sole Reference Document was in effect to comply with the provisions of Rules 7 and 8, even though these provisions were not expressly mentioned.
  - (c) The matter was handled by the Hearing Chair at the TTP hearing, exactly in the way contemplated by the ADRR and that DBC's argument was therefore without merit.
  - (d) In any event, Rules 7 and 8 in no way establishes or expands the jurisdiction of the TTP.

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<sup>73</sup> Network Rail letter to ORR dated 6 February 2019

## ORR's consideration of the appeals

88. ORR has carefully considered the issues involved in these appeals and has considered in detail the Determination and the entirety of the submissions made by GBRf, DBC and Network Rail.
89. ORR considers that these appeals raise the following issues:
- (a) Whether the TTP was correct in determining that TTP1331 and TTP1376 raised issues which were outside its jurisdiction.
  - (b) If the TTP was not correct, whether the Hybrid Timetable properly took effect as the New Working Timetable which became the December 2018 Working Timetable.
  - (c) Whether the TTP gave proper consideration to the disputes raised by GBRf regarding Train Slots offered to it in the December 2018 Working Timetable.
90. This determination covers the first two of these issues. We will consider the third issue separately before concluding our work on GBRf's appeal.

## The jurisdiction of the TTP

91. GBRf (supported in argument by DBC) appeals the statement in the Determination that:

*"The Panel was satisfied that the powers set out in Condition D5.3.1 did not extend to allow the Panel to determine:*

- (a) issues relevant to the production of the New Working Timetable;*
- (b) the points of principle advanced by GBRf; or*
- (c) matters of contract, namely whether the D-26 Weekday Timetable is contractually binding on the Dispute Parties or a breach of the Network Code<sup>74</sup>.*

92. The TTP considered that its jurisdiction did not allow it to consider these matters<sup>75</sup>.

93. The principal provision of the Network Code setting out the jurisdiction of the TTP in relation to a timetabling appeal is Condition D2.7.2, which states that:

*"Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it... provided that an appeal is lodged within twenty Working Days of its publication. All such appeals shall be conducted in accordance with Condition D5".*

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<sup>74</sup> Section H, paragraph 74 of the Determination

<sup>75</sup> Section H, paragraph 75 of the Determination

94. In accordance with Condition D5.1, the TTP's determination is to be in accordance with the ADRR, which (through Chapter A, Rule 5) make clear that its determinations are to be reached on the basis of the legal entitlements of the parties and on no other basis.
95. In essence, ORR considers that Condition D2.7.2 provides the TTP with jurisdiction to consider any issue which it is necessary for it to consider to properly determine a Timetable Participant's appeal against the New Working Timetable. We deal with the particular issues further below:

***Matters of contract and breaches of the Network Code***

- (a) We consider that it is beyond any doubt that under Condition D2.7.2 the TTP is permitted, and required, to consider matters of contract. It is required to determine whether an appeal should succeed on the basis of the legal entitlements of the parties set out in the Network Code. This necessarily entails concluding as part of the appeal whether Network Rail (or, as the case may be, a Timetable Participant) has complied with its contractual obligations.
- (b) The contractual impact of the TTP's decision is given effect by any order of the TTP under Condition D5.3.1 and by the impact of that determination as persuasive authority in any future appeal to the TTP<sup>76</sup>. In addition, Condition D5.7.1 provides that where a decision of Network Rail is overturned on appeal, Network Rail may be liable in respect of that decision, but only where it was made in bad faith or was unreasonable.
- (c) Frequently an appeal will involve the TTP considering whether Network Rail has made timetabling decisions in accordance with Condition D4 of the Network Code (such as whether Network Rail has correctly applied the Decision Criteria<sup>77</sup>). However, appeals may require the TTP to consider other provisions.

***Points of principle***

- (d) In determining a particular appeal against the New Working Timetable, it may be necessary for the TTP to reach a conclusion on points relating to the interpretation or operation of the Network Code which might be relevant in future timetable preparation or disputes and which might be described as '*points of principle*'.
- (e) If it is necessary for the TTP to form conclusions on such points to determine the appeal, it must do so. Such determinations then form persuasive authority in any future appeal.
- (f) For completeness, we note that the ADRR does provide for the TTP to refer specified regulatory issues to ORR for determination prior to the TTP making its

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<sup>76</sup> Chapter A, part 7 of the ADRR

<sup>77</sup> Set out in Condition D4.6 of the Network Code

own determination in an appeal<sup>78</sup>. In some cases, the TTP may consider that it would be appropriate to make such a reference.

