

Juliet Lazarus

General Counsel and Director of Competition
Tel: 0207 282 2089
Email: juliet.lazarus@orr.gov.uk

15 January 2019

GB Railfreight Limited
DB Cargo (UK) Limited

Network Rail Infrastructure Limited

By email only

Dear Sirs,

Appeals under Part M of the Network Code by GB Railfreight Limited (GBRf) and DB Cargo (UK) Limited (DB Cargo) in respect of decisions TTP1331 and TTP1376

1. On 19 December 2018, we confirmed that ORR was still considering whether or not to hear the above appeals. We also conveyed our decision that DB Cargo had standing to bring its appeal and requested further information from GBRf and DB Cargo on the remedies each is seeking in the event ORR decides to hear the appeals.
2. GBRf and DB Cargo responded to this request on 4 January 2019. Network Rail subsequently requested the opportunity to make representations in respect of this further information and was given a short period to make any further representations. These were received on 9 January 2019.
3. I have been appointed by ORR to determine whether or not ORR should hear these appeals and, if so, to determine them.
4. Under Condition M4.1 of the Network Code, the ORR may decide that the appeal should not proceed to it, including on the grounds that:
 - a. the matter is not of sufficient importance to the industry;
 - b. the reference is frivolous or vexatious;
 - c. the conduct of the appellant ought properly to preclude its being proceeded with;
or
 - d. it is appropriate or convenient for the matter instead to be disposed of by the High Court (in Scotland, by the Court of Session).
5. We have now received detailed representations on whether or not ORR should decide that the appeals should proceed, in particular Network Rail's representations that ORR should decide not to hear the appeals. Having considered all of these representations (including those summarised in this letter), we set out our response below.
6. We note that it has not been argued that the matter is not of sufficient importance to the industry.

Vexatious conduct and other conduct of the appellants

7. Network Rail submits that ORR should decide not to hear the appeals on the basis of the previous conduct of the appellants. In particular, in relation to GBRf's appeal, Network Rail submits that:
 - a. The volume of disputed train slots raised, GBRf's lateness in raising them and the fact that many of the disputed slots related to the timetable issued at D-26 (which Network Rail argues has been superseded) make bringing the dispute unconscionable and/or vexatious.
 - b. GBRf did not seek to develop any case in relation to the 63 disputed train slots in the hearing of TTP1331 and TTP1376 and is not fundamentally concerned about these slots. It is improper for it to seek to develop such a case on appeal.
 - c. The appeal was brought 12 days before the Hybrid Timetable took effect. GBRf cannot contemplate that a practical answer can be found within the time available and this is a further reason why GBRf's conduct is unconscionable or vexatious.
8. ORR considers that it should not lightly determine that an appeal should not proceed on the basis of vexatious conduct by the appellant, because such a decision removes a right of appeal. The threshold is a high one. In this case, we do not consider that Network Rail has provided satisfactory evidence to demonstrate that the threshold is met. In particular:
 - a. ORR considers that the TTP's determination raises issues which are of significant importance to the industry (including on the scope of its jurisdiction) and ORR's understanding is that this is not disputed. ORR does not consider that GBRf has acted in a vexatious manner by seeking to appeal that determination.
 - b. GBRf submitted before the TTP that the train slots in dispute should not have been a surprise to Network Rail. ORR can properly consider as part of the appeal whether the manner in which GBRf has disputed particular train slots should impact the outcome of an appeal. Such consideration would involve a detailed review of the facts, which is better suited to consideration as part of the appeal.
 - c. ORR is not aware that GBRf has failed to meet any deadline as part of the appeal process. While it is clearly preferable that an appeal is heard before the relevant timetable has come into effect, ORR does not consider that the bringing of an appeal at this time constitutes vexatious conduct.
9. Network Rail also submits that ORR should decide not to hear DB Cargo's appeal. In particular, DB Cargo did not itself appeal any part of the New Working Timetable or advance before the TTP the arguments now advanced. It would be wrong in principle for DB Cargo to now bring an appeal against the TTP's decision as a collateral challenge to the actions of Network Rail or to enable a timetabling appeal to force ORR to make a decision on a breach of contract. In its letter dated 9 January 2019, Network Rail also submitted that DB Cargo is not directly affected by the determination.
10. As noted above, on 19 December 2018 we decided that DB Cargo had standing to bring its appeal. The issue here is whether its conduct should preclude us hearing that appeal. ORR can see that there may be cases where a Timetable Participant appealing a decision of the TTP without previous involvement in the appeal, and entirely on grounds not raised before the TTP should not proceed.

