

**IN THE MATTER OF PART D OF THE NETWORK CODE**

**AND IN THE MATTER OF THE ACCESS DISPUTE RESOLUTION RULES**

**AND IN THE MATTER OF TIMETABLING DISPUTES TTP1331 AND TTP1376**

**AND IN THE MATTER OF AN APPEAL TO THE ORR OF THE DETERMINATION OF TTP1331 AND TTP1376**

**BETWEEN**

**GB RAILFREIGHT ("GBRf")**

**v**

**NETWORK RAIL INFRASTRUCTURE LIMITED ("Network Rail")**

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**Network Rail's Response Notice to GBRf's Appeal to the ORR dated 27 November 2018**

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**1. INTRODUCTION**

- 1.1 This is Network Rail's notice (the "**Response Notice**") in opposition to GBRf's appeal to the Office of Rail and Road ("**ORR**") dated 27 November 2018 (the "**Appeal**") against the Timetabling Panel ("**TTP**")'s determination in TTP1331 and TTP1376 (the "**Determination**").
- 1.2 Network Rail serves this Response Notice pursuant to the Network Code, section M5.1.1.
- 1.3 TTP1331 and TTP1376 were appeals brought by GBRf under Part D2.7.2 of the Network Code under which any Timetable Participant affected by the New Working Timetable is entitled to appeal **against any part of it** and were in relation to the timetable to take effect on 9 December 2018.
- 1.4 By way of general background to the December 2018 timetable change, on 8 June 2018 Network Rail published a timetable that offered weekday trains only (the "**D26 Weekday Timetable**"), and subsequently developed what was known as a hybrid timetable, which was offered on 17 August 2018 (the "**Hybrid Timetable**"). It was the Hybrid Timetable that was to be (and now has been) implemented on 9 December 2018.
- 1.5 TTP1331 related to the contents of the D26 Weekday Timetable and TTP1376 related to the contents of the Hybrid Timetable. Accordingly, TTP1331 related and relates to a timetable that is not going to be implemented. However, GBRf's sole reference document, which related to both TTP1331 and TTP1376 (the "**GBRf SRD**"), disputed train-slot decisions made by Network Rail in relation to both the D26 Weekday Timetable and the Hybrid Timetable. It also asked the TTP to make what were described as various determinations "of principle" in relation to the timetable process for December 2018.
- 1.6 GBRf provided the Determination to the ORR with the Appeal, but another copy is attached with this Response Notice for convenience at **Appendix A**.
- 1.7 Network Rail refers the ORR to the Determination for further background as to the dispute, the positions taken by both parties, and the reasoning and decision of the TTP. Network Rail also attaches at **Appendix B** its sole reference document submitted in TTP1331 and TTP1376 (the "**NR SRD**") and, at **Appendix C**, a copy of Network Rail's opening submissions which were made at the hearing itself (the "**NR Submissions**"). Both of these documents provide further details of the position that Network Rail took in those proceedings.
- 1.8 Network Rail opposes the Appeal on the following grounds:

- 1.8.1 The ORR is not the appropriate forum to determine the matters set out in the Appeal and is requested to exercise its power under M4.1.1. and decide not to allow the matter to proceed to it;
- 1.8.2 If, contrary to Network Rail's primary position, the ORR allows the Appeal to proceed, Network Rail's position is that:
  - 1.8.2.1 The TTP was correct to determine that it did not have jurisdiction to decide the points raised in the Appeal at paragraphs 4.1(a) – (d);
  - 1.8.2.2 The TTP was correct in its decision not to consider the 63 train slots referred to in the Appeal at paragraph 4.2 (the "**63 Disputed Trains**"); and
  - 1.8.2.3 In any event, in view of wider industry considerations and the passage of time, it is neither practicable nor possible for Network Rail to review the 63 Disputed Trains.
- 1.9 Network Rail also notes that any appeal would be limited to a review of the TTP's decision unless the ORR considers it in the interests of justice to hold a re-hearing (under M7.1). Network Rail suggests that there is no basis for the Appeal to be anything other than a review of the Determination.
- 1.10 This Response Notice is structured in the following way:
  - 1.10.1 First, Network Rail's reasons for considering that the matter would be more conveniently determined by the High Court than by the ORR;
  - 1.10.2 Secondly, Network Rail's response to the "Jurisdiction" section of the Appeal;
  - 1.10.3 Thirdly, Network Rail's response to the "Dispute in Relation to Train Slots" section of the Appeal;
  - 1.10.4 Fourthly, Network Rail's response to GBRf's request for expedition; and
  - 1.10.5 Fifthly, Network Rail's submissions in respect of its costs of responding to the Appeal.
- 2. **REQUEST THAT THE ORR MAKES A DECISION UNDER M4.1.1 TO REFUSE TO HEAR THE APPEAL**
  - 2.1 Network Rail asks the ORR to make a decision pursuant to M4.1.1 that the Appeal should not proceed to the ORR on the grounds that the matter would be more appropriately or conveniently disposed of by the High Court.
  - 2.2 For the avoidance of doubt, subject to the points made in paragraph 2.7 and Sections 3 and 4 below, Network Rail considers that the TTP's analysis of its own jurisdiction was correct and that if, contrary to Network Rail's primary position, the ORR allows the appeal to proceed, it can and should be summarily disposed of.
  - 2.3 Otherwise, as will be apparent from Network Rail's substantive response to the matters raised in the Appeal, as set out at Sections 3 and 4 below, determining the wide-ranging questions raised by the Appeal will or may involve an in-depth exercise of factual, contractual and legal investigation and analysis.
  - 2.4 The primary reason why Network Rail submits that the questions raised by the Appeal (and discussed further below in the context of Network Rail's substantive response) would be best addressed by the High Court is that the questions focus in particular upon the nature and extent of the powers of the TTP. This is an issue of construction and of law, and not an issue of industry practice.

