

## TTP2318 Network Rail Sole Response

### 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 Waterloo General Office, London, SE1 8SW (“the Defendant”).

1.2 Third parties to this dispute may include DB Cargo (UK), Trans Pennine Express, Northern Rail, East Midlands Railway and Cross Country Trains.

### 2 CONTENTS OF THIS DOCUMENT

2.1 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 SRD document, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in its respective documents, 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 SRD, including references to documents or contractual provisions not dealt with in the Claimant’s SRD document.
- (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

3.1 In paragraph 2.1 of its SRD, GBRf has referred this matter to a Timetabling Panel (“the Panel”) for determination in accordance with Condition D3.5.3 of the Network Code (under Condition 3.5 Network Rail Variations with less than 12 Weeks Notice). NR confirms the amended and rejected schedules returned to GBRf by NR in its Week 40 GBRf Informed Traveller Offer (GBRf SRD Appendix 3.2) were Network Rail Variations returned less than 12 weeks out from the commencement of the relevant possession in this dispute, however, it is NR’s view that Condition D3.4.16 provides GBRf with the contractual basis for this dispute.

- 3.2 Condition D3.5.3 would only apply if the Restriction of Use leading to the Network Rail Variation was advised to GBRf with less than 12 weeks' notice, which was not the case here as indicated by GBRf's own opposition to the Engineering Access Statement containing possession 3774226 (GBRf SRD Appendix 1.3), dated 24th February.
- 3.3 NR notes that its Week 40 GBRf Informed Traveller Offer was made on 20th October and not 17th October as reported by GBRf in paragraph 2.1 of its SRD.
- 3.4 NR accepts that GBRf has the right to bring its reference under Condition D3.4.16. In paragraph 4.1 of its SRD, GBRf does correctly state the dispute is brought under Condition 3.4.16.
- 3.5 In answer to the Hearing Chair (Second Directions letter, items 2, 3 and 6), NR confirms that it has complied with the consultation requirements set out in Condition D3.4.4 (see Figure 1 below) and, in doing so, has applied the Decision Criteria set out in Condition D4.6. Appendix M of this Sole Response provides detail on our application of the Decision Criteria for the proposal of possession 3774226. Appendix 1 of GBRf's 9th November response to the Hearing Chair's Second Directions letter illustrates that their responses to EAS Versions 1 to 3 *do* follow after each of the respective consultation dates listed in Figure 1 below.

<b>Figure 1: Consultation of Engineering Access Statement (EAS) and further amendments to possession 3774226</b>	<b>Date</b>	<b>Appendix</b>
EAS Version 0	16th September 2022	E
EAS Version 1	21st October 2022	F
EAS Version 2	3rd February 2023	G
EAS Version 3	31st March 2023	H
EAS Version 4	14th July 2023	I
POST EAS PRE CPPP DISRUPTIVE DURATION EXTENSION REQUEST (RPT14361): WEEK 40 MIRFIELD CORRIDOR (i.e. Extension Request)	28th April 2023	J
DECISION POST EAS PRE CPPP DISRUPTIVE DURATION EXTENSION (RPT14361): WEEK 40 MIRFIELD CORRIDOR (i.e. Extension Decision)	17th May 2023	K
Draft Period Possession Plan (meeting date and notes)	25th May 2023	L

- 3.6 NR is aware of GBRf's dissatisfaction with our decisions concerning its diverted biomass flows between the Port of Liverpool and Drax Power Station in Week 40. These diversions owe to possession 3774226 (GBRf SRD Appendix 5.2), which removed GBRf's capability to operate its biomass flows via the normal Calder Valley and Diggle routes. Both pre and post our GBRf Informed Traveller Offer for Week 40, NR has sought to work collaboratively with GBRf to accommodate as many of its biomass services as possible into the timetable, using new and essential terminal workings information brought to light by GBRf. This new information is critiqued in paragraph 4.3.1 of this Sole Response.
- 3.7 In answer to the Hearing Chair (Second Directions letter, item 12), NR confirms that no other reasonable diversionary route was available to GBRf beyond the Hope Valley route. Some minor examination was performed of the very circuitous alternative diversionary route of Crewe-Stafford-West Midlands-Derby-Chesterfield-Sheffield. This examination was performed alongside a GBRf colleague during a joint working session between both parties on 1st November, however it was deemed by the GBRf colleague that, from a resourcing point of view, the very circuitous route was "unworkable".
- 3.8 GBRf SRD Appendix 3.2 confirms that the Week 40 GBRf Informed Traveller Offer on 20th October contained nine schedule rejections. GBRf SRD Appendix 1.1 (their Notice of Dispute on 27th October) confirms the same nine rejections but went further in noting that 15 other schedules were "Offered with insufficient terminal time". A total of 24 points of issue.

