

12 July 2017

Appeal under Part M¹ of the Network Code by Abellio ScotRail Limited in respect of Determination TTP1064 of the Timetabling Panel – Determination by ORR

Introduction

1. On 12 May 2017, Abellio ScotRail Limited (**ASR**) served a Notice of Appeal on ORR under Part M of the Network Code (the **Notice of Appeal**) in respect of a determination of the Timetabling Panel of the Access Disputes Committee (the **TTP**) regarding dispute TTP1064 (the **Determination**). This dispute was heard by the TTP on 20 April 2017 and the Determination was issued to the parties on 5 May 2017.
2. The original dispute and this appeal relates to Version 2 of the Timetable Planning Rules for Scotland applicable to the New Working Timetable for 2018 (the **New TPRs**) applicable, in effect, to the timetable to be introduced in December 2017. After hearing the appeal, the TTP determined “... *the decision of Network Rail to introduce the New TPRs shall stand*”.²
3. ASR is appealing the Determination under Part M of the Network Code. Condition M2 of the Network Code provides that any appeal made under Part M must comply with the requirements of Condition M3. Condition M3 provides that a party must set out in a Notice of Appeal why it believes the determination is:
 - a. wrong; or
 - b. unjust because of a serious procedural or other irregularity.

Appeal to ORR

4. ASR is appealing the Determination because it:
 - a. believes the decision is wrong, and

¹ [Current Network Code document by Part.](#)

² See paragraph 7.1 of the Determination.

- b. considers that the failure of the TTP to consider the specific objections of ASR to the changes proposed by Network Rail makes the Determination unjust because of a serious procedural or other irregularity.

5. ASR's Notice of Appeal sets out the following grounds (summarised as appropriate):

a. The Determination is wrong because:

- i. Network Rail did not consider data (including GPS data) and objections raised by ASR before implementing the changes. As a result the consultation process was ineffective and the changes introduced are unreliable.

In line with the TTP's view that all available sources of information should be used, the Hearing Chair should have concluded that the changes were unreliable and should not have been implemented until further verification could be undertaken.

- ii. Network Rail did not conduct any modelling, proposed changes based on unreliable historic data and did not take account of actual GPS and On Train Monitoring Recorder (**OTMR**) data.

In line with the TTP's view that all available sources of information should be used and modelling should take place if ORR recommends it, the Hearing Chair should have concluded that the changes were unreliable and should not have been implemented until further verification could be undertaken.

- iii. Network Rail did not apply the Decision Criteria (as defined in Condition D4.6.4) to the changes as required by Network Code Condition D.

*The Hearing Chair appears to have mischaracterised ASR's argument by seemingly suggesting ASR claimed that the Timetable Rules Improvement Programme (**TRIP**) and/or Observed Data Analytics (**ODA**) breached the Decision Criteria. ASR is not challenging the TRIP or ODA processes themselves. It is challenging the changes made as a result of those processes, and asserts that it is the changes themselves to which the Decision Criteria must be applied. As such, the Hearing Chair appears in fact to agree with ASR's argument, despite then applying incorrectly that finding to TTP1064.*

In line with the TTP's finding that Network Rail should apply the Decision Criteria to individual changes and the fact that Network Rail did not do so, the Hearing Chair should have concluded that the changes were

unreliable and rejected them until a proper analysis of the Decision Criteria could be conducted.

- iv. A correct application of the Decision Criteria to the changes should have considered the impact upon all relevant considerations including the Scotland Route Utilisation Strategy (**RUS**), the commercial interests of the parties (including ASR's ability to meet Transport Scotland's Service Level Commitments (**SLCs**) which represent government policy and the scope of the franchise award). Such a correct application should result in the changes being rejected as set out in Appendix 2 of ASR's Sole Reference³.

The Hearing Chair should have considered ASR's submissions in relation to each of the Decision Criteria and assessed whether the changes were justified in light of those Decision Criteria. In doing so he should have noted that Network Rail's reasons for implementing the changes at this time appear to be motivated by a desire to protect the UK-wide TRIP programme rather than assess whether the changes are ready and robust to introduce. Having conducted this assessment the Hearing Chair should have concluded that the Decision Criteria were not made out and the changes should be rejected.

- v. There is a risk that the proposals, if implemented prematurely and based on inapplicable historic data from a period when performance was poor may adversely affect current good performance.

In line with the TTP's concerns about damaging current good performance and ensuring changes are robust to ensure the proper operation of the Network the Hearing Chair should have rejected the changes until their impact was properly modelled and assessed (as anticipated by Network Rail's own TRIP programme).

- b. The Determination is unjust because of a serious procedural or other irregularity:

- i. The TTP appeared to reject ASR's submissions as a result of the perceived absence of detailed objections to each change, despite ASR's request that these be dealt with after the points of principle and its explanation that individual objections are of limited value where Network Rail has not undertaken the necessary analysis and modelling to justify its changes.

