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**TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE**

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**Determination in respect of dispute references TTP807 and TTP808**  
*(following a hearing held at 1 Eversholt Street, London, on 1 June 2015)*

**The Panel:**

Stephen Murfitt	Hearing Chair
Peter Warhurst	elected representative for Franchised Passenger Class, Band 1
Tamzin Cloke	elected representative for Franchised Passenger Class, Band 2
Nigel Oatway	elected representative for Non-Passenger Class, Band 2
Matthew Allen	appointed representative of Network Rail

**The Dispute Parties:**

For GB Railfreight Ltd (“GBRf”)

Paul Yates	Working Timetable Manager
Ian Kapur	National Access Manager

For Freightliner Ltd and Freightliner Heavy Haul Ltd (together, “FL”)

Jason Bird	Track Access Manager, Freightliner Ltd
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DB Schenker Rail (UK) Ltd (“DBS”)

Not represented

For Network Rail Infrastructure Ltd (“Network Rail”)

Mark Sleet	Timetable Production Manager
Richard Moody	Operational Planning Project Manager
Martin Savage	Sponsor

For First Greater Western Ltd (“FGW”)

Robert Holder	Network Access Manager
Matthew Turner	Permanent Timetable Manager

**In attendance:**

Tony Skilton	Committee Secretary
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## **1 Introduction, jurisdiction, procedural history of this dispute and documents submitted**

1.1 The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

“ADR Rules” means the Access Disputes Resolution Rules

“ORR” means Office of Rail Regulation

“Rules” means the Timetable Planning Rules and the Engineering Access Statement (i.e. the Network Code definition)

“Secretary” means the Secretary of the Access Disputes Committee

“TPRs” means Timetable Planning Rules (the Network Code definition is reproduced in Annex 1)

- 1.2 At 17 21 on 2 March 2015 Network Rail notified GBRf, FL, DBS, FGW and other relevant operators of its decision to amend the TPRs applying from December 2016 on the Western & Wales Route; this amended Network Rail’s previously published decision (Version 2) regarding the TPRs for 2016.
- 1.3 GBRf disagreed with decisions made by Network Rail within the decision document and accordingly issued a Notice of Dispute on 3 March 2015.
- 1.4 FL was also dissatisfied with the decisions made by Network Rail within the decision document in that the changes related to a Network Change which had not yet been established; FL accordingly issued a Notice of Dispute on 9 March 2015. This response by FL was within the five Working Days deadline specified in Condition D2.2.8(a).
- 1.5 Upon becoming aware of the disputes being registered, FGW declared that it would wish to be a Dispute Party in the event of matters proceeding to a Timetabling Panel hearing.
- 1.6 Disputes TTP807 and TTP808 were clearly related. On 23 April 2015 the Allocation Chair ordered that the two disputes be heard and resolved together under the provisions of ADR Rule B20.
- 1.7 I was appointed as Hearing Chair on 29 April 2015 and the date for the hearing was set as 1 June 2015. Regarding ADR Rule H21, I concluded that in view of the number of parties involved, it would be appropriate for sole reference documents to be provided and the Secretary informed the parties accordingly.
- 1.8 Upon becoming aware of the Timetabling Panel hearing, DBS notified that it wished to be a Dispute Party.
- 1.9 Each Dispute Party served a sole reference document/statement.
- 1.10 ADR 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. I did not identify any overarching issues of law, only some issues of interpretation of a number of relevant documents relied upon by parties and some issues of mixed fact and law which constituted the substance of the disputes to be determined; this was advised to the Panel members and to the Dispute Parties on 26 and 27 May 2015 respectively.
- 1.11 I am satisfied that the matters in dispute should properly 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.
- 1.12 The hearing took place on 1 June 2015. The Dispute Parties gave opening statements and were then questioned by the Panel, finally being given opportunity to make closing remarks.

- 1.13 In its consideration of the parties' submissions and its hearing of the dispute, 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".
- 1.14 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to 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 and Track Access Agreements

2.1 The provisions of the Network Code in issue are, principally, Conditions D2.2.7, D2.2.8, D4.1.1 and D4.6. The relevant extracts are set out at Annex 1 to this Determination.

2.2 Also relevant is the definition of "Network" set out in Condition A1.2,

“ 'Network' means the network in respect of which Network Rail is the facility owner and which is situated in England, Wales and Scotland “

2.3 FL indicated that the definition of "Network" in its Track Access Agreements differed from that in the Network Code. For the sake of completeness, it is noted that the relevant definition contained in the Track Access Agreements of FL and GBRf read as follows:

“ 'Network' means the network of which Network Rail is the network operator and which is situated in England, Wales and Scotland provided that the track and associated installations between Milepost 3 and Rochdale Junction on the route from Thorpes Bridge Junction via Oldham Mumps to Rochdale Junction shall be excluded“

and the relevant definition contained in FGW's Track Access Agreement reads as follows:

“ 'Network' has the meaning ascribed to it in Part A of the Network Code “

## 3 Submissions made and outcomes sought by Dispute Parties

3.1 GBRf's principal submissions in its sole reference document and opening submissions were as follows:-

3.1.1 On 2 March 2015 Network Rail had issued a decision document to apply to the December 2015 Working Timetable for new TPR values at West Ealing. The decision was in conjunction with a proposed Network Change at that location. GBRf submitted that Network Rail cannot implement changes to TPRs prior to the establishment of the dependent Network Change process set out in Condition G10 of the Network Code.

