
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP1127

(following a hearing held at 1 Eversholt Street, London on 5 September 2017)

The Panel:

Clive Fletcher-Wood Hearing Chair

Members appointed from the Timetabling Pool

David Fletcher elected representative for Franchised Passenger Class, Band 2
Robin Nelson elected representative for Non-Passenger Class, Band 2
Mark Sleet appointed representative of Network Rail

The Dispute Parties:

For GB Railfreight Ltd ("GBRf")

Jason Bird LTP Timetable Manager
Jack Eagling Senior Planning Manager
Ian Kapur National Access Manager

For Network Rail Infrastructure Ltd ("Network Rail")

Andrew Robinson Amended Schedule Planning Manager
Nick Coles Customer Relationship Executive
Matthew Dickerson Senior Route Freight Manager
Nick Rendall Timetable Specialist
Katherine McManus Project Manager (Timetable Change)
Jonathan Salmon Signaller (attended as a witness but not called)

In attendance:

Tony Skilton Secretary, Access Disputes Committee

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1 Introduction, Substance of Dispute and Jurisdiction

- 1.1 On 11 July 2017 GBRf notified - pursuant to Condition D3.3.9 - dispute with Network Rail in relation to Network Rail's decision to reject a Train Operator Variation Request ("TOVR" or "the Bid").
- 1.2 The TOVR was for train 6Y61 to operate from Tonbridge West Yard to Grain in the 2017 Subsidiary WTT from 24 July 2017 with the intention of continuing to run in subsequent WTTs. For a train to operate on this route, via Sevenoaks, it must reverse in or near Tonbridge station. The TOVR was submitted to Network Rail by GBRf on 27 June 2017 and declined on 4 July 2017, the stated underlying reason for rejection being "due to issues at Tonbridge".
- 1.3 GBR's initial objection was that the notice of rejection from Network Rail did not contain sufficient information to be compliant with Condition D3.3.11. When supplementary information provided by Network Rail on 10 July 2017, GBRf's view was that this did not show any rigorous test of the correct application of the Decision Criteria nor was the Objective (specified in Condition D4.6.1) satisfied.
- 1.4 In its notice of dispute, GBRf requested that the dispute resolution process be expedited due to the requirement for the path concerned being an immediate one.
- 1.5 I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.
- 1.6 In its consideration of the Parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in ADR Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.7 The abbreviations used in this determination are as set out in the list of parties above and in this paragraph 1.7.

"ADR Rules" means the Access Disputes Resolution Rules

"ORR" means Office of Road and Rail

"SRT" means Sectional Running Time

"TPR" means Timetable Planning Rule

"WTT" means Working Timetable

2 Background, history of this dispute process and documents submitted

- 2.1 I was appointed as Hearing Chair on 18 July 2017. Some difficulty was experienced in making suitable arrangements for the matter to be heard over the main summer holiday period and 5 September 2017 was eventually set as the date for the hearing. At my request, the Dispute Parties were required to provide Sole Reference Documents.
- 2.2 GBRf served its Sole Reference Document on 15 August 2017.
- 2.3 Having read GBRf's material, on 17 August 2017 I issued Directions indicating points which I wished GBRf to clarify and also matters which I required Network Rail to cover in its statement of case. GBRf provided a preliminary response on 21 August 2017 and confirmed its accuracy on 22 August 2017.
- 2.4 Network Rail served its Sole Reference Document on 23 August 2017. I was concerned to note, for the first time in my experience as a Hearing Chair, that Directions (being my Directions of 17 August 2017) had not been complied with; further Directions were accordingly issued on 29 August 2017 with a view to securing from both Dispute Parties answers to points which ought reasonably to have been capable of being established prior to commencement of the hearing and therefore

enabling all concerned to arrive for the hearing properly prepared. Those Directions were accompanied by my list of identified issues of law raised by the dispute, as required by Rule H18(c).