³ The document containing ASR's original reference to the TTP including the subject matter in dispute, a detailed explanation of the issues in dispute and the decision sought.

- ii. By changing the procedure for hearing the joined TTP references⁴ two days before the hearing, the TTP prevented ASR having its case fully heard. Network Rail was (as noted in the Determination) in possession of ASR's detailed objections which go as far as it is possible to go without further analysis being undertaken by Network Rail.
- iii. ASR also objects to the TTP's finding (on the basis of its apparent understanding of Network Rail's oral submission and contrary to the evidence in ASR's reference and Network Rail's impact assessment) that all current schedules can be operated after the changes. If this was understood to mean that current ASR service patterns and schedules can be maintained after the changes, that is contrary both to Network Rail's Impact Study and to ASR's evidence of its SLCs being breached, both of which were before the Panel. ASR consequently considers the TTP's finding to be unavailable to it (and incorrect). Consequently a key finding on which the TTP's Determination was based was flawed.

6. ASR is seeking the following remedies:

- a. That ORR directs Network Rail that the New TPRs be cancelled and not apply (or order that the New TPRs are so cancelled);
- b. That ORR declares that:
 - i. Network Rail has not correctly applied the Decision Criteria;
 - ii. There remain a number of significant unaddressed issues raised by ASR regarding the methodology employed to utilise ODA data for the New TPRs and that further jointly specified methodological work should be undertaken to address these issues, taking account of alternative and more relevant data, including that provided by ASR;
 - iii. Work undertaken by the TRIP team in Scotland had not been modelled to validate the values, and prove the data is correct and that such modelling should be undertaken;

⁴ ASR's reference to the TTP was one of a number of references made by various train operators. The TTP considered whether to join the references or hear them separately.

- iv. No performance modelling has been undertaken to demonstrate a performance improvement, and that such modelling should be undertaken;
 - v. The Timetable Impact Study independently undertaken is too limited to demonstrate that all ASR's Firm Access Rights can be accommodated;
- c. That ORR gives general directions to Network Rail specifying the results to be achieved in connection with the New TPRs, including the objective of revisions to the TPRs, the appropriate level of assessment and modelling involved (including by reference to ORR guidance), and where relevant the appropriate assumptions to make. Such directions to include a direction to identify TPRs which where possible allow Access Beneficiaries to comply with Franchise Agreements and SLCs; and
- d. Or, as appropriate, the ORR deems the relevant timescales for the preparation of a working timetable to amount to exceptional circumstances and substitute its own decision in connection with the New TPRs.

ORR's handling of the appeal

7. The preliminary procedural matter to be determined by ORR, in accordance with Condition 4 of Part M, was whether or not the appeal should proceed to it. On 17 May 2017 we asked Network Rail if it wished to make representations on this issue. It provided its representations on 22 May 2017. In response, ASR made a submission on 23 May 2017. On 23 May 2017, we asked ASR for any further representations it wished to make with respect to Network Rail's representations on the effect on its timetable planning of reverting to the previous TPRs (i.e. version 4 of the 2017 TPRs (Scotland)) and the number of individual TPRs that remained unresolved between the parties. We received ASR's representations on 25 May 2017.
8. On 26 May 2017 Network Rail provided its Respondent's Notice pursuant to Condition 5 of Part M. On 30 May 2017 ASR made representations about the Determination in respect of previously linked appeals. On 31 May 2017 Network Rail provided further representations in response to ASR's submissions.
9. ORR gave careful consideration to ASR's Notice of Appeal, the Determination and the representations made by both parties up to end of 25 May 2017. Having done so, we informed ASR and Network Rail on 1 June 2017 that the appeal should proceed.
10. As we set out in our letter of 1 June 2017, Condition 7 of Part M provides that an appeal will be limited to a review of the decision of the lower tribunal unless we

consider, in the circumstances of the individual appeal, it would be in the interests of justice to hold a re-hearing. As a result, ORR will not normally give permission for parties to put forward a case that was not argued before the TTP or to submit new evidence not previously put to the TTP unless it is clear that the interests of justice require it.

