

Sole Reference ("TTP1198") by Rail Express Systems to a
Timetabling Panel in accordance with the provisions of Chapter
H of the ADR Rules effective from 1 August 2010 (and
subsequently amended)

SOLE REFERENCE BY RAIL EXPRESS SYSTEMS LIMITED IN RESPECT OF A DISPUTE RELATING TO AN OBJECTION BY NETWORK RAIL INFRASTRUCTURE LIMITED TO A NOTICE OF DISPUTE SUBMITTED TO THE SECRETARY BY DB CARGO (UK) LIMITED ON 1 DECEMBER 2017 PURSUANT TO CONDITIONS D2.7.2 OF THE NETWORK CODE IN RESPECT OF THE 2018 SUBSIDIARY NEW WORKING TIMETABLE ("TTP1198")

1 DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows:-

(a) Rail Express Systems Limited (Company number 2938991) whose Registered Office is at Lakeside Business Park, Carolina Way, Doncaster DN4 5PN ("Rail Express Systems") ("the Claimant"); and

1.2 Network Rail Infrastructure Limited (Company number 2904587) whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("NRIL") ("the Defendant")

(a) The Claimant's point of contact is Quentin Hedderly, Network Capacity Manager, Lakeside Business Park, Carolina Way, Doncaster DN4 5PN (Tel: 01302 575201) (E-mail: quentin.hedderly@deutschebahn.com)

(b) The Defendant's point of contact is Matthew Allen, Head of Timetable Production (Capacity Planning) (Tel: 07734 282514) (E-mail: matthew.allen@networkrail.co.uk)

2 THE CLAIMANT'S RIGHT TO BRING THIS REFERENCE

2.1 This matter is referred to Timetabling Panel ("the Panel") for determination in accordance with Condition D2.7.2 (D5.1.1) of the Network Code.

3 CONTENTS OF REFERENCE

This Sole Reference includes:-

(a) The subject matter of the dispute in Section 4;

- (b) A detailed explanation of the issues in dispute in Section 5;
- (c) In Section 6, the decisions sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (d) Appendices and other supporting material.

4 SUBJECT MATTER OF DISPUTE

- 4.1 This is a dispute regarding the application of Decision Criteria set out in Condition D4.6 of the Network Code and the allocation of capacity in the New Working Timetable in respect of the 2018 Subsidiary Change ("May 18 WTT").
- 4.2 The Timetabling Change process set out in Part D of the Network Code is undertaken on the Claimant's behalf by its sister Company DB Cargo (UK) Limited ("DB Cargo") who raised a large number of issues (over 200) in its response to the Defendant's May 18 WTT (including the Claimant's Train Slot that is the subject of this particular dispute reference).
- 4.3 Following an initial dispute raised by the Defendant in respect of the validity of the Notice of Dispute issued by DB Cargo that was subsequently resolved amicably, since 1 December 2017 the parties have been working through the large number of issues seeking solutions. All such issues have now been resolved with the sole exception of the Claimant's Train Slot that is the subject of this particular dispute, which is the 1Y46 10:58 ThO London (Victoria) to Folkestone West (via Canterbury East) (arr.13:05) ("1Y46") which is a Pullman passenger service operated on behalf of the Claimant's customer, Belmond.
- 4.4 The Claimant has operated 1Y46 for a number of years without any major issues arising during each relevant Timetable Change. 1Y46 is routed via Canterbury East as a set down is necessary for passengers travelling on Belmond's "Historic Canterbury" day excursion. In line with previous timetable changes, the Claimant, through DB Cargo, requested that the previously established schedule be 'rolled over' into the May 18 WTT.

4.5 Unfortunately, the Defendant had exercised its Flexing Right in the May 18 WTT. Whilst the new departure time from London Victoria at 11:01 is acceptable to the Claimant and Belmond, the new later arrival time at Folkestone West at 13:30, is not.

4.6 Appendix A – Extract of Train Schedule 1Y46 path offer for 24/05/18 – 06/12/18

Appendix B – 19/04/18 example detailing Train Schedule 1Y46 path for Dec 17 WTT (14/12/17 – 17/05/18)

Appendix C – 050318 e-mails

Appendix D – 200418 e-mails

5 EXPLANATION OF EACH ISSUE IN DISPUTE AND THE CLAIMANT'S ARGUMENTS TO SUPPORT ITS CASE

5.1 As mentioned in paragraph 4.4 above, the Claimant (and its predecessors) has for many years operated the Belmond Pullman (previously Venice Simplon Orient Express). Since the train's re-launch in 1982, one of its regular operations is to convey passengers on the first and/or ultimate leg of their through journey between London, Paris and Venice (or vice versa). Belmond also offer an "Historic Canterbury" day excursion as part of the regular Thursday operation. After being served brunch, passengers on the day excursion alight at Canterbury East. A significant majority of passengers (c.70 - 80%) are using the Pullman as part of an International rail journey and travel through to Folkestone West. Continental passengers are transferred by road coaches and Eurotunnel shuttle to connect with the Venice Simplon Orient Express scheduled to depart from Calais Ville at 17:19 CET. There are a significant number of constraints which must be adhered to in order that customers of Belmond Pullman receive a premium service. The Pullman is planned to operate on 16 x Thursdays on the Folkestone itinerary during the current timetable period.

