

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 TTP 1064; 1065; 1066; 1069; 1071;
1073; 1075

BETWEEN:

(1) ABELLIO SCOTRAIL LIMITED ("ASR")
(2) DB CARGO (UK) LIMITED ("DBC")
(3) FIRST GREATER WESTERN LIMITED ("GWR")
(4) XC TRAINS LIMITED ("XCTL")
(5) GB RAILFREIGHT LIMITED ("GBRf")
(6) ARRIVA RAIL NORTH LIMITED ("ARN")
(7) EAST COAST MAIN LINE COMPANY LIMITED ("VTEC")

Claimants

v

NETWORK RAIL INFRASTRUCTURE LIMITED ("NR")

Defendant

NR's RESPONSE TO HEADS A AND B ISSUES

Introduction

1. The Claimants have each brought a Timetabling Dispute against NR¹.
2. By Directions dated 31 March 2017 (the "31 March Directions") the Hearing Chair indicated that he considered there was a degree of overlap between many of the Sole Reference Documents ("SRDs") brought by many of the Claimants². By an Annex to the 31 March Directions, the Hearing Chair set out a table which showed his view (subject to some clarifications contained in the Hearing Chair's letter dated 4 April 2017) as to which SRDs contained "*Common issues of principle*" (referred to as "*Head A*") and which contained "*Specific issues which flow from the common issues of principle*" (referred to as "*Head B*").
3. In respect of the Claimants' claims, this Defence sets out NR's position in respect of the parts of the various SRDs identified by the Hearing Chair as falling under what he terms Head A or Head B in the Annex to the 31 March Directions (as subsequently corrected). Accordingly, this Defence does not deal with Head C or Head D namely the matters raised in:
 - 3.1 any part of GBRf's Part 1 or Part 3 SRDs (parts 1 and 3 of TTP1069); and

¹ There is a further Dispute brought by TfL: TTP1068. This Response does not cover that Dispute which will be dealt with separately by NR. No further reference will be made in this Defence to TfL or TTP1068. References to "the Claimants" are references to the Claimants listed in the heading above and do not include TfL.

² As set out below, NR does not accept that there is the degree of overlap between the SRDs that the Hearing Chair has indicated, and in particular it is not accepted that there is any common issue relating to consultation. Nevertheless, it is clear which parts of which SRDs are to be responded to under the approach directed by the Hearing Chair and for convenience, NR continues to use the titles Heads A, B etc.

- 3.2 DBC's Issue 1 (TTP1065 – see in particular paragraphs 4.1 1); 4.3(a); 5.1; and 6.1(a) of DBC's SRD).
4. For the reasons set out in footnote 1 above, reference to "*the Claimants*" (or to "*a Claimant*") in this Defence does not include a reference to TfL³.
5. The said Heads C and D issues will be responded to separately by 26 April 2017 pursuant to the 31 March Directions.
6. Save in so far as this Response, or the Appendices to it, contain admissions, NR joins issue with the Claimants in all aspects of their claims.

Matters arising out of the template

7. Given the nature of this Response, which responds to several separate SRDs, the Hearing Chair helpfully indicated in his letter dated 4 April 2017 that NR need not follow the template for responding. However, in order to assist, NR sets out briefly certain matters contained in the template:
 - 7.1 The parties to the respective disputes, and their contact details, are correctly shown in the various SRDs;
 - 7.2 NR accepts that the various disputes are Timetabling Disputes. The precise scope of each dispute varies from dispute to dispute and is dealt with in the separate Appendices attached to these Responses. NR seeks a direction, pursuant to the Network Code, Part D paragraph 5.3.1(b), that each of its challenged decisions shall stand. Further, NR considers that much of the relief sought by the Claimants is inappropriate and beyond the powers of the Timetabling Panel ("*the TTP*") to grant. Accordingly, while NR does not dispute the Claimants' rights to bring their disputes, NR does dispute that even if, which is denied, any part of the complaints are established, the Claimants are entitled to the alleged or any relief. Details of this are set out below; and
 - 7.3 The further details of NR's case are set out below and in the Appendices attached hereto.

