
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP1880
(following a hearing held via videoconference, on 13 July 2021)

The Panel:

Alexander Rozycki Hearing Chair

Members appointed from the Timetabling Pool

Peter Warhurst elected representative for Franchised Passenger Class, Band 2
Ian Kapur elected representative for Non-Passenger Class, Band 1
Toby Patrick-Bailey appointed representative of Network Rail

The Dispute Parties:

GB Railfreight Ltd (“GBRf”)

Darren Pell Engineering Access Manager
Jack Eagling Head of Timetabling and Long-Term Traincrew Planning

Network Rail Infrastructure Limited (“NR”)

Tony Worgan Western Route Access Planning Manager
Adam Hodgson Policy Advisor
Robin Jenkins Head of Planning
Maria Lee Head of National Access
Nick Millington Head of Maintenance Delivery
Jon Mitchell Route Works Planning Manager

Interested parties:

DB Cargo (UK) Ltd.

Graham White Access Manager South

Freightliner Group

Chris Matthews Track Access Manager

Rail Operations (UK) Ltd.

Michael Gatenby Timetable Delivery Manager

In attendance:

Tamzin Cloke Committee Secretary (“Secretary”)

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A Background and Jurisdiction

1. Dispute TTP1880 was raised by GBRf by service of a Notice of Dispute on 03 June 2021 in respect of NR's decision of 27 May 2021 in relation to revised Section 4 Restrictions of Use for patrolling activity on Western Route ('the Decision'). The dispute was brought on the basis that GBRf disagreed with the Decision due to the potential impact on its business and its view that, consequently, Network Rail had failed to appropriately apply the Decision Criteria in making the Decision. GBRf concurrently requested that the hearing be expedited owing to the proximity of the Restrictions of Use.
2. I was appointed as Hearing Chair on 24 June 2021 and I satisfied myself that the matters in dispute included grounds of appeal which may 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.
3. In its consideration of the Parties' submissions and its hearing of the Disputes, 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'.
4. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 4 and as otherwise defined in this determination document:
 - "ADR Rules" means the Access Dispute Resolution Rules, and "Rule" is construed accordingly
 - "Chapter H" means Chapter H of the ADR Rules
 - "DC" means Decision Criteria, as outlined in Network Code Condition D4.6
 - "EAS" means Engineering Access Statement
 - "NC" means Network Code
 - "Part D" means Part D of the Network Code
 - "TTP" means Timetabling Panel

B History of this dispute process and documents submitted

5. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide Sole Reference Documents. The proposed Panel hearing was notified generally by means of the website and by email to those identified as potential interested parties by the Dispute Parties.
6. On 01 July 2021, GBRf served its Sole Reference Document, in accordance with the dispute timetable as issued by the Secretary.
7. On 08 July 2021, NR served its Sole Reference Document in accordance with the dispute timetable as issued by the Secretary.
8. Freightliner Group; DB Cargo (UK) Ltd.; Direct Rail Services Ltd.; Rail Operations (UK) Ltd. declared themselves to be interested parties. All, save Direct Rail Services Ltd., were represented at the hearing. Both Freightliner and Rail Operations (UK) representatives had to leave the hearing early due to prior commitments.
9. On 12 July 2021, the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that so far as there were any relevant issues of law, for the most part the issues to be determined by the Panel concerned, initially, whether NR's Decision amounted to a

Network Rail Variation for the purposes of Conditions D3.4 and D3.5. If the Decision was a Network Rail Variation, the issues remaining were: whether NR conducted an adequate and/or sufficient consultation with GBRf, whether NR, as a contractual fact-finder, acted reasonably in making the Decision; whether, and to what extent, NR took into account the Objective, as defined in Condition D 4.6.1, in making its Decision; whether the remedies the Parties sought were available to the Panel under Condition D5.3.1 and Rule H50 of the ADRR.

10. The hearing took place on 13 July 2021. The Dispute Parties made opening statements, responded to questions from the Panel concerning various points and were given the opportunity to make closing statements. The interested parties were given the opportunity to raise points of concern.
11. I confirm that the Panel had read all of the papers submitted by the Dispute Parties and I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of the dispute process, both written and oral, notwithstanding that only certain parts of such materials are specifically referred to or summarised in the course of this determination.

C Outcomes sought by the Dispute Parties

12. In its sole reference document, GBRf requested the panel to determine that:
 - (a) Under Condition D3.4.4(b) NR was remiss in its failure to apply the Decision Criteria. In making its Decision NR had inaccurately evaluated the impact that its proposal would have on GBRf's business, and likely that of others. That the Decision reached was flawed given the alternatives that GBRf contended were available;
 - (b) NR had been remiss in implementing its Decision and this was contrary to Condition D3.4.6; and,
 - (c) NR's Decision should be "struck down", with all entries in the current versions of Section 4 of the EAS relating to line of reference GW130 removed, other than the long-standing entry relating to Saturday night into Sunday morning.
13. Following clarification sought via a Directions Note, dated 07 July 2021, GBRf clarified that it was of the view that NR should be directed to reconsider its Decision on the basis that it had failed to take all relevant factors into account when making its Decision, under the powers available in Condition D5.3.1(a). However, should the panel be minded to do so, GBRf was not adverse to the Panel utilising the powers available under D5.3.1(c) ("exceptional circumstances") if it felt this was appropriate, but made no specific allegation of exceptional circumstances, save for noting that it felt Restrictions of Use of this nature were more properly dealt with via the process laid out in Condition D2.2 and NR's use of the 'late notice' provisions of Part D was "therefore exceptional".
14. NR asked the Panel to determine that it had complied correctly with the process as set out within Part D of the Network Code, including consultation requirements and the application of the Decision Criteria. Consequently, NR requested that the Panel uphold its Decision.

