

IN THE MATTER OF PART D OF THE NETWORK CODE

AND IN THE MATTER OF THE ACCESS DISPUTE RESOLUTION RULES

AND IN THE MATTER OF TIMETABLING DISPUTES: TTP: 1064; 1065; 1066; 1069;
1071; 1073

BETWEEN:

(1) ABELLIO SCOTRAIL LIMITED ("ASR")
(2) DB CARGO (UK) LIMITED ("DBC")
(3) FIRST GREATER WESTERN LIMITED ("GWR")
(4) XC TRAINS LIMITED ("XCT")
(5) GB RAILFREIGHT LIMITED ("GBRf")
(6) EAST COAST MAIN LINE COMPANY LIMITED ("VTEC")

Claimants

v

NETWORK RAIL INFRASTRUCTURE LIMITED ("NR")

Defendant

NR'S RESPONSE TO

THE 1st GBRf SRD

INTRODUCTION

1. Abbreviations used in GBRf's first SRD are adopted in this Response, and in particular reference to **"the Determination"** is adopted. References to Paragraphs are to Paragraphs in GBRf's first SRD.

Overview of NR's response to GBRf's first SRD

2. NR denies that GBRf is entitled to the relief it seeks, or to any relief, for the reasons set out hereinbelow. NR will also rely as appropriate on "NR's Response to Heads A and B Issues" ("**NR's Principal Response**") which sets out NR's overall position in particular on issues relating to: the extent to which there are common issues of principle; consultation; the application of Decision Criteria; the scope of the Timetable Panel's ("the TTP") powers; and the appropriateness and availability of the relief being sought by the Claimants in general and GBRf in particular. This response incorporates NR's Principal Response. Further, particular regard should be had to: Appendix 1 to NR's Principal Response (the witness statement of Matthew Allen); and Appendix 6 to NR's Principal Response (NR's Response to the Substantive Parts of the 2nd GBRf SRD).

3. The nature of the dispute in Section 4 of GBRf's first SRD is noted. It is accepted that this is a timetable dispute, but for the reasons set out below and in NR's Principal Response, it is denied that GBRf is entitled to the relief sought or any relief.
4. As elaborated in the following section of this Response, NR has complied with the relevant directions of the Determination.

Item 1: Failure To implement Freightliner's proposal in respect of Stratford SRTs and margins

5. The determination was made in the context of an appeal brought by Freightliner Ltd and Freightliner Heavy Haul Ltd (together, "FL"). Item 2a of the Determination stated that NR was to consult revised SRTs using FL's values as the basis for that consultation.
6. Item 2a of the Determination also related to junction margins at Stratford. It recorded the expectation that NR would consult the next version of the TPRs with a standard figure of 3½ minutes.
7. As the chronology set out in Appendix NR1 demonstrates, NR has engaged in a detailed and ongoing process of consultation which has taken into account the interests of all Timetable Participants – and, in particular, the signallers at Liverpool Street who have safety concerns, which must be paramount. GBRf's stance is governed by the misapprehension that the Determination requires that the product of any consultation must be the same as its starting point, and this gives them a veto over any change to values. That is incorrect. The Determination made it clear that that was not the order that was being made.
8. The relevant section of the Determination is found at paragraph 6.4. Following the Determination NR consulted using FL's values as directed. After the consultation process NR, having taken proper account of all relevant information available to it, concluded that the proposals which relied on FL's values were not supported and that the previous TPRs should be maintained. NR's reasons are explained more fully below. It should be noted that NR's decision has been accepted by FL itself.
9. NR acted in accordance with the Determination in consulting on the basis of FL's proposals. Following consultation, and on the basis of all the information then available to NR, NR was entitled not to implement these proposals.
10. The first matter in dispute relates to the time values to be attributed to passing through the Stratford station. GBRf's position, formerly argued by FL, but which FL itself has now abandoned, is that the majority of the pass through routes (of which there are circa 20) should be marked as quicker.

