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## **A Background and Jurisdiction**

1. Dispute TTP2187 was raised by GBRf by service of a Notice of Dispute on 24 February 2023 in respect of NR's decisions in relation to NR's Timetable Planning Rules decisions for 2024, Version 2. The dispute was brought on the basis that GBRf disagreed with the Decision due to NR's alleged inclusion of items that had not been agreed through prior consultation and also non-inclusion of items that had been agreed to be included. On 06 March 2023 GBRf requested that a hearing be expedited for some matters under the TTP2187 reference owing to the proximity of working starting on the 2024 calendar year. Other matters under TTP2187 would remain in dispute.
2. I was appointed as Hearing Chair on 16 March 2023 and I satisfied myself that the expedited matters included grounds of appeal which may be heard by a Timetabling Panel convened in accordance with Chapter H of the ADRR 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:
  - "ADRR" means the Access Dispute Resolution Rules and "Rule" is construed accordingly
  - "BTPF" means the Better Timetables for Passengers and Freight programme
  - "Decision Criteria" means Network Code Condition D4.6
  - "Chapter H" means Chapter H of the ADRR
  - "CRC" means Class Representative Committee
  - "Part D" means Part D of the Network Code
  - "PfC120" means Proposal for Change 120
  - "SRD" means Sole Reference Document
  - "TPRs" mean Timetable Planning Rules
  - "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 SRDs. 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 03 April 2023 GBRf served its SRD, in accordance with the amended dispute timetable as issued by the Secretary.
7. On 13 April 2023 NR served its SRD in accordance with the amended dispute timetable as issued by the Secretary.
8. The following companies declared themselves to be interested parties: Abellio East Anglia Ltd.; Arriva Rail London Ltd.; First Greater Western Ltd.; Freightliner Group; Grand Central Railway Company Ltd.; Legge Infrastructure Services Ltd.; London Underground; Northern

Trains Ltd.; ScotRail Trains Ltd.; XC Trains Ltd. All, save ScotRail, were represented at the hearing for the items relevant to their company<sup>1</sup>.

9. Although a number of issues were expedited under the reference, by 14 April 2023 only two of these remained to be determined: whether NR had acted correctly in publishing timetable development timescales from Proposal for Change (PfC) 120 in Appendix A of the National TPRs, rather than timescales that accorded with published Part D timetable development timescales; whether NR had followed Part D consultation processes when changing TPR headways on Line of Route SO140 (Kent).
10. On 14 April 2023 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that the issues to be determined by the Panel comprised: whether the Panel had to apply ADRR A5 ‘Each and every Forum should reach its determination on the basis of the legal entitlements of the Dispute Parties, and on no other basis’; whether GBRf had a legal entitlement to timetable development dates for the 2024 National TPRs in accordance with the current Network Code Part D, rather than with BTPF/PfC120 timescales; If NR was in breach, what remedy, if any, should be granted, taking into account all relevant rules, including ADRR A5, ADRR H50 and Network Code D5.3.1.
11. The hearing took place on 19 April 2023. The Dispute Parties made opening statements, responded to questions from the Panel concerning various points and were given the opportunity to make closing statements, which they both declined. The interested parties were given the opportunity to raise points of concern.
12. On the afternoon of the hearing, and at an advanced stage of the hearing, the parties reached an agreement in relation to Line of Route SO140 (Kent) for further detailed discussions to take place. The agreement was that, pending those discussions, the SO140 aspect of this dispute was withdrawn. If those discussions did not result in agreement the dispute could, if necessary, be reopened at a later date (with a new reference). Accordingly, this Determination now focuses on the National TPR issue.
13. I confirm that the Panel had read all 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**

14. In its SRD, GBRf requested the Chair to determine that:

In respect of the National TPRs, that the Chair determine that NR had no legal entitlement to depart from the timescales laid down by Part D of the Network Code (as it is presently constituted) and must revert to the correct dates as soon as is reasonably practical; although there was a significant proposal for change in existence (PfC120), NR did not have any legal entitlement to implement the revised timescales until approval was given by ORR. GBRf also requested that the Chair determine that notice is given at D-73 for the (whole) 2025 timetable year on the correct date, unless ORR were to approve PfC120 before that D-73 date.

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<sup>1</sup> Some representatives left after the National TPR item had concluded.

15. NR asked the Chair to determine that:

(As its revised National TPRs Version 3, issued on 14 April 2023 had added a caveat in Appendix A that the proposed June 2024 (PfC120) timetable development dates were subject to ORR approval,) the Panel endorse the approach by NR to include the PfC120 development dates to show the intended future process in the National TPRs with the caveat that these dates are reliant on formal ORR approval of Network Code Part D changes.