### ***The production of the New Working Timetable***

- (g) Condition D2.7.2 sets out a right for Timetable Participants to appeal against “*the New Working Timetable... within twenty Working Days of its publication*” (emphasis added). The provision envisages that there is a particular timetable which is subject to the appeal process.
- (h) We therefore agree with Network Rail that, in order to consider an appeal, the TTP must necessarily conclude what is the New Working Timetable published under Condition D2.7.1 which should be treated as the timetable which is capable of appeal<sup>79</sup>. The TTP cannot make a determination without having formed a view on the timetable which is the relevant starting point for the purpose of the appeal process.
- (i) This is not inconsistent with the reference in Condition D2.7.2 to being able to appeal against ‘*any part...*’ of the New Working Timetable. Those words simply acknowledge that parts of the relevant timetable may be challenged. The TTP must still come to a conclusion on which timetable is relevant. Indeed, the TTP cannot determine an appeal against any part of a timetable without first identifying the relevant timetable.
- (j) Generally, the issue will not be contentious. But if there is a dispute between the parties on this point, the TTP must consider that dispute as part of the appeal. It must conclude which is the relevant timetable on the basis of the legal entitlements of the parties set out in the Network Code. The conclusion would then influence what the TTP was permitted to consider in the appeal.
- (k) In addition, we note that consideration of the production of the New Working Timetable may in some cases assist the TTP in determining whether Network Rail erred in the particular decisions it made in relation to that timetable which are under appeal.

96. However, despite having jurisdiction to come to conclusions on matters of contract, points of principle and the production of the New Working Timetable, we conclude that the TTP’s jurisdiction is limited to determining the appeal against the New Working Timetable. The Network Code does not empower the TTP to make binding pronouncements on the interpretation or operation of the Network Code, or on the compliance of Network Rail with its contractual obligations, to the extent not necessary for it to determine the appeal before it against the New Working Timetable.

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<sup>78</sup> Chapter C of the ADRR

<sup>79</sup> Paragraph 3.3.4 of Network Rail’s Response Notice to GBRf’s Appeal to ORR

97. In particular, the TTP may be required to consider the process of the development of the New Working Timetable in determining an appeal. However, this would be for the purpose of enabling it to determine an appeal. It is not the TTP's role to make binding pronouncements on compliance with that process, separate from its determination of the appeal against the New Working Timetable itself.
98. The TTP considered that its jurisdiction was constrained by Condition D5.3.1. We do not agree. Instead, the limits of the TTP's jurisdiction are set out in Condition D2.7.2. We agree with DBC that Condition D5.3.1 sets out powers which are available to the TTP once it has determined whether or not the appeal should succeed. The language of Condition D5.3.1 is permissive, rather than being restrictive<sup>80</sup>.
99. We agree with GBRf that, considering the Network Code as a whole, the broad remit of the TTP is supported by Chapter A, Rule 5 of the ADRR. However, it is Condition D2.7.2 which sets out the TTP's jurisdiction and we do not consider that this is broadened by Rule 5.
100. In the circumstances of these appeals, GBRf appealed two timetables to the TTP and these were (quite properly in the circumstances) heard together. Both appeals to the TTP related to Train Slots which GBRf considered should have been allocated to it in the December 2018 Working Timetable and its failure to secure the desired Train Slots.
101. There was a dispute between GBRf and Network Rail as to which timetable should be treated as the timetable which was capable of appeal. GBRf submitted that it was the D-26 Weekday Timetable and Network Rail submitted that it was the Hybrid Timetable. It was necessary for the TTP to come to a conclusion on which timetable was subject to the appeal process in order to properly determine the appeal.
102. The TTP was therefore required to come to a conclusion on that point and, to the extent doing so involved consideration of contractual obligations or points of principle, it was required to give that consideration.
103. Network Rail submitted that it would be illogical for ORR to determine that the TTP has jurisdiction in areas which the TTP has stated are not within its sphere of expertise or jurisdiction, for which it does not have the structures in place and which it has already recognised it is not well placed to decide<sup>81</sup>. ORR does not agree. The proper position on jurisdiction depends upon the relevant contractual provisions. The TTP's view of its role set out in a particular decision is not determinative. It is not

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<sup>80</sup> The exception to this is the limit on the TTP's power to substitute its own decision for Network Rail in Condition D5.3.1(c), but this does not negate the general point.

