
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP773

(following a hearing held at 1 Eversholt Street, London on 1 April 2015)

The Panel:

Suzanne Lloyd Holt Hearing Chair

Robert Holder elected representative for Franchised Passenger Class, Band 1
Peter Warhurst elected representative for Franchised Passenger Class, Band 1
Nick Gibbons elected representative for Non-Passenger Class, Band 1
Shona Elkin appointed representative of Network Rail

The Dispute Parties:

For XC Trains Ltd ("XC")

Tamzin Cloke Track access & Possessions Strategy Manager
Matthew Pocock Head of Train Planning & Resources
Richard Thackray Senior Traincrew Diagramming Productivity Manager

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Matthew Rice Operational Planning Manager
Lee Tuttle Project Manager
Peter Tirrell Customer Manager

In attendance:

Tony Skilton Committee Secretary



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1 Introduction, jurisdiction, procedural history of this dispute and documents submitted

- 1.1 On 23 January 2015, NR notified XC and other operators of its decision to reject operation of XC's trains between Birmingham New Street and Manchester Piccadilly on the Saturday and Monday of Week 6 in 2015/16, these being Saturday 2 May and Bank Holiday Monday 4 May 2015. XC's planned train service - for which an Access Proposal had been made had already been reduced (due to engineering works) to one train per hour each day between these two cities but the rejection nevertheless affected 66 trains. This notification from NR was at TW-14.
- 1.2 Considering NR to have failed to comply with the procedure set out in Network Code Condition D3.4, XC issued a Notice of Dispute on 27 January 2015.
- 1.3 By TW-12, NR had found capacity to enable reinstatement of all 66 of XC's trains between Birmingham New Street and Manchester Piccadilly. Whilst this satisfied XC's train service requirement, XC nevertheless wished to continue to have the notified dispute heard by a Timetabling Panel in order to obtain clarification regarding the process for Network Rail Variations where the decision is to be confirmed at TW-12 (per Condition D3.4.15).
- 1.4 The abbreviations used in this determination are as set out in the list of Parties above and otherwise as specified in the text below.
- 1.5 I am satisfied that the matters in dispute should properly be heard by a Timetabling Panel convened in accordance with Chapter H of the Access Disputes Resolution Rules (the "Rules") to hear an appeal under the terms of Network Code Condition D5, the designated appellate body appropriately being the Office of Rail Regulation.
- 1.6 In its consideration of the parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.7 Documents submitted to the Panel
 - 1.7.1 As the appointed Hearing Chair, and aware from the Notice of Dispute that the Dispute Parties were seeking legal clarification of the requirements of the Network Code rather than an outcome which would determine the timetable for Week 6, I requested as permitted by Rule H21, that XC and NR provide sole reference documents setting out their respective cases.
 - 1.7.2 The sole reference document from XC was served on 3 March 2015. Having read this, in accordance with Rule A10 on 12 March I requested, for completeness, that XC provide various documents referenced in its submission and I also indicated that NR should particularly address certain of the items within its sole reference document. XC responded on 16 March 2015. The sole reference document from NR in response was received on 17 March 2015.
 - 1.7.3 Rule H18(c) requires that the Hearing Chair review the statements of case to identify and itemise in written form all relevant issues of law; the only issue of law which I identified was that relating to the interpretation of documents and this was advised to the Panel members and to the Dispute Parties on 24 March 2015.
- 1.8 The hearing took place on 1 April 2015. The Dispute Parties gave an agreed joint opening statement, were then questioned by the Panel and myself, finally being given opportunity to make closing remarks.
- 1.9 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to me and the Panel over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarised in the course of this determination.

2 Relevant provisions of the Network Code

- 2.1 The provisions of the Network Code in issue are, principally, D3.4 and in particular D3.4.10. The provisions of D2.5 are also relevant.

The relevant extracts are set out at Annex 1 to this Determination.

3 Submissions made and outcomes sought by Dispute Parties

- 3.1 XC's principal submissions in its sole reference document were as follows:-

3.1.1 XC's submission was that it had some concerns about the quality and detail level of the studies that were being produced by Network Rail in the Restriction of Use context. XC attempted to address those concerns by sending to Network Rail on 18 June 2014, following a request, a list of what it considered to be sufficient information to enable a Timetable Participant to reach an informed decision for the purposes of Condition D3.4.8. Evidence was produced to show that document was resent by XC to Network Rail on 15 December 2014. The information there set out by XC closely resembled the elements detailed in Condition D2.5.1 as being required of a Timetable Participant when submitting an Access Proposal to Network Rail.

