

**IN THE MATTER OF PART D OF THE NETWORK CODE**

**AND IN THE MATTER OF TIMETABLING DISPUTE TTP2525**

**BETWEEN**

**FREIGHTLINER LIMITED**

**CLAIMANT**

**V**

**NETWORK RAIL INFRASTRUCTURE LIMITED**

**DEFENDANT**

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**RULE H18(c) LEGAL NOTE**

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**Issue 1 – Parameters of the Dispute**

1. The parties agree that the subject-matter of this dispute is the Defendant’s decision to publish changes to the Wales & Western Timetable Planning Rules (TPRs) for the 2025 subsidiary timetable through Condition D2.2.7 relating to restrictions in the area of Westbury station on Line of Route GW560.
2. It is understood that this relates to the Defendant’s decision to publish Version 4.1 of the TPRs which contain the restrictions at Westbury on 10<sup>th</sup> October 2024, and that this is therefore the decision under challenge (‘the Decision’).
3. I note that the Claimant, in its SRD (Paragraphs 5.7 and 5.8) alleges that the Defendant is in breach of its Network Licence and that, in publishing the Decision, it is essentially using the Part D processes to bypass the contractual requirements laid out in Part G. In light of an appeal under Part D being premised upon a Timetable Participant being “dissatisfied with any decision of Network Rail in respect of those Rules (including any decision to revise those Rules pursuant to Condition D2.2.7)” (Condition D2.2.14) and in light of an appeal lying only against a “decision” (Condition D5.1.1), the Claimant is invited to reflect upon and make submissions at the hearing as to whether either of these matters fall within the Panel’s jurisdiction

and, if so, their precise relevance to the issues in this dispute identified within this Note. The Defendant will be invited to make submissions in response.

4. Further, the Claimant seeks that the Panel instruct the Defendant “to withdraw these Rules from the Final Rules for the 2025 Subsidiary Timetable and any subsequent versions of the Rules already consulted or Decisioned” (Paragraph 6.2 of its SRD). In equal measure, in light of an appeal lying only against a “decision,” but also bearing in mind my power under Rule H50 to make such orders as I consider necessary to resolve the dispute including without limitation that one Dispute Party should take or not take specified action (Rule H50(a)), the Claimant is invited to reflect upon and make submissions at the hearing as to whether the Panel has jurisdiction to make any ruling against the Defendant regarding what are understood to be unpublished and unappealed versions of the TPRs. The Defendant will be invited to make submissions in response.

### **Issue 2 – whether the TPRs are associated with Network Change**

5. A core issue raised by the Claimant is whether a TPR which has the effect of restricting capacity in relation to a physical change that has not been established though Part G can be deemed as implementing that change (Paragraph 5.3 of its SRD). Essentially, it is understood that the Claimant is contending that the TPRs in question should not have been published without a Network Change being established subject to the process under Part G first. To this end, I note the Defendant’s contention that there is no requirement for a Network Change and reference to binding precedent that there is no link between Part D and Part G.
6. This issue was subject to detailed analysis in the Panel’s Determination of TTP1065 and others. In Paragraph 5.10, the Hearing Chair referred to the ORR Determinations in disputes TTP570/571 and TTP807/808. Specifically with reference to Paragraphs 49 and 50 of the ORR Determination in relation to TTP807/808, the Hearing Chair concluded as follows by way of guidance:

*The Panel interprets these paragraphs as drawing a distinction between the fact that there is no explicit contractual link between Part D and Part G and recognition by the ORR of the fact that there must necessarily be an operational link between TPRs*

*solely arising because of Network Change and that Network Change, to avoid the situation either pre-or post-Network Change in which Network Rail and TOCs/FOCs are trying to operate a timetable in which the TPRs in force relate to the opposite situation.*

7. The Hearing Chair, in the same Paragraph of the Determination, further stated as follows:

*Therefore the Panel concludes that Network Rail is not correct in saying that a Timetable Participant may not object to a TPR change simply on the grounds that any associated change has not been made: in our interpretation the ORR clearly recognises the practical reality that TPRs associated with Network Change can only take effect when the Network Change becomes a reality on the Network, and that the National TPRs reflect this because of the recently introduced ability of Network Rail to propose a changed TPR which will only come into effect from a given date.*