#### **D Relevant provisions of the Network Code and other documents**

16. The versions of the Network Code Part D and the ADRR dated 01 June 2022 were applicable to these dispute proceedings. Part D contains a mandatory procedure for the Bi Annual Timetable Review Process. This includes D2.1.7 *'not later than D-73 in relation to the Principal Change Date only, NR shall publish to all Timetable Participants a calendar showing the milestone dates which will apply (for the purposes of this condition D2) to the process of planning the New Working Timetables to take effect as Working Timetables on the Principal Change date and the Subsidiary Change date'*. (As explained in D2.1.5, 'D' represents the Timetable Change Date and '-73' refers to 73 weeks prior to that date).
17. Those milestone dates are helpfully summarised in Annex 1 to Part D, but reflect mandatory dates set out throughout D2. Part D sets out a detailed interlocking timescale for consultation, preparation and publication. At D2.2.2 *'Between D64 and D60 NR shall consult with Timetable Participants in respect of any proposed changes to the (Timetable Planning) Rules'*. At D2.4 the Priority Date is set at D40. In D2.4.4, *'Access Proposals submitted by D-40 (the Priority Date) are given priority in the compilation of the New Working Timetable in certain circumstances set out in Condition D4.2.'* At D2.6.1 *'During the Timetable Preparation Period (D40 to D26) NR shall compile the proposed New Working Timetable'*. Further at D2.7.1, *'the New Working Timetable shall be published by NR at D26...'*. Annex 1 to Part D lists 19 specific dates or periods by or during which specific activity must happen/complete. In D1.1.8 there is a duty on NR and all Timetable Participants to collaborate and to have sufficient resources.
18. It is important to note the nature of the exercise to be undertaken by NR under D2 in compiling the calendar of milestone dates. NR's task is to compile the actual calendar dates that reflect the fixed formula contained in Network Code D2. There is no scope for exercise of judgement or discretion nor the application of the Decision Criteria by NR. It is a simple mechanical task of compiling calendar dates that reflect the provisions of D2. Network Code D2 does not give NR any unilateral power to choose any alternative date. The only way that alternative dates can be applied is by following the procedures and processes in the Network Code such as a) D2.1.3 whereby change implementation dates may be changed if all Timetable Participants have been informed of, and not objected to, the change and b) changing the provisions of the Network Code, using the processes within the Network Code itself at Part C. These Part C processes involve consultation, CRC voting and approval by ORR.
19. NR says on its website (Operator Access section) *'the Network Code is a set of contractual rules incorporated into each track access agreement between NR and all train operators. It covers those areas where all parties are obliged to work together to the same standards and timescales. This includes such areas as: developing the timetable ...'*

20. The Track Access contract between NR and GBRf incorporates the Network Code. GBRf's Track Access Contract was not shown to the Panel. However, Track Access Contracts for freight operators such as GBRf are based on ORR's Model Track Access Contract for Freight Operators. 2.1 of that model contract states '*The Network Code and the Traction Electricity Rules are incorporated in and form part of this Contract*'.
21. In the ORR appeal determination of TTP1174, at paragraph 6, the position is summarised as '*the Network Code is a set of rules incorporated into, and forming part of, each access contract between NR and holders of rights of access to the track owned and operated by NR*'.
22. Also from NR's website (Operator Access section re Network Code) it is said '*our responsibility is to ensure that the Code provides appropriate contractual certainty for all affected parties and does not benefit one contractual party to a greater extent than another*'.
23. The effect of being incorporated into the contract between NR and GBRf is that the Network Code is legally binding on both GBRf and NR. The Network Code is also legally binding on all train operating companies, both passenger and freight. However, the Network Code may be changed using mechanisms within the Code itself, provided that the relevant processes/procedures are followed – see Part C.

## **E Submissions by the Dispute Parties**

24. The substance of GBRf's case was set out in simple terms in GBRf's SRD. GBRf says that Version 1 of the 2024 National TPRs issued on 21 October 2022 by NR contained incorrect (i.e. not in accordance with Network Code D2) dates for the timetable preparation period. GBRf says that Version 2 issued on 03 February 2023 contained (in substance) the same dates but with the timescales for the subsidiary timetable removed. GBRf states '*all this, is of course, not permissible in Part D as it is written*'.
25. GBRf says that these (incorrect) dates cause serious practical problems. GBRf had to produce its Priority date submission at D-40 in order to remain contractually compliant, but without using a Prior Working Timetable, as this was not issued until 10 March 2023 (D-39 instead of D-45). GBRf says that the problems are continuing, saying '*the December 2023 timetable will again be late (D-23 on 30 June 2023 instead of D-26 on 09 June 2023)*'. Further '*we have no confirmed end date for the timetable being currently planned to start in June 2024, which we are due to commence planning over this summer, nor of what activities we should be doing for subsequent timetables which require planning of resource and human issues such as annual leave*'.
26. In contrast, NR relied in its SRD on two factual and practical matters. The most important at the hearing was the effect of Proposal for Change 120 (and in particular the vote of the CRC in favour of Pfc120). NR contends that the provision of development dates is in alignment with the outcome of the CRC vote. As set out below, NR subsequently issued Version 3 of the Timetable Development dates, caveating the proposed June 2024 Subsidiary Change Dates by saying that the dates were subject to approval of Pfc120. NR also advanced arguments about the practicalities of returning to Part D timescales. GBRf disputes NR's arguments and justifications for the issuance of timetable development dates not in accordance with Network Code D2.

