

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
ISSUE 1 OF THE DBC SRD**

INTRODUCTION

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

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

2. NR denies that DBC is entitled to the relief it seeks, or to any relief, for the reasons set out herein. 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 DBC 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 Mr Matthew Allen); and Appendix 3 to NR's Principal Response (NR's Response to the Substantive Parts of the (2nd) DBC SRD").
3. The nature of the dispute referred as Issue 1 in Section 4 of DBC'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 DBC 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 19 April 2016 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 below 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. DBC'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.
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 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. NR's issue of versions 1.0 and 2.0 of the TPRs is introduced by DBC at paragraphs 5.1 of its SRD addressing Issue 1. NR has complied with the necessary consultation steps in Part D of the Rules. The material dates and actions of that chronology are as follows:

Relevant Chronology

Prior to Consultation Obligations in Part D

13. 19 April 2016: Determination TTP625/685/733/872.
14. 24 June 2016: On 24 June 2016 NR sent operators an email with an agenda for a TPR forum on 1 July 2016 which was to discuss TPRs for the 2017 Timetable year, which had already been consulted and were now at version 4.0. The proposals were an AOB item on the agenda. That forum was for the 2017 Timetable year. This discussion was to be an advance look at the values. The values were later formally proposed for the 2018 timetable year through Version 1 of the TPRs.¹

D-64 (16/09/16) TO D-60 (14/10/16): NR SHALL CONSULT WITH TIMETABLE PARTICIPANTS IN RESPECT OF ANY PROPOSED CHANGES TO THE RULES

15. 3 October 2016: NR circulated the proposals for discussion at the upcoming TPR Forum [Annex / p. 207]
16. 10 October 2016: Discussion at TPR forum following advance consultation of Version 1.0 of the 2018 TPRs and circulation of the proposals. DBC, Abellio Greater Anglia ("GA"), MTR Crossrail ("MTR") and GBRf all indicated they were happy with the changes proposed. [Annex / p. 228]

D-59 (21/10/16) – NR shall provide to all timetable participants a draft of the revised rules

D-59 to D-54 (25/11/16) NR shall consult with timetable participants; timetable participants may make representations in respect of any changes they propose or objections they may have to the draft rules

17. 21 October 2016: Issue of Version 1.0 of the 2018 TPRs.
18. 25 November 2016: DBC responded to Version 1.0 of the 2018 TPRs. DBC did not mention the FL proposals. [Annex / p. 58]

D-54 (25/11/16) to D-44 (03/02/17) – NR shall consider representations and objections

19. On 22 December 2016 NR gave its preliminary response to DBC. There was no mention of the FL proposals, or the Stratford values as DBC had not raised them in its November 2016 response. [Annex / p. 319]

¹ The proposals included an inconsistency in the document which led to NR inadvertently omitting an allowance in Version 1. The inconsistency was that the table of the changes in the FL email from Mr Bird was missing an item that was listed in the text of that same email. NR had reproduced the table Mr Bird provided in V1 of the 2018 TPRs, hence the omission.