3.9 In answer to the Hearing Chair (Second Directions letter, item 13), at the time of submission of this Sole Response, NR believes it has reconciled 18 of the 24 issues to GBRf's satisfaction however the following six biomass services remain rejected for Week 40:

▪ 6E10GB (SO)	10:10	Liverpool Biomass TML GBF – Drax AES (GBRF)	15:45	Saturday 30th December
▪ 6E27GA (MO)	19:15	Liverpool Biomass TML GBF – Drax AES (GBRF)	02:06	Monday 1st January
▪ 6M77FD (TO)	01:45	Drax AES (GBRF) – Liverpool Biomass TML GBF	05:42	Tuesday 2nd January
▪ 6E17GB (SO)	12:32	Liverpool Biomass TML GBF – Drax AES (GBRF)	18:35	Saturday 30th December
▪ 6E09GC (MO)	06:06	Liverpool Biomass TML GBF – Drax AES (GBRF)	12:57	Monday 1st January
▪ 6E34GA (MO)	21:59	Liverpool Biomass TML GBF – Drax AES (GBRF)	04:00	Monday 1st January

3.10 An overview on all progress on the Week 40 GBRf biomass train plan is reported in Appendix A of this Sole Response, which highlights GBRf are in receipt of 32 valid schedules (highlighted green) for their Week 40 biomass train plan. The aforementioned six rejections are highlighted red on the Appendix A document. The Appendix A document itself was the product of the joint working day between NR and GBRf planning colleagues on 1st November, with an earlier version of the same document sent to GBRf colleagues on 2nd November (GBRF SRD Appendix 5.4) to demonstrate the progress made the day before.

3.11 In paragraph 5.7 of its SRD, GBRf stated that “a total X3 loaded services” required further validation, as opposed to the six rejected biomass services above. The discrepancy between these numbers owes to the subsequent confirmation by NR’s North West & Central Route that it cannot grant some possession easements which would have enabled the offer of the aforementioned 6E27GA (MO), 6E34GA (MO), 6M77FD (TO), which were originally highlighted as yellow in the GBRf SRD Appendix 5.4 to signify their “pending easement” status. Email confirmation of these three further rejections is contained in Appendix B.

3.12 NR notes that GBRf has continuously disputed possession 3774226 and that its acceptance of the possession would be dependent upon the delivery of a “timetable study” for the possession (GBRF SRD Appendix 6.2). As such, this matter should arguably have been escalated by GBRf to become an earlier dispute of a different nature, as opposed to a dispute about final timetabling outputs, especially given the reported criticality of the services and the contention by the end customer (Drax) that “Recovering stocks in w/c 31-Dec has long been factored into our planning assumptions, with use of the Hope Valley diversion route allowing Liverpool to Drax services” (GBRF SRD Appendix 6.4).

3.13 Whilst NR concedes it was unsatisfactory in its actions not to commission a timetable study for possession 3774226 despite assurances that it would, NR strongly disagrees that in its subsequent timetabling actions following the GBRf Week 40 Variation Bid (GBRF SRD Appendix 1.3) it has “overlooked”, “discounted” and “insufficiently considered” the Week 40 GBRf biomass train plan (SRD paragraph 5.3). Despite critical non-compliances in GBRf’s Week 40 Variation Bid (see paragraph 4.3.1) and significant shortcomings in GBRf’s use of a capacity study (see paragraphs 3.15 to 3.17), NR can evidence that it acted competently and compliantly in its obligations when processing GBRf’s bid under Condition 3.4 of the Network Code (see paragraphs 4.2.7 to 4.2.9).

3.14 NR considers that Condition D3.4 (Network Rail Variations with at least 12 Weeks Notice), Condition D4.3 (Decisions concerning Train Operator Variations), Condition D4.4 (Decisions concerning Network Rail Variations) and Condition D4.6 (The Decision Criteria) are all applicable to this matter.