- 2.5 The issues raised by the Appeal appear to be the sort of example contemplated by M4.1.1, which would be more conveniently disposed of by the High Court than the ORR.
- 2.6 Further, the matters raised by GBRf in the context of both its Appeal in relation to the jurisdiction of the TTP and in relation to the 63 Disputed Trains took place against the backdrop of the complicated factual background leading up to the industry decision to proceed with the Hybrid Timetable.
- 2.7 It is not clear to what extent GBRf intends, or contends, that this factual background will be or can be a part of the Appeal. Specifically:
- 2.7.1 It is not clear to Network Rail to what extent GBRf is seeking to ask the ORR **actually to answer** the questions over which the TTP decided that it had no jurisdiction, rather than simply review the Determination on jurisdiction and determine whether that decision was right or wrong;
- 2.7.2 These questions related to Network Rail's conduct in preparing the timetable for December 2018 and in particular the process leading up to the Hybrid Timetable;
- 2.7.3 For the avoidance of doubt, Network Rail submits that it is not appropriate, in the context of an appeal that is (or should be) confined to a review of the Determination, for any substantive findings to be made on the underlying questions in relation to which the TTP decided that it did not have jurisdiction, not least in circumstances where the TTP itself has made no findings on those issues and the material to enable such findings to be made was not before the TTP and will not be before the ORR;
- 2.7.4 However, it appears to be within GBRf's contemplation that such matters may form part of the Appeal: if that is the case, for the reasons explained below, the ORR should refuse to entertain that aspect of the appeal in any event; and
- 2.7.5 Further, the decision to proceed with the Hybrid Timetable forms the necessary background to the decisions disputed in the context of the 63 Disputed Train Slots. It appears that, to deal with GBRf's contentions in the Appeal relating to the 63 Disputed Trains, the ORR is also being invited to make factual findings on the process leading up to the Hybrid Timetable; if that is the case, for the reasons explained below, the ORR should refuse to entertain that aspect of the appeal in any event.
- 2.8 Network Rail does not consider that the ORR is in the position of being able to take such decisions: as well as such decisions being beyond the scope of a review of the decision of the TTP, the material to enable it to do so was not before the TTP, has not been the subject of findings by the TTP, and the material will not be before the ORR.
- 2.9 The background to the adoption of the Hybrid Timetable is factually complicated. Without prejudice as to whether there can be appeals in relation to such a question (either generally or in relation to the Determination), in order for the adoption of the Hybrid Timetable to be considered properly and to enable the issues raised by GBRf to be determined, a significant amount of further evidence and analysis would be required including the legal analysis of the conduct of Network Rail and all industry participants (including the Department for Transport). This would require significantly more factual evidence, and analysis of the underlying documentary material, than was, or could have been, before the TTP or that will be, or could be, before the ORR on a review of the TTP's Determination.
- 2.10 Such an exercise would not be in accordance with what we understand would be provided for in the usual ORR procedure or timeframes. Further, it would necessarily involve contributions and representations from parties who are not party to TTP1331 and TTP1376.
- 2.11 Therefore, if and to the extent that GBRf is raising questions relating to the decision to adopt the Hybrid Timetable, and/or if and to the extent that consideration of those questions is an inherent part of the consideration of the Appeal, Network Rail submits that the High Court process would be the more appropriate route to consider those questions. 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. It would also allow for more time for factual and expert evidence to be considered and tested properly, and for the legal analysis to be advanced and considered in the proper way by the most appropriate tribunal to determine these matters.

- 2.12 Further, the ORR was aware of the recommendation made by Andrew Haines and supported by the industry to proceed with the Hybrid Timetable. We understand that the ORR wrote to the DfT to express support for the recommendation, and that the recent report published by Stephen Glaister called the decision to de-risk the timetable "*prudent and proportionate*" in the circumstances<sup>1</sup>.
- 2.13 Network Rail therefore suggests that, to the extent that it is contemplated that dealing with the Appeal will or may involve findings as to the process leading up to the introduction of the Hybrid Timetable, the ORR cannot properly and should not act as an arbiter as to that question and the issue, if it is to be raised, must be raised in the High Court.

