

***Defendant's Response to a Sole Reference to a Timetabling Panel in  
accordance with the provisions of Chapter H of the ADR Rules effective  
from 1 August 2010 (and as subsequently amended)***

Dispute Reference: TTP1706

## 1 DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows: -

- (a) GB Railfreight Limited whose Registered Office is at 3rd Floor, 55 Old Broad Street, London EC2M 1RX ("GBRf") ("the Claimant"); and
- (b) Network Rail Infrastructure Limited whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("Network Rail") ("the Defendant").

1.2 Third parties that may be affected by the ruling are:

DB Cargo Rail (UK) Ltd, Abellio East Anglia Limited, Abellio East Midlands Limited, Govia Thameslink Railway (GTR) Limited, XC Trains Limited

## 2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant's Sole Reference includes: -

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
- (b) A detailed explanation of the Defendant's arguments in support of its position on those issues where it disagrees with the Claimant's Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant's Sole Reference.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fall to be determined as part of the dispute;
- (d) The decisions of principle sought from the Panel in respect of
  - (i) legal entitlement, and
  - (ii) remedies;
- (e) Appendices and other supporting material.

## 3 SUBJECT MATTER OF DISPUTE

3.1 In response to GBRf's Sole Reference Document (SRD), Section 4, Network Rail agrees that this is a dispute regarding a package of Restrictions of Use (RoU) between Ely North Junction and Peterborough in weeks 23-27 of 2020.

3.2 The dispute has arisen over Network Rail's actions with regard to the Network Code Condition D4.6.2 in respect of how the decision has been reached to take the proposed disruptive access.

## **4 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE**

### **4.1 Issues where the Defendant Accepts the Claimant's Case**

4.1.1 In response to GBRf SRD Section 4.1, Network Rail agrees with the timeline presented.

4.1.2 Network Rail agrees with the statement in GBRf SRD, Sections 4.3, 4.15 and 4.17

4.1.3 Network Rail confirms the dates GBRf SRD, Section 4.7

### **4.2 Issues where the Defendant qualifies or refutes the Claimant's Case**

4.2.1 In response to GBRf SRD, Section 4.1, Network Rail agrees with the timeline presented, but qualifies that the capacity work is not a requirement under the Network Code.

4.2.2 In response to GBRf SRD, Section 4.2, Network Rail submits that it has carried out a consultation in accordance with D3.4.4 (a) and that consultation was satisfactory and appropriate in the circumstances. The consultation was in line with D8.6.1 and has been ongoing since 21<sup>st</sup> May 2020 with all operators (refer to Appendix A: Timeline of Events), albeit all operators have been aware of the issues regarding degradation of the timbers at Manea for some time and the need for access therefore would not have been a surprise to operators. In reaching its decision in relation to the disputed access, Network Rail correctly applied the Decision Criteria under condition D3.4.4.(b).

4.2.3 In its SRD, Section 4.4, GBRf submit that they will be unable to utilise their assets during this time, but there would be nothing to stop them using these assets elsewhere on the network rather than sitting idle.

4.2.4 Network Rail agrees with the statement in GBRf SRD, Section 4.5, but qualifies that the safety critical nature of the work due to asset condition and environmental constraints were highlighted at this meeting. The preferred delivery option 'DEFCON4' was also presented, along with details of other options considered and reasoning for not taking them forward (refer to GBRf Appendix 3.2), including DEFCON0.

4.2.5 In response to GBRf SRD Section 4.6, Network Rail draws reference to Appendix C: Infrastructure Assessment and Appendix C1: Manea Timings (reference spreadsheet).

4.2.6 In response to GBRf SRD, Section 4.8, Network Rail qualifies that the agenda issued on 9<sup>th</sup> June 2020 (GBRf Appendix 3.4) stated 'Discuss the 6hr double line block window' and did not specify the times for all line block (ALB).

4.2.7 In response to GBRf SRD, Section 4.9, Network Rail agrees and additionally submits that it has continued to show consultation and collaboration with operators (refer to Appendix A). Network Rail qualifies that the initial remit of the study was the capacity between March and Ely, and through the SLW, which was outlined to operators. Network Rail has continued to work with operators to identify end to end paths.

4.2.8 In response to GBRf SRD, Section 4.10, Network Rail qualifies that the notes issued on 15<sup>th</sup> June 2020 highlighted the concerns raised by operators, and as a result that both daytime and overnight options were to be explored (GBRf Appendix 3.7).

