

TTP2280, 2352 and 2413

Network Rail Infrastructure Limited Sole Reference Document

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 and
- (b) Network Rail Infrastructure Limited (NR) whose Registered Office is at Waterloo General Office, London, SE1 8SW

1.2 Third Parties to this Dispute may include Freightliner Group Limited, DB Cargo, DRS, Cross Country, West Midlands Trains, Chiltern Railways (as described by GBRf In TTP2280, TTP2352, TTP2413)

2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant's Sole Reference Document (SRD) includes:-

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
- (b) A detailed explanation of the Defendant's arguments in support of its position on those issues where it disagrees with the Claimant's Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant's Sole Reference.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fail to be determined as part of the dispute;
- (d) The decisions of principle sought from the Chair in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (e) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

The first dispute raised by GBRf (assigned as TTP2280) is brought on the basis that Network Rail have failed to produce a requested Timetable Study (a subset of a Capacity Study) based on their assertion that the Possessions (above) would have been classified as a 'Severity 4' under the Access Impact Matrix. As part of this dispute, GBRf are alleging that provision of a Capacity Study (whether required or agreed) constitutes part of the Network Rail 'proposal' under Conditions D3.4.7 through D3.4.12.

Possession Numbers for Week 18 – 3756238 and 3842903 and a Chronology of Amendments and Publications are included in the Appendix. The locations directly affected by the Possessions are between Didcot Parkway and Leamington Spa South Junction. These Possessions are considered by Network Rail to be disruptive in nature.

These Possessions were initially proposed within V3 Engineering Access Statement and decided under V4.

Network Rail have also found it necessary to issue 'late notice' decisions for extended Possessions as permitted under D3.4 (or D3.5). It is agreed that these 'late notice' changes relate to extensions (in time and geography) to both Possession decisions made for Week 18 to align 3756238 with 3842903. These have been disputed under TTP2413 and TTP2325 respectively.

The Week 21 and 22 Possessions relate to HS2 based Possession activities taking place between Castle Bromwich Junction and Landor Street Junction Between under Possession Numbers 3734374 & 3734378. These Possessions were initially proposed within V1, 2, 3 and 4 of the EAS.

Network Rail Does not dispute GBRfs right to bring this to a Timetable Panel in accordance with Condition D2.2.8 or D5 of the Network Code and the ADRR.

4 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE

4.1 Issues where the Defendant accepts the Claimant's Case.

4.1.1 NR Accepts that GBRf have not received the relevant severity 4 Capacity Study in respect to week 18's Possession access 3756238 & 3842903

4.1.2 NR accepts the record of events and timeline reported by GBRf in its SRD paragraphs 4.1 to 4.15 in respect of Possessions 3756238 and 3842903

4.2 Issues where the Defendant qualifies or refutes the Claimant's Case.

4.2.1 Within various paragraphs of their SRD, GBRf have interpreted the term 'proposal' to include a Timetable Study. Network Rail disagree with this stance. The term 'proposal' is present within Conditions D2 and D3 that address decisions for Possessions in the EAS, or 'late notice' possessions (post EAS). The term 'proposal' is not one that the Network Code defines. It is agreed that any possession must be proposed, consulted and then decisioned (if it to go ahead).

4.2.2 D2.2.2 (not replicated here) refers to 'proposed' changes to the Rules (Timetable Planning Rules and the EAS). These proposed changes form the Draft Rules (V1 and 3 EAS) which are further consulted resulting in publication of the revised Rules (V2 and 4 EAS) which can be disputed.

4.2.3 Similar wording is used under D3.4 in so far as Network Rail must again provide 'proposals' for Restrictions of Use which are then consulted on and decisioned if necessary. There is nothing contained within Part D that stipulates that a Capacity Study forms part of any 'proposal'.

4.2.4 GBRf also allege in various paragraphs that as Network Rail have not provided a Timetable Study by TW-30 (D3.4.8) that we have lost our ability to apply our Flexing Rights. As per TTP2318 and 2320, Network Rail note that the guidance offered by the Chair in this respect is that Condition D3.4.9 is in fact a stand-alone provision that allows Network Rail to request a revised Access Proposal from any Timetable Participant to facilitate the planning of a Network Rail Variation (the extension decisions in this instance). Under D3.4.10 this must be done by no later than TW-22 or under other reasonably prescribed times if D3.5 is utilised.

