

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

DB CARGO (UK) LIMITED ("DB Cargo")

v

NETWORK RAIL INFRASTRUCTURE LIMITED ("Network Rail")

Network Rail's Response Notice to DB Cargo's Appeal to the ORR dated 27 November 2018

1. INTRODUCTION

- 1.1 This is Network Rail's notice (the "**Response Notice**") in opposition to DB Cargo (UK) Limited ("**DB Cargo**")'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. This Response Notice is served without prejudice to Network Rail's contention that DB Cargo does not have *locus standi* to bring an appeal from the Determination. This is addressed in detail in Section 2 below.
- 1.3 TTP1331 and TTP1376 were appeals brought by GBRf under Part D2.7.2 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 which was to, and which did, take effect on 9 December 2018.
- 1.4 GBRf has served its own appeal from the Determination. DB Cargo did not bring an appeal under Part D2.7.2 in relation to the matters the subject of TTP1331 and TTP1376 and did not serve a Single Reference Document in TTP1331 and TTP1376. As appears from page 1 of the Determination, DB Cargo attended the hearing **solely** in the capacity of an interested party and not as a Dispute Party: DB Cargo was and is not a Dispute Party and as a result cannot appeal the Determination. The role of DB Cargo is addressed further below.
- 1.5 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 indeed was) implemented on 9 December 2018.
- 1.6 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 in 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, and also asked the TTP to make what were described as various determinations "of principle" in relation to the timetable process for December 2018.
- 1.7 DB Cargo provided the Determination to the ORR with the Appeal, but another copy is attached with this Response Notice for convenience at **Appendix A**.

- 1.8 Network Rail refers the ORR to the Determination for further background as to the dispute, the positions taken by Network Rail and GBRf, 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.
- 1.9 Network Rail opposes the Appeal on the following grounds:
- 1.9.1 DB Cargo is not a Dispute Party and so has no *locus standi* to bring an appeal in proceedings between Network Rail and GBRf;
- 1.9.2 The ORR is not the appropriate or convenient 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 Appeal to proceed to it;
- 1.9.3 The ORR is also requested to exercise its power under M4.1.1 to decide not to allow the Appeal to proceed to it because of the conduct of DB Cargo in particular in not taking an active part in the hearing before the TTP and in not advancing before the TTP the arguments that it now seeks to advance;
- 1.9.4 If, contrary to Network Rail's primary position, the ORR allows the Appeal to proceed, Network Rail's position is that:
- 1.9.4.1 The TTP was correct to treat the Hybrid Timetable as the New Working Timetable rather than the D26 Weekday Timetable:
- (a) GBRf appealed to the TTP on the basis of D2.7.2 which only provided a right of appeal in relation to part of the New Working Timetable;
- (b) In order to have any jurisdiction to consider the timetable due to take effect on 9 December 2018, the TTP therefore had to treat the Hybrid Timetable (the only timetable to be implemented) as the New Working Timetable; and
- (c) The TTP's decision was therefore plainly right and indeed was the only one that it could have taken that would have permitted it to make any decisions as to capacity allocation in relation to the December 2018 timetable, the Hybrid Timetable.
- 1.9.4.2 The TTP was correct to determine that it did not have any jurisdiction to decide contractual issues, including as to whether the process that had led to the development of the New Working Timetable had been compliant with the Network Code. It did not in fact make any decision on the contractual questions raised by DBC. Therefore, it is not possible for the ORR to review any such decision on Appeal.
- 1.10 Network Rail 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 submits that there is no basis for the Appeal to be anything other than a review of the Determination. This is addressed further below.
- 1.11 This Response Notice is structured in the following way:
- 1.11.1 First, Network Rail's position as to the lack of *locus standi* of DB Cargo in these matters;
- 1.11.2 Secondly, Network Rail's reasons for considering that the matter would be more conveniently determined by the High Court than by the ORR;

- 1.11.3 Thirdly, Network Rail's position as to the TTP's decision that the Hybrid Timetable was the New Working Timetable;
- 1.11.4 Fourthly, Network Rail's position as to the section of the Appeal challenging the contractual basis for the Hybrid Timetable; and
- 1.11.5 Fifthly, Network Rail's position as to the costs of this Appeal.

