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22 July 2015

Dear Jonathan,

APPEAL UNDER PART M OF THE NETWORK CODE

Thank you for your letter dated 14 July 2015 on the above matter which was copied to DB Schenker Rail (UK) Limited ("DB Schenker") in its capacity as a Respondent in respect of the appeal to Office of Rail Regulation ("ORR") by Network Rail Infrastructure Limited ("the Appellant") regarding paragraphs 6.1.1, 6.1.2, 6.1.3 & 6.1.5 of the determination TTP807 & TTP808 of the Timetabling Panel dated 12 June 2015 ("the Determination").

Introductory remarks

1.1. The purpose of this letter is to confirm that in accordance with Condition M5.1.1 of the Network Code, DB Schenker opposes the appeal for the reasons set out in this letter.

1.2. DB Schenker understands from the Notice of Appeal that the Appellant believes that the Determination is wrong and should be largely struck out because in summary:

- The Determination relies on paragraph 5.1 of a determination of the Timetabling Panel dated 8 December 2014 in respect of TTP371, TTP513, TTP514, TTP570 & TTP571. This paragraph was struck out by ORR in its decision dated 11 June 2015 following a separate appeal by the Appellant ("TTP371 Appeal"), therefore the Determination directly conflicts with the TTP371 Appeal.
- The Determination conflicts with Access Dispute Resolution Rule A7 which provides that "*In reaching its determination each and every forum shall... (b) be bound by the relevant decisions of the ORR on a regulatory issue and any relevant decision of the courts*".
- The Determination introduces an express link between a Timetabling Planning Rule changes under Part D of the Network Code and a Network Change under Part G of the Network Code which does not presently exist and such a link would likely have a significant detrimental impact on the operation of Parts D and G of the Network Code.

1.3. DB Schenker disagrees with the Appellant's view that the Determination is wrong and should be largely struck.

Link between Parts D & G of the Network Code

2.1. The primary issue DB Schenker wishes to focus on in its opposition to the appeal is whether or not Parts D and G of the Network Code are in fact linked in any way which might have a bearing on the outcome of the appeal, notwithstanding the TTP371 Appeal.

2.2. Whilst it may appear at first glance that the Network Code is made up of separate independently operating parts as the Appellant seems to suggest in respect of the matters pertaining to this appeal, DB Schenker considers that the Network Code is in fact one set of rules that should be considered holistically. In respect of this appeal it is clear that the process for proposing changes to the Network is contained within Part G of the Network Code and that the process for proposing changes to the Timetable Planning Rules ("TPRs") is contained in Part D. However, it is also true that in certain circumstances proposed changes to TPRs can also constitute Network Changes in their own right, whilst Network Change proposals can also result in consequent changes becoming necessary to TPRs.

2.3. The Network Code recognises the linkage between its various parts by including within Part A, a number of general provisions that apply across the Network Code as a whole. One of these provisions is the definition of the term "Network" which is specified in Condition A1.2 of the Network Code as follows:

"Network" means the network in respect of which Network Rail is the facility owner and which is situated in England, Wales and Scotland;

2.4. The term "Network" is used both within the definition of "Network Change" and the definition of "Timetable Planning Rules" as follows (emphasis added):

"Network Change means in relation to an Access Beneficiary:

*(a) any change in or to any part of the **Network** (including its layout, configuration or condition) which is likely materially to affect the operation of:*

- (i) the Network; or*
- (ii) trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; or*

*(b) any change to the operation of the **Network** (being a change that does not fall within paragraph (a) above which....."*

*"Timetable Planning Rules a document, formerly called Rules of the Plan, regulating, for any part of the **Network**, the standard timings and other matters necessary to enable trains to be included in the New Working Timetable or scheduled into the Working Timetable applicable to that part of the **Network**, being rules which specify (amongst other matters) any required:*

*(a) timings (including specified allowances) allowed for travel between specified points on the **Network** for each type of train and for each type of traction used, taking into account any particular constraints imposed by railway vehicles which may form part of the train;*
(b)"

2.5. Taking account of the above definitions, DB Schenker submits that the TPRs are only valid if they apply to the "Network" and that changes to the "Network" do not become part of the "Network" until a Network Change is proposed, consulted upon, established and implemented. This 'link' (made through common use of the definition of the "Network") is essential in DB Schenker's view otherwise there would be a strong risk that the "Network" that the TPRs are applied to and the physical "Network" (which is changed through Part G) will diverge if changes to TPRs that relate to Network Changes are implemented when the underlying Network Changes they are dependant upon are not. This would not only cause significant confusion but would also be contrary to the definition of TPRs in Part D of the Network Code (i.e. that they should relate to the Network).

