

## **1 DETAILS OF PARTIES**

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

- (a) GB Railfreight Limited ("GBRf") whose Registered Office is at 3rd Floor, 55 Old Broad Street, London, EC2M 1RX ("the Claimant"); and
- (b) Network Rail Infrastructure Limited ("NR") whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("the Defendant").

1.2 All other Train and Freight Operating Companies could be affected by the outcome of this dispute.

## **2 THE CLAIMANT'S' RIGHT TO BRING THIS REFERENCE**

2.1 This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Condition D5.1 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 allocation of capacity during the bi-annual process specified in Part D2.6 and D4.2, and subsequent changes to allocated capacity.

4.2 This dispute is split into several different parts according to subject matter:

4.2.1 Train Slots in respect of the New Working Timetable offered to GBRf at D-26 (on 8 June 2018) and subsequently withdrawn by NR;

4.2.2 Trains Slots requested by GBRf on the Priority Date but rejected by NR;

4.2.3 Trains Slots requested by GBRf on the Priority Date but not processed by NR (and therefore presumed to be rejected);

4.2.4 Train Slots requested by GBRf on the Priority Date where amendments were requested to the Train Slots in the Prior Working Timetable, but those amendments have not been processed by NR;

4.2.5 Train Slots offered by NR at D-26, or on 17 August 2018 that are not compliant with the applicable Rules and/or other train slots; and

4.2.6 Miscellaneous other items, such as non-compliance with contractual provisions.

4.3 On 8 June 2018 (D-26) NR made its offer to GBRf in respect of Train Slots for the December 2018 Working Timetable. This was incomplete as it did not include a number of requests from GBRf made at D-40, and neither did it include Train Slots in respect of weekend schedules, which (it was noted) should have followed two weeks later. The offer documentation is detailed in Appendix A.

4.4 On 6 July 2018 NR wrote to all affected Train and Freight Operating Companies (Appendix B) outlining its proposals in respect of alterations it intended to make to the December 2018 Working Timetable – subsequently known as the “Hybrid” timetable. The outcome of these alterations are partially the subject of the dispute.

4.5 On 17 August 2018 NR issued a revised December 2018 timetable – the offer documentation is attached as Appendix C.

4.6 GBRf issued Notices of Dispute on 22 June 2018 in respect of the New Working Timetable and again on 23 August 2018 in respect of issues arising from the “Hybrid” timetable.

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

5.1 In the case of Train Slots offered on 8 June 2018 and subsequently withdrawn, GBRf believes NR to be in breach of contract, as the Train Slots offered on that date are

contractually binding (as referenced in the offer letter attached as Appendix A, as well as Condition D4.7). These Train Slots cannot be subsequently withdrawn by NR without GBRf's permission or alternatively under the provisions of Parts D8.4, D8.5 or Part J. There is no provision in the Network Code by which NR is permitted to alter the dates upon which the New Working Timetable can be issued, save as detailed in D2.7 (and which does not apply in this instance), and neither is there any provision to make amendments to the New Working Timetable that are not the subject of a Restriction of Use, except by consent as detailed in Condition D3.6. NR has neither sought nor received permission from GBRf to make any such amendments. GBRf has accepted the majority of the revised Train Slots forced upon it, acting in good faith. There is however a number of instances whereby Train Slots previously offered on 8 June 2018 have been revoked: these are detailed in Appendix D. In most cases, NR has offered the capacity to other operators so it is no longer simply a case of reinstating the Train Slots offered on 8 June 2018.

- 5.2 In connection with what is noted in paragraph 5.1 above, GBRf would like the Panel to clarify points of principle and determine accordingly, and also determine what should happen in the instance of each Train Slot in question. On points of principle, does that Panel agree that NR has no authority to alter the due date of D-26 without prior authority afforded under D2.7? GBRf believes that there is no such authority for good reason, namely that the timely delivery of all other subsequent processes (e.g. Informed Traveller and the Prior Working Timetable for the next timetable) are jeopardised. Does that Panel agree that NR may not change or revoke a Train Slot already offered at (the correct) D-26 without mutual consent, and that Network Rail is in breach of contract for acting as it has? In the case of specific Train Slots, GBRf would like to have the offers of 8 June 2018 reconfirmed, but by way of compromise is content to receive alternatives acceptable to it. However from GBRf's perspective the backstop needs to be that conflicting subsequent offers to other operators are invalid and should be withdrawn unless NR is able to provide alternative Train Slots that GBRf finds acceptable.
- 5.3 In the case of Trains Slots requested by GBRf on the Priority Date but rejected by Network Rail (details in Appendix D), GBRf has been provided with no valid reasons for those rejections and there has been no application of the Decision Criteria in any instance. While NR may feel obliged to provide a weighting of the Decision Criteria as