2. LOCUS STANDI OF DB CARGO

- 2.1 The provisions in the Network Code which relate to the bringing of an appeal to the ORR, namely Part M, refer to the challenge of a determination by an "Appellant".
- 2.2 "Appellant" is defined as:

"any Dispute Party seeking to challenge a determination made in accordance with the ADRR [Access Dispute Resolution Rules] by appeal to the Office of Rail and Road".
- 2.3 "Dispute Party" is defined in the ADRR rules as:

"an Involved Party which is likely to be materially affected by the outcome of the dispute and is putting its position to the Forum and/or requesting a determination from a Forum."
- 2.4 "Involved Party" is defined in the ADRR rules as:

*"in relation to a dispute, dispute procedure or dispute resolution process means a party **directly involved** in the dispute including the Secretary, all Dispute Parties, and the Forum" [emphasis added]*
- 2.5 DB Cargo, as noted above, was only involved in TTP1331 and TTP1376 as an interested party. As recorded in paragraph 67 of the Determination, its involvement in the proceedings was limited to:
 - 2.5.1 Noting that it was interested to understand the effect of any changes to GBRf's schedules in the Hybrid Timetable on its own, DB Cargo's, schedules; and
 - 2.5.2 Noting that it had an outstanding Notice of Dispute against Network Rail in respect of the December 2018 timetable change which had not yet been brought to dispute and which DB Cargo hoped to settle.
 - 2.5.3 DB Cargo did not address any submissions to the TTP.
- 2.6 In particular, DB Cargo did not seek to advance the arguments that it now seeks to make the subject of an appeal in relation to whether the Hybrid Timetable or the D-26 Weekday Timetable was the New Working Timetable or to the effect that the New Working Timetable could not unilaterally be withdrawn by Network Rail. Accordingly, the TTP was not able to address any such submissions when making the Determination.
- 2.7 TTP1331 and TTP1376 are proceedings between Network Rail and GBRf. DB Cargo has no right to bring an appeal to the ORR in respect of a dispute where it was not a party directly involved in the dispute. The impact, if any, on DB Cargo of the outcome of GBRf's appeal is likely to be indirect: it will only arise, if at all, if DB Cargo is affected by a decision on one of GBRf's slots. DB Cargo is not therefore an **Involved Party**. Even if DB Cargo were truly an interested party (as to which Network Rail makes no admissions), the fact that a party may be an interested party does not mean that it is an Involved Party, as defined.
- 2.8 Furthermore, DB Cargo neither "put its position" to the TTP, nor did it "request a determination" from the TTP. Therefore even if, contrary to Network Rail's primary submission, DB Cargo is an Involved Party, DB Cargo is not and cannot be a Dispute Party and consequently cannot be an Appellant.

- 2.9 Network Rail notes in this context that the TTP did not treat DB Cargo as a Dispute Party: the only Dispute Parties so far as the TTP were concerned were Network Rail and GBRf.
- 2.10 Notwithstanding the reasons set out below, for which it considers that the Appeal should not proceed and/or opposes the Appeal substantively, Network Rail also asks the ORR to determine that the Appeal should not proceed on the basis that DB Cargo has no standing.
3. **REQUEST THAT THE ORR MAKES A DECISION UNDER M4.1.1 TO DECIDE NOT TO HEAR THE APPEAL**
- 3.1 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.
- 3.2 For the avoidance of doubt, subject to the points made in paragraph 3.7 and Sections 4 and 5 below, Network Rail considers that the TTP's analysis of what is the New Working Timetable and its own jurisdiction were correct and that as such if, contrary to Network Rail's primary position, the ORR allows the Appeal to proceed, it can and should be summarily disposed of.
- 3.3 Otherwise, as will be apparent from Network Rail's substantive response to the matters raised in the Appeal, as set out at Sections 4 and 5 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.
- 3.4 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 they 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.
- 3.5 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.
- 3.6 Further, the matters raised by DB Cargo took place against the backdrop of the complicated factual background leading up to the industry decision to proceed with the Hybrid Timetable.
- 3.7 It is clear that DB Cargo contemplates the ORR making factual findings about the process which led to the publication of the Hybrid Timetable. In particular:
- 3.7.1 DB Cargo asks the ORR to find that:
- 3.7.1.1 The TTP erred in describing the Hybrid Timetable as the New Working Timetable;
- 3.7.1.2 The New Working Timetable is defined in Part D of the Network Code; and
- 3.7.1.3 The New Working Timetable is not capable of being unilaterally withdrawn and replaced with some other timetable(s) such as in this case the Hybrid Timetable.
- 3.7.2 Network Rail considers that this is tantamount to asking the ORR to investigate the circumstances in which the Hybrid Timetable came to be published and for the ORR to decide whether or not it was in breach of contract as a result of its involvement in and as part of the industry decision to proceed with the Hybrid Timetable for December 2018.