- 4.2.9 In response to GBRf SRD, Section 4.11, Network Rail clarifies that the Capacity Study was remitted Friday 12th June 2020 (one day after the meeting), started on Monday 15th June 2020 and by the meeting on Thursday 18th June 2020, some SLW capacity was identified, 5 working days since 11th June meeting.
- 4.2.10 In response to GBRf SRD, Section 4.12, Network Rail clarifies that there was no capacity work remitted for Weeks 18 and 21 and that the focus was on the blockade and capacity through the single line working (SLW), and the latter was not applicable in Week 18 or 21. The Week 18 RoU avoided the Saturday freight peak (2350 Saturday to 0250 Monday) and Week 21 was a 'standard' diversionary block with freight diverting via the Great Eastern Main Line and London. It is also noted that no dispute has been registered by any Operator in relation to Week 18 or 21 and as such this does not form part of this dispute. Operators are in fact time barred from raising any dispute in relation to access in Weeks 18 and 21 under the Network Code.
- 4.2.11 In response to GBRf SRD, Section 4.13, Network Rail qualifies that its decision to take the RoU is not conditional on a Capacity Study being produced as this is not required under the Network Code. Network Rail has nevertheless continued to work collaboratively with operators to produce the Study, despite not being required to do so in support of the Decision.
- 4.2.12 In response to GBRf SRD, Section 4.14, Network Rail submits that the access proposal was submitted with a reduced but reasonable response date, permitted under Network Code D3.5. Network Rail notes that the reduced response date was also agreed by all affected operators.
- 4.2.13 In response to GBRf SRD, Section 4.18, Network Rail clarifies that it agreed to undertake a Capacity Study and not a timetable study with respect to this particular disruptive possession. The initial remit of the Study was the capacity between March and Ely, and through the SLW, which was outlined to operators. Network Rail continues to work with operators to identify end to end paths.
- 4.2.14 In response to GBRf SRD, Sections 4.18, 4.19, 4.20 and 4.21, Network Rail note that GBRf refer to a "timetable Capacity Study". We are working on the assumption that they mean a Capacity Study
- 4.2.15 Regarding GBRf's SRD Section 5.1, Network Rail maintains that Network Code Condition D3.4.4 requires Network Rail to consult with all operators, which GBRf accepts that Network Rail has done. D3.4.4 does not oblige Network Rail to take on board GBRf's representations. Network Rail has had due regard to GBRf's opinions throughout the consultation and has acted on them where appropriate (for example with reference to the timing of the ALB). Network Rail submits that it has applied the Decision Criteria in line with Network Code Condition D4.6.2 and that it has considered all of the Considerations and applied those that are relevant to the issue at hand.
- 4.2.16 Regarding GBRf's SRD Section 5.2, Network Rail qualifies that in the event the RoU can not go ahead as planned, that the risk to the daily operation of the railway is much greater. GBRf refer to the "three most important Decision Criteria"; Network Rail submit that this is incorrect in that all Decision Considerations are of equal weighting and are to apply these in a manner that is 'fair and not unduly discriminatory' as per D4.6.3. Network Rail maintains that it has applied them in support of considering a decision to take access.