#### *Conduct of GBRf*

- 2.14 As a further reason for its request to the ORR not to permit the Appeal to proceed to it, Network Rail draws attention to GBRf's conduct throughout this dispute.
- 2.15 Until receipt of the GBRf SRD, as further explained below, Network Rail had been led to understand by GBRf that only a limited number of slots were in issue. It then received, on 23 October 2018 (i.e. only a few weeks before the Hybrid Timetable was due to take effect), the GBRf SRD, which purported to set out a very significant number of disputed train slots.
- 2.16 The volume of disputes raised, the late timing for disputing them (given, in particular, that the Hybrid Timetable was published on 17 August 2018), and the fact that many of the disputed slots related to decisions made in the preparation of the superseded D-26 Weekday Timetable make bringing the dispute unconscionable and/or vexatious.
- 2.17 Further, GBRf (as discussed in more detail below) did not actually seek to develop any case in relation to the 63 Disputed Trains in the hearing of TTP1331 and TTP1376. In fact, it made no submissions in relation to them when given the opportunity, which is consistent with the approach adopted before receipt of the GBRf SRD. In truth, GBRf is not fundamentally concerned about all these slots.
- 2.18 Having not sought to address those slots, GBRf now seeks to raise them in the Appeal. Network Rail submits that is not a proper way to proceed and does not form the proper basis of an appeal intended primarily to **review** the TTP's Determination.
- 2.19 The Appeal was brought 12 days before the Hybrid Timetable took effect. It cannot be within GBRf's contemplation that a practical answer could be found to its disputes within the time available. Network Rail therefore again considers that the bringing of the Appeal is an example of unconscionable and/or vexatious behaviour on GBRf's part.
- 2.20 For the reasons set out above, Network Rail therefore asks the ORR to use its power under M4.1.1 to decide not to allow the Appeal to proceed to it.

### 3. **RESPONSE TO "JURISDICTION" SECTION OF THE APPEAL**

- 3.1 GBRf seeks in the Appeal to ask the ORR to decide that the TTP erroneously determined that its own jurisdiction did not allow it to decide:
- 3.1.1 Issues relevant to the production of a New Working Timetable by Network Rail;

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<sup>1</sup> Office of Rail and Road: Independent Inquiry into the Timetable Disruption in May 2018, 7 December 2018, paragraph 1.22.

- 3.1.2. Points of principle raised by GBRf as to the ability of Network Rail to alter timetables and process requested Train Slots;
- 3.1.3. Matters concerning the contractual relationship between GBRf and Network Rail; and
- 3.1.4. Whether the actions of Network Rail involved a breach of the Network Code.

*Background*

- 3.2 In the GBRf SRD, GBRf asked the TTP to determine a number of points of principle arising from Network Rail's production of the timetable which took effect in December 2018. These points of principle were:
  - 3.2.1 Does [the] Panel agree that Network Rail has no authority to alter the due date of D-26 without prior authority afforded under D2.7?
  - 3.2.2 Does [the] Panel agree that Network Rail may not change or revoke a Train Slot already offered at (the correct) D-26 without mutual consent, and that Network Rail is in breach of contract for acting as it has?
  - 3.2.3 GBRf requested a determination that Network Rail is not entitled to ignore Access Proposals made to it, there being no such provision in Part D that permits it to do so; and
  - 3.2.4 GBRf requested a determination of breach of contract on other matters where the Panel considered that this applied.
- 3.3 Network Rail submitted in the NR SRD that these matters were outside the jurisdiction of the TTP. Network Rail refers to Appendix B in this regard but it sets out below a summary of its position:
  - 3.3.1 GBRf had set out in its Notices of Dispute for TTP1331 and TTP1376 that it made its appeal to the TTP on the basis of D2.7.2 of the Network Code, which provides (so far as relevant) that:

*"Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it..."*
  - 3.3.2 GBRf can therefore appeal to the TTP under D2.7.2 against a decision of Network Rail as to a part of the New Working Timetable.
  - 3.3.3 The TTP has jurisdiction to determine specific capacity allocation disputes arising from the contents of the New Working Timetable, and has considerable expertise in dealing with such disputes.
  - 3.3.4 In order to consider any appeal, the TTP necessarily needed to determine what the New Working Timetable was: plainly it was the Hybrid Timetable since that is the timetable which was due to be (and was) implemented and GBRf cannot therefore be "affected" by any other timetable.
  - 3.3.5 No other timetable could form a relevant basis of complaint, because it was not going to be implemented and so could not "affect" a Timetable Participant and no other timetable could form the basis of an appeal under D2.7.2 because it is not the New Working Timetable.
  - 3.3.6 The TTP does not have jurisdiction on an appeal under D2.7.2 to consider the points of principle put forward by GBRf, including whether or not Network Rail had complied with its contractual obligations. 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.

- 3.3.7 The TTP's lack of jurisdiction to consider these "points of principle" is amply demonstrated by its powers, which are set out at D5.3.1 and are as follows:
- 3.3.7.1 It may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;
  - 3.3.7.2 It may direct that a challenged decision of Network Rail shall stand; and
  - 3.3.7.3 It may, in exceptional circumstances, substitute an alternative decision in place of a challenged decision of Network Rail.

Such powers clearly provide for it to assist with the allocation of capacity in certain narrow and carefully prescribed ways.