- 2.5 Both Parties responded to the further directions on 1 September 2017. Network Rail apologised for not having satisfied my Directions of 17 August 2017 and now addressed the points raised; Network Rail also provided some helpful comments regarding the identified issues of law even though this is not required ahead of the hearing.
- 2.6 Further review of the material received from the Parties now led me to the preliminary view that Network Rail's original decision to reject the Bid was flawed in law because it only referred to one of the Considerations in the Decision Criteria (this being in response to a TOVR which requires Network Rail to apply the Decision Criteria as a matter of course). To avoid further delay through having this procedural shortcoming addressed and - in all probability - a fresh Dispute initiated for hearing at a later date, but with the Parties relying on exactly the same arguments as now, I issued a Note to the Parties on 4 September 2017 in which I invited GBRf to abandon its request set out in paragraph 6.1(b) of its Sole Reference Document (i.e. that the Panel determine "that Network Rail must accept the bid as it is compliant with the TPRs") and invited Network Rail to concede that its original decision was flawed; both Parties could then ask this Panel to examine their respective cases (already set out in their Sole Reference Documents) to conclude whether Network Rail had now identified the correct Considerations and weighed them appropriately.
- 2.7 Later on 4 September 2017 Network Rail responded in support of my suggested way forward. GBRf also responded, indicating that some clarification was needed to assist its understanding; in view of the late hour at which this e-mail was received, I left this for the hearing.
- 2.8 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarized in the course of this determination.

3 Relevant provisions of the Network Code and other documents

- 3.1 The Network Code Part D was applicable to the issue to be determined in this dispute, particularly Conditions D3.3.3, D4.3.1 and D4.6.
- 3.2 Condition D3.3.3 reads:
"From D-26 and during the relevant Timetable Period, a Timetable Participant is entitled to make a Train Operator Variation Request and Network Rail shall have the power to accept, reject or modify it, subject to the timeframes set out in Conditions D3.3.6 and D3.3.7 below and acting in accordance with Condition D4.3."
- 3.3 Condition D4.3.1 reads:
"In responding to a Train Operator Variation Request, Network Rail shall conduct itself as follows:
(a) it is entitled to exercise its Flexing Right;
(b) when exercising its power set out in Condition D3.3.3 Network Rail shall apply the Decision Criteria in accordance with Condition D4.6 except that it shall not accept a Train Operator Variation Request if to do so would give rise to any conflict with any Train Slot already scheduled"
- 3.4 Condition D4.6 - The Decision Criteria - is reproduced as Annex "A" to this document.

4 Submissions made by the Dispute Parties

- 4.1 I opened the hearing by explaining how I had arrived at the conclusions set out to the Parties in my Note of 4 September 2017. GBRf's initial view was that it was still open to the Panel to direct that Network Rail should accept the Bid. I explained that in my view a procedural error on Network Rail's part (now admitted by Network Rail) did not entitle the Panel to grant GBRf's request, not least because of the specific requirement that the Decision Criteria must be applied a TOVR. Network Rail had now followed this process, but its conclusions were disputed on every point by GBRf. The differences between the Parties now needed to be resolved, which could be done by another Timetabling Panel in a fresh Dispute, but which it seemed more sensible and more likely to achieve a solution in line with the Principles governing Timetabling Panels if this Panel now determined the Dispute on the basis of the views of the Parties, which had now been set out in full. After an adjournment in which to consider its position, GBRf agreed to withdraw paragraph 6.1(b) of its Sole Reference Document and, like Network Rail, to ask this Panel to examine their respective cases to conclude whether Network Rail had now identified the correct Considerations and weighed them appropriately.
- 4.2 Before proceeding I made opening remarks, explaining why it was important to comply with Directions to assist the Panel and the Parties to prepare for the hearing (or indeed in some cases to clarify issues and so enable parties to reach a settlement before a hearing). I also sought to clarify that there is no requirement for a Party to respond to a Hearing Chair's identification of the issues of law required by Rule H18(c), although in this case it was helpful to understand Network Rail's position before the hearing. I commented on the fact that even after a number of requests for information had been answered by the Parties, the hearing was commencing with some facts still not clear to the Panel. I reminded both Parties that it is too easy for those close to a dispute not to understand that what is obvious to them may not be obvious to others; therefore it is helpful to ensure that statements of case are clear on their face. My final point was that in any dispute in which the Decision Criteria were engaged, parties need not find words to describe those Considerations which are not relevant as being 'neutral'; they should simply be dismissed as not relevant.
- 4.3 In the light of the procedure that had now been agreed between the Parties, I dispensed with the customary procedure of hearing opening statements from the Parties. Although the Dispute was initiated by GBRf, and it would therefore be usual for GBRf to open the substantive hearing, as Network Rail was required to apply the Decision Criteria in response to a TOVR it seemed more appropriate instead to invite Network Rail to start by amplifying its Sole Reference Document by highlighting how it had approached the Decision Criteria, with GBRf then being able to respond.
- 4.4 After taking further oral evidence from the Parties, each was given opportunity to make a closing statement to the hearing.

