

**TTP2318 and TTP2320 (Second Hearing)**  
**XCTL and GWR Joint TOC Sole Reference Document**

**1. DETAILS OF PARTIES**

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

- (a) GB Railfreight Limited (“GBRF”) whose Registered Office is at 3rd Floor, 55 Old Broad Street, London, EC2M 1RX (“the First Claimant”);
- (b) Freightliner Limited (“FL”) whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ (“the Second Claimant”);
- (c) Freightliner Heavy Haul Limited (“FLHH”) whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ (“additional dispute party/parties”);
- (d) First Greater Western Limited (“FGW”, “GWR”, “Great Western Railway”) whose Registered Office is at Milford House, 1 Milford Street, Swindon, Wiltshire, SN1 1HL (“additional dispute party/parties”);
- (e) XC Trains Limited (“XCTL”) whose Registered Office is at 1 Admiral Way, Doxford International Business Park, Sunderland, SR3 3XP (“additional dispute party/parties”); and
- (f) Network Rail Infrastructure Limited (“NR”) whose Registered Office is at Waterloo General Office, London, SE1 8SW (“the Defendant”).

1.2 Involved parties to this dispute include DB Cargo (UK), Northern Trains, Transpennine Trains, Arriva Rail London, Govia Thameslink Railways and First MTR South Western Trains.

**2. CONTENTS OF REFERENCE**

2.1 The Sole Reference includes:

- (a) Responses to NR’s SRD and comments to paragraphs 11 to 17 of the 7th Directions
- (b) Further comments
- (c) The decisions of principle sought from the Chair

**3. RESPONSES TO NR’S SOLE REFERENCE DOCUMENT (SRD) AND COMMENTS TO PARAGRAPHS 11 TO 17 OF THE 7<sup>TH</sup> DIRECTIONS**

**Q.11**

*Is NR correct in saying that if a freight service diverted in connection with a NR Variation under D3.4 cannot be accommodated on the diversionary route NR is under no duty to apply any Flexing Rights to other operators’ services to accommodate the diverted freight services, nor is it required to apply the Decision Criteria in respect of such services?*

3.1 NR asserts in 4.11.1 of its SRD that it is “...under no duty to apply any Flexing Rights to other operators’ services to accommodate the diverted freight service, nor is NR required to apply the Decision Criteria in respect of such services.” and under 4.11.9(c) “NR’s entitlement to its Flexing Right is only applicable to schedules bid via a rAP...”

3.2 XCTL and GWR disagree with this statement completely and fundamentally.

3.3 NR’s SRD seeks to treat the process under D3.4 as a standalone section and does not seek to cross

reference D3.4 with the previous steps in D2 (particularly D2.4) around creation of the New Working Timetable or D4.6 The Decision Criteria.

- 3.4 It is clear from the wording of D4.6 that it is overarching regarding any decision taken under Part D and NR cannot pick and choose when to apply The Decision Criteria:

*“Where Network Rail is required to decide any matter in this Part D 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 (“the Objective”).”*

- 3.5 In trying to achieve the Objective, considering Access Proposals submitted under condition D3.4.10 against those already submitted under D2.4 is an activity NR must undertake to ensure capacity is shared in the most efficient and economical manner.
- 3.6 As Access Proposals are submitted under D2.4 and D3.4, the two should be treated as equals and NR is obligated under D4.6 to make decisions consistent with the Objective and the Considerations when allocating capacity.
- 3.7 NR not behaving in such a manner as described in 3.6 above results in inefficient and uneconomical use of capacity which is in direct contravention of the Objective and is why we end up in situations of dispute such as the original elements of TTP2318/2320.

**Q.12**

*If NR is correct in this opinion, then does this interpretation of Part D only apply to freight services, or does it apply to any diverted train?*

- 3.8 We agree that D3.4 does not differentiate between the type of service and is applicable to any “Train Slot”

**Q.13**

*If, however, NR is not correct in its interpretation of Part D on this point, is this in fact an NR policy?*

- 3.9 We would argue, perhaps controversially, that while it is not an NR policy to treat passenger and freight services differently, or to treat different Operator’s services within the same “category” differently, it is certainly a behaviour that NR can be seen to demonstrate on a regular and consistent basis.