- 3.3.8 Furthermore, the decision to publish and offer the Hybrid Timetable was the culmination of a process of industry collaboration. This was not simply a unilateral decision attributable to Network Rail: it was the result of significant collaboration and consultation within the industry, overseen by the Secretary of State for Transport. Ultimately the Secretary of State for Transport accepted the recommendation of Andrew Haines, the then Network Rail CEO designate, following that industry-wide collaboration and consultation.
- 3.3.9 Network Rail does not accept that it was in breach of contract in relation to its conduct in that process. It is Network Rail's position that it was entitled to act as it did, 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.
- 3.3.10 To make any determination on that question, the TTP would need to have access to factual evidence and input from a wide range of industry participants. This is not the sort of issue that could be determined by the TTP, or in the short timeframe allowed for a timetabling dispute.

#### *The Determination*

- 3.4 The Determination runs to 85 paragraphs. Much of this is background and an explanation of the TTP's reasoning. Although helpful, much of this is obiter and does not bind the parties. The TTP's actual determination, and the material that can be the subject of an appeal, is crisply set out in paragraphs 79 to 83<sup>2</sup>.
- 3.5 The TTP decided that:
- 3.5.1 The Hybrid Timetable is the New Working Timetable (80);
  - 3.5.2 Any disputes as to the contents of the D-26 Weekday Timetable can no longer form part of any relevant dispute before the TTP (81);
  - 3.5.3 The TTP did not have the jurisdiction, or the appropriate structures in place, to conduct any investigation as to the process whereby the Hybrid Timetable evolved (82);
  - 3.5.4 The TTP's powers do not extend to allow it to determine:

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<sup>2</sup> Network Rail notes for example that while concluding that the Hybrid Timetable was the New Working Timetable (80), the TTP have expressed the view that Network Rail was in breach of D2.7.1. It is not clear to Network Rail what the alleged breach is and Network Rail does not accept that there was a breach. However, the point is irrelevant for three reasons. First, any breach does not, did not and could not prevent the finding that the Hybrid Timetable is the New Working Timetable. Secondly, any issues as to breach and its effect are recognised as being matters that are not for the TTP. Thirdly, this is a matter that the TTP itself recognises that it has no jurisdiction to opine on (82).

- 3.5.4.1 Issues relevant to the production of the New Working Timetable;
  - 3.5.4.2 The points of principle advanced by GBRf; and
  - 3.5.4.3 Matters of contract, namely whether the D-26 Weekday Timetable is contractually binding or a breach of the Network Code (82).
- 3.5.5 There was a specific direction in relation of a particular train slot (83).
- 3.6 It is Network Rail's submission (for the reasons put forward in the NR SRD document and summarised at paragraph 3.3 above) that the TTP was clearly correct to find as it did.
- 3.7 The TTP's decision to treat the Hybrid Timetable as the New Working Timetable was correct, and indeed the only one that it could take in order to have any jurisdiction to hear appeals relating to the only timetable that was to (and did) take effect on 9 December 2018, the Hybrid Timetable.
- 3.8 GBRf appealed under D2.7.2. The TTP therefore had jurisdiction to hear disputes from Timetable Participants "*affected by the New Working Timetable*". Plainly, no-one can be affected by a timetable that is not going to be implemented: such a timetable can have no "effects" and no one can be affected by it.
- 3.9 A Timetable Participant can only be affected by a timetable that is to be implemented. In order to hear any dispute which related to the timetable that was to be (and was) implemented on 9 December 2018, the TTP was required to find that the Hybrid Timetable was the New Working Timetable: indeed, despite their assertions to the contrary, in truth GBRf had to accept that in order to bring an appeal under Part D2.7.2 in relation to part of the New Working Timetable. Any dispute as to the D26 Weekday Timetable is otiose because that was not the timetable that was to be (and indeed was) brought into operation on 9 December 2018 and so no one could be "affected" by it.
- 3.10 The TTP's function on an appeal under D2.7.2 is to determine specific capacity allocation disputes, and it does not have jurisdiction, or suitable structures in place, 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. That would require more evidence than is or could be before the TTP, the participation of more parties and the type of analysis and determinations that are beyond the scope of the TTP's expertise.
- 3.11 The TTP's findings in this regard are consistent with the previous TTP decision in Disputes TTP1233, 1237, 1240, 1270, 1288 and 1291 brought by, inter alia, GBRf, and seeking determinations by the TTP of various contractual issues including alleged breach of contract with regard to the timetabling process.
- 3.12 A Directions Hearing was held on 27 April 2018. Mr Clive Fletcher-Wood as Hearing Chair recognised in his letter to the parties after the Directions Hearing that the TTP would not necessarily have jurisdiction to address all aspects of the case, and referred the matter to an Allocation Hearing. A copy of his letter to the parties is attached as **Appendix D**.
- 3.13 Therefore, the TTP has now itself recognised (twice) that making declarations of principle in relation to contractual issues is outside its remit and it does not have the appropriate structures or expertise to handle such disputes.
- 3.14 It is hard to see how such a decision could properly be challenged. If the TTP's determination as to its own jurisdiction were to be overturned on appeal, the effect would be illogical. In essence, 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. Network Rail submits that the interests of justice cannot properly be served by such a position.
- 3.15 Furthermore, the ORR could not itself determine, on a review of the TTP's decision, issues that the TTP did not determine because the TTP decided that they did not have jurisdiction

to do so. First, the material required to make such decisions was not before the TTP and will not be before the ORR. Secondly, the appeal procedure does not itself have the structures in place to permit the ORR to make such determinations.

