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## **TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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### **Determination in respect of dispute references TTP2243, TTP2244, TTP2245, TTP2260 and elements of TTP2251**

(following a hearing held at Mimet House, on 09 August 2023)

#### **The Panel:**

John Hewitt                      Hearing Chair

#### Members appointed from the Timetabling Pool

Chris Matthews                elected representative for Non-Passenger Class, Band 2  
Richard Parsons                appointed representative of Network Rail

#### **The Dispute Parties:**

##### Heathrow Express Operating Company Ltd. ("HEOC")

Paul Fowler                      Project Manager, Planning & Operations  
Jyoti Chander                    Planning & Performance Manager

##### First Greater Western Ltd. ("GWR")

Matt Cambourne                Head of Train Planning  
Rob Holder                        Network Access Manager  
Peter Bridges                    Strategy Interface Manager

##### Network Rail Infrastructure Limited ("NR")

Tony Worgan                      Access Planning Manager  
Nick Drake-Wilkes               Project Manager (Timetable Development)  
Adam Hodgson                    Policy Advisor  
Darren Broderick                Customer Relationship Executive (HEOC)  
Richard Turner                    Customer Relationship Executive (GWR)

##### MTR (Crossrail) Corporation Ltd. ("MTR-EL")

Paul Breese                        Head of Service Delivery  
Jonathan James                    Head of Contract Management

#### **Interested parties:**

Heathrow Airport Ltd.        Paul Quilter  
GB Railfreight Ltd.            Tom Mainprize (\*attended virtually)  
Freightliner Group            Robin Nelson

#### **In attendance:**

Tamzin Cloke                      Committee Secretary ("Secretary")

#### Observers for professional development (attended virtually)

Andy Bottom (MTR); Kate Oldroyd (Northern); Nicola Forman (NR); Charmain James (NR); Alex Belk-Sumpton (Freightliner); Daniel Bukieda (Freightliner); Dana Morley (Freightliner); Esther Sumner (ORR - until 13:00 only)

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## **A Background and Jurisdiction**

1. Dispute TTP2243 was raised by GWR by service of a Notice of Dispute on 07 July 2023 in respect of NR's decisions in relation to late notice access for HS2 preparatory works on the GWML in Week 33, 2023. On 10 July 2023 both HEOC and MTR-EL served Notices of Dispute against both the access in Week 33 and a separate decision for similar access in Week 29, 2023. HEOC's disputes were registered as TTP2244 (Week 29) and TTP2245 (Week 33). MTR's disputes were registered as TTP2246 (Week 29) and TTP2247 (Week 33). The disputes were brought on the basis that GWR and HEOC disagreed with NR's assessment of both the capacity available during the engineering access and NR's preliminary decision on capacity allocation of the same, which was due to be confirmed in the subsequent timetable offers. MTR's dispute centred on resolving stabling issues with the train plan.
2. On 10 July 2023 GWR also raised a dispute against the Confirmed Period Possession Plan for Weeks 41-44 (TTP2251). An element of this, in Week 43, contained similar subject matter to TTP2243 and, following discussion with the Secretary, GWR asked that this element only of TTP2251 be heard together with the other issues in dispute, in the interests of efficient and fair resolution.
3. I was appointed as Hearing Chair on 19 July 2023 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.
4. 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'.
5. 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:
  - "2TT" means two-track timetable
  - "ADR Rules" mean the Access Dispute Resolution Rules and "Rule" is construed accordingly
  - "CCOS" means Crossrail Central Operating Section
  - "CPPP" means Confirmed Period Possession Plan
  - "CTP" means Concept Train Plan
  - "Decision Criteria" means Network Code Condition D4.6 and "Consideration" has the meaning given at Condition D4.6.2
  - "GWML" means Great Western Mainline
  - "HS2" means the High Speed Two rail project
  - "Part D" means Part D of the Network Code
  - "tph" means trains per hour
  - "TPRs" means "Timetable Planning Rules"
  - "TTP" means Timetabling Panel
  - "STP" means Short Term Plan

## **B History of this dispute process and documents submitted**

6. 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.