- 3.7.3 For the avoidance of doubt and as set out further at Section 5 below, Network Rail's position is that this question is not within the jurisdiction of the TTP. The TTP itself agreed that it had no jurisdiction to make such a determination. Network Rail therefore considers that this cannot properly be the subject of an appeal to the ORR.
- 3.7.4 DB Cargo also asks in the alternative that if the ORR is not able to accept its appeal it seeks to ascertain how the TTP was able to conclude that the Hybrid Timetable is the New Working Timetable by reference to the legal entitlements of the parties. Network Rail also considers this to be a request to the ORR to make a substantive determination on the status of the Hybrid Timetable.
- 3.8 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 and will not be before the ORR.
- 3.9 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 DB Cargo to be determined, a significant amount of further evidence and analysis would be required including an 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.
- 3.10 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.
- 3.11 Network Rail also does not consider that the ORR is in the position of being able to take such decisions: as well as 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 and will not be before the ORR.
- 3.12 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 parties who are not party to TTP1331 and TTP1376.
- 3.13 Therefore, if DB Cargo wishes to raise questions relating to the decision to adopt the Hybrid Timetable, Network Rail is of the opinion 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.
- 3.14 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 circumstances¹.
- 3.15 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

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

the Hybrid Timetable, the ORR cannot properly act 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 DB Cargo

3.16 Even if the ORR does not accept the submissions above, there is a further reason why the ORR should refuse to hear DB Cargo's appeal and that is the conduct of DB Cargo in relation to the Determination. As set out above:

3.16.1 DB Cargo did not itself seek to appeal any decision of Network Rail in relation to part of the New Working Timetable in TTP1331 and/or TTP1376.

3.16.2 DB Cargo did not address any submissions to the TTP that the Hybrid Timetable was not the New Working Timetable, as to what was the New Working Timetable or as to the powers of Network Rail or the effect of the decision to publish the Hybrid Timetable prior to the hearing and did not seek to address any submissions to the TTP on those or any other matters.

3.16.3 In particular, DB Cargo did not advance the arguments that it now seeks to make the subject of an appeal to the effect that the Hybrid Timetable was not the New Working Timetable or as to the powers of Network Rail or the effect of the decision to publish the New Working Timetable and to use that timetable to become the Working Timetable.

3.16.4 It would be wrong in principle to permit DB Cargo, even if (contrary to Network Rail's submissions in Section 2 above) it has *locus standi* to bring an appeal, now to seek to advance arguments, and in particular arguments that raise issues of fact, not advanced by DB Cargo to the TTP: that is not in truth an appeal from the decision of the TTP but an attempt to mount a collateral challenge to the actions of Network Rail.

3.17 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, either on the ground that it would be more conveniently resolved by the High Court or on the ground that DB Cargo's conduct precludes it from bringing the Appeal.

4. **NETWORK RAIL'S SUBSTANTIVE RESPONSE TO DB CARGO'S CHALLENGE TO THE TTP'S DECISION THAT THE HYBRID TIMETABLE IS THE NEW WORKING TIMETABLE**

4.1 GBRf brought its appeal under D2.7.2 of the Network Code, which provides in relevant part that:

"Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it".

4.2 As further explained below, the jurisdiction of the TTP is therefore limited to hearing challenges relating to decisions made in relation to **parts of** the New Working Timetable.

4.3 Accordingly, the TTP had to determine which timetable was the New Working Timetable in order to determine the basis of GBRf's right to appeal under D2.7.2, which was the basis of GBRf's appeal to the TTP, and which only provided a right of appeal in relation to part of the New Working Timetable.

4.4 No one can be "affected" by a timetable that is not going to be implemented: such a timetable can have no "effects" that result in someone being "affected". A Timetable Participant can only be affected by a timetable that is to be implemented.

4.5 Therefore, in order to hear any dispute which related to the timetable that was to be (and indeed was) implemented on 9 December 2018 (i.e. the Hybrid Timetable) the TTP was required to find that the Hybrid Timetable was the New Working Timetable: indeed, 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 was and is otiose because that was not the timetable that was to be (and was) brought into operation on 9 December 2018 and so no one could be "affected" by it.