11. After careful consideration of representations received from ASR on 5 June 2017 and Network Rail on 9 June 2017 in response to our letter of 1 June 2017, we confirmed by letter on 9 June 2017 that we were not persuaded that it would be in the interests of justice to hold a re-hearing. We therefore confirmed that we would proceed with the appeal by way of review only.
12. As we noted in our letter of 1 June 2017 and restated in our letter of 9 June 2017 the TTP process is meant to be quick, recognising the timetable process is time constrained and must continue alongside any appeal that is brought. This means there is an additional onus on the party bringing an appeal to ensure it raises the correct grounds of appeal at the right time: a party cannot expect to change the basis of the appeal it is bringing mid-way through or to introduce new evidence that was not before the TTP. Further, the party bringing the appeal needs to be able to demonstrate, in its grounds, why the TTP's decision was wrong or unjust because of a serious procedural or other irregularity.
13. We have in particular considered ASR's representation in paragraph 3.1 of its letter addressed to ORR of 5 June 2017 that it will be necessary for ORR to analyse facts which were not available to the TTP as a result of the factual situation developing since the TTP hearing. ASR's view is that the reversions that have subsequently been made by Network Rail to the New TPRs go to whether the rules were introduced prematurely without being properly validated or modelled. In contrast, Network Rail's view in paragraphs 2.2 to 2.5 of its response on 9 June 2017 is that there has been no change or evolution in the factual position relevant to the ASR appeal; changes have been made to the rules because Network Rail has been seeking to respond constructively to ASR's late wish to consult. Having considered these differing views together with final representations from ASR and Network Rail on 14 June 2017, we are not persuaded by ASR's analysis of the relevance of what has happened since the TTP hearing. We have therefore limited our review to whether ASR has demonstrated, in the grounds set out in its Notice of Appeal, that the Determination was wrong and/or unjust because of a serious procedural or other irregularity based on the factual material available to the TTP.

ORR's decision

14. In this case, having considered the Notice of Appeal and accompanying documents, ORR determines that ASR has not demonstrated that the Determination is wrong or unjust because of a serious procedural or other irregularity.⁵ ORR has therefore decided that the appeal should fail and the Determination should stand. Our reasons are set out below.

15. We consider the two limbs on which ASR's grounds of appeal are based in turn, dealing first with the limb that the Determination was wrong and then with the limb that the Determination was unjust because of a serious procedural or other irregularity.

The Determination is wrong

16. The grounds on which ASR argues that the Determination was wrong were set out at paragraph 5. We address each of ASR's grounds in turn below but in ORR's view, the grounds contained in ASR's Notice of Appeal do not demonstrate that the Determination was wrong.

Network Rail's consultation process was ineffective

17. There was considerable evidence from both parties before the TTP in relation to the consultation carried out by Network Rail. It is clear from the Determination that the TTP took into account all the evidence before it and having done so it was not persuaded by ASR's argument that Network Rail had not engaged with it, stating that "... *there is clear evidence of what the Panel accepted as being genuine consultation with ASR.*"⁶ While the TTP noted that it was unfortunate that ASR's GPS data appeared not to have been fully utilised by Network Rail and repeated its view that it expected all available and relevant data to be used, it did not see any need to investigate this further for the same reasons that it did not investigate why ASR appeared to have ceased to participate in further discussion with Network Rail from 2 or 3 February 2017.⁷

18. The TTP further found that if a Timetable Participant has ceased to engage with Network Rail at any stage of the development of new TPRs as ASR did in this case, it is difficult to imagine how a TTP could then determine that the consultation process had failed because of any lapse on Network Rail's part.⁸ ORR considers that this was a finding the TTP was entitled to reach based on the evidence before it.

⁵ See Condition M3.1.1(b) of Part M of the Network Code.

⁶ See paragraph 6.3 of the Determination.

⁷ See paragraph 6.3 of the Determination.

⁸ See paragraph 6.3 of the Determination.

19. ORR considers that ASR has not demonstrated the way in which the TTP's conclusion on this point erred. ASR's argument is primarily based on disputing the conclusions reached by the TTP after careful consideration of the evidence. ASR does not point to any evidence that the TTP ignored or to errors of reasoning on the part of the TTP. In ORR's view, ASR has not demonstrated that the Determination on this head was wrong.

Network Rail did not take into account all relevant data or undertake necessary modelling

20. In its Notice of Appeal, ASR states that the Determination is wrong on the grounds that the TTP said all available sources of information should be used, but Network Rail had not taken into account actual GPS and OTMR data. As such, ASR argues the TTP should have concluded the changes were unreliable. On the basis of an investigation report published by ORR in relation to Network Rail's delivery of its regulated performance targets in Scotland 2014-15⁹, ASR also argues the new timetable and its rules should have been modelled before implementation.

21. In our view the Notice of Appeal does not identify why the conclusion of the TTP on this ground was wrong or how it had erred in reaching that conclusion based on the evidence before it.

22. Both written and oral evidence was before the TTP as to the data that was used by Network Rail, particularly the use of ODA. Submissions were heard in relation to modelling of data, the use by Network Rail of historic data and provision of GPS data by ASR. Having given careful consideration to this matter, the TTP was not persuaded the concerns raised by ASR relating to the data Network Rail used were determinative when considering all other factors, including Network Rail's evidence as to how ODA data is handled and evidence as to the provision of ASR GPS data to Network Rail.¹⁰

23. It is also our view that the TTP's statement that all available sources of information should be used, is to be read in conjunction with the TTP's finding that "... *professional judgment must be applied in assessing which inputs are likely to be useful...*".¹¹ This recognises that, having applied its professional judgment, there may be reasons why Network Rail decides not to use all sources that are available to it. A decision not to use all possible sources does not automatically mean the changes are therefore unreliable and should not be implemented. In ORR's view, ASR has not demonstrated that the TTP's decision on this head was wrong.

