

TTP2207

Network Rail Infrastructure Limited Sole Reference Document

1 DETAILS OF PARTIES

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

(a) Heathrow Express Operating Company Limited, whose Registered Offices are at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW ("**HEOC**") (the "**Claimant**"); and

(b) Network Rail Infrastructure Limited, whose Registered Office is at 1 Network Rail, Waterloo General Office, London SE1 8SW ("**Network Rail**" or "**NR**") (the "**Defendant**").

1.2 Network Rail agree with the list of parties that may be affected by findings in this matter as provided within the HEOC submission.

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 Chair in respect of

(i) legal entitlement, and

(ii) remedies;

(e) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

Network Rail does not dispute HEOC's right to bring this dispute in accordance with Condition D5 of the Network Code insofar as the Network Code and ADRR are applicable.

Network Rail confirms that the dispute relates to Network Rail's decision to offer HEOC a reduced service level as measured against their Track Access Agreement in relation to the Week 11 offer on a two-track timetable basis. This is a dispute regarding a timetable offer and not whether a decision around a possession is valid.

This dispute relates to Network Rail's application of the Decision Considerations under D4.6.

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 Network Rail accepts that HEOC's dispute relates to the proposed timetable offer which was received by Great Western Railway (GWR) on behalf of HEOC in respect to the two-track railway timetable for Week 11, Sunday 11th June 2023, possession number 3462100

4.1.2 Network Rail agree that HEOC Track Access Agreement contains the right to operate Heathrow Express (HEX) services four times every hour in each direction.

4.1.3 Network Rail agree that possession number 3462100 is not in dispute.

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

4.2.1 Possession number 3462100 formed part of the Engineering Access Statement (EAS) for 2023. Network Rail have followed the relevant steps as set out within Part D of the Network Code. We have established the possession, undertaken discussions with operators regarding the impact and severity of the possession through application of the Access Impact Matrix which led to a need for a Capacity Study. Operators have then submitted their revised Access Proposals and Network Rail have applied the Decision Criteria to reach the decisions made resulting in the timetable offer for Week 11.

4.2.2 HEOC claims under paragraph 4.2(a) and (b) of their SRD that Network Rail's use of the EAS 2024 and concept train plan in relation to possession number 3462100 (which falls in 2023) is not satisfactory or compliant. Network Rail see no explanation or evidence from HEOC either within their SRD submission, or any prior correspondence as to why they feel this is the case.

4.2.3 It is submitted that neither the concept train plan nor the Capacity Study produced by Network Rail for this matter are binding in nature but rather is indicative only. Neither has the status of a 'decision' under Part D of the Network Code.

4.2.4 Possession 3462100 (as agreed by all impacted operators) is a disruptive possession and as such it is implied that there will be an impact on customers service levels. For additional context, possession 3462100 was included within EAS 2023 V2, V3 and V4 as a Section 7 possession (a one-off disruptive possession) which was also included within the Draft and Confirmed Period Possession Plans.

4.2.5 Network Rail refute HEOC's claim under (SRD paragraph 4.2(c)) that they were not given the opportunity to provide any comments or participate in relation to the Week 11 offer (which required a reduction in services). Key dates and activities undertaken can be found within Appendix A and it is submitted that HEOC had multiple opportunities to participate and provide comments in relation to the Draft Period Possession Plan, the Confirmed Period Possession Plan, the concept train plan, the Capacity Study and the offer itself. It is submitted that Network Rail has considered and accounted for all information that has been provided by HEOC which is in of itself, evidence that they have both commented and Network Rail has also developed its position regarding the Capacity Allocation through this process based on feedback from all operators including HEOC.

4.2.6 HEOC claims in their SRD at paragraph 4.2(d) and again at paragraph 5.2(b) that Network Rail's offer does not make effective use of the capacity available and that there has been insufficient assessment of capacity. HEOC have not identified or evidenced why they believe Network Rail's offer is not effective. Network Rail would query what qualifies as either 'effective' or 'sufficient' to HEOC in this case. Network Rail have produced a concept train plan and Capacity Study which was supported by a published Decision Criteria document (7th February 2023) and used to inform the Week 11 offer. It is submitted that this qualifies a sufficient assessment.

4.2.7 HEOC is claiming (SRD paragraph 5.2(a)) that the offer unfairly impacts their service compared to other train services / operators. Network Rail has engaged with all Timetable Participants since 4th February 2022 and developed a Capacity Study which Network Rail have considered in its application of the Decision Criteria under D4.6. Condition D4.6 stipulates that it must be applied when Network Rail "is required to decide any matter..." and that its objective is to "share capacity on the Network for the safe carriage of passengers and goods". It does not stipulate that capacity must be shared equally in all circumstances, but rather that Network Rail is to "reach a decision which is not unduly discriminatory". It is submitted that Network Rail have conformed to these requirements and reached a decision which is "fair" based on the data that has been provided to Network Rail by Timetable Participants.