3.1.2 It was XC's case that Network Rail had failed to supply what XC considered was sufficient information under Condition D3.4.10(b) to enable XC to reach an informed decision for the purposes of D3.4.8. As appears from paragraph 4.6 of XC's sole reference document, XC took Week 6 TTY 2015 as an example of the issues which were causing them concern. XC submitted, at their paragraph 4.7, that the example provided served to highlight that Network Rail had not paid attention to the Decision Criteria when they allocated WCML capacity at TW-14 and failed to notify XC either of the reduced capacity and proposed allocation of it to TOC service group, which XC assert is required pursuant to the provisions of D3.4.10(b), or the reason for rejecting services (D3.4.11).

3.1.3 XC asserted, as appears from paragraph 5.6 of their sole reference document, that their ability to agree a single piece of engineering work rested upon an understanding, to be achieved through D3.4.10, of how it would impact on their business, both in terms of resources and customers. XC went on to suggest that it followed that its ability to agree multiple concurrent pieces of engineering work (upon which Network Rail's delivery plan must rely given that XC crosses eight Routes), relied on the same level of information being supplied per possession.

3.1.4 XC submitted further – see their paragraph 5.9 – that the failure by Network Rail to apply the Decision Criteria in advance of TW-26, had led to the TW-18 to TW-12 process being used to determine and allocate available capacity, including requirement of trains to divert, extension of journey times, re-routing and missed station calls. The specific examples on which XC relied included the following:

Decision Criterion (a) "that the spread of services reflect demand". XC's complaint was that in Week 6, TTY 2015, when it became apparent that capacity was constrained, Network Rail's first action was to reject the XC Birmingham and Manchester service group in its entirety, leaving no direct train service between Birmingham and Manchester for two days of a Bank Holiday weekend.

Decision Criterion (b) "that journey times are as short as reasonably possible". In the case of Week 6, TTY 2015, XC submitted that passengers would have or could face considerably extended journey times and additional interchange which act as an inhibition to travel. In Week 6, on the Saturday, the approximately 8,000 passengers which XC carried on stages of the route for the equivalent day in 2014, would have had to catch a train to either Tamworth or Derby, and change again at Stoke for another operator's service to Manchester and vice versa.

3.1.5 In concluding its written reference, XC sought a determination under Condition D5.3.1(a) that, as a matter of principle, Network Rail should supply information by TW-26 to meet the requirement of Conditions D3.4.8 ("the Network Rail Variations to be made") and D3.4.10(b) ("the aspects of the Access Proposal which need to be revised and its reasons for this"). Further, XC asked that the requested guidance be placed on the website of the Access Disputes Committee so that all parties can be clear as to what is required.

3.2 Network Rail's principal submissions were as follows:

3.2.1 Network Rail accepted, at paragraph 3.4 of their sole reference document, the principal points made by XC, save what was said at paragraph 4.3 of the XC sole submission, namely what XC considered was sufficient information to reach an informed decision for the purposes of Condition D3.4.8. As appears from paragraph 3.1 above, XC's view of what constituted sufficient information had been set out in their email – XC to Network Rail dated 18 June 2014, resent by XC to Network Rail on 15 December 2014.

3.2.2 It was Network Rail's submission, as set out in their paragraph 3.5, that the requirements for compliance with Condition D3.4.10(b), as proposed by XC, were overly prescriptive.

3.2.3 Paragraph 4.13 of Network Rail's submission document set out its view that the following principal items need to be prescribed to describe the impact on a Timetable Participant's business when any Restriction of Use is proposed:

- (a) What is the overall hourly/daily quantum of capacity available to each Timetable Participant by Service Group?;
- (b) What is the impact on journey times between key Timetable Participant locations?; and
- (c) What is the impact on a Timetable Participant's ability to discharge its commercial and contractual obligations (e.g. freight end-user contracts, DfT Service Level Commitments and Network Code compliance).

Network Rail, at their paragraph 4.14, expressed the belief that the detail proposed in their paragraph 4.13 should all be developed with due consideration to the Decision Criteria outlined in Network Code Condition D4.6.

3.2.4 In concluding its written submission, Network Rail stated that it sought the following determination:

3.2.4.1 Under Condition D5.3.1(a), that the outputs proposed by Network Rail in paragraph 4.13 of its submission document (set out in 3.2.3 above) were sufficient for Network Rail adequately to deliver Condition D3.4.10.

3.2.4.2 Network Rail also asked that the Panel review the Access Impact Matrix document provided as Appendix B to its written submission and endorse it as best practice to be followed by Network Rail when Restrictions of Use are requested and additional capacity work is required.

3.2.4.3 Network Rail further asked the Panel to provide guidance as to what Timetable Participant information should be made available to Network Rail on a periodic basis to support any proposed Restriction of Use.

3.3 At the hearing, the parties presented an agreed joint opening statement which reflected the result of their having worked together to seek some way of resolving the issues between them. The Panel noted this approach with approval.