⁹ [ORR investigation report: Network Rail's delivery of its regulated performance targets in Scotland 2014-15](#)

¹⁰ See, for example, paragraphs 5.15 and 5.25 of the Determination.

¹¹ See paragraph 6.2 (page 26) and paragraph 6.9.1 of the Determination.

24. With regard to the question of timetable and performance modelling, it is clear that the TTP did not consider the lack of modelling carried out by Network Rail to be determinative of the issues before it. The TTP was able to consider the lack of modelling as part of the evidence presented in considering the issue of data and weigh that against everything else Network Rail had done as regards collection and analysis of data. Having done so, it was open to the TTP to conclude that the lack of modelling was not a determinative factor.
25. While the TTP did suggest that if the ORR had previously said modelling ought to be done, then presumably modelling should be undertaken¹², it went on to conclude that this was not a matter that was necessary for the TTP to examine in depth. Rather, it was an issue the TTP felt could be addressed in guidance.
26. With regards to ORR's position on modelling, our investigation report into Network Rail's delivery of its regulated performance targets in Scotland 2014-15 did not go as far as to state that modelling should always be carried out by Network Rail. Rather, our recommendation was that *where* modelling is going to be carried out by Network Rail, Network Rail should carry this out earlier on in the process and use improved modelling. This would, in our view, help to reduce issues of unreliability with the timetable. However, this is not the same as saying that Network Rail *must always* carry out performance modelling of changes, as ASR believed to be the case at the hearing.¹³ Further, modelling of the type envisaged in the investigation report is carried out on the basis of a timetable. In this appeal, we consider that our investigation report recommendations are of limited application as the challenge to Network Rail's process arises (perfectly properly) before any timetable has been created. As a result, we do not consider that the lack of modelling was a determinative factor and, in our view, ASR has not demonstrated that the TTP's decision on this issue was wrong.

Network Rail did not apply the Decision Criteria to the changes

27. ORR agrees with the TTP that strategic initiatives such as TRIP, will not normally engage the individual Considerations (as defined in Condition D4.6.2) in the Decision Criteria. We also agree with ASR and the TTP that the Decision Criteria should be applied to each change made by Network Rail to TPRs.
28. There is no evidence that ASR identified or took the TTP through specific individual rule changes where it considered Network Rail had failed to apply the Decision Criteria.

¹² See paragraph 5.9 of the Determination.

¹³ See paragraph 4.4 (page 9) of the Determination.

In our view, it is not sufficient for a party to make generalised claims about a failure of process without substantiating that claim with the specific examples where it alleges Network Rail has failed to meet its obligations. See also paragraph 39 below.

29. We are not convinced by ASR's argument that Network Rail does not explicitly consider or apply the Decision Criteria when making changes to the TPRs. ASR alleged in its submission to the TTP that "... on 3 February 2017 there was a list of changes that were made and in its view the Decision Criteria should have been applied at that stage."¹⁴ ASR goes on to state that Network Rail had in fact failed to apply the Decision Criteria to the revisions.¹⁵ The evidence that was before the TTP does not however support this assertion.
30. In its submissions, Network Rail stated that the whole structure of the decision making process was geared around ensuring that the Considerations are given their proper due.¹⁶ It confirmed that it considered the Decision Criteria for every decision it makes in accordance with Part D and that all proposed revisions of the TPRs include a written reason for the proposed change, which is based on the Decision Criteria.¹⁷ ASR did not present any evidence that Network Rail had not provided written reasons for the proposed changes for the second revision of the TPRs issued on 3 February 2017. Indeed the TTP noted that "... the consultation process was continuing"¹⁸ after the publication of version 2 of the TPRs on 3 February 2017.
31. As we noted above in paragraph 17, the TTP found Network Rail had carried out genuine consultation with ASR but that ASR had ceased to participate in further discussions with Network Rail from 2 or 3 February 2017.¹⁹ ASR has sought to use paragraph 84 of the Witness Statement of Matthew Allen, which was before the TTP, as evidence that Network Rail does not explicitly consider or apply the Decision Criteria when making changes to the TPRs. Looking further at Mr Allen's witness statement, he explains that every TPR value is intended to reflect the capability of the infrastructure accurately so Network Rail's considers accuracy is the starting point for any revision. In Network Rail's view, accuracy underpins almost all of the Considerations (at least (a), (c), (d), (e), (g) and (j) – and less directly (f) as well) and

¹⁴ See paragraph 5.19 of the Determination.