"Common Issues of Principle"

8. At the Hearing Chair's invitation, NR is setting out its Defence to what the Hearing Chair has identified as Heads A and B in a single document.
9. However, care needs to be taken with this. The Claimants bring separate claims and seek separate relief. They cannot be lumped together and treated as the same for all purposes. It is essential to consider each Claimant's particular complaint and the precise remedy they seek and why. It is also inappropriate to consider facts or matters relied on

³ A number of other TOCs and FOCs also issued Notices of Dispute and in some cases their own SRDs. However, agreement has been reached with these other parties so that nothing further needs to be said in relation to them.

by one Claimant when considering the complaint brought by another Claimant who has not relied on such facts or matters.

10. Particular care needs to be taken with the identification of common issues across the various SRDs, since detailed analysis suggests that there are in fact few genuinely common themes. NR does not accept the provisional views expressed by the Hearing Chair on this issue, in particular in the Hearing Chair's letters dated 31 March, 4 and 5 April 2017.
11. Plainly, NR should only face and respond to the Dispute which each individual Claimant presents and it is no part of the TTP's function to widen individual disputes or to allow a Claimant who advances a claim on one basis to start advancing it on some other basis (e.g. because another Claimant advances such a claim) or based on evidence which another Claimant relies on.
12. Similarly, for each Claimant, the TTP should separately consider whether the particular relief sought by that Claimant is applicable and should not consider whether any other relief, not sought by that Claimant, should be granted.
13. It is clear that each of the Claimants is concerned about some aspect of NR's decisions contained in the various Timetable Planning Rules ("TPRs") for the 2018 timetable, version 2.0 which were issued on 3 February 2017 ("*the Revised Rules*") and that each is also critical to some extent about (different) detailed outputs of the revisions to the TPRs which have been made in light of the Timetable Rules Improvement Programme ("*TRIP*"). In some cases (but not all) this is described by the Claimant as an error of methodology. It is accepted, therefore, that in order to determine each of these Disputes, the TTP needs to understand the nature of TRIP and something about the methodology employed.
14. When considering questions of methodology, the TTP should be careful to ensure that it is only the criticisms made by the particular Claimant which are reviewed when considering whether that Claimant should be granted any relief.
15. Some, but by no means all, of the Claimants allege failures of consultation. Where no such allegation is made the TTP should not consider it in relation to that Claimant and should not expect NR to meet a case which has not been put.
16. Similarly some, but by no means all, of the Claimants expressly allege failures in relation to the Decision Criteria. Where no such allegation is made, again, the TTP should not expect NR to meet a case which has not been put.
17. NR sets out below some key points, some of which relate to some or all of the Claimants' cases, and some which are specific to particular Claimants. However, for the reasons set out above, it is not appropriate to treat the Claimants as a single group for all purposes and as such it is necessary for the TTP to give specific consideration to the various

Appendices attached which set out NR's response to the specific points made by each Claimant.

Timetable Rules Improvement Programme

18. The Claimants' complaints appear to arise in the main out of dissatisfaction with aspects of the outcomes and conclusions of TRIP.
19. NR sets out at Appendix 1 a witness statement from Matthew Allen which: (i) explains the background to TRIP; (ii) explains the methodology used and the role of Observed Data Analytics ("ODA"); and (iii) provides some details about the extensive involvement of the Claimants in TRIP and the many forums, meetings and consultations which they have participated in, or had the opportunity to participate in.
20. In summary:
 - 20.1 TRIP was a major industry-wide programme aimed at improving Train Service Performance across the entire rail network;
 - 20.2 The overall purpose of TRIP was to use huge amounts of actual data – far more than had ever previously been used – to provide large scale systematic analysis of train planning rules based on the designed capacity of the network and known historical patterns of delays;
 - 20.3 One important aspect of TRIP is the ODA tool which combines information from a range of data sources to understand how services were planned and how they actually ran;
 - 20.4 Timetable Participants, including all of the Claimants, have been closely involved with the development of TRIP and have had extensive access to information through the very many forums which have taken place over the last 3 years; and
 - 20.5 There has been widespread enthusiasm for and support of the use of ODA in principle by Timetable Participants. It means that the data upon which timetabling decisions are taken is more extensive and more reliable. It is also data which is already used in many other areas in particular for safety and compensation matters. In other words, the underlying data is recognised generally as being reliable and useful.
21. It is important that the TTP understands this background. The impression that some of the Claimants seek to convey is that the TRIP approach has somehow taken them by surprise and been foisted on them by NR. That is not the case. There has been widespread enthusiasm for TRIP and recognition that it represents an important advancement in providing accurate data which in turn should lead to increased efficiency of the rail network.