2.6. In addition, if the changes to TPRs relating to the particular Network Change in themselves constitute "Network Change" because they are likely to materially affect the operation of trains on the Network, then they could not be implemented in any case if the associated Network Change (or alternatively a new Network Change proposal containing just the changes to TPRs) has not been established and/or implemented. By way of example using the proposed changes considered as part of the Determination, if the TPRs are changed to reflect the Network Change proposal at West Ealing but the Network Change proposal itself is not established and implemented, the TPRs would no longer be consistent with that part of the Network as it is currently constituted. Therefore, DB Schenker believes that the relevant process in Part G (in respect of Network Change) and the relevant process in Part D (in respect of any consequent changes to TPRs that rely on those Network Changes being implemented) need to be carried out in parallel and implemented together to avoid there becoming in effect two "Networks" one applying to Part D and the other to Part G.

2.7. It is the view of DB Schenker that the above link is what the Determination sought to confirm in paragraphs 6.1.1, 6.1.2 & 6.1.3 as follows:

6.1.1 That Timetable Planning Rule changes may not be implemented if the associated Network Change has not been established and implemented under Condition G.10 of the Network Code. Accordingly the present decision by Network Rail published on 2 March 2015 in relation to Timetable Planning Rules 2016 at West Ealing together with the consultation document dated 13 February 2015 shall be withdrawn.

6.1.2 *This determination does not prevent Network Rail proposing TPRs changes but these should be conditional upon the Network Change being established and implemented, and the changes to the Rules need to state whether TPRs changes are subject to the implementation of Network Changes.*

6.1.3 *This determination does not remove the onus upon Network Rail and Timetable Participants to discuss and to agree TPRs values in the absence of established Network Change.*

2.8. DB Schenker notes that Network Rail also refers to the "link" between the proposal to amend the TPRs at West Ealing and the associated Network Change in paragraph 3.6 of its Notice of Appeal i.e.:

"In conjunction with the proposal to amend the TPRs, the Appellant has also proposed a Network Change, initially issued to the Dispute Parties on 5 August 2014....."

2.9. DB Schenker submits that Network Rail's comments support its view (and the view of the Timetabling Panel) that the two sets of proposals (i.e. the Network Change and the associated amendments to TPRs at West Ealing) are linked and should be put into effect at the same time. It is worth noting in passing that two Timetabling Panels (i.e. TTP371 and TTP807 & TTP808 both including Network Rail representatives) have come to broadly the same conclusions in respect of these matters.

2.10. Furthermore, given that Network Change proposals in connection with major schemes (as is the case here) tend to be issued in accordance with Part G far in advance of any associated proposals for change to TPRs in accordance with Part D of the Network Code, there should ordinarily be little or no risk of the Network Change and associated changes to TPRs not being implemented at the same time. However, this is of course dependent upon Network Rail ensuring that the necessary processes in respect of Parts D & G of the Network Code are conducted in a timely manner by promptly addressing concerns raised or, if this is not possible, expeditiously referring the issues for determination in accordance with the Access Dispute Resolution Rules ("ADR Rules").

2.11. In this particular case, and despite its apparent importance, it is noted that Network Rail issued the relevant Network Change proposal nearly a year ago (and six months before the associated proposals to change the TPRs) and to DB Schenker's knowledge (confirmed by Network Rail in paragraph 3.7 of its Notice of Appeal) Network Rail has still not yet addressed the concerns raised by consultees nor referred the matter for determination in accordance with the ADR Rules. It could be argued that had the Network Change proposal been carried out more expeditiously, the Determination would not have been necessary (nor would this appeal) and the Working Timetable for December 2015 could have been planned with a greater degree of certainty and assurance.

2.12. In summary, therefore, and for the above reasons, DB Schenker submits that there is a 'link' between Network Change proposals in accordance with Part G of the Network Code and associated changes to TPRs (particularly if those TPRs also constitute

...

Network Change in their own right) as they all refer to and depend upon the same "Network" as defined in Part A of the Network Code.