GWR cannot recall outside of a capacity plan environment ever being asked to move or withdraw its services to accommodate freight amended due to a Restriction of Use. This may have been because of time constraints rather than any policy.

**Q.14**

*To assist in answering these questions, does NR or any operator have any record of NR flexing WTT services to accommodate past diversions, whether of passenger or freight services?*

- 3.10 There are many 10s if not 100s of examples that could be drawn upon to demonstrate this activity just in the last year, it is such a regular practice. It is for this reason we struggle to understand why NR is asserting it does not need to flex WTT schedules during the D3.4 process when it does it so regularly?
- 3.11 NR draws out 5 examples itself and, rather than labour the point, 2 examples for XCTL are included below. 3.12 demonstrates what happens when NR doesn’t undertake its responsibilities in this area, and 3.13 demonstrates that NR does flex WTT services to accommodate diverted services, sometimes unbeknown to the Operator being flexed.
- 3.12 Week 22 2023 EAS August Bank Holiday Monday (TTP2165) – Original NR “offer” at TW-10 (D3.4.13) contained the rejection of 12 XCTL services, mostly Bristol-Manchester services, and earlier departures from Manchester Piccadilly for a further 13 services. Due to the interworking between these service groups the plan would’ve been undeliverable due to lack of Traincrew and Units, meaning the single largest flow on the XCTL network (Birmingham to / from Manchester) would’ve been unable to operate.

Following quick conversations post TW-10 between XCTL and NR, and between NR and other

Operators, notably Northern Trains, NR subsequently offered all services and correctly timed departures from Manchester Piccadilly. This happened 3 working days after receipt of the “Offer”.

I recognise the amendments to WTT services happened post offer, and NR could argue it was done with the good will of another Operator, Northern Trains in this example, rather than it exercising its Flexing Right or flexing services to accommodate diverted paths (for reference, Northern services were still in their WTT paths, it was XCTL that were diverted via Crewe). I would argue that had NR undertaken its responsibilities adequately between TW-18 and TW-14 as per Part D timescales (between TW-12 and TW-10 in this example), Northern would not have objected to the amendments made and all parties would have saved considerable time and been spared from having to write dispute emails, various phone calls and chasing to get the issues resolved.

- 3.13 In contrast to the above example, and to perhaps demonstrate the point in 3.9; Week 43 MO 2024 EAS contained a West Coast Main Line block on the Trent Valley with Avanti West Coast (AWC) services diverting via the Midlands. This block had no direct impact on XCTL services.

Upon receiving the “Offer” at TW-10 for Week 43, 18 WTT XCTL services across the Coventry corridor had been flexed (retiming between Birmingham International and Coventry in both directions) to accommodate the diverted AWC services without any contact or discussion with XCTL prior to the TW-10 offer. XCTL accepted the flexes to our services without comment.

This is a good example of what NR is empowered and obligated to do through Part D and when done properly, save for a courtesy phone call to advise of amendments being made, meets no resistance from Operators. It should be noted that examples 3.12 and 3.13 involved timetabling work carried out by the same NR Planning Team in Milton Keynes.

- 3.14 GWR services have been retimed or suspended to accommodate both XCTL and South Western Railway services during the D3.4 process. NR has acknowledged that flexing of existing service is likely to be necessary in GWR reaching an alternative London Main Line terminus when Paddington is closed for the construction of Old Oak Common new station.