## F Facts and the Hearing

27. The facts are largely agreed. NR accepts that the TPRs for the 2024 Timetable Version 2 (and by the time of the hearing, Version 3) contain (many) milestone dates different from those prescribed by Network Code D2.
28. The factual background includes the effect of the COVID-19 pandemic. During the pandemic the timetable production schedule was understandably disrupted and did not comply with Part D timescales. Since then, there has not been a return to Part D timetable production dates. One factual issue where the parties differ is whether it would have been feasible to return to Part D timescales for the December 2022 and May 2023 timetables.
29. NR has been pursuing the Better Timetables for Passenger and Freight Users ('BTPF') project. NR describes this as *'an ambitious industry-wide change programme that is transforming the way that the timetable is produced, executed and managed for everyone involved'*.
30. NR says that *'implementing changes to Network Code Part D is now a critical step in that journey. NR proposed a set of changes to Part D to the industry in late 2022 via PfC120. The changes include a move away from the May and December timetable dates to two timetable change dates ... in June and October, with an optional intervention point in February with changes by consent. Working Timetable development would take place between D-32 and D-18... The planned changes are designed to bring the necessary formal structure back into the industry as is required by the timetabling process...'*
31. On 05 January 2023 the CRC voted by a majority (six votes out of eight) in favour of accepting PfC120. However, there are two matters remaining to be resolved before the change can be implemented. First, NR's licence must be amended. Condition 7.18 of NR's licence currently requires that NR must provide appropriate, timely and accurate information to train operators at TW-12, i.e. 12 weeks before the timetable comes into effect. The PfC120 proposals will mean that NR's obligation will be to provide that information four weeks later at TW-8, only eight weeks before the timetable takes effect. A consultation is required, including with passenger groups. NR's SRD said that ORR are getting ready to begin consultation and *'current plans show this consultation completing in July 2023'* (but see below as to the ORR's current assessment of timing).
32. A second obstacle to approval and implementation of PfC120 is The Railways Infrastructure (Access Management and Licensing of Railway Undertakings) Regulations 2016. NR explained that the definition of 'working timetable period' in those regulations refers to changes taking place on the second Saturday in December, with which PfC120 would not be consistent. Legal opinion is being sought as to whether it is possible to use a clause which apparently permits the infrastructure manager to use different timetable change dates. NR is optimistic of a favourable outcome before this summer, saying that NR expected this (regulations) issue to be resolved with ORR 'in April 2023'.
33. Importantly on 13 April 2023 and shortly before the hearing ORR wrote to the industry, including the Access Disputes Committee and both Dispute Parties. That email and the earlier ORR letter of 22 February 2022 to the industry are attached as Annex A. ORR was responding to requests *'by industry colleagues in light of the parallel (but different) milestones for timetable production, which stem from the contractual requirements of Part D of the Network Code, and those requested by NR'*.

34. ORR stated that it *'continues to place an emphasis on the importance of a structured return to contractual timescales and the recognition that industry and NR have worked together to produce timetables in difficult circumstances.* ORR then cites paragraph 14 of its 22 February 2022 letter: *'the timescales and processes set out in the Network Code were put in place to ensure transparency and sufficient time for all parties to carry out their responsibilities effectively. **Departing from contractually agreed terms inevitably puts all parties at risk of confusion and dispute. It must be remembered that our role is to apply the law set out in legislation and under the contracts parties hold'*** (emphasis added). NB the Panel's duties have of course similarities to ORR's duties – because of ADR Rule A5 requiring the Panel to *'reach its determination on the basis of the legal entitlements of the Dispute Parties, and upon no other basis'*.
35. ORR's letter of 13 April 2023 refers to *'BTPF through PfC120 proposes new milestones for a June 2024 timetable change'* and then explains the two legal issues stating *'the CRC recognised that ORR cannot consider this PfC120 until NR's licence is modified and the move away from a December timetable change date is shown to legally align with the ... Regulations. **As such, the Network Code remains the official contracted process until advised otherwise by ORR'*** (emphasis added).
36. ORR's letter also notes the challenges faced by NR *'not least where it has passed contractual milestones (e.g. D-73 and other dates beyond it) or reflect continuing late input decisions by publicly contracted parties'* and ORR emphasises constructive engagement by all parties. ORR then records *'NR has proposed timescales for timetable production to June 2024 in preparation for a possible BTPF implementation. In common with recent timetable change processes these milestones are not aligned with the Network Code but are those which NR considers deliverable at the present time. **In the meantime, it remains a matter for individual operators to decide if they will work to these timescales'*** (emphasis added). The highlighted sentence is consistent with the legal analysis that, notwithstanding the milestone dates issued in the 2024 TPRs, parties continue to be contractually entitled to rely on the timescales prescribed by Part D.
37. ORR's April 2023 letter concludes with the steps being taken to resolve the two outstanding issues before PfC120 can proceed further. These include plans for an initial consultation on the licence modification with industry and passenger groups (NB that consultation was subsequently launched by ORR on 28 April 2023). This would be followed by a statutory consultation for launch in July - meaning ORR could consider the Network Code changes after the consultation has closed. It is to be noted that this timescale is less optimistic than that of NR. This means that the earliest date at which PfC120 could be formally approved by ORR is after the close of the statutory consultation.
38. The ORR letter of 22 February 2022 had also stated *'a continued separation of planning services for timetables from the contractual rights of parties and, therefore, non-compliance with the Network Code is neither desirable for railway users nor sustainable because of the pressure placed on resources for infrastructure managers and operators'*. That letter had also cited ORR's appeal decision in HAL/TTP003 which had emphasised the importance of the formal Network Code Part C modification process in providing legal certainty for all industry Timetable Participants.
39. By the time of the hearing (and therefore a few days after the ORR letter) there had been a shift of emphasis by both parties with increased focus on the future. GBRf's Opening Statement included *'whilst recognising that we are now too far down the road in the planning cycle to recover Part D timescales for the December 2023 Timetable, and likely*



those for the Timetable starting in June 2024, GBRf is seeking a Determination that timetable production timescales should conform to Part D as soon as reasonably practical, and in GBRf's opinion that is December 2024'. GBRf added, 'NR is due to issue a notice for the December 2024 to December 2025 Timetable year at D-73 (in accordance with Network Code condition D2.1.7) due in July this year, then it will need to defer the implementation of Pfc120 changes until a suitable point that does not significantly affect the workload of train operators'.