22. In truth the Claimants are dissatisfied with a tiny proportion of the outputs of TRIP and are seeking to make widespread allegations about the timetabling process only in order to make relatively small changes to the timetable to suit their specific aims. As Matthew Allen explains in paragraph 19 of his witness statement (Appendix 1), some 6,200 TPR revisions were made in the Revised Rules (400 having been withdrawn from v.1 of the revision after consultation), of which only about 250 (4%) are still being challenged i.e. a tiny proportion given the scale of the overall revision. Further, 28 of 36 operators have accepted the revisions in full.
23. The TTP is reminded that NR's obligation is not to any particular Timetable Participant or group of them, but to all "*current and prospective users and providers of railway services*" (see "*the Objective*" in Part D paragraph 4.1).

The process of consultation

24. Part D requires NR to consult with Timetable Participants:
- 24.1 Pursuant to Part D paragraph 2.2.2, between D-64 and D-60, NR is to consult with Timetable Participants in respect of any proposed changes to the Rules;
- 24.2 Pursuant to Part D paragraph 2.2.4, following distribution of the Draft Rules and by D-54, NR is to consult with Timetable Participants in respect of the Draft Rules provided to them and Timetable Participants may make representations to NR in respect of any changes they propose or objections they may have; and
- 24.3 Pursuant to Part D paragraph 2.2.5, between D-54 and D-44 NR shall consider any representations and objections made pursuant to D2.2.4 and may amend the Draft Rules.
25. Part D paragraph 2.2.6 provides that in preparing the revised Rules, NR must act in accordance with Condition D4.1 and provide Timetable Participants with its reasons for making any revisions to the Rules.
26. NR has complied with its obligation to consult with the Claimants. Between D-64 [16/09/16] and D-60 [14/10/16], consultation took place. The Draft Rules were provided at D-59 on 21/10/16 and between D-59 and D-54 [25/11/16] further consultation took place. NR considered the representations and objections made between D-54 and D-44 [03/02/17] and issued the final revised Rules on 03/02/17.
27. The evidence shows that, unsurprisingly, consultation is actually a more fluid and ongoing process than Part D suggests. That is a sensible and pragmatic approach: and a necessary one in light of the pressures of time. This is a point to be borne in mind when considering the evidence of exchanges between relevant parties. The process is not an overly formal one where each and every point is exhaustively documented by both sides in correspondence: the great majority of concerns and differences are resolved in this pragmatic way.

28. As set out below and in the Appendices which set out the position in relation to individual Claimants, it is only some of the Claimants who make any complaint of an alleged failure to consult. Where no such complaint is made, no consideration should be given to this by the TTP – although, entirely without prejudice to that point, the evidence set out in fact demonstrates that in each case consultation was thorough and sufficient.

29. Turning to the individual Claimants:

ASR

30. Although ASR make some limited allegations about a failure to consult, this does not appear to be ASR's principal complaint. ASR asserts that "[NR] *appears to have been motivated by seeking to implement its new centralised [TRIP] rather than established timetabling approaches*" (ASR SRD para 4.2(b) – see also para 5.2).

31. There is no proper basis for such an assertion. NR sets out in Appendix 2 its response to the substantive parts of the ASR SRD (i.e. section 5 thereof) including details of the consultations which took place.

DBC

32. There is no express allegation of failure to consult. DBC's complaint appears to relate to certain specific planning headway values on a section of Route Section GW103.

33. In any event, all necessary consultation took place in relation to this matter. NR sets out in Appendix 3 its response to the substantive parts of the DBC SRD (i.e. section 5 thereof) including details of the consultations which took place.

GWR

34. There is no express allegation of failure to consult. GWR's complaint appears to be that NR does not have sufficient justification for the decisions it has taken. This appears to be a criticism of Decision Criteria rather than anything else.

35. In any event, all necessary consultation took place in relation to this matter. NR sets out in Appendix 4 its response to the substantive parts of the GWR SRD (i.e. section 5 thereof) including details of the consultations which took place.