¹⁵ See paragraphs 4.4 (page 8 and page 9) and 5.19 of the Determination.

¹⁶ See paragraph 4.9 (page 16) of the Determination.

¹⁷ See paragraph 5.20 of the Determination and paragraph 83 of the Witness Statement of Matthew Allen, which was before the TTP.

¹⁸ See paragraph 4.9 (page 15) of the Determination.

¹⁹ See paragraph 6.3 of the Determination.

certainly the Objective.²⁰ He explains that on occasions other considerations are also relevant and can provide a reason to use a planning value other than the most accurate from a capability perspective. He goes on to explain in some detail how Network Rail carries out its decision making when considering revisions to ensure the Considerations are properly applied.²¹ He concludes that Network Rail often uses consultation to make sure it adequately captures considerations other than accuracy to ensure that the Considerations in Condition D4.6.2 are properly applied.²² Mr Allen further adds that “... [Network Rail] is somewhat reliant on operators to explain *why* a revision will have an impact on performance, or *why* it will have an impact upon them. When this information is provided [Network Rail] is well placed to assess and weigh these considerations appropriately, which it cannot do if operators provide only assertions. Where supporting information is not provided by operators, then all [Network Rail] can reasonably do is place more weight and importance on the evidence it does have before it”.²³

32. ASR could have raised issues with Network Rail in relation to the application of the Decision Criteria to specific changes if it had continued to engage with the consultation beyond 2 or 3 February 2017. It is not clear why ASR did not do so. Further, ASR set out its case in its Sole Reference at a general and high-level. It is therefore difficult to see how an argument that Network Rail has disregarded the Decision Criteria could succeed when the argument was not supported by reference to specific examples of failure. Having considered this together with ASR’s withdrawal of engagement from the consultation process, our view is that ASR has not demonstrated that the TTP’s decision on this head was wrong.

Network Rail incorrectly applied the Decision Criteria to the changes

33. ASR argues a correct application of the Decision Criteria to the changes should have considered the impact on all relevant considerations including the Scotland RUS and the commercial interests of the parties, including ASR’s ability to meet its SLCs.

34. The TTP noted in the Determination²⁴ that the commercial interests of any Timetable Participant and Network Rail are included in the Considerations, all of which are given equal status in Condition D4.6.2. The TTP went on to note that: “*When applying the Considerations in any particular case, D4.6.3 requires Network Rail to identify those*

²⁰ See paragraph 85 of the Witness Statement of Matthew Allen, which was before the TTP.

²¹ See paragraphs 86 to 89 of the Witness Statement of Matthew Allen.

²² See paragraph 89 of the Witness Statement of Matthew Allen, which was before the TTP.

²³ See paragraph 89 of the Witness Statement of Matthew Allen, which was before the TTP.

²⁴ See paragraph 6.5 of the Determination.

which it regards as relevant and apply those to achieve [a] result which is fair and not unduly discriminatory. Only if two or more of the Considerations conflict will Network Rail then weigh the Considerations to arrive at an appropriate decision.”

35. Taking the above into account, the TTP found that “... *an amendment to a TPR which is operationally necessary cannot be ‘trumped’ by any commercial interest... once its weighting has been properly applied any consequential commercial issues, such as a failure to achieve SLCs under a Franchise Agreement, are not seen as a matter falling to be dealt with under Part D of the Network Code and, therefore, in a Timetabling Panel Determination.*”²⁵ It is clear that the TTP understood that commercial interests of a party were a relevant factor when applying the Decision Criteria but correctly held that it was just one of a number of factors set out in Condition D4.6.2 that Network Rail had to take into account. It does not therefore follow that the application of the Decision Criteria is incorrect simply because the commercial interests of a party has not been the overriding consideration in whether to implement a specific change.
36. We do not consider that the TTP erred in not assessing whether all the changes proposed by Network Rail were justified in light of the Decision Criteria as ASR did not, in its Sole Reference, request relief in relation to specific changes. Rather, ASR had asked for a broad finding that “... *the revisions made to TPR 2018 (Scotland) were contrary to the correct application of the Decision Criteria.*”²⁶ However, as the TTP noted, “... *it is only when individual TPR adjustments emerge from the process that it can be asked whether the Considerations which are relevant in each case have been correctly identified and where any are in conflict, they have been weighed appropriately in each case.*”²⁷ Consequently, where a party has not identified, by reference to individual amendments, why the Decision Criteria has been incorrectly applied in that instance, we do not see how it is possible for the TTP to make any specific findings in this regard. Accordingly we do not consider that ASR has successfully demonstrated that the TTP’s decision on this head was wrong.

There is a risk that the proposals may adversely affect ASR’s current good performance

37. ASR argued before the TTP that the introduction of the revised TPRs would have a significant effect on its current and planned services to an extent which would prejudice its ability to meet its SLCs²⁸. It is clear from the Determination that there was evidence

²⁵ See paragraph 6.5 of the Determination.