11. However, in this case, we do not consider that DB Cargo's conduct should preclude us from hearing its appeal. In particular:
- a. As noted above, the TTP's determination raises issues which are of significant importance to the industry. If ORR proceeds to hear GBRf's appeal on the same issues of principle, it seems appropriate to also allow DB Cargo to bring its appeal; noting that DB Cargo was an interested party before the TPP. ORR does not consider that Network Rail is unduly prejudiced by this approach.
 - b. Although not directly affected by the determination of GBRf's train slots, we accept that DB Cargo is affected by the TTP's determination, given the potential for it to be followed in future TTP decisions. DB Cargo also clearly has an interest in the position of what is the correct New Working Timetable under the Network Code (noting that ORR has not yet determined that it has jurisdiction to make such a determination).
 - c. DB Cargo's appeal focuses specifically on the TTP's determination and on the specific reasoning of the TTP, including a submission that the determination and its reasoning was confusing. There are a number of points which flow directly from the TTP's determination and therefore the ORR does not consider it unreasonable that DB Cargo did not raise these points beforehand.
12. For these reasons ORR is not minded to refuse to hear the appeals on the basis of the previous conduct of the appellants.

Disposal by the High Court – Legal and factual complexity

13. In its Response Notices to both appeals, Network Rail submits that it would be more appropriate or convenient for the appeals to be disposed of by the High Court on the basis of the nature of the appeal. In particular:
- a. Consideration of the appeals may involve an in-depth exercise of factual, contractual and legal investigation and analysis – the issue is of construction and of law, not of industry practice.
 - b. Any investigation of the circumstances in which the Hybrid Timetable came to be published (which were factually complicated) would require more factual evidence and analysis than was, or could have been, before the TTP (or will be before ORR).
 - c. Such an investigation would not be appropriate for an appeal that is (or should be) confined to a review of the determination.
 - d. Neither would such an exercise be in accordance with the usual ORR procedure or timeframes. It would necessarily involve parties who are not involved in the appeals.
 - e. In contrast, the High Court process would permit the issues and factual evidence to be identified by reasoned pleadings and for that evidence to be adduced properly and considered by the most appropriate tribunal to determine these matters.
14. The Network Code creates a framework for appeals against TTP decisions to ORR. As well as the industry knowledge and expertise which ORR has available, it will often be

the case that ORR can determine an appeal more quickly and at a lower cost to the parties than would be the case through a High Court process.

15. It is not envisaged by the Network Code that an appeal to ORR would determine only matters of industry practice. The making of findings of law and fact are necessarily part of the role. This is reflected in Condition M8.1 of the Network Code, which allows ORR to set an appropriate process on the collection of evidence and consideration of legal issues (including through the appointment of a legal or technical assessor).
16. That the issues are complex does not necessarily mean that it would be inappropriate for ORR to hear the appeal and a number of previous appeals have involved complex issues of law and fact.
17. Nevertheless, there may be issues which should lead ORR to conclude that an appeal would be more appropriately or conveniently disposed of by the High Court. For example, the need to determine a point of law in an area where there is conflicting case law or the need to examine witnesses may suggest that a High Court process would be more appropriate. Whether or not there is such an issue will depend upon the particular facts of the case.
18. In this case, ORR does not consider that the points raised by Network Rail justify a refusal to hear the appeals on the ground that it would be more appropriate or convenient for them to be disposed of by the High Court.
19. It is noted that ORR's consideration of the appeals is not necessarily limited to a review. Under Condition M7.1 of the Network Code, the appeals are limited to a review of the TTP's decision unless the ORR considers that, in the circumstances of an individual appeal, it would be in the interests of justice to hold a rehearing. ORR considers that this allows sufficient flexibility for ORR to set a process which will enable it to determine the issues arising.
20. If, as part of the appeal and following a review of the TTP's decision, ORR is required to make findings of fact in relation to the preparation of the Hybrid Timetable, we are not persuaded that this would necessarily require representations from parties which are not parties to the appeal. However, we are satisfied that the Network Code is sufficiently flexible to enable ORR to obtain such representations if required.