40. NR's opening statement said 'in relation to the inclusion of development dates that are not currently reflected in Network Code Part D, NR assert that these dates have been included in alignment with the outcome of the CRC vote which was in favour of Pfc120 changes to Network Code Part D. Whilst the addition of these dates into Version 2 2024 National TPRs may not have been highlighted specifically, NR has clearly demonstrated its intention to implement the CRC supported Pfc120 dates through various industry forums and two update briefing packs from BTPF shared with industry in March and April 2023. NR does concede that it would have been more informative to include commentary to clarify that the dates refer to the Pfc120 changes that are awaiting formal ORR approval. This has since been added to Version 2.1 of the 2024 National TPRs. Therefore, NR requests that the Panel endorse the approach by NR to include the Pfc120 development dates to show the intended future process in the National TPRs with the caveat that these dates are reliant on formal ORR approval of Network Code Part D changes' (the proposal to include the caveat in a new version had also been mentioned in NR's SRD of 13 April 2023).
41. In fact, a new version of the 2024 TPRs (first seen after the hearing on 19 April) was dated 14 April 2023 (some five days earlier) and is described as Version 3. It contains dates for the Principal Change Date that are unchanged from Version 1. It includes Subsidiary Change Dates calculated in accordance with the Pfc120 proposals rather than with the Network Code D2 timescales. Importantly it also adds the caveat at the top of Appendix A that 'Please note the dates shown in this table will only be used upon formal ORR endorsement of Pfc120 changes to Network Code Part D'. It appears that there was also a Version 2.1 issued on the same date, 14 April 2023, to the same effect.

## **G Analysis/Observations and Guidance**

42. This Determination must be reached 'on the basis of the legal entitlements of the Dispute Parties and on no other basis' (ADRR A5). GBRf contends that both parties are legally bound to abide by the Network Code. Therefore, GBRf contends that the National TPRs must be compiled in accordance with the provisions of Network Code D2. NR's principal arguments for TPRs incorporating Pfc120 dates are respectively a) alignment with Pfc120 and b) some practical issues with reverting to Part D timescales.
43. NR was consistent in applying Pfc120 timescales in the 2024 TPRs. Version 2 which was the initial subject of this dispute followed on from the majority CRC vote in favour of Pfc120. Pfc120 dates were used because NR had 'clearly demonstrated its intention to implement the CRC supported dates'. It was indeed clear that NR intended to proceed with Pfc120. However, Version 2 did not explain that those dates referred to Pfc120 dates that were awaiting ORR approval and completion of the Pfc120 process.
44. Version 3, dated 14 April 2023, corrects the absence of a caveat and provides Pfc120 dates for both Principal and Subsidiary Timetables. The caveat is a welcome development; it explains formally in the TPRs the reason for departure from Part D timescales and that

those timescales are dependent on approval and implementation of PfC120. However, even in Version 3 the position remained that a) the timescales are not in accordance with Network Code D2 and b) there is no certainty for Timetable Participants as to which timetable development dates would ultimately apply.

45. As well as NR having made very clear its intention to apply PfC120, NR explained at the hearing that it had thought at the time of earlier versions of the 2024 TPRs that the PfC120 process would take far less time and face fewer hurdles than turned out to be the case. It appears that that optimism and the drive to take the PfC120 project forward led to NR's decision. Of course, as events have turned out, PfC120 is still neither formally submitted to ORR, nor approved.
46. The use of PfC120 timescales had however also caused problems. The result of issuing Versions 1 and 2 was that the industry has been working to two different Timetable Development dates of respectively the Network Code Part D and PfC120. ORR in the 22 February 2022 letter had said that '*a continued separation of planning services for timetables from the contractual rights of parties ... is neither desirable for railway users or sustainable because of the pressure placed on resources for infrastructure managers and operators*'.
47. There is also the issue of the continuing uncertainty as to whether, and when, PfC120 will be adopted and implemented. The issues include whether PfC120 is approved (alternative outcomes must be realistically possible for a consultation to be meaningful). Secondly, consultations take time and processes sometimes take longer than expected (as for example has happened in relation to the earlier implementation plan for PfC120). Thirdly, the consultation may well raise issues of fundamental importance, particularly as to the Informed Traveller timescales. Fourthly, even if PfC120 is approved/adopted it may be that additional steps are necessary; for example, if the reduction in the Informed Traveller timescales is mitigated by new steps (for example new technology) it may be necessary to demonstrate that such technology is up and running rather than in the early stages of development.
48. The conclusion from the above is that PfC120 remains a proposal (and only a proposal) that may, or may not, be approved in whole or part. The end date for formal submission, approval and implementation is at best many months away and beyond July. Even in Version 3 the timescales are not in accordance with Network Code D2 and there is no certainty for Timetable Participants as to which timetable development dates will ultimately apply.
49. NR did not advance any legal argument (whether in terms of rules, contracts, case law or otherwise) to counter GBRf's contentions as to the legal position. In particular, NR sensibly did not advance any argument based on the legal concept of 'frustration' (whereby in certain circumstances when performance of a contract becomes impossible, then the contract is discharged) nor of 'force majeure'. The conditions for either frustration or force majeure to apply were not present in this case.
50. As to practical issues raised by NR, the first and main issue cited by NR was the (lack of) readiness of some other Timetable Participants to conform to Network Code D2 timescales following the COVID-19 pandemic and other subsequent events. NR's view is that the industry is not currently in a position to deliver Part D timescales owing to a lack of certainty in specification and funding at the timescales set out in Part D. It is clear that there are continuing problems/issues as described in ORR's letter of 13 April 2023 '*NR faces*

*challenging circumstances in managing the current timetable process...'. There was a dispute between the parties in their respective SRDs as to whether it would have been 'perfectly feasible' to return to Part D timescales for the December 2022 and May 2023 timetables. The outcome of this difference of view does not determine the outcome of this dispute and was not the subject of evidence, but of differing assertions. NR pointed to its PfC consultation saying that to revert to all Part D timescales would take '9-12 months' and would result in 'localised pockets of divergence' and a cost for extra planning resource (potentially for many parties) to undertake the recovery work. It is likely, from previous industry efforts to recover Part D timescales following the May 2018 timetabling crisis, that any negative impact of a recovery plan would manifest most acutely in the weekly Informed traveller (TW-) processes, as opposed to the bi-annual revision of the Working Timetable.*