In their agreed joint opening statement, the parties clarified that they were seeking the following:

- 3.3.1 That the Panel agree that the Access Impact Matrix would be an appropriate interpretation of the level of information required by operators under Condition D3.4.10(b) and, subject to agreement on severity level between parties, Network Rail should supply the information within the timescales laid out in the Matrix;
- 3.3.2 If the Panel cannot agree to the request in 3.3.1, then it was asked to provide a definition of what constitutes sufficient information under Condition D3.4.10(b); and
- 3.3.3 That the Panel determine that parties to the Network Code should be compliant with 3.3.1 by the publication of Version 4 of the Engineering Access Statement for 2016, which is due to be issued on Friday 10 July 2015.

4 Oral exchanges at the Hearing

- 4.1 At this juncture, reference may helpfully be made to the Record of evidence given at the Hearing, attached at Annexure 2. Panel members and I were most encouraged to note that XC and Network Rail had committed significant time and energy over recent weeks towards the production of the Access Impact Matrix provided at Annex B to Network Rail's sole reference statement. That said, Panel members and I took the opportunity to stress to the parties that Network Code Condition D3.4 made it clear that the Decision Criteria were to be followed through the whole Restrictions of Use process such that, if a version of the draft Matrix were to be adopted, those Decision Criteria would need to be referred to in each of the identified areas of severity set out in the proposed Matrix.
- 4.2 Panel members and I also made it clear we considered that, in any implementation of the sort of Matrix proposed, Network Rail should provide detailed Traffic Remarks by the Draft Period Possession Plan and by no later than the Confirmed Period Possession Plan.
- 4.3 As to the overall usefulness of the Access Impact Matrix document developed by the parties, Panel members and I indicated that it constituted a good starting point when dealing with the D3.4 process and should allow for sensible dialogue and consultation as between Network Rail and XC and, subject to what is said at 5.6 below, with other operators.

5 Analysis and consideration of issues and submissions

- 5.1 The nub of the dispute, as appears clearly from the initial sole submissions of both parties, and indeed from the agreed joint statement produced at the Hearing, is what Network Rail needs to do to ensure its compliance with the provisions of D3.4.10(b). So as to analyse what is so required on the part of Network Rail, it is necessary to consider the following provisions:

D2.5 – Content of an Access Proposal;

D3.4 – the procedure whereby Network Rail is to be entitled to make a Variation to the Working Timetable and take a Restriction or Restrictions of Use and the timeframe there set out, in particular the timeframe for Network Rail proposals – D3.4.7, necessary consultation – D3.4.8 and the requirement for submission by a Timetable Participant of a revised Access Proposal – D3.4.9 and D3.4.10(c);

D4.6 and D3.4.4(b) – application of the Decision Criteria;

D8.6 – the obligation to consult.

I deal with each of those provisions in turn.

- 5.2 D2.5 – Content of an Access Proposal

As I have indicated, it seems to me necessary, so as to direct what information Network Rail needs to provide to a Timetable Participant under D3.4.10(b), that is, "Network Rail shall specify the aspects of the Access Proposal which need to be revised and its reason for this", to look at the required contents of an Access Proposal. D2.5.1 makes clear that an Access Proposal "shall include as a minimum in respect of each Train Slot, save to the extent that Network Rail expressly agrees in writing to the contrary..." some 11 items of information. Condition D2.5 is reproduced in full in Annex 1 to this Determination so I do not repeat it in full here. Suffice to say that those 11 items of information include timings of train movements (2.5.1(b)), rolling stock to be used (2.5.1(e)), required train connections (2.5.1(f)) and required platform arrangements (2.5.1(i)). Those elements are cited by way of example, simply to underline the extent of the detail required from a Timetable Participant when preparing and submitting an Access Proposal. It follows, therefore, that where, pursuant to the provisions of Condition D3.4.10 "Network Rail requires a revised Access Proposal...", Network Rail must have in mind and must be specific about those elements of the Access Proposal which need to be revised and why those revisions are considered to be necessary. To take an example from XC's sole reference document in relation to Week 6 TTY 2015 (XC's paragraph 4.6), there is the suggestion that part of the difficulty which Network Rail encountered and which led it to reject XC's revised Access Proposal (their TW-18 bid) was that there was insufficient capacity at Birmingham New Street.

5.3 D3.4 – Restriction of Use procedure

5.3.1 These provisions deal with the planning of Network Rail Restrictions of Use such that resultant timetables are published "at least 12 weeks prior to the start of each Timetable Week". Condition D3.4 sets out a clear series of steps and a timeframe for those steps, designed to achieve a notification by Network Rail to all Timetable Participants of its decision in respect of Network Rail Variations by not later than TW-14. In summary, the steps and timeframe are as follows:

- (a) Network Rail to provide to each Timetable Participant, by TW-30, its proposals for Restrictions of Use in respect of the corresponding Timetable Week. Network Rail may amend/supplement those proposals and notify them to Timetable Participants prior to TW-26.
- (b) After TW-30 but by TW-26, Network Rail to consult with each affected Timetable Participant. Network Rail to seek to agree all Network Rail Variations to be made.
- (c) Network Rail has the ability to require a Timetable Participant to submit a revised Access Proposal in respect of any Train Slot. That requirement has to be notified to the affected Timetable Participant no later than TW-22.
- (d) When requiring a revised Access Proposal, Network Rail has to specify the aspects of the Access Proposal which need to be revised and explain why.
- (e) The revised Access Proposal required has to be submitted to Network Rail by the Timetable Participant no later than TW-18.