5 Oral evidence at the hearing

- 5.1 Network Rail explained that in Condition D4.6.2, Considerations (a), (h), (k) or (l) were not considered to be relevant. Network Rail's detailed explanations regarding each other Consideration was set out in its our Sole Reference Document but to highlight them:-

Regarding (b), Network Rail accepted that there is a demand for this service (6Y41) as GBRf had put in a bid.

Regarding (c), Network Rail had put heavy weighting against the Bid because of the known issues existing at Tonbridge with movements into and out of the West Yard. The TPRs were are clearly not adequate and Network Rail was experiencing performance impact and associated financial issues.

Regarding (d), Network Rail acknowledged that accepting the Bid would give GBRf the shortest journey time for this train, but in the wider context of it leading to adverse performance it would cause other operators to experience longer journeys.

Regarding (e), Network Rail did not believe that adding in another service with performance issues would be in the interests of maintaining and improving an integrated system of transport for passengers and goods.

Regarding (f), whilst Network Rail accepted that there is a commercial interest for GBRf in running this train, it would create commercial impact for other operators who would be experiencing poor performance and there would be Track Access Agreement Schedule 8 performance regime compensation costs for Network Rail.

Regarding (g) – consistency with any relevant Route Utilisation Strategy – whilst GBRf was saying that 6Y41 train would be in line with the Freight Network Study, this traffic was not mentioned in the Study so Network Rail had not regarded it as deserving of any significant weighting.

Regarding (i), Network Rail considered that the bid would lead to negative environmental consequences because of other trains taking longer and wasting fuel, also that poor performance in the Tonbridge area leading people to use road transport instead.

Regarding (j), whilst GBRf would be able to make use of its assets, Network Rail considered that the knock-on effect of delays would prevent other operators from using their assets efficiently.

Network Rail's conclusions regarding these various Considerations all combined to reinforce its original decision to decline the Bid from GBRf on the grounds of adverse performance impact, which engaged Consideration (c).

- 5.2 GBRf considered that the Considerations identified by Network Rail other than (c) could each be balanced the opposite way and that Network Rail had ignored the positive aspects of this proposed train. Network Rail's view on every single other Consideration went back to performance, whereas GBRf believed that performance should be weighed under Consideration (c) alone. GBRf thought that the other Considerations had not been weighed correctly by Network Rail. As for (c), GBRf had not yet seen from Network Rail any evidence of performance risk around 6Y41 as the train has not yet been run; Network Rail appeared to be relying at least in part on a movement which enters the West Yard, not leaves it.
- 5.3 Asked if it had now abandoned safety as a reason for declining the Bid, Network Rail responded not, safety being covered in the Objective.
- 5.4 The Panel raised a number of questions, addressed to both Parties. Where reliance was placed on any of the answers this is discussed below.