3.15 NR considers the capacity study material provided within GBRf SRD Appendix 5.3 as non-relevant material to the extent that GBRf incorrectly report this article to be “a timetable study that has been produced ahead of the possession” (GBRF SRD paragraph 4.5). The capacity study extract contained within GBRf SRD Appendix 5.3 is

not a timetable study produced ahead of the three-day possession 3774226 but in fact an access commission by the Transpennine Route Upgrade (TRU) team intended to establish the requirements and options to fulfil a minimal service level for cross Pennine freight during a 23-day 'Eye of the Needle' blockade in 2026. Page 6 of GBRf SRD Appendix 5.3 carries multiple references to "the 23-day blockade", which itself is not 3774226.

- 3.16 We recognise that this timetable dispute (centred around possession 3774226) is simultaneous to other discussions about TRU engineering access in the same area in future years, which may have caused some confusion to GBRf, but it remains the case that the capacity study was not for possession 3774226. As such, NR disagrees with the weight placed by GBRf on the capacity study article and its conclusions (on pages 6 and 7) within GBRf SRD Appendix 5.3.
- 3.17 In answer to the Hearing Chair (Second Directions letter, items 10 and 11), paragraphs 3.15 and 3.16 above explain why the optimism indicated in the capacity study article was unjustified in this case – put simply, the capacity study article dated 13th January did not relate to possession 3774226 and the intentions of the capacity study article have yet to come fruition and are not intended to come to fruition until the 23-day blockade in 2026. NR confirms that the conclusions of the capacity study have not been applied and this explains why our decisions in this matter are disconnected from the capacity study article. The capacity study was not fit for purpose.
- 3.18 Regarding GBRf SRD paragraph 4.8, and in answer to the Hearing Chair (item 11), GBRf is correct in its contention that NR's Freight Informed Traveller planners had not seen the capacity study. Only on 18th October (two days before offer) did GBRf supply to NR's Freight Informed Traveller planners a selection of F3 schedules (for GBRf services) supposedly linked to the study. It must be stated that in isolation from the potential F3 schedules for other operators' services (not supplied), the F3 schedules for GBRf services alone lacked any meaningful utility in the matter. The F3 schedules of other operators, if in existence, were not made available to the NR Freight Informed Traveller team.
- 3.19 NR has evidence that GBRf were in receipt of the F3 schedules as early as 17th August (eight days before the Week 40 TW-18 bidding deadline of 25th August). This followed their bilateral approach to the authors of the capacity study, D2Rail, which is evidenced in Appendix C. This evidence suggests GBRf has falsely contended in its paragraph 4.8 that it "finally attained the schedules from the Capacity Study on the 17th October 2023 long after our bid on the 25th August". GBRf obtained the F3 schedules from D2Rail on 17th August.
- 3.20 It is NR's view that GBRf could have helped far more constructively in this matter by raising to the NR Freight Informed Traveller team the existence of the capacity study and/or its F3 schedules at the time of bidding, or on any one of its weekly Thursday liaison calls with the NR Freight Informed Traveller team. The NR Freight Informed Traveller team was not cited on the entire matter nor were they made aware of the criticality of the services/situation by GBRf prior to Week 40 planning.
- 3.21 Notably, GBRf SRD paragraphs 4.5 and 4.8 contradict themselves on the matter of whether GBRf made their Week 40 Variation Bid in compliance or conjunction with the capacity study. It is unclear to NR what the "technical issue" cited in paragraph 4.8 may have been that prevented GBRf from bidding compliantly with the capacity study. What is clear is that the GBRf Week 40 Variation Bid was not in alignment with either the capacity study article in GBRf SRD Appendix 5.3 nor the D2Rail F3 schedules – this is illustrated in Appendix D (see Comments/Differences column). Furthermore, the capacity study was not fit for purpose.
- 3.22 Using as a sample the biomass schedules highlighted by GBRf themselves in their SRD Appendix 5.3 (Pages 3, 4 and 5), NR's Appendix D highlights that the same schedules in the GBRf Week 40 Variation Bid were different

in their characteristics compared to GBRf SRD Appendix 5.3 and also the F3 schedules supplied by D2Rail. Typically, the following could be said about the GBRf Week 40 Variation Bid:

- Bid schedule timings do not align to capacity study report shown in Appendix 5.3
- Bid schedule timings do not align to D2Rail F3 print
- Timing Load of bid doesn't align to commentary from capacity study report shown in Appendix 5.3
- Bid days of operation do not align for some bid schedules to the days of operation in capacity study report shown in Appendix 5.3 or D2Rail F3 prints

3.23 Putting to one side that the capacity study was not fit for purpose, it is NR's view that if GBRf had genuinely sought to assist this matter more constructively then it would have bid in alignment with the capacity study.