part of its defence of this dispute, it does not justify the fact this has not happened as part of the normal process. Each reason for rejection is different, and the reasons supplied are contained in Appendices A3 and C2, but the common themes are non-compliance with Timetable Planning Rules (“TPRs”) and NR’s unwillingness to exercise its flexing rights. It is quite clear that while attempting to validate GBRf’s Access Proposals that NR is looking for gaps around other Train Slots rather than looking for the optimum solution in each instance. The optimum solution can only involve NR using its flexing rights in every instance to fulfil the Objective as detailed in D4.6.1. If NR does not exercise its flexing rights then it cannot possibly have fulfilled the Objective, as sub-optimal solutions can only be the result. GBRf’s view is that the process outlined in D4.2.2 stipulates that NR should consider all Access Proposals made to it, and that rejection is only an option when there is no timetabling solution. There can only be no timetabling solution if the totality of the Access Proposals received has been taken into account and NR’s flexing rights have been applied to their fullest extent. It also appears from NR’s actions that there is a presumption that new Access Proposals have lower priority for consideration compared with Rolled Over Access Proposals or Access Proposals that involve an amendment to Train Slots contained in the Prior Working Timetable (letters issued as “notice of intention to reject” refer – see Appendices A4 and C3). While Rolled Over Access Proposals (or amendments to them) may have Firm Rights whereas a new Access Proposal might not, that does not automatically mean, in GBRf’s opinion, that rejection is an option in the event of any conflict between them, without undertaking adequate measures to find timetabling solutions. This is particularly so in the case of conflict between a Rolled Over Access Proposal that has Firm Rights but in terms of quantum only. GBRf’s assertion is that D4.2.2(d) only can be invoked when adequate measures have been taken to accommodate all Access Proposals but NR is unable to do so, and in no way provides a way of deciding which Access Proposals it should *consider* for inclusion. In some cases, in order to accept a new Access Proposal it may be necessary to flex a significant number of other trains to achieve a result; unless this exercise is undertaken it is impossible to say whether such changes are reasonable or not, even where this might fundamentally alter the structure of the timetable. In terms of alleged non-compliance with TPRs it is difficult to see how this can be a legitimate reason for rejection: no Timetable Participant can make an Access Proposal that is TPR-compliant as it cannot possibly know what other Timetable Participants have

requested, and moreover there is no requirement in Part D to attempt to do so. Achieving compliance with TPRs is surely NR's function when it comes to publishing the New Working Timetable. GBRf therefore submits that rejection of Access Proposals on the basis of TPR on-compliance is invalid. GBRf would therefore request that the Panel determines that NR gives further consideration for including these Train Slots in the December 2018 Working Timetable. As NR's flexing rights are no longer as wide-ranging as they would have been had they been applied between D-40 and D-26, should the Panel determine in GBRf's favour then the provisions of D5.3.2 and D5.3.3 may be necessary – otherwise the likely outcome is rejection as it is unlikely that validation will be successful if such Access Proposals are treated in the same way as Train Operator Variation Requests. It should be noted that GBRf specifically makes a number of Access Proposals at each cycle of the timetable development process in order to attempt to gain capacity that is not attainable by submitting a Train Operator Variation Request for any timetable that is post-D-26. This is usually the case where all the capacity is already taken up, or the timetable has been designed in a sub-optimal way that means additional paths are not achievable.