- 4.6 The TTP clearly appreciated these points and noted several times in the Determination that the Hybrid Timetable was the New Working Timetable.
- 4.7 Network Rail submits that it was plainly correct to do so. Without such a decision, the TTP would have had no jurisdiction at all in relation to the timetable that has now taken effect. The determination would have been illogical if it had been in any other terms.
- 4.8 The TTP did not, nor was it entitled to, come to any conclusion as to whether the Hybrid Timetable was a New Working Timetable that had been reached through compliance with the processes set out in the Network Code. That question is one of legal and contractual analysis and (as set out further in Section 5) the TTP itself recognised that it did not have jurisdiction to decide it.

5. **NETWORK RAIL'S RESPONSE TO DB CARGO'S CHALLENGE TO THE CONTRACTUAL BASIS OF THE HYBRID TIMETABLE**

- 5.1 DB Cargo is asking the ORR to determine that:

"the New Working Timetable is defined in Part D of the Network Code and is not capable of being unilaterally withdrawn and replaced with some other timetable(s) such as in this case with the Hybrid Timetable."

- 5.2 Network Rail considers that this constitutes an attempt to revive the "points of principle" raised by GBRf in TTP1331 and TTP1376, which relate to the development and publication of the Hybrid Timetable and whether Network Rail was entitled to act as it did.
- 5.3 In TTP1331 and TTP1376, Network Rail took the position (as explained further below) that the TTP had no jurisdiction to make findings on those points, and the TTP agreed with it.

Background

- 5.4 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 due to take effect in December 2018. These points of principle bear striking similarity to those raised by the Appeal. They were:
 - 5.4.1 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?
 - 5.4.2 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?
 - 5.4.3 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; and
 - 5.4.4 GBRf requested a determination of breach of contract on other matters where the Panel considered that this applied.
- 5.5 Network Rail submitted in the NR SRD that these matters were outside the jurisdiction of the TTP. For further details, Network Rail refers to the NR SRD but also sets out below a summary of its position:
 - 5.5.1 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 (set out above);
 - 5.5.2 GBRf could therefore appeal to the TTP under D2.7.2 against a decision of Network Rail as to a part of the New Working Timetable;

- 5.5.3 The TTP has jurisdiction to determine specific capacity allocation disputes arising from the contents of the New Working Timetable, and has considerable expertise to deal with these disputes;
- 5.5.4. In order to consider any appeal, the TTP necessarily needs to determine what the New Working Timetable is: plainly it is the Hybrid Timetable since that is the timetable which is actually due to be implemented and no timetable participant can therefore be "affected" by any other timetable;
- 5.5.5. No other timetable could form a relevant basis of complaint, because it is not going to be implemented and no other timetable could form the basis of an appeal under D2.7.2 because it is not the New Working Timetable;
- 5.5.6. The TTP did not, however, have jurisdiction to consider the points of principle, including whether or not Network Rail had complied with its contractual obligations when producing the New Working Timetable. These were not disputes arising from the contents of the New Working Timetable, but rather a wholesale complaint about the procedure that resulted in the publication of the Hybrid Timetable (which was the New Working Timetable);
- 5.5.7. 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:
- 5.5.7.1. It may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;
- 5.5.7.2. It may direct that a challenged decision of Network Rail shall stand; and
- 5.5.7.3. 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;
- 5.5.8 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;
- 5.5.9 For the avoidance of doubt, 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; and
- 5.5.10 To make any determination on that question, the TTP would have needed to have access to factual evidence and input from a wide range of industry participants. This was not the sort of issue that could be determined by the TTP, or in the short timeframe allowed for a timetabling dispute.

The Determination

- 5.6 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 83².