3.24 In answer to the Hearing Chair (Second Directions letter, item 5), NR submits as its Appendix N its definition of what constitutes a capacity study. The definition is explained in reference to the Access Impact Matrix. Of note from this definition:

- Capacity Studies are indicative only and do not constitute a 'decision' by Network Rail
- They are used to aid decisions by access planners on the balance of the possession footprint and the train service that can run
- They are a useful aid as to informing the inputs of operators bids for NR variation requests

3.25 Notably in this matter regarding possession 3774226, there was not an agreement on capacity allocation which might have been derived from a capacity study nor any agreement of GBRf's need to run x15 loaded services (36,000 tonnes of fuel to Drax). GBRf SRD Appendix 6.1 attempts now to provide some information in this area and GBRf SRD Appendix 6.2 simply says that GBRf needed to run "all" of its services, which in itself does not recognise Condition D4.6.1 ("the Objective") but merely reflects GBRf's own commercial imperatives.

3.26 NR provides in its Appendix O the actual train running data on GBRf loaded biomass services from Liverpool Bulk Terminal to Drax for the Christmas and New Year period last year (2022/23). Our finding from this data is that GBRf only required to operate x12 – not x15 – loaded biomass services from Liverpool Bulk Terminal to Drax for the comparable weekend last year (Saturday 31st December 2022 to Monday 2nd January 2023).

3.27 In answer to the Hearing Chair (Second Directions letter, item 15 and 18), NR does not consider that an order under Condition D.5.3.1(a) to the effect of cancelling the possession would be effective. The TRU programme has confirmed that loss of possession 3774226 would mean the loss of key enabling works as part of the wider TRU project (3774226 is one event in a sequence of events). Cancellation of the possession would cause infrastructure issues, be commercially hurtful to Network Rail, and would not remove the need to carry out the enabling works – another three-day blockade would have to be replanned and potentially at a time which does not suit GBRf and is more harmful.

## **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 has consistently disputed possession 3774226 in Week 40 and have themselves only been prepared to accept the possession on production of a timetable study (GBRf SRD paragraphs 4.2 and 5.6).

- 4.1.2 NR accepts it was unsatisfactory in its actions not to commission a timetable study for possession 3774226 despite assurances that it would (GBRf SRD paragraph 5.6).
- 4.1.3 NR accepts that it is in the interests of all industry stakeholders to have a supported industry plan for significant access disruption (GBRf SRD paragraph 4.8). NR is grateful of GBRf's cooperation with the TRU programme.
- 4.1.4 NR accepts that its GBRf Week 40 Informed Traveller Offer contained a number of rejections due to a lack of capacity and conflicting possessions on the diversionary route (GBRf SRD paragraph 4.12). Previous paragraphs 3.8 to 3.11 of this Sole Response detail the balance and quantum of those issues in our offer.
- 4.1.5 NR confirms that GBRf's common advice to the NR Freight Informed Traveller during the validation process was "Please flex others to gain us a path" (GBRf SRD Appendix 4.2).
- 4.1.6 In the context of very disruptive possessions such as 3774226, NR agrees with GBRf SRD paragraph 4.16 to the extent that "it is impossible to divert a significant number of trains onto another route without having to re-time other trains" however it is NR's firm view that such disruptive possessions are only reasonably mitigated by capacity allocation decisions which usually derive from assured capacity studies or a joint trains meeting with affected operators, and not through any entitlement NR has to exercise its Flexing Right under Condition D4.4.1.
- 4.1.7 Notably, the diversionary challenges posed by possession 3774226 are recognised by GBRf in its paragraph 4.17. It is therefore with some surprise and contradiction that GBRf would knowingly contend in the same paragraph that, without the requested timetable study, "there might just have been a few "tweaks" to the GB Railfreight-bid schedules, on validation, when Network Rail received the amended schedules on the 18th October." NR accepts that it was always going to be a very difficult task for its Freight Informed Traveller team to deliver GBRf's Hope Valley aspirations amongst those of other operators.
- 4.1.8 NR accepts that the capacity study cited in this case was not "fit for purpose" (GBRf SRD paragraphs 4.8, 4.18 and 5.4) but notes its purpose was never to assist possession 3774226. In paragraphs 3.15 to 3.22 of this Sole Response, NR has explained at length the lack of utility the capacity study had in the matter and how, nevertheless, GBRf failed to bid in alignment with it. NR agrees "the issues that have unfolded in this case highlight the criticality of a well-produced and valid timetable study" (GBRf SRD paragraph 4.18) but considers that this argument by GBRf, and similar arguments made in its paragraph 5.4, simply reinforce how well the NR Freight Informed Traveller has done to arrive at 32 valid schedules out of 38 in the GBRf biomass plan, and how difficult a task that has been.
- 4.1.9 In answer to the Hearing Chair (Second Directions letter, item 7), NR accepts that in delivering its separate outcomes for schedules contained in the GBRf Week 40 Variation Bid it did not share information pertaining to the Network Code Decision Criteria (GBRf SRD paragraph 4.20). Given the very high turnover of schedules that the NR Freight Informed Traveller team has to process and the perceived abrasiveness by FOCs of applying Decision Criteria to each schedule transaction, it has not been the convention of the NR Freight Informed Traveller team to supply Decision Criteria information with each schedule transaction. NR wishes to make clear that this admission does not equate to a lack of consideration or application of the Decision Criteria in its Week 40 outputs. Later in Section 4 of this Sole Response (specifically paragraphs 4.2.7, 4.2.8 and 4.2.9), NR details the extent to which it did apply its Flexing Right and Network Code Decision Criteria in its timetable decisions under Condition 4.4.1 and Condition D3.4.4.
- 4.1.10 NR acknowledges the beneficial, but rather late-in-the-day, assistance GBRf provided in this matter by agreeing to cancel some of its other services. This action raises the issue of how GBRf could have been more helpful by

