TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP2453, TTP2454, TTP2455 and TTP2456
(following a hearing held in London, on 01 July 2024)

The Panel:

John Hewitt	Hearing Chair

Members appointed from the Timetabling Pool

Lee Tuttle	elected representative for Franchised Passenger Class, Band 3
Richard Parsons	appointed representative of Network Rail

The Dispute Parties:

First Greater Western ("GWR")

Matt Cambourne	Head of Train Planning
Rob Holder	Network Access Manager
Justin Kerr-Peterson	Senior Strategy Interface Manager
Jake Sprules	Senior Commercial Insights Analyst

Network Rail Infrastructure Limited ("NR")

Iain Mackenzie	Head of Performance
Richard Turner	Customer Relationships Executive
Tony Worgan	Route Access Strategy Manager
Adam Hodgson	Policy Advisor
Nick Drake-Wilkes	Timetable Project Manager

Involved Parties:

DB Cargo (UK) Ltd.	Graham White
GB Railfreight Ltd. ("GBRf")	Ian Kapur, Tom Mainprize
Heathrow Express Operating Company Ltd.	Jyoti Chander, Paul Fowler
MTR Corporation (Crossrail) Ltd. ("MTR")	James Linley

In attendance:

Tamzin Cloke	Committee Secretary ("Secretary")

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A Background and Jurisdiction

1. Dispute TTP2453 was raised by GWR, by service of a Notice of Dispute on 23 May 2024 in respect of a decision made by NR. That decision, which is set out on page 2 of an 'official' document issued by NR is as follows:

   "OFFICIAL
   After consideration of the performance data for two track operation during winter/spring 23/24, initial passenger demand data review and early insights into the performance modelling Network Rail have decided that maximum capacity for scheduled passenger services remains at 14.5tph. This allows capacity for 1 path every two hours for other services such as engineering trains and a maximum of one charter service in each direction per weekend excluding empty stock moves. GWR are instructed that 7 trains per hour should not operate in any consecutive hours. This applies to HS2 works between weeks 25 and 32. Network Rail will review week 35 onwards once the review of demand data and performance modelling is completed.

   The quantum of services operating should be measured at the junction entering the two track section of operation in the applicable direction."

   NR states that it applied the Decision Criteria when arriving at this decision and the document recording the outcome of that exercise comprises Appendix F to NR's SRD.

   From hereon this decision is referred to as 'the Principal Decision'.

   Three further Notices of Dispute were raised. One on 23 May 2024, and two more on 24 May 2024 and 06 June 2024 against three further decisions for similar subject matter in Weeks 25, 29 and 31, 2024, and were registered as TTP2454, TTP2455 and TTP2456, respectively.

   From hereon the four decisions are referred to as 'the dispute decisions'.

   The four disputes were brought on the basis that GWR contends that more trains (15.5tph, against an NR decision of 14.5tph) could be accommodated on the available infrastructure. GWR requested that a hearing be expedited owing to the proximity of the RoUs.

   GWR did not dispute that the RoUs were properly taken for the purposes of HS2 engineering works.

2. I was appointed as Hearing Chair on 12 June 2024 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.

   In its SRD (Section 3) NR stated, in the first paragraph, that it did not dispute GWR's right to bring the disputes. But, in the penultimate paragraph it stated that it had not yet offered the Timetable for any of the weeks in issue and that as such it submitted no formal decisions had been issued. I took that to be an implication that no decisions had yet been made that were capable of being in dispute within the meaning of Part D. At the hearing I sought clarification. By the time of the hearing the Week 25 Timetable had been offered. NR stated it did not wish to argue that the Notices of Dispute were premature. It stated that its principal decision to limit capacity to 14.5tph when access was only available on two

tracks was a firm decision that would be applied for the foreseeable future. It thus recognised that at some imminent points in time, when the Timetable was offered, GWR would undoubtedly have the right to raise a dispute. Both parties took the view that it was pragmatic and mutually beneficial to them for the issues to be determined sooner rather than later and both parties wished the hearing to proceed on the basis that NR had made decisions within the meaning of Part D. None of the Involved Parties raised any objections to this course.