D Relevant provisions of the Network Code and other documents

15. The versions of the Network Code Part D and the ADR Rules dated 18 January 2021 were applicable to these dispute proceedings.

16. Conditions D3.4, D3.5, D4.6, D5.3.1 and D8.6 are particularly relevant and are appended in Annex "A".

E Submissions by the Dispute Parties

17. GBRf made the following principal submissions:

17.1 The Decision would cause an unacceptable level of uncertainty to its existing and prospective customers. In particular, it referred to such changes being introduced piecemeal across the country, but to an extent unknown to GBRf. Therefore, GBRf felt that it could not accept the changes until it became aware of the full network-wide picture.

17.2 GBRf needed to protect its ability to access the network when it wants in the short, medium and long term.

17.3 There had not been an adequate level of consultation, and the Decision was reached in a way which was hurried and aggressive. GBRf considered that its interests had simply not been taken into account.

17.4 NR did not properly weight the DC and did not thereby consider GBRf's needs.

17.5 GBRf had not been furnished with a document from NR weighting the relevant DC, although it acknowledged that such a document had been produced. However, this left it with the impression that the Decision had been made before the relevant notification was issued.

17.6 As soon as NR was tasked with implementing 'green zone working/patrolling' by July 2022, it should have initiated discussion with all affected parties in the rail industry at that point.

18. NR made the following principal submissions:

18.1 The background to the Decision was relevant. Following the tragic deaths of patrolling staff at Margam, unassisted lookout working must be eradicated by the end of July 2022. This is backed up by two legally enforceable ORR Improvement Notices. However, patrolling of the railway is a non-negotiable requirement of operating a safe railway. In respect of Acton Bank, such patrolling cannot take place while trains are running.

18.2 The issue of safety on the network is absolutely critical to NR's operation, there being obligations placed upon it in legislation and in ORR Improvement Notices, which allow NR no derogation in certain matters of safety. A breach of these obligations would certainly lead to prosecution.

18.3 The area of line subject to the possession does not have the technology implemented to enable automated inspections. This means that trained staff need to physically walk the line. Continuing with patrols using unassisted lookout arrangements on a Tuesday and Friday would place NR in breach of its obligations.

18.4 NR investigated whether Saturday night possessions could be utilised for this patrolling but reached the conclusion that they could not because patrolling staff were already fully

utilised across the whole week, including weekend shifts. In looking for a suitable alternative, it was identified that there was 'white space on the graph' for 70 minutes on a Monday morning between 07:15 and 08:25 when no train slots exist in the Working Timetable and in respect of which there were no known TOVRs.

- 18.5 The Decision relates to a non-disruptive possession, there being no trains planned at the relevant time, and no impact on GBRf and other TOCs. NR had chosen this particular time in consideration to all Timetable Participants, because there was no impact on any train services.
- 18.6 It consulted on these non-disruptive decisions in accordance with the process detailed in the NC, and had followed the NC correctly in making the Decision.
- 18.7 It would expect GBRf and indeed any other TOC to follow the process set out in Part D should future business arise.
19. NR also made the following submissions, which it referred to as "high-level principles in relation to this matter and its potential impact on the network:"
 - 19.1 EAS Sections 1.5.2 and 1.5.4.2 stipulate that, in the event that a TOC response is not received within 10 working days, it will be deemed to be agreed, forfeiting any right of appeal.
 - 19.2 It could not have been remiss in respect of its application of D3.4.6 on the basis that this Condition is not itself applicable to this scenario.
 - 19.3 NR was pleased to note that all parties agreed that consultation had occurred.
 - 19.4 There would need to be a discussion about what constitutes 'adequate' consultation under D8.6. NR submitted that it had consulted adequately and that, if GBRf was to argue the contrary, it would need to substantiate this claim with evidence which NR submitted had not been done.
 - 19.5 GBRf had stated that, prior to any formal consultation taking place, it would dispute this non-disruptive possession regardless of whether or not the process was followed and regardless of whether or not the decision was justified with reference to the NC. NR submitted that this was unreasonable behaviour.