7. On 19 July 2023, following an application made by the Secretary on behalf of the Dispute Parties, the Allocation Chair ordered that the dispute references be resolved together on the grounds that they concerned the same, or similar, subject matter and that it would be in the interests of efficient and fair resolution to do so.
8. Between the disputes first being registered and the initial submission deadline, the following developments occurred with respect to the disputes registered: MTR-EL reached agreement with NR on its outstanding issues and, wishing to remain a Dispute Party in support of NR's decision being upheld, withdrew TTP2246 and TTP2247, becoming a defendant alongside NR; following a new, and similar, late notice access decision from NR for Week 37, on 26 July 2023 GWR issued a new Notice of Dispute (registered as TTP2260) and asked that the issue be joined with the remaining TTP2243, TTP2244, TTP2245 and elements of TTP2251. A further order to this effect was requested, and received, from the Allocation Chair on 27 July 2023. The four decisions made by NR in respect of Weeks 29, 33, 37 and 43 are collectively referred to below as 'the Decisions', save where the context otherwise permits.
9. Consequently, on 26 July 2023 GWR and HEOC served their Sole Reference Documents, in accordance with the dispute timetable as issued by the Secretary. GWR's Sole Reference Document already contained its submissions in relation to TTP2260, in anticipation of an order being granted. When GWR filed its Sole Reference Document it requested that appendices 2 and 3 be treated as confidential to me, the Panel and NR. GWR then amended its request to the effect that appendix 2 be shared with the Parties but that neither appendix 2 or 3 be posted on the Committee's website. I sought the views of the other parties on this request. None were received. In the absence of any objections I granted the request.
10. On 02 August 2023, NR and MTR-EL served their Sole Reference Documents in accordance with the dispute timetable as issued by the Secretary.
11. Freightliner Group; GB Railfreight Ltd.; Heathrow Airport Ltd., declared themselves to be interested parties. All were represented at the hearing.
12. On 03 August 2023 the Dispute Parties were advised by me – for the purposes of ADR Rule H18(c) – that so far as there were any relevant issues of law, the issues to be determined concerned, initially, whether NR's Decisions were made in accordance with the provisions of Part D of the Network Code, and in particular D4.6 of the Code. In making its Decisions, the Parties were reminded, NR was obliged to have had regard to all relevant and material facts and matters known (or which it ought to have known) to it at the time the respective Decisions were made. NR had a duty to exercise its discretion in good faith, rationally and not capriciously. The discretion vested in NR must also have been exercised consistently with its contractual purpose. Noting the close similarity of the issues raised, and determined, in TTP2207 - which had preceded the disputed Decisions - the Parties were advised to focus on the timeline of the issues under dispute and on any new and material facts, data and information which had become available (or which ought to have become available) to NR between TTP2207 and the date of each of the disputed Decisions being made.

13. On 04 August 2023 I issued directions (the Third Directions) requiring the parties to make submissions or provide clarification on a number of questions. All parties responded by the due date and further information and documents were provided by them.
14. The hearing took place on 09 August 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.
15. 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**

16. In its sole reference document, GWR requested I determine that:
  - a. NR's decision on the overall number of available tph on the GWML Relief Lines, and on GWR's allocation of that number, was wrong for the three weekends and for the foreseeable future; and,
  - b. that NR should withdraw its decision and be required to rework this issue in light of discussions at the Hearing; and,
  - c. that either the possession is withdrawn or GWR's plan for quantum of its own services be applied in those hours GWR requires them.
17. Recognising that some of the request would require a finding of "exceptional circumstances", GWR contended exceptional circumstances applied for the following reasons: in GWR's view, exceptional circumstances were required to generate an expedited Hearing; the issue was "precedent setting with the repercussions likely to be felt for a decade or more".
18. In its sole reference document, HEOC requested I determine that:
  - a. NR had not acted in accordance with Part D of the Network Code, nor the HS2 Supplemental Agreement and therefore, HEOC was permitted to operate 4tph on Sunday 15 October 2023 and Sunday 12 November 2023, in accordance with its contractual right to do so; and,
  - b. NR should complete the actions specified in Section 4.3 of HEOC's Sole Reference Document (pertaining to recommendations arising from TTP2207 HEOC alleged had not been actioned) to ensure that NR would be properly informed when proposing any future Restriction of Use for HS2 Works.
19. HEOC did not contend that exceptional circumstances had arisen.
20. NR asked me to determine that it had complied correctly with relevant contractual provisions and the Network Code to reach a reasonable decision on capacity. Consequently, NR requested that I uphold its Decisions.
21. NR refuted GWR's suggestion that exceptional circumstances had arisen and the suggestion that this TTP hearing would set anything further than a "persuasive precedent". NR stated that there was nothing particularly unusual in expediting dispute references that would meet the exceptional circumstances threshold, and that the same could be said for the introduction of MTR-EL additional services, which had prompted NR to reassess the

capacity allocation during 2TTs on the GWML. NR submitted that I did not need to determine HEOC's request that it run 4tph as the reduction in HEOC's service was within the bounds of correct application of Network Code D4.6.

22. Finally, MTR-EL requested that I uphold the Decisions made by NR in relation to capacity allocation for Old Oak Common station 2TT possessions in Weeks 29, 33, 37 and 43. MTR-EL did not address the question of exceptional circumstances.