5.3.2 The crucial step in the Restriction of Use procedure outlined above, and that which the parties contend has been creating the difficulties which have led to this Dispute, is that set out at D3.4.10(b) namely that "Network Rail shall specify the aspects of the Access Proposal which need to be revised and its reasons for this".

5.3.3 It should be borne in mind, at this point, that the principles of interpretation of documents, as set out by the courts of England and Wales (see in particular the judgment of Lord Hoffman in the leading case of *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1WLR 896) tell us that if the ordinary meaning of the words make sense in relation to the rest of the document, the Court will give effect to that language. That judgment also tells us that a document must be

interpreted objectively. That approach is in accordance with Network Code Condition A1.1(e) which requires that "Words and expressions defined in the Interpretation Act 1978 shall have the same meaning in this code and the rules of interpretation contained in that Act shall apply to the interpretation of this code". In the case of D3.4.10(b) the words are plain on the face of the document and they make sense as a requirement imposed on Network Rail but, to fulfill that requirement, Network Rail and the Timetable Participants with whom it is working do, as this Dispute makes clear, need some guidance on the day to day working of the provision. That guidance can, as it seems to me, be derived from the consideration and analysis of the Part D provisions to which I refer specifically in this section 5 of my determination and, in particular, from Condition D2.5 – Content of an Access Proposal and Condition D4.6 – The Decision Criteria.

5.4 D4.6 and D3.4.4(b) – application of the Decision Criteria

5.4.1 Given their importance, I have included these provisions of the Network Code at Annexure 1 to this determination. I do not therefore recite them in full here but underline that the D3.4.4(b) provisions mean that the Restrictions of Use procedure as set out in Condition D3.4.3 "must require that all decisions of Network Rail be made by application of the Decision Criteria in accordance with Condition D4.6". So, when following the procedure and timeframe set out at Condition D3.4, Network Rail must apply the Decision Criteria. That, in turn, means that when Network Rail requires a revised Access Proposal, and therefore must specify the aspects of the Access Proposal which need to be revised and its reasons for this, Network Rail needs, in so requiring and specifying, to apply such Decision Criteria considerations, for example, that the spread of services reflects demand (D4.6.2(b)), that journey times are as short as reasonably possible (4.6.2(d)), the commercial interests of any Timetable Participant of which Network Rail is aware (4.6.2(f)) are considered, and enabling operators of trains to utilise their assets efficiently (4.6.2(j)), as may be appropriate in any particular case.

5.4.2 Since it is plain that the various provisions of Part D of the Network Code are to be read together, and indeed, Condition D3.4.4(b) specifically so requires in relation to the application of the Decision Criteria when operating the Restrictions of Use procedure at Condition D3.4 and since, further, Conditions D3.4.9 and D3.4.10 refer to a revised Access Proposal, the minimum requirements of an Access Proposal as provided at Condition D2.5 need to be borne in mind when consideration is given to what elements need to be revised. It is clear, in my view, that the elements of an Access Proposal as listed at D2.5.1(a) to (k) plus the Decision Criteria listed at D4.6.2(a) to (k) read, as appropriate, to the particular Restriction of Use or Uses envisaged, are to be taken into account and applied. I return to those provisions when indicating the Panel's view of those aspects which Network Rail "shall specify" so as to ensure compliance with its obligations pursuant to Condition D3.4.10(b).

5.5 D3.4.4(a) – Requirement for consultation and D8.6 – Provision to consultee of sufficient information

D3.4.4 provides that:

"the procedure referred to in Condition D3.4.3:

- (a) must require that no amendment to the Rules may be made unless Network Rail has consulted with all Timetable Participants likely to be affected by the amendment;"

D8.6.1 provides that:

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

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

As appears from Condition D3.4 set out at Annexure 1 to this Determination, "Network Rail is to provide to each Timetable Participant, by TW-30, its proposals for Restrictions of Use in respect of the corresponding Timetable Week. All such proposals may be amended or supplemented by Network Rail at any time prior to TW-26 and such amends or supplements should also be provided to Timetable Participants prior to TW-26." Condition D3.4.8 goes on to provide that "after TW-30 but by TW-26, Network Rail **shall consult** *[my emphasis]* with each Timetable Participant affected (directly or indirectly) by the Restrictions of Use proposed pursuant to Condition D3.4.7 and shall seek to agree all Network Rail Variations to be made". Taking those provisions together with the provisions of D3.4.4(a) and D8.6 set out above, it is plain that Network Rail, to enable compliance with its consultation obligations, needs to provide sufficient information to Timetable Participants to enable them to engage constructively in the consultation process.