Other matters relating to the appeal

3.1. The Appellant asserts that the Determination does not comply with ADR Rule A7 as it fails to take account of the TTP 371 Appeal as a binding precedent pursuant to ADR Rule A7(b). DB Schenker disagrees that the TTP371 Appeal is a binding precedent given that the issues it considered were matters of contractual interpretation and not regulatory issues. Therefore, DB Schenker considers that the TTP371 Appeal would have instead been considered under ADR Rule A7(a) as having persuasive authority which is also a situation recognised by the Appellant in paragraph 4.12 of the Notice of Appeal. However, as the TTP371 Appeal was issued on the same day as the Determination, it would have been difficult for the TTP371 Appeal to have been taken into account in the Determination under either limb of ADR Rule A7.

3.2. The Appellant submits in paragraphs 4.13 & 4.14 of its Notice of Appeal that Parts D and G are distinct and contractually separate parts of the Network Code. Part D refers to the process for revision of the timetable of the **Network** (emphasis added) and Part G deals with Network Change. The Appellant therefore appears to agree that the TPRs must relate to the Network but does not explain how the Network can include any Network Change that has not been established and/or implemented which would be the implication if proposed changes to TPRs relating to a Network Change proposal could be implemented irrespective of whether or not the underlying Network Change is also established and/or implemented.

3.3. In paragraph 4.15 of its Appeal Notice, the Appellant submits that the Network Code deliberately does not include a link between Parts D and G of the Network Code and that, as a result, paragraphs 6.1.1 & 6.1.2 of the Determination are therefore wrong as they create an inappropriate and unprecedented contractual link between Parts D and G of the Network Code. For the reasons set out in section 2 of this letter, DB Schenker strongly disagrees. It is essential to ensure that the TPRs reflect the Network as amended by Network Changes that have been established and/or implemented otherwise there would be a disconnect between the Working Timetable and the physical Network. This is what the Determination sought to convey in DB Schenker's view (i.e. that amendments to TPRs that are dependant upon related Network Change proposals should be implemented together).

3.4. In paragraph 4.16 of its Notice of Appeal the Appellant suggests that if a link between Parts D and G of the Network Code is introduced it would lead to significant operational issues and practical uncertainties for the wider industry and includes some examples in paragraph 4.18 of the Notice of Appeal as follows:

"An inability of Network Rail to draft a timetable that would take effect immediately after the implementation of a Network Change, which might prevent use being made of new infrastructure until a subsequent timetable change date."

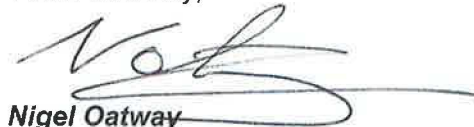
"An inability of Network Rail to draft a timetable to replace one that could not be operated on altered infrastructure."

3.5. DB Schenker takes the opposite view. If the link (which already exists in DB Schenker's view as explained in section 2 of this letter) were to be removed and TPRs could be amended irrespective of whether they are dependent upon underlying Network Changes, this would lead to far worse practical difficulties as Train Slots could be planned over infrastructure that does not exist. However, notwithstanding these comments, it does not seem to DB Schenker that the Determination would give rise to the difficulties mentioned above and prevent Network Rail drafting a timetable that would take effect immediately after the implementation of a Network Change nor an inability to draft a timetable to replace one that could not be operated on altered infrastructure.

3.5. It is interesting to note that the Appellant is not also appealing the first sentence of paragraph 6.1.5 of the Determination which states: *"There is reasonable doubt as to the information contained in the TPRs Notice, or that it accurately reflects the capability of the Network"* as this sentence includes a situation that could arise if the Appellant's appeal is upheld. That is if changes to TPRs could be implemented irrespective of whether or not the associated Network Change on which those TPR amendments depended was implemented, the TPRs could then include information that does not accurately reflect the capability of the Network.

DB Schenker hopes that these comments are helpful. If you have any queries, require any further information or wish to discuss DB Schenker's representations, please let me know.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nigel Oatway', with a long horizontal flourish extending to the right.

Nigel Oatway
Access Manager

cc.	David Young	Network Rail
	Sian Williams	Network Rail
	Ian Kapur	GB Railfreight
	Rob Holder	First Greater Western
	Jason Bird	Freightliner
	Tony Skilton	ADC Secretary