XCTL

36. NR sets out in Appendix 5 its response to the substantive parts of the XCTL SRD (i.e. section 5 thereof) including details of the consultations which took place.

GBRf

37. There is no express allegation of failure to consult in either GBRf 2 or 3. GBRf 2 para 4.3 states that “[t]he methodology used by TRIP is the main point of contention here” and the remainder of the SRD bears that out.

38. In any event, all necessary consultation took place in relation to this matter. NR sets out in Appendix 6 its response to the substantive parts of the GBRf SRD (i.e. section 5 thereof) including details of the consultations which took place.

ARN

39. NR sets out in Appendix 7 its response to the substantive parts of the Arriva SRD (i.e. section 5 thereof) including details of the consultations which took place.

VTEC

40. Although there is no express allegation of failure to consult, VTEC does complain that NR has not provided sufficient evidence of its methodology. In relation to this, NR sets out in Appendix 8 its response to the substantive parts of the VTEC SRD (i.e. section 5 thereof) including details of the exchanges which took place.

Conclusion on consultation

41. The following conclusions can be drawn:

41.1 NR was fully aware of its obligations under Part D to consult with the Claimants and had proper procedures in place, in accordance with the requirements of Part D, to notify the Claimants of proposed changes in the Rules, to enable the Claimants to make objections and representations in relation to such proposed changes, and for NR to consider such objections and representations. The Claimants were well aware of the custom and practice in place, which works well;

41.2 The process of consultation relating to TRIP has been extensive and goes back many years. TRIP is an industry-wide initiative and the role it played, and that played by ODA, was familiar to all Timetable Participants, including the Claimants. Further, it is to be borne in mind that the revision to the Rules involves over 6,000 separate revisions and it is only a tiny proportion of them that are being questioned by the Claimants. Plainly, the overall process of consultation and decision making has been satisfactory;

41.3 Each Claimant's case needs to be considered individually: there is no proper basis on which the TTP can conclude that there was any widespread failure to consult. No Claimant can properly bring such a claim – other than in relation to itself – and in any event the evidence establishes that the consultation was extensive;

41.4 The TTP must consider each individual Dispute separately and, in respect of each Claimant, only consider the arguments run by that particular Claimant. There is no

"*common issue of principle*" relating to consultation, rather some (but not all) of the Claimants make specific allegations relating to consultation. These are responded to above and in the relevant Appendices;

- 41.5 In each case the evidence shows that consultation was carried out, and continues to be undertaken, and was sufficient in all the circumstances; and
- 41.6 If and to the extent that the TTP concludes that in relation to a particular Claimant some aspect of the claimed failure to consult is made out, the TTP must go on to consider what, if any, remedy is appropriate. NR make the following points:
- 41.6.1 The only relief which TTP can grant is that set out in Part D paragraph 5.3.1. This is addressed below and the following observations are made subject to the points made in the section on relief below;
- 41.6.2 In the 31 March Directions the Hearing Chair indicated that one likely possibility would be to order that the 2018 Revision 2 TPRs concerned should not be implemented;
- 41.6.3 It is not accepted that this is the correct approach. First, this is not something which any of the Claimants (with the possible exception of ASR in relation to Scotland) are asking for. The TTP should therefore not consider such relief even if, which is not the case, it is an available remedy;
- 41.6.4 Secondly, this would amount to substitution by the TTP of its own decision for NR's decision. Absent exceptional circumstances (which are plainly not present nor even suggested to be by any Claimant other than ASR – see ASR SRD paragraph 6.1(d) – and that in a wholly unconvincing way) the TTP has no power to make any such order;
- 41.6.5 Further, the TTP needs to consider in each case: (i) the precise extent of any failure to consult; (ii) exactly what part of the TPRs relating to that Claimant are affected thereby; and (iii) what difference (if any) further consultation would have made;
- 41.6.6 The latter point is important: it is only if the TTP is satisfied on the evidence that fuller consultation either would or might have made a difference to the TPR for that Claimant that any question of granting relief can arise. To take a purely theoretical example: if the TTP is satisfied that Claimant A was not fully consulted in relation to some measurement proposed by NR but the evidence shows (e.g. in relation to Claimant B perhaps) that NR's proposal was reasonable, then it would be pointless and unnecessary to grant any relief; and
- 41.6.7 To put the point another way, the TTP must abide by ordinary legal principles (see ADRR Chapter A para 5). In order to qualify for relief a Claimant must

show not just breach but also loss: if additional consultation would have made no difference, there is no basis to grant relief.