providing this information at the point of bidding. This action also highlights how counter-productive it is to the Informed Traveller process that the timetable is occupied by non-running obstacles.

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

- 4.2.1 NR refutes that GBRf's "bids were made in conjunction with a timetable study" (GBRf SRD paragraph 4.5). Only on 18th October (two days before offer) did GBRf supply to NR's Freight Informed Traveller planners a selection of F3 schedules (for GBRf services only) supposedly linked to the study. GBRf made their Week 40 Variation Bid on 25th August. Though paragraph 3.19 and Appendix C of this Sole Response has established that GBRf were in receipt of the F3 schedules from 17th August, paragraph 3.22 and Appendix D of this Sole Response show clearly that the GBRf Week 40 Variation Bid was not in alignment with the capacity study. The NR Freight Informed Traveller team was also not in receipt of the capacity study schedules of other operators.
- 4.2.2 NR queries how, when initially in receipt of 25 valid schedules (GBRf SRD paragraph 4.12) out of a required 38 for their biomass train plan (Appendix A), GBRf would only be able to deliver 4,800 tonnes of biomass to Drax.
- 4.2.3 NR refutes the contention by GBRf that it believed the capacity study in this case was "workable with other operators for the duration of the disruption and with the use of flexing rights" (GBRf SRD paragraph 4.8). This position is inconsistent with GBRf's overarching objection to possession 3774226 and its associated demand for a timetable study (which did not materialise). Consequently, NR contends that GBRf would have expected that the NR Freight Informed Traveller team would struggle to deliver their requirements given the capacity constraints on the Hope Valley diversionary route, which GBRf clearly understood hence its opposition to the possession.
- 4.2.4 NR refutes any and all contentions that the capacity study in this case was intended to be applied to possession 3774226 for the reasons explained in paragraphs 3.15 to 3.19 of the Sole Response.
- 4.2.5 NR refutes that it reached a decision for a disruptive possession without adequate consultation, as required by Condition D3.4.4(a), Condition D3.4.8 and Condition D.3.4.12. Paragraph 3.5 of this Sole Response provides the timetable of consultation for possession 3774226, supported by Appendices E to L.
- 4.2.6 NR refutes GBRf's contention that "between submitting our bid and receiving the offer, there had been little or no communication from the planning team in Milton Keynes" (GBRf SRD paragraph 4.13). The NR Freight Informed Traveller team has a weekly Thursday liaison call with GBRf at which the matter of GBRf's Week 40 Variation Bid (and its Hope Valley diversions) were never raised as a risk. Furthermore, in the course of the Week 40 planning week, NR shared at least seven emails with GBRf regarding the week's emerging biomass issues/rejections, and conducted multiple phone calls with GBRf counterparts to seek advice on the bid. These emails are enclosed as Appendices P to V, with Appendix V highlighting the execution of phone calls by NR.
- 4.2.7 NR refutes GBRf's contention that "NR has its power of flexing rights but it often chooses not to use these rights" (GBRf SRD paragraph 4.16). Appendices Q to U are all NR emails to GBRf communicating Week 40 schedule rejections. Common to all five emails is the rejection commentary from the NR planner stating "I looked at retiming the passenger service, but there is no time for me to remove, and due to the potential retiming I will need to do, it will break the running plan." The "running plan" refers to passenger operators' train diagrams and connections.
- 4.2.8 These multiple rejection commentaries clearly demonstrate an effort on the part of the NR planner to retime other operators' services in order to facilitate GBRf's biomass services, however the NR planner concludes on each occasion that retiming the proximate passenger services leads to breakages in their running plan (i.e. train diagrams / rotations), which commonly cannot be reasonably overcome without significant rework of the whole