- 5.4 In the case of Train Slots requested by GBRf on the Priority Date but not processed by NR (and therefore presumed to be rejected); GBRf would also like the Panel to determine that NR gives further consideration for including these Train Slots in the December 2018 Working Timetable, on the same basis as the Train Slots referred to in §5.3 above. GBRf is unable to say whether the omission of these Access Proposals is an oversight on NR's part or a deliberate action, but it would be useful as a point of principle if the Panel were to give guidance or a determination on NR's ability not to process Access Proposals made to it.
- 5.5 In the case of Train Slots requested by GBRf on the Priority Date where amendments were requested to the Train Slots in the Prior Working Timetable, but those amendments have not been processed by NR; GBRf would again request the Panel to determine that NR gives further consideration for including these Train Slots in the December 2018 Working Timetable, on the same basis as the Train Slots referred to in §5.3 above.
- 5.6 Regarding those Train Slots that are the subject of §5.4 and §5.5, GBRf is of the view that NR is not entitled to ignore Access Proposals made to it, there being no such

provision in Part D that permits it to do so. GBRf would therefore request the Panel, as a point of principle to determine to that effect should it agree that to be the case. Condition D2.4.4 gives some discretion over inclusion of Access Proposals received after D-40; but does not afford such discretion to those received before D-40.

5.7 In the case of Train Slots offered by NR at D-26, or on 17 August 2018 that are not compliant with the applicable TPRs and/or other train slots, GBRf is requesting that the Panel determine that NR must make such Train Slots compliant, without destroying their integrity or altering them in any way not acceptable to GBRf. This will necessarily mean minor adjustment to other train operators' services. Where the effect on other train operators (in each individual circumstance) is deemed by NR in its opinion to require more than minor adjustment, then it should apply under D5.3.3 to the Panel, noting the timescales for doing so. There are also three specific trains that are not compliant with the Engineering Access Statement. In one instance, the train should be re-dated not to include the affected dates, one needs to be diverted via an alternative route; in both cases these actions were the subject of the original Access Proposals. The third example either requires retiming to an alternative Train Slot acceptable to GBRf or an amendment to the Engineering Access Statement to allow the Train Slot to be valid in its existing times. GBRf is materially disadvantaged by being in receipt of non-compliant Train Slots – it is often the case that adjustments to such services are required during the validity of the timetable and (rightly or wrongly) it then becomes GBRf's responsibility to sort out any non-compliance to avoid rejection. Similarly it becomes impossible to add a "Y" option on top of any such Train Slot as any such attempt will be rejected on the grounds on non-compliance.

5.8 The remaining Train Slots in dispute are listed in Appendix D as "miscellaneous". Most are where the Train Slot offered is outside of the contractual windows for departure/arrivals and GBRf's requested remedy is for those Train Slots to be offered compliantly. One other Train Slot has been rejected due to a non-compliance with the Engineering Access Statement rather than being flexed earlier in order to be compliant. GBRf does not view NR's actions to be correct in this instance, as for similar reasons outlined in §5.3 above, the rejection should be invalid when there is a perfectly achievable solution by flexing the train earlier. In one further instance, one Train Slot has missing dates in its schedule rather than applying Mondays to Fridays throughout

the December 2018 Working Timetable. GBRf knows of no impediment to this train running as requested (as which is run on behalf of NR itself).

## 6 DECISION SOUGHT FROM THE PANEL

6.1 Due to the variety of reasons for bring this dispute, the determinations requested are listed above in each relevant section on both points of principle and specifics. This specifically includes that NR is in breach of contract for removing Train Slots already offered to GBRf. We also seek a determination of breach of contract on other matters where the Panel considers that this applies.

In terms of remedy, a specific action, where not included in the body of the text above, is listed against each Train Slot in Appendix D. A determination of breach of contract also serves as a remedy.

## 7 APPENDICES

The Claimant confirms that it has complied with Access Dispute Resolution Rule H21.

## 8 SIGNATURE

For and on behalf of GB Railfreight Limited



\_\_\_\_\_  
Signed

Jason Bird-----  
Print Name

Timetable Manager \_\_\_\_\_  
Position

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## **The Appendices**

Appendix A – December 2018 New Working Timetable offer documentation of 8 June 2018

Appendix A1 – offer letter

Appendix A2 – rejections

Appendix A3 – extract of change log showing rejections

Appendix A4 – letter of intent to reject for 6V87

Appendix B – letter from Network Rail outlining its proposals for altering the December 2018 New Working Timetable

Appendix C – December 2018 timetable re-offer documentation of 17 August 2018

Appendix C1 – offer letter

Appendix C2 – extract of change log showing rejections

Appendix C3a/b/c/d – letters of intent to reject

Appendix D – list of Trains Slots disputed by GBRf (extract of GBRf Offer Response document) together with details of issues and individual remedies