5.2 The Claimant (through DB Cargo) received a timetable Offer for 1Y46 for the May 2018 timetable period which provides an arrival at Folkestone West at 13:30 (see Appendix A). This is 25 minutes later than the 13:05 arrival which has prevailed in previous timetable periods (see Appendix B for the schedule which applied for the previous Timetable period). An arrival time at Folkestone West of 13:30 is too late to

provide a robust connection for continental bound passengers travelling on the same day's Venice Simplon Orient Express. The Defendant has chosen to flex 1Y46 significantly in order to accommodate South-eastern and GTR services. To compound matters, opportunities which could have provided an earlier arrival at Folkestone West, have been frustrated through capacity being awarded to empty coaching stock inter-depot movements.

- 5.3 The Claimant disputes the outcome of the Timetable Offer in providing a significantly later arrival at Folkestone West for 1Y46. Whilst the Claimant accepts that the Defendant is entitled to exercise its Flexing Rights, it would also expect the Defendant to have exercised its Flexing Rights in respect of other relevant services on the network that have prevented an earlier arrival being achieved, all such decisions to be by reference to the Decision Criteria set out in Condition D4.6 of the Network Code. In other words, carry out the process for all services in parallel so that appropriate decisions can be made on any flexing options that would better accommodate all of the relevant Access Proposals.
- 5.4 Instead, the Claimant believes that the Defendant has accommodated other passenger services in the May 18 WTT first and then tried to accommodate 1Y46 in the 'white space' available capacity that remains. There have been a large number of changes on the South Eastern Route in the May 18 WTT, which has resulted in less 'white space' being available. Nevertheless, all of Network Rail's timetabling decisions under Part D of the Network Code should be by reference to the Decision Criteria irrespective of the 'level' of priority services enjoy under Condition D4.2.2(d) of the Network Code.
- 5.5 This assertion is reinforced by ORR's appeal decision in respect of TTP No.1174 issued on 15 February 2018 (relevant extracts as follows):

"ORR considers that it is fundamental to a proper understanding of the provisions relating to the Decision Criteria that the wording of Condition D4.6 imposes an obligation on Network Rail. The provisions do not confer an entitlement or power. The obligation is to achieve the Objective (applying the Considerations) where Network Rail "is required to decide any matter". In relation to the compilation of the WTT, Network Rail's obligation is reinforced by the language of Condition D4.2.1"
(paragraph 61)

"The meaning of the words "where Network Rail is required to decide any matter in this Part D" in Condition D4.6.1 must, in ORR's view, be interpreted in light of the fact that they explain the extent of Network Rail's obligation, rather than qualifying its powers." (paragraph 62)

".....Part D sets out a number of decisions which Network Rail is required to make. Network Rail submitted that Condition D4.6.1 is very widely drafted and that, when Part D is considered as a whole, there are clear general obligations imposed on it relating to the compilation of the WTT such that Condition D4.6.1 applies generally to decisions it makes when compiling the WTT." (paragraph 64)

"ORR agrees that Condition D4.6.1 applies generally to such decisions. In particular, we note the following points:

- Condition D1.1.1 imposes a general responsibility on Network Rail to establish the WTT and Condition D2.6.1 obliges Network Rail to compile the proposed WTT. Network Rail will necessarily be required to make many decisions as it compiles the WTT. It is a natural reading of the words in Condition D4.6.1 that the Decision Criteria apply to all such decisions.*
- This is supported by Condition D4.2.1, which expressly provides that Network Rail shall apply the Decision Criteria in compiling the WTT and does so without qualification. Condition D1.1.5 similarly requires that in conducting the processes prescribed by Part D (including the compilation of the WTT) decisions shall be made in accordance with the principles set out in Condition D4 (which includes the Decision Criteria). These provisions are inconsistent with the argument that the Decision Criteria are relevant only to specified types of decision.*
- ORR does not agree that "decisions" are required only where there is a conflict between Access Proposals or with the Timetable Planning Rules. Network Rail's responsibility for compiling the WTT means that, in practice, it must decide whether to include, vary or reject each Train Slot requested in an Access Proposal (doing so in accordance with the provisions of Part D). Any such decision is binding unless overturned by an appeal*
- The wording of the Network Code therefore strongly supports the interpretation that Network Rail has an obligation to apply the Decision Criteria to all of the decisions it makes and we see no reason why a limitation should be implied. The nature of the Objective and Considerations are such that they are of relevance generally to the compilation of the WTT. It is entirely consistent with the purpose of the Decision Criteria that they should apply to all decisions which Network Rail makes in compiling the WTT, so that there is a consistent driver in decision making which affects the interests of many and varied parties. In contrast, we do not consider that it would align with the purpose of the Decision Criteria if Network Rail was only required to apply them to certain decisions" (paragraph 65)*

5.6 The main reason given by the Defendant for not being able to achieve an earlier arrival time for 1Y46 at Folkestone West can be summarised as *"Unfortunately the increased volume of traffic and the recast timetable for GTR and Southeastern means that it is not possible to make improvements to the paths for these trains" [including 1Y46]* along with a mention of the specific trains preventing an earlier arrival time at Folkestone West for 1Y46 (see Appendices C & D). Whilst these may or may not be valid reasons, they do not absolve the Defendant from making decisions by reference to the Decision Criteria. The Claimant has received no information from the Defendant detailing the decisions it has made when considering the Decision Criteria when allocating capacity between 1Y46 and the specific trains preventing an earlier arrival time at Folkestone West for 1Y46 in the May 18 WTT.