5.6 Having analysed what seem to me to be the relevant provisions of the Network Code and their application to the issues in this dispute, it is necessary to consider in some detail the outcomes sought by the parties (as set out at paragraph 3.3 of this Determination) and to consider what I may properly direct.

5.6.1 I take each of those requested outcomes in turn:

3.3.1 "that the Panel agree that the Access Impact Matrix would be an appropriate interpretation of the level of information required by operators under Condition D3.4.10(b) and, subject to agreement on severity levels between parties, Network Rail should supply the information within the timescales laid out in the matrix".

Panel members and I had some concerns about this requested outcome. Whilst, subject always to the application by Network Rail of the Decision Criteria and the timely provision of information to and consultation with XC, it was an approach we felt we could support, it was clear that its working as between Network Rail and XC alone, could well impact adversely on other operators. Further, it was clear that any adoption of the Matrix by all operators across the industry would require proper consultation via the Timetable Planning Rules change procedure. In any event, it was entirely possible that, as between Network Rail and another operator or operators, additional elements might need to be included in the draft Matrix. For those reasons, I concluded it would not be appropriate simply to direct, as requested, that working to the draft Matrix would be an appropriate interpretation of the level of information required to be provided by Network Rail under Condition D3.4.10(b).

5.6.2 In the alternative, the parties sought the following outcome:

3.3.2 – "if the Panel cannot agree to the request in 3.3.1, then it was asked to provide a definition of what constitutes sufficient information under Condition D3.4.10(b)".

It does not seem to me appropriate to provide a definition as such. To attempt to do so, would be to ignore what Network Rail and XC have effectively acknowledged by working up together the draft Access Impact Matrix, namely that general agreed guidelines are appropriate and that the level of severity of a Restriction of Use will indicate the level of information to be provided to operators by Network Rail. Indeed, as I have indicated in paragraph 5.3.3 above, what is really needed is not a re-definition but a clarification.

Accordingly, what I consider I am able to direct, having consulted with Panel Members and taking into account the relevant provisions of the Network Code which I have referred to at paragraph 5.1 above, is to indicate in general terms the elements

necessary to achieve compliance with the provisions of Condition D3.4.10(b), in other words, to attempt to put some flesh on the bones of what those provisions require. Those essential elements should include:

- (a) available capacity through the restricted area and over alternative routes;
- (b) proposed allocation to individual operators normally operating through the restricted area or on diversionary routes;
- (c) impact of (a) and (b) on journey times, rolling stock required (for, e.g. performance or passenger capacity), service groups, demand for services catered for where possible and, in the case of a multi-Route operator, impact on other services across the Network;
- (d) impact on the commercial and contractual obligations of a Timetable Participant.

I should stress that the elements which I have listed are indicative and not prescriptive. The approach of Network Rail must remain one of taking into account the provisions of, in particular, Conditions D2.5 and D4.6.

5.6.3 The parties also sought, as an additional outcome:

3.3.3 "that the Panel determine that parties to the Network Code should be compliant with 3.3.1 by the publication of Version 4 of the Engineering Access Statement for 2016, which is due to be issued on Friday 10 July 2015."

Again, Panel members and I were clear that we should not, at this stage, and in advance of any proper consultation, seek to require that other parties to the Network Code, that is, parties other than XC, should follow the Access Impact Matrix in their dealings with Network Rail in respect of Restrictions of Use. That said, Panel members and I agreed we could certainly commend the draft Matrix (amended as suggested in paragraph 4.2 above) as a constructive approach. I further took the view that it was open to me to direct, and I will so direct in my determination, that Network Rail should issue the draft Access Impact Matrix (amended to show need for consideration of Decision Criteria throughout, and to replace CPPP with DPPP) as a draft for consultation, explaining the reasons for that consultation, giving time for comment, (always as envisaged under Condition 8.6) with a view to incorporating the Matrix, as may be suitably amended following such consultation, into the Timetable Planning Rules at the first opportunity.

5.7 No application for Costs was made. It seems unlikely that Costs as defined were incurred by either party. The power to award Costs in a Timetabling Dispute is limited to the circumstances set out in Rule H60 and I make no award.

6 Determination

6.1 Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues,

I determine that the elements of information which Network Rail should provide to a Timetable Participant in order to achieve compliance with Network Code Condition D3.4.10(b) are:

- (a) available capacity through the restricted area and over alternative routes;
- (b) proposed allocation to individual operators normally operating through the restricted area or on diversionary routes;

- (c) impact of (a) and (b) on journey times, rolling stock required (for, e.g. performance or passenger capacity), service groups, demand for services catered for where possible and, in the case of a multi-Route operator, impact on other services across the Network;
- (d) impact on the commercial and contractual obligations of a Timetable Participant.