6 Analysis and consideration of issues and submissions

- 6.1 For the reasons explained above, although Network Rail sensibly conceded that it had not properly applied the Decision Criteria before making the original decision to refuse the Bid, we could not accept GBRf's submission that in consequence the Panel was entitled to direct Network Rail to accept the Bid. This was for a number of reasons, some of which are discussed elsewhere in this Determination, but the simplest reason was that Network Rail has no choice but to apply the Decision Criteria to a TOVR; it had not done before making the original decision - that exercise still had to be completed formally.
- 6.2 Network Rail had now applied the Decision Criteria and its analysis was set out in its Sole Reference Document. That analysis still rejected the Bid. The Panel could have remitted the decision back to Network Rail, with the inevitable consequence that the

Bid would be refused once more, at which point GBRf would commence a fresh Dispute to resolve the arguments which were now before this Panel. It was for this reason that I had offered the Parties the opportunity for the Panel to decide the Dispute on the basis of the arguments now before it, which GBRf eventually accepted.

- 6.3 It was clear even before the hearing that the Bid did not create any conflict with an existing Train Slot; if so Network Rail would have been duty bound to reject it on that basis.
- 6.4 The Panel was satisfied that in the Sole Reference Documents of both Parties the relevant Considerations had been identified (I comment on safety below).
- 6.5 What was clear to the Panel, however, was that for understandable reasons arising from poor performance in the Tonbridge area, some of which related to the problems of getting access to and egress from the Yard, Network Rail had, in our view, weighed all the Considerations through the prism of its anxiety about performance. Network Rail accepted that the weight of some considerations was in GBRf's favour, but the Panel concluded that because of its near-obsession with performance Network Rail had applied too little weight to those Considerations and far too much to D4.6.2(c), the maintenance of performance. This was illustrated by Network Rail articulating its concern about 'the risk of conflict' in its response to the Directions of 29 August 2017.
- 6.6 While the Panel obviously accepts the importance to the industry as a whole of achieving the best possible performance, it concludes that the WTT can only be planned on the assumption that the existing timetable will work. Otherwise the mere 'risk of conflict' would justify refusing any bid for new services, whether passenger or freight.
- 6.7 Further, it became clear in the oral exchanges at the hearing that Network Rail was strongly opposed to any train being signalled from the Yard to the Down Slow line beyond position light signal AD2032. The Panel concluded that this determined opposition had contributed to the way in which Network Rail had approached the Bid and the weight it had accorded to the relevant Considerations.
- 6.8 Relatively late in the process Network Rail had raised concerns about safety. I admit to always being on the alert to any Party in any Dispute seeking to play a safety card in the hope that it might be a trump card which will not be properly examined. Safety is not one of the Considerations, but it is necessarily set out within the Objective, to which the Considerations are subordinate. In spite of the conclusion on this issue reached below, I would have thought it wrong not to give safety sufficient time for this point to be discussed (indeed the discussion on safety in the hearing took up considerably more time than any other point).
- 6.9 Network Rail's principal concern arose from the length of the propelling move required to place the locomotive propelling 6Y41 on the country side of signal AD2032. In Network Rail's view the overbridge at the country end of Tonbridge station would make it impossible for a shunter standing on Platform 3 to see sufficiently far beyond the overbridge to be able to control the move beyond the overbridge safely in a way which meets the requirements of the Rule Book.
- 6.10 The Parties were unable to agree on the distance involved for this move, but the Panel accepts that it is a considerably greater distance than to propel into Platform 1 or 2. In examining a move both into and out of the Yard by reversing in either of these platforms we learnt that a propelling move into either of these platforms is controlled by a shunter standing on Platform 1/2 to control the propelling move, which GBRf stated to be 514 yards. It had already been explained that either signal AD159 or AD161 had to be cleared before the propelling movement started, not only as protection but also because 4 or 5 wagons had to pass through the overbridge to ensure that the train was clear of the points at the London end. The shunter was regarded by both Parties as having a sufficient view through the overbridge to control this more limited movement safely. In a move into the Yard reversing in Platforms 1 or

2 the train is stopped short of the overbridge (at AD159 or AD161), then called on so that the rear of the train will be clear of the junction at the London end of the station to permit the reversing move.