51. There is a duty in Network Code D1.1.8 to have necessary and sufficient resources. D1.1.8 states *'NR and Timetable Participants shall each establish and maintain systems and resources which are necessary and sufficient to facilitate ... collaboration and their compliance with the procedures set out in this Part'*. The ability of differing Timetable Participants to comply (or otherwise) with D2 timescales is a complex and vexed issue on which there are differing views as to the extent, causes and solutions. The Panel did not have the material on which to make a finding on these issues. Such findings were ultimately not necessary for this determination. However, it is noted that the outcome from the current position is disadvantageous on two fronts. Firstly, Timetable Participants who are neither compliant with D2 timescales, nor with their duty to have sufficient resources, benefit from the informal arrangements to operate at shorter-notice periods, but have impacted their legal right to recourse under Part D (e.g. in D2.4.4, priority for inclusion) by failing to bid in accordance with prescribed timescales. Secondly, compliant operators are clearly - as I heard during the hearing - placed under considerable practical pressure trying to operate two timetabling processes in parallel, by working to Part D timescales and receiving responses from NR in accordance with non-Part D timescales.
  
52. NR also contended that a return to the current timescales set out in Part D would result in the industry planning community taking *'a backwards step with collaborative behaviours and alignment to deliver joint goals'*. GBRf rejected this proposition. There is a continuing duty on all parties to collaborate as set out in Network Code D1.1.8 *'it is the responsibility of NR and all Timetable Participants to collaborate with each other so that the implementation of the procedures in this Part D is carried out with optimal efficiency'*. It was not clear why there would be a connection between Part D timescales and (reduced) collaboration, beyond the fact that it would be an instance of a Timetable Participant deciding to disagree with NR's approach and to rely on its legal rights. It might be thought that NR departing from the (binding) Network Code would be equally, if not more, damaging to the prospects of collaboration.
  
53. There is case law on the issues of the effect of pending changes and practicalities which includes ORR appeal determinations from Timetabling Panels. Those cases are binding on this Panel. These include HAL/TTP003, where it is said at para 98, *'Finally, ORR observes that across industry each Network Code has a formal modification process to provide legal certainty for industry participants. Changing the timescales and processes, from those within the Network Code, without following the proper modification procedures, puts all parties at risk in the case of a dispute, as highlighted in this appeal. ORR therefore encourages the industry to ensure there is clarity over these Network Code processes to mitigate this risk'*.

54. ORR's appeal determination on TTP244 at para 61 states '*if NR or [the train operator] does not consider the procedure as set out in the Code to be practical, there are processes which can be used to initiate change. **Unless and until such processes are used, the procedure set out in the Code should be followed in its entirety.** This will ensure that a transparent decision making process is operated which leaves parties clear as to their respective positions and which is not at risk of being impugned'* (emphasis added). In TTP1174 at para 92 '*Condition 1.23 of NR's network licence provides that NR must run an efficient and effective process and, where necessary and appropriate, initiate changes to industry processes. This means that if NR were to consider the Network Code to be ineffective, it should initiate changes to the processes set out in it.*'
55. The legal conclusions that this Panel derives from the above are that 1) a Proposal for Change is only effective when it is approved and comes into force; not simply by a proposal being initiated. The legal conclusion is, as ORR put it in the letter of 13 April 2023 re PfC120, '*as such, the Network Code remains the official contracted process until advised otherwise by ORR*' and 2) when there are practical issues then (as ORR put it in TTP244) '*unless and until such processes [for changing the Network Code] are used, the procedure set out in the Code should be followed in its entirety*'.
56. Further, the legal conclusion is, again as ORR's 13 April 2023 letter put it in relation to proposed timescales for timetable production to June 2024, '*these milestones are not aligned with the Network Code, but are those which NR considers are deliverable at the present time. **In the meantime, it remains a matter for individual operators to decide if they will work to these timescales***' (emphasis added). The reason that Timetable Participants may decide not to work to PfC120 timescales at present is because of a continuing contractual right to Network Code Part D2 timescales. Operating at PfC120 timescales prior to the PfC being approved puts an operator at a clear risk with respect to any potential timetabling disputes.
57. The fundamental problem with NR's arguments (including that of having demonstrated a clear intention to apply PfC120) is that those arguments did not and could not displace the clear legal authority that NR must apply the Network Code unless and until the Code is formally changed. This is in circumstances whereby this Panel must make determinations based solely on legal entitlements in accordance with ADRR A5.
58. It follows therefore that NR was, and is, in breach of its legal obligations in Versions 1 and 2 of the 2024 TPRs (and in all subsequent versions containing PfC120 dates), in that the timetable development dates included in Appendix A of the TPRs 2024 were not in accordance with Network Code Part D.
59. This TTP will therefore determine that 'NR has, and had, no legal entitlement to depart from the timescales set out in Part D of the Network Code as presently constituted. Although there is a significant proposal for change in existence (PfC120), NR did not, and does not, have any legal entitlement to implement the dates in the proposal for change until approval is given by ORR'.
60. In passing, it is noted that although the legal conclusion is that there is no entitlement to depart from Network Code timescales until the Network Code itself is changed, GBRf only asked for wording in the determination that there is no such entitlement until ORR approval is given. The wording requested may have been on the sensible basis that once ORR approval is given, then the changes to the Network Code will inevitably follow.