3.1.2 In support of that submission GBRf relied on Determination TTP371 which stated "*a Timetable Planning Rule change, related solely to a Network Change, should not be put into effect before the associated Network Change is implemented*". A Network Change had to be established before any further Part D conditions became applicable.

3.1.3 Network Rail had not provided any evidence of the methodology used in the preparation of the associated TPRs. In particular there had been a lack of evidence in

relation to junction margins and exactly where these had been calculated. A junction margin needed to refer to a specific location where services would be assessed for timetabling purposes. A submission by Network Rail that the wording the "end of the platforms" could be altered to make the location clearer, demonstrated a lack of understanding on the part of Network Rail as to precisely what had been calculated. The new values were based on an infrastructure that was not in existence.

- 3.1.4 GBRf had requested evidence as to values from Network Rail through its reply to the Western and Wales Timetable Planning Rules 2016 Version 2 in an attempt to understand the values that were being proposed, with a view to agreeing, or producing a counter-proposal. GBRf disputed that it failed to take up Network Rail's offer of seeing the Railsys evidence for the Timetable Planning Rules proposals. There had been an offer from Network Rail to discuss the specifics of the layout and scheme plan, but there were no discussions as to how the various junction margins had been calculated, and that remained the position at the date of hearing. To date there had been no discussion with Network Rail as to any relevant modelling.
  - 3.1.5 In addition to the concern as to where the values had actually been measured from geographically, there was a concern on the part of GBRf as to the margin values of five minutes specified in particular instances. GBRf had received no evidence of methodology supporting these values, and had proceeded on the basis that those values may have been calculated on an inaccurate basis.
  - 3.1.6 Network Rail had withdrawn TPRs proposals for similarly non-established Network Changes for both Oxford and, more recently, Old Oak Common, and in both cases Network Rail cited the non-agreement of the TPRs and the non-establishment of the associated Network Change, as the substantial reasons for the withdrawal of the TPRs. Such a practice on the part of Network Rail ran contrary to the claim made in these proceedings that Part D and Part G of the Network Code are separate, and should not be jointly applied.
  - 3.1.7 In concluding its written reference, GBRf sought a determination by which Network Rail would withdraw both the consultation document issued under Condition D2.2.7 on 13 February 2015 and the decision document issued on 2 March 2015.
- 3.2 FL's principal submissions in its sole reference document and opening submissions were as follows:-
- 3.2.1 Part G of the Network Code provided the procedures which access parties had to go through when certain types of changes to the Network occurred, or were proposed. Part G provides a mechanism for contractual change as to what constitutes the Network. Changes to TPRs should not be implemented in respect of a change to the Network which had not been proposed *and established* under Part G. In the case of West Ealing the Network Change had not been established and therefore the scope and size of the Network remained unchanged at that location in terms of the contractual position. It was unreasonable for there to be changes to TPRs that were based on a different infrastructure to be implemented in advance of the establishment of the associated Network Change.
  - 3.2.2 The decision in relation to the TPRs was not in accordance with Determination TTP371 regarding changes to TPRs in circumstances where Network Change had not been established. Although Network Rail had appealed the decision in TTP371, that decision remained in place until such time as the Regulator decreed otherwise.
  - 3.2.3 The definition of the Network as set out in FL's Track Access Agreement is important. Part G of the Network Code provides the procedures for Access Parties when certain

types of change to the Network occur, or are proposed, and as such provide the mechanism for contractual change to what constitutes the Network. It therefore follows that if a Network Change has not been established, then proposed changes do not constitute part of the Network.