- 4.2.17 Regarding GBRf's SRD Section 5.3, Network Rail refutes that it has not maintained its infrastructure in a timely manner. Appendix C details the events and process changes which have identified a high volume of urgent renewals as well as evidencing the operators reluctance to allow earlier intervention.
- 4.2.18 Regarding GBRf's SRD Section 5.5, Network Rail refers to Appendix C temporary speed restrictions (TSR) and renewals plans.
- 4.2.19 Regarding GBRf's SRD Sections 5.4 and 5.6, Network Rail clarifies that the timbers classified as 'orange' (refer to GBRf Appendix 3.2) require renewal by March 2021, meaning they must also be replaced during the 2020 access (as noted above). If Network Rail does not do so, these timbers will become life expired, which could result in a more disruptive RoU (i.e. closure of the line). Network Rail clarifies that it is restricted by the window of consent agreed by Natural England and also by flooding during the Winter months.
- 4.2.20 Regarding GBRf's SRD Section 5.7, refer to Appendix C2: Options (including DEFCO0N0) for details. Network Rail clarifies this option was outlined during the initial meeting with operators on 21<sup>st</sup> May 2020 and submits that there have not been any requests to re-visit it, or preference voiced for it by operators prior to the receipt of the GBRf SRD.
- 4.2.21 Regarding GBRf's SRD Section 5.8, Network Rail clarifies that it has planned to work within the constraints and timings as imposed by Natural England.
- 4.2.22 Regarding GBRf's SRD Section 5.9, it is submitted by Network Rail that a RoU by its very nature limits the number of paths that are available for use and a reduction in the number of services that can run during an RoU is therefore inevitable. In any case, this dispute is a dispute in relation to access only, and not timetabling (i.e. whether or not certain trains can or cannot be accommodated on the network)
- 4.2.23 Regarding GBRf's SRD Sections 5.10 and 5.11, Network Rail refutes that it stated to operators that a full timetable study would accompany any decision made in relation to the access sought (whether to offer assurance that all its services could be accommodated or otherwise). Network Rail agreed to undertake a Capacity Study (not a timetable study) to illustrate the impact of the RoU between Ely and Peterborough and this focus on passage through the SLW was reflected in the remit. Though not part of the initial remit, nor a requirement of the Network Code, Network Rail has continued to work in good faith with operators on end to end timings as and when they have been submitted. Network Rail is not required by the Network Code to complete a Capacity Study prior to making a decision (and Network Rail must make a decision in relation to access within 10 days). As recognised by GBRf SRD Section 5.9, the volume of work required for a Capacity Study (particularly with end to end paths) is extensive and there was insufficient time to conduct this prior to the decision needing to be made. To be clear, Network Rail is a safety critical company and the decision was made on clear and obvious safety grounds.
- 4.2.24 Regarding GBRf's Sections 5.12 and 5.13, GBRf have referenced TTP210 within Paragraphs 5.12 and 5.13. GBRf seek to rely on this Determination from 8th May 2008 to argue that specific obligations are placed on Network Rail in respect of how it carries out its duties when considering specific amendments to the Engineering access Statement and justification of the same. It is submitted that the excerpts selected for inclusion by GBRf have been selected to back their assertion and have also been paraphrased/ amended. For clarity, Network Rail have included the exact wording from TTP210

(Paragraphs 31 to 33) as Appendix B3 to this paper. It is submitted that these paragraphs must be read in their entirety and understood in the context of the dispute brought at the time (TTP210) to be correctly understood.

GBRf indicate that Paragraph 31 places an obligation on Network Rail to share information such as “(a) the extent of contractual commitments between...Operators”. Paragraph 31.1 places the obligation to share information on both parties, not just Network Rail and it is submitted that GBRf have at no stage submitted this for consideration.

Network Rail submit that Paragraph 32 (omitted by GBRf) provides additional context and makes it clear that this particular Determination does not adopt *"a stance that implies that nothing can or should be determined in relation to the acceptance of a proposed amendment to Rules of the Route unless the consequences of that proposed amendment have been translated into a fully timed and validated draft timetable. Indeed, the Panel considers that such a proposition would have unwarranted resource implications and would in many instances be disproportionate to the changes proposed"*. It is submitted that GBRf are seeking to rely on an historic Determination as a precedent which itself specifically states that it is not setting a precedent.

Network Rail submit that it has complied with the general obligations within TTP210 which it submits are more relevant under Paragraph 32 but would also note that the scenarios presented are not similar enough for a precedent to apply in this case. TTP210 dealt with changes to the Rules of the Route which were required as a result of overrunning engineering works. The possession in this case is being brought on the grounds that the maintenance required has become a safety critical issue in line with both Network Code Part A Condition 1.1 and Part D Condition 4.6.1. Additionally, over the last 12 years, the Network Code, TPR's and EAS (along with best practice and internal workings) have all moved on significantly changing both the requirements and approach to planning such possessions.

- 4.2.25 Regarding GBRf's section 5.14, Network Rail refutes that it has not continued to work with operators to *"resolve any outstanding issues including the confirmation of the amended timetable"*; as this can clearly be seen in Appendix A. It qualifies that it has continued to support operators in submitting a Revised Access proposal and are looking into the end to end paths, furthermore this dispute is focused solely on the issue of Access, not Timetabling.
- 4.2.26 With reference to GBRf's SRD Section 5.15, Network Rail submits that it has considered cost, under Decision Criteria D4.6.2 (f). This Consideration was awarded 'low' status on the basis that Network Rail's interests and those of the Operators tend to be diametrically opposing. On the basis that these essentially cancel each other out, a 'low' status was decided upon in this case. In reaching this conclusion, Network Rail has not provided this weighting towards taking the access but rather have neutralised this based on the information available at the time the decision was made. It also asserts that had this RoU been planned in the Engineering Access Statement (EAS) under D2.2, the same costs would be incurred.
- 4.2.27 Regarding GBRf's SRD Section 5.16, GBRf infers that it will be unable to utilise its assets efficiently during this time. However, there would be nothing to stop GBRf from using its assets elsewhere on the network rather than sitting idle. It is