Disposal by the High Court – ORR's previous involvement

21. Again, in its Response Notices to both appeals, Network Rail submits that, to the extent it is contemplated that dealing with the appeals may involve findings relating to the introduction of the Hybrid Timetable, ORR cannot properly act as arbiter in these appeals. Network Rail states that this is on the basis that:
 - a. ORR wrote to DfT to express support for the recommendation to proceed with the Hybrid Timetable.
 - b. The report published by ORR on the Independent Inquiry into the Timetable Disruption in May 2018 described the decision to de-risk the timetable as '*prudent and proportionate*' in the circumstances.
22. Although not stated expressly, it appears to ORR that these submissions may amount to representations that ORR should not hear the appeals on the basis of actual or apparent bias (due to ORR's previous involvement).


23. We confirm that ORR did have some involvement in the industry discussions around the introduction on the Hybrid Timetable. In particular:
- a. In a letter to Network Rail dated 25 June 2018, ORR stated that it very much supported the principle of de-risking the December 2018 timetable change, given the experience of the May 2018 change.
 - b. In a letter to DfT dated 28 June 2018 (referenced by Network Rail), ORR stated that it supported the option of a hybrid timetable for December 2018, given the experience of the May change.
 - c. In a letter to Network Rail (system operator) dated 29 June 2018, ORR stated that it welcomed '*NR's recent focus on understanding the key assumptions underpinning the next timetable change and its work with operators to assess the industry's readiness, the many risks... and the options for managing these risks*'.
 - d. In a letter to Network Rail dated 27 July 2018 (regarding findings of breach of Network Rail's network licence in relation to conduct leading up to the May 2018 timetable change) ORR required Network Rail to report to ORR on the process for the December 2018 timetable. ORR also required Network Rail to report publicly against its T-12 Recovery Plan for the December 2018 timetable. In this letter, ORR expressed support for the decision to '*de-risk implementation of the December timetable*'.
 - e. As noted by Network Rail, the report published by ORR on the Independent Inquiry into the Timetable Disruption in May 2018 described the decision to de-risk the timetable as '*prudent and proportionate*' in the circumstances.
24. It follows that ORR did, on a number of occasions, express support for de-risking the December 2018 timetable, including through the adoption of a hybrid timetable. ORR fully supported, and supports, the move to adopt a December timetable to reduce the risk of disruption to passengers and freight customers.
25. However, ORR was not asked to (and did not) express a view on how Network Rail should seek to implement the Hybrid Timetable in accordance with the provisions of the Network Code or express a view on whether the manner in which it chose to implement the Hybrid Timetable was permitted by the processes set out in the Network Code.
26. ORR does not consider that it is tainted by actual or apparent bias and is wholly satisfied that it can proceed to determine the appeals impartially on the basis of the provisions of the Network Code and the legal entitlements of the parties.
27. As sectoral regulator, there will often be appeals where ORR has had some previous involvement in the factual background to the matter. However, this is not of itself a reason to prevent ORR from properly determining appeals referred to it. That will require case by case consideration and, having considered our previous involvement in this case, ORR does not consider there to be any reason for it to recuse itself in these appeals.
28. Network Rail has already made representations on this issue, which have been considered. It is also assumed, from the fact that the appeals have been brought, that the appellants do not share the concerns raised by Network Rail about ORR's ability to act as arbiter in these appeals.
29. However, should GBRf or DB Cargo wish to make any representations on this issue, having considered what is set out above about ORR's involvement in the adoption of the

Hybrid Timetable, these should be made to us by 14:30 on Thursday 17 January 2019 at the latest.

Minded to decision

30. It follows that ORR is minded to hear both appeals, subject only to consideration of any representations which GBRf or DB Cargo wish to make in relation to ORR's previous involvement in the preparation of the Hybrid Timetable (as set out immediately above). Following the above time period, we will write to you with our decision and, if we decide to hear the appeals, set out the next steps.
31. To be clear, a decision that ORR is minded to hear the appeals does not involve any determination of whether the TTP was correct to decide that the disputes in TTP1331 and TTP1376 involved matters which were outside of its jurisdiction (including, but not limited to, contractual matters). ORR would necessarily determine the issue of jurisdiction as part of the review of the TTP's decision.

Yours faithfully



Juliet Lazarus