3.16 Nevertheless, GBRf asks the ORR to overturn the TTP's decision on its own jurisdiction.

*Further comments on Part C of the Appeal*

3.17 In response to GBRf's detailed submissions on jurisdiction set out in Section C of the Appeal, Network Rail's position remains as set out in the NR SRD, which is amplified above.

3.18 It also makes the following specific comments:

3.18.1 GBRf seeks to refer to the description of the Purpose of the Timetabling Panel set out in Chapter H of the Access Dispute Resolution Rules (mistakenly referred to in the Appeal as Chapter H, Part I of the Network Code) to argue for a wider jurisdiction for the TTP than that which the TTP itself recognises, or than is set out in Part D of the Network Code.

3.18.2 This provision was plainly intended to be a general description of the role of the TTP once its jurisdiction has been established; it does not provide the basis of its jurisdiction.

3.18.3 As set out above, GBRf referred its dispute to the TTP **under D2.7.2** of the Network Code and the TTP's jurisdiction to hear GBRf's dispute is therefore based exclusively on the provisions of D2.7.2.

3.18.4 As a result, the TTP is, as it recognises, empowered only to hear disputes against a decision of Network Rail as to a part of the New Working Timetable.

3.18.5 Network Rail further disputes GBRf's characterisation of Condition D5.3.1 which sets out the powers of the TTP. Far from being "merely" a description of the powers available to the TTP, the provisions in D5.3.1 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. The TTP simply does not have the power to decide "points of principle".

3.18.6 Network Rail accepts the potential importance of the questions raised at paragraphs 12 to 17 of the Appeal, and accepts that there may be a forum in which such questions could be properly considered. That forum, however, is not the TTP.

3.19 Network Rail therefore requests the ORR not to overturn the TTP's decision as to its jurisdiction.

**4. RESPONSE TO THE "DISPUTE IN RELATION TO TRAIN SLOTS" SECTION OF THE APPEAL.**

4.1 GBRf appeals the TTP's failure to consider the Disputed Train Slots "*because of a mistaken belief that they were drawn from a superseded timetable*".

*Background*

4.2 As Appendix D to the GBRf SRD, GBRf provided a spreadsheet of 73 trains, in relation to which it brought disputes (the "Appendix D Trains").

4.3 In order to explain Network Rail's position on the Appendix D Trains, some further background of the timetabling process for the December 2018 timetable is required:



- 4.3.1 For the D-26 Weekday Timetable, operators submitted Access Proposals at D-40 as usual and Network Rail considered these in the normal way<sup>3</sup>. When the timetable was published, only the weekday slots were offered;
  - 4.3.2 As set out below, those offers were withdrawn and replaced by the offers in the Hybrid Timetable;
  - 4.3.3 Accordingly, the D26 Weekday Timetable was never a final decision of Network Rail for the purposes of D4.7 of the Code;
  - 4.3.4 As explained in Section 3 of the NR SRD, due to various concerns about the deliverability of the D26 Weekday Timetable, an industry decision was taken, sanctioned by the Secretary of State for Transport, to proceed instead with the Hybrid Timetable;
  - 4.3.5 In essence, the Hybrid Timetable meant that operators considered to be "high risk" would have their May 2018 timetable rolled over and would not proceed with the offer under the D26 Weekday Timetable;
  - 4.3.6 All freight operators including GBRf were considered high risk because of the number of their interactions with other operators;
  - 4.3.7 As a result, GBRf would continue to run its May 2018 timetable. Its Access Proposals and its offer under the D26 Weekday Timetable were no longer to be implemented and decisions made in relation to its Access Proposals in the context of preparing the offer became moot;
  - 4.3.8 Rolled-over operators such as GBRf were given the opportunity to provide certain "priority" requests which would be incorporated into the Hybrid Timetable;
  - 4.3.9 GBRf provided its priority slots on 3 July 2018 (eight in total). Of these, four were included in the Hybrid Timetable;
  - 4.3.10 The four priority slots that were not so included were included in the Appendix D Trains; and
  - 4.3.11 The other 69 Appendix D Trains were not flagged to Network Rail as a priority for inclusion in the Hybrid Timetable unless and until receipt of the GBRf SRD might be said to indicate that GBRf so regarded them (as to which no admissions are made).
- 4.4 Network Rail notes that GBRf divides the Appendix D Trains into six categories in the GBRf SRD and at paragraph 22 of the Appeal.
- 4.5 However, when considering the Appendix D Trains, and as set out in the NR SRD, Network Rail considers it more helpful to analyse them in the context of the following three categories:

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<sup>3</sup> With the proviso that, due to the decision to offer only weekday slots at D-26, validation (i.e. checking compliance with the Timetable Planning Rules) of the weekday slots may have been prioritised over weekend slots.