- 3.2.4 There is a clear link between Part D and Part G of the Network Code. Both processes should run in tandem and not be permitted to create confusion either contractually or in terms of planning.
  - 3.2.5 It is desirable that a Network Change proposal should contain full details of the effect on the Network, and this should include relevant changes to TPRs and the capacity of the Network. It is therefore logical that Network Rail should investigate such changes to TPRs in advance of a Network Change in order that a TPR change proposal may follow the Network Change in Part D timescales. In relation to West Ealing such detail was omitted from the Network Change proposal.
  - 3.2.6 A period of some eight months had elapsed since FL's rejection of the Network Change proposal, and although there had been continuing discussions, there had been no movement in respect of Network Rail's position.
  - 3.2.7 In concluding its written reference, FL sought a determination that a change to TPRs could not be implemented if the associated Network Change had not been established under Condition G10. Further, FL also sought determination - for the avoidance of doubt - that Network Rail could not implement changes to TPRs in respect of a change or changes to the Network where Network Rail had failed to propose a relevant Network Change.
  - 3.2.8 FL explained that the requested elements of a determination were put forward to avoid incentivising Network Rail not to complete the Network Change process or indeed not to propose Network Change at all.
  - 3.2.9 FL further expressed belief that it is desirable that a Network Change proposal should contain full details of any effects on TPRs and the capacity of the Network, but left it for the Panel to decide whether this aspect should form part of the determination.
- 3.3 DBS's principal submissions in its written statement were as follows:-
- 3.3.1 Network Change was the driver behind the revision of TPRs at West Ealing, and DBS submitted that Network Rail was not entitled to propose or implement change to TPRs until the Network Change had been established. In support of its submission DBS referred and relied upon Determination TTP371, TTP513, TTP514, TTP570 and TTP571 as being persuasive in the case before the Panel.
  - 3.3.2 DBS advanced the argument that it would be acceptable for there to be a conditional proposal amending TPRs from a date in January 2016, subject to the establishment of the Network Change at West Ealing. The present decision of Network Rail as to TPRs in respect of West Ealing was inadmissible.
  - 3.3.3 In concluding its written statement, DBS sought that the Panel determine accordingly.
- 3.4 Network Rail's principal submissions in its written statement and opening submissions were as follows:
- 3.4.1 Crossrail intend over the Christmas period 2015 to implement changes to the layout of the infrastructure in the West Ealing area. In summary those changes involve the creation of a bay platform at West Ealing for the Greenford branch passenger service to

terminate at, and furthermore, the conversion of a double junction at West Ealing between the Relief lines and the Greenford branch lines into a single lead junction. The Christmas 2015 period had been chosen as this project is on the critical path for the Crossrail programme. If Network Rail were unable to complete the project during the Christmas 2015 period then it would place at risk other work, which could result in Crossrail missing its committed finish date of September 2018. There was also the consideration that FGW had a franchise commitment to operate new services, from no later than May 2016, which required the new infrastructure.

- 3.4.2 Network Rail agreed that the Network Change had not been established. There was no mention of the term TPRs (or anything similar) in Part G of the Network Code and therefore Network Rail did not accept the Claimant's assertion that Part G of the Network Code stated that a Network Change had to be established before TPRs changes could be implemented.
- 3.4.3 Determination TTP371 states in summary that *"a Timetable Planning Rule change related solely to a Network Change should not be put into effect before the associated Network Change is implemented"*. The determination uses the word "implemented" and not "established," and since the Network Code made a distinction between "implemented" and "established", Network Rail did not accept the Claimant's assertion that a Network Change had to be established before TPRs changes could be implemented. In any event the TPRs changes were not due to take effect until Christmas 2015 when the new layout takes effect and the Network Change is implemented.
- 3.4.4 There is no requirement for a Network Change to be established before changes are made to TPRs, but there does need to be a reasonable expectation that the Network Change will be established and implemented in advance of any TPRs changes being put into effect. Network Rail did have a reasonable expectation that the Network Change would be established and implemented in advance of the TPRs changes being put into effect.
- 3.4.5 Network Rail had complied with the Network Code in relation to the proposal as to TPRs on 13 February 2015. The proposal in respect of West Ealing was made in accordance with Condition D2.2.7 of the Network Code which allowed Network Rail to propose reasonable changes to the Rules between D-44 and D-26. The changes proposed were reasonable, and following consideration of operator responses and applying the decision criteria, the proposal was turned into a decision on 2 March 2015.
- 3.4.6 Railsys modelling demonstrated that the values proposed at West Ealing were suitable to produce a contractually compliant new working timetable that Network Rail intended to publish at D-26 for December 2015. Network Rail considered that they had produced a timetable that was consistent with the exercised Firm Access Rights of the timetable participants and was therefore in accordance with Conditions D4.2.2(a) and (b).
- 3.4.7 There is no requirement under Condition D2.2.7 for a Network Change to have become established. Network Rail submitted that Part D and Part G are different parts of the Network Code and that they work separately and deal with separate issues: Part D relates to timetabling; Part G covers the commercial settlement between Network Rail and Access Beneficiaries as a result of changes to the Network affecting their business. In accordance with Determination TTP371, Network Rail had proposed that the changes to the TPRs at West Ealing would only apply once the Network Change had been implemented; currently planned for Christmas 2015.