- 6.11 GBRf suggested that the problem could be overcome by having one shunter on Platform 3 and another at a vantage point (which it had identified) on the country side of the overbridge, with control being passed between the shunters at an appropriate time. GBRf made two further points, which need to be discussed: the first being that this objection had not been raised previously, in spite of it holding a Firm Right to propel a train beyond signal AD2032 and the fact that such a move is currently planned within the WTT. It was suggested by Network Rail that the timetabled move (of 6Y39, at 04 30 MO) rarely follows this route, instead it was suggested anecdotally that it was usually routed through Platform 1 or 2. It was accepted by GBRf that this did happen sometimes, but GBRf submitted that the planned route was followed on occasion; further, one of GBRf's representatives stated that he had seen this move (beyond signal AD2032) performed himself, although he accepted that this had occurred at least 2/3 years ago.
- 6.12 As to GBRf's objection on the basis that this concern had not been raised previously, my own experience leads me to conclude that this objection cannot be supported, as it is always open – and indeed should be encouraged – for legitimate safety concerns to be raised, however long a movement (in this case) has been in the WTT and whether or not it is a Firm Right.
- 6.13 GBRf's second objection to Network Rail raising safety concerns in response to a bid was that GBRf is the dutyholder under the *Health and Safety at Work, etc Act 1974*, so the responsibility for ensuring that any movement is carried out safely rests with GBRf, not with Network Rail.
- 6.14 As a start point this is unarguable, but there is a more subtle balance in this area which requires further investigation (and which I discussed in the Determination of dispute ADA20). While every industry party carries primary responsibility for ensuring that its undertaking is conducted safely, all industry parties depend on others to achieve safety. Network Rail expects those given access to the Network to conduct their undertakings safely; equally TOCs/FOCs are entitled to expect Network Rail to ensure that the Network is operated safely. But given this interdependence, each party has a right, and indeed a duty, to raise any concerns about the safe operation of the undertaking of any other party on which it relies. If any such concerns cannot be resolved between the industry parties then the remedy lies in recourse to the ORR, a procedure codified in recent years. While this may be seen as something of a nuclear weapon, it is a step that sometimes must be taken.
- 6.15 Having allowed time to air this topic, justifiably in my view, I expressed my firm opinion that safety issues cannot be determined by a Timetabling Panel, which has neither the authority nor the expertise to do so. Any Timetabling Panel determining a dispute of this kind can only do so on the assumption that movements proposed can be carried out safely; it is for the industry parties involved to deal with any safety concerns in the way set out above.
- 6.16 In this context the Panel was concerned at the suggestion raised by Network Rail (for the second time in my recent experience) that the controlling signaller 'would not signal' a move included within the WTT because of safety concerns. The Panel obviously recognises the safety critical work undertaken by signallers and the importance of their use of their discretion, but does not accept that signallers' discretion should extend to a decision 'not to signal' a planned move. Safety concerns of this kind should be raised by signallers with their own line management, to be addressed by Network Rail in conjunction with the Operator(s) concerned as discussed above. The Panel hopes that in deploying this tactic now in two Disputes within my knowledge, Network Rail is not encouraging signallers to think that this is an appropriate way in which their discretion should be exercised.

