
**APPEAL TO THE OFFICE OF RAIL AND ROAD
AGAINST A DETERMINATION OF
THE TIMETABLING PANEL OF THE ACCESS DISPUTES
COMMITTEE IN RESPECT OF DISPUTES
REFERENCE TTP 1331 / 1376 DATED 20 NOVEMBER 2018**

(A) BACKGROUND

1. The background, history and determinations sought by the dispute parties, and the submissions made, are recorded within Paragraphs 1-48 of the Determination dated 20 November 2018 ("**Determination**").
2. The oral evidence given at the hearing is as stated at Paragraphs 49-66 of the Determination.
3. The analysis, guidance, and determination of the Hearing Chair, Stephen Murfitt, is given at Paragraphs 68-85 of the Determination.

(B) GROUND OF APPEAL

4. GB Railfreight Limited ("**GBRf**") appeal to the Office of Rail and Road, pursuant to D 5.2 of the Network Code in respect of two distinct elements of the Determination. Those are essentially as follows:
 - 4.1 Issues of Jurisdiction - the Timetabling Panel erroneously determined (at Paragraph 74) that its own jurisdiction did not allow it to determine:
 - (a) issues relevant to the production of a New Working Timetable by Network Rail ("**NR**");
 - (b) points of principle raised by GBRf as to the ability of NR to alter timetables and process requested Train Slots;
 - (c) matters concerning the contractual relationship between GBRf and NR;
 - (d) whether the actions of NR involved a breach of the Network Code.
 - 4.2 The Panel's failure (at Paragraph 76) to consider GBRf's schedule of 63 disputed Train Slots because of a mistaken belief that they were drawn from a superseded timetable.

(C) DETAILED GROUNDS OF APPEAL - JURISDICTION

5. The primary purpose of a Timetabling Panel is as described in Chapter H, Part I, of the Network Code as follows:-

"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.*"

6. From a plain reading of that Chapter, the Timetabling Panel has a very wide remit in relation to the nature of the disputes referred to it.
7. References TTP 1331 and TTP 1376 are unquestionably "disputes", they have been referred to it by GBRf which, together with NR, are both "parties to an access agreement which incorporates Part D of the Network Code", and the disputes unquestionably arise "out of or in connection with issues of timetabling, timetable change and the allocation of capacity ...". The issues referred to at Paragraph 4.1 above are firmly within the jurisdiction of a Timetabling Panel.
8. In the circumstances, the Timetabling Panel has assumed a wholly unnecessarily narrow and restrictive view as to its own jurisdiction.
9. In particular, Condition D5.3.1 of the Network Code, as quoted by the Timetabling Panel at Paragraph 73 of its Determination, which describes the powers of the Panel, 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.
10. Condition D5.3.1 merely describes the powers which are available to the Timetabling Panel, and not the extent of the jurisdiction of the Panel. There is nothing within that Paragraph which limits the jurisdiction of the Panel in the way that it suggests.
11. This issue is clearly of importance, not just in connection with the present disputes, but is of considerable concern to GBRf in relation to how the Timetabling Panel acts in relation to future matters referred to it.
12. At the heart of this dispute is the entire legal basis upon which NR is entitled to issue, or subsequently alter, a New Working Timetable.
13. D2.7.1 of the Network Code specifically provides 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 D2.7."
14. There is no lawful mechanism by which NR is entitled to make unilateral changes to a New Working Timetable after D-26, except as provided above.
15. Although the Determination does say, at Paragraph 71, that the Panel was satisfied that NR 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". It does not identify any such obligation or, if it exists, how it overrides part D of the Network Code.
16. Furthermore, whilst Paragraph 72 of the Determination suggests that the Panel was unable to conduct an investigation into the process whereby the Hybrid timetable was produced, the reality is that no such investigation was necessary in circumstances where the Panel had already concluded at Paragraph 71 that the timetable had been produced in a manner which breached Condition D2.7.1.