#### **Q.15**

*Is an amendment to a schedule required as a direct or indirect result of a Restriction of Use a Part D3.3 Train Operator Variation, as NR suggested during the first hearing, or a Network Rail Variation under Part D3.4?*

- 3.15 The schedules that are “bid” for by an Operator to be amended for engineering work are Network Rail Variations. If NR amends a WTT schedule for a Network Rail Variation, that amended schedule also becomes a Network Rail Variation. This is not made explicit in Part D but logic says the amendment to the WTT schedule would not have happened without the original Network Rail Variation so there is no other label that could be applied to it. The fact that NR then “Offers” all amended WTT schedules as part of the holistic plan at TW-14 (TW-10) further supports this view.

#### **Q.16**

*Part D entitles NR to exercise Flexing Rights; is there an implied duty on NR to do so if otherwise Access Proposals cannot be accommodated?*

- 3.16 NR states in their SRD paragraph 4.15.1 “An amendment to a schedule required as a direct or indirect result of a Restriction of Use....is a revised Access Proposal....in response to a Network Rail Variation.” If NR asserts that an amended WTT schedule in response to a Network Rail Variation is an Access Proposal, then NR is entitled to exercise its Flexing Right

**Flexing Right** a right, exercisable by Network Rail in allocating a Train Slot in the New Working Timetable or relevant **Working Timetable** [my emphasis], to vary a Train Slot sought in an Access Proposal

D3 concerns “Variations to the Working Timetable” and by NR’s submission, the amended WTT schedule is an Access Proposal, therefore it can exercise its Flexing Right. D4.6 then “forces” NR to achieve the Objective when making its decisions concerning all areas of Part D, giving it a duty (stated, not implied), to apply Flexing Rights or apply the Considerations if capacity does not exist for all Access Proposals.

Note that further comment is made in 3.6 above regarding this point.

- 3.17 D4.4.1 (a) states Flexing Rights can be applied to Access Proposals submitted under D3.4.10 only and is specific about that. Given the statement in 3.15 above about amended WTT schedules as a result of Network Rail Variations also being considered Network Rail Variations, and 3.16 above defining these amended WTT schedules as being an Access Proposal, it could be argued that while they weren't directly submitted under 3.4.10 by an Operator, it is NR that requires the Access Proposal, not the Operator, and that D4.4.1 (a) applies to these schedules.

**Q.17**

Should Condition D2.5.1(k) apply only to passenger trains? Given that GBR's biomass services leave the Network at Liverpool and at Drax, should the reference to services leaving the Network be removed?

- 3.18 We agree with NR that D2.5.1(k) should be reworded to encompass all railway vehicles, not just passenger. The statement in the current definition of "*provided the vehicles have not left the network.*" should remain. If the last part is removed it could be argued that all Operators could be forced to supply next workings once any railway vehicle arrives at depots off the network. If vehicles leave the network, it is no longer NR's responsibility to plan them, even if it would be useful information in some circumstances, such as freight next working.

We would be supportive of a proposal being taken to Class Representatives Committee to discuss potential changes such as this, the reference in 4.7 below about definition of Access Proposal pointing to the wrong section (if deemed correct) and any other changes brought about by this hearing.