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

23. The versions of the Network Code Part D and the ADR Rules dated 13 March 2023 were applicable to these dispute proceedings.
24. Conditions D3.4, D4.6 and D5.3 were particularly relevant.

#### **E Approach to the determination**

25. As mentioned previously the issues raised in these disputes bear close resemblance to those raised in TTP2207. It was common ground that in accordance with ADR Rule A7 every Forum shall take note of relevant published TTP determinations as persuasive authority but need not be bound by them. I informed the parties that the Panel proposed to focus on the changes to the factual matrix that had occurred since the date of the decision (3 April 2023) which was the subject matter of the TTP2207 dispute, the hearing of TTP2207 (10 May 2023) and the publication of the determination of TTP2207 (24 May 2023). No objections were raised to this course.
26. For ease of reference and for continuity I shall adopt the abbreviations set out in paragraph A4 of the TTP2207 determination.
27. One of the key issues in TTP2207 was the reliability and robustness of the information and data NR relied upon in arriving at its decision that the optimum capacity was to run 14.5tph during the Restriction of Use. Paragraphs 235 - 240 of the determination of TTP2207 set out conclusions on that issue and in that case held it was reasonable for NR to await delivery of further performance data due in June 2023 before undertaking a further assessment of capacity (paragraph 239(3)).
28. In the subject disputes the material Decisions were taken by NR on the following dates:

TTP2244	Week 29	4 July 2023
TTP2243 and TTP2245	Week 33	4 July 2023
TTP2251	Week 43	6 July 2023
TTP2260	Week 37	20 July 2023

Each of the Decisions was made pursuant to Network Code Part D3.4.

29. The role of the Panel and its constitution is set out in ADR Rule H1-48 and I have to make a reasoned determination in accordance with ADR Rule H49-52. In terms of approach I reminded myself and the Dispute Parties that the Panel is to review the information and data which was (or which reasonably should have been before) NR at the time of making the Decisions and to consider whether in context the Decisions were within the range of

reasonable decisions which a commercial decision maker might make. I respectfully adopt and endorse the legal guidance on the approach set out in paragraphs 223-230 of the determination in TTP2207.

30. In summary I have to determine whether the Decisions were:
- a. were made in bad faith, i.e. not made in good faith;
  - b. irrational;
  - c. capricious; or
  - d. inconsistent with the contractual purpose.
31. I also reminded myself and the Dispute Parties that whilst there is no universal strict legal definition of the expression ‘bad faith’, in a range of authorities it has been said to be the opposite of ‘good faith’ generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or some contractual obligation not prompted by an honest mistake, not playing fair or conduct which is commercially unacceptable, improper or unconscionable, but not actually dishonest.

## F Evidence at the hearing

32. No formal evidence in terms of written statements endorsed with statements of truth were filed or produced at the hearing. Instead, at the hearing, the parties’ representatives made a number of oral observations which might be characterised as a mix of evidence of fact, criticisms, submissions, viewpoints, opinions, speculations and recollections.
33. In the event there was little, if any, dispute as to the material facts as to what occurred post TTP2207. For material purposes NR retained its view of capacity at 14.5 tph.
34. The Decision Criteria relied upon by NR is set out in Appendix C to its Sole Reference Document.
35. In its Decision Criteria D4.6.2 (c) – **maintaining and improving train service performance** – NR stated this was relevant and allocated a ‘High’ weighting. NR relied upon the same reasoning as adopted in TTP2207, namely:

Evidence	NR Opinion
<p>Historically a 14.5tph timetable delivers a compliant timetable which also usually meets the Industry set Public Performance Measure.</p> <p>However, past performance data demonstrates that 14.5tph has not achieved the Industry target in certain scenarios and this too will remain the case with the new proposed CTP.</p>	<p>The performance challenges that are seen during 2TT running remain today and are being modelled through performance modelling with an expected output for June 2023.</p> <p>The re-allocation of capacity per operator is not seen as a solution to ensure the performance target is consistently achieved. The volume of tph means that the service cannot recover once a delay is incurred.</p>

36. In its Decision Criteria D4.6.2 (d) – **That journey times are as short as reasonably possible** – NR stated this was relevant and allocated a ‘Medium’ weighting. NR relied upon the same reasoning as adopted in TTP2207, namely:

Evidence	NR Opinion
<p>The CTP is based on the May 2023 timetable. Any increases in journey times have been kept to a minimum by working through constraints and compromises with the Operators to understand the impact and severity to the operation of services beyond Paddington to the East and Reading to the West where applicable.</p> <p>Where there are contractual committed journey times, every effort has been made to get as close as possible to these durations.</p>	<p>Delivery of a TT containing 14.5 paths per hour is the optimum for the industry based on historic data for acceptable performance, resilience, and the ability to recover. Compromises in terms of journey times and stopping patterns have been made to reach the best overall result.</p>

37. It was common ground that operating 14.5 tph in reality means that over a 2-hour period 14 trains will run in the first hour and 15 trains will run in the second hour in both directions. It seems this was based around a timetable structure that supports 15tph in which one path is not utilised in the one hour.
38. It was also common ground that for the material parts of the day the NR allocation of the 14.5 tph was:  
**GWR:** 6.5, which equates to 80% of its normal Sunday service;  
**HEOC:** 2, which equates to 50% of its normal Sunday service; and  
**MTR-EL:** 6, which equates to 60% of its normal Sunday service.
39. It was further common ground that a timeline of material events following TTP2207 was as set out in Annex A to NR's Sole Reference Document. Mindful of the conclusion reached in TTP2207 about some weaknesses in the extent and quality of data relied upon by NR, it sought to garner more data. Steps taken to achieve this include, but are not limited to:

Date(s) 2023	Event/Comment
02 June	Letter sent to GWR, MTR-EL and HEOC asking for passenger loading for Sundays 11 June, 18 June, 25 June and 02 July 2023 (Weeks 11-14) to be provided.
09 June	Teams/telephone calls with TOCs to discuss details about the collection of the information and the approach NR was taking.
06 June to 14 July	Internal presentation of and review of modelling outputs. Performance Team raised concerns that modelling assumptions and outputs do not match the experience of Week 11 or other 2TT events.
12, 23 & 27 June & 04 July	HEOC supplied passenger data week by week
19 June	Formal request to TOCs for weeks 29 & 33 access
23 June	GWR request to run 7.5 tph during a Ladbroke Grove Main Line side block 2TT



29 June	NR revised performance modelling remit to include GWR above request to run 7.5tph. Evidently NR was unable to provide additional modelling resource until August 2023 to commence this piece of work
03 July	Letter from HEOC to NR requesting a range of details of NR's action plan following TTP2207
04 July	Decision for Weeks 29 & 33 access sent to TOCs
06 July	NR wrote to TOCs advising them that they should continue to bid in line with CTP and Decision Criteria until the data had been analysed and updated information issued to them. Timetable planning for Week 29 was about to commence. Data from MTR-EL was provided on 14 July and data from GWR was provided on 19 July – see below
06 July	Decision on Weeks 41, 42, 43 and 44 sent to TOCs (in the CPPP)
09 July	NR replied to the HEOC letter of 04 July to include, among other things, that modelling work would be undertaken and that would be followed by a revised capacity study if required. The letter noted that the performance modelling work needed to be fit for purpose.
14 July	Internal NR meeting on modelling to question assumptions and to revise remit to consider additional delay factors into the model.
14 July	MTR-EL provided passenger data for Weeks 11-14 in a single submission.
18 July	NR wrote to TOCs with a detailed analysis of Week 11 train performance and attached observations from a NR employee at Paddington on the Sunday of Week 11 who carried out some work on performance. NR stated it was working with its modelling team to understand the impact of late running and overall service resilience TOCs invited to a meeting proposed for 27 July to discuss in more detail. That meeting was rescheduled to 02 August so that all TOCs could attend.
19 July	GWR supplied passenger data for Weeks 11-14. NR said it needed two weeks to analyse the data supplied by all three TOCs
20 July	Decision for Week 37 sent to TOCs
21 July	For Week 28: 21 July was the TOC bid date; 04 August NR offer date & 18 August the publication date for the service
25 July	NR wrote to TOCs to say passenger data for Weeks 11-14 analysis was complete; that capacity allocation had been made proportionate to demand and did not unfairly disadvantage any single TOC and thus NR would not seek to change the 14.5tph allocation.
27 July	NR wrote to all three TOCs to say that whilst the passenger data provided for Weeks 11-14 shows demand in excess of projections used for CTP, there is, in all cases, sufficient seated capacity for the number of people travelling.
02 August	Review meeting with TOCs held.