For avoidance of doubt, I wish to make it clear that in adopting this process I do not in any way make a finding or determination that NR was correct in its view that the subject Notices of Dispute were premature and that GWR ought to have awaited the offer of the Timetable. The point was not discussed or investigated fully and it remains open for determination on another occasion if and when it is raised or becomes a live issue.

3. In its consideration of the Parties' submissions and its hearing of the Disputes, the Panel was mindful that, as provided for in ADR Rule A5, it should 'reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.

4. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 4 and as otherwise defined in this determination document:

ADR Rules mean the Access Dispute Resolution Rules and "Rule" is construed accordingly
Chapter H means Chapter H of the ADR Rules
Decision Criteria means Network Code Condition D4.6
GWML means Great Western Mainline
HS2 means the High Speed Two project
ORR means Office of Rail and Road
Part D means Part D of the Network Code
SRD means Sole Reference Document
TTP means Timetabling Panel
RoU means Restriction of Use
tph means trains per hour
WTT means Working Timetable

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 Involved Parties by the Dispute Parties.

6. On 20 June 2024 GWR served its SRD, in accordance with the dispute timetable as issued by the Secretary.

7. On 27 June 2024 NR served its SRD in accordance with the dispute timetable as issued by the Secretary.

8. DB Cargo (UK) Ltd., GB Railfreight Ltd., Heathrow Express Operating Company Ltd. and MTR Corporation (Crossrail) Ltd. declared themselves to be Involved Parties. All were represented at the hearing, whether virtually or in person.

9. On 28 June 2024 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that so far as there were any relevant issues of law, for the most part the issues to be

determined concerned matters of fact and the correct interpretation of Part D, specifically around whether any formal Part D decisions had in fact been made by NR. Insofar as any formal 'decisions' within the meaning of Part D had been made, the Parties were reminded that NR was obliged to have regard to all relevant and material facts and matters known (or which it ought to have known) to it at the time each decision was made. NR was under 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.

10. With the above in mind, GWR was asked to address - in its opening statement and generally at the hearing - whether it submitted that NR had acted in bad faith, irrationally, or capriciously. It was asked to share its opening statement in good time with NR prior to the hearing.

11. The hearing took place on 01 July 2024. The Dispute Parties made opening statements, responded to questions and issues by the Panel and/or the opposite party concerning a variety of points and were given the opportunity to make closing statements. The Involved Parties were also given the opportunity to raise points of concern.

12. Part way through the dispute process GWR wished the TTP take into account further passenger loading data, comprising updated commercial information which was not before NR at the time it made the subject decisions. I directed that this data be added to GWR's SRD as Appendix 4 and that at the hearing I would hear submissions as to its relevance and admissibility. Having heard rival arguments on the issue I decided that Appendix 4 was not relevant on this occasion (but might be relevant on a future occasion should NR review the subject) and thus it was inadmissible so far as the TTP was concerned, as it contained information that NR did not have, and could not reasonably be expected to have had, at the time it made the disputed decisions. As it was inadmissible, it had not been reviewed by me prior to the hearing.

13. In its SRD, GWR requested that its Appendices 2 and 3 be treated as commercially sensitive and that they not be put on the Committee's website. At the hearing no objection was taken to that and accordingly I make a direction to that effect.

14. Appendix B to NR's SRD comprises Passenger Demand Data supplied by GWR, Heathrow Express and MTR. This data was provided on the basis that NR would treat it as commercially sensitive. NR requested that this Appendix not be put on the Committee's website. At the hearing no objection was taken to that and accordingly I make a direction to that effect.

    I may add that Appendix B was not provided to GWR and GWR did not make any objection to that.

15. I confirm that the Panel had read all of the admissible 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 SRD, GWR requested that I determine:

a) In principle, NR's 'cap' on overall numbers of trains running during all the RoUs was "illegal" and that, consequently, NR's application of the Decision Criteria and the Objective was wrong, insofar as it related to GWR's services; and,
b) As a consequence of this, NR be directed to withdraw its decisions on capacity at 14.5tph (i.e. the Principal Decision) and reconsider the issue and thus also the RoUs issued limiting capacity to 14.5tph.