11. This would only be possible if the signalling for the freight trains for this station were to be taken out of the automated ARS (Automatic Route Setting) signalling system and be dealt with manually. There are serious safety and process issues with this.
12. The Determination in question was dated 19 April 2016. The relevant chronology following that determination is introduced by GBRf at paragraphs 5.2 to 5.6 of its first SRD. NR has complied with the necessary consultation steps in Part D of the Rules as may be seen in Appendix NR1.

Response to Section 5 of GBRf's SRD – 5.1 to 5.8

13. GBRf argues at paragraph 5.2 that the proposals in Version 1.0 of the 2018 TPRs were '*exactly as Freightliner had proposed...*'. NR accepts that in doing so it followed the non-binding directions in the Determination by starting the consultation on the basis of FL's values.
14. As to paragraph 5.3, it is clear that NR understood the extent of its proposals but promised ODA analysis to investigate them further. As discussed at paragraph 10 of appendix NR1, NR presented information at the 6 January 2017 forum (which GBRf were invited to but did not attend) that showed that the majority, but not all, of the transit times would be reduced. This same information had been shared prior to that forum with GBRf on 2 December 2016 [**Annex/p.1**] but no response was received from GBRf. NR fully understands that the FL proposal will not involve a reduction in transit time in all cases, rather the majority of them. NR has obtained ODA data to understand if their concerns were justified or if the actual running of the trains suggested the FL proposal was attainable. The ODA data suggests that while the FL proposal is achievable in some cases, in the majority of cases for which ODA data is available, it is not [**Annex/p.267**].
15. As to Paragraph 5.4, the effect is complex: some journeys would be increased but NR accepts the majority would have been reduced. Chris Deal of NR shared a spreadsheet with Mr Bird setting out how the timings for each crossing may differ up and down [**Annex/p.1-18**].
16. NR has addressed the 24 January 2017 meeting which GBRf refers to at Paragraph 5.5 at paragraph 15 of Appendix NR1.
17. Paragraph 5.6 is agreed, NR confirmed on 3 February 2017 that it would not implement FL's proposal.
18. GBRf argues at Paragraph 5.7 that, in withdrawing its original proposal which used FL's values as the basis for the consultation, NR had not complied with the Determination. This claim is denied as the obligation to start a consultation on the basis of certain figures does not require NR to complete that consultation on

the basis of the same figures. NR is bound by Rule D4.2 to apply the Decision Criteria in Rule D4.6. NR has done so by consulting fully, and taking into account all parties' arguments. Had NR simply stuck with the FL values as GBRf suggests, it would have, amongst other matters, had to ignore the evidence from ODA and the submissions of the Liverpool Street signalling authority. It would also have given GBRf's preferences priority over the other operators. Doing this would have been contrary to the guidance of the Decision Criteria.

19. The Determination does not direct that certain values must be applied into the finalised TPRs, nor could it, for the reasons which NR has set out in its submissions over Heads A and B as to the limits of the TTP's powers. The TTP proceeded on this basis in the Determination where it recognised its limited powers.
20. The Version 1.0 commentary at Section 5.3, Item EA 1010 expressly applies the direction from the Determination. These proposals were supported in the October 2016 meeting.
21. NR did not email the operators with its decision until it had consulted with the Liverpool Street SSM. NR provided the draft wording of the 3 February 2017 email to the Liverpool Street SSM for their approval before sending it out to the operators.
22. On 3 February 2017 NR emailed the operators to notify them of its decision that the TPRs would remain unchanged and that NR would not accept FL's proposal. GBRf does not refer to the reasons which NR gave for this decision which, NR submits, properly took into account the Decision Criteria:
 - 22.1 NR expressly makes the point that it has consulted and considered submissions from FL, GA and MTR which support the decision for the current TPRs to remain, it was only GBRf that objected.
 - 22.2 Consultation with the Liverpool Street / Stratford signallers indicates that GBRf's proposals would lead to delays and safety issues.
 - 22.3 The TPRs would remain unchanged, but through the Event Steering Group for Crossrail and Greater Anglia re-franchising, NR will undertake a review of the Stratford TPRs so that: *"the TPRs and SRTs accurately reflect the capability of the infrastructure, without reference to past assumptions."*
 - 22.4 FL, GA and MTR support this approach.
 - 22.5 NR is obliged, in applying the Decision Criteria, to balance the competing demands of all operators, NR's signallers and NR's own preferences. It has properly balanced these interests and its proposal is supported by all parties