- 6.17 A point made by Network Rail during the hearing was that 'all involved' had agreed that the route concerned to beyond signal AD2032 should no longer be available for use. This statement was not examined, so the Panel is not clear whether this meant the route from signal AD2059 to beyond AD2032, or the route from the Godstone Line across the Down Main, thus denying access to the Down Slow to any train from Godstone and indeed any train on the Down Main. In this context the Panel does no more than record as an observation its expectation that Network Rail will consider carefully whether any such proposal would amount to Network Change.
- 6.18 Having set out the way in which the Panel dealt with these issues, its clear conclusion was that Network Rail had failed to weigh the relevant Considerations properly, and that on the assumption that the Bid was compliant the balance was strongly in favour of GBRf, so that if that assumption was justified then the Bid should be accepted.
- 6.19 At this point, however, an important 'but' had to be considered, whether the Bid was actually compliant, in the sense of being an accurate reflection of the time that the propelling manoeuvre to beyond signal AD2032 would take.
- 6.20 Our final question to both Parties was whether they were entirely confident with the proposed timing; both said that they could not be confident (which was much to GBRf's credit).
- 6.21 In response to earlier questioning, GBRf had explained that the Bid was devised on the basis of adding the current SRTs for each section of the planned move to achieve the total time required, but it accepted that these SRTs were all relating (in the case of freight) to a locomotive-hauled move, not a propelling move. The validity of timings based on SRTs was therefore brought into question.
- 6.22 The Panel was made aware by Network Rail of a current proposal – which it accepts has not been agreed – to add 5 minutes to the current planning assumption of 3 minutes for a propelling move from signal AD2061 to Platform 1 or 2.
- 6.23 Against the background of these uncertainties the Panel was unable to conclude that the Bid was actually compliant, in the sense of including realistic timings for the propelling move at 3 mph for what is clearly a considerable distance. It therefore felt unable to reach a Determination requiring Network Rail to accept the Bid (a point discussed further below). The Determination must therefore be limited to the expression of the Panel's opinion that Network Rail failed to weigh the relevant Considerations appropriately and that the correct weighting was so very clearly in favour of GBRf's Bid being accepted, if the timing in the Bid for the propelling move is correct.
- 6.24 The Panel does, however, strongly recommend that the Parties should consult quickly, to agree – if possible – on how long the propelling move in the Bid would actually take. If GBRf's timing is accurate then the Panel anticipates that Network Rail will wish to reconsider the Bid in the light of the Panel's clear conclusion that the relevant Considerations had not been weighed correctly and the expectation that any later Timetabling Panel is likely to accept this conclusion as persuasive authority.
- 6.25 If, alternatively, GBRf's timings are not realistic, then it will no doubt wish to consider how the Bid might need to be re-cast, as although the Panel's views on the appropriate weighting would not change, those views were reached on the basis that the Bid was compliant in this respect.
- 6.26 Even in these circumstances the Panel hopes that Network Rail would be conscious of what the Panel regards as a general presumption in Part D (referred to in Directions) that bids should be accepted where this is possible. GBRf sought to rely on the conclusion in Timetabling Dispute TTP834 (that, '*As a matter of legal entitlement: under the Network Code as presently constituted and incorporated in Timetable Participants' Track Access Contracts, Network Rail is not entitled to reject an otherwise contractually compliant Access Proposal other than in accordance with the relevant provisions of the Network Code for the time being in force*') as persuasive

authority in this Dispute. Again as explained in Directions, the Panel is conscious of the distinction between an Access Proposal, in which the Decision Criteria are only engaged to resolve any conflict emerging, and the automatic requirement for Network Rail to apply the Decision Criteria in respect of any TOVR.