F Oral evidence at the hearing

20. After considering the statements of the parties as listed in paragraph 10 above, and having heard the parties' further oral submissions in their opening statements, I and the Panel questioned the parties' representatives to clarify a number of points which had arisen further to my identification of the legal issues in my Rule H18(c) Legal Note and the submissions made. In line with the practice adopted at previous Timetable Panel Hearings, although the representatives' answers to questions were not taken as sworn evidence (in common with the parties' SRDs, statements and further information provided), I consider that we are entitled and, in the absence of any evidence to the contrary, obliged to accept them as true and accurate statements. Accordingly, I have taken them into account in reaching this determination.
21. The following issues were so questioned, discussed and clarified:

22. As a preliminary issue, I sought to clarify with the parties the precise parameters of the dispute. In my Rule H18(5)(c) Legal Note, I referred the parties to the last two sentences of Paragraph 4.6 and the last sentence of Paragraph 4.9 of GBRf's SRD as, potentially, seeking the Panel's determination on matters going beyond the Decision. In particular, I drew the parties' attention to an appeal under Part D being premised upon a Timetable Participant being dissatisfied with "any final decision" of NR in respect of a Network Rail Variation (Condition D 3.4.16 and D 3.5.3) and an appeal lying only against a "decision" (Condition D 5.1.1).
23. GBRf submitted that there was a wider issue at stake in respect of what NR is seeking to introduce, and that it would like the Panel to take this into account. It stated that NR wished to turn the possessions in question into a "long-term decision" impacting upon GBRf's ability to plan services into the future. It emphasised that the nature of its business is both very fluid and very changeable. It referred to a "collective dispute" regarding the 2022 EAS and stated that one of the items objected to as part of that dispute is the same possession becoming a regular possession every week in 2022, which it submitted was relevant. However, it accepted that the Panel could only make a determination on the Decision with which GBRf was dissatisfied in accordance with the principles referred to above, and confirmed that it was not seeking the Panel's determination on anything beyond the appealed Decision itself.
24. NR emphasised that the Panel's determination should be concerned purely with the Decision. It pointed out that, in so far as issues relating to future business are concerned, TOCs (including GBRf) have the right to make an application to NR under Condition D3.3 for a Train Operator Variation Request ('TOVR'). It emphasised that TOCs can in turn express dissatisfaction with any decision made by NR regarding a TOVR request, and thereby raise a separate dispute. NR acknowledged that there may be some background relevance to the impact that its overall strategy has on GBRf's future business, but maintained that the Panel's determination should only address the one item that had been consulted upon, namely Acton Bank, to which the Decision relates.
25. I and the Panel engaged the parties in a discussion about the effect of the line being unused on the Panel's application of the relevant provisions of Part D.
26. GBRf maintained that, while the line is indeed unused in the Working Timetable for the period outlined within the Decision, there is provision within the NC for it to be used within the window that NR intends to block it by operation of its Decision. It explained that, absent the Decision, GBRf has the capacity to run a train via Acton Bank on a Monday, which it will no longer be able to do if the Decision is implemented. It submitted that the Decision amounts to a Network Rail Variation in these circumstances, notwithstanding the line being unused, because it relates to the inability to add or vary Train Slots.
27. GBRf referred in particular to NR having not taken sufficient account of its business. I was referred to the determination of TTP1706, in particular to Paragraph 87.5, which was cited to me as follows: "NR should be reminded of the need to understand the commercial interests of its customers, which appears not to have been the case here." I sought to establish whether the determination to which I had been referred related to existing (as opposed to future) commercial interests, and GBRf confirmed that it related to existing business only. In this respect, GBRf submitted that NR should consider future, as well as existing, requirements.

28. I asked GBRf to clarify whether it wished to put any data regarding future business before the Panel for consideration. It was not able to refer the Panel to any specific data. It hinted that such data exists, but that it could not be shared with the Panel by reason of confidentiality. However, it stipulated that freight traffic in general is expected to increase in volume very soon, with HS2 being a well-known driver of increased freight movements.
29. NR maintained that the relevant access is not disruptive in nature, there being no TOVRs or VSTP bids in place. It emphasised that the dispute was purely concerned with new traffic which is not yet present. I explored with NR the apparent likelihood of future traffic to which GBRf had referred. In this respect, NR submitted that GBRf should make a request under Condition D3.3 if such new traffic indeed emerged, and that it would consider such a request within the applicable timescales. NR explained that GBRf would need to make such a request in any event in order to enable a relevant train to fit onto the graph, and so placing this additional onus on it does not place it in any less advantageous position. In response, GBRf contended that any such request would certainly be rejected if it conflicted with a published possession (as would be the case if the Decision were implemented). NR did not accept this proposition, explaining that it would apply Condition D3.3 to any request made in order to decide whether to accept, modify or reject it and, in doing so, would consider all available options, including amending the possession.
30. NR was also referred to section 1.5.2 of the National EAS which permits TOCs to propose changes to the EAS and therefore to propose a change to the window in the future. NR confirmed that this provision is indeed utilised by it, and that it undertakes changes to the EAS to accommodate operators' services all the time.
31. We then discussed the requirement for NR to consult under Part D.
32. GBRf accepted that the correspondence with NR starting on 18th May 2021, followed up with a formal proposal on 21st May 2021, amounted to a consultation. Its principal objection was that the consultation was not sufficient before publication of the Decision on 27th May 2021.
33. GBRf acknowledged that it could have put more information before NR as part of this consultation in addition to simply asserting that it should utilise the existing Saturday night 'Section 4' period (23:00 – 09:30). GBRf stated that its intention was to understand why NR did not make use of the access it already had in the possession plan. It further stated that the impact on its future business of the possession would not have come as a surprise to NR. GBRf further submitted that the consultation had been rushed, and that there should have been a deeper level of consultation. Specifically, the consultation should have considered more depth and detail in respect of upcoming potential demand from new customers.
34. As for GBRf's failure to respond to NR's formal consultation request of 21st May 2021 within the timescale set down or at all due to the incorrect line of route code appearing on that correspondence (GW103, as opposed to GW130), GBRf put this down to having been bombarded with requests from NR at that time. It had been prioritising correspondence with reference to the line of route code and did not contemplate that correspondence relating to this issue would be advanced under the line of route code that was used.
35. NR referred to the fact that no meeting had been requested by GBRf and that there were no alternative suggestions put forward save for the Saturday night slot. It had received responses within two days from all other TOCs. Regarding the speed of the consultation

process, it stated that the issue was a pressing one, as workers were being put at risk due to unprotected lookout arrangements.