17. GWR stated it did not believe that exceptional circumstances applied and stated that no financial remedy was sought.

18. NR asked me to determine, as a point of principle, that it has the capability and entitlement under Network Code Part D to decide to limit capacity (in the case of these disputes, the number of tph) i.e. the Principal Decision, provided NR's decisions are justified by reference to the application of the Decision Criteria.

19. NR sought confirmation that it had followed the processes set out within Part D, and that in doing so it had reached a reasonable decision in terms of taking the RoUs, and a reasonable position in relation to the capacity study based on the information made available to it at the time. In the absence of any objections the Panel proceeded on the basis that the Principal Decision amounted to a decision within the meaning of Part D and thus capable of amounting to a dispute to be heard by the Panel and the subject of a determination by me.

20. NR made no comment in its SRD on whether or not it considered exceptional circumstances applied.

D Relevant provisions of the Network Code and other documents

21. The versions of the Network Code Part D and the ADR Rules dated 22 February 2024 were applicable to these dispute proceedings.

22. The provisions of Part D particularly relevant are: D3.1.2; D4.2.2; D4.6 and D5.3.1. For ease of reference these are set out in Annex A.

23. Before proceeding to look at the detailed subject matter in dispute it is helpful to record that this is the third hearing concerning a limit on capacity on the operation of two track services on Sundays when engineering access is taken to enable HS2 works to be undertaken.

    Two previous determinations are relevant:

    TTP2207

    Dated 24 May 2023 Hearing Chair: Paul Stevenson; and,

    TTP2243/2244/2245/2260

    Dated 23 August 2023 Hearing Chair: John Hewitt

24. The role of the Panel and its constitution is set out in ADR Rules H1 to H48 and I have to make a reasoned determination in accordance with ADR Rules H49 to H52. 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) available to NR at the time of formulating its conclusion. The outcome of the capacity study was that the capacity limit should be set at 14.5tph on Sundays when engineering access restricted the infrastructure to two tracks of four, and we needed to consider whether this was within the range of a reasonable decision which a commercial decision maker might make.

Again, I respectfully adopt and endorse the legal guidance on the approach set out in paragraphs 223-230 of the determination in TTP2207.

25. In summary I have to determine whether the dispute decisions were:
    a. made in bad faith, i.e. not made in good faith;
    b. irrational;
    c. capricious; or
    d. inconsistent with the contractual purpose.

26. Part D is a material part of the access contract to which GWR is a party. Interpretation of commercial contracts and similar instruments is something the courts undertake on a routine basis. Over the years the House of Lords, and now the Supreme Court, has given guidance on the approach to adopt. I do not propose to set out the full extent of the current guidance here, but I bear it in mind. In particular I have regard to the guidance given in *Sara & Hossein Asset Holdings Ltd (a company incorporated in the British Virgin Islands) v Blacks Outdoor Retails Ltd* [2023] UKSC 2 where the Supreme Court adopted a commercially balanced interpretation of a lease; rejecting the overly textual approach of the Court of Appeal in favour of reading the relevant clause in the context of the contract as a whole.

    Lord Hamblen started his speech by reciting the cornerstone of contractual interpretation, as set out by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24. Lord Hamblen said that those principles, as relevant to the subject appeal, were as follows:

    "*(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.*
    (2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.
    (3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated."

    In summary, the guidance is to place weight on both the natural meaning of words used and context in which they were used to find a commercially balanced interpretation of the relevant provision.

E Submissions by the Dispute Parties and discussion on them

27. 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.

GWR had two submissions:

"Principle
A determination is sought that Network Rail's cap on overall numbers is illegal; and that application by Network Rail of the Decision Criteria and Objective concerning the number of GWR services is wrong; and

Specific Conclusion
A determination is sought that Network Rail withdraw its decisions and be required to rework this issue in the light of discussions today at the Hearing."

It ought to be noted here that the powers available to a TTP Chair in determining an appeal any appeal made pursuant to Part D are constrained by and limited to those set out in Condition D5.3.1.