5.7 Consequently, without such information and given the characteristics of 1Y46, the Claimant does not believe or at least cannot be certain that the Defendant has met the objective set out in Condition D4.6.1 of the Network Code i.e.:

"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."

In addition, the Claimant would argue that in any such consideration of the Decision Criteria themselves set out in Condition D4.6.2 of the Network Code, the Defendant has not, or at least does not appear to have done, given sufficient weight to the particular Decision Criteria that demonstrate it has considered the full range of adverse implications to the Claimant and its customer, Belmond, of a significantly later arrival at Folkestone West. The Claimant would have expected the following Decision Criteria to have featured highly in Network Rail's decision:

(b). that the spread of services reflects demand; 1Y46 arrival time at Folkestone West is 25 minutes later in the May 18 WTT than the previous timetable and does not provide a satisfactory connection for International passengers.

(d). that journey times are as short as reasonably possible; 1Y46 journey time has been extended by 22 minutes in the May 18 WTT when compared with the previous timetable.

(e). maintaining and improving an integrated system of transport for passengers and goods. With the later arrival time at Folkestone West in the May 18 WTT, passengers travelling on 1Y46 would experience a significant risk to their onward Paris and Venice connections.

(f). the commercial interests of which Network Rail is aware. The extended transit and later arrival at Folkestone West will adversely affect the commercial interests of the Claimant in that its customer may decide to remove some of its business from rail.

(j). enabling operators of trains to utilise their assets efficiently. There are implications for the Claimant's train crew and the customer service staff on 1Y46 resulting from the extended journey time of the later scheduled arrival of 1Y46 at Folkestone West and from the current temporary mitigation measures that have had to be introduced to achieve an earlier arrival time for 1Y46 at Folkestone West.

5.8 Given that the May 18 WTT is now in operation, it should be noted that in order to meet its customer's requirement for an earlier arrival time at Folkestone West, the Claimant has attempted to provide a temporary solution through the good offices of Southeastern. In order to afford a robust connection for continental passengers an earlier path has been identified from London Victoria to Folkestone West (via Canterbury East) for 1Y46, but is reliant on Southeastern relinquishing its Train Slots for 5Y70 and 5L19 on the day in question. There is currently no agreement currently in place to enable this mitigation measure to be operated for the duration of the May 18 WTT. Notwithstanding this, the Claimant does not consider that this mitigation measure is ideal as a permanent solution because it causes two key adverse issues to its customer.

5.9 Firstly with check-in at Victoria for a 10:01 departure, it means that more passengers will have to stay in London prior to their trip. Check-in at Victoria is rushed as a 'bottle neck' is created by passengers arriving closer to departure time. Secondly, whilst some additional time must be allowed for possible delays with the Channel transfer, a 12:30 arrival at Folkestone West means an additional 30 minutes must be "lost" somewhere, which detracts from the overall passenger experience. There is

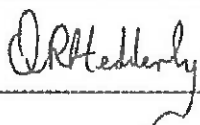
additional crewing time both for the Claimant and Belmond staff arising from the earlier departure time.

5.10 The wording of the Network Code strongly supports the interpretation that Network Rail has an obligation to apply the Decision Criteria to all of the decisions it makes that are of relevance to the compilation of the WTT. Condition D4.6.3 of the Network Code requires Network Rail to *"reach a decision which is fair and not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail"*. In the context of this dispute, the Claimant has seen no evidence that any consideration of the Decision Criteria has been taken when the Defendant decided that 1Y46 could not continue to enjoy an earlier arrival time at Folkestone West in the May 18 WTT.

6 DECISION SOUGHT FROM PANEL

6.1 The Claimant is seeking the panel to determine that (1) the Defendant has not applied the Decision Criteria correctly (or indeed at all) in its decisions concerning the allocation of capacity in the May 18 WTT between 1Y46 and the relevant trains preventing an earlier arrival for 1Y46 at Folkestone West and, consequently, (2) that the panel to direct the Defendant to provide a Train Slot in the remainder of the May 18 WTT which meets the key criteria of (i) reaching Folkestone West at or prior to 13:10, (ii) contains a Canterbury East set down and (iii) does not depart London Victoria before 10:00.

SIGNATURE

For and on behalf of DB Cargo (UK) Limited	
Signed	
Print Name	QUENTIN HEDDERLY
Position	NETWORK CAPACITY MANAGER