4.2.8 HEOC have been consulted throughout this process, and at no point have they provided any detailed breakdown or opinion as to why or how a different interpretation of the data presented should lead to their desired outcome of four trains per hour. Historically when implementing a two-track timetable for this area of the network, the allocation has been based on 6 (GWR)/ 4 (MTR)/ 4 (HEX) trains per hour. This does take into consideration the fact that the Elizabeth Line is now fully open, with services running West to East through the Central Operating Section (COS). This is an important new factor that has been incorporated into the Decision Considerations.

4.2.9 Network Rail note HEOC's claim (paragraph 4.7) that the HS2 Supplemental Agreement does not give Network Rail the right to disregard the claimants' contractual rights. It is agreed that there is no automatic right to do so. Network Rail submit that it has not disregarded the Claimants contractual rights under their TAA but rather, have fully considered these via the application of the Network Code as incorporated via the TAA and HS2 Agreement in relation to HS2 works.

4.2.10 On this occasion, Network Rail's application of Part D has led to a decision to offer reduced services to HEOC as compared with their TAA Rights (generally two trains per hour rather than four). Network Rail submit that this is a decision that is justified through its application of D4.6. Network Code D3.4.2 allows Network Rail to make a variation to the Working Timetable provided it complies with D3.4.2(a) and (b).

4.2.11 Under paragraph 4.11 of their SRD, HEOC reference various considerations under D4.6 which they are taking issue with, and which Network Rail have addressed below.

A) Utilising assets efficiently (D4.6.2(j)): To date, HEOC have provided no evidence to substantiate this claim. As detailed within the published Decision Criteria, Network Rail have published the possession itself within the EAS 2024 and provided both a concept train plan and Capacity Study to allow collaboration with Timetable Participants to try and maximise the efficiency of the timetable. On the basis that this timetable is to facilitate a disruptive possession, Network Rail accepts that a reduction in services for all Timetable Participants may mean less efficient utilisation of their assets for the duration of the possession. Between 05:00 and 09:00 HEOC are running the maximum 4 tph on both the main and relief line (full quantum of services).

B) Commercial Interests (D4.6.2(f)): HEOC claim within their paragraphs 4.11 and 5.2(c) that Network Rail have failed to consider their commercial interests. Network Rail refute this claim and would note that we asked for relevant information at the outset of this process which HEOC provided. Information provided was considered and factored into the decision made for Week 11. Network Rail note that HEOC have not specified or evidenced what, if any commercial information we have failed to account for or why this would result in a different outcome. Network Rail utilised HEOC's own data sets

and commercial forecasting as part of the decision process which resulted in an increase in their service offering at the start of the day (back up to four trains per hour up to 09:00).

C) Negative impact on the reputation of HEOC: Network Rail note that HEOC have provided no explanation or evidence to support this claim. It is also noted that this is not a consideration factor under D4.6.

D) Significant impact in passengers re Journey Times (4.6.2(d)): Network Rail would refer to the information contained within the Decision Criteria document which evidences how we have accounted for this consideration. HEOC have provided no specific information or evidence to support their claim.

E) Significant impact on passengers re reliability (4.6.2(c)): Network Rail have assumed that this is in reference to 'performance' under D4.6.2. Network Rail would refer to the information contained within the Decision Criteria document which evidences how we have accounted for this consideration. HEOC have provided no specific information or evidence to support their claim. The importance of performance of the timetable in this instance is reflected by the fact that Network Rail assigned a 'High' weighting to this consideration factor.

F) Significant impact on passengers re other factors: HEOC have provided no indication to Network Rail as to what 'other factors' consists of and as such we are unable to address this.

4.2.12 Network Rail refute HEOC's claim within paragraph 4.11 that a making changes to alternative train services (i.e., other operators) would not have such a detrimental impact on passengers. In reaching this decision, Network Rail have assigned a 'High' weighting to Consideration D4.6.2(b) – that the spread of services reflects demand. As an example of how we have approached this, we can utilise data provided by operators in relation to 'demand by hour' for the busiest hour of the Sunday in dispute (12:00 to 13:00). Network Rail are mindful of sharing information from Timetable Participants that is commercially sensitive in relation to their passenger footfall numbers. With that in mind, it can be confirmed that using both the 2019 'demand' numbers that demand for MTR services is twice that of Hex, and that demand for GWR services is just over five times that of Hex. Utilising 2026 forecast data, this would amend to demand for both GWR and MTR services being approximately four times larger than the Hex demand. The offer also reflects the provision of a reasonable spread of services available to all passengers at various price points.