- 4.5.1 **"Hybrid Timetable Train Slots"** which are disputed train slots in relation to the Hybrid Timetable, notably three<sup>4</sup> of the priority slots that were not included in the Hybrid Timetable, and RSB Roll-overs<sup>5</sup>;
- 4.5.2 **"Rolled Over Train Slots"** which are disputed train slots that were rolled over from GBRf's May 2018 Timetable, but in relation to which GBRf had sought, in its D-40 Access Proposals, some change to the slot for December 2018; and
- 4.5.3 Train slots where the disputed decision related to the treatment of GBRf's Access Proposal in the context of the preparation of the D26 Weekday Timetable.
- 4.6 The most numerous category is the third: train slots where the disputed decision related to the preparation of the D-26 Weekday Timetable.
- 4.7 In relation to the Appendix D Trains, Network Rail explained the following:
  - 4.7.1 GBRf was entitled to bring disputes relating to the Hybrid Timetable Train Slots. Network Rail made every attempt to resolve those disputes prior to the Hearing of TTP1331 and TTP1376.
  - 4.7.2 As regards the Rolled Over Train Slots, it was an essential part of the Hybrid Timetable that GBRf would have its May 2018 timetable rolled over. It was not by then possible to consider the Rolled Over Train Slots without risking both the successful implementation of the December 2018 timetable and the preparation of the May 2019 timetable.
  - 4.7.3 The D26 Weekday Timetable would not be implemented and is not the December 2018 New Working Timetable. The TTP therefore has no jurisdiction to consider disputes in relation to its preparation. No further consideration has been, will be, or can be given to disputes brought in relation to the decisions made by Network Rail in the preparation of the D26 Weekday Timetable.
- 4.8 Network Rail also explained that GBRf had raised the Appendix D Trains extremely late. Only four of those slots were notified to Network Rail in July 2018 as a priority for inclusion in the Hybrid Timetable.
- 4.9 It was entirely unreasonable of GBRf to raise in the GBRf SRD, on 23 October 2018, such a number of disputes in respect of a timetable due to take effect on 9 December 2018.
- 4.10 For further details on its position in relation to the Appendix D Trains, Network Rail refers to the NR SRD.
- 4.11 In advance of the hearing of TTP1331 and TTP1376, Network Rail prepared a Schedule ("**NR's Schedule**") (copy attached as **Appendix E**) of those train slots that it was prepared to consider, being the eight Hybrid Timetable Train Slots and the two Rolled Over Train Slots that were considered for exceptional reasons (further explained in the NR SRD). For the sake of clarity, 6E77GB (see footnote 4) was therefore not included in NR's Schedule because it was not understood to be a Hybrid Train Slot, and was not considered.

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<sup>4</sup> The fourth, 6E77GB, was an Appendix D Train and should have been included in this category. However, it had also been rejected by Network Rail as part of the consideration of GBRf's Access Proposals in the preparation of the D-26 Weekday Timetable and was identified by GBRf as an "Access Proposal not actioned." Network Rail therefore included it in the third category: train slots where the disputed decision related to the treatment of GBRf's Access Proposal in the context of the preparation of the D-26 Weekday Timetable. 6E77GB was rejected on both occasions because of a junction margin conflict at Coldham Lane Junction. In any event, it is not now possible to accommodate 6E77GB because this would require significant retiming to other operator's schedules.

<sup>5</sup> RSB stands for Rolling Spot Bids. This refers to new or amended schedules that have been submitted for an existing timetable. Network Rail attempts to roll forward RSBs into future timetables (which is outside of the provisions in the Network Code). If RSB amendments had been made to the May 2018 trains for an operator, Network Rail attempted to roll those amendments forward (a "**RSB Roll-over**") into the Hybrid Timetable if there was capacity to accommodate the train slot without introducing train schedule conflicts.

### *The Determination*

- 4.12 As set out above, the TTP concluded in the Determination:
- 4.12.1 That the Hybrid Timetable was the New Working Timetable and consequently that the D-26 Weekday Timetable was not the New Working Timetable;
  - 4.12.2 That the TTP's jurisdiction was limited to considering disputes in relation to the New Working Timetable;
  - 4.12.3 Therefore, that its jurisdiction extended to considering disputed train slots in the Hybrid Timetable, and did not extend to considering disputes in relation to the D-26 Weekday Timetable;
  - 4.12.4 The TTP considered NR's Schedule. By the time of the Hearing, seven of the ten disputes included in NR's Schedule had been resolved between the parties. The TTP made a determination on the remaining three<sup>6</sup>; however, the TTP recorded in paragraph 76 that:

*"Having concluded that the Hybrid Timetable is the New Working Timetable, then the Panel was no longer required to consider the GBRf schedule of 63 disputed Train Slots [ie the 73 trains in Appendix D of the GBRf SRD, less the ten trains included in NR's Schedule], because they were substantially drawn from the D-26 Weekday Timetable";* and
  - 4.12.5 The TTP also recorded at paragraph 76 that *"insofar as business-critical Train Slots were concerned, it is able to bid under Short Term Planning (STP) arrangement or to submit a Train Operator Variation Request" ("TOVR")*.
- 4.13 Network Rail considers that the TTP's decision as set out at paragraph 4.12 was unquestionably correct. The offer made to GBRf in the D-26 Weekday Timetable was not to be (and has not been) implemented and that timetable is not the New Working Timetable. As explained above at paragraphs 3.7 to 3.9, a Timetable Participant can only be "affected" by a timetable that is to be implemented. Any dispute as to the D26 Weekday Timetable is otiose because that was not the timetable brought into operation on 9 December 2018 and so no-one could be "affected" by it.
- 4.14 Further, in exceptional circumstances, the industry decided to adopt an approach that required GBRf to have its May 2018 timetable rolled over as was. Consequently, it is difficult to see what could be achieved from an academic exercise designed to analyse the offer that GBRf alleges it should have had under the D26 Weekday Timetable.
- 4.15 In other words, the landscape had changed entirely between the publication of the D26 Weekday Timetable and the publication of the Hybrid Timetable. The preparation of the Hybrid Timetable did not involve the usual consideration of the operator's Access Proposals, but was a different process made necessary by the exceptional circumstances surrounding the December 2018 timetable (as explained further in Section 3 of the NR SRD). As such, the treatment of GBRf's Access Proposals is not a relevant question.
- 4.16 GBRf did not develop submissions on any of these train slots at the hearing itself. Network Rail, and apparently the TTP, was left with the clear impression that GBRf had no real expectation that these slots be considered but was concerned only with establishing the various points of principles which are considered above.

### *The Appeal*

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<sup>6</sup> One of the slots (0E05GA) is dealt with expressly in Paragraph 83 of the Determination. GBRf complain that the other two slots (6L13HA and 4V52DA) were rejected but that the TTP did not give valid reasons for this. In fact, as GBRf is well aware, there was full discussion of this at the hearing and the TTP accepted that these slots clashed with other operators' Firm Rights

- 4.17 However, GBRf now sets out in Section D of the Appeal its objection to the entirely reasonable decision by the TTP not to consider the 63 Disputed Trains.
- 4.18 Although GBRf's position is not entirely clear, Network Rail understands GBRf to be asserting at paragraph 20 of the Appeal that, because the 63 Disputed Trains are not included in the Hybrid Timetable (or, in relation in particular to the Rolled-Over Trains, are included, but not in the form that GBRf would like), it also has a dispute in relation to them under that timetable over which the TTP does have jurisdiction.
- 4.19 It appears that GBRf therefore considers that the TTP was in error in deciding that the 63 Disputed Trains related to the superseded D26 Weekday Timetable and it did not therefore have jurisdiction to consider them.
- 4.20 Network Rail responds as follows:
- 4.20.1 GBRf's position shows a fundamental misunderstanding of the Hybrid Timetable and the exceptional industry circumstances that led to it;
- 4.20.2 The Hybrid Timetable was agreed upon by the industry, and has been referenced approvingly by regulators and politicians, as the best solution to the significant challenges faced in the December 2018 timetable change:
- 4.20.2.1 After the disruption and damage to the industry's reputation that arose from the unsuccessful May 2018 timetable change, it was necessary to de-risk the December 2018 timetable change;
- 4.20.2.2 The recommendation that the Hybrid Option was the best method of de-risking the December 2018 timetable change was made by Andrew Haines, following extensive industry collaboration;
- 4.20.2.3 That recommendation was supported and adopted by the Secretary of State.
- 4.20.2.4 The ORR has itself called the decision to de-risk the timetable change "*prudent and proportionate*", set out that the actions taken in the preparation of the December 2018 timetable change had resulted in a "*more efficient, effective, fair and transparent process*" than had been seen for May 2018, and recommended further industry collaboration going forward;
- 4.20.2.5 The Treasury Select Committee in its report into the May 2018 timetabling disruption set out that "*we endorse the more cautious approach – announced by the industry in July- to the changes planned for December 2018*".
- 4.20.3 A fundamental part of delivering that much-needed and industry-approved proposal was that certain operators, including GBRf, would need to have their May 2018 schedules rolled over;
- 4.20.4 It was not possible for rolled over operators to be offered the train slots that they had requested in their Access Proposals or been offered at D-26, in view of the recognised need to de-risk the December 2018 timetable change and the industry approved response to that challenge;
- 4.20.5 Rolled over operators were given the opportunity to request their priority slots, and Network Rail accommodated GBRf's requested slots where possible;