#### **4. FURTHER COMMENTS**

- 4.1 NR states in 5.1 of its SRD "*...NR submits that there is difference between the application of its Flexing Right during the creation of the New Working Timetable (the time between PDNS at D-40 and publication of the timetable at D-26) and dealing with Network Rail Variations.*" We would submit, as is detailed above in 3.16, that there is no difference between application of the Flexing Right due to the term included in the definition around "Working Timetable" and that Flexing Right is not solely applicable during preparation of the New Working Timetable.
- 4.2 We agree with NR's statement in 5.3 of its SRD that it is strong working relationships across the industry that achieves the desired outcomes when dealing with the process in D3.4 most of the time. NR could improve its communication and earlier discussion with Operators on complex timetable issues. As the Infrastructure Provider, we would like to see more ownership and leadership of issues arising during the D3.4 process, given that the D3.4 process is to enable NR to maintain and enhance the infrastructure, rather than the passive style NR adopts currently. This could help alleviate some of the issues such as those discussed in this TTP making it as far as a dispute.
- 4.3 We agree with NR's opening sentence of 5.5 and do not believe that any party wishes to make what is already a time consuming and complex process any more onerous. If NR undertook its duties consistently as written here, we would suggest the process would be improved and reduce time spent dealing with poor planning, poor validation, surprise issues and the level of involvement it requires from various managers to work these issues through to a suitable conclusion, which is often the result.
- 4.4 We disagree completely with NR's statement in 5.7 of its SRD and the exaggeration placed in that sentence overstates the issue. There is no expectation that NR should "*...alter or flex great swathes of the WTT to accommodate Network Rail Variations...*", just that it should undertake that exercise when required to enable its own access requirements for maintenance and the efficient operation of all Operators' services. On occasion, NR does amend a significant number of WTT schedules to achieve the Objective during the D3.4 process. The ask here is that it does so consistently, for every Operator, when it is required to, which is by no means every week.
- 4.5 NR's SRD paragraph 5.8 states "*...the substantive scope of NR's ability to flex operators' services is defined within their Track Access Contracts access rights.*". This is an interesting statement as the XCTL Track Access Contract (TAC), which follows the ORR model TAC, contains no reference to flex or flexing rights, either as a defined term or as a reference. The level of flex applicable to specific Access Rights contained in an Operator's TAC under Schedule 5 is not determined in the current passenger TACs (I cannot speak for FOC TACs or rights). All (most) passenger TACs are for quantum rights for train services and other protections such as journey time protection and flexing limits were removed many years ago.

4.6 Paragraph 5.9 of NR's SRD seems to want to enable NR to pick and choose when it should try and achieve the Objective based on how difficult or time consuming it might be to resolve conflicts during the timetabling process. We would argue strongly that NR is not afforded this luxury and that it must always act consistently when making decisions within Part D with D4.6 being the overriding instruction to NR. To take this a step further and to reiterate the point made elsewhere in this document, NR not acting consistently in undertaking its duties is one factor that leads to this type of dispute.

4.7 NR's SRD focuses on the term "revised Access Proposal" which is a term that is not defined in the Network Code. Access Proposal is defined in Part D, but I would suggest that the definition might point to the wrong section of Part D:

**Access Proposal** shall have the meaning shown in Condition D2.4.1

Should perhaps read "*shall have the meaning shown in Condition D2.5.1*", which describes the contents of an Access Proposal rather than D2.4.1 which describes the exercising of rights for the New Working Timetable.

4.8 The definition of Access Proposal, whether revised or not, carries the same definition when applied to parts D2 or D3.

4.9 To make one final point, which is touched on above. D3.4 is there for the benefit of NR to enable it to maintain and enhance the infrastructure. I feel NR often forgets this and undertakes D3.4 purely as something it must do, losing sight of the reason for it. The same could be said for the negotiation of the access and possessions that drive the D3.4 process. As a practitioner for many years in this area, from working at both NR and now XCTL, NR does not strive to get the best outcome for itself and all those parties that are involved in the process. Access Planning is fraught with challenges and issues, most of which are NRs own making due to its poor planning processes, which adds extra challenge to the D3.4 process. NR then applies itself inconsistently while undertaking the timetabling process around the access it wants to maintain the infrastructure and then dislikes it (for want of a better description) when Operators challenge its inconsistency. Perhaps a different approach would enable more collaboration with Operators and achieve better results for itself, all Operators, and all end users.

## 5. DECISIONS OF PRINCIPLE SOUGHT FROM THE CHAIR

5.1 XCTL and GWR seeks from the TTP the determination that NR's interpretation of its Flexing Right within its SRD is incorrect and that NR does have the authority (as described through D2 and D3) and duty (under D4.6) to carry out amendments of any schedule when planning for Restrictions of Use, whether services are directly or indirectly effected, during the process defined in D3.4 to achieve the Objective contained in D4.6.

## 6. SIGNATURE

For and on behalf of XCTL and GWR.



**Lee Tuttle**

Head of Planning – XCTL

6<sup>th</sup> February 2024