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Dear

**Appeals under Part M of the Network Code by GB Railfreight Limited (GBRf)
And DB Cargo (UK) Limited (DB Cargo) in respect of decisions
TTPI331 and TTPI376:**

Thank you for your letter of 18th January 2019 giving GB Railfreight the opportunity to respond to Network Rail's additional submissions, made on 13th December 2018 and on 9th January 2019, in respect of TTPI331 and TTPI376 decisions.

For clarity, the Respondent's two letters and an e-mail are titled as follows:

13th December 2018 – *Network Rail's Response Notice to GBRf's Appeal to the ORR dated 27 November 2018.*

9th January 2019 – *Appeals under Part M of the Network Code by GB Railfreight Limited ("GBRf") and DB Cargo (UK) Limited ("DB Cargo") in respect of decisions TTPI331 and TTPI376.*

9th January 2019 – *E-mail timed at 17:25 - Appeals regarding TTPI331 and 1376.*

With regard to Network Rail's letter of 13th December 2018 - *Network Rail's Response Notice to GBRf's Appeal to the ORR dated 27 November 2018* - GB Railfreight has the following comments and responses to make:

In GB Railfreight's view, Network Rail has sought to frustrate the laid down and agreed timetabling processes as defined in the Network Code. This appears to have been the case throughout these particular examples (TTPI331 and TTPI376), from the initially made timetabling decisions, arguments advanced in its Sole Reference Document, at the Timetable Panel Hearing itself, and in the letter dated 13th December 2018.



The central and over-arching points to GB Railfreight's current position are as follows:

- a) In the preparation of the defined and laid down timetable offers, the Network Code must be adhered to and;
- b) The formal publication of the 2019 Principal New Working Timetable was on 8th June 2018 as defined in The Network Code. This was, indeed, confirmed by Network Rail in a letter sent to GB Railfreight on 8th June 2018 titled "*Publication of 2019 Principal New Working Timetable*" along with relevant attachments.
- c) In the operation of the agreed Determination Procedure, and in the specific cases of TTPI331 and TTPI376, the Timetabling Panel determination, and any outcome of appeal to the determination, is to be based of the legal entitlements of the Dispute Parties and upon no other basis.

The events of the last seven months have shown that Network Rail believes that, in its currently approved Track Access Contract with GB Railfreight Limited, it can unilaterally depart from the provisions of Part D of the Network Code for its own convenience and without consequence.

Most of the provisions of Parts D and M (and Chapter H) of the Network Code are quite clear in meaning and it is of concern that Network Rail attempts to argue otherwise, through its legal representatives rather than conducting the arguments through its own employees responsible for timetable production decision-making.

In this particular Response Notice, Network Rail provides an introduction and then argues its points under five separate headings, to which GB Railfreight shall respond:

Request that the ORR makes a decision under M4.1.1 to refuse to hear the appeal:

In Item 2.1, Network Rail argues that this matter would "more appropriately and conveniently" be determined by the High Court. Although this is an option in the process of dispute resolution, it seems to GBRf somewhat premature when the standard agreed industry processes (i.e. TTP and, if necessary, an appeal to ORR) have yet to be exhausted.

Given the likely cost of an immediate legal route, and that the subject matter of the dispute is significantly concerned with industry processes that the High Court might not be familiar with, it is GB Railfreight's opinion that an appeal to ORR is the correct first course of action if the outcome of a Timetabling Panel Determination is not satisfactory to one or more parties. We are, therefore, pleased that ORR has decided to hear the appeal.

Response to "Jurisdiction" Section of the Appeal:

In terms of jurisdiction of a Timetabling Panel (TTP), Network Rail argues that the Panel "correctly" determined that it did not have the jurisdiction to pronounce on matters of principle. However, GB Railfreight's view is clear that Chapter H1 of the Network Code provides for a very wide remit for a Timetabling Panel.



Network Rail implies that a Timetabling Panel's jurisdiction is limited to evaluating decisions in allocating capacity, however this overlooks the wider remit of a TTP in also being able to determine on other matters:

Chapter H, H1, clearly states *“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...”*.