17. By choosing to ignore D2.7.1, NR has caused considerable detriment to the interests of GBRf. It cannot be right, whatever the circumstances, that NR can wilfully disregard the processes specifically provided by Part D of the Network Code.
18. GBRf emphasises, for the avoidance of any doubt, that it is not seeking to undo the entirety of the December 2018 timetable, or seeking any substantial re-writing of it. On the contrary, and quite understandably, it is merely seeking a fair and legal resolution of the issues relating to its Train Slots, as considered in more detail at (D) below. Any suggestion or implication by NR that GBRf's complaints, if upheld, would lead to significant network disruption, would be wholly without merit.

(D) DISPUTE IN RELATION TO TRAIN SLOTS

19. For reasons best known to itself, which are certainly not apparent from its determination, the Timetabling Panel concluded (at Paragraph 76 of its Determination) that it "was no longer required to consider the GBRf schedule of 63 disputed Train Slots because they were substantially drawn from the D-26 Weekday Timetable".
20. In fact, that conclusion, and the basis upon which it was purportedly made, is erroneous. All of the 63 disputed Train Slots referred by GBRf not only derived from the D-26 Weekday Timetable but were also directly and inextricably related to the Hybrid Timetable/New Working Timetable.
21. Accordingly, (except as referred to below) the Timetabling Panel swept away the 63 disputed Train Slots on a wholly erroneous basis, and failed to deal properly, or at all, with an issue which was quite properly referred to it for determination.
22. For ease of reference, as it is not entirely clear from the Determination, the issues in relation to the 63 Train Slots were grouped for convenience into six distinct categories, as follows:-
 - 22.1 Train Slots previously offered on 08/06/2018, but subsequently withdrawn [2 slots];
 - 22.2 Access Proposals not actioned (rejected) [12];
 - 22.3 Access Proposals not actioned (missing from offer or no response, therefore presumed rejected) [11];
 - 22.4 Access Proposals not actioned (alternatives offered) [13];
 - 22.5 Train Slots offered but not compliant with the Rules or other Train Slots [18];
 - 22.6 Miscellaneous [7].
23. It can readily be seen that only 2 Train Slots (those referred to at 21.1 above) were directly related to NR's decision to ignore the Network Code by making unilateral changes to a New Working Timetable after D-26 (which GBRf contends was not only a breach of the Network Code, but also a breach of contract).
24. The issues referred to at 22.2 to 22.6 above were common to both the 'original' New Working Timetable, and the subsequent 'Hybrid'. GBRf had two disputes open in relation to each of the Train Slots, one each for the original and Hybrid timetables. Naturally the two disputes in relation to each Train Slot were to be heard together for ease of case management.

25. Whilst Paragraph 76 of the Determination (erroneously) stated that the Panel was no longer required to consider the 63 disputed Time Slots, the Panel went on (in Paragraphs 77 and 78) to deal with 3 of them as follows:-
 - 25.1 6L13 and 4V52 stating that valid reasons existed for rejecting these Train Slots (without identifying what those reasons were);
 - 25.2 0E05 was directed by the Panel for review by NR as it had Firm Rights (but it was not the only Train Slot with Firm Rights which had not be considered by NR);
26. Finally on this issue, the Panel appear to imply, at Paragraph 76 of the Determination, that GBRf would not be prejudiced by NR's breach of Condition D2.7.1 (and the Panel's own failure to consider the 63 disputed Train Slots) because GBRf would be able to bid under the STP arrangement, or to submit a TOVR.
27. However, that ignores the fact that STP and TOVR's cannot possibly provide a solution in the a number of the disputed Train Slots, as the capacity no longer exists in circumstances where NR does not now have the level of flexing rights which it had between D40 and D26. Therefore, GBRf is no longer able to bid compliantly unless other Train Slots change, either at the volition of other operators or by consent.
28. In circumstances where NR ignores Access Proposals, or fails to process them adequately, then GBRf will be left without any effective right of appeal, or any effective remedies, if the Panel shrinks from the responsibility of making orders under D5.3.1(c).
29. Accordingly, the determination of the Timetabling Panel was both wrong and unjust. It purported to determine what the New Working Timetable was, but then failed to consider disputed Train Slots relating to that timetable.

(E) EXPEDITED PROCESS

30. Pursuant to M6.1.1, GBRf believes that the appeal should be dealt with on an expedited basis. The Train Slots in dispute apply between December 2018 and May 2019 and the appeal should, as a matter of common sense, be concluded as early as possible, with any hearing to be held as soon as can be arranged.