36. I and the Panel explored with NR the nature and tone of the correspondence which seemed, at least on its face, inconsistent with any intention to engage in meaningful open-minded consultation. NR accepted that the correspondence of 18th May 2021 had been poorly worded, but maintained that “due process” was thereafter followed. In this regard, it submitted that there had been no request made by GBRf for any deeper form of consultation, but merely a suggestion that the Decision, if implemented, would be objected to. In so far as NR’s knowledge of the industry was concerned (notwithstanding that this was not an issue which was specifically put to it as part of the consultation), it referred to Appendix H of its SRD and that its train planning department had identified a relevant gap in the train service. In this regard, NR contended that it would simply not have been possible for it to check for every single possibility of future train services. NR also reiterated the option of GBRf making use of Condition D3.3 in the event of any future demand.
37. I and the Panel then discussed with the parties the reasonableness of the Decision and, in particular, NR’s application of the DC when exercising its contractual discretion to make the Decision.
38. I explored with NR why there was no contemporaneous record of the DC having been applied at the time that the Decision was made. NR explained that it would have been impractical to document its application of the DC at the time of the Decision, but assured the Panel that the DC were in fact applied. It stipulated that, in this case, their application was simple, and that most criteria were deemed to be of low relevance, because the possession was non-disruptive and did not affect any train services. Regarding its actual write-up of the DC which post-dated the Decision, NR explained that this represented a record of its thought processes at the time of making the Decision, and that it only produces such a record in the event of a dispute.
39. In terms of the weighting of the DC in relation to the Decision, NR did not consider many of the DC to be applicable due to the non-disruptive nature of the possession. It had identified those it thought were most relevant within its write up. In respect of its application of the DC with reference to the Objective, which stipulates the need to consider both current and prospective users, NR referred to Annex H of its SRD which, it submitted, demonstrated that it had enquired of its train planning department about whether anything was running on the track at the proposed time. It submitted that, accordingly, it had done what was reasonable to identify potential traffic.
40. NR also confirmed that the existing Tuesday slot needed to be moved to the Monday slot, because the Tuesday slot involved unprotected lookout working, which was no longer acceptable. NR had looked for an alternative slot in order to undertake this work in a non-disruptive manner which did not affect train services.
41. I also referred NR specifically, and somewhat by way of interjection, to its contentions regarding the applicability of Condition D3.4.6 in its SRD. NR confirmed that it did not consider this provision applicable, as it was not seeking to make any changes to the Rules themselves.
42. GBRf referred to the fact that the Objective specifically requires consideration of prospective users. It contended that, in this instance, NR was obliged to consider future demand particularly given the location of the line, there being no diversionary route and the

high profile of upcoming demand. It suggested that those factors in particular should have affected NR's weighting of the DC. It considered (a) to be particularly critical, and submitted that taking one hour away on a Monday was a "retrograde step." It acknowledged the need for NR to conduct maintenance work on the line and that, in doing so, the safety of its workers was a key consideration. It submitted that NR should, nonetheless, have been aware of its business needs because the route in question is a key freight route.

43. Finally, I discussed the issue of remedy with the parties in the event that the Panel decided to uphold the appeal.
44. GBRf confirmed that it was asking the Panel to enact Condition D 5.3.1(a) and thereby requesting that NR be directed to reconsider the Decision with a greater level of consultation. It made clear that it was not asking the Panel to substitute its own decision for that of NR pursuant to Condition D 5.3.1(c), but suggested that the fact that the existing arrangement had been in place for eight years, as well as the track worker safety programme across the entire network being a one-off programme to remove 'red zone working,' might amount to exceptional circumstances entitling the Panel to exercise its power of substitution under this provision. However, in essence, what GBRf was requesting from the Panel was that it set down directions giving GBRf a greater opportunity to discuss available options with NR focusing in more detail on the issue of prospective demand.
45. NR confirmed that it was seeking a ruling from the Panel that the Decision be upheld under Condition D5.3.1(b). However, if the Panel were to apply (a), it submitted that the effect should be to provide directions only, but not to stop the access that is currently in place following the Decision.
46. I invited interested parties attending the hearing to make any observations they wished to. The only interested party remaining in the hearing at this stage was DB Cargo.
47. DB Cargo referred to the difference between Section 4 and Section 7 access. Other than that, it confirmed that it had nothing further to add. NR asked if DB Cargo could request something in the Panel's determination even though it was not a Dispute Party. The Secretary confirmed that, as an interested party, DB Cargo could only provide its views and the Panel could consider them, but these did not have the formal status of a Dispute Party making a request via a SRD or other submission. DB Cargo added that it did not dispute the Decision on the basis that the possession in question did not disrupt any train slots.
48. I gave both parties the opportunity to provide closing statements should they wish to do so. GBRf chose not to do so. NR provided a closing statement in which it summed up its position with reference to the lack of information provided by GBRf and that it was relying only on hypothetical trains and services. It emphasised that it hoped that the Decision would be upheld or, in the alternative, requested that the Chair provide a clear steer as to the state of the existing Decision and any directions made.