- 6.27 For this reason it was unable to regard TTP834 as direct persuasive authority, although it does reinforce the presumption in favour of accepting bids where capacity exists to permit any proposed new service to operate.
- 6.28 Two observations arise from this situation: firstly that this appears to give some lesser status to a TOVR than to an Access Proposal, yet in the next WTT a TOVR would become an Access Proposal, so the purpose of this distinction is not clear to the Panel. A further point is that the Panel is puzzled as to why Network Rail must automatically apply the Decision Criteria in a tightly time-bound TOVR process, when in many cases there will be no conflict requiring the Decision Criteria to be applied.
- 6.29 In the meantime, however, the Panel also thought it possible that other options for the operation of 6Y41 might emerge. In this context the Panel recommends as guidance that consideration should be given to the circumstances in which the hourly terminating 'Southern' service remains in Platform 1 for 40 minutes in each hour (during which another train briefly occupies the country end). Absorbing capacity in this way which might otherwise create further opportunities for GBRf's services to gain access to or egress from the Yard did not seem to the Panel to meet the Objective. The Panel recognises that neither Southern nor 'Southeastern' participated in this Dispute, and considerations such as Personal Needs Breaks must be examined, but nonetheless the Panel recommends that this issue should be reviewed.
- 6.30 A further recommendation, as guidance, is that SRTs for planned propelling moves should be developed where they are not already in place. This will give FOCs (in particular) and Network Rail greater confidence in any future bids involving propelling moves.
- 6.31 Both Parties' Method of Working documents were submitted in evidence. It became clear that each of them contained errors, which did not surprise the Panel as they are working documents which the Panel regards as providing useful guidance. The Panel does not, however, endorse any approach by which a Party regards any Method of Working document – whether its own or another industry party's document – as having an equivalent status to TPRs. This is in part because TPRs are part of the contractual matrix governing the way in which the railway is run, and can be subject to appeals to a Timetabling Panel when this is necessary. The same does not apply to Method of Working documents.
- 6.32 For this and similar reasons the Panel recommends that Network Rail should not place undue reliance on its internal documents when applying the Decision Criteria or making any other decisions relating to Access Proposals or TOVRs.
- 6.33 The final point considered by the Panel was what remedy it could have granted in the light of its clear conclusion that Network Rail had not correctly weighed the Considerations and if it had accepted that GBRf's Bid was compliant. This section is once again only offered as guidance and observations, but in the light of the way that the issue of possible remedies has come to the fore in recent Timetabling Panel hearings it is felt that comments in this area may be useful.
- 6.34 Having reached the conclusion that a proper application of the Decision Criteria was in favour of GBRf, if the Panel had had confidence in the timings within the Bid, then it would have wanted to direct that the Bid should be accepted. At that stage it would have had to review Condition D5.3.1 to decide on the remedy. It could have complied with D5.3.1(a) by giving '*general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved*', but could only '*substitute an alternative decision in place of a challenged decision of Network Rail*' under D5.3.1(c) if '*exceptional circumstances*' had arisen.

- 6.35 In Dispute TTP1064 and the associated Disputes Network Rail submitted that exceptional circumstances could only apply if a Party (obviously meaning the Claimant) raised the point in its Sole Reference Document. This point remains untested, but as a personal view I do not accept it for a number of reasons, including the fact that most Disputes proceed without legal input until a Hearing Chair becomes involved, and that the duty of a Timetabling Panel to *'take the initiative in ascertaining facts and law'* clearly includes a right to decide whether exceptional circumstances have arisen. But, as observed above, this point has not been tested.
- 6.36 The real problem arises when, as occurs so often, a Timetabling Panel is faced with a binary decision, as it was for example in Dispute TTP985 and would have been in this Dispute in slightly different circumstances.
- 6.37 Could it have been credibly submitted in this Dispute that exceptional circumstances had arisen entitling the Panel to substitute its own decision under D5.3.1(c)? I do not think that the Panel could reasonably have reached such a conclusion, but there is an artificiality in seeking to devise a form of words to fit a decision that could clearly have been in favour of the Bid being granted into the constraints of the words of D5.3.1(a), in that we would be trying to reflect a binary decision which clearly fell one way into *'general directions...specifying the result to be achieved but not the means by which it shall be achieved'*, while falling short of actually substituting the Panel's decision for that of Network Rail.
- 6.38 Against this background this Panel very much welcomes the view of the ORR expressed in its Determination of the Appeal against TTP1064 that *'the wording in limbs (a) to (c) in Condition D5.3.1 could in future be clarified'* and strongly recommends that work to achieve such a welcome clarification should be put in hand.
- 6.39 Summary of observations and guidance