²⁶ See section 8.1(d) of ASR’s Notice of Appeal.

²⁷ See paragraph 6.2 (page 27) of the Determination.

²⁸ We would note that consistency with an SLC is not, of itself, a matter that is a Consideration for the purposes of Condition D4.6.2 of the Network Code. Inconsistency with an SLC will only be relevant when applying the Decision Criteria to the extent that it impacts on those matters consisting of the Considerations under Condition D4.6.2.

before the TTP from both parties in relation to ASR's current performance and the potential impact of the New TPRs on that performance.²⁹

38. While the TTP was conscious of the significance of the concerns about possible effects on ASR's services, the TTP noted that it did not have sufficient evidence before it to conclude whether ASR's SLCs would in fact be unachievable (nor was it asked to reach such a conclusion).³⁰

39. The TTP put it to ASR that ASR gave examples in its case which it did not actually specifically plead.³¹ ASR did not dispute this. Consequently, we consider that the TTP rightly held that it was not possible to allow ASR to amend its claim without the consent of Network Rail (which was not given). The TTP did, however, note in guidance that if references are made in the future against individual TPR amendments, it will be open to the TTP to address any concerns over proposed changes to the TPR derived from flawed data affecting both performance and capacity in Scotland.³² It is our view that the TTP considered this issue appropriately and could not allow ASR to argue its case on a basis of detailed claims which it had failed to set out in its Sole Reference. It is therefore our view that ASR has not demonstrated that the TTP's decision on this head was wrong.

Injustice due to a serious procedural or other irregularity

40. This limb is clearly intended to cover those circumstances in which there was a serious irregularity in the procedure adopted by the TTP that has had a bearing on the fairness of the outcome. It will often be the case that a party will argue that a process could have been better conducted. However, that does not mean that the process was flawed in a way which resulted in injustice to a party. Rather, to succeed on this ground, the appellant needs to show that there was a serious procedural or other irregularity that has led to an injustice being caused to the appellant.

41. The purpose of the TTP is to determine disputes which arise out of or in connection with timetabling issues and, in accordance with its process rules, it should endeavour to reach fair, rapid and inexpensive determinations of disputes drawing on a knowledgeable peer group with relevant railway expertise.³³ We do not consider that

²⁹ See, for example, paragraphs 4.4 (page 7, page 8 and page 10), 5.7, 5.8, and 5.11 of the Determination.

³⁰ See paragraph 6.2 (page 26) of the Determination.

³¹ See paragraph 5.4 of the Determination.

³² See paragraph 6.9.3 of the Determination.

³³ See ADR Rule H14.

the circumstances outlined in paragraph 5(b) above amount to injustice due to a procedural or other irregularity for the reasons set out below.

Absence of detailed objections to each change

42. In relation to ASR's claim set out in paragraph 4.4(a) of its Notice of Appeal, we would reiterate that ASR's Sole Reference set out the subject matter of the dispute at a high-level and on a general basis. ASR did not identify specific rules that it sought to challenge and, where it did give examples, this was in relation to matters that had not been specifically pleaded or for which it was seeking relief. Without the consent of Network Rail to allow ASR to amend its grounds of appeal (which was not given), the TTP was entitled to conclude that ASR's submissions on specific individual issues could not form part of ASR's submissions under the appeal before it.³⁴

It cannot therefore be said that there was procedural impropriety on the part of the TTP in rejecting submissions from ASR which did not form part of ASR's claim as pleaded before the TTP.

Inability to have case fully heard

43. With regard to ASR's assertion that it was prevented from having its case fully heard because the TTP changed the procedure for the joined TTP references two days before the hearing, we would make the following observations:

- a. ASR was put on notice as of 31 March 2017³⁵, that the Hearing Chair had categorised its claim as only falling under Head A – Common Issues of Principle and not under any of the Heads for specific issues. This was on the basis of ASR's Sole Reference, which it had submitted to the TTP.
- b. It was not until 10 April 2017 that ASR, in a letter to the Hearing Chair, made reference as to how its claim had been categorised. In its letter it stated that ASR's Sole Reference did deal with specific issues. It further stated that it "... *may request...*" that its submissions on the specific points of detail were heard, depending on the outcome of the hearing.
- c. The Hearing Chair subsequently wrote to all parties, including ASR, on 18 April 2017 stating he was minded to hear each of the disputes separately. The letter expressly provided the parties with an opportunity to make submissions on this proposal prior to the hearing on 20 April 2017.

³⁴ See paragraphs 5.4 and 6.7 of the Determination.

³⁵ The Access Disputes Committee sent a letter to all parties, including ASR, on 31 March 2017 in relation to the Timetable disputes.