Methodology/ Decision Criteria

42. Where NR is required to decide any matter in Part D, paragraph 4.6.1 provides that:

"...its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective")"

43. In achieving the Objective, NR is to apply "any or all of the considerations" in paragraph 4.6.2(a)-(k) ("the Considerations"). These include:

43.1 "maintaining, developing and improving the capability of the Network" (a);

43.2 "maintaining and improving train service performance" (c);

43.3 "maintaining and improving an integrated system of transport for passengers and goods" (e); and

43.4 "the commercial interests of [NR]...or any Timetable Participant of which [NR] is aware".

44. Paragraph 4.6.3 provides that NR must consider which of the Considerations is or are relevant to the particular circumstances and apply them:

44.1 *"...so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and [NR]. Where, in light of the particular circumstances, [NR] considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight."*

45. It follows that NR in reaching any decision needs to balance a wide range of interests. Its job is not simply to further the perceived commercial interests of a particular Claimant (although it takes that into account) but to ensure that the overall interests of all current and prospective users of railway services are served in the most efficient and economical manner.

46. As explained in Matthew Allen's witness statement at Appendix 1, the overall purpose of TRIP, and the use of ODA, was to address the single biggest measure of Public Performance Measure ("PPM") attrition, namely Specification Error – that is delay associated with the way the rail timetable is created and then operated. Using ODA analysis allows huge amounts of historic data to be recorded and analysed and the result is a far more accurate basis on which to analyse, for example, headways, sectional running times ("SRTs") and dwell times.

47. Reducing Specification Error leads to increased efficiency on the rail network since it increases the chances of services running as they are actually planned to. By making realistic assumptions about actual running times (e.g. taking the 25th percentile) NR is taking steps to maintain and improve train service performance and ensure that journey times are as short as reasonably possible (Part D, para 4.6.2(c) and (d)).
48. The suggestion that NR has not properly applied the Decision Criteria is far-fetched. NR has no ulterior motive in seeking to improve the efficiency of rail services and has simply been engaged in the latest chapter of a long programme seeking to improve such efficiency.
49. Some of the Claimants, by contrast, are dressing up their particular, and generally very narrow, complaints, as though they are somehow evidence of a widespread failure on NR's part. The attempt fails. Further, it is presently unclear whether and if so how any particular revision will impact the timetable. In many cases, it seems that the Claimants' real concern is not with the particular revision itself but with the potential impact that revision may have on the timetable in due course. That is a concern which, if valid, falls to be raised at another stage: it does not provide any proper basis for challenging the revised rule itself.
50. If there are aspects of the methodology adopted by NR which are shown to be open to criticism then it is of course open to the TTP to require NR to carry out further analysis in respect of particular Claimants' individual and identified complaints. That is far removed from the more extravagant claims made by some of the Claimants – e.g. ASR – whereby the Claimant seeks in effect to challenge the legitimacy of TRIP in its entirety. There is no proper basis on which the Claimants can distance themselves from the overall TRIP project.
51. Turning to methodology. Here there are a series of detailed criticisms made by each of the Claimants, although again there is no commonality of approach across the claims, so care needs to be taken to treat each complaint separately. NR relies generally on Matthew Allen's witness statement at Appendix 1.
52. Detailed responses to the Claimants' individual claims are set out in the Appendix for each relevant Claimant. These Appendices are central to NR's case and the TTP is invited to read and consider them in detail.
53. Drawing some of the principal themes together NR makes the following points:
- 53.1 The use of actual data is generally, and rightly, seen as a significant step forward. Theoretical modelling alone is just that – theoretical. It is essential that actual data is obtained in order to check the actual operation of the rail network. ODA provides a more reliable way than previous measures of obtaining significant amounts of reliable data. It

is not perfect (no method is) but provides a better insight than any other method of analysing real-world data;

- 53.2 The use of ODA does not change the fundamental principles and assumptions which are set out in the TPRs, most of which have been in place for a long time and are not controversial. What ODA does is to provide a more substantial and reliable body of data so that the overall picture which emerges is more accurate and reliable;
- 53.3 The data produced obviously needs to be understood and analysed. NR's analysis, for the reasons explained in Matthew Allen's statement, is that taking the 25th percentile of the data generally produces a value representative of a well-performing train;
- 53.4 The data itself is not applied without further review. It is reviewed, challenged and if necessary recalculated both internally in NR and in conjunction with the Timetable Participant affected. If it is shown that some value is incorrect, NR will of course revise it; and
- 53.5 The level of active engagement of each Timetable Participant in this process varies but each of them have extensive opportunities to review and consider the data, both within and outside of the formal consultation periods and process.