timetable. To this end, NR is in compliance with Condition D4.6.1 as its timetable decisions demonstrate fulfilment of “the Objective” in accordance with the following clauses of Condition D4.6.2 (The Decision Criteria):

**(d) that journey times are as short as reasonably possible**

In this matter and overall, journey times would increase through accommodation of the freight service because a wide number of passenger services in the aforementioned running plan (i.e. train diagram) would be slowed, displaced and/or delayed to accommodate the freight service, and there would be an arising need to retime multiple parts of the passenger train diagram and the wider timetable.

**(e) maintaining and improving an integrated system of transport for passengers and goods**

In this matter and overall, there would be a degradation to train connections as a result of the slowing, displacement and/or delay of one or more passenger services to accommodate the freight service, and there would be an arising need to retime multiple parts of the passenger train diagram and the wider timetable.

**(j) enabling operators of trains to utilise their assets efficiently**

In this matter and overall, there would be a larger inefficiency in slowing, displacing and/or delaying multiple passenger service assets in the aforementioned running plan versus optimising the single freight service, and there would be an arising need to retime multiple parts of the passenger train diagram and the wider timetable.

- 4.2.9 In answer to the Hearing Chair (Second Directions letter, item 9), paragraphs 4.2.7 and 4.2.8 combine to evidence that NR did make efforts to retime other operators’ services in order to facilitate GBRf’s biomass services, and in doing so did attempt to exercise, as it is entitled to do, its Flexing Right whilst also considering the Network Code Decision Criteria. As such, NR did discharge those articles listed under Condition D.4.4.1 (a) and (c), and Network Rail disagrees with GBRf’s remarks to the contrary in GBRf SRD paragraphs 4.19 and 5.2. Similarly, and for the same reasons, NR refutes GBRf’s remarks in GBRf SRD paragraph 4.20 that NR did not make consideration of the Decision Criteria under Condition D.3.4.4(b). NR wishes to state clearly that in its timetable decisions in this matter, the consideration and application of the Decision Criteria was present in all actions albeit not explicitly conveyed in its communications for the efficiency and customer-friendly reasons outlined in paragraph 4.1.9.
- 4.2.10 In further answer to the Hearing Chair (Second Directions letter, item 9), NR confirms that, when deciding upon Network Rail Variations, Condition D4.4.1 entitles NR to exercise its Flexing Right when responding to an Access Proposal submitted under Condition D3.4.10. In the course of processing the Access Proposal, and as outlined in Condition D3.4.11, Network Rail subsequently “may modify, accept or reject a revised Access Proposal”, giving written reasons for any modifications or rejections in the process.
- 4.2.11 NR wishes to emphasise that Condition D4.4.1 “entitles” NR to flex services when processing Access Proposals related to Network Rail Variations, but the clause does not demand that NR *must* flex services. Furthermore, Condition D4.3.1 is clear that in being entitled to exercise its Flexing Right, NR shall not accept a Train Operator Variation Request if to do so would give rise to any conflict with any Train Slot already scheduled in the New Working Timetable. In line with Condition D4.3.1, NR wishes to note that it feels strongly that it cannot flex parties that have not been consulted on a Network Rail Variation Request (i.e. indirectly affected parties) but NR does sense that GBRf and others do not agree here.
- 4.2.12 In answer to the Hearing Chair (Second Directions letter, item 7), NR identified Decision Criteria (d), (e) and (j) as relevant to the particular circumstances surrounding all schedule rejections except those linked to services being foul of possessions. As Appendices Q to U illustrate, it was a common theme encountered by the NR planner that they “looked at retiming the passenger service, but there is no time for me to remove, and due to the potential retiming I will need to do, it will break the running plan.” The impacts that would arise if whole running plans (train diagrams) were to break would be: increased journey times and broken service connections; and sub-



optimal use of multiple assets. As such, Decision Criteria (d), (e) and (j) were relevant in the matter, with all three holding equal weight given the similar implications (inefficiencies) of a running plan(s) falling apart.