<sup>81</sup> Paragraph 3.14 of Network Rail's Response Notice to GBRf's Appeal to ORR



illogical for ORR to make its own finding on what those provisions mean as part of an appeal against the TTP's decision.

104. In relation to the issues around jurisdiction, ORR concludes that the TTP was incorrect to conclude that its own jurisdiction did not allow it to determine issues relevant to the production of the New Working Timetable, points of principle advanced by GBRf or matters of contract. The TTP was required to consider these matters to the extent necessary to properly hear GBRf's appeal. In particular, in this appeal this meant that the TTP was required to consider whether the D-26 Weekday Timetable or the Hybrid Timetable should be treated as the timetable which was capable of appeal under Condition D2.7.2<sup>82</sup>.

## The New Working Timetable under Condition D2.7.1

105. DBC (supported in argument by GBRf) appeals the TTP's Determination that the Hybrid Timetable replaced the D-26 Weekday Timetable as the New Working Timetable. DBC also asks ORR to determine that the New Working Timetable cannot be unilaterally replaced by Network Rail after D-26<sup>83</sup>.

106. As a preliminary point, DBC clearly set out in its Notice of Appeal the findings in the Determination against which its appeal is brought<sup>84</sup>. We therefore do not agree with Network Rail that there is no decision of the TTP for ORR to review on this issue<sup>85</sup>.

107. In addition, ORR does not accept Network Rail's argument that the Hybrid Timetable was necessarily the New Working Timetable, because it was due to be (and was) implemented and was the only timetable which could affect Timetable Participants<sup>86</sup>. If, as DBC submits, the Hybrid Timetable was not legally valid, it could not have been the New Working Timetable against which appeals could be brought. It would then be necessary to identify which timetable was valid. Whether or not the Hybrid Timetable properly took effect as the New Working Timetable which became the December 2018 Working Timetable depends upon the proper interpretation of the Network Code, applied to the relevant facts.

108. The meaning of the term 'New Working Timetable' is set out in Condition D2.1.6 of the Network Code:

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<sup>82</sup> In addition to these points of principle, GBRf raised a point of principle relating to Condition D4.2.2 (Section C, paragraph 16(iii) of the Determination). This relates to the issue of Network Rail's consideration of Train Slots and is not covered further in this determination.

<sup>83</sup> Paragraph 18 of DBC's Notice of Appeal

<sup>84</sup> Section H, paragraphs 71 and 76 and Section I, paragraph 80 of the Determination

<sup>85</sup> Paragraph 3.10 of Network Rail's Response Notice to DBC's Appeal to ORR

<sup>86</sup> Paragraphs 3.8-3.9 of Network Rail's Response Notice to GBRf's Appeal to ORR

*“[...]The prior Working Timetable is then subject to a process of amendment under Condition D2 and during this period shall be referred to as the “New Working Timetable”. The timetable which the New Working Timetable becomes on a Timetable Change Date is the Working Timetable”.*

109. The New Working Timetable is the timetable developed by Network Rail, before it becomes the Working Timetable. Condition D2 of the Network Code sets out a detailed chronological process of consultation and revision of the timetable, starting with the timetable published at D-26 in the previous timetable process and running until D-26 in relation to the timetable being developed. There are likely to be many versions of the New Working Timetable as the timetable is amended throughout the process.
110. It is clear from Condition D2.1.2 (supported by Conditions D1.1.3, D2.1.4 and D2.1.5) that Network Rail is required to follow this process.
111. The fixed end point in the Condition D2 process is in Condition D2.7; the required publication of a New Working Timetable and the entitlement for Timetable Participants to appeal against it. Following that stage, Condition D3 sets out processes for specified variations to be made to the New Working Timetable.
112. The key provision for the purposes of this appeal is Condition D2.7.1:
- “The New Working Timetable shall be published by Network Rail at D-26, subject only to variations made in the course of the appeal process described in this Condition 2.7”.*
113. ORR notes the following points from Condition D2.7.1:
- (a) It sets out an obligation on Network Rail.
  - (b) That obligation is to publish the New Working Timetable (being a particular version of the New Working Timetable).
  - (c) The obligation is to publish the New Working Timetable by a particular point in time (D-26).
  - (d) The words ‘*subject only to variations made in the course of the appeal process...*’ must apply to the New Working Timetable, but they form part of the obligation imposed on Network Rail under this condition. Strictly, there appears to be an omission in the Network Code here, because the New Working Timetable must also necessarily be subject to any changes made through the processes set out in Condition D3.
114. We consider that the fact that Condition D2.7.1 is imposing an obligation on Network Rail is significant in interpreting the final words limiting variation (quoted above). In our view, it has the effect that those words should not be treated as setting out a