4.2.5 Within the GBRF SRD (paragraphs 5.3 through 5.6) it appears to be alleged that these possessions will result in a total loss of Railfreight to road. Network Rail acknowledge that the Week 18, 21 and 22 Possessions are disruptive All Line Blocks. In respect of Weeks 21 and 22 however, a completed Timetable Study has now been shared detailing available capacity on diversionary routes. Whilst Network Rail consider any Capacity Study to be indicative only (we cannot mandate that any operator bid in line with these), it would be an odd occurrence if the final timetable offer excluded 100% of the GBRf traffic.

4.2.6 The Capacity Study completed for Weeks 21 and 22 is predicated on information supplied by operators as part of the ongoing consultation. The development of this study represented an opportunity for operators to contribute input and information to allow Network Rail to understand the impact that the proposed Possessions would have on their business. Network Rail can see no provision within Part D or the Rules which stipulates that a Capacity Study (in any guise) must be completed and provided to operators at the time that the proposal is made, or decision is taken by Network Rail. Indeed, it is common practice that an

operator lodge a 'holding dispute' over a Possession decision within the EAS (or under late notice) pending the provision of a required/ agreed Capacity Study. If the operator remains unhappy with the output of the study, they may choose to progress the dispute to a hearing. If they are content, generally we see the holding dispute withdrawn.

4.3 Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination

4.3.1 Network Rail Acknowledges that at the time of GBRf completing their SRD, a capacity study had not been completed, but Network Rail Contends that the Completed study has now been issued to all affected operators. Network Rail Further contends that at the time of GBRf writing their SRD, the Capacity Study process was taking place with updates emailed to all affected operators.

4.3.2 Network Rail issued Report Update 1 for the Capacity Study on the 28th February. Within the email Network Rail outlined a couple of queries, and asked for requested feedback.

4.3.3 Network Rail Issued Report Update 2 for the Capacity Study on the 7th March, Within the Email content Network Rail stated that this possession access was different from previous instances where this route has been blocked. As part of the usual Consultation Process Network Rail invited responses from affected operators.

4.3.4 Network Rail Issued Report Update 3 for the Capacity Study on the 12th March, Network Rail invited response. It was noted (and shown in Appendix 2.1.3):

'Please note if we haven't received any response to feedback / questions to operators then our working assumption is correct'

4.3.5 Network Rail Issued Report Update 4 for the Capacity Study on the 27th March, Network Rail invited responses.

4.3.7 Network Issued F3 Documents as part of the email content for Update 4. Within the Appendix (3.1.1 and 3.1.2), GBRf Services are detailed although F3s were also sent for DBC, Freightliner and DRS Services.

4.3.8 Network Rail issued the Decision Criteria Table as part of the same email correspondence (Appendix 2.1.5)

4.3.9 The Water Orton Timetable Study (Part 1) was issued by Network Rail on 2nd April. This contained F3 Prints for all Freight Companies and the final, 27 page report

4.4 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant

4.4.1 GBRf have lodged the dispute regarding the Week 21 and 22 Possessions on the basis that no Capacity Study has been provided. Network Rail has now provided the Capacity Study for this access (between Castle Bromwich Junction and Landor Street Junction) in Weeks 21 and 22 allowing GBRf to bid for services in advance of the Train Planning Deadline of the 12th April 2024.

4.4.2 GBRf argue within paragraph 4.25 of their SRD that the absence of a Timetable Study doesn't preclude them from bidding, but rather that they must then bid in an uninformed manner. It is submitted that the provision of the completed Study for Weeks 21 and 22 removes this concern and allows GBRf to submit requests to Network Rail in an informed manner.

4.4.3 Network Rail has provided the Timetable Study to operators who have been impacted directly and indirectly. It is submitted that this opens Network Rails' Flexing Rights up for those operators services under D3.4 and/ or D3.5 and allowing us to use best endeavours to achieve the Objective under D4.6.1..

5 DECISION SOUGHT FROM THE CHAIR

5.1 It is noted that GBRF are not claiming that exceptional circumstances are present and neither do they appear to be asking for the Possessions in question to be overturned or removed. GBRf are seeking a determination that Network Rail is in breach of its obligations under both the Network Code and Track Access Contracts.

5.2 Regarding the Week 18 Possessions (3756238 and 3842903), Network Rail acknowledges the absence of the required capacity study. On Friday 15th March 2024 Network Rail held an internal Teams Meeting to establish whether there was any internal or external resource to complete to capacity study. Regrettably, it was determined that there was not. As such we would welcome any general directions the Chair deems appropriate under D5.3.1(a).