61. In GBRf's Opening Statement it had been stated '*whilst recognising that we are now too far down the road in the planning cycle to recover Part D timescales for the December 2023 timetable, and likely those for the timetable starting in June 2024...*' From these words, together with the wording of section 6 of GBRf's SRD, it is concluded that GBRf is **not** asking for an order requiring the issuance now of a new Version of the Timetable Development Dates which would impose Network Code Part D timescales on the entire industry (including those Timetable Participants who have been working to PfC120 timescales) at comparatively late stages for either of those timetables (NB even in relation to the May 2024 Timetable then, on Network Code D2 timescales, several milestones have already been passed). That is a sensible and constructive approach; although there are currently practical problems, such an order might well make the overall position worse.
62. The 2025 Timetable. GBRf also sought an order for the future – that NR '*must revert to the correct dates as soon as is reasonably practical*' and that the Panel determines that '*notice is given at D73 for the whole 2025 timetable year on the correct date unless ORR approves PfC120 before that date*'.
63. It is understandable that GBRf wished to bring certainty to the 2025 timetable dates. This is particularly so as, according to ORR, PfC120 will not be approved until (at the earliest) after a consultation planned to launch in July has concluded. Further, NR has been in breach of its obligations to GBRf for a considerable time and had appeared unmoved, despite a clear legal position. Those breaches included failing to publish the D-73 calendar for the 2023 Timetable until October 2022, rather than when it was due in July 2022.
64. There is however a real practical problem for NR in relation to the 2025 timetable. The issue of timetable development dates for the timetable planned to start in December 2024 is due at D-73, which will fall in July 2023. At that stage, if PfC120 is not yet approved (and it seems very unlikely that it will be) then NR must issue timetable development dates using Part D timescales. If PfC120 changes are approved by ORR in, say, October 2023 then (in the absence of transitional provisions) there would be a (very) considerable time lag before PfC120 dates could be implemented.
65. At the hearing there was a commendably frank and open discussion of this issue. NR accepted that PfC120 approval by July 2023 was 'in the high-risk category'. It has to be said that if ORR is right about PfC approval timescales then 'high-risk' is a serious understatement. NR did also frankly say that 'we know we've got a deadline in July to declare what we are doing for the next timetable year' and that NR had a Plan B in mind if PfC120 was not approved before D-73 in July. GBRf's view was that it was better to use the timescales as currently laid down under Part D unless and until PfC120 gained full approval. GBRf also frankly said 'if that puts PfC120 back a year, then it puts it back a year'
66. Should the panel make an order going beyond a declaration of the legal position as set out above? The legal position is clear and is confirmed in the ORR letter of 22nd February 2022, in the ORR letter of 13 April 2023, in ORR's determination in HAL/TTP003 and in this determination. The wording in Network Code D2.1.7 is mandatory: '*not later than D-73 ... NR shall publish...*'. It logically follows that if the legal position is unchanged then NR should apply the Network Code as it then is for the purposes of the 2025 timetable development. NR's 'Plan B' therefore must, as a matter of law, comply with the provisions of the Network Code as it then is.
67. The Panel's powers to make orders are set out in ADRR H50 '*... the Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute*

*including without limitation that a) one Dispute Party should take or not take specified action or b) the meaning of an agreement or a Dispute Party's obligation under that agreement are as stated in the determination.'*

68. However, the exercise of those powers is subject to Network Code D5.3.1. The Hearing Chair '*... a) may give general directions to NR specifying the result to be achieved but not the means by which it shall be achieved and ... c) may substitute an alternative decision in place of a challenged decision of NR provided that the power described in c) shall only be exercised in exceptional circumstances.'*
69. There is some legal authority on the effect of D5.3.1(c) in the form of ORR appeal determinations. It is clear that Hearing Chairs should exercise some caution so as to avoid being unduly prescriptive. In simple and non-legalistic terms, it is a reminder that 'the duty of the Hearing Chair is to determine the dispute, but not to run the railway'.
70. Further, the wide-ranging powers in ADRR H50 are subject to an important limitation to '*orders that are **necessary** to resolve the dispute*' (emphasis added). The subject matter of this dispute is Version 2 of the 2024, not the 2025, TPRs. The ambit of the dispute is determined by the Notice of Dispute, which states 'I give Notice of Dispute ... in relation to the 2024 TPRs, Version 2.0 issued on 3 February 2023.' GBR's SRD also stated at 4.1 'this is a dispute regarding NR's decisions regarding Version 2 of the TPRs in respect of the December 2023 [i.e. 2024] timetable and the processes involved in reaching those decisions and the timescales involved'. Making an order about the 2025 TPRs is not necessary to resolve a dispute about Version 2 of the 2024 TPRs.
71. Accordingly, because of ADRR H50, an order will not be made in relation to the 2025 TPRs.
72. The Hearing Chair also had further reservations about making an order for the 2025 TPRs requested. First, the order sought is about what is 'reasonably practical' at a future date, which by its nature is uncertain and may change, and where caution by the Hearing Chair is needed. Further the words 'reasonably practical' are not the test in Part D; there is a danger that if those words are applied in this determination that it may become thought that 'reasonably practical' is the test that should be applied.
73. As NR's approach in Versions 1, 2 (and now) 3 of the 2024 TPRs is not in accordance with the Network Code and is in breach of NR's legal obligations, then NR's request that its approach be endorsed must be refused.

## **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.
- i) NR has, and had, no legal entitlement to depart from the timescales set out in Part D of the Network Code as presently constituted. Although there is a significant Proposal for Change in existence (PfC120), NR did not, and does not, have any legal entitlement to implement the revised timescales in the Proposal for Change until approval is given by ORR.
  - ii) NR's request that its approach be endorsed is refused.

- iii) No application was made for costs.
- iv) 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.

A handwritten signature in cursive script that reads "Andrew Long".