general rule limiting variation of the New Working Timetable after D-26 (i.e. that the New Working Timetable can only be varied by appeal and Condition D3 processes after that date). Instead, we consider that the meaning of the final words limiting variation is that the New Working Timetable which Network Rail must publish is the New Working Timetable which (it considers) will be subject only to those limited variations. Those words effectively prescribe what must be published.

115. ORR concludes from these points that Condition D2.7.1 requires Network Rail to have made a final decision on the New Working Timetable, which it intends to implement as the Working Timetable on the Timetable Change Date (subject only to variations made through the appeal process and Condition D3 processes). The timetable on which that final decision is made must be published by D-26.
116. ORR considers that this is the proper interpretation on the basis of the wording of Condition D2.7.1. It is also consistent with the intended purpose of the provision, which forms part of a process of set milestones for the biannual timetable change.
117. ORR considers that the framework set out in the Network Code is designed to provide for the development of each new timetable, starting from the Prior Working Timetable and ending at the Timetable Change Date when the New Working Timetable becomes the Working Timetable.
118. Network Rail's work on the New Working Timetable is time limited, balancing the need for adequate time to conduct the timetable development process with the need of Network Rail and Timetable Participants for a level of certainty around the future timetable by a particular point in the process. This needs to allow adequate time for any legal and practical steps necessary to implement the timetable (including, for example, time for any appeal process and for driver rostering).
119. By D-26 Network Rail must reach a final decision, providing certainty for Timetable Participants that there will thereafter be changes only through appeals and through the limited processes set out in Condition D3. It is not sufficient for Network Rail to publish a timetable at this date which is indicative or draft. It must have given sufficient consideration to produce its final decision, subject only to the use of the specific further processes under the Network Code.
120. This requirement for a final decision has an important consequence under the Network Code, because Condition D4.7.1 provides that:

*'Save where expressly otherwise stated in this Part D, where Network Rail has announced a final decision in respect of any process regulated by the Part D, that decision shall be:*

  - (a) *binding on Timetable Participants save to the extent that it is changed by an appeal authorised by this Part D;*

- (b) *binding on Network Rail save to the extent that:*
  - (i) *Network Rail is expressly permitted by any provision of this Part D to deviate from or amend that decision; or*
  - (ii) *a decision is changed by an appeal authorised by this Part D”.*

121. Where Network Rail has made a final decision in accordance with Condition D2.7.1, Condition D4.7.1 provides that that decision will be binding other than where the Network Code expressly provides for it to be changed.
122. We see no basis under the Network Code for making changes to the New Working Timetable once Network Rail has complied with the obligation in Condition D2.7.1 to publish a timetable on which it has reached a final decision, other than through the appeals process and the processes set out in Condition D3. Excluding changes through these processes, the New Working Timetable has become binding within the meaning of Condition D4.7.1.
123. Network Rail submitted (and the TTP accepted) that Network Rail was entitled to produce a Hybrid Timetable ‘... *not least in the light of Network Rail’s responsibility under the Network Code to produce the Working Timetable, the conditions of its licence and the obligations as to the standard of Network Rail’s performance of its contractual obligations under clause 4 of its track access agreements*’<sup>87</sup>.
124. Network Rail has not been clear about how these obligations could permit it to depart from the provisions of the Network Code set out above. ORR concludes that there is no provision of the Network Code or the track access agreements which would permit such a departure and no reason why Network Rail’s licence obligations exempt it from its obligations under the Network Code in the way that it has implied.
125. In their appeals, GBRf and DBC both submitted that there was no basis for Network Rail to revise the New Working Timetable following its publication at D-26<sup>88</sup> and that any timetable published at D-26 necessarily becomes binding, subject to appeal. We do not agree with this analysis. In particular:
- (a) As set out above, we do not consider that such an interpretation accords with the meaning of Condition D2.7.1, where the limitation on variations is expressly part of the obligation on Network Rail to publish the New Working Timetable.
  - (b) Condition D2.7.1 does not use clear words to state that the New Working Timetable which is published necessarily becomes binding (in contrast to the clear words used in Condition D4.7.1).