- 3.4.8 There is nothing in Determination TTP371, or in the Network Code Part D or Part G, that does not allow Network Rail to propose or implement TPRs changes prior to the Network Change being established.
- 3.4.9 The Panel in deciding the present case should limit its consideration and decision as to Network Rail's entitlement to amend TPRs under Part D and Condition D2.2.7 in particular, and not by reference to Determination TTP371 and whether, in the current case, Network Rail had correctly applied Part D and Condition D2.2.7. Determination TTP371 does not apply to the current case as the TPRs are listed as starting in December 2015 once the infrastructure is in place.
- 3.4.10 The reliance by GBRf on decisions made in respect of Oxford as to the position taken by Network Rail is of limited value to the Panel in determining the present case. There were important distinguishing facts that led to the Network Rail decisions in relation to Oxford.
- 3.4.11 Network Rail had offered to discuss with the Dispute Parties evidence with regard to values, which would have included the Railsys modelling. The concern as to junction margins could be met by a rewording of the proposals to include "platform end margins" which would clarify the location.
- 3.4.12 Network Rail refuted any suggestion made by any of the parties that there was no clear methodology utilised as to the calculation of the values. Network Rail had evidence that the current December 2015 TPRs could accommodate current capacity and Network Rail remained willing to share that work with the Dispute Parties.
- 3.4.13 Network Rail suggested that the issues raised as to the future use of the Network at West Ealing are more appropriately addressed by the Part G process in establishing Network Change.
- 3.4.14 Concluding its written statement and opening submissions, Network Rail stated that it sought determination that the planned December 2015 TPRs in the West Ealing consultation document and the decision would remain. Additionally, Network Rail sought determination that Network Rail was able to use Condition D2.2.7 to propose alterations to the Rules after Version 2 of the Rules had been published.
- 3.5 FGW's principal submissions in its written statement and opening comments were as follows
- 3.5.1 FGW supported the TPRs.
- 3.5.2 FGW currently operates a two car diesel train service twice per hour from Paddington to Greenford. The extended franchise (to April 2019) requires a two car diesel train service twice per hour from West Ealing to Greenford, and an eight car electric train service twice per hour from Paddington to Hayes. The current franchise agreement also requires FGW to co-operate with Network Rail to install Crossrail.
- 3.5.3 TPRs changes could be made without infrastructure change such that a Paddington to Greenford service could be planned alongside the need for freight services using the new rules. FGW accepted that the revised West Ealing to Greenford service requires the construction of the new bay platform.
- 3.5.4 FGW did not otherwise seek any specific determination.

#### **4 Oral exchanges at the Hearing**

4.1 After considering the written submissions of the Dispute Parties, and having heard the parties' further oral submissions in their opening statements as summarised in Section 3 above, I and the other members of the Panel questioned the parties' representatives to clarify a number of points arising out of their submissions. I considered that we were entitled, and obliged, to accept the answers to these questions as true and accurate statements and, accordingly, I have taken them into account in reaching this determination.

4.2 In order to achieve a structure to the questioning the Panel addressed each party in turn, accepting that the answers to the questions would prompt questions to other parties out of sequence. I have therefore grouped a summary of the answers by reference to each dispute party, although the actual questions and answers at the time did not necessarily follow this pattern precisely.

#### **4.3 Network Rail**

4.3.1 The Network Change proposal contained no indications as to likely changes to TPRs.

4.3.2 Network Rail was content with the modelling as at 13 February 2015.

4.3.3 There was reasonable confidence that all relevant freight rights could continue to be accommodated at West Ealing with regard to the Network Change proposal. There could only be reasonable confidence because at that point in time the timetable had not been developed.

4.3.4 There had been no discussion with Timetable Participants about specific values to go into the TPRs in respect of West Ealing. With hindsight Network Rail accepted it should have engaged in specific conversations regarding this matter, and in particular should have followed up promptly with GBRf, by telephone, in order fully to understand the issues.

4.3.5 There should have been a discussion with Train Operators to take them through the Railways modelling and explain its values. There had been no discussion with Train Operators who were not provided with the Railways modelling until it was produced as part of Network Rail's sole reference for the present hearing.

4.3.6 There was an expectation on the part of Network Rail that the proposed Network Change at West Ealing would be implemented in order to introduce the timetable for December 2015 using the new TPRs. Network Rail was committed to working with the industry, including GBRf, FL, and HS2, for the benefit of all. The decision on 2 March 2015, to establish revised TPRs for West Ealing, was reasonable under the Decision Criteria set out in Condition D4.6 of the Network Code. Conditions D4.6.2(a), (c) and (e) (with c being given the highest weighting) were particularly relevant.

4.3.7 There were 3.5 objections from Train Operators that remained outstanding to the proposed Network Change.

4.3.8 A failure to establish the Network Change at West Ealing would be a disaster for the industry as a whole, and that possibility remained. The handling of the TPRs at West Ealing would depend upon the outcome of the present hearing. Future options include continuing with the new TPRs on the basis that Network Rail considered that the freight services currently operating could still run, but an alternative option would be to offer revised TPRs.