except for GBRf and DBC. Even FL, whose original values were the subject of the direction in the Determination, supports NR. GBRf has been unable or unwilling to provide evidential support for its position.

- 22.6 NR might have been criticised for acting contrary to the guidance of the Decision Criteria had it not taken the positions of the signallers and the other Timetable Participants into account and simply stuck to the starting point of the FL values. Further, the TTP had held in the Determination at paragraph 6.3.5 that it did not have the tools to decide which Dispute Party was right in respect of this matter. There was detailed argument and evidence, none of which is before this present Panel, but on balance the Panel preferred FL's submission. Accordingly, it was appropriate for those values to be a starting point, capable of and requiring review following consultation.
23. At Paragraph 5.7 GBRf notes that the Panel had held in the Determination that it was not open to it to order that FL's counter proposal was adopted. It gave the reason for this – all affected operators must be consulted on TPRs and this Dispute only involved two FOCs. Accordingly its direction was that the process starts with FL's values, but those values must be the subject of consultation.
24. As for Paragraph 5.8, NR's submissions on the powers of the TTP are set out in NR's Principal Response, and in NR's opening submissions on 20 April 2017. The TTP was correct to find that it could not determine what TPRs should be – it does not have that power and in any event is unable to carry out the necessary consultation process.
25. GBRf's claim that NR "*acted in bad faith*" and "*reneged upon*" an agreement is unparticularised, improperly made and unsustainable. NR seeks the rejection of any such suggestion in strong terms. NR was obliged to consult and to give due weight to all necessary factors, which it duly and openly did and is continuing to do. NR is working on a further counter proposal. NR gave this commitment to operators including GBRf at the 24 January 2017 meeting. This was further reinforced by NR confirming that the values would be reviewed as part of the ESG (Event Steering Group) – [Annex/p.19-20].
26. NR are working through a plan whereby it should have prepared some draft analysis in the week commencing 15 May 2017 with the aim of sharing that analysis at the TPR forum on 19 May 2017. NR expects that further work and discussions will be required after that forum with the aim of getting agreement to the new values no later than at the TPR forum to be held in the week commencing 26 June 2017. NR's aim is to establish them for the May 2018 TT either through consent in Version 4 of the TPRs or through Part D2.2.7. NR makes this statement while understanding that establishing new values is of course subject to following the proper consultation process.

27. Whilst not specifically raised by GBRf, NR considered the Decision Criteria in the context of the decision in V2 of the TPR.¹ In applying the Decision Criteria NR prioritised D4.6.1, 'the Objective.' If the FL proposal was implemented in V2 of the TPR then NR would fail to meet the Objective, as due to the inability of the trains to consistently meet the times in the FL proposal NR would not be able to efficiently share capacity on the network. NR also considered that implementing the FL proposal would also fail to meet the Objective due to the safety concerns raised. This failure to meet the Objective was the main driving force behind NR's proposed way forward.