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<sup>87</sup> Paragraph 3.3.9 of Network Rail’s Response Notice to GBRf’s Appeal to ORR

<sup>88</sup> GBRF’s Reply, p3 and paragraph 18 of DB Cargo’s Notice of Appeal

- (c) Condition D4.7.1 provides for final decisions to be binding, but permits this to be deviated from in other parts of Part D. If Condition D2.7.1 were intended to mean that any decision of Network Rail at D-26 (whether intended to be final or not) were binding, this would have been done clearly - to signify a deviation from Condition D4.7.1. There is no clear deviation, suggesting that the standard position set out in Condition D4.7.1 is intended to apply.
- (d) As set out above, we consider that the intended purpose of the provision is that the New Working Timetable that Network Rail is obliged to publish must be its final decision as to the timetable it intends to become the Working Timetable at the Timetable Change Date (subject to appeals and Condition D3 processes). It is not consistent with that purpose to read any timetable published by D-26 as being binding.
- (e) In particular, if any timetable published at D-26 would necessarily become binding, subject to appeal and Condition D3 processes, this could have perverse consequences. For example, if Network Rail had published only a partial timetable (e.g. only weekday services) at D-26 due to problems it was experiencing leading to a delay, the binding timetable would not include weekend services. If this had been the intention of Condition D2.7.1, we consider that the Network Code would have contained further provision for what would happen in such circumstances. Similarly, it would have been made clear what would happen if Network Rail failed to publish a timetable at D-26 altogether. We do not consider that it was the intention of Condition D2.7.1 that the appeal process and Condition D3 processes would be the only available mechanism to rectify major gaps in the New Working Timetable in such circumstances.

126. In the circumstances of this appeal, in light of the proper interpretation of Condition D2.7.1 as set out above, ORR has considered whether Network Rail made a final decision by D-26, meaning that the D-26 Weekday Timetable is binding as the New Working Timetable as GBRf and DBC have submitted and, consequently, that the Hybrid Timetable would not have been binding.

127. It is noted that Network Rail has stated in these appeals that *'the D26 Timetable was never a final decision of Network Rail for the purposes of D4.7 of the Code'*<sup>89</sup>. In other words, Network Rail does not consider that the D-26 Weekday Timetable constituted a final decision.

128. Although Network Rail's explanation is revealing, ORR has also considered the evidence and formed its own view. In particular, we note that Network Rail wrote to Timetable Participants at the same time as publishing the D-26 Weekday Timetable on 8 June 2019, explaining what was being published. In particular:

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<sup>89</sup> Paragraph 4.3.3 of Network Rail's Response Notice to GBRf's Appeal to ORR

- (a) It was stated expressly that SO and SU (weekend) schedules *'are not the final SO and SU schedules for the December 2018 Timetable... are subject to change and will need to be significantly revised'*<sup>90</sup>. The communication on the D-26 Weekday Timetable stated expressly that it did not constitute a final decision for certain services in the New Working Timetable. As noted above, ORR does not consider that Condition D2.7.1 envisages Network Rail making a final decision only for weekday services in the New Working Timetable.
- (b) In any case, even in respect of the SX (weekday) schedules, the letter sets out an *'offer'* period, during which the operator must give a *'response'*<sup>91</sup>. Operators were requested to *'consider bidding service reductions back to Network Rail during the offer response period in order to deliver improved outcomes...'*<sup>92</sup>. There would then be a *'confirmation'* before the appeal period deadline. The making of such an offer is not consistent with Network Rail making a final decision. ORR does not consider that Condition D.2.7.1 envisages Network Rail publishing only an offer at D-26<sup>93</sup>.
- (c) The letter stated that:

*Network Rail is continuing to engage in dialogue with the industry and government with regards to the steps to be taken to reduce the risks associated with future significant timetable changes, with an immediate focus on actions and other options for the December 2018 Timetable. I will write to you further on this matter in due course.*<sup>94</sup>

This further supports the argument that the D-26 Weekday Timetable was not intended to be final.