These elements are indicative and not prescriptive. The approach of Network Rail must remain one of taking into account the provisions of, in particular, Conditions D2.5 and D4.6.

6.2 At the hearing, Network Rail gave an undertaking that, interim to any change in the Timetable Planning Rules to incorporate the proposed Access Impact Matrix, it would use the proposed Matrix for all relevant business relating to XC. That undertaking being expressed by XC as fully acceptable -

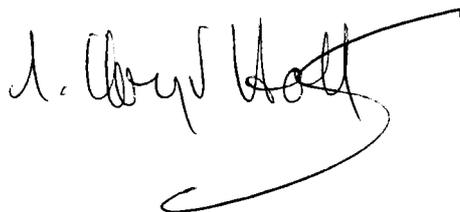
I hereby direct (by consent) that until introduction of any change in the Timetable Planning Rules to incorporate an Access Impact Matrix, Network Rail shall apply the version of the Access Impact Matrix submitted to the Panel (as may be amended) when proposing any Restrictions of Use which will affect services operated by XC (always having regard to the Decision Criteria as they may affect XC and any other operator).

I further direct that Network Rail shall issue to the industry that draft Access Impact Statement, (amended to show need for consideration throughout of the Decision Criteria and to replace CPPP with DPPP) as a draft for consultation, setting out the reasons for that consultation, giving time for comments as envisaged under Condition D8.6, with a view to incorporating the Matrix, as may be suitably developed and amended following such consultation, into the Timetable Planning Rules at the earliest opportunity.

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.

Suzanne Lloyd Holt
Hearing Chair

16th April 2015



Annex 1 to Timetabling Panel determination of reference TTP773

Extracts from PART D of the Network Code (29 June 2012)

2.5 Content of an Access Proposal

- 2.5.1 Each Access Proposal shall include as a minimum in respect of each Train Slot, save to the extent that Network Rail expressly agrees in writing to the contrary:
- (a) the dates on which Train Slots are intended to be used;
 - (b) the start and end points of the train movement;
 - (c) the intermediate calling points;
 - (d) the times of arrival and departure from any point specified under paragraphs (b) and (c) above;
 - (e) the railway vehicles or Timing Load to be used;
 - (f) any required train connections with other railway passenger services;
 - (g) the proposed route;
 - (h) any proposed Ancillary Movements;
 - (i) any required platform arrangements at the start, end and all intermediate calling points;
 - (j) any relevant commercial and service codes; and
 - (k) the proposed maximum train speed and length and, in relation to a freight train, the proposed maximum train weight.

Annex 1 (Continued)

3.4 Network Variations with a least 12 Weeks' Notice

- 3.4.1 The procedures described in this Condition D3.4 are designed to facilitate the planning of Network Rail Restrictions of Use at least 12 weeks prior to the start of each Timetable Week.
- 3.4.2 Network Rail shall be entitled to make a variation to the Working Timetable provided that:
- (a) the Network Rail Variation is made only for the purpose of taking Restrictions of Use which are consistent with the Rules, as published following the process set out in Condition D2.2 or as amended in accordance with the procedure established pursuant to Condition D3.4.3; and
 - (b) Network Rail complies with the procedure set out in this Condition D3.4.
- 3.4.3 Network Rail shall include in the Rules a procedure to enable amendment of the Rules, following their finalisation in accordance with Condition D2.2. This amending power is without prejudice to the amending power referred to in Condition D2.2.7, and is to be utilised in order to facilitate changes which Network Rail considers necessary to take Restrictions of Use.
- 3.4.4 The procedure referred to in Condition D3.4.3:
- (a) must require that no amendment to the Rules may be made unless Network Rail has consulted with all Timetable Participants likely to be affected by the amendment;
 - (b) must require that all decisions of Network Rail be made by application of the Decision Criteria in accordance with Condition D4.6;
 - (c) may authorise changes to the procedure.
- 3.4.5 All amendments to the Rules made pursuant to the procedure referred to in Condition D3.4.3 shall be subject to the appeal procedures in Condition D5 as if they were made pursuant to a procedure set out in this Part D.
- 3.4.6 Notwithstanding anything stated elsewhere in this Part D, where any amendment is made to the procedure referred to in Condition D3.4.3 by use of that procedure, the amendment shall not take effect until the determination of any appeal against the same.
- 3.4.7 Where Network Rail proposes to make any variation to the Working Timetable consequent upon an amendment to the Rules made in accordance with this Condition D3.4, Network Rail shall provide to each Timetable Participant, by TW-30, its proposals for Restrictions of Use in respect of the corresponding Timetable Week. All such proposals may be amended or supplemented by Network Rail at any time prior to TW-26 and such amendments or supplements should also be provided to Timetable Participants prior to TW-26.
- 3.4.8 After TW-30 but by TW-26, Network Rail shall consult with each Timetable Participant affected (directly or indirectly) by the Restrictions of Use proposed pursuant to Condition D3.4.7 and shall seek to agree all Network Rail Variations to be made.