G Analysis/Observations and Guidance

Parameters of the Dispute

49. Having heard the parties' submissions and considered the relevant provisions of Part D (Conditions D3.4.16 and D3.5.3), the Panel is satisfied that its determination must be restricted to the Decision alone. The Panel has, however, taken into consideration

submissions as to the wider implications of the Decision on GBRf's business in so far as it might assist it in scrutinising the reasonableness of NR's decision-making when it made the Decision. The Panel also acknowledges that there is a broader strategy in place, on the part of NR, to implement similar possessions across the entire network, and that the Panel's determination might have some bearing upon any dispute raised in respect of that broader strategy, albeit this case turns on its own particular facts.

Whether NR's Decision amounted to a Network Rail Variation for the purposes of D3.4 and D3.5

50. A significant feature of this dispute is that the Decision relates to a Restriction of Use during a presently unused period in the Working Timetable, albeit on an important freight route linking various parts of the country. The fact, however, that it is unused, or "non-disruptive" as NR puts it, gives rise to a consideration as to whether or not the Decision amounts to a Network Rail Variation, as defined in Condition 3.1.2, thereby triggering the processes in 3.4 and 3.5 of Part D.
51. The Panel notes, in the first instance, that a Network Rail Variation is predicated upon a variation of the "Working Timetable," both of which are in turn predicated upon amendments being made to Train Slots. A Train Slot is "a train movement or a series of train movements, identified by arrival and departure times at each of start, intermediate (where appropriate) and end points of each train movement." Clearly, if the line is unused, there are no "train movements" and therefore no Train Slots, as defined. The definition of Network Rail Variation in Condition 3.1.2 is, in equal measure, silent as to presently non-existing, but potential, Train Slots.
52. However, the relevant provisions of Part D also make reference to the concepts of a free-standing "variation" and to a "Restriction of Use," the latter of which is defined broadly as "a restriction of use of all or any part of the network" (Condition A 1.1). The term "Restriction of Use" is incorporated into many of the key provisions of D3.4 and 3.5. The Panel refers, in particular, to Conditions D3.4.7, D3.4.8 and D3.5.1. The Panel observes that, in these three Conditions, the term "Restriction of Use" appears to be used interchangeably with that of Network Rail Variation. The Panel therefore concludes that, within Part D, a Network Rail Variation is a Restriction of Use, as more broadly defined, and therefore that the process set down in D3.4 and D3.5 is triggered by a decision, like the one to which this determination relates, which seeks to restrict the use of a section of the network even though it is presently unused. However, the Panel also concludes that the absence of any existing use or disruption is a factor which may have a bearing upon the extent of NR's duty to consult (Condition D3.4.8) as well as its weighting of the DC.

Consultation

53. NR had a duty to consult with GBRf in advance of the Decision in accordance with Conditions D3.4.8 and D8.6. GBRf accepts that the correspondence between the parties starting on 18th May 2021, followed by a formal proposal on 21st May 2021 and Decision on 27th May 2021 amounted to a consultation. It challenges the sufficiency of that consultation.
54. Further to the above consultation, on 21st May 2021, NR invited formal responses to the proposal by 27th May 2021, which was shortened from the initial timescale ending on 31st May 2021. This email contained an incorrect line of route code, GW103 instead of GW130, which meant that GBRf did not respond to this formal request within the timescale set down or at all. It told the Panel that it had missed the email because it had been inundated with requests from NR at the time and, given the incorrect code, simply did not prioritise this

correspondence. The Panel accepts that this is the likely reason for its failure to engage in this formal part of the consultation. Be that as it may, GBRf did object to the proposal in the initial correspondence on one basis, namely that NR ought to utilise the time already available to it within the existing timetable, namely on a Saturday night, between 23:00 and 09:30. No other substantive objection was put forward.