40. Both GWR and HEOC were critical of NR and both contended that NR could and should have taken more proactive steps.
- Both assert that NR has failed to produce any performance modelling data for its CTP to demonstrate (i) the levels of performance it can deliver, or (ii) the impact of increasing the number of tph would have on performance. HEOC complains that NR is merely relying on assumptions and historic data to make decisions with respect to 2TT allocations. It also complains that modelling work in respect of its CTP in October 2022 was due to be completed by June 2023 but it has failed to complete it.
- GWR complain that it asked NR to model its suggestion of 15.5tph but this did not occur. Instead NR relied upon some data collected on the morning of 11 June 2023. Later that day, when atypical adverse weather conditions occurred and when other Restrictions of Use impacted on travel to and from London and South Wales, data in the afternoon and evening was rendered unreliable.
- NR did not dispute that 14.5tph and GWR's proposal for 15.5tph were both TPR compliant. It also accepted that there are ways of creating TPR compliant timetables which incorporate more tph. But, it maintains there is still no reliable evidence available that it is possible to deliver more than 14.5tph at a level that meets achievement of jointly agreed performance targets. However, the evidence presented is equivocal as to what is or is not possible and as to whether the 14.5tph option is capable of meeting agreed performance targets.
- GWR also complain that at the 02 August 2023 review meeting NR advised that a major point of conflict was at Ladbrooke Grove where MTR-EL trains to/from the CCOS conflict with services using the mainline station at Paddington. GWR argued that this had been identified some months prior at which time it had made the suggestion MTR-EL rains might use the mainline station when 2TTs occur, as it had done previously until the CCOS was fully operational, but that NR had failed to look into this potential solution to free up more tph.
- A range of further issues and potential mitigations were raised, including moving engineering dwell times and recovery times, particularly for GWR at Reading, which it was argued NR ought to look at to explore whether more than 14.5tph might be feasible and without undue impact on performance.
41. It might be conveniently noted here that NR appended, to its response to my Third Directions dated 08 August 2023, the agenda and papers prepared for and presented to the review meeting that had been held on 02 August 2023. In terms of performance and modelling it may be summarised as showing that in terms of 14.5tph, 15tph or 15.5tph there was little appreciable difference. In essence, and as noted by several of the Parties, none of the timetable options performed 'well' but in some instances, those modelled options with more tph performed as well or even better, than those with fewer.
- The review also included performance data gathered during Week 11 when there was a 2TT. It happens that in error for that day NR had offered GWR 8tph instead of 6.5tph (in certain hours), which was in breach of the CTP. GWR accepted the offer and ran the additional paths. The performance review did not identify any material adverse impact, but there was no specific comparison of performance data provided which made a comparison between those hours when more trains ran and those when they did not.
42. It was not in dispute that the issue was whether NR had arrived at reasonable decisions based on the information it had (or should have had) before it at the time it made the Decisions and in compliance with its contractual obligation and as set out in paragraphs 29-31 above.

43. HEOC initially contended that NR “*appear[s] to have failed to act in good faith in making its decision to restrict access to 14.5tph.*” Evidently this submission was made on the basis that NR had not complied with Network Code D3.4.7 on the footing that NR had not made clear the implications of the Restrictions in reducing its service from 4tph to 2tph. NR countered this by asserting that it was not obliged to do so, because there is no Part D requirement to notify HEOC of the specifics of a reduced service pattern at either TW-30 or TW-26. NR drew attention to D3.4.10(a) and (b).  
HEOC argued that the D3.4.7 should be read so as to require NR not only to set out its proposals for a Restriction of Use but also to the implications arising from the Restriction. In discussion on this topic HEOC did not contend that NR’s failure to specify the implications was deliberately kept from HEOC so as to mislead or to pull the wool over its eyes in a deceitful way. In answer to a question whether the failure to mention the implications might be characterised as ‘inadvertence’ Mr Fowler replied: “*Probably was, yeah*”. Mr Fowler also accepted that inadvertence or incompetence does not amount to bad faith.
44. HEOC also contended that the Decisions were irrational because it had been demonstrated from the data available from 11 June 2023 that more than 14.5tph could run and that was supported by additional work both it, HEOC, and GWR had done.
45. Initially, and in response to questions set out in the third directions, GWR did not contend that the Decisions were made in bad faith, were irrational, capricious or inconsistent with the contractual purpose. But, as the hearing developed, GWR developed an argument that NR’s decision to stay with capacity at 14.5tph was illogical and that NR’s focus was to work to provide what evidence it could to support that position. Further, NR had failed to give timely consideration to mitigations which might be deployed to increase the number of trains and that NR had relied overly heavily on performance on the ground that it was listed on ORRs regulatory register for performance on the Western Route. These factors led to GWR coming round to the view that perhaps ‘illogicality’ might amount to irrationality or unreasonableness in decision making within the legal framework that applies here.
46. MTR-EL supported the Decisions to retain capacity at 14.5tph. It acknowledges that the possessions are against a background of poor performance and it considers that NR has taken a prudent approach. It argues that similar 2TT possessions have seen evidence of significant challenge and that any increase in the number of paths would need to be supported by robust performance modelling to reflect infrastructure reliability.  
MTR-EL also supports NR allocation on the basis that passenger count indicates the train paths allocated to each TOC were broadly aligned with passenger demand.
47. In summary NR maintained that its Decisions to retain capacity at 14.5tph were not irrational or unreasonable. It accepts it was a nuanced decision and there is no clear right or wrong answer. It also accepted that it was not unexpected or unsurprising that HEOC and GWR took a different slant. The Decisions taken on 04, 06 and 20 July 2023 were based on the Decision Criteria dated 01 March 2023 and that was and still is the most up to date information.
48. In its response to the Third Directions, HEOC contended that NR’s Decisions were inconsistent with the contractual purpose. This was on the footing that pursuant to the relevant Track Access Agreement it had the contractual right to run 4tph. It was not in dispute that the subject engineering possessions were HS2 related within the meaning of the Supplemental Agreement dated 21 December 2017. It was also not in dispute that NR had the contractual right to impose Restrictions of Use in connection with such works