5.3 With regard to Weeks 21 and 22, Network Rail submits that it has followed and applied the relevant contractual provisions and the Network Code, and that in doing so has reached a reasonable decision. Network Rail request that the Chair uphold its decision under D5.3.1(b).

5.4 GBRf are requesting that the Chair direct Network Rail to apply its Flexing Right to services impacted directly and indirectly by these Possessions. It should be noted that a Capacity Study has been completed for Weeks 21 and 22, which is the pre-cursor to publication of a compliant timetable for GBRf and other affected operators. Network Rail notes that the Bid Date for Week 21 is to be no later than the 12th April under the Subsidiary Timetable Change June 2024 Revision Schedule, and the 19th April for Week 22 Submission. Network Rail then has a commitment to offer compliant paths to as many operators as we can no later than the 10th May and 17th May respectively, or to notify them of any rejections accordingly

5.5 It is noted that GBRf are asking for both costs and damages in the event that there is a determination that Network Rail are in breach of contract. We take this to mean either the Code (incorporated into the TACs) or the TAC itself but welcome clarity from GBRf on this matter. Network Rail are currently unclear exactly what costs or damages GBRf would be seeking and so can only comment at a high level. No train service has been offered back to operators at this stage. On this basis, no train services for GBRf have been rejected from the timetable. Any trains that are rejected (and that have relevant Rights) will attract compensation through the usual industry mechanisms. Network Rail also note that D5.7 stipulates that we would only be liable in damages in respect of decisions that are 'made in bad faith' or 'unreasonable'. Network Rail submit that no action had been taken in bad faith, nor were the decisions unreasonable. GBRf have alleged neither of these positions within their SRD and submitted no evidence in respect of this. Network Rail request the Chair confirm that no damages (punitive) are due in this matter. In the event that the Chair disagrees with Network Rail's stance, we would also reference TTP1520 which confirmed that whilst a Chair of a TTP could determine that compensation may be due, that the amount in question is a matter for the parties to resolve or refer to an ADA.

6 APPENDICES

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

1.1 – Emails

1.1.1 Email Dated 28th February to GBRf and DBC colleagues concerning queries for Update 1 of the Ongoing Capacity Study

1.1.2 Email Dated 7th March to GBRf and colleagues concerning queries for Update 2 of the Ongoing Capacity Study

1.1.3 Email Dated 12th March to GBRf and colleagues concerning queries for Update 3 of the Ongoing Capacity Study

1.1.4 Email Dated 27th March to GBRf and colleagues concerning queries for Update 4 of the Ongoing Capacity Study

1.1.5 Email Dated 2nd April to GBRf and colleagues containing Part 1 of the Timetable Report.

2.1 – Capacity Study Updates and Documents

2.1.1 Capacity Study Update 1 (This document outlines progress for the capacity studies on the planned possessions in the Water Orton area for Weeks 21 and 22, 17th – 27th August 2024.)

2.1.2 Capacity Study Update 2 (This document outlines the progress on the Water Orton timetable study for week ending Friday 1st March 2024)

2.1.3 Capacity Study Update 3 (This document outlines the progress on the Water Orton timetable study for week ending Friday 8th March 2024)

2.1.4 Capacity Study Update 4 (This document outlines the progress on the Water Orton timetable study for week ending Friday 22nd March 2024)

2.1.5 Decision Criteria Table Issued as part of Version 4 of the Capacity Study

2.1.6 Timetable Report for the Week 21/22 Access between Castle Bromwich Junction and Landor Street Junction.

3.1 – ‘F3’ Train Service Paths Generated During the Capacity Study Process

3.1.1 F3 Print for Saturday Only GBRf Services issued on the 27th March

3.1.2 F3 Print for Saturdays ‘Excepted’ GBRf services issued on the 27th March

4.1 – Timeline Documents

4.1.1 Chronological Timeline of Week 18 and 21 Possessions and dates of publications, and subsequent amendments.

4.1.2 Subsidiary Timetable Change June 2024 Revision Schedule

7 SIGNATURE

For and on behalf of

Network Rail

Signed



Print Name

Paul Higgs

Position

Route Access Strategy Manager Central Area

*Now provide the Appendices (“**The Appendices**”) using a page break. A covering list of Appendices will be helpful. Bear in mind that the Panel and Chair will need to read everything submitted; only include material that will genuinely be helpful to the Panel, for example, do not append entire Network Code Chapters or entire policy documents - the relevant extracts will suffice.*