- 4.3.9 If the new infrastructure as envisaged by the Network Change did not materialise, then it would still be possible to run the train plan under the new TPRs. There was an understanding on the part of Network Rail that the Network Code does not allow TPRs to be changed back after D-26 without the agreement of all the operators concerned.
- 4.3.10 In considering Determination TTP371 an important distinction needs to be drawn between "established" and "implemented": "established" being either having reached agreement with operators, or having a determination imposed; "implementation" being the date when the Network Change was carried out on the ground.
- 4.3.11 As to the weight to be given to its reported decisions at Oxford and Old Oak Common, Network Rail did not have a reasonable expectation that those Network Changes would go ahead, and so the proposed TPRs did not meet the reasonableness test under Condition D2.2.7 of the Network Code.
- 4.3.12 The e-mail from Network Rail to various operators on 13 February 2015 (which contained the proposal under Condition D2.2.7) made reference to amendments to the TPRs being pursuant to a request received from FGW. Network Rail was unable to clarify what request had been received from FGW. Later enquiries revealed that the staff member who had dealt with the matter had since retired and therefore it was not possible to answer the question.
- 4.3.13 Whilst the collaborative approach to Network Change at West Ealing was to be applauded, it had been a learning experience, and there is a possibility that there will need to be a dispute hearing in order to secure a resolution to that Network Change.
- 4.3.14 As to the timing point for the junction margins at West Ealing, it is correct to say that in the Railsys modelling report, line 5 of table 1.3 and line 1 of table 1.4 are identical for the same train, save there is a technical margin of 1.53 minutes into the bay platform as against 3.53 minutes into the relief platform.
- 4.3.15 There are aspects of the TPRs where the wording could be clearer and in particular the table should have read "to Up Bay platform".
- 4.3.16 Railsys modelling is used regularly for timetable planning calculations, but there is a distinct and important human intervention. In order for the detail of Railsys modelling to be explained, Network Rail would need to ask the relevant analyst how the TPR data was actually compiled.

#### 4.4 **First Greater Western (FGW)**

- 4.4.1 The opening statement of FGW confirmed that the future West Ealing to Greenford shuttle could work without the proposed TPRs but it was accepted that the anticipated service did need a new bay platform at West Ealing.
- 4.4.2 It would be possible to have a timetable which worked, but there would need to be a new bay platform because there could not be a shuttle into the up relief platform. The new bay platform would have to be situated at a different location.
- 4.4.3 The FGW Access Proposal for the December 2015 timetable was for the continuance of through trains from Greenford to Paddington, but the Department of Transport was happy for FGW to accept Network Rail flexing those trains to terminate and start back from the new bay at West Ealing. There was a further agreement that Network Rail could flex the Paddington to Hayes service to improve capacity by running eight car trains. FGW has bid for two trains per hour on each service. The new Service Level Commitment with the Department of Transport makes it the TOC's prerogative to

decide what to do, but FGW will be required to use existing access rights for Paddington to Hayes, and West Ealing to Greenford services.

- 4.4.4 Determination TTP371 makes no difference because the proposals relate to Christmas 2015. Whatever happens with the Network Change, the timetable can work under both the old and the new TPRs.

#### 4.5 **GBRf**

- 4.5.1 The principal argument was that TPRs should not be changed until Network Change has been established but there was also a challenge to the values in the TPRs proposed for West Ealing.
- 4.5.2 No evidence had been provided as to how the values had been assessed by Network Rail, and it was not until the papers were served in relation to the current hearing that there was any visibility of information supporting the values proposed by Network Rail.
- 4.5.3 There had been no discussions with Network Rail regarding the TPRs. The geography of the TPRs proposal was not clear because it showed timings at West Ealing for trains going to West Ealing and in those circumstances there had been an assumption that the timings were taken at a midpoint; for example, when coming out of platform 5. However, such detail was not covered clearly in the Railsys modelling report and was still not fully understood. It was not appropriate to discuss the matter at the present stage of the process, and in any event there was a shortage of GBRf staff which prevented such discussion.
- 4.5.4 The TPRs discussion should have been started by Network Rail before the TPRs were formally proposed. An example of such good practice was Version 2.3 recently issued within D-26 for putting extra time into the TPRs in the Filton area.
- 4.5.5 There was no objection lodged by GBRf to the Network Change at West Ealing. The reason was that with such large numbers of Network Change proposals and supplemental track access arrangements being handled at the time, the need to object to the Network Change proposal was overlooked in the volume of work.
- 4.5.6 The offer of discussion by Network Rail was made on 5 March 2015, but that was interpreted not as an invitation to have discussions about the proposal, but rather as a session where Network Rail would explain the decision that had already been made and explanations would be provided as to how it came about.
- 4.5.7 There was no follow up or chasing of Network Rail because the impression had been formed that Network Rail's decision was already made and unlikely to change.
- 4.5.8 The Network Rail data had now been seen, but there were a number of issues. Some margins were too long, and some are too short, but no detailed work had been undertaken in relation to an examination of this data.

#### 4.6 **Freightliner (FL)**

- 4.6.1 In relation to Network Change, a meeting with Network Rail had been arranged for the following week but the jury was out as to whether an agreement could be reached. The devil was in the detail and there was a need to understand how Crossrail services and FGW's services would fit in.

- 4.6.2 The Railsys modelling contained within Network Rail's submission for the present hearing was the first sight of information as to the timing of services.
- 4.6.3 There had been only a cursory look at the Railsys modelling, but that cursory look had suggested that the margins needed a much closer and more detailed examination. The reason why there was no follow up in order to obtain more information was that it was put out by Network Rail as a Condition D2.2.7 item whereby Network Rail would seek to optimise the timetable.
- 4.6.4 There had been no examination of the network data in detail but it would be useful to know the timing points as some of the margins appear overly generous.