44. While ASR asserted that its Sole Reference raised specific issues, it did not, in its letter of 10 April 2017, identify where this was set out in the Sole Reference. It is our view that ASR's Sole Reference, particularly the grounds of relief sought, does not identify any specific rule on which it sought a TTP determination.
45. Equally, we do not agree with ASR's apparent suggestion in its Notice of Appeal³⁶ that its letter of 10 April 2017 should have elicited a response to ASR's 'request' to have any points of detail determined after the Determination. Not only is it for the party making the appeal to ensure it has put forward the case it wants to argue but it is clear from the language used in the letter and the way it is drafted that this did not require any action on the part of the TTP. Further, in response to the Hearing Chair's letter of 18 April 2017, ASR could have made submissions about its case and the specific issues alluded to in its earlier letter. However, it appears that ASR did not make any such submissions nor provide clarity as to why it did not agree with the categorisation of its claim by the TTP, if that was indeed the case.
46. The Hearing Chair is entitled to make or amend the procedure to be followed by the parties in the TTP.³⁷ ASR was given the opportunity to make representations on the characterisation of its dispute, the proposed way forward to enable a timely resolution of the issues and the subsequent proposal to hear each of the disputes separately. ASR did not object at any stage. There is no evidence that ASR was not able to put forward and argue the case that it had set out in its Sole Reference. ASR wanted the TTP to make findings on specific detailed claims which it had not included in its Sole Reference. On the basis of the case before it, the TTP was entitled to decline to reach a determination on these matters and this does not mean that ASR was prevented from having its case fully heard. We do not therefore consider that ASR has been able to demonstrate that the TTP's approach and actions in this regard amounted to a serious procedural or other irregularity causing injustice.

Finding that all current schedules can be operated after the changes

47. ASR also objects to the TTP's finding that all current schedules can be operated after the changes. However, it does not provide any evidence to support its argument as to why the TTP's finding was unjust because of a serious procedural or other irregularity.
48. The use of the words "current schedules" in the second paragraph of 6.2 of the TTP's Determination is potentially confusing. It could imply the existing timetable of services

³⁶ See paragraph 3.5 of ASR's Notice of Appeal to ORR.

³⁷ See Condition 20 of Chapter H of the Network Code.

and that these will continue to operate without any change following implementation of the New TPRs or it could mean that the current number of services (but not the precise detail of each service) could continue. Having considered the TTP's Determination and the discussion around getting the schedules to work³⁸, it is our view that in this context, the use of the words "current schedules" was clearly referring to existing operators being able to maintain existing levels of service³⁹, i.e. in terms of the quantum of services and calling patterns, rather than meaning the precise timings of trains as set out in the existing timetable.

49. ASR suggests that when the TTP stated it accepted "... *all current schedules can be made to work and that all operators can be accommodated...*"⁴⁰, the TTP understood it may have meant and have been intended to mean that "... *the existing schedules which are compliant with ASR's SLCs could be made to work.*"⁴¹ We do not agree with this characterisation of the TTP's statements. In respect of meeting the SLCs, the TTP questioned Network Rail closely on whether ASR could still meet its SLCs once the New TPRs were introduced. The TTP noted that it did not have sufficient evidence before it to conclude whether ASR's SLCs would in fact be unachievable but further, that it was not asked to reach such a conclusion.⁴²
50. Consequently we do not agree with ASR's assertion that whether ASR's current schedules could be operated after the changes (and be operated in compliance with its SLCs) was a key finding on which the TTP's determination was based. Nor do we accept that an experienced TTP, which had expressly stated that it could draw no conclusion on whether ASR's SLCs would be achievable and with clear evidence before it as to the likely effects of the changes on ASR⁴³, would subsequently interpret Network Rail's assurance to mean that, following the changes, ASR's "... *existing schedules which are compliant with ASR's SLCs could be made to work...*".⁴⁴

³⁸ See paragraph 5.12 of the Determination.

³⁹ See paragraph 5.12 of the Determination.

⁴⁰ See paragraph 6.2 (page 26) of the Determination.

⁴¹ See paragraph 24 of the Witness Statement of Neil Allan Sutton dated 12 May 2017.

⁴² See paragraph 6.2 (page 26) of the Determination.

⁴³ There was evidence before the TTP that the changes would affect existing journey times (see, for example, paragraph 5.11 of the Determination where Network Rail stated two services at Airdrie would be affected) and that there would be extended journey times and impact on turnarounds (see paragraph 5.13 of the Determination).

⁴⁴ We assume that the reference to paragraph 22 of Suttons' Witness Statement in paragraph 4.4(b) of ASR's Notice of Appeal, should in fact refer to paragraph 24.

51. We do not therefore consider that ASR has provided any evidence to support its objection or to demonstrate how the TTP's finding was unjust in this regard because of a serious procedural or other irregularity.