20. On 3 January 2017 NR gave its full Version 1.0 response to DBC. There was no mention of the FL proposals, or the Stratford values as DBC had not raised them in its November 2016 response. [Annex / p. 320-323]
21. 6 January 2017: Discussion of Stratford area at TPR forum [Annex / p. 324-326], following circulation of the agenda on 5 January 2017.
 - 21.1 DBC did not attend the forum, but a spreadsheet of FLs proposed values was shown to those present by the Chair, Chris Deal of NR.
 - 21.2 NR had concerns with FL's values and the consequential likely reduction in transit time in most cases. The differences between the existing values and FLs proposals were shared with the operators in order to get their views on FLs proposals. GA and MTR challenged FLs proposals, as did FL themselves, now represented by Dave Beadle. GA requested evidence for the SRT reductions so Chris Deal of NR noted that he had requested ODA data in order to investigate the matter more fully.
22. 23 January 2017 – NR Capacity Planning emailed the Liverpool Street Local Ops Manager regarding Stratford, quoting the FL dispute and asking for signalling comment on this. [Annex / p.327]. Liverpool Street SSM (Shift Signalling Manager) emailed back to NR Capacity Planning stating that the FL view on approach control to signal L292 was incorrect. [Annex / p. 328].
23. 24 January 2017 – MTR Crossrail telephoned and wrote to NR to provide support for retaining the existing values but proposed looking at the values through the Event Steering Group.
24. 24 January 2017: A phone conversation between FL and NR took place where FL stated that they no longer supported their original proposals, that they were content with the current values and proposed that the values be reviewed more thoroughly through the Event Steering Group. [Annex / p. 329]. This was followed up by an email from FL on 25 January 2017 [Annex / p. 329].
25. 24 January 2017: Chris Deal, Hazel Chalk and Mark Sleet of NR held a meeting at short notice with Mr Bird of GBRf, but no other operators (although others including DBC were invited), to explain the reasons why NR was not intending to proceed with what were now the GBRf proposals. NR took along ODA data supporting the current values. GBRf argued that in order for the trains to be able to pass through the section in their proposed values that they should be put on manual signalling as opposed to ARS system signalling, but this is not feasible or safe. NR offered to review values through the Event Steering Group but GBRf said it would not make any difference to the dispute.
26. 27 January 2017: Greater Anglia emailed NR to state they had performance concerns with the FL proposal, that performance had improved since the values were changed to

the current levels and that they wanted the values looked at as part of the Event Steering Group [Annex/ p.268]

27. 31 January to 2 February 2017: NR planners and the Liverpool Street Shift Signalling Manager ("SSM") exchanged emails. The SSM wrote on 31 January that workstations are all busy, especially Stratford and manually setting routes would not be practicable, raising a performance risk (as it would not be recognised by other ARS trains) and would only serve to increase rather than reduce delays. On 2 February the SSM wrote to highlight approach control issues with the FL proposal, and reported signaller issues with the plan, and the issue of removing services from ARS (Automatic Route Setting) affecting them across the network. The SSM makes clear that there would be safety concerns in moving the signalling to manual at Stratford. If a freight train were to come out of ARS then ARS would signal other trains as if the removed train was not there until the track circuit signalling, separately, stopped the two trains from entering the same section [Annex/ p. 269-270].

D-44 (3/2/17) – NR shall issue the final revised rules (v2)

28. On 3 February 2017 NR sent a note to Timetable Participants explaining why they were removing the FL proposals from the TPRs. NR also published Version 2.0 of the 2018 TPR on this date.
29. Also on 3 February 2017, the Anglia (Crossrail East) ESG Meeting Number 9 was held. Para 4.0 of the meeting minutes confirms "*Stratford SRT's are to be reviewed as part of the ESG*". [Annex / p.19]
30. On 6 February 2017 DBC responded to Anglia TPR Forum notes, stating that they will need to consider position over Stratford. [Annex / p.330]
31. On 20 Feb 2017 DBC responded to version 2 of the TPRs, noting the decision not to implement the revised rules and awaiting new proposals from NR and the timescales for these. DBC asked NR for a response by 24 March 2017. [Annex/ p.137]). It can be seen that DBC's position was that proposals are required, not that the values in the determination be adopted:

DB Cargo notes Network Rail's decision not to implement revised timetable planning rules in the Stratford area. The March 2016 determination of Access Disputes Committee TTP625/872 stated that the existing Rules were not fit for purpose, so Network Rail is obliged to produce proposals to remedy this. Please advise timescales for the production of these proposals. [Annex/ p.143]

32. On 29 March 2017, Mr Kitchin of DBC met with NR at NR offices. NR promised and has since sent ODA data to demonstrate the suitability of the values.

33. On 7 April 2017, NR sent DBC a proposed plan and timeline to establish a new set of rules for Stratford [**Annex/ p.331-332**].