## **5 Analysis and consideration of issues and submissions**

- 5.1 The submissions and oral exchanges at the Hearing raised a number of issues and I now deal with each of them in turn.
- 5.2 GBRf, FL and DBS submitted that TPRs should not be implemented in respect of a Network Change which had not been proposed and established under Part G of the Network Code. FGW submitted that it was not necessary to have the revised infrastructure in place to enable the TPRs (that refer to through services) to be in place.
- 5.3 Network Rail submitted that Parts D and G were separate and distinct parts of the Network Code. Part D related to timetabling and Part G covered the commercial settlement between Network Rail and Access Beneficiaries as a result of changes to the network affecting their businesses.
- 5.4 All of the Dispute Parties made reference to Determination TTP371, TTP513, TTP514, TTP570 and TTP571 decided on 8 December 2014. The relevant part of that determination states:
- 5.1 A Timetable Planning Rule change related solely to a Network Change should not be put into effect before the associated Network Change is implemented.*
- All of the parties accepted that the decision was subject to an appeal to ORR; a matter I have ignored for the purpose of this determination.
- 5.5 GBRf, FL and DBS all relied on Determination TTP371 as being relevant and persuasive as to the facts of the present case and its determination.
- 5.6 Network Rail submitted that there was nothing in Determination TTP371 (or in the Network Code Parts D or G) that did not allow Network Rail to propose or implement TPRs changes prior to a relevant Network Change being established. Part G allows for a Network Change to be established at any time before implementation of the change, but Part D laid down strict timescales for the amendment of TPRs and timetabling procedures that Network Rail is required to follow. Network Rail was often obliged to propose and implement TPRs changes to reflect Network Change before they were established.
- 5.7 In answer to my question to Network Rail as to the distinction between "established" and "implemented", Network Rail replied that "established" meant having reached agreement following a consensus or a determination being made, while "implementation" was when that Network Change happened on the ground. Network Rail urged the Panel to limit its consideration as to Network Rail's entitlement to amend TPRs under Condition D2.2.7, and whether Network Rail had correctly applied those provisions in this case and not by reference to Determination TTP371.
- 5.8 ADR Rule A7 provides:

*In reaching its determination each and every forum shall:*

- (a) Take note of relevant published ADA or TTP determinations (and those of any predecessor bodies) and of any other relevant tribunal excluding (to the extent referred to in (b) below) the ORR, has persuasive authority, but need not be bound by them;*
- (b) Be bound by any relevant decision of the ORR on a regulatory issue and any relevant decision of the Courts.*

- 5.9 A consideration of the practical issues surrounding timetabling changes and Network Change does establish in my judgement a practical link. The decision taken by Network Rail demonstrated such a link as the timetabling changes at West Ealing will only apply once the Network Change has been implemented as planned for December 2015.
- 5.10 In response to questions from the Panel, Network Rail stated it had a "reasonable expectation" of being able to establish the Network Change (despite 3.5 objections that remained outstanding), but accepted a failure to establish the Network Change would be a "disaster for the industry". Network Rail identified a number of options for TPRs changes dependent on the determination of this hearing and the establishment of Network Change.
- 5.11 The weakness of the Network Rail argument is that until such time as Network Change is either agreed or determined by a dispute panel, the outcome remains uncertain for all parties. Agreement of all parties will often require changes to the proposals in order that agreement is achieved, and if the matter cannot be agreed between the Dispute Parties then the matter is referred for a determination in accordance with ADR Rules. I suggest that Network Rail placed too much weight on its 'reasonable expectation' that Network Change would be agreed, and in its submissions gave insufficient weight to the possibility that Network Change would not be agreed.
- 5.12 If therefore there is uncertainty as to the infrastructure and its final form, it is extremely difficult for a Train Operator to make a judgement about matters that relate to timetabling. In my judgement there must be some certainty as to the infrastructure before a Train Operator can embark upon a reasoned evaluation of its position in a timetabling dispute. As different proposals are formulated as to the shape of the infrastructure then so may the Train Operator change its view as to its position in relation to timetabling.
- 5.13 The Network Rail argument that Parts D and G of the Network Code "work separately and deal with separate issues" is not sustainable as is clear from Network Rail's own decision made in relation to timetabling at West Ealing that the TPRs changes at West Ealing will only apply once Network Change has been implemented in December 2015. I accept that the Network Code does not define the relationship between Part D and Part G. I also fully appreciate and take into consideration the considerable difficulties that Network Rail must have in relation to capacity planning. However, nothing that I have said so far prevents Network Rail proposing TPRs changes, but they should be conditional upon the Network Change being established and implemented, and the changes to the Rules need to state whether TPRs changes are subject to the implementation of Network Changes.
- 5.14 One of the disappointing aspects of this case (which I shall refer to later) was the lack of discussion between the relevant parties as to material issues. There remains an obligation upon Network Rail and Timetable Participants to discuss and agree TPRs values in the absence of established Network Change.
- 5.15. I confirm that I have placed weight on Determination TTP371 which appears to me to be entirely logical. I therefore determine in relation to the first issue that the present decision by

Network Rail dated 2 March 2015 in relation to TPRs 2016 at West Ealing should be withdrawn (together with the consultation document dated 13 February 2015) because those TPRs changes are not explicitly conditional on the associated Network Change being implemented under Condition G10.