provided it acted in compliance with Network Code Part D. Once this had become common ground HEOC withdrew this challenge.

49. Finally in this section I wish to look at the question of remedies and Network Code D5.3.
50. HEOC, in its opening submission requested that I should determine that it is permitted to operate 4tph on Week 29 and Week 33 *'in accordance with its contractual right to do so.'* Mr Fowler accepted that was not a determination I was empowered to make within Part D5.3. Instead, Mr Fowler invited me to give general directions to NR specifying the result to be achieved but not the means by which it shall be achieved.
51. GWR, in its opening statement, sought a determination that removes the decision for each of the days in issue and as a strategy for the future asked NR to think again, and permit GWR to operate 7.5tph whenever a 2TT is necessary between Ladbroke Grove and Acton only. In its Sole Reference Document GWR had asked that the possessions be withdrawn. This request was withdrawn at the hearing. GWR also argued that there were 'exceptional circumstances' within the meaning of Part D5.3.1(c) such that the outcome of this dispute would set a precedent going forward for a decade or more. It was argued that the HS2 2TT possession strategy constituted a significant change that would last for a number of years for the building of Old Oak Common and then forwards from that from renewals of infrastructure that are planned in the Paddington area. In this context a number of observations were made by all of the parties on the general way forward, including mention of a Possession Strategy Proposal being developed by NR under Network Code Condition D6, the evolution of the PSP, what representations have been made to date and the scope for further representations to be made in the future. Whilst it had raised the question of 'exceptional circumstance' GWR made clear that no financial penalty was sought.

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

52. The crux of the issue in these disputes is NR's adherence to a capacity of 14.5tph which it asserts is the historic high and which was the product of the Decision Criteria issued on 01 March 2023. There was criticism of this decision in TTP2207. NR maintains that there is no reliable evidence or data produced in the meantime which might cause it to take a different view. NR is supported in this adherence by MTR-EL. GWR and HEOC take a different view. They have strong views that an increase to 15.5tph or 16.5tph will not have a disproportionately adverse effect on performance. They have also raised issues and made suggestions about improvements and mitigations which they say will enhance the prospect of improved performance with a slightly increased utilisation. Clearly GWR and HEOC have legitimate commercial interests in the number of trains they can run, the tickets they can sell and the profits they can make. All this in addition to the wider public benefit of rail services on offer.
53. As explained above (paragraph 30) an appeal against the Decisions can only succeed if it can be shown in each case that it was made in bad faith, was irrational, was capricious or was inconsistent with the contractual purpose. HEOC placed reliance on bad faith and irrationality. In its Sole Reference Document GWR did not clearly identify which of those four features it placed reliance upon. Clarification was sought in my Third Directions. In its response GWR stated that it did not rely upon any of them. That being so, one might have thought that GWR ought to have withdrawn its disputes. It did not do so. During the course of the hearing, GWR developed an argument that NR's adherence to 14.5 tph was illogical and that illogicality might constitute unreasonableness, and possibly irrationality.