This is clearly a broad remit, and deliberately so, covering all aspects of the timetabling function across the industry. From this legal entitlement, as clearly written in the Network Code, it is GB Railfreight's view that the Timetabling Panel did, indeed, have jurisdiction to determine the subject matter presented to it as it was all directly related to how the December 2018 Timetable was produced, implemented, and issues thence arising. Observations and guidance also form a valuable part of any Timetabling Panel Determination.

Response to the “dispute in relation to train slots” section of the appeal:

In response to points made in this section, GB Railfreight still believes its claims to be relevant and in need of determination. While it is clear that Network Rail made the Hybrid Timetable become the Working Timetable on 9th December 2018, GBRf believes that it did not do so, legitimately, under the provisions of Part D of the Network Code.

Part D of the Network Code is clear that the New Working Timetable is *only* issued at D-26 and provides neither a mechanism for it to be on any other date, nor the ability for it to be superseded by any other timetable.

Condition D2.7.1 in the Network Code is clear on this legal entitlement stating *“The New Working Timetable shall [my emphasis] be published by Network Rail at D-26, subject only to variations made in the course of the appeal process described in this Condition D2.7”*.

This is deliberately so, as the consequential effects of not delivering at D-26 are that the processes for Informed Traveller (T-12) amended offers, and also the New Working Timetable for the subsequent timetable, are prejudiced. By Network Rail's own admission, the issue of the Hybrid Timetable undid the Informed Traveller recovery plan that had been in place earlier in the year.

From the legal entitlements of the Network Code, GB Railfreight is clear that the offer of train slots made at D-26 is contractually binding (as noted in the offer letter provided by NR) and may not be withdrawn without consent; such consent was neither requested nor granted.

With regard to the imposed Hybrid Timetable, in practical terms, GBRf, acting in good faith, accepted to work with the majority of the new train slots as differences were either negligible or non-existent.

Network Rail makes much of the “industry” decision to implement the Hybrid Timetable, as if the “industry” were one body with the authority to make such decisions, and in doing so also apparently possessing the authority to bypass Part D of the Network Code.



GB Railfreight must remind all parties that the Track Access Contract between GB Railfreight Limited and Network Rail Infrastructure Limited (dated 11th December 2016) is a *bilateral* agreement and no other parties are involved other than the Office of Rail and Road's statutory oversight.

The list of train slots in TTPI331 and TTPI376 represents the fallout from Network Rail's imposition of the Hybrid Timetable, and in some cases its lack of properly processing GBRf's Priority Date Notification Statement (PDNS at D-40) provided on 2nd March 2018.

GBRf submitted two Notices of Dispute - one in respect of the formal Network Code-dated offer of 8th June 2018, and the other in respect of the imposed Hybrid Timetable.

The latter Notice of Dispute was issued because of the uncharted territory in which GB Railfreight found itself. No challenge was made, at the time, regarding GBRf's ability to submit a Notice of Dispute at this stage.

Much is made in this section of Network Rail's letter as to GBRf's challenge on the lack of provision of adequate train slots that were not notified as "priority" in the run up to the issue of the Hybrid Timetable, however GBRf's understanding of the word "priority" is as its simple definition of "one being treated as more important than another or others". GB Railfreight had absolutely no expectation that every other outstanding disputed timetabling issue would be ignored by Network Rail, and which continue to be ignored even today.

Network Rail also makes reference to the potential for a disruptive effect on other operators' December 2018 Timetable train slots that have been offered and are now in operation, and that this should, therefore, preclude proper determination. GBRf believes this position to be against fair challenge to Network Rail's decisions.

GB Railfreight wishes for the correct decisions that should have been made at D-26 to be made now. It is inevitable that a challenge to Network Rail's decisions takes some time to bring to a hearing, after allowing a window of opportunity for Network Rail to correct its actions. In this instance, given the date of issue of the Hybrid Timetable, it is difficult to see how the whole process could have been done more quickly.

It is, therefore, disingenuous for Network Rail to argue that GBRf had brought the case too late and that an effect on other operators should not be countenanced. If the latter were such a concern, it would mean an effective appeal to Network Rail's decisions would be curtailed and that would then provide an incentive for Network Rail to delay dealing with concerns so that its decisions could not be challenged.