55. The essential elements of a consultation for the purposes of Part D are set out in Condition D8.6.1 pursuant to which the party being obliged to initiate the consultation shall provide the consultee with (a) sufficient information for the consultee to be able to comment on the subject-matter of the consultation and (b) a reasonable time in which to respond to the consultation.
56. The Panel also takes note of the observations of the TTP in TTP1122 in respect of the paucity of information before NR and its consequent reliance on assumptions, some of which proved to have been misdirected. In this case, NR was directed to seek clearer and firmer data when the information before it was “thin” (Paragraph 6.3). The Panel is also guided by the overarching duty of a contractual decision-maker in the position of NR not to abuse its power by exercising its discretion in a manner which is either arbitrary, capricious or irrational (*Braganza v BP Shipping Ltd* [2015] UKSC 17 to which the parties were referred). In these circumstances, it seems to the Panel that the duty to consult is an important bulwark against NR exercising its contractual discretion arbitrarily and/or capriciously. These principles are mirrored in the TTP’s determination in TTP271, which established that, as a matter of principle, in order to find against NR, “the Panel would have to be satisfied that NR had failed in the execution of one of the procedures through which it is contracted through the Track Access Agreement or the Network Code, or that it had made a capricious decision, which did not take into account either the facts of the case, or the guidance embodied in... the Decision Criteria.”
57. The Panel concludes that the consultation was imperfect in certain material ways. It acknowledges that the language used by NR in its initial email of 18th May 2021 was on any analysis inconsistent with any intention to engage in a meaningful and open-minded consultation. It is plainly unsatisfactory that an incorrect line of route code was placed on important correspondence, which resulted, albeit for reasons which were equally unsatisfactory, in GBRf not providing a formal response to the consultation.
58. The Panel does find, however, that NR satisfied the essential elements of a consultation pursuant to Condition D8.6.1 and that, in the circumstances, the consultation was sufficient. In this sense, the Panel notes that there was sufficient information in the email of 18th May 2021 to enable GBRf to respond, and no good reason has been provided to the Panel to show why the subsequent timescales set down, although short, did not enable GBRf to respond more fully to the information which had been provided. While the Panel takes note of the observations in TTP1122, it considers that, in circumstances in which no relevant information and/or data was forthcoming at all in response to the initial consultation, the obligation to consult did not extend, in the context of Part D, to NR actively seeking out such information and/or data from GBRf (or indeed any other TOC). The Panel finds that such an onerous burden is not envisaged in the process in D3.4 and D3.5 with reference to the provisions of Condition D8.6.1 which place the duty upon the party consulting (here NR) to provide sufficient information and therefore by implication upon the consultee (here GBRf) to respond sufficiently to that information. It is the Panel’s view that this is not a situation in which information and/or data put before NR was partial or unclear, but one in which it was altogether lacking. GBRf’s response consisted of the single assertion that NR should make use of space already available to it. The Panel

therefore rejects GBRf's principal submission that there ought to have been a deeper level of consultation in these specific circumstances.

59. In any event, GBRf requests that the Panel utilise its power in Condition D5.3.1(a) to give directions to NR to engage in another period of consultation. Taking into account the guidance in TTP1122, the Panel acknowledges that this is a power available to it. However, in the course of the hearing, GBRf was unable to put before the Panel any further information and/or data which it proposed to put before NR in respect of the impact on its business and potential future use of the line by its customers. In this regard, and taking into account the fact that the existing consultation provided GBRf with a sufficient opportunity to put any such information and/or data before NR, it is not persuaded to exercise this power in the circumstances.

Application of Decision Criteria/Reasonableness of Decision

60. NR is permitted to make variations to the Working Timetable, but in doing so it must apply the DC in Condition D4.6 (Condition D3.4.4(b)). The DC are not exhaustive in scope and the Panel considers that, as a contractual decision-maker, NR has an overarching duty to exercise its contractual discretion in a manner which is reasonable in the *Wednesbury* public law sense (applying *Braganza*, above). However, the Panel considers that NR's application of the DC is the most useful yardstick in determining whether NR has acted reasonably in making a decision.
61. In considering the reasonableness of NR's decision-making, the Panel is guided by the nature of the Objective in Condition D4.6.1 being "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 Panel also notes that, when applying the Considerations in Condition D4.6.2(a)-(l), NR must either consider which of them are most relevant and apply those it has identified as relevant so as to reach a decision which is not unduly discriminatory or, when two or more of them will lead to a conflicting result, decide which of them is or are the most important in the circumstances and, when applying it or them, do so with appropriate weight.
62. One issue which initially troubled the Panel was that the document setting out NR's application of the DC, at Annex G of its SRD, post-dated the Decision. This gave it a retrospective flavour which caused the Panel to question whether NR in fact applied the DC at the time of making the Decision. NR submitted that it applied the DC at the time of the Decision, but that documenting their application at the time would have proved time consuming and onerous. The explanation given strikes the Panel as one which is plausible albeit the Panel considers that it is good practice for NR to demonstrate its application of the DC in line with publication of the Decision. Accordingly, while the Panel accepts that NR did apply the DC, it considers that it would have been beneficial for NR to document its application simultaneously to avoid the impression that its application of the DC post-dated the Decision.
63. It was clear from the submissions made by NR, both within its SRD and expanded upon at the hearing, that two factors were of particular relevance to its weighting of the DC. Firstly, the fact of the proposed possession being non-disruptive as already discussed and, secondly, the need to conduct patrolled maintenance in a manner that ensures the safety of workers and is compliant with relevant ORR Improvement Notices. The latter factor involved phasing out what has been referred to as "red zone working" by the end of July 2022.

64. Against the above backdrop, NR gave the following Considerations a ‘high’ rating:

(a) maintaining, developing and improving the capability of the network

65. The Panel finds that NR appropriately considered the mandatory requirement to conduct patrolling for the purpose of maintaining the railway, and the need to do so safely, to be of high importance to achieving the Objective. The Panel accepts that, in this instance, NR sought to do so in a manner which was least disruptive, and accepts its submission that, for operational reasons, it was unable to simply utilise the space available on a Saturday night. During the hearing, GBRf was not able to provide evidence of any alternative time slot other than the Saturday night, which NR had established was unsuitable. Accordingly, the Panel finds that there was no realistic alternative available to NR which would have been any more efficient or economical.

