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Dear Katherine,

**APPEAL UNDER PART M OF THE NETWORK CODE BY DB CARGO (UK) LIMITED
IN RESPECT OF DETERMINATIONS TTP1331 & 1376 OF THE TIMETABLING PANEL**

Thank you for your e-mail dated 13 December 2018 requesting a response from DB Cargo (UK) Limited (“**DB Cargo**”) to the representations made by Network Rail in section 2 “*Locus Standi of DB Cargo*” of its Response Notice to the ORR dated 12 December 2018.

DB Cargo served its notice of appeal in good faith and, in its considered view, consistently with the provisions of Condition D5.2.1 of the Network Code.

The relevant part of Condition D5.2.1 states:

“Where either Network Rail or a Timetable Participant is dissatisfied with the decision of a Timetabling Panel under Condition D5.1, it may refer the matter to the Office of Rail and Road for determination under Part M,.....” (emphasis added).

DB Cargo is “*a Timetable Participant*” and, as evidenced by the issues set out in its notice of appeal, it was clearly dissatisfied with the decision of a Timetabling Panel (in this case TTP1331 & 1376). Therefore, it considered that it was entitled to refer the matter to the ORR for determination.

If, as Network Rail argues, that serving a notice of appeal is an action that is available solely to the Dispute Parties, then it would have been quite simple for the drafting of Condition D5.2.1 to have made this limitation explicit by instead stating, for example:

“Where either Network Rail or a relevant Timetable Participant is dissatisfied...” or *“Where any Dispute Party is dissatisfied....”*.

However, this limitation is not explicit and DB Cargo considers that it was not intended to be either. A Timetable Participant could raise an appeal against a Timetabling Panel determination irrespective of whether or not that Timetable Participant is also a “Dispute Party”. This is because of the way in which the timetable and the process by which it is developed interlinks the requirements of all Timetable Participants through the



accommodation of Train Slots in the timetable. It is not unusual that a decision of a Timetabling Panel in respect of a particular dispute could give rise to adverse effects on other Timetable Participants who may not have believed that they would have, or should have been affected by the outcome. This could be as a result of being affected by an unforeseen change to a Train Slot which has consequential effects on other Train Slots or, as in the case of TTP1331 & 1376, by a matter of principle concerning Part D of the Network Code that creates a potential precedent for the future.

DB Cargo considers that in those circumstances, previously unaffected Timetable Participants could also submit a notice of appeal to the ORR, hence the wider wording of Condition D5.2.1. The only other way of addressing this in DB Cargo's view would be for every Timetable Participant to protect its interests by becoming a Dispute Party in each and every timetabling dispute that could affect the parts of the network that they operate over to guard against a Timetabling Panel's determination giving rise to unforeseen consequences. Clearly, this approach would introduce considerable time, effort and costs on the industry which would, in the vast majority of cases, turn out to be abortive.

DB Cargo argues that its view is further supported by the provisions of Access Dispute Resolution Rule H52. Unlike other types of dispute determinations which are kept private (e.g. arbitration) or published in due course on the Access Dispute Committee's ("**ADC**") website (e.g. access dispute adjudication), Access Dispute Resolution Rule H52 mandates that timetabling panel determinations are not only to be published immediately on the ADC website but a copy is also to be sent by the Secretary of the ADC individually to all Resolution Service Parties. DB Cargo submits that if the outcome of any timetabling determination was intended to remain solely within the domain of the relevant Dispute Parties, such action would be unnecessary and publication would no doubt follow the less time critical requirements used in respect of access dispute adjudication determinations (i.e. any party could obtain and read a copy if it so desired once the determination is eventually published on the ADC website).

DB Cargo notes Network Rail's criticism that DB Cargo did not seek to become a Dispute Party in respect of TTP1331 & 1376. However, until the determination was published, DB Cargo did not foresee a Timetabling Panel issuing a determination which failed, in DB Cargo's view, to adequately explain how it arrived at the decisions that it made, contrary to Access Dispute Resolution Rule H51k. Only at this point could DB Cargo have been aware of an issue which may have prompted it to progress its own dispute.

As indicated above, given that the timetable and the process by which it is developed as set out in the common conditions contained in Part D of the Network Code, are relied upon by all Timetable Participants, it is crucial that the decisions reached by Timetabling Panels are properly explained so as to aid industry understanding for the future. Without such understanding, precedents can be created from determinations (such as is the case here with TTP1331 & 1376 in respect of decisions concerning the New Working Timetable) without any proper understanding of why those precedents exist.

In summary, therefore, DB Cargo submits that it was permitted to serve a notice of appeal in this case pursuant to the provisions of Part D supported by its accompanying

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arguments advanced above. If DB Cargo's interpretation of Condition D5.2.1 is correct, it would seem inconsistent to allow a right of appeal in Part D only to remove it again in Part M.

The ORR must ultimately decide whether or not DB Cargo's appeal is allowed to continue. However, if it is not allowed to proceed, this does not alter the fact that DB Cargo (and others) considers there are some substantive issues with TTP1331 & 1376 that should be addressed for the benefit of the industry and in particular to aid understanding going forward. These include those issues set out in DB Cargo's notice of appeal. Presumably, the existence of these substantive issues led the ORR to reach an initial view that it would be minded to hear DB Cargo's appeal (ORR's letter to the parties dated 4 December 2018 refers).

Finally, although not contained in section 2 of the Response Notice, DB Cargo notes that in section 6 Network Rail is inviting the ORR to award costs against DB Cargo for raising its appeal because it considers DB Cargo's appeal to be "*entirely misconceived*". DB Cargo rejects this assertion on the basis of the foregoing, and submits that its appeal does not meet any of the circumstances set out in Condition M4.1.1 (a) to (c) that would ordinarily result in the appeal being immediately rejected (i.e. of insufficient importance to the industry, frivolous or vexatious or improper conduct). Consequently, whether or not the ORR decides it has the jurisdiction to hear the appeal, DB Cargo considers that a cost award against it in this case would be entirely inappropriate, unfair and could discourage parties from referring important matters to the ORR in the future.

DB Cargo raised its appeal in good faith because it believes that there are substantive issues with TTP1331 & 1376 to be addressed. If the wording of the Network Code contains inconsistencies that have given DB Cargo the impression that it could serve a notice of appeal in this case, the fact that this position may be incorrect does not alter the position that the substantive issues highlighted by DB Cargo still remain. The ORR's initial view indicating it was minded to hear DB Cargo's appeal appears to indicate that these substantive issues do exist and may warrant a review.

DB Cargo hopes that the above comments are helpful. If you require any further information, please let me know.

Yours sincerely,

Access Manager

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