4.2.13 NR refutes that GBRf's services were "overlooked", "discounted" and "insufficiently considered" as contended in GBRf SRD paragraph 5.3. There is clear evidence in NR's GBRf Week Informed Traveller Offer (GBRf SRD Appendix 4.2) and our rejection emails (Appendices P to U) that NR gave ample coverage to GBRf's biomass services and explained each conflict leading to rejection. All GBRf services in their Week 40 Variation Bid were reviewed – all current progress is recorded in Appendix A.

### **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 The Hearing Chair notes in its Second Directions (item 8) that "Network Rail needs to be properly informed when exercising the Decision Criteria". It is extremely material to the schedule rejections and amendments that have triggered this dispute, and to the dispute overall, that NR was not in receipt of critical terminal workings/next workings information pertaining to GBRf's biomass train plan at the point of bidding. Furthermore, this information was only supplied to NR shortly after GBRf raised its Notice of Dispute (see Appendix W). The GBRf Notice of Dispute cited numerous schedules "Offered with insufficient terminal time". GBRf's failure to supply terminal workings as part of its bid is a major failing in this matter and explains clearly why NR arrived at offers with insufficient terminal time. GBRf's terminal workings arrived with NR far too late into the planning process.

4.3.2 As stated by Condition D2.5.1(k) (Content of an Access Proposal), it is necessary for an Access Proposal to contain "the proposed previous and next working of the railway passenger vehicles of the proposed Train Slot provided that the vehicles have not left the Network". It is NR's view that the GBRf Week 40 Variation Bid was non-compliant for this reason, and that it is unacceptable this dispute has been raised because of 15 schedules "Offered with insufficient terminal time".

4.3.3 GBRf's Week 40 Variation Bid was further non-compliant owing to: its non-timed/unvalidated nature (conceded by GBRf SRD paragraph 4.18); the absence of mandatory Adjustment and Engineering timing allowances between Altrincham and Knottingley on its Hope Valley diversionary route (Appendix X); the absence of ancillary movements in the bid; and the planning of trains through possessions (paragraph 3.11). In short, GBRf's Week 40 Variation Bid was deficient in multiple respects, in addition to not aligning with the capacity study.

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

4.4.1 In this matter, NR has been open in stating that the task of executing GBRf's Week 40 biomass diversions has been, and was always going to be, a difficult task. An assured timetable study relevant to possession 3774226, as part of a joint industry initiative, would have no doubt led to better results than those delivered to GBRf by the NR Freight Informed Traveller team. NR notes that it is unsatisfactory that it did not produce the aforementioned timetable study when it said it would do so.

4.4.2 That this matter has become a timetable dispute provides learning for all and NR has made arguments in paragraph 3.12 that potentially this matter should have escalated to an earlier dispute of a different nature. However, these points aside, NR has established here that its NR Freight Informed Traveller team has not failed in its Part D obligations to process GBRf's Week 40 biomass proposals and, overall, has actually achieved a considerable degree of success despite GBRf's own non-compliant bidding. The evidence in this case, Appendix A and Appendices P to U, illustrates that the NR Freight Informed Traveller team did not "overlook", "discount" or "insufficiently consider" the GBRf Week 40 Variation Bid.