submitted by Network Rail that a RoU by its very nature limits the number of paths that are available for use and a reduction in services that are able to run during the RoU is therefore almost inevitable. Network Rail maintains that it has applied Decision Criteria as per D4.6.2

- 4.2.28 Regarding GBRf's SRD Section 5.17, Network Rail submits that since there have been requests for disruptive access to address the deteriorating condition of the wheel timbers in the Manea area since 2017, and that their condition would not remain static, there has been ample time for GBRf to complete driver training for complex and large scale diversions. The disinclination of operators to agree access in 2019 has, Network Rail submits, contributed to the requirement for the RoU.
- 4.2.29 Regarding GBRf's SRD Sections 5.18 and 5.19, Network Rail submits that this RoU is a proactive response to accelerated deterioration of the wheel timbers. It has been seeking access since 2017 to address this issue, and given the unwillingness of operators and limitations imposed by Natural England with regard to the ability to undertake works, which has led to the request for the RoU under D3.5 (refer to Appendix C). Network Rail qualifies that whenever the RoU took place, there is a risk of financial impact on operators and there is a compensation process in place that deals with that. Network Rail refutes the GBRf claims of 'poor planning' and 'inability to plan' as the proposal/ decision of this RoU is permitted under D3.5, and since previous attempts to gain access in this area have been opposed by operators.
- 4.2.30 Regarding GBRf's SRD Section 5.20, Network Rail submits that it has taken the decision based on the Engineering advice that this RoU is the best for safety, maintenance and timely renewal, and in the overall interest of all operators.
- 4.2.31 Network Rail maintains that SLW supports operators as it provides an open line on which, they can run trains and in turn this reduces the potential impact financially and allows them to use their assets more efficiently than with an ALB.
- 4.2.32 In Network Rail's application of the Decision Criteria, this Consideration was awarded 'low' status on the basis that Network Rail's interests and those of the Operators tend to be diametrically opposing. On the basis that these essentially cancel each other out, a 'low' status was decided upon in this case. In reaching this conclusion, Network Rail have not provided this weighting towards taking the access but rather have neutralised this based on the information available to us at the time the decision was made.
- 4.2.33 Regarding GBRf's SRD Section 5.21, Network Rail submits that it has addressed the issues summarised here in 4.2.15 to 4.2.32.
- 4.2.34 Network Rail notes the GBRf view that exceptional circumstances apply. Network Rail is also of the view that, in this case, exceptional circumstances do indeed apply. However, the basis of this view does not align to that advanced by GBRf.
- 4.2.35 Network Rail submits that the history of operator opposition to previous access options described in Appendix C dating back to 2017, coupled with the accelerated deterioration identified at site and the potential consequences of sudden failure of one or more degraded timbers while a train is on the bridge, represent a significant safety and operational risk. Although the restricted engineering opportunities specific to this site are in themselves unremarkable as they apply every year, when combined with the gravity of the deterioration reported they do contribute to a quite unique combination of potentially serious impact, coupled with uncommonly restricted opportunity to address. If the access opportunity identified by Network Rail is not taken before the window of opportunity for intervention closes in October 2020, further deterioration

could result in an extensive period of closure, the impact of which would make the impact of the proposed access seem somewhat inconsequential in comparison. For these reasons Network Rail believe that exceptional circumstances do apply.

**4.3 Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination**

4.3.1 Network Rail would like to refer to Appendix C3: TSR History in relation to the questions posed by Panel within their Directions.

4.3.2 Within their Directions, Panel have sought clarification from Network Rail as the factors that have led to it being unable to comply with timings within Network Code Part D. It is submitted that due to the above detailed factors, Network Rail has instigated this proposal under D3.5 and Network Rail has evidenced that it has previously attempted to gain this access with advanced planning and notification (as per D3.4) However, this was strongly rebuffed by Operators.