8. In reaching my determination of this dispute, I will not be bound by, but can take into account, the above TTP determination (Rule 7 (a)). Accordingly, I take note of the above guidance. It seems to me, therefore, that the Panel will need to decide whether the TPRs which form part of the Decision are TPRs which are “associated with Network Change.” I note the Defendant’s position on this issue set out at Paragraphs 4.2.5 – 4.2.7 and the Panel will need to determine which party’s position is correct.

### **Issue 3 – Consultation, the Decision Criteria and *Wednesbury* Reasonableness**

9. Condition D2.2.7 obliges the Defendant to consult with Timetable Participants, and the Defendant is to make all decisions by application of the Decision Criteria set out in Condition D4.6 (Condition D4.1). I note from Paragraphs 4.15 – 4.17 of the Claimant’s SRD that the Claimant appears to accept that there has been consultation. The Claimant is invited to confirm at the hearing whether my understanding in this regard is correct.
10. The question for the Panel will be whether that consultation was adequate and/or efficient, and the extent to which the Defendant took into account the Objective, as defined in Condition 4.6.1, in making the Decision. The Panel’s determination in

TTP1630 establishes that “there needs to be a balanced decision, applying the Decision Criteria. This will include comparing the operational gains and losses from the proposal.” I take from the guidance provided in this TTP determination, that the Panel will need to scrutinise in particular the material relied upon by the Defendant notwithstanding whether or not the Defendant can show that it had adhered both to the letter and spirit of the relevant Conditions in the Network Code (Paragraph 73 of the TTP determination).

11. Further, I take note of the Panel’s determination in TTP271 which establishes that, as a matter of principle, in order to find against the Defendant, “the Panel would have to be satisfied that Network Rail had failed in the execution of one of the procedures to which it is contracted through the Track Access Agreements and the Network Code, or that it had made a capricious decision, which did not take into account either the facts of the case, or the guidance embodied in the ... Decision Criteria.” To this end, I note that there is a specified procedure for amending TPRs in the National TPRs at Paragraphs 1.3.1 – 1.3.2, and the Panel will therefore scrutinise the extent to which the Defendant followed that procedure.
12. In considering the above, it will be for the Defendant to establish that it had properly weighted the Decision Criteria. To this end, I take heed of the ORR’s formulation of the test at Paragraph 56 of its determination of an appeal by Network Rail against Determinations TTP337, 359 and 382.
13. In addition to the Decision Criteria, which are non-exhaustive in nature, it seems that the Defendant’s position in this case is that of a contractual fact-finder. Accordingly, the Defendant’s decision must be shown to have been reasonable in the *Wednesbury* sense. In particular, the Panel will need to determine whether the Defendant took all relevant matters into account. To this end, I have regard to the Supreme Court’s decision in *Braganza v BP Shipping Ltd* [2015] 1 W.L.R. 1661.

#### **Issue 4 – Remedy**

14. The Panel’s powers are confined to those set out in D5.3, D5.7 and Rule H50 of the ADRR.

15. The Claimant is invited to make submissions as to how the specific remedies which it seeks within its SRD fall within D5.3.1, in particular on what basis it contends that the Panel has jurisdiction over the alleged breach by the Defendant of its Licence Conditions (Paragraph 6.3 of the SRD). Furthermore, the Claimant is invited to make submissions as to its claim for both costs (6.4 of its SRD) addressing the following matters in particular:

- a) On what basis within the Network Code or the ADRR it seeks an award of costs and in what amount;
- b) Whether this is, in reality, a claim for damages as opposed to costs;
- c) If so, which part of D5.7.1 it relies on for the purposes of damages and what amount of damages does it seek?

16. The Defendant will be invited to respond to any submissions made if it so wishes.

**Alexander Rozycki**

**Hearing Chair**

**16<sup>th</sup> December 2024**