- 4.4.3 GBRf's main arguments in this matter centre on: NR's application of its Flexing Right; NR's consideration and application of the Decision Criteria; and the existence of capacity study outputs, which GBRf believed should be applied by NR to the GBRf Week 40 Variation Bid.
- 4.4.4 Paragraphs 4.2.7 to 4.2.12 of this Sole Response evidence both that: NR *did* attempt to exercise, as it is entitled to do, its Flexing Right; and consideration and application of the Decision Criteria *did* underpin NR's communications to GBRf on its Week 40 biomass rejections. Paragraph 4.1.9 explains the clear reasons why Decision Criteria information was not explicitly shared at the time.
- 4.4.5 Paragraphs 3.15 to 3.17 and 4.1.8 of this Sole Response detail that the capacity study outputs in this case were not fit for purpose and were not ever intended for possession 3774226. As such, NR has argued that the capacity study outputs supplied to the NR Freight Informed Traveller team are non-relevant material. However, insofar as the Panel might consider them relevant, NR has been able to evidence across paragraphs 3.15 to 3.22, 3.25, 4.1.7 and 4.1.8 that: GBRf did not bid in alignment with the capacity study; GBRf only supplied the capacity study unreasonably late in the planning process; GBRf only supplied their parts of the capacity study; there was not an agreement in place for this capacity study to be applied; and GBRf knew it was unrealistic that the capacity study could be applied.
- 4.4.6 Further in NR's favour, paragraphs 4.3.1 to 4.3.3 detail that GBRf's Week 40 Variation Bid was non-compliant on various counts but, most significantly, lacked key terminal workings information material to the dispute raised. This information was, unacceptably and unhelpfully, only supplied to NR in the short hours after GBRf served its Notice of Dispute.
- 4.4.7 Noted in paragraph 3.25, NR finds that GBRf's commercial imperative – specifically the need for all of their Week 40 biomass trains to be successfully offered – is inconsistent with Condition D4.6.1 (“the Objective”). Furthermore, NR can find no agreement committing it to the offer of all 15 loaded services for the period of the possession.
- 4.4.8 In summary, NR finds that it has met all of its contractual obligations under Part D and has not failed any contractual agreement to provide GBRf with a certain number of loaded biomass services.

## **5 DECISION SOUGHT FROM THE CHAIR**

- 5.1 NR seeks from the Panel the determination that: it has not acted unreasonably in this timetabling matter; and that its Freight Informed Traveller team has reasonably, and correctly, met all of its contractual obligations under Part D, including the application of its Flexing Right.
- 5.2 NR seeks from the Panel the determination that its original timetabling decisions should be upheld.
- 5.3 NR does not consider effective an order, under Condition D.5.3.1(a), requesting it to offer the six rejected schedules. Through the validation of the Week 40 timetable, NR has established that capacity for the six rejected schedules does not currently exist and could only be found at the removal/cost of other operators' services, which in itself would likely lead to a dispute with another party.
- 5.4 NR does not believe any exceptional circumstances exist in the dispute which would prevent the Hearing Chair from reaching the conclusion that NR's original timetable decisions should be upheld. NR notes GBRf's reply to the Hearing Chair's first Directions letter, where GBRf confirmed that it was not asking for the cancellation of possession 3774226.

- 5.5 In answer to the Hearing Chair (Second Directions letter, item 18), NR cannot identify any alternative remedy which might be imposed which would permit GBRf to exercise its rights while not affecting the possession.
- 5.6 NR does not seek costs in this matter.
- 5.7 The NR Freight Informed Traveller team continues to work with GBRf to remedy all matters.

## 6 APPENDICES

- 6.1 NR confirms that it has complied with Access Dispute Resolution Rule H21.

APPENDIX A	GBRf Week 40 biomass train plan progress – 8th November
APPENDIX B	Email containing three GBRf additional rejections – 7th November
APPENDIX C	GBRf receipt and supply of capacity study F3 schedules
APPENDIX D	GBRf Week 40 Variation Bid compared to capacity study outputs
APPENDIX E	EAS Version 0 consultation – 16th September
APPENDIX F	EAS Version 1 consultation – 21st October
APPENDIX G	EAS Version 2 consultation – 3rd February
APPENDIX H	EAS Version 3 consultation – 31st March
APPENDIX I	EAS Version 4 consultation – 14th July
APPENDIX J	Extension Request for possession 3774226 – 28th April
APPENDIX K	Extension Decision for possession 3774226 – 17th May
APPENDIX L	DPPP meeting notes – 25th May
APPENDIX N	NR Definition of Capacity Study
APPENDIX O	GBRf loaded biomass trains last Christmas and New Year (2022-23)
APPENDIX P	Week 40 email communication (6E27GA, 6E34GA, 6M77FD)
APPENDIX Q	Week 40 email communication (6E09GC)
APPENDIX R	Week 40 email communication (6E10GB)
APPENDIX S	Week 40 email communication (6E10GB)
APPENDIX T	Week 40 email communication (6E17GB)
APPENDIX U	Week 40 email communication (6E24GA)
APPENDIX V	Week 40 email communication (general)
APPENDIX W	GBRf terminal workings – 27th October
APPENDIX X	GBRf Week 40 Variation Bid schedules (missing allowances)

## 7 SIGNATURE

For and on behalf of Network Rail Infrastructure Limited



**Nick Coles**

Timetable Production Manager – Freight