129. ORR concludes from the evidence that Network Rail is correct to say that the timetable published at D-26 did not constitute a final decision. On that basis, the D-26 Weekday Timetable did not become binding under Condition D4.7.1 of the Network Code.

130. For the reasons set out above, Network Rail's failure to make a final decision on the New Working Timetable by D-26 was not compliant with the timescale set out in Condition D2.7.1 of the Network Code for it to publish the New Working Timetable (subject to appeals and Condition D3 processes). However, despite Network Rail's

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<sup>90</sup> Network Rail's Sole Reference Document, Appendix 1, p1

<sup>91</sup> Network Rail's Sole Reference Document, Appendix 1, para 5

<sup>92</sup> Network Rail's Sole Reference Document, Appendix 1, p1

<sup>93</sup> We understand that, for some time, Network Rail and train operators have been treating the timetable published at D-26 as an offer, with Network Rail asking operators for a response by D-24 and finalising it at D-22. Our role in this appeal does not extend to determining matters outside the factual ambit of the case before us and we make no further comment about this practice in this determination.

<sup>94</sup> Network Rail's Sole Reference Document, Appendix 1, p1

failure to comply with the timescale, ORR considers that the obligation to make and publish a final decision continued to apply<sup>95</sup>.

131. ORR has considered whether the obligation was complied with subsequently (notwithstanding that the time period was not met).
132. Network Rail notified timetable participants of its intention to adopt the Hybrid Timetable on 17 August 2018<sup>96</sup> and offered this further version of the New Working Timetable to Timetable Participants on this date. As noted above, this offer did not constitute compliance with the obligation in Condition D2.7.1 to make and publish a final decision. However, although the precise date of publication does not appear to be clear from the evidence before us, we are satisfied that Network Rail subsequently published its confirmed decision to implement the Hybrid Timetable (as a final decision). Timetable Participants were given an opportunity to appeal by 14 September 2018<sup>97</sup>. Network Rail implemented the Hybrid Timetable on 9 December 2018.
133. ORR concludes that, although the D-26 Weekday Timetable did not constitute Network Rail's final decision under Condition D2.1.7, the Hybrid Timetable did constitute its final decision (thereby belatedly meeting Network Rail's obligation). The Hybrid Timetable became binding (subject to appeal and D3 processes) at the point Network Rail published that final decision. That timetable is therefore the relevant timetable for the purpose of any appeal under Condition D2.7.2.
134. In conclusion in relation to the New Working Timetable under Condition D2.7.1, as set out above, we see no basis under the Network Code for revising the New Working Timetable once Network Rail has made a final decision and published the timetable (other than as permitted through appeals or Condition D3). However, we have concluded that Network Rail did not make a final decision by D-26 in relation to the December 2018 Working Timetable. Instead the Hybrid Timetable, which was the final, binding timetable, was not published until after D-26. In effect, Network Rail was late in meeting its obligations under the Network Code.
135. The purpose of ORR's consideration in these appeals is to determine whether the Hybrid Timetable properly took effect as the New Working Timetable against which appeals could be brought under Condition D2.7.2, as it was a ground of appeal that the TTP determined this point incorrectly. We have concluded that the TTP was correct to determine as it did, although for the different reasons set out above.

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<sup>95</sup> See Condition A1.1 of the Network Code

<sup>96</sup> GBR's Sole Reference Document, Appendix C1

<sup>97</sup> GBR's Sole Reference Document, Appendix B

136. We have not considered the detail of the factual circumstances surrounding the development of the Hybrid Timetable in coming to this conclusion. In particular, we have not considered the merits of the approach taken, the detail of the industry collaboration on that approach or what alternatives were available. On the basis of the analysis set out above, it is unnecessary for us to do so to reach a conclusion on this issue.
137. However, it is important to note that in reaching our conclusion we have considered the provisions of Part D of the Network Code and concluded that it sets out a mandatory process for the development of the New Working Timetable, which provides stability and certainty for the industry. In coming to our conclusion in this appeal, we were necessarily required to consider whether Network Rail had followed that process to determine which timetable was the relevant timetable which is subject to appeal. Under the provisions of the Network Code, Network Rail is not entitled to replace the New Working Timetable at any time it wishes (but only in accordance with those provisions).