66. GBRf has, in Appendix 5.2 of its SRD, suggested that this Consideration should have had no weight at all on the basis that “Routine maintenance is not related to the capability of the network.” NR has argued, in response, that GBRf might have confused the term “capability” with “capacity.” Either way, the Panel finds that the need to conduct maintenance on the network is an important consideration which impacts on its capability, as properly interpreted.

(c) maintaining and improving train service performance

67. For broadly the same reasons as those applicable to (a), the Panel considers that NR weighted this Consideration appropriately. GBRf has, with reference to this criterion, and in its assessment of (d) – that journey times are as short as possible – referred to delays owing to the absence of a diversionary route. The Panel acknowledges that this factor might have been relevant to NR’s weighting of these Considerations, but notes that no specific information or data was put before NR, or indeed the Panel, in this regard. Accordingly, it finds that this Consideration was weighted appropriately.

(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

68. The Panel considers that this Consideration was appropriately weighted as ‘high.’ The Panel accepts that, in weighing this Consideration, NR took into account the commercial interests of other Timetable Participants with reference to there being no existing traffic on the line and, in choosing this particular section of track, took into account the requirements of the Objective to consider efficiency and the overall interests of current and prospective users. NR referred the Panel in particular to Annex H of its SRD, which shows that enquiries had been made of any potential trains on the line in advance of the Decision. Further to this, GBRf did not present NR with any specific information and/or data relating to potential future use. Accordingly, the Panel finds that this Consideration was weighted appropriately.

(j) enabling operators of trains to utilise their assets efficiently

69. For reasons similar to those relating to (a) and (f), the Panel considers that, in the circumstances, this Consideration was weighted appropriately. The Panel considers that NR looked to find a solution that was the least disruptive, and in doing so selected a time

with no known traffic either using, or likely to use, it. This was of direct relevance to the usage of assets by TOCs. The Panel reiterates that, while it acknowledges GBRf's contentions regarding potential blockages due to the absence of reasonable diversionary routes, it notes that no information and/or data was put before NR or indeed the Panel in this regard. Accordingly, the Panel finds that this Consideration was weighted appropriately.

70. The Panel is satisfied, therefore, that NR applied the Considerations having regard to the Objective in Condition D 4.6.1, and conducted the correct exercise set down in Condition 4.6.3 by applying the Conditions with reference to their relevance, and applying them to reach a decision that was fair and not unduly discriminatory. The Panel is also satisfied that, in doing so, and while this is likely to have some (albeit hitherto unspecified) impact on GBRf into the future, it had made the Decision reasonably in the *Wednesbury* sense.

Outcomes Sought

71. The Panel has considered the outcomes sought by the parties. In particular, GBRf clarified, in response to the Directions Note referred to at Paragraph 13 above, that it was asking the Panel to direct that NR reconsider its decision pursuant to Condition D 5.3.1(a). It was no longer seeking that the Panel "strike down" the Decision, which in any event the Panel could only do if it were satisfied that it should substitute its own decision for that of NR if exceptional circumstances applied.
72. The Panel gave significant consideration to exercising its power to give the directions sought in circumstances in which it acknowledges that the Decision may have far reaching (albeit hitherto unspecified) consequences for GBRf. However, ultimately it is not persuaded to do so on the basis of the absence of any information and/or data being provided either before or during the hearing which would provide any realistic prospect of NR making a different decision. The Panel also noted that the consultation process did provide GBRf with the opportunity to present such information and/or data to NR, and it did not do so.
73. The Panel accepts NR's submission that it had not been "remiss" in applying Condition D3.4.6. This is because NR did not seek to make any amendment to the Rules referred to in Condition D3.4.3. Accordingly, Condition D 3.4.6 was inapplicable.

H Determination

74. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.
75. Pursuant to Condition D 5.3.1(b), the Decision shall stand.
76. No application was made for costs.
77. 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.

Alexander Rozycki
Hearing Chair
28th July 2021



Annexes

Annex A: extracts from Network Code Part D, D3.4, D3.5, D4.6, D5.3.1, D8.6

3.4 Network Rail Variations with at least 12 Weeks Notice

- 3.4.1 The procedures described in this Condition D3.4 are designed to facilitate the planning of Network Rail Restrictions of Use at least 12 weeks prior to the start of each Timetable Week.
- 3.4.2 Network Rail shall be entitled to make a variation to the Working Timetable provided that:
- (a) the Network Rail Variation is made only for the purpose of taking Restrictions of Use which are consistent with the Rules, as published following the process set out in Condition D2.2 or as amended in accordance with the procedure established pursuant to Condition D3.4.3; and
 - (b) Network Rail complies with the procedure set out in this Condition D3.4.
- 3.4.3 Network Rail shall include in the Rules a procedure to enable amendment of the Rules, following their finalisation in accordance with Condition D2.2. This amending power is without prejudice to the amending power referred to in Condition D2.2.7, and is to be utilised in order to facilitate changes which Network Rail considers necessary to take Restrictions of Use.
- 3.4.4 The procedure referred to in Condition D3.4.3:
- (a) must require that no amendment to the Rules may be made unless Network Rail has consulted with all Timetable Participants likely to be affected by the amendment;