Illegality

28. In support of its first point GWR relied upon the provisions of Condition D3.1.2. That provision is set out in full in Annex A. To paraphrase GWR argued the material words were *"… Network Rail may wish to vary … the Timetable …on an ad hoc basis by … (c) removing one or more Train Slots … in order to* ***facilitate*** *a Restriction of Use …"* [emphasis added].
GWR placed great emphasis on the word 'facilitate' and argued that if a RoU could be facilitated with 15.5tph then NR had no authority to remove a Train Slot to impose a limit of 14.5tph.
At the hearing GWR did not offer any dictionary definition(s) of the expression 'facilitate' save that it was a word of limitation which imposed a constraint on NR and that the removal of a Train Slot was only permitted if it directly facilitated the RoU. It argued that NR may only remove a Train Slot if it was essential to allow the RoUs to occur in a way consistent with the requirements of the Train Planning Rules. The point was made *"There's nothing in there that says you can take a train out if you want to, it's only where it's necessary."* GWR submitted that recent history shows that a two track RoU can work and thus be 'facilitated' with 15.5tph so that it was not necessary to reduce capacity to 14.5tph to facilitate the RoU.

GWR drew attention to, and contrasted the provisions of, Condition D8.4.1 which permits NR to remove a Train Slot where, at a certain time and date, a company proposing to operate a train service does not have the necessary Access Rights.

GWR gave several responses to questions or points raised by members of the TTP. Condition D3.4.11 was raised as an example of the range of actions open to NR.

29. It was put to GWR that if its interpretation was correct, then it might be said that NR has no authority to reject a service if it can be offered compliantly, despite authority to the contrary. That authority was the appeal decision of the ORR in TTP1174. This had been cited by NR in its SRD. The relevant paragraph is 91 which reads:

"91. ORR considers that the provisions of the Network Code envisage that there will be circumstances where Network Rail may not achieve the Objective by including all requested Train Slots in the WTT, even where there are no conflicts with other proposals or the Rules (or with the applicable International Freight Capacity Notice or Exercised Firm Rights). This might include where requested Train Slots would, if accepted in the WTT, give rise to a clear

and substantial safety or performance concern. In such a situation, Network Rail would in the first instance be required to consider whether to exercise its Flexing Right and should only allocate Train Slots in the prescribed order of priority in Condition D4.2.2(d) (and ultimately reject one or more requested Train Slots) to the extent that it is unable to vary requested Train Slots in a manner which will achieve the Objective (and will lead to a WTT which is consistent with the principles in Conditions D4.2.2(a) and D4.2.2(b)).”

GWR submitted that that paragraph was inert and its response to it was:

“[…..] if you read the beginning of the sentence you read out to me, it was talking about the Conditions, and at the end you're talking about the Objective. So, that paragraph has to do with decisions applied to it. We're not there yet, we haven't talked about the Decision Criteria. We're at the stage before application of any Decision Criteria. [...] Before you get to that stage, it's where Network Rail can seek to remove trains from the timetable. There's nothing there that says look at the Decision Criteria, it just says you take the train out to facilitate a Restriction of Use. It's nothing to do with that TTP at all.”

30. NR rejected the submissions made by GWR on the interpretation of Condition D3.1.2 and its limitations on the steps available to it. NR placed reliance on the finding of the ORR in paragraph 91 of the appeal decision on TTP1174 and reminded the TTP of the binding nature of ORR appeal decisions.

F Application of the Decision Criteria

31. GWR’s second submission was that NR had not applied the Decision Criteria correctly and that the outcome of the process to limit capacity to 14.5tph was irrational.

32. The Decision Criteria document in issue is at Appendix F to NR’s SRD. It is dated 17 May 2024 and was issued to the relevant parties the day prior, 16 May 2024.

33. In essence there were only two Criteria in contention, namely Condition D4.6.2(b) and (c). For ease of reference those are (extract quoted directly from NR Appendix F):

	Criteria Considerations	**Relevance Yes or N/A**	**W’ting**	**Evidence**	**NR Opinion**
b	That the spread of services reflects demand;	Y	High	A forecast was developed up to and Includes 2026 demand. 2026 year has been chosen as this is to the midpoint of the HS2 OOC construction. Operators provided actual demand data from five Sundays in June and July 2023. This "spot check" demonstrated that	A mixed hourly allocation of capacity on the basis of 14.5 tph through the day. Capacity allocation is shown on tab 'CTP’. Where demand demonstrates the need for more than 2tph for HEx, the proposal allows for the service to increase.

				across all operators 14.5tph provided sufficient capacity. All three impacted operators were also requested to provide demand data from 10 Sundays between December 23 and February 24. The data provided demonstrates sufficient capacity to meet demand.	
c	Maintaining and improving train service performance;	Y	High	Two track performance data from winter/spring 23/24 has shown a performance drop below Regulatory targets (previous and current), for both Main Line and Relief Line blocks when compared to the average four track Sunday in summer/autumn 2023.	The performance challenges that are seen during 2 track running remain today. There is little resilience in the two track train plan to cope (or recover) from any operational and external incidents.