- 3.4.9 To facilitate the planning of any Network Rail Variation, Network Rail may require that any Timetable Participant shall submit a revised Access Proposal in respect of any Train Slot.
- 3.4.10 Where Network Rail requires a revised Access Proposal:
- (a) the requirement must be notified to the affected Timetable Participant no later than TW-22;
 - (b) Network Rail shall specify the aspects of the Access Proposal which need to be revised and its reasons for this;
 - (c) Network Rail shall specify a reasonable period in which the revised Access Proposal must be provided, and in any event the revised Access Proposal shall be submitted no later than TW-18.
- 3.4.11 Network Rail may modify, accept or reject a revised Access Proposal and where it modifies or rejects any revised Access Proposal, it must provide written reasons for its decision.
- 3.4.12 Where a revised Access Proposal has not been submitted by a Timetable Participant as required by Network Rail, Network Rail shall be entitled to make a Network Rail Variation of any Train Slot in respect of which the revised Access Proposal was required and no appeal may be made in respect of Network Rail's decision.
- 3.4.13 Not later than TW-14, Network Rail shall notify all Timetable Participants of its decision in respect of Network Rail Variations to be made pursuant to the procedure in this Condition D3.4.
- 3.4.14 Not later than TW-13, any Timetable Participant affected by Network Rail's decision notified pursuant to Condition D3.4.13 shall inform Network Rail whether it accepts or disputes that decision.
- 3.4.15 At TW-12, Network Rail shall record and provide to all Timetable Participants, in accordance with Condition D3.7.1, the Network Rail Variations to be made pursuant to this Condition D3.4.
- 3.4.16 Subject as provided in Condition D3.4.12, any Timetable Participant which is dissatisfied with any final decision of Network Rail in respect of a Network Rail Variation may appeal against it in accordance with Condition D5.

Annex 1 (Continued)

4.6 The Decision Criteria

- 4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective").
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the "Considerations") in accordance with Condition D4.6.3 below:
- (a) maintaining, developing and improving the capability of the Network;
 - (b) that the spread of services reflects demand;
 - (c) maintaining and improving train service performance;
 - (d) that journey times are as short as reasonably possible;
 - (e) maintaining and improving an integrated system of transport for passengers and goods;
 - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
 - (g) seeking consistency with any relevant Route Utilisation Strategy;
 - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
 - (i) mitigating the effect on the environment;
 - (j) enabling operators of trains to utilise their assets efficiently; and
 - (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates.
- 4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in the light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.
- 4.6.4 The Objective and the Considerations together form the Decision Criteria.

Annex 1 (Continued)

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 Regulation (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.

Annex 2 to Timetabling Panel determination of reference TTP773

Record of evidence given during the hearing of dispute TTP773 on 1 April 2015

Note: This Record is not designed to be a verbatim account of the proceedings but is intended to be a note of the evidence given to the hearing. It has been compiled from notes taken by the Committee Secretary at the hearing and has been approved by the Hearing Chair and Panel Members as being substantially accurate to the best of their recollection.

Joint opening statement delivered by XC:

The Engineering Access Statement for 2014, and subsequently the Engineering Access Statement for 2015, have seen record numbers of dispute referrals to the Access Disputes Committee.

Of the 130 references made by XC, and by XC on behalf of Grand Central Railway, in the 18 months leading up to February 2015 102 of them concerned what are commonly referred to as 'capacity studies'.

In each instance XC believed, under Condition D3.4.10(b), that there was not sufficient understanding of the impact of the engineering work on the train plan - and subsequently XC's business and ability to fulfil its contracts - to be able to agree the possession or possessions in question.

This is a nationwide, multi-operator issue. XC has consistently tried to work with Network Rail but it became clear that a change of approach was required when XC received the Short Term Planning offer for Week 6 of 2015 at "TW-14" with 66 trains rejected, leaving no direct Manchester to Birmingham services for two days of a Bank Holiday weekend.

Following the escalation of this dispute reference to a Panel hearing, Network Rail and XC have worked together to find a resolution. We have developed a matrix as a guideline for assessing when further information about the impact of engineering work on the timetable is required and what it should contain in order to satisfy Condition D3.4.10(b).

We are jointly asking Panel to do the following:

- (a) Agree with us that the matrix would be an appropriate interpretation of the level of information required by operators under Condition D3.4.10(b) and, subject to agreement on severity level between parties, that Network Rail should supply the information within the timescales laid out in the matrix;
- (b) If the Panel cannot agree (a), then provide a definition of what constitutes sufficient information under D3.4.10(b); and
- (c) Determine that parties to the Network Code should be compliant with (a) by the publication of the Engineering Access Statement for EAS 2016 Version 4 - which is Friday 10 July 2015.