Conclusion

28. The first version of the 2018 TPRs was, on GBRf's case, exactly as FL had proposed i.e. the starting point for the consultation was using FL's values as directed in item 2a of the Determination.
29. NR conducted a proper consultation which concluded with the decision set out by email on 3 February 2017. GBRf has made no argument and provided no evidence to support any claim that NR failed to take the Decision Criteria into account or that FL's proposal is technically acceptable or appropriate.
30. GBRf requests that FL's proposal be implemented in full. For the reasons given in the Determination, that is impossible as not all relevant operators are party to this Dispute. The analysis and information NR has presented shows the values it included in version 2.0 of the 2018 TPRs to be properly achievable. Further, GBRf has not demonstrated how or why NR's proposal is flawed or in any way contrary to the requirements of the Decision Criteria.

Item 2: Failure To implement agreement on Network Services Trains

31. Item 1a of the previous dispute which led to the Determination related to train service requirements for Network Services Trains. The parties to those disputes are recorded to have reached the agreement listed in Paragraphs 5.10 to 5.16 of GBRf's first SRD.
32. GBRf does not argue that this agreement formed a binding part of the Determination but it asserts that NR has not acted in accordance with this agreement.
33. GBRf argues at Paragraph 5.20 that there has been no collaborative review, and in particular it requires specific dates of operation of Network Services Trains in

¹ Criteria: (c), was given high weighting. Criteria (e) and (f) were also material. Criteria: (a), (d) and (j) were all considered to have a lower priority. Criteria: (b); (g); (h); (i); (k) and (l), were considered as not relevant.

order to bid around those services. It also seeks adjustments to the TPRs and timetables in relation to operation of Network Services Trains.

NR's Response:

34. Paragraphs 5.10 to 5.16 of GBRf's first SRD correctly set down the record of the agreement between GBRf and NR as recorded in section 4.4 of the Determination. That agreement was not part of the Determination and cannot have had binding effect as the Panel implicitly recognised at section 4.3.
35. As the chronology in Appendix NR2 demonstrates, NR has engaged in a detailed and ongoing process of consultation which has answered the concerns of GBRf. However, GBRf wishes to bring this matter to a determination despite NR having met GBRf's concerns.
36. The relevant section of the Determination is found at paragraph 4.4. Following the Determination NR consulted with all timetable participants, in particular GBRf and DBC. No other operator has raised a dispute.
37. The Determination in question was dated 19 April 2016. The material dates and actions of the relevant chronology following that Determination are set down in Appendix NR2.

Response to Section 5 of GBRF's SRD – 5.9 to 5.23

38. Paragraphs 5.9 to 5.16 are agreed as accurate copies of the record of the agreement from the Determination. NR has acted in accordance with this agreement, as GBRf recognised in the email of 23 March 2017. It is hoped that GBRf may be able to notify the TTP that many of its concerns have been met.
39. As for Paragraph 5.17, the TTP does not need to determine whether the agreements were a binding part of the Determination, since it is clear that NR has acted in accordance with the agreements. If the TTP decides to determine this question, it is plain that the Determination simply recorded an agreement between the parties, it did not formally give directions that each party would act in accordance with that agreement and as such this was not formally any part of the TTP's determination. However, it is accepted that the clear implication was that NR would act in that manner, and NR has accordingly done so.
40. NR will now address each of the agreements that GBRf has pleaded out from Paragraphs 5.10 to 5.16.
41. As to Paragraph 5.10 – NR does support the principle that Network Services should appear in the WTT as dated services, matching the dates on which they are actually planned to run within that version of the WTT.