34. Each of these were discussed in some detail. As to demand, the TTP considered carefully the data comprised within NR SRD Appendix B. Some questions were put to GWR on its data but these were carefully phrased given the commercial sensitivity issue surrounding it. This also constrains what can be said about the detail in this determination.

    Obviously, there is a range of demand, both seated and standing, at different times of the day.

35. GWR accepted that in broad terms a provision of 14.5tph met or was reasonably close to its anticipated demand for most of the time. It was common ground that demand is not fixed and there will always be fluctuations in demand driven by a range of different external circumstances and factors.

36. As to performance, it was common ground that the subject section of track has had a very poor performance record for quite some time, such that NR has been unable to achieve Regulatory targets and that Wales and Western Region is listed on the ORR's regulatory escalator for performance.

37. Historic evidence suggests that performance is poor irrespective whether capacity provided is 14.5, 15.5 or 16.5tph. NR picked up a suggestion made at the hearing of TTP2243 et al

that it might be prudent to carry out a trial with trains at 15.5tph to test whether NR concerns were well founded. This was duly carried out and a report on it dated 26 April 2024 is at NR SRD Appendix C. Further information on performance is at Appendix D. Unfortunately, on pretty much every Sunday under that review external factors had an adverse impact on performance which renders it difficult, if not impossible, to draw clear or reliable conclusions or set baselines for an 'average' Sunday.

38. From discussions at the hearing, it appears that performance is less important to GWR than maximisation of revenue income. GWR would not be drawn on what level of performance it would consider to be acceptable. It was common ground that different operators might have different views on acceptable performance and that NR is obliged to have regard to all competing views. This would include circumstances where accommodating the aspirations of one operator may increase the risk of consequential impact elsewhere on the network. It was also common ground that historic practices and performance levels on the line of track in issue were now dated given the changes in dynamic brought about, more recently, the introduction of the Elizabeth Line service operated by MTR and HS2 engineering works. NR submitted that it is required to have regard to all three operators, which serve different markets, timings and passenger demand.

39. It was common ground that capacity of 10.5tph would lead to a significant improvement in performance, but would fail to satisfy anticipated demand to such an extent that it would have an adverse impact on the passenger operators and the rail industry generally.

40. There was a detailed discussion at the hearing about the trial study carried out, the several external factors which affected the performance and the various mitigations that GWR and other operators had carried out, which all impacted and compromised the data. NR considered this rendered it difficult to establish a clear baseline from which to work. Further, future mitigations had been agreed by some operators and the impact of them has yet to be established. NR submitted that these and other data would be considered in future reviews on capacity and demand. There was a degree of consensus that the greater the number of tph, the greater the risk of an adverse impact on performance.

41. NR conceded that both 14.5tph and 15.5tph would technically work and said:

    "What we have tried to do is balance that spread of demand and then overall performance. So, you could argue that neither of them actually works from a performance perspective and that you could look for an even lower overall quantum of services but actually when you look at the data supplied to us, using a, sort of, using and interpreting that data. That brings you to 14.5 as the balanced position, whereby we are offering enough seats for passengers and therefore that informs our decision on 14.5. That demand data doesn't lead us to conclude that there is the necessity to increase to 15.5 trains per hour."

42. GWR accepted that NR's decision on 14.5tph was nuanced but submitted it was irrational because it was not based on clear data. It said that 4 days out of 360 hardly had much relevance, it was overridden by other constraints of the Decision Criteria and the Objective and was adopted by NR because it was under the thumb from the ORR to improve performance. The same point about clear data might be said about GWR's assertion that 15.5tph is the right capacity to allow.