## Overall Conclusions

138. ORR concludes that the Determination misconstrued Part D of the Network Code in a number of important respects.
139. ORR concludes that the TTP was incorrect to conclude that its own jurisdiction did not allow it to determine issues relevant to the production of the New Working Timetable, points of principle advanced by GBRf or matters of contract. The TTP was required to consider these matters to the extent necessary to properly hear GBRf's appeal. In particular, in this appeal this meant that the TTP was required to consider whether the D-26 Weekday Timetable or the Hybrid Timetable should be treated as the timetable which was capable of appeal under Condition D2.7.2.
140. ORR agrees with GBRf that the Determination sets out a wholly unnecessarily narrow and restrictive view as to the TTP's own jurisdiction.
141. The Determination was correct in finding that the Hybrid Timetable properly took effect as the New Working Timetable. However, we do not agree with the reasoning set out in the Determination, which misconstrued Part D of the Network Code.
142. ORR concludes that Condition D2.7.1 requires Network Rail to have made a final decision on the New Working Timetable, which it intends to implement as the Working Timetable on the Timetable Change Date (subject only to variations made through the appeal process and Condition D3 processes). The timetable on which that final decision is made must be published by D-26.
143. We see no basis under the Network Code for revising the New Working Timetable once Network Rail has made a final decision and published the timetable (other than as permitted through appeals or Condition D3).
144. In relation to the December 2018 Working Timetable, Network Rail did not make a final decision by D-26 in relation to the December 2018 Working Timetable. Instead the Hybrid Timetable, which was the final, binding timetable, was not published until after D-26. In effect, Network Rail was late in meeting its obligations under the Network Code.
145. It is a necessary finding of this determination that Network Rail failed to comply with Condition D2.7.1 of the Network Code. However, that failure was not the publication of the Hybrid Timetable itself, but rather the failure to make a final decision on the timetable by D-26 and the subsequent delay in meeting its obligation under Condition D2.7.1. Any further issues in relation to this delay are outside the scope of this appeal and we do not consider them further.

## ORR's Determination of Issues of Jurisdiction ground of GBRf's Appeal

146. In light of the considerations above and having considered GBRf's Notice of Appeal and other relevant documents, ORR determines in relation to GBRf's appeal on issues of jurisdiction that the Determination misconstrued Part D in finding that the TTP's jurisdiction did not allow it to determine issues relevant to the production of the New Working Timetable, points of principle as to the ability of Network Rail to alter timetables and process Train Slots, matters concerning the contractual relationship between GBRf and Network Rail and whether the actions of Network Rail involved a breach of the Network Code.
147. ORR determines that the ground of GBRf's appeal relating to paragraph 74 of the Determination succeeds, that the paragraph is wrong and should be, in effect, struck out from the Determination. Consequently, ORR also determines that paragraphs 75 and 82 are also wrong and should be, in effect, struck out from the Determination.
148. GBRf argued that the D-26 Weekday Timetable was contractually binding, although this was not stated as a formal ground of appeal. To the extent this argument forms part of GBRf's appeal, ORR determines that the appeal in relation to paragraph 80 of the Determination does not succeed and that this paragraph is not wrong and so stands.

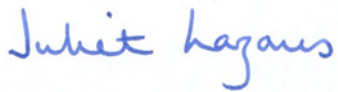
## ORR's Determination of DBC's Appeal

149. In light of the considerations above and having considered the Notice of Appeal and other relevant documents, ORR determines that:
- (a) the Network Code requires Network Rail to publish the New Working Timetable as a final decision at D-26;
  - (b) once Network Rail has published the New Working Timetable as a final decision, the New Working Timetable is not capable of being unilaterally withdrawn and replaced; and
  - (c) the Determination misconstrued Part D in stating that Network Rail was '*entitled to produce a Hybrid Timetable by reference to its obligation under its licence, in the various Track Access agreements to which it is a party and under the Part D*'<sup>98</sup>.
150. Consequently, ORR determines that DB Cargo's appeal succeeds in part and that the final sentence of paragraph 71 is wrong and should be, in effect, struck out from the Determination.

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<sup>98</sup> Section H, paragraph 71 of the Determination

151. However, ORR determines in relation to DBC's appeal that the Determination did not err in describing the Hybrid Timetable as the New Working Timetable, that the appeal in relation to paragraph 80 of the Determination does not succeed and that this paragraph is not wrong and so stands.



**Juliet Lazarus**

**General Counsel and Director of Competition**

**Duly Authorised by the Office of Rail and Road**

13 March 2019