Relief sought

- 54. For the reasons set out above it is essential that when considering whether any of the Claimants are entitled to relief, and if so what relief, the TTP:
 - 54.1 Considers each Claimant and its claim separately and individually;
 - 54.2 Considers only the relief sought by the individual Claimant and does not grant relief sought by one Claimant to another Claimant; and
 - 54.3 Bears in mind the limits of its own powers as set out in Part D, paragraph 5.3.1.
- 55. This last point is important since many of the Claimants appear to be seeking relief which goes far beyond what the TTP has jurisdiction to give, and therefore what the Claimants are entitled to ask for.
- 56. Part D Paragraph 5.3.1 provides that:

"In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail Regulation (as the case may be) may exercise one or more of the following powers:

- (a) it may give general directions to [NR] specifying the result to be achieved but not the means by which it shall be achieved;*
- (b) it may direct that a challenged decision of [NR] shall stand;*

(c) *it may substitute an alternative decision in place of a challenged decision of [NR]*

provided that the power described in (c) above shall only be exercised in exceptional circumstances."

57. NR's position is that all of its challenged decisions should stand and the TTP should so direct: and in doing so dismiss all the Claimants' claims.
58. If, contrary to NR's position, the TTP finds that some element of a Claimant's dispute is made out by the Claimant, the starting point is that the TTP gives general directions to NR specifying the result to be achieved but not the means by which it shall be achieved. By way of example, the TTP could give a general direction that in relation to some particular revision which affects a particular Claimant, NR is to give further consideration to specific matters so as to fulfil any perceived failure to consider a particular representation or objection made by that Claimant.
59. It is only in exceptional circumstances that the TTP can substitute an alternative decision in place of a challenged decision. The rejection of an NR decision amounts to the substitution of an alternative decision, even if that alternative decision is simply the position before the proposed revision is made. Accordingly, the TTP needs to be satisfied that there are exceptional circumstances before taking any such decision.
60. Apart from ASR, none of the Claimants has asserted that such exceptional circumstances exist which would justify any such course of action and it follows that it is not open to the TTP to take this approach in relation to any other Claimant. Moreover, and more fundamentally, it cannot properly be said that exceptional circumstances arise here.
61. On a proper analysis what the TTP is actually faced with is a small number of detailed objections to an enormous set of revisions. Given: (i) the scale of TRIP; (ii) the number of changes proposed; (iii) the fact that many Timetable Participants are entirely happy with the proposed revisions; and (iv) the fact that each of the Claimant's specific complaints represent a tiny number of the revisions which affect that Claimant, it can readily be seen that the circumstances cannot on any view be described as "exceptional". It follows that the only powers open to the TTP are those set out in paragraph 5.3.1(a) or (b).
62. Finally it is noted that in the 31 March Directions the Hearing Chair noted in paragraph 4 that *"All Timetable Participants are to note that in a number of these claims the Panel is being asked to strike down the 2018 TPRs completely"*. NR makes the following points:
- 62.1 Save for ASR seeking this remedy in relation to the Revised Rules for the Scotland timetable, NR does not understand any of the Claimants to be seeking any such order. In any event, as explained below, ASR is plainly not entitled to any such order and the TTP does not have power to grant it;

- 62.2 NR's understanding of the relief sought by the other Claimants is that they are simply seeking to have particular revised rules, which do or might affect them, set aside. The extent to which it is open to the TTP to grant such relief is dealt with below; and
- 62.3 If, contrary to NR's understanding, any of the Claimants seek to set aside the entirety of the revisions set out in NR's Revision 2.0 issued on 3 February 2017, then this is plainly not a remedy available to any individual Claimant, nor is it something which the TTP has the power to grant. Individual Claimants have no standing to seek any remedy which affects anyone other than themselves. The vast majority of revisions are agreed by all Timetable Participants and to set these aside would be wrongly to interfere with the rights of all these others.