Response to Section 5 of DBC's SRD – 5.1

34. DBC argues in the first paragraph of 5.1 that the proposals in Version 1.0 of the 2018 TPRs were in accordance with the Determination. 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.
35. As to the second paragraph:
- 35.1 NR agrees that it subsequently withdrew these proposals in Version 2.0, as is seen in the chronology above.
- 35.2 NR also admits that in the email of 3 February 2017 it notified DBC that there would be a review through ESGs.
- 35.3 NR agrees that the email gives no timescales for such a review. However, it is committed to holding such a review. 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 (as evidenced by the 7 April 2017 email referred to DBC referred to at paragraph 33 above). NR also gave this commitment at the 24 January 2017 meeting with GBRf. 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**].
- 35.4 DBC asserts that that this does not comply with the Determination of TTP625/685/733/872 – the Determination does not mention or require that there be a review – this is NR's initiative to try to get the right values which the whole industry agrees with.
36. DBC goes on to assert in the third paragraph that the earliest it will be possible for further changes to be made is through the provisions of Rule D2.2.7.
- 36.1 DBC fears that this will lead to an increase in workload of DBC, other TOCs during the Timetable Development Period. NR does not accept that this is either correct, or a legitimate objection to the application of Rule D2.2.7. NR will do the majority of the work and provide the supporting investigations for the Network Participants to review.
- 36.2 DBC have not bid for any new trains through Stratford for December 2017. All of the DBC trains that run through Stratford in the December 2017 TPRs are either currently running or are planned to run in the May 2017 timetable. Therefore the bulk of any work to put in new timings will fall to Network Rail.

37. As to DBC's concerns in the fourth paragraph of 5.1, NR regrets that DBC were apparently relying on NR implementing these proposals: DBC was not entitled so to rely. NR has acted as directed by the TTP in the Determination, and in accordance with the Decision Criteria. DBC argues that, in withdrawing its original proposal which used FL's values as the basis for the consultation, it had not acted as it was directed in 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 DBC 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 DBC's preferences priority over the other operators. Doing this would have been contrary to the guidance of the Decision Criteria.
38. 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.
39. 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.
40. 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.
41. 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. DBC does not refer to the reasons which NR gave for this decision which, NR submits, properly took into account the Decision Criteria:
- 41.1 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 and DBC that objected.
- 41.2 Consultation with the Liverpool Street / Stratford signallers indicates that FL's proposals would lead to delays and safety issues.
- 41.3 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."
- 41.4 FL, GA and MTR support this approach.

- 41.5 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. DBC has not provided evidential support for its position.
- 41.6 NR might have been criticised for not acting contrary to the guidance of the Decision Criteria had it not taken the positions of the signallers and the other operators 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.
42. NR 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.
43. 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 at the meeting with GBRf on 24 January 2017 and this same commitment was made to DBC both through conversations and also in the 3 February 2017 email. 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].
44. 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.

Conclusion

45. The first version of the 2018 TPRs were, on DBC'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.

46. Whilst not specifically raised by DBC, NR considered the Decision Criteria in the context of the decision in V2 of the TPR.² 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.
47. NR conducted a proper consultation which concluded with the decision set out by email on 3 February 2017. DBC 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.
48. DBC requests that the proposals in Version 1.0 of the TPRs be reinstated. For the reasons given in the Determination, that is impossible as not all relevant operators are party to this Dispute. Further, DBC has not demonstrated how or why NR's proposal is flawed or in any way in breach of the requirements of the Decision Criteria.
49. NR requests that the Panel directs that NR's decisions stand.
50. Turning to DBC's proposed relief set out in Paragraph 6.1(a):
- 50.1 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;
- 50.2 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 DBC 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 DBC effectively 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.

For and on behalf of
Network Rail Infrastructure Limited

Signed

² 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.

Mark Sleet

Print Name

MARK SLEET

Position

TIMETABLE PRODUCTION MANAGER