Andrew Long  
Hearing Chair  
04 May 2023

## Annexes

### Annex A: ORR email dated 13 April 2023 and letter dated 22 February 2023

#### Email dated 13 April 2023

**Clancy, Gareth** [address redacted], 13 April 2023 at 16:07

Dear colleague,

This email sets out the ORR position on the industry processes for timetabling as defined by the Network Code. This clarification was requested by industry colleagues in light of the parallel (but different) milestones for timetable production which stem from the contractual requirements of Part D of the Network Code, and those requested by Network Rail. In addition to planning purposes, this clarification is important for the functioning of the Access Disputes Committee.

This ORR position is consistent with that communicated previously in February 2022. ORR continues to place an emphasis on the importance of a structured return to contractual timescales and the recognition that industry and Network Rail have worked together to produce timetables in difficult circumstances.

“The timescales and processes set out in the Network Code were put in place to ensure transparency and sufficient time for all parties to carry out their responsibilities effectively. Departing from contractually agreed terms inevitably puts all parties at risk of confusion and dispute. It must be remembered that our role is to apply the law as set out in legislation and under the contracts parties hold.”

The Better Timetables for Passengers and Freight programme (BTPF) through PfC 120 proposes new milestones for a June 2024 timetable change. Industry has been engaged in the development of these proposals and passed them at the industry Class Representative Committee (CRC) in January 2023 contingent on two items highlighted through the consultation process. The CRC recognised that ORR cannot consider this PfC 120 until Network Rail’s licence is modified and the move away from a December timetable change date is shown to legally align with The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016. As such, the Network Code remains the official contracted process until advised otherwise by ORR.

Network Rail faces challenging circumstances in managing the current timetable process, not least where it has passed contractual milestones (e.g. D73 and other dates beyond it) or reflect the continuing late input decisions by publicly contracted operators, to reach upcoming timetable changes. Industry does need to continue to engage constructively with efforts to implement improved timescales and processes to deliver the most efficient timetable planning process. Network Rail has proposed timescales for timetable production to June 2024, in preparation for a possible BTPF implementation. In common with recent timetable change processes, these milestones are not aligned with the Network Code, but are those which Network Rail considers are deliverable at the present time. In the meantime, it remains a matter for individual operators to decide if they will work to these timescales.

To help inform passenger train and freight operators in their decision making, I am sharing the steps that ORR is working on, for the points of legal clarification required for BTPF, and the process for making a decision on PfC 120.

- The Railways (Access, Management and Licensing of Railway Undertakings) Regulations



2016 specify a December timetable change requirement. Network Rail has provided a legal position setting out a view on how PfC 120 could proceed. ORR is considering this position and will advise Network Rail as soon as practically possible.

- In April 2023, ORR plans to launch an initial consultation on the necessary Network Rail licence modification to change the Network Rail T-12 requirement. This will seek responses from industry and passenger groups. Dependent on the responses to this initial consultation, ORR could then produce a Statutory Consultation on the licence modification for launch in July.
- Depending on the outcome of the first two items, we expect Network Rail may submit a BTPF proposal to ORR around the time of ORR's Statutory Consultation, meaning ORR could consider the Network Code changes after the Statutory Consultation has closed.

Gareth

This email has been bcc'd because of the wide circulation list. However, if you think I have missed an important group or would like further clarification on this position please contact me.

Circulation List: Network Rail Capacity Planning (Timetable Production); Network Rail (PMO); Network Rail (Regulatory Reform); Access Disputes Committee; RailPartners (Track Access Forum); RailDeliveryGroup (Performance and Planning Forum); ORR (Access); ORR (Operations)

**Daniel Brown**  
Director, Economics, Markets and Strategy



22 February 2022

## **Timetabling and Network Code change requirements**

### *Introduction*

1. Since March 2020, in response to public health measures and changes to passenger demand, operators have had to make numerous changes, sometimes at short notice, to planned services. Infrastructure managers have had to plan timetable changes in the context of this uncertain environment.

2. As the country continues in its recovery from the pandemic, the industry must continue to work together in planning services, to ensure the best network use for passengers and freight. This is especially important because a continued separation of planning services for timetables from the contractual rights of parties, and therefore, non-compliance with the Network Code (the Code), is neither desirable for railway users or sustainable because of the pressure placed on resources for infrastructure managers and operators.

3. Network Rail is responsible for publishing the timetable on its network and is subcontracted by other infrastructure managers to provide timetable services. Commendably, during the last two years, industry has minimised legal disputes, even as changing circumstances have increased resource and commercial pressures. However, while the continued goodwill of industry participants remains important, the Code(s) must be amended to ensure future planning certainty and transparency for users.

4. Our duties and functions under legislation<sup>1</sup> enable ORR to hold industry to account in relation to applications for access and determinations of appeals on timetabling. To support reaching a more stable and robust planning platform this statement sets out how we plan to hold industry to account on the delivery of the timetable and compliance with the Code. This includes the Better Timetabling for

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<sup>1</sup> [The Railways Act 1993](#) and [The Railways \(Access, Management and Licensing of Railways Undertakings\) Regulations 2016](#)

Passengers and Freight (BTPF) programme led by Network Rail (previously Industry Timetable Process Reform) and industry compliance with the Code.

5. This regulatory statement explains how we will apply the legislative and contractual framework in line with our published guidance and policies. In summary, this statement explains:

- a. Current timetabling process: We expect industry to engage constructively with timetable planning and we will engage in that vein;
- b. ORR holding to account:
  - i. our approach to timetabling during the pandemic
  - ii. our expectations for industry led proposals for change to the Code and ORR intervention;
- c. Timetable reform and TTP003:
  - i. we expect industry to work constructively to reform timetabling and follow the formal change process set out in Network Code(s) to avoid ambiguity and mitigate the risk of disputes;
  - ii. infrastructure managers need to obtain sufficient evidence to support the consideration and application of the Decision Criteria under Part D of the Network Code.