43. NR accepted that the data will change over time. It now had the data set out in GWR's Appendix 4 and the recent TRENO modelling. NR said it anticipated that its position on 14.5tph would remain until the end of 2025 but it would review the data, probably annually,

or sooner if there were clear new factors in play. NR also made the point that it was reliant on all operators to supply data and delays or omissions in doing so would impact its ability to carry out a thorough review.

44. Although the main focus on the Decision Criteria was demand and performance there was also some discussion on the commercial interests of GWR and other passenger operators.

45. NR made a brief concluding statement. GWR declined the invitation to do so.

    Mr Kapur for GBRf made a short statement and queried whether the capacity study under review amounted to a decision within the meaning of Part D.

    Mr Linley for MTR made a final statement. In broad terms he emphasised that performance was very important to MTR and the targets it had to achieve. He said MTR was supportive of the approach taken by NR.

G Analysis/Observations and Guidance

46. First, I propose to discuss GWR's first point that it was illegal for NR to 'cap' capacity at 14.5tph. I have set out above the guidance given by the Supreme Court on the modern approach to interpretation of commercial instruments.

47. At the hearing GWR did not offer a definition of the expression 'to facilitate' but submitted that it somehow restricted what NR could lawfully do or imposed a limitation or constraint on NR that it could only remove a Train Slot where it was necessary to do so to facilitate a RoU

48. Post-hearing I have looked up the definition of 'facilitate' in several standard dictionaries of English and the range of them include:

    "to make something easier"; "to assist in the progress of"; "to make something easier or less difficult"; "to help forward"; "to make an action or a process possible or easier"

    There are more in a similar vein.

    Part D is a comprehensive contractual document which imposes a wide range of strict obligations on both parties. In a number of provisions it stipulates quite clearly what a party 'may or may not do' or 'shall or shall not do'. Those specifics or limitations are not found in D3.1.2

    I find that the use of the expression 'to facilitate' in D3.1.2 properly construed does not impose a restriction or constraint upon NR such that on each RoU it must allow the maximum number of Train Slots possible consistent with the works proposed to be carried out and that not to do so would be in breach of the contract or in some other way unlawful or illegal.

    In my judgement, looking at Part D in the round, it affords NR a degree of latitude in the manner in which the Timetable is evolved, and where appropriate, varied. Looking at it objectively I find that if the parties had intended the limitations or constraints contended for by GWR more explicit language would have been adopted.

I am reinforced in this conclusion by the decision of ORR, at paragraph 91, in the appeal decision in TTP1174. In construing Part D the ORR has quite clearly stated that NR has a degree of discretion and that there may be circumstances where the allocation of rights or Train Slots need not follow the norm where there may be circumstances which give rise to a clear and substantial safety or performance concern. I do, of course, accept that paragraph 91 is concerned with a different issue under Part D but the findings of the ORR on the degree of contractual flexibility vested in NR are apt to apply to the interpretation of Condition D3.1.2.

49. Turning to the Decision Criteria, GWR accepted that in broad terms the data showed anticipated demand was met by a capacity of 14.5tph and I find that it cannot be said that it was irrational for NR to come to that conclusion. As to performance, all parties accepted that NR's decision was nuanced. The evidence over recent times is confused and confusing. 14.5tph is not obviously right or obviously wrong. Equally 15.5tph is not obviously right or obviously wrong. GWR asserts that the decision to select 14.5tph was irrational. Irrationality is a high hurdle to establish. It means that the decision arrived at was inconsistent with reason, or logic or was absurd. I find that GWR has not discharged the burden on it.

50. In my judgement it cannot be said that the decision was capricious or so outrageous that no reasonable decision maker could properly have arrived at it. Inevitably, NR had to do its best with the data it had at the time. It was common ground that it was a nuanced decision. It seems to me that that decision was well within the range that a reasonable decision maker could properly arrive at. Given the issues around performance and the action of ORR it was, in my view, not unreasonable that NR took a slightly more cautious approach on the impact of performance than GWR might have taken.