42. As to Paragraph 5.11, NR completed this review. The different revisions of the National TPRs (since V4 2017 TPRs up to V2 2018 National TPRs) do show that a review of the services listed has been undertaken, which is demonstrated using the formatting technique outlined in the commentary letter. NR uses text in green with a strike through for items which have been deleted, and text in red for new or amended information. The change is also highlighted with a thick vertical line at the right hand side of the page. NR can elaborate on the detail of removals at the hearing, if required.
- 42.1 V0 2018 National TPRs (30 September 2016) contained 42 amendments to the Network Measurement Trains table, which was additional 'Specific Recording Sections' and 'Required Platform Recording' information as part of complying with the agreement recorded in Section 4.4 of TTP625/685/733/872 Determination.
- 42.2 No Operators responded with any comments or objections to this proposal of change (V0) in preparation for V1.
- 42.3 V1 2018 National TPRs (21 October 2016) proposed the same 42 amendments to the Network Measurement Trains table.
- 42.4 Following responses to V1 from DBC [Annex/p.58-107] and GBRf [Annex/p.109-132], NR continued to review the list of Network Services listed to remove any services which are no longer required, and provide additional information about the frequency with which network services are required to run. In responses to both parties on 18 January 2017, NR did ask DBC [Annex/p.271-272] and GBRf [Annex/p.133] to provide specific areas of concern to be addressed in V2, but neither party were forthcoming in responses. Indeed DBC did not respond, and GBRf's response was *'Thanks – we look forward to Version 2.0'* [Annex/p.134].
- 42.5 V2 2018 National TPRs (3 February 2017) confirmed the original 42 amendments, and also provided additional running frequency information for the 93 services which did not display that information at the time. This is for all services listed from page 35 to page 110. It also included an amendment to the 'Specific Recording Sections' and 'Required Platform Recording' for one service which did not display it at Version 1 This is for 1Z23DA listed on page 110.
- 42.6 Both DBC [Annex/p.135-182] and GBRf [Annex/p.183-205] responded to note the additional information that had been provided, but were still not satisfied that the review process outlined (in the original TTP determination) had taken place. A conversation took place with both parties on 22 March 2017 to identify what additional information they would require to enable them to withdraw this element of their response/dispute. Both suggested that having the

information about actual dates of operation by COP on 22 March 2017 would be sufficient.

- 42.7 On this basis, NR provided both parties [Annex/p.206] with an amended list of network measurement trains which included start dates of the cyclical programmes the trains run to. This was enough to meet DBC's concerns. However, GBRf still maintains its claim despite its concession that the additional information shows a *'huge step forwards'*.
43. As to Paragraph 5.12 – train running frequency for all services is visible in V2. NR has received comments from operators about the relevance of services with a running frequency of more than 8-weeks being stated in the National TPRs and will take steps to remove these from the next possible version of the National TPRs. NR agrees that it is not appropriate to include services with these running frequencies in the National TPRs.
44. As to Paragraph 5.13 – the types of trains and reasons for them running are well known throughout the industry. However, it is important for NR to provide appropriate information about reasons why Network Services are required to run, so its intention is to provide a two page summary of the information in the next possible version of the National TPRs. NR can provide a draft of this summary to any operator that requests it.
45. As to Paragraph 5.14, NR has consulted transparently, as the chronology demonstrates. NR is considering adding further information into Section 3 of the National TPRs to state the types of trains contained within Section 3, and their reasons for running. This will be consulted as a change under D 2.2.7 as a V2.1 and will be shown in V4 of the TPRs following consultation after V3. As is provided by Section 3.2 of the National TPRs, the train slots identified in Section 3 are to be considered the preliminary train slots as they have the potential to be amended during the timetable drafting period.
46. As to Paragraph 5.15, NR considered both the Objective and the Decision Criteria in the context of the proposed changes to the TPRs. NR prioritised the criteria in the following way. Considerations (a)², (c)³, (e)⁴ and (j)⁵ were given a high weighting, and (f)⁶ some, but a lower, weighting. The very purpose of the Network Services trains is to maintain and improve the capability of the Network, train service performance, and an integrated system of transport for passengers

² Maintaining, developing and improving the capability of the Network.

³ Maintaining and improving train service performance.

⁴ Maintaining and improving an integrated system of transport for passengers and goods.

⁵ Enabling operators to utilise assets efficiently.

⁶ 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.

and goods, which culminate in enabling operators of trains to utilise their assets efficiently. Further, the intention of providing running frequency information and start dates of network services trains is to enable Timetable Participants to understand where different capacity opportunities exist in the timetable. The other Considerations were not applicable.