#### *Current Timetabling process*

6. For the timetable process to reach a degree of stability it requires industry to act in a constructive manner in its access right applications and timetable bids. Operators should note the many Code requirements and criteria infrastructure managers must consider, as well as our previous statement on [Future Service Levels and Unused Access Rights](#). Of particular relevance is the section on new applications, where we stated we may require further information and “*we may need to examine the impacts of the proposed services on the timetable that is likely to operate, as well the impacts in the scenario where all services with rights are timetabled*”.

#### *ORR holding to account*

7. Over the past two years our regulatory approach to timetabling Code compliance and requirement to produce a timetable by T-12 weeks (Network Licence and Informed Traveller timetable) has acknowledged the challenging circumstances faced by industry. We have focussed on whether Network Rail has done everything “reasonably practicable” to deliver timetabling effectively. At the start, this meant managing timetable risk, and support of passenger and freight operations. Latterly, we have also welcomed its engagement on timetable reform (BTPF) which aims to achieve Code compliance as well as improving the process. We have communicated

this in our [Annual Assessment of Network Rail](#) (July 2021) and continued to closely monitor the work by the System Operator in Network Rail.

8. As proposals for change to the Code and timetabling processes grow in significance, it is necessary for industry to demonstrate it has clearly analysed the proposals. Given the operational nature of many processes, industry will often understand best the possible solutions and the consequences and these need to be articulated in the relevant proposal for change. For any proposals for change (whether industry led or initiated by ORR) we expect industry will provide, as a minimum:

- a. a clear articulation of all of the issues (procedural and legal) and the extent of industry agreement on the need for change;
- b. a clear explanation of the identified issues, and why the proposal is the most appropriate one in respect of the issues cited;
- c. a clear understanding of the operational implications (processes and systems);
- d. a clear assessment of the implications of a particular Code change, for example, on other parts of the Code, TACs, dispute processes or legislation<sup>2</sup>;
- e. a clear draft proposal which demonstrably addresses identified issues and industry participants' views; and
- f. plans for implementation and management of risks with identified owners.

9. We will continue to carefully monitor BTPF and Code changes in line with our statutory duties and role set out in the Code. Alongside this, we will continue to respond to industry proposal for change consultations, using the criteria set out above as a guide. We will also participate in Task & Finish groups where a regulatory view could be constructive. This will ensure we are able to assess how Network Rail has engaged with industry to develop workable proposals and support our functions as approver of Code changes.

#### *Timetable reform and TTP003*

10. Network Rail's BTPF engagement for phase 1 produced the high-level process objectives for timetable reform in December 2021. Our understanding is that these objectives attracted sufficient support for Network Rail to enter Phase 2, where

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<sup>2</sup> For example, Part D is linked to The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016

it will define and deliver the detail required to meet those objectives. This includes the necessary Code changes.

11. In January 2022, Network Rail began an industry consultation on its first Proposals for Change to the Code under BTPF. Network Rail has since organised a Task and Finish Group to develop them further. We will participate in this group as a regulatory view could be constructive, while ensuring we do not fetter our discretion in our approval role.

12. Timetable reform has the potential to improve outcomes for all operators, infrastructure managers, funders, freight customers and passengers. Industry does need to continue to engage constructively with efforts to improve the timescales and processes to deliver the most efficient timetable planning process. This relies on industry having a common understanding of the end state and direction of travel. It also relies on industry having sufficient capacity to use its expertise to make changes to its processes with that end goal in mind.

13. In January 2022, we published a [Timetable Panel Dispute Determination \(TTP003\)](#) on the Heathrow Airport Ltd (HAL) network. The timetable process and its timescales under the Code was central to this case. To ensure clarity of approach for industry, it is important that we set out where this determination has a relevance to the wider network.

14. Our Determination emphasised the importance of the formal modification process in providing legal certainty for all industry timetable participants. The timescales and processes set out in Network Code(s) were put in place to ensure transparency and sufficient time for all parties to carry out their responsibilities effectively. Departing from contractually agreed terms inevitably puts all parties at risk of confusion and dispute. It must be remembered that our role is to apply the law as set out in legislation and under the contracts parties hold.

15. Another conclusion in our Determination of wider industry significance is the importance of following the processes and procedures for application of the Decision Criteria contained in Part D of the Network Code. In particular, an infrastructure manager needs to demonstrate with evidence that it has endeavoured to comply with access proposals submitted in accordance with the Network Code through consideration of relevant option(s). It must also have sufficient evidence to support its consideration and application of each of the Decision Criteria.

#### *Industry and funder considerations*

16. Industry is planning its recovery from major changes in services levels over the last two years, and there are significant upcoming timetable projects on the mainline network. Improving the governance and contractual structure set by the Code, while ensuring sufficient clarity and stability is in place to provide industry and funder certainty, is vital. To achieve these apparently conflicting objectives, funders

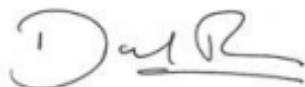
and infrastructure managers need to work together to coordinate their respective plans to mitigate the pressures placed on the industry planning community.

17. Industry and funders must engage closely in the consideration of the BTPF (or any) changes. If appropriate changes to the Code cannot be agreed, then it follows that a return to contractual timescales in the Code will need to be pursued. We would not expect industry to operate in the longer term in continued non-compliance with the Code.

*Application of this statement*

18. The scale of industry change has increased the uncertainty for timetable planning. This statement sets out our position regarding timetable reform and use of the existing processes within Network Code(s) to ensure transparency and regulatory certainty. This statement is available on our website and should be considered alongside our [track access guidance](#), which sets out our regulatory approach across the track access regime. This statement will remain relevant while the process of industry timetable reform is ongoing. However, we will review this guidance in April 2023.

**Daniel Brown**

A handwritten signature in black ink that reads 'Daniel Brown'.