- 5.7 The TTP decided that:
- 5.7.1 The Hybrid Timetable is the New Working Timetable (80);
 - 5.7.2 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);
 - 5.7.3 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);
 - 5.7.4 The TTP's powers do not extend to allow it to determine:
 - 5.7.4.1 Issues relevant to the production of the New Working Timetable;
 - 5.7.4.2 The points of principle advanced by GBRf; and
 - 5.7.4.3 Matters of contract, namely whether the D-26 Weekday Timetable is contractually binding or a breach of the Network Code (82).
 - 5.7.5 There was a specific direction in relation of a particular train slot (83).
- 5.8 It is Network Rail's submission (for the reasons put forward in the NR SRD and summarised at paragraph 5.5 above) that the TTP was clearly correct to find as it did.
- 5.9 As discussed in more detail above, clearly the TTP was correct to find that the Hybrid Timetable was the New Working Timetable, otherwise it would have had no jurisdiction to consider disputes as to the allocation of capacity within it. It did not have jurisdiction to consider any contractual questions arising in the context of the preparation of the New Working Timetable, including whether it had been produced in compliance with the Network Code.
- 5.10 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.
- 5.11 This is consistent with the previous TTP decision in Disputes TTP1233, 1237, 1240, 1270, 1288 and 1291 brought by, inter alia, GBRf and DB Cargo, which sought determinations by the TTP of various contractual issues including alleged breach of contract with regard to the timetabling process.
- 5.12 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 (at **Appendix D**) that the TTP would not necessarily have jurisdiction to address all aspects of the case, and referred the matter to an Allocation Hearing.

² Network Rail notes for example that, as DB Cargo point out, 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).

- 5.13 The TTP has now itself recognised (twice) that making declarations of principle in relation to contractual issues is outside of its remit and it does not have appropriate structures to handle such disputes.

Comments on DB Cargo's appeal

- 5.14 The TTP did not make any finding as to whether the "New Working Timetable is defined in Part D of the Network Code and is not capable of being unilaterally withdrawn and replaced with some other timetable(s) such as in this case with the Hybrid Timetable".
- 5.15 Not only did it not address that issue, on the contrary, it explicitly set out that "any dispute... as to how the Hybrid Timetable came into effect, cannot be the subject of any relevant dispute before the Panel".
- 5.16 Network Rail considers, as explained above, that the TTP was entirely correct in deciding as it has. To the extent that DB Cargo seeks to overturn the TTP's decision as to its own jurisdiction, Network Rail repeats the points set out above.
- 5.17 DB Cargo however does not appear to be appealing the TTP's decision on jurisdiction as such, but rather asking the ORR to make some form of determination on the underlying questions. Network Rail considers that this is not possible.
- 5.18 The Network Code sets out at M7.1.1, as noted above, that:

"Every appeal will be limited to a review of the decision of the lower tribunal unless the Office of Rail and Road considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing."

- 5.19 The TTP correctly decided that it had no jurisdiction to make any findings on that issue. There is therefore no decision on the underlying questions for the ORR to review, as the TTP made none.
- 5.20 The ORR would, in order to reach any determination on the point, have to undertake its own investigation and analysis as to whether Network Rail was entitled to replace the D-26 Weekday Timetable with the Hybrid Timetable.
- 5.21 If this is the intention behind the Appeal, Network Rail considers that DB Cargo is attempting to subvert the purpose of the appeals procedure in Part M of the Network Code. M7.1.1 is clear that the standard position is that the ORR reviews a decision rather than undertaking a lengthy analysis of its own.
- 5.22 For the reasons set out in Section 3 above, Network Rail considers that the ORR is, in any event, not the correct forum to undertake any such substantive exercise of evaluation of Network Rail's actions in developing the hybrid timetable.
- 5.23 Further, 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. We understand that the ORR actually wrote to the DfT in support of the Hybrid Timetable. Having recognised the need to de-risk the timetable and been supportive of the steps taken to do so, the ORR cannot fairly now uphold an appeal designed to undermine the industry-agreed approach.

Request to ORR to ascertain the basis of the TTP's decision

- 5.24 DB Cargo asks the ORR in the Appeal:

"If ORR considers that it is not able to agree with DB Cargo's requests above, in order to provide clear understanding for the industry, DB Cargo requests that ORR seeks to ascertain how the Timetabling Panel was able to conclude that the Hybrid

Timetable is the New Working Timetable by reference to the legal entitlements of the parties".

- 5.25 There is an inherent illogicality to DB Cargo asking the ORR to ascertain the reasoning of another decision-making body.
- 5.26 Network Rail again interprets this as DB Cargo asking the ORR not to review the decision of the TTP (the proper purpose of an appeal) but to undertake instead a separate exercise of analysis.
- 5.27 For the reasons set out above, Network Rail considers this to be impermissible.

6. COSTS

- 6.1 Network Rail considers that DB Cargo has brought the Appeal despite not having standing to do so, and despite asking the ORR to determine matters that cannot properly be the subject of an appeal.
- 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