4.2.13 Network Rail refute the claim made by HEOC under their paragraph 5.1. It is submitted that HEOC have been unclear as to what 'adhering to the necessary procedure' means. Network Rail submit it has adhered to all requirements under the TAA, Supplemental Agreements and Network Code.

4.2.14 Network Rail refute the claim from HEOC within their paragraph 5.2(a) that carrying out these works should not disproportionately disadvantage the Hex services over other operators. As noted

above, the footfall numbers provided by operators have been utilised by Network Rail to reach this decision regarding capacity allocation. It is submitted that the footfall numbers evidence that the Hex services do not have the footfall numbers to justify four trains per hour under a two-track timetable at the expense of other operators' services who are servicing higher passenger demand. It is submitted the decision made by Network Rail is both justified and entirely proportionate.

4.2.15 HEOC claim within their paragraph 5.2(c) that Network Rail have failed to consider their commercial interests. Network Rail refute this claim and would note that we asked for relevant information at the outset of this process which HEOC provided. All this information was considered and factored into the decision made for Week 11. Network Rail note that HEOC have not specified or evidenced what, if any commercial information we have failed to account for or why this would result in a different outcome. Network Rail utilised HEOC's own data sets and commercial forecasting as part of this process which resulted in an increase in their service offering (back up to four trains per hour) at the start of the day (up to 9:00).

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 submit that the Capacity Study was utilised to reach the decision made in relation to the Week 11 timetable offer. The concept train plan is not a blanket indicator for all two-track timetables in this area, but rather a starting position from which Network Rail fed in any updated information into the Decision Considerations to inform decisions. The Access Impact Matrix required that Network Rail produce a Capacity Study, which we did. Network Rail have also gone further and produced a concept train plan to make best use of the data available to Network Rail even though this is not a requirement under Network Code Part D. Feedback from HEOC has been considered as demonstrated by Network Rail making amendments to the timetable offer which increased the number of services for HEOC from two trains per hour back up to four trains per hour (up to 09:00) as detailed within the decision.

4.3.2 HEOC are claiming that Network Rail should have concluded that the Timetable offer made should have included more trains for HEOC. Historically, HEOC have regularly challenged Network Rail in the poor performance of the two-track timetable on this section of the network when their "Right Time" measure has been less than 50%. The data available to Network Rail demonstrates that the Week 11 offer represents the best allocation of capacity and that adding additional services into the Timetable would result in reduced/ poor performance as has historically been the case.

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

4.4.1 It is acknowledged that due to the disruptive nature of the agreed possession, this is a situation whereby multiple Access Proposals have been made that do not sit together perfectly within the timetable. Network Rail submit that it has applied the Decision Considerations under Part D utilising all the information requested, supplied and available to us to reach a decision which is justified against D4.6. It is also submitted (in line with TTP1880) that the decision reached by Network Rail is an informed and reasonable one i.e., one that is not arbitrary nor capricious (as per *Braganza v BP Shipping Ltd and another*) as referenced in Appendix B

4.4.2 As noted above, Network Rail submits that it has adhered to and applied the Network Code correctly in reaching the decision on the allocation of capacity. We have considered all the Decision Considerations under D4.6.2 and applied any that are relevant to the situation as evidenced by the provision of the Decision Criteria. Network Rail submit that the 'High' weighting that it has applied to Considerations (b) and (c) are reasonable based on the information provided to us.

4.4.3 Network Rail submit that it has also satisfied the essential elements of consultation as detailed by D8.6 in that it has provided sufficient information to allow Timetable Participants to understand the issues being presented and enough time to be able to comment. Network Rail has engaged with all Timetable Participants commencing in February 2022.

5 DECISION SOUGHT FROM THE CHAIR

5.1 Network Rail submits that it has followed and applied the relevant contractual provisions and the Network Code correctly and asks the Panel to confirm this.

5.2 Network Rail requests that the Panel should uphold the decision made by Network Rail in relation to its Timetable Offer to HEOC for Week 11.

6 APPENDICES

Appendix A - Network Rail Chronology

Appendix B – TTP1880 Extract

7 SIGNATURE

For and on behalf of
[usually Network Rail Infrastructure Limited]

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Signed

A handwritten signature in black ink, appearing to read 'A Muggleton', written over a horizontal line.

Print Name – Alan Muggleton

Position – Operational Planning Manager