- 5.16 In a wider context, and outside the jurisdiction of the present Panel, it is clear that the relationship between Parts D and G of the Network Code is a matter of debate in the industry which has led to a number of difficulties beyond the present case relating to West Ealing. In the circumstances it must be sensible for urgent consideration to be given to clarifying this important relationship between two substantial parts of the Network Code and the subsequent dependent procedures.
- 5.17 The second issue raised by Network Rail was its ability to use Condition D2.2.7 to propose alterations to the Rules after Version 2 of the Rules had been published. I can deal with this in short order because little time was taken up at the hearing in relation to this matter. I confirm that Network Rail is able to use Condition D2.2.7 to propose alterations to the Rules after Version 2 of the Rules has been issued, provided that Version 2 has been published prior to D-44 and it considers, acting reasonably, such alterations necessary or desirable in order to optimise the relevant New Working Timetable.
- 5.18 The third issue is that Network Rail has asked for a determination that the planned TPRs in the West Ealing decision issued on 2 March 2015 should stand. Although the determination of the first issue is an answer to that question, the Panel has explored the nature of the values set out in the relevant documentation, and in particular how Network Rail arrived at those stated values.
- 5.19 Network Rail confirmed during the hearing that the values in the proposed TPRs were derived from the Railsys modelling reported in the operational planning document entitled Operational Planning: Capacity Analysis Team West Ealing Infrastructure Project Report (Network Rail Appendix C) and that no other data sources were used in the compilation of those values.
- 5.20 The wording contained in the report was not clear and Network Rail accepted during oral exchanges that the document could have been somewhat clearer. The information contained in the TPRs is used by train planners working for Network Rail and Timetable Participants for the planning of train services, and so in those circumstances TPRs should be sufficiently clear to allow planners to develop timetables which deliver the commercial requirements of Timetable Participants and make optimum use of the capacity of the Network.
- 5.21 Turning to the detail of the Capacity Analysis Team Report, there were a number of discrepancies in the data which Network Rail was unable to explain adequately during oral exchanges at the Hearing. Tables 1.3 and 1.4 of the Report relate to different movements using platform 4 and the bay platform respectively. Two pairs of movements appear in both tables, with significantly different technical margins. Therefore by way of an example a freight train timed at 60-66S24 2400T running from West Ealing towards Drayton Green followed by a train timed 165-1 running from Drayton Green to West Ealing. The report showed a technical margin of 3.53 minutes between these two train movements when running into the Up Relief platform, but only a technical margin of 1.53 minutes running in the Bay Platform.
- 5.22 A key factor influencing the margin in this case should be the first movement which is the same in both cases, so the time to clear the confliction point of the freight train should be the same. Following this, the passenger train can run towards West Ealing. The only difference between the two cases is the platform into which the passenger train is running, and the information presented in the scheme plan does not suggest that the running time is two minutes quicker into the Bay platform. Furthermore the TPRs decision requires an additional one half minute adjustment allowance for a train running into the Bay platform compared with the Up Relief through platform; so if there were to be a difference between the two margins, it would be

expected that the margin would be greater if the second train is running into the Bay platform, contrary to the values in the report.

- 5.23 There are also a number of very low values with the technical margin between a passenger train departing from West Ealing towards Drayton Green, and a freight train from Drayton Green towards West Ealing shown in the report as 0.48 minutes or 0.59 minutes depending on the timing load of the freight train. I, and the Panel, have decided that there is a reasonable doubt as to whether the information contained in the TPRs notice accurately reflects the capability of the planned infrastructure at West Ealing. Accordingly, I am unable to endorse the West Ealing decision as to the TPRs changes and determine that the Network Rail decision (together with the consultation document) should be withdrawn.
- 5.24 To the extent that I am able to support the planned December TPRs changes for West Ealing, I am unable to do so because of the determination I made earlier in this decision that TPRs may not be implemented if the associated Network Changes have not been implemented under Condition G.10.
- 5.25 The Rail Industry relies to a considerable extent on the early exchange of relevant information followed by informed discussion leading where possible to an agreement. It is therefore a matter of comment that Railsys modelling data were not disclosed by Network Rail until its submissions were made to the Panel and, furthermore, the reluctance of Train Operators to then consider the information in detail and come to a judgement. Put at its highest, an earlier informed discussion between the relevant parties both as to the values and the proposed Network Change may have led to an agreement and the avoidance of this dispute hearing.
- 5.26 During the course of the hearing, indication was given from amongst the Freight Operators that the volume of material issued at times by Network Rail for Network Change and timetabling across the national Network is too great for their detailed scrutiny and response within the timescales prescribed in the Network Code. Track access contracts contain an obligation for Operators to “act with due efficiency and economy and in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced ... Operator”. Whilst I recognise there will be peaks and troughs within the workload, parties are encouraged to consider their resourcing arrangements and whether they are compliant with their contractual obligations.
- 5.27 Finally, reliance was placed by GBRf on Network Rail's decision at Oxford and Old Oak Common when Network Rail, citing non-established Network Changes, withdrew TPRs which had not been agreed. I accept the argument of Network Rail both as to relevance and distinguishing features with regard to the Oxford and Old Oak Common decisions, and therefore confirm such occurrences have formed no part of my determination.
- 5.28 No application for Costs was made. It seems unlikely that "Costs" as defined were incurred by any party. The power to award Costs in a Timetabling Dispute is limited to the circumstances set out in ADR 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,