- 4.20.6 The 63 Disputed Trains were not identified by GBRf as priority slots<sup>8</sup>;
- 4.20.7 If every rolled over operator brought a TTP dispute in respect of the trains that they had requested in their Access Proposals that did not appear in the Hybrid Timetable, or did not appear in the format that they would like, the disruption to the industry agreed approach would be obvious. Indeed, it would have been impossible for Network Rail to comply with its obligations under its licence and provide a reliable and deliverable timetable change;
- 4.20.8 No other operator has sought to over-turn the industry-agreed approach through repeated (and misconceived) TTP disputes.
- 4.21 Network Rail reiterates the points made at paragraph 4.10 of the NR SRD. It is not now possible to reconsider the 63 Disputed Trains without causing serious prejudice to the successful implementation of the December 2018 Timetable and/or significant disruption to the schedules of other operators. In particular:
- 4.21.1 In order to comply with GBRf's request to offer each of the 63 Disputed Train Slots or a suitable alternative, Network Rail would need to amend other Operators' schedules to find the capacity to accommodate GBRf compliantly;
- 4.21.2 If capacity could not be found, other Operators' schedules would need to be removed to accommodate GBRf's requests;
- 4.21.3 Any amendments to another Operator's schedule that changed the timing of the train's arrival at its destination or stops at intermediate stations could break a minimum connection with another service, or a driver/unit diagram. In this scenario, there would be knock-on impacts on other trains and/or the operator would need to rework its complex plans for driver rostering and train formations;
- 4.21.4 Removing other Operators' slots entirely would of course cause significant implications to driver/unit diagrams and a large re-planning exercise for both the Operators and Network Rail (neither of which have the spare resources to undertake such a process);
- 4.21.5 The December 2018 timetable is already functioning and Operators and passengers are using it. There can be no grounds to prioritise GBRf's commercial aspirations over the smooth functioning of the timetable and over the interests of other train operators.
- 4.22 Network Rail considers GBRf's argument at paragraph 28 of the Appeal to be misconceived. It is of course not the case that the TTP's decision leaves GBRf "*without any effective right of appeal, or any effective remedies*". GBRf on the contrary is seeking to use the TTP process to undermine the industry agreed decision to adopt the Hybrid Timetable. This is not permissible.
- 4.23 For these reasons, Network Rail respectfully requests the ORR not to overturn the TTP's decision not to consider further the 63 Disputed Trains. In particular, having recognised the need to de-risk the timetable and been supportive of the steps taken to do so, the ORR cannot fairly now penalise Network Rail for implementing in practice the steps that were agreed by the industry.
- ORR request to provide a status update in relation to the 63 Disputed Trains*
- 4.24 Network Rail notes that the ORR has specifically requested it to provide an update on the status of the 63 Disputed Trains, by its letters dated 4 and 6 December 2018.

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<sup>8</sup> With the accepted exception of 6E77GB, discussed further above. In any event, it is not possible to accommodate 6E77GB, as explained above.

- 4.25 Network Rail has explained above the reasons for which it has not considered afresh, and cannot consider afresh, the 63 Disputed Trains. It therefore has no status update to provide.
- 4.26 Network Rail also understands the ORR to be asking it to confirm the extent to which GBRf has availed itself of the (perfectly sensible) strategies suggested by the TTP in paragraph 76 of the Determination and submitted TOVRs in respect of the 63 Disputed Train Slots.
- 4.27 GBRf could submit a TOVR in one of the two following ways:
- 4.27.1 It could either submit a Short Term Planning bid ("**STP bid**") which would, as a one-off, amend a service running in a given week; alternatively,
- 4.27.2 It could submit a Rolling Spot Bid ("**RSB bid**") which would amend the Working Timetable. The amend would run for the rest of the timetable and (as explained in footnote 5) Network Rail would endeavour to reflect it in future timetable.
- 4.28 As regards the 63 Disputed Trains, GBRf has made no STP bids for any new train slots bid at D-40 that Network Rail declined to include in the Hybrid Timetable, and only two RSB bids. Both of the RSB bids were accepted by Network Rail.
- 4.29 This reflects Network Rail's position, as explained above, that the 63 Disputed Trains do not appear to be of particular importance to GBRf. Despite being given the opportunity, it has not sought to develop a case in relation to them.

## 5. **EXPEDITION**

- 5.1 Network Rail has been asked to give its position on GBRf's request that the Appeal be expedited.
- 5.2 Network Rail's position is that the Appeal is otiose. As set out above, GBRf appears (although it is not entirely clear, given that the majority of its claims related to the superseded D26 Weekday Timetable) to be seeking to have various train slots included or modified in the Hybrid Timetable. That timetable came into effect on 9 December 2018. It is therefore already in force as at the date of this Response Notice, let alone by the time any decision can be made.
- 5.3 In any event, no changes can be made to the Hybrid Timetable without jeopardising the industry-agreed approach to de-risk the December 2018 timetable change.
- 5.4 Leaving aside any questions as to whether any of the 63 slots are important to or regarded as important to GBRf, Network Rail submits that there is no point whatsoever in expediting the Appeal. Whenever it is decided, it will be after the inception of the Hybrid Timetable, which cannot, in any event, be altered.
- 5.5 Network Rail therefore rejects the suggestion that the Appeal should be expedited.

## 6. **COSTS**

- 6.1 Network Rail considers GBRf to have brought the Appeal in circumstances where:
- 6.1.1 It knew that the TTP had found, more than once, that it had no jurisdiction to decide points of principle and moreover that the TTP's decision was clearly correct;
- 6.1.2 In any event, even if the ORR overturned the TTP's decision on jurisdiction, it would not have the relevant information to enable it to decide substantively on the underlying questions put to the TTP, and further would not be the appropriate or convenient forum for such a decision; and
- 6.1.3 Network Rail is unable to consider the Disputed 63 Train Slots because of the accepted industry position of proceeding with the Hybrid Timetable.

6.2 Network Rail therefore considers the Appeal to be entirely misconceived. Further, Network Rail has been put to considerable expense in responding to the Appeal, not least through the need to prepare this Response Notice.

6.3 Network Rail therefore asks the ORR to use its power under 8.1.1(d) to award costs in its favour.

**Signature**

For and on behalf of *Network Rail Infrastructure Limited*

Signed

M. Allen 12/12/2018

Print Name

M. ALLEN

Position

Head of Timetable Production

