

**IN THE MATTER OF PART D OF THE NETWORK CODE
AND IN THE MATTER OF TIMETABLING DISPUTE TTP2690**

BETWEEN

**FIRST TRENITALIA WEST COAST RAIL LIMITED (T/A AVANTI WEST
COAST**

CLAIMANT

V

NETWORK RAIL INFRASTRUCTURE LIMITED

DEFENDANT

RULE H18(c) LEGAL NOTE

Parameters of the Dispute

1. The parties agree that the subject-matter of this dispute is the Defendant's decision not to include trains within the Dec 25 New Working Timetable ('NWT') following an Access Proposal by the Claimant.
2. The first decision relates to the rejection of four train services on the WCML South line and is referred to as 'Item 2.'
3. The second decision relates to the rejection of four trains on the line between London Euston and Liverpool Lime Street due to power supply issues and is referred to as 'Item 3.'
4. I record that Item 1 in the Claimant's SRD has been resolved between the parties and has been withdrawn. It therefore no longer falls for my determination.

5. In respect of Item 3, the Claimant seeks that the Defendant revisit the mitigations that the Claimant has proposed, and that it shares full power supply outputs in a timely manner, so that it can fully assess suitable mitigation and facilitate a plan to enable the full ESG timetable to operate between London Euston and Liverpool Lime Street in the May 2026 timetable. However, in accordance with D5.1.1, an appeal lies only against a ‘decision’ by the Defendant. I also, however, bear 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 Defendant has not yet made any decision in respect of the May 2026 timetable, and I therefore observe that I do not seem to have jurisdiction to make such a determination. The parties are invited to reflect upon and make submissions in their opening statements as to whether I have jurisdiction to make the determination sought by the Claimant or whether I should confine my determination to the Defendant’s decision in respect of the Dec 25 NWT, which is the decision under challenge.

Item 2 – Rejection of Services on the WCML South

6. I observe that the Claimant’s core contention is that it does not believe that the Defendant has correctly applied the Decision Criteria when deciding not to accommodate the relevant train services in the Dec 25 timetable. It is the Defendant’s core contention that, with a focus on performance and timetable resilience, it applied the Decision Criteria by having them in mind while developing the timetable.
7. Under Condition D4.2.1, the Defendant, when compiling a NWT in accordance with Condition D2.6, shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in Condition D4.2. The ORR has confirmed, in its decision, dated 15 February 2018, on an appeal against a TTP decision dated 14 November 2017 (TTP1174), its decision being binding on me, that “*The obligation on Network Rail to apply the Decision Criteria must therefore be considered in conjunction with Condition D4.2.2*” (Para 69). The ORR went on to state, at Para 70, that:

“Condition D4.2.2 provides a general obligation on Network Rail to endeavour wherever possible to comply with Access Proposals (the Obligation to Comply). As

noted previously, that obligation is not absolute, but is qualified by a number of principles.”

8. The parties in their respective SRDs have not made any specific submissions on the operation of Condition D4.2.2 notwithstanding the above (qualified) Obligation to Comply on the Defendant. However, it seems to me that the Panel will need to make a determination as to the extent to which the Defendant complied with Condition D4.2.2 in conjunction with its application of the Decision Criteria (bearing in mind the ORR’s above determination).
9. In particular, the Panel will be interested to hear the parties’ submissions, and make determinations on, any issue which they may wish to raise with reference to D4.2.2 (a), (b) and/or (c). I note that the Claimant’s contention that the Defendant had an *“inconsistent approach