Indeed, GB Railfreight now finds itself in similar circumstances in respect of the May 2019 Timetable Offer, where Network Rail has not processed, or inadequately processed, GBRf's Access Proposals. The outcome of TTPI331 and TTPI376 appeals will have a direct bearing on how GBRf challenges Network Rail's decisions for the May '19 and future timetable offers. Only if the entire appeals process can be concluded in a small matter of weeks after the relevant D-26 date can likely effect on other operators be avoided.

Expedition:

GB Railfreight's view is that the Office of Rail and Road has already pronounced on this matter and GBRf respects its decision.



Costs:

GB Railfreight notes that Network Rail is making a request for costs on the basis that GBRf knew that the Timetabling Panel had no jurisdiction, that ORR would not have all relevant information if it overturned the TTP's decision, that the Hybrid Timetable is (as a whole) an accepted position (again quoting the "industry"), and that it has gone to considerable expense in responding. GBRf fully refutes all of these claims.

GBRf maintains that the TTP did have jurisdiction but failed to recognise that and act accordingly. Were ORR to overturn the appeal, then the issue of information could arise however ORR has the authority to request all the information it reasonably believes it requires (and may indeed appoint a legal or technical assessor as provided for in Condition M8.1).

Network Rail might have gone to considerable expense in dealing with these two appeals, but the extent of that cost is of its own making in using legal representatives to undertake the TTP process and deal with all aspects of the appeal rather than its own internal resources. While Network Rail is entitled to be represented by whomever it sees fit, it is envisaged that the TTP process (and by logical extension any subsequent appeal to ORR) should be legal but not legalistic; as much was stated in the guidance and recommendations regarding legal issues in the determination of TTP1065/66/68/69/73.

Furthermore, GB Railfreight believes that the extent of that expense has been compounded by Network Rail's legal representatives' unsolicited correspondence, examples of which I am responding to here, at no additional legal charge.

To that extent, GB Railfreight asks ORR to consider whether it requires Network Rail to comment any further on the contents of this letter given that Network Rail has made its points on a number of occasions already. GBRf notes that Network Rail has no entitlement under Part M to request that costs be awarded to it, as the question of whether to apportion costs, and in what manner, is a matter for ORR alone.

With regard to Network Rail's letter of 9th January 2019 - *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 TTP137* - GB Railfreight has the following comment:

GB Railfreight believes that the Juliet Lazarus letter, dated 15th January 2019, has already adequately dealt with the concerns that GB Railfreight had. GB Railfreight agrees with the contents of this letter and supports the "Minded to Decision".

With regard to Network Rail's e-mail of 9th January 2019 timed at 17:25 - *Appeals regarding TTP1331 and 1376* – GB Railfreight has the following comments and responses to make on the four further representations in the body of this e-mail:

GB Railfreight can confirm that it is not specifically seeking a full re-hearing as Network Rail, somewhat illogically, suggests. If the Office of Rail & Road decides that the Timetabling Panel determination was incorrect then it follows that the question of all of the train slots may need to be examined.



The assertion that a full re-hearing would not be “normal process” is puzzling; GB Railfreight is content to let ORR decide on matters, as provided by Condition M7.

The question of whether or not individual slots were identified as “priority” is dealt with above and is in any case not relevant here. GBRf strongly refutes the assertion that no serious attempt was made to request a TTP decision in respect of the trains slots – this was an integral part of the Sole Reference Document at the hearing, but was swept aside by the TTP because of its decision regarding the Hybrid Timetable.

With regard to the final point of this e-mail, GBRf is, indeed, technically able to submit Train Operator Variation Requests (TOVRs), however some individual circumstances prohibit this in some cases, e.g. capacity that can only be attained by the flexing of other operators’ services which is no longer within the gift of GBRf at this stage, and is unlikely to be agreed by the affected operators.

In any case, GB Railfreight submits that it has already made Access Proposals in respect of all of these train slots. It is Network Rail’s decisions, or refusal to process them that is the subject matter of part of this dispute.

Yours sincerely,

Head of Capacity Planning.