Specifically relating to this Dispute

- 6.39.1 That the Parties should quickly seek to agree – if possible – on the actual time that the proposed propelling move will take, and then proceed as recommended in paragraph 6.24 et seq.
- 6.39.2 That Network Rail should review the situation in which a terminating Southern service occupies Platform 1 at Tonbridge for 40 minutes in each hour, with a view to creating more opportunities for trains entering or leaving the West Yard to reverse in this platform (paragraph 6.29).

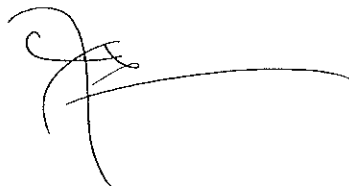
General points

- 6.39.3 The importance of complying with Directions (paragraph 4.2).
- 6.39.4 The value of setting out statements of case clearly enough for those not already familiar with the issues and the location(s) involved to have a clear understanding of the points in issue between the parties (paragraph 4.2).
- 6.39.5 A Timetabling Panel must assume that the existing WTT will work (paragraph 6.6).
- 6.39.6 While any safety concerns by any party should be aired to permit them to be discussed, a Timetabling Panel can only proceed on the assumption that a movement which is either in the WTT or is proposed (as an Access Proposal or a TOVR) can be carried out safely (paragraph 6.15).
- 6.39.7 That it is not appropriate for Network Rail to suggest that a planned move will or might not be signalled by the controlling signaller of his/her own volition (paragraph 6.16).

- 6.39.8 If Network Rail is proposing to make an existing signalled route unavailable to traffic, it should consider whether that would amount to Network Change (paragraph 6.17).
- 6.39.9 The Panel queries whether it is necessary for the Decision Criteria to be applied automatically to any TOVR, when in some cases there will be no conflict with other services requiring this task to be undertaken (paragraph 6.28).
- 6.39.10 If SRTs do not currently exist for planned propelling moves, then they should be developed (paragraph 6.30).
- 6.39.11 That in applying the Decision Criteria Network Rail should be cautious in placing undue reliance on internal documents (paragraph 6.32).
- 6.39.12 In the light of the ORR's comment in its Determination of the Appeal against TTP1064 that the wording in Condition D5.3.1 could be clarified, the Panel recommends that work to achieve this should be put in hand (paragraph 6.38).

7 Determination

- 7.1 Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, my determination is that in responding to the Bid Network Rail correctly identified the relevant Considerations within the Decision Criteria, but weighed them entirely inappropriately, as on a proper application the balance clearly favoured the Bid being accepted rather than being rejected. As the Panel did not have confidence in the timings within the Bid for the propelling move out of the West Yard, however, it felt unable to direct – in any form – that Network Rail should accept the Bid.
- 7.2 I confirm that, so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Clive Fletcher-Wood
Hearing Chair

15 September 2017

EXTRACT FROM THE NETWORK CODE, PART D

4.6 The Decision Criteria

- 4.6.1 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 in the overall interest of current and prospective users and providers of railway services ("the Objective").
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the "Considerations") in accordance with Condition D4.6.3 below:
- (a) maintaining, developing and improving the capability of the Network;
 - (b) that the spread of services reflects demand;
 - (c) maintaining and improving train service performance;
 - (d) that journey times are as short as reasonably possible;
 - (e) maintaining and improving an integrated system of transport for passengers and goods;
 - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
 - (g) seeking consistency with any relevant Route Utilisation Strategy;
 - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
 - (i) mitigating the effect on the environment;
 - (j) enabling operators of trains to utilise their assets efficiently; and
 - (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates.
- 4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant 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 Network Rail. Where, in the light of the particular circumstances, Network Rail 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.
- 4.6.4 The Objective and the Considerations together form the Decision Criteria.