XC and Network Rail agree the following:

- (a) Network Rail has not consistently discharged its obligations under the Network Code during the process for the Engineering Access Statement for 2015;
- (b) This situation cannot continue any longer, both because Network Rail is in breach of the Code and is placing too many of the access planning decisions into the hands of the Short Term Planning teams and this potentially adds increased cost and poor performance into the production of the plan.

(c) We believe that the matrix is an appropriate way of satisfying Condition D3.4.10(b); and
We would prefer a Panel to ratify this formally and append it to the Directory of Precedents (Network Code) on the Access Disputes Committee website.

The following is our sole point of disagreement on this topic:

XC would like to make clear that it believes its "T-12" record to be largely a reflection of the hard work of the industry's planners between "TW-14" and "TW-12", in particular its excellent Short Term Planning Manager, as well as an indication that XC is often forced to accept sub-optimal train plans that it would never negotiate in what it regards as the normal course of events. It remains XC's contention that the Network Code process is being followed inconsistently by Network Rail and that Network Rail's subsequent access agreement process is inadequate, with a lack of sufficient information being provided to operators within an appropriate timeframe.

For their part, Network Rail recognise the effort that goes into the "T-12" publication from all parties, including the XC Short Term Planning Manager, and hope that this level of consistency continues indefinitely.

In conclusion, XC and Network Rail return the Panel's attention to the following requirements:-

- (a) Agree with us that the matrix would be an appropriate interpretation of the level of information required by operators under Condition D3.4.10(b);
- (b) If the Panel cannot agree (a), then provide a definition of what constitutes sufficient information under D3.4.10(b); and
- (c) Determine that parties to the Network Code should be compliant with (a) by the publication of the Engineering Access Statement for EAS 2016 Version 4 - which is Friday 10 July 2015.

We note that in making a joint opening statement it may seem that we have few areas of disagreement remaining. It is both parties' belief that, rather than withdraw the dispute, our solution is best captured formally as a precedent of Access Disputes Committee to put on record the agreed definition of Condition D3.4.10(b) and the process by which it can be satisfied.

(NR) We agree with the joint statement and we have nothing to add.

Chair We have been very encouraged by your joint approach.

We have had a preliminary look at the Access Impact Matrix provided as Annex B to NR's Sole Reference Statement and would comment that Network Code Condition D3.4 makes it clear that the Decision Criteria are to be followed throughout the whole process so if we decide upon you making any textual amendments to the Matrix, we would look for the Decision Criteria to be mentioned in each of the identified areas of severity.

We also consider that detailed traffic requirements should ideally be issued before the CPPP stage and preferably by the DPPP stage. NR needs to have gone through the possible traffic options by this stage if the engineering work is to be carried out and the train planning will need to be done anyway.

Q1 Is the Matrix something you would be willing to sign up to between you as a way of going forward?

A1 (XC) Yes

(NR) Yes, as a tool for Access Planners to use when considering engineering access affecting XC, but we recognise that it would need to be put to the other operators to get wider application. A lot of work has gone into developing this Matrix between us over the past 6 weeks and it would be of real benefit when dealing with other operators.

Panel It is certainly wider than XC and NR and other operators would want to take a view. Other points could be included in the Matrix, such as recognising necessary terminal time for freight trains when engineering work affects services.

Q2 To what extent do you see this Matrix as an indicative way of working or do you see it as a box-ticking exercise?

A2 (XC) It provides a framework for how different types of engineering access need to be handled. The issue has been bubbling around for far too long and the Matrix gives NR a framework to manage engineering work proposals in language that everyone understands.

(NR) We agree; NR goes to operators for Restrictions of Use and past experience guides the approach to be taken. We like the idea of using the Matrix as a framework: it provides principles which will hopefully build up trust by operators over a period of use, to the benefit of all concerned.

Q3 Is there anything either of you wishes to clarify with the other, or points you wish to pick up on?

A3 (XC) No.

(NR) No.

Closing statements:

By XC: We simply wish to restate what we are jointly asking for, that is:-

- (a) Agree with us that the matrix would be an appropriate interpretation of the level of information required by operators under Condition D3.4.10(b);
- (b) If the Panel cannot agree (a), then provide a definition of what constitutes sufficient information under D3.4.10(b); and
- (c) Determine that parties to the Network Code should be compliant with (a) by the publication of the Engineering Access Statement for EAS 2016 Version 4 - which is Friday 10 July 2015.

By NR: We agree.

The Hearing Chair outlined the intended decision, which included requirement that NR will use the existing consultation process to propose incorporation of the Matrix into the Timetable Planning Rules. For the interim, NR undertook to use the Matrix for all relevant business relating to XC - always applying the Decision Criteria - and noted that in view of where XC travels to on the network, this should have wider benefits for other operators.