51. In its submissions GWR sought a determination that NR be required to reconsider its decision on capacity, decide upon 15.5tph and allocate the additional train to it so that it might operate 7.5tph of the 15.5tph. In the light of my conclusions set out above that falls away. If and when NR reviews its position on capacity it will be for NR to determine whether any increase is appropriate on the evidence as it then stands and, if so, to which operator it should be allocated. At the hearing no evidence was adduced as to the basis of allocation of 6.5tph to GWR and why if an extra train was available, it should be allocated to GWR. Whilst an additional train would generate more revenue for GWR, the same might be said of one or some of the other passenger operators.

52. NR had stated that its decision on capacity would stand until the end of 2025 and that it proposed to review the position annually, unless new clear data in the interim became available. Given that data and circumstances will change over time and given the importance of capacity to the operators, I consider that an overview ought to be undertaken at periods of not less than six months and that overview might or might not then lead to a more extensive review being carried out.

H Determination

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

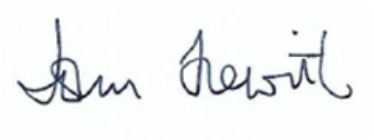
54. It was not illegal or unlawful for NR to carry out its capacity study and there was no breach of D3.1.2 in NR deciding that the capacity should be set at 14.5tph.

55. The Principal Decision was arrived at in compliance with the proper application of the Decision Criteria.

56. That the RoUs in issue in the disputed decisions, which limit capacity to 14.5tph, shall stand.

57. No application was made for costs.

58. 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
12 July 2024

Annexes

Annex A: Relevant provisions of Part D

3.1.2 From D-26 and during the relevant Timetable Period, Network Rail may wish to vary either the New Working Timetable, if it is before the Timetable Change Date, or otherwise the Working Timetable on an ad hoc basis by:

(a) adding an additional Train Slot on one or more occasions;

(b) amending the detail of one or more Train Slots;

(c) removing one or more Train Slots;

(but in each case not any Train Slot that is an International Freight Train Slot) in order to facilitate a Restriction of Use. Any

such variation is referred to as a "Network Rail Variation". The process to be followed where a Network Rail Variation is sought with more than 12 weeks notice is set out in Condition D3.4. The process to be followed where a Network Rail Variation is sought with less than 12 weeks notice is set out in Condition D3.5.

4.2.2 Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:

(a) a New Working Timetable shall conform with the Rules and the applicable International Freight Capacity Notice applicable to the corresponding Timetable Period;

(b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;

(c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right;

(d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority:

(i) first to:

(A) the Firm Rights of any Timetable Participant that will subsist during the whole of the Timetable Period and which have been Exercised; and

(B) any rights Network Rail has for Network Services included in the Rules;

(ii) second to Firm Rights of any Timetable Participant, that were in force at the Priority Date but will expire prior to or during the Timetable Period and which have been Exercised, provided that Network Rail considers (acting reasonably) that new Firm Rights, substantially the same as the expiring rights, will be in force during the Timetable Period;

(iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided Network Rail considers (acting reasonably) they will be Firm or Contingent Rights in force during the Timetable Period;

(iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided Network Rail considers (acting reasonably) they will be Firm or Contingent Rights in force during the Timetable Period;

(iv) fourth to any:

(A) rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date but before D-26 in accordance with D2.4 and D2.5.

Where more than one set of rights or expectation of rights are so notified, capacity is to be allocated in the order in which Access Proposals containing details of the rights (or expectations thereof) are submitted to Network Rail; and

(B) Strategic Capacity contained in the Strategic Capacity Statement.

4.6 The Decision Criteria

4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective").

4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(l) below ("the Considerations") in accordance with Condition D4.6.3 below:

(a) maintaining, developing and improving the capability of the Network;

(b) that the spread of services reflects demand;

(c) maintaining and improving train service performance;

(d) that journey times are as short as reasonably possible;

(e) maintaining and improving an integrated system of transport for passengers and goods;

(f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;

(g) the content of any relevant Long Term Plan and any relevant Development Timetable produced by an Event Steering Group;

(h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;

(i) mitigating the effect on the environment;

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

(k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Capacity to which the Strategic Train Slot relates; and

(l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.

4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and

Network Rail. Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.

5.3 Powers of dispute resolution bodies

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

(a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;

(b) it may direct that a challenged decision of Network Rail shall stand;

(c) it may substitute an alternative decision in place of a challenged decision of Network Rail;

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