**4.4 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant**

4.4.1 Network Rail submits that this RoU is planned in accordance with D3.5 and is the result of accelerated deterioration of the asset and not lack of planning, and that progressing with the RoU as planned is more beneficial than amending the delivery strategy to DEFCON0, (refer to Appendix C2) as requested in GBRf's SRD. This is due to the immediate safety risk to the operational railway that would be imported, especially given the environmental constraints in this area.

4.4.2 Network Rail submits that it has correctly applied all relevant Considerations of the Decision Criteria to the RoUs in Weeks 23 to 27 and this is evidenced in Appendix D: Decision Criteria and in Sections 4.3.26 and 4.3.32.

4.4.3 Network Rail submits that that it has continued to engage regularly with operators to address capacity issues, though not required to do so under the Network Code, and that that this is an Access Dispute and not a Timetable Dispute and the latter addresses issues such as train path allocation/ accommodation.



## 5 DECISION SOUGHT FROM THE PANEL

- 5.1 Network Rail has agreed that exceptional circumstances apply (albeit for differing reasons to those submitted by GBRf), therefore enabling the Panel to exercise their power under D5.3.1(c). Network Rail ask the Panel to confirm that Network Rail has complied with the requirements of the Network Code in reaching its decision regarding the RoU in dispute. Network Rail submit that it has justified the decision reached by reference to the Network Code and as such cannot be said to be 'non-compliant' in this respect.
- 5.2 Network Rail ask the Panel to uphold the decision taken by Network Rail and to confirm that the RoU is to progress as currently planned to allow the completion of the urgently required repairs without further delay to ensure the safety of the network.
- 5.3 It is noted that GBRf is asking the Panel to direct Network Rail to review the access proposals outstanding in relation to the Manea works to reach an acceptable programme of works for 2021. Network Rail can agree to the suggested review but note that there is no requirement within the Network Code mandating that any such programme be 'agreed'. In the event the RoU is upheld as suggested, this review would take place over the next 8 weeks and be subject to the usual Network Code timescales (such as D3.3.)
- 5.4 Network Rail ask the Panel to confirm that the GBRf request under its SRD (Section 6.1(c)) falls outside the remit of the powers confirmed on the Panel by the Network Code. It is submitted that as Natural England are a third party (not subject to the Network Code) no direction can be given as to how parties such as Network Rail interact with them or impose a decision which places an unenforceable obligation on such parties.
- 5.5 Network Rail ask the Panel to confirm that the GBRf request under its SRD (Section 6.1(d)) falls outside the remit of the powers confirmed on the Panel by the Network Code. It is submitted that there are already existing mechanisms within both the Network Code and contracts between parties which are designed to address the issue of compensation. Any changes which may be required to such mechanisms in the future are to be addressed through the appropriate channels.
- 5.6 Network Rail ask the Panel to confirm that the decision in relation to the RoU for Manea Bridges is upheld under D5.3.1(b).
- 5.7 Network Rail asks the Panel to confirm that the completion of any commissioned Capacity Study is not a prerequisite in making a decision as to whether or not a possession is to be taken.

## 6 APPENDICES

The Defendant confirms that it has complied with Access Dispute Resolution Rule H21

Extracts of Access Conditions/ the Network Code are included where the dispute relates to previous (i.e. no longer current) versions of these documents.

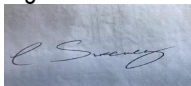
All appendices and annexes are bound into the submission and consecutively page numbered. To assist the Panel, quotations or references that are cited in the formal submission are highlighted (or side-lined) so that the context of the quotation or reference is apparent.

Any information only made available after the main submission has been submitted to the Panel will be consecutively numbered, so as to follow on at the conclusion of the previous submission.

## 7 SIGNATURE

For and on behalf of  
*Network Rail Infrastructure Limited*

Signed



Print Name  
COLIN SWEENEY

Position  
HEAD OF PLANNING, ANGLIA ROUTE

### The Appendices

Appendix A – Timeline of Events

Appendix B - Referenced correspondence (from Timeline) and extracts

- Appendix B2 – Natural England 2020 Consent
- Appendix B3 - TTP210 extract (paragraphs 31 to 33)

Appendix C – Network Rail Infrastructure Assessment

Appendix C1 - Manea Timings (reference spreadsheet)

Appendix C2 – Options (including DEFCON0)

Appendix C3 – TSR History (Possession Planning System reports)

Appendix D - Network Rail Application of the Decision Criteria

Appendix E - Addresses of Third Parties