63. Turning now to the relief sought by each individual Claimant:

ASR

64. ASR's proposed relief is set out in paragraph 6.1 of the ASR SRD.

64.1 ASR's paragraph 6.1(a):

64.1.1 ASR's proposal is absurd and has no basis in law, still less in the Network Code. It is not open to ASR, a single Timetable Participant, to seek total cancellation of the proposed Revision (as defined by ASR i.e. the revision of the 2018 Timetable Planning Rules (Scotland) published by NR on 3 February 2017 – see ASR SRD paragraph 4.1). Such a move would potentially affect other Timetable Participants, many of whom are content with the proposals and have not sought to appeal them. ASR has no standing to seek such an order and the TTP has no power to grant it.

64.2 ASR's paragraph 6.1(b):

64.2.1 ASR seeks various declarations. The TTP has no power to grant such declarations. It can only either direct that NR's decision stands or give general directions to NR as to a result to be achieved. Even if, contrary to NR's case, the TTP is persuaded or assisted by any of the vague and unsubstantiated allegations made by ASR, it is not open to the TTP to make such declarations; and

64.2.2 Plainly, the TTP can consider the nature of NR's obligations under Part D of the Network Code but, beyond reminding NR of the terms of that Code, there is no basis for TTP giving any greater form of direction or declaration. The fact that paragraph 5.3.1(a) says in terms that the TTP can specify a result but not the means by which that result is achieved, emphasises this important point. This point applies equally to all the Claimants so for convenience will not be repeated in each case.

64.3 ASR's paragraph 6.1(c):

64.3.1 It is open to the TTP to give general directions to NR specifying a result to be achieved but ASR's proposals exist in a vacuum. Indeed, ASR appears to be inviting the TTP to do the very thing which paragraph 5.3.1(a) says the TTP cannot do, namely to set out the means by which a result is to be achieved: the TTP cannot direct NR to carry out particular types of modelling for example. ASR has failed to provide any particulars of the precise ways in which it would like the Revisions to be revised and how. It has chosen instead to make exaggerated and vague criticisms of the overall process. The TTP cannot be expected to make out ASR's case for it.

64.4 ASR's paragraph 6.1(d):

64.4.1 There is a half-hearted effort to assert exceptional circumstances on the grounds that "*the relevant timescales for the preparation of a working timetable...amount to exceptional circumstances*". This is plainly unsustainable: the timetable is set out in the Network Code and as such, however challenging, it cannot sensibly be said that the timetable amounts to exceptional circumstances. Quite the contrary: the timetable is the ordinary routine circumstance; and

64.4.2 It follows that no question of the TTP applying its own decision can arise.

DBC

65. DBC's proposed relief is set out in paragraph 6.1 of the DBC SRD.

65.1 DBC seeks an Order that certain planning values be withdrawn and "*if necessary*" replaced with revisions:

65.1.1 The TTP has no power to order that particular values be "*withdrawn*". Its only power (other than directing the decision to stand) is to give general directions to NR specifying a result to be achieved. DBC appears not to have directed its mind to this or to what result NR should be directed to achieve. The TTP is unable to give the order sought; and

65.1.2 The proposal that if necessary substitute values be provided would amount to an exercise of the power under paragraph 5.3.1. There is rightly no suggestion that there are exceptional circumstances and as such this plea is unsustainable.

GWR

66. GWR's proposed relief is set out in paragraph 6 of the GWR SRD.

66.1 GWR's paragraph 6.2:

66.1.1 GWR seeks a determination in principle concerning the sufficiency of evidence. It is not open to the TTP to provide relief of such a type.

66.2 GWR's paragraph 6.3:

66.2.1 Certain specific conclusions are sought, namely that there is insufficient evidence for each of the five cases brought by GWR and that as such the position reverts to that in place in May 2017; and

66.2.2 If the TTP considers there is any force in the particular points made in relation to the five decisions referred to by GWR its only recourse is to give general directions to NR and specify a result to be achieved. It cannot, absent exceptional circumstances which are rightly not asserted, effectively substitute its own decision for NR's which is what reverting to the May 2017 position amounts to.