- (b) must require that all decisions of Network Rail be made by application of the Decision Criteria in accordance with Condition D4.6;
 - (c) may authorise changes to the procedure.
- 3.4.5 All amendments to the Rules made pursuant to the procedure referred to in Condition D3.4.3 shall be subject to the appeal procedures in Condition D5 as if they were made pursuant to a procedure set out in this Part D.
- 3.4.6 Notwithstanding anything stated elsewhere in this Part D, where any amendment is made to the procedure referred to in Condition D3.4.3 by use of that procedure, the amendment shall not take effect until the determination of any appeal against the same.
- 3.4.7 Where Network Rail proposes to make any variation to the Working Timetable consequent upon an amendment to the Rules made in accordance with this Condition D3.4, Network Rail shall provide to each Timetable Participant, by TW-30, its proposals for Restrictions of Use in respect of the corresponding Timetable Week. All such proposals may be amended or supplemented by Network Rail at any time prior to TW-26 and such amendments or supplements should also be provided to Timetable Participants prior to TW-26.
- 3.4.8 After TW-30 but by TW-26, Network Rail shall consult with each Timetable Participant affected (directly or indirectly) by the Restrictions of Use proposed pursuant to Condition D3.4.7 and shall seek to agree all Network Rail Variations to be made.
- 3.4.9 To facilitate the planning of any Network Rail Variation, Network Rail may require that any Timetable Participant shall submit a revised Access Proposal in respect of any Train Slot.
- 3.4.10 Where Network Rail requires a revised Access Proposal:
 - (a) the requirement must be notified to the affected Timetable Participant no later than TW-22;
 - (b) Network Rail shall specify the aspects of the Access Proposal which need to be revised and its reasons for this;

- (c) Network Rail shall specify a reasonable period in which the revised Access Proposal must be provided, and in any event the revised Access Proposal shall be submitted no later than TW-18.

3.4.11 Network Rail may modify, accept or reject a revised Access Proposal and where it modifies or rejects any revised Access Proposal, it must provide written reasons for its decision.

3.4.12 Where a revised Access Proposal has not been submitted by a Timetable Participant as required by Network Rail, Network Rail shall be entitled to make a Network Rail Variation of any Train Slot in respect of which the revised Access Proposal was required and no appeal may be made in respect of Network Rail's decision.

3.4.13 Not later than TW-14, Network Rail shall notify all Timetable Participants of its decision in respect of Network Rail Variations to be made pursuant to the procedure in this Condition D3.4.

3.4.14 Not later than TW-13, any Timetable Participant affected by Network Rail's decision notified pursuant to Condition D3.4.13 shall inform Network Rail whether it accepts or disputes that decision.

3.4.15 At TW-12, Network Rail shall record and provide to all Timetable Participants, in accordance with Condition D3.7.1, the Network Rail Variations to be made pursuant to this Condition D3.4.

3.4.16 Subject as provided in Condition D3.4.12, any Timetable Participant which is dissatisfied with any final decision of Network Rail in respect of a Network Rail Variation may appeal against it in accordance with Condition D5.

3.5 Network Rail Variations with less than 12 Weeks Notice

3.5.1 It may be necessary for Restrictions of Use to be arranged by Network Rail with less than 12 weeks notice or otherwise outside the process described in Condition D3.4. The following paragraphs of this Condition D3.5 are intended to facilitate such Restrictions of Use.

3.5.2 Where Network Rail proposes to make any variation to the Working Timetable in circumstances where it is not reasonably practicable to comply with the timing requirements of Condition D3.4, Network Rail shall follow the procedures set out in Condition D3.4 save that:

- (a) the timing requirements specified there; and
- (b) Conditions D3.4.13, D3.4.14 and D3.4.15;

shall not apply. In carrying out those procedures, Network Rail shall be permitted (for itself) and shall prescribe (for affected Timetable Participants) such time periods for each step as are reasonably practicable in the circumstances. Network Rail shall notify all affected Timetable Participants of its final decision in respect of any such change as soon as reasonably practicable. Any variation to a Working Timetable made pursuant to this Condition D3.5.2 shall be a "Network Rail Variation" for the purposes of this Part D.

- 3.5.3 Any Timetable Participant which is dissatisfied with any final decision of Network Rail in respect of a Network Rail Variation made pursuant to Condition D3.5.2 may appeal in accordance with Condition D5.

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)-(l) 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) the content of any relevant Long Term Plan and any relevant Development Timetable produced by an Event Steering Group;
- (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;
- (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 Capacity to which the Strategic Train Slot relates; and
- (l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.
- (m)

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 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.

5.3 Powers of dispute resolution bodies

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

- (a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;
- (b) it may direct that a challenged decision of Network Rail shall stand;
- (c) it may substitute an alternative decision in place of a challenged decision of Network Rail;

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

8.6 Consultation

8.6.1 Where in this Part D, any party is under an obligation to consult with another, the party obliged to initiate the consultation shall provide the consultee with:

- (a) sufficient information for the consultee to be able to comment on the subject matter of the consultation; and
- (b) a reasonable time in which to respond to the information provided.