47. As to Paragraph 5.16, during the next occurring Timetable Development cycle (December 2017), NR will endeavour to deconflict the commercial aspirations of freight operators where there is recognised to be a clash with the required Network Services path. It is intended that the additional information provided in V2 of the 2018 National TPRs will be used by Timetable Participants to inform its indication of dated requirements when submitting its Access Proposal prior to D-40.
48. NR has responded to Paragraph 5.17 above.
49. As to Paragraphs 5.18, 5.19 and 5.20, GBRf's complaint at Paragraph 5.20 that *'so far there has been no other progress on any of the parts of the agreement listed above'* has been superseded by the provision of information in March 2017 and GBRf's agreement that this is a *'huge step forwards.'*
50. NR has now included running frequency for all services listed, and 'Specific Recording Sections' and 'Required Platform Recording' is included for all network measurement trains. As NR explains above, since the publication of V2, NR has also provided additional information to GBRf and DBC which details the start dates of the cyclical programmes the trains run to. The amended list also includes one deletion of a train service which is no longer required to run. It is NR's intention to provide these dates to all timetable participants and this will be consulted as a change under 2.2.7 as a V2.1 and will be shown in V4 of the TPRs following consultation after V3.
51. As to Paragraphs 5.21 to 5.23, the TTP neither has the power, nor the information before it, to consider and determine the issue GBRf raises, that of the reasonable level of operation to justify inclusion in the WTT. This must remain a matter for consultation and review between the Timetable Participants. However, as for Paragraph 5.21, NR agrees that it is not appropriate to show services with these running frequencies in the National TPRs. NR has received other comments about the relevance of services with a running frequency of more than 8-weeks being stated in the National TPRs and will take steps to remove these from the next possible version of the National TPRs.

Decision sought from the panel

52. NR requests that the Panel directs that NR's decisions stand.

53. Turning to GBRf's proposed relief. As to Paragraph 6.1(a):
- 53.1 For the reasons outlined in NR's Principal Response and which were amplified at the hearing on 20 April 2017, the TTP does not have power to grant declarations; and
- 53.2 Further and in any event the TTP should not make the finding sought at Paragraph 6.1 (a). The TTP should note that the relief that GBRf seeks is not in fact that the previous determination be implemented – that determination was that NR consult on the basis of FL's proposal, which plainly occurred. What GBRf seeks is that FL's proposal itself be implemented i.e. that the TTP substitute its own decision for that of NR. Such a step can only be taken in exceptional circumstances. No allegation is made that there are any such exceptional circumstances and there are none. Accordingly it is not in any event open to the TTP to grant the relief sought.
54. As to Paragraphs 6.1 (b) and (c):
- 54.1 In effect GBRf again seeks declarations and/or the substitution of the TTP's decisions for NR's. For the reasons outlined above, and in NR's Principal Response and in NR's Opening Submission on 20 April 2017, any such relief is beyond the TTP's powers since (i) it is not open to the TTP to grant wide-ranging declarations and (ii) absent exceptional circumstances (which are rightly not alleged) the TTP cannot substitute its own decision for NR's; and
- 54.2 In any event, the evidence shows that NR has complied with all of the elements of the agreement recorded at paragraph 4.4 of the Determination. The relief that GBRf seeks, that the agreement be enshrined in the TPRs as a new section, is not relief that the TTP may grant. NR has met the terms of the agreement. It is not appropriate or necessary for this prolix set of terms to be enshrined in the TPRs or for the TTP to grant detailed relief (as to "minimum level of operation") which would require consultation with other Timetable Participants.

signature

For and on behalf of

Network Rail Infrastructure Limited

Signed

Mark Sleet

Print Name

MARK SLEET

Position

TIMETABLE PRODUCTION MANAGER

The Appendices