66.3 GWR's paragraph 6.4:

66.3.1 GWR does not seek a remedy but notes that if these changes are determined to be Network Changes it will seek compensation through Part G. Since GWR, rightly, does not invite the TTP to make any finding here, the point is perhaps moot. However, for completeness, it is plainly not open to the TTP to determine whether any Network Change has occurred and the TTP should resist any temptation to delve into the difficult area of the relationship, if any, between Parts D and G of the Network Code. If GWR wishes to rely on the outcome of this dispute for other purposes it can do so in due course, subject to the rules and procedures of the Network Code.

XCTL

67. XCTL's proposed relief is set out in paragraph 6 of the XCTL SRD.

67.1 XCTL's paragraphs 6.1 to 6.3:

67.1.1 These paragraphs effectively seek declarations. For the reasons set out above, the TTP does not have power to grant such relief.

67.2 XCTL's paragraphs 6.4 and 6.5:

67.2.1 XCTL seek orders that certain TPR proposals be removed from the 2018 version 2.0. Again, if the TTP considers there is any force in the particular points made in relation to the decisions referred to by XCTL its only recourse is to give general directions to NR and specify a result to be achieved. It cannot, absent exceptional circumstances which are rightly not asserted, effectively

substitute its own decision for NR's which is what removing certain decisions and reverting to the previous position amounts to.

GBRf

68. GBRf's proposed relief is set out in paragraph 6.1 of the GBRf 2 SRD.

68.1 GBRf's paragraphs (a) and (b):

68.1.1 These can be dealt with together. Both (a) and (b) effectively seek declarations and these are not matters which the TTP is able to provide.

68.2 GBRf's paragraph (c):

68.2.1 GBRf seeks an order that certain TPR proposals be removed from 2018 version 2.0. Again, if the TTP considers there is any force in the particular points made in relation to the decisions referred to by GBRf, its only recourse is to give general directions to NR and specify a result to be achieved. It cannot, absent exceptional circumstances which are rightly not asserted, effectively substitute its own decision for NR's which is what removing certain decisions and reverting to the previous position amounts to.

ARN

69. ARN's proposed relief is set out in paragraph 6.1 of the Arriva SRD.

69.1 ARN seeks a decision from the TTP directing NR to withdraw the proposed changes to LN600 SRTs and to re-engage in consultation with the Timetable Participants. As such, this is a mixed request for a substitute decision (where, rightly, no exceptional circumstance have been alleged) and for, in effect, declarations. For the reasons set out above in relation to other Claimants, the TTP cannot give either form of relief.

VTEC

70. VTEC's proposed relief is set out in paragraph 6.1 of the VTEC SRD.

70.1 VTEC's paragraph 6.1(a):

70.1.1 VTEC seeks an order that certain TPR proposals be removed from 2018 version 2.0. Again, if the TTP considers there is any force in the particular points made in relation to the decisions referred to by VTEC its only recourse is to give general directions to NR and specify a result to be achieved. It cannot, absent exceptional circumstances which are rightly not asserted, effectively substitute its own decision for NR's which is what removing certain decisions and reverting to the previous position amounts to.

70.2 VTEC's paragraph 6.1(b):

70.2.1 VTEC effectively seeks declarations. Again, the TTP does not have power to grant such relief.

Appendices

71. The following Appendices are attached:

71.1 Appendix 1: Witness statement of Matthew Allen dated 12 April 2017;

71.2 Appendix 2: Response to ASR SRD and Annex 1;

71.3 Appendix 3: Response to DBC SRD;

71.4 Appendix 4: Response to GWR SRD;

71.5 Appendix 5: Response to XCTL SRD;

71.6 Appendix 6: Response to GBRf 2 SRD;

71.7 Appendix 7: Response to ARN SRD; and

71.8 Appendix 8: Response to VTEC SRD.

72. Further, an Annex to the appendices containing certain key documents referred to in the appendices.

Signature:

For and on behalf of

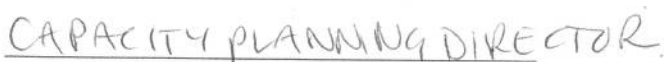
Network Rail Infrastructure Limited



Signed



Print Name



Position