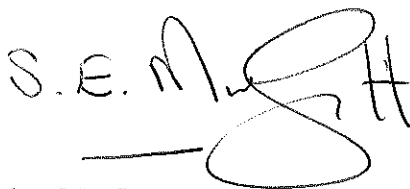
### **I determine**

- 6.1.1 That Timetable Planning Rule changes may not be implemented if the associated Network Change has not been established and implemented under Condition G.10 of the Network Code. Accordingly the present decision by Network Rail published on 2

March 2015 in relation to Timetable Planning Rules 2016 at West Ealing together with the consultation document dated 13 February 2015 shall be withdrawn.

- 6.1.2 This determination does not prevent Network Rail proposing TPRs changes but these should be conditional upon the Network Change being established and implemented, and the changes to the Rules need to state whether TPRs changes are subject to the implementation of Network Changes.
- 6.1.3 This determination does not remove the onus upon Network Rail and Timetable Participants to discuss and to agree TPRs values in the absence of established Network Change.
- 6.1.4 Network Rail is permitted to use Condition D2.2.7 to propose alterations to the Rules after Version 2 of the Rules has been issued provided that Version 2 has been published prior to D-44 and Network Rail considers, acting reasonably, that such alterations are necessary or desirable in order to optimise the relevant New Working Timetable.
- 6.1.5 There is reasonable doubt as to the information contained in the TPRs Notice, or that it accurately reflects the capability of the Network. Accordingly the Network Rail decision of 2 March 2015 in relation to Timetable Planning Rules 2016 at West Ealing shall be withdrawn together with the consultation document dated 13 February 2015. If I had been able to support the Network Rail decision on 2 March 2015 then the reasons set out at paragraph 6.1.1 of this determination would have prevented me from doing so.
- 6.1.6 There is no award as to costs.

I confirm that, so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.

A handwritten signature in black ink, appearing to read 'S.E. Murfitt', with a horizontal line underneath the name.

Stephen Murfitt  
Hearing Chair

12 June 2015

## **Annex 1 to Timetabling Panel determination of reference TTP807/808**

### **Extracts from the Network Code, Part D (29 June 2012)**

#### **Condition D1.1.11**

Definition of Timetable Planning Rules:-

“a document, formerly called Rules of the Plan, regulating, for any part of the Network, the standard timings and other matters necessary to enable trains to be included in the New Working Timetable or scheduled into the Working Timetable applicable to that part of the Network, being rules which specify (amongst other matters) any required:

- (a) timings (including specified allowances) allowed for travel between specified points on the Network for each type of train and for each type of traction used, taking into account any particular constraints imposed by railway vehicles which may form part of the train;
- (b) timing margins or allowances for stopping at junctions and other specified points;
- (c) minimum timing margins or headways between successive trains travelling on the same section of track;
- (d) minimum and maximum time periods for stopping at stations and other specified points; and
- (e) restrictions as to the speed of railway vehicles on any section of track”

#### **Condition D2.2.7**

“Between D-44 and publication of the New Working Timetable at D-26, Network Rail may further revise the Rules where it considers, acting reasonably, such revision necessary or desirable in order to optimise that New Working Timetable. Before making any such further revisions to the Rules, Network Rail must first consult with all Timetable Participants who may be affected by the proposed changes. Network Rail will then inform all affected Timetable Participants of any such changes as soon as practicable after they are made. ....”

#### **Condition D2.2.8**

“.... any Timetable Participant dissatisfied with any decision of Network Rail in respect of those Rules (including any decision to revise those Rules pursuant to Condition D2.2.7) is entitled to appeal against any part of it. Any such appeal shall be conducted in accordance with Condition D5 and must be made by a Timetable Participant:

- (a) in respect of any decision to revise the Rules pursuant to Condition D2.2.7, within five Working Days of receipt of Network Rail’s decision; ...”

#### **Condition D4.1.1**



“In conducting the processes set out in Condition D2.2 by which the Rules are revised on a bi-annual basis (including the amendment process described in Condition D2.2.7), Network Rail shall make all decisions by application of the Decision Criteria in the manner set out in Condition D4.6.”

## 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.