54. In my view NR, in its capacity as a contractual decision maker where its decisions may or do have a material commercial impact on TOCs, is obliged to ensure that its decisions are kept up to date and are made with the benefit of the most up to date information and data that it can reasonably procure within its own resources or secure from outside third parties.
55. It is plain on the evidence (and is not in dispute) that, due to HS2 related works, engineering possessions on two of the four lines out of Paddington are going to be a regular occurrence on Sundays going forward for several years. It is also clear that GWR and HEOC have raised significant and important issues on the extent of those possessions and impact of those possessions such that NR is obliged to keep them under close and regular review.
56. I have no hesitation in rejecting HEOC's assertion that the decision to adhere to 14.5tph was made in bad faith. There is no evidence to support that. It was surprising that the assertion was put forward in view of the convention that responsible commercial organisations do not make allegations of bad faith, fraud or deceit unless there is some credible evidence to support them.
57. The only evidence HEOC relied upon was the fact that NR had not explicitly informed it in the initial proposals made pursuant to Network Code D3.4.7 that the impact of the restriction would reduce its service from 4tph to 2tph. NR says that it was not obliged to do so at that time. I agree with NR. A proper construction of D3.4.7, read in conjunction with D3.4 as a whole, does not impose that obligation on NR. Further, the restrictions and the pattern of them had been the subject of discussions and meetings with TOCs for several months and the implications were fairly clear. If upon receipt of the proposal HEOC had any doubt or concerns about the implications arising from it, it could of course have raised a question. I infer that HEOC as a skilled and experienced TOC will act with a degree of skill, diligence, prudence and foresight. The more so where a potential Restriction of Use may impact or limit the number of trains it might run,
58. Neither GWR nor HEOC argued that any of the Decisions were capricious. My understanding is that HEOC withdrew its submission that the Decisions in Weeks 29 and 33 were inconsistent with the contractual purpose. In case it be held that I am wrong about that I make a finding that the Decisions are not so inconsistent. By virtue of the HS2 Supplemental Agreement. Network Code Part D applies to HS2 related works. There is no dispute that the engineering works in question fell within the definition of HS2 related works as defined in the supplemental agreement. NR has a statutory duty to facilitate the carrying out of works to deliver the HS2 Project. To do that it has the contractual right under Network Code Part D to impose Restrictions of Use even if those restrictions impact adversely on access rights enjoyed by TOCs. I am therefore satisfied that the Decisions were made within the contractual purpose. Of course, NR has the obligation to comply with the requirements of Network Code Part D and if it does not do so, there may be a remedy for breach of contract available to a TOC, but that remedy does not feature in a TTP dispute.
59. That leaves irrationality. Sometimes the expressions 'rational' and 'reasonable' are used interchangeably in this context. A contractual decision maker is given a fair amount of leeway and the bar that a decision is irrational or unreasonable is a high one. As ever, context is crucial as are the consequences of the decision for the other parties to the contract.

60. In relation to Week 29 the decision was made under Code D3.4 on 04 July 2023. NR could have delayed the decision until 21 July 2023 and still made it within Network Code D3.4. After that date, if the possession was still required it would fall to be made under Network Code D3.5, but only if NR could satisfy the provisions of Network Code D3.5. NR explained that it did not defer making the decision until 21 July 2023 because if it had done so there would have been insufficient time for the TOCs to submit revised bids or access proposals. There is a tension and some conflict in the timetabling process where two or more processes are going forward at the same time. Neither GWR nor HEOC expressly submitted that the decision should have been deferred to 21 July 2023. In the circumstances I consider that it was reasonable for the decision for Week 29 to be made on 04 July 2023. Of course, the decision fell to be made against the information and data that was (or should have been) available to NR on or by that date. This date was relatively soon after receipt of the determination in TTP2207. NR had put a number of processes, enquiries and calls for data in place by this date and many of them were 'works in progress'. Neither MTR-EL nor GWR had provided any passenger data for Weeks 11-14 by this date and HEOC had only provided such data for Weeks 11, 12 and 13. HEOC's formal letter urging progress on the issues raised in TTP2207 is dated 03 July 2023. It is not clear when it was received by NR but even if it was seen by the subject decision maker within NR on or by 04 July 2023 there was no time for its contents to be actioned or taken into account.
61. In these circumstances and given the relatively little new or further reliable information and data that was available to NR I do not consider that it was unreasonable or irrational of NR to adhere to its view that 14.5tph was the optimum capacity for Week 29. I shall therefore determine that NR's decision on Week 29 shall stand.
62. The same cannot be said for Weeks 33, 37 and 43. Here the urgency for the decisions were not so pressing. A number of initiatives were being worked through. Some of these are highlighted in the table in paragraph 39 above. In the view of the Panel it is significant that detailed analysis of Weeks 11-14 was before NR by 25 July. It was perhaps unfortunate, although understandable, that the review meeting proposed by NR for 27 July had to be put back to 02 August to accommodate HEOC.
63. NR has argued that its decision to adhere to 14.5tph is a nuanced decision. I am minded to agree with that conclusion. Given the stance taken by GWR, the Panel infers that GWR might also agree. HEOC has been more ambivalent. There are inevitably rival and conflicting views and on some aspects it comes down to a matter of emphasis.
64. There is now quite a large amount of new or revised data available to NR. The Decisions of NR are of critical importance to GWR and HEOC in particular. There are significant commercial implications. Taking things in the round I consider that in taking the decisions for Weeks 33, 37 and 43 when it did, NR was perhaps a little premature and could and should have waited a little longer to take into account further information as it was developing. I consider that this just tips the balance into the unreasonable territory. I consider that the right course at this stage is for NR to look once again at all relevant material now before it and carry out a reassessment. It may also be helpful if NR reconsiders what a measure of success really means. If the measure of success is TPR compliance there might be a case for it to offer 16.5tph as this has been shown to be TPR compliant. If the measure of success is PPM, and the 11 June data shows the failure of the 14.5tph it raises the question why NR is not rowing back from this service level and offering fewer train paths. It may be, based on oral observations made at the Hearing, that GWR's poor Right Time performance at Reading is a contributory factor to the issues that arose,