Relief sought by ASR

52. ASR is seeking, among others, a direction from ORR that ORR directs Network Rail that the New TPRs be cancelled and not apply (or order that the New TPRs are so cancelled). Such a finding would require Network Rail to revert to version 4 of the 2017 TPRs (Scotland). To inform our consideration of this request for relief, we sought representations from both parties on the effect on Network Rail's timetable planning if the entirety of the New TPRs were to be set aside in favour of version 4 of the 2017 TPRs (Scotland). However, in light of our decision that ASR has not demonstrated that the Determination is wrong or unjust because of a serious procedural or other irregularity we have not needed to determine whether or not to grant this relief sought by ASR.

ORR's determination

53. For the reasons given above, ORR determines that ASR has not demonstrated that the Determination is either:

- a. wrong; or
- b. unjust because of a serious procedural or other irregularity.

54. Consequently, ORR determines that the Determination should stand.

Costs

55. Condition M8.1.1(d) sets out that ORR has the power "*to make such orders as it shall think fit in relation to the proportions of the costs of proceedings in question (assessed in such manner as [ORR] shall determine) which shall be borne by each party*".

To date, we have not exercised this power.

56. We note that Network Rail considers that ASR's conduct in pursuing this appeal has been unreasonable and requests that ORR should exercise its powers under Condition M8.1.1(d) to make an order that ASR shall pay all of Network Rail's costs.⁴⁵

57. As we set out above in paragraph 12, the TTP process is meant to be quick, recognising the timetable process is time constrained. This means there is an additional onus on the party bringing an appeal to ensure it raises all the grounds of

⁴⁵ See paragraph 118 of Network Rail's Respondent's Notice to ORR.

appeal that it wishes to rely on at the right time: a party cannot expect to change the basis of the appeal it is bringing mid-way through or to introduce new evidence that was not before the TTP.

58. We recognise the serious nature of ASR's commercial concerns. We note that ASR sought a rehearing by ORR and to raise arguments in front of us that were not pleaded in front of the TTP. We also note that ASR has sought to adduce new evidence in front of ORR. In our view this does not amount to conduct that is so unreasonable that it justifies an award of costs. However, it has had an impact on the appeal process and on Network Rail. In future cases, we would expect the parties to have regard to the principles in paragraph 57 and to do their utmost to ensure that their case is appropriately argued and evidenced at the right time in front of the TTP and ORR to aid speedy resolution in their own interests and those of Network Rail and the wider industry.

59. The TTP remarked that legal issues were to the fore in this claim to a greater extent than in any previous TTP hearing.⁴⁶ We also note the heavy use that both ASR and Network Rail have made of external legal advisers. While it is clearly for each party to a dispute to determine how best to put its case to protect its legal and commercial rights, it is self-evident that extensive use of external advisers increases the costs of a dispute. It is also worth bearing in mind that, if one party makes extensive use of such advisers, the other party may feel it has to do so as well. As the Hearing Chair commented, the dispute resolution mechanism contained in the ADR rules and Part M of the Network Code is not intended to operate like commercial litigation and neither the TTP nor ORR is set up to deal with disputes argued in this way. The processes are intended to lead to a legally robust conclusion without being legalistic. We make no criticism of the conduct of any of the lawyers in front of ORR but if these processes start to take on the adversarial characteristics of commercial litigation, we have concerns that it will become increasingly difficult for the TTP or ORR to conduct industry appeals. In future cases, we hope the parties will bear this in mind.

60. In light of the above, we do not consider it appropriate to order that one party pay the costs of the other in this appeal.

Concluding remarks

61. We note Network Rail's view of the extent of the power under Condition D5.3.1 for the TTP or ORR to direct that a decision of Network Rail does not stand. While we consider that the wording of limbs (a) to (c) of Condition D5.3.1 could in future be

⁴⁶ See paragraph 6.1 of the Determination.

clarified, it seems clear to us that the power to give a general direction under Condition D5.3.1(a) encompasses the power to quash a decision of Network Rail. This point is not however, relevant to the determination of this appeal. As a result, we simply support the TTP's approach to this issue at paragraph 6.8.4 of the Determination.

62. We are encouraged by the positive engagement between Network Rail and ASR since this appeal was made to ORR and the parties are now clearly trying to resolve the outstanding concerns. We understand they have significantly reduced the number of individual rules at issue. Timetabling is a continuing, multi-party process and although the December 2017 timetable has now been finalised to enable operational planning and publication, work on the May 2018 timetable has started and continues. We expect this collaborative working to continue in the time available and hope that industry processes will enable those issues which were not able to be addressed for December 2017 to be satisfactorily resolved for May 2018 (including, if necessary, through the use of the industry dispute process for concerns about individual changes).

A handwritten signature in blue ink that reads 'Juliet Lazarus'.

Juliet Lazarus
Director of Legal Services

Duly authorised by the Office of Rail and Road
12 July 2017