and the underlying cause of the downfall of the 14.5tph timetable lies elsewhere. If that is the case, offering more paths would not make this situation any worse, in and of itself.

65. Given the strength of views held by GWR and HEOC on the capacity for paths and in light of more recent experience NR might consider there is some value in increasing capacity for one to two Sundays in the near term by way of an experiment and to undertake practical tests of resilience in the timetable. Success or failure can then be taken into account in future planning. It may be that TOCs, or some of them might need to make a gesture in light of any adverse financial consequences NR might incur if these experiments were to result in severe poor performance. Of course, NR must not just have regard to the interests of GWR and HEOC. It must also bear in mind the interest of MTR-EL and any other TOC or FOC that may be affected. Also, NR might reconsider the sustainability of the 14.5tph timetable given the performance challenges implicit in information presented at the hearing; this could include a review of the current timetable and allocation assumptions, but with increase or decrease of the current capacity utilisation levels in mind as potential outcomes.
66. Finally on remedies I have to deal with GWR's original assertion set out in its Sole Reference Document that there are exceptional circumstances here such that I may substitute an alternative decision in place of the challenged decisions of NR. My understanding is that that assertion was withdrawn at the hearing. In its opening statement GWR stated that it sought "*a determination that removes this decision for each of these dates and as a strategy for the future, asks NR to think again, and permits 7.5tph to be operated by GWR whenever a 2TT railway is necessary between Ladbroke Grove and Acton only.*" There is a contradiction here. On the one hand GWR asks that NR think again but presumably irrespective of the outcome of that thinking GWR be permitted to run 7.5tph. The determination is that I have given a direction to NR to think again, which is what I think GWR eventually asked me to do. To do more would require a finding of exceptional circumstances.
67. In case it is upheld elsewhere that GWR did not withdraw its claim to exceptional circumstances at the hearing it is pragmatic that I make a finding on it. The essence of the claim is that Sunday possessions along the line in question will continue for many years to come and that I should set a precedent at this time. I reject the submission that the fact of long-term future possessions amount to exceptional circumstances. In any event GWR has not made it clear what alternative decision it asks me to arrive at. If it is that GWR be permitted to run 7.5tph it makes no account of paths to be allocated to other TOCs. I consider that the number of paths and the allocation of them amongst the TOCs is something that can only properly and fairly be done as a single exercise. Furthermore, there is simply no case for precedent setting for years to come based on the information before the Panel at the present time. I also consider it wise to bear in mind ADR Rule A7 and the consequence of making a persuasive precedent. There is no reliable evidence before the Panel that enables me to reasonably and properly conclude that additional paths should be provided, or if they were, to whom they should be allocated. I am firmly of the view that NR should assess and review future possessions periodically and as and when required based on the relevant data and information then available which should properly go into the decision making. Inevitably over time a whole range of factors will change or vary and such factors will need to be taken into account. In making allocations of a limited number of paths available NR must act fairly, sharing the pain amongst the affected TOCs whilst ensuring a reasonable range of passenger rail services is available to the travelling public. All three passenger TOCs concerned have contractual rights and neither one can trump the others,

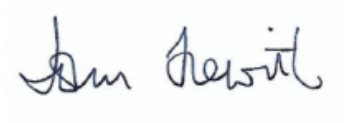
## H Determination

68. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.

- a. That the NR decision for Restriction of Use on Sunday of Week 29 shall stand; and
- b. That NR shall reconsider the capacity for Weeks 33, 37 and 43 to ascertain whether it might be appropriate to effect an increase or decrease, even if only for experimental and evaluation purposes; and if so, how such increased or decreased capacity shall be allocated fairly in accordance with the Objective.

69. No applications were made for costs.

70. 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.



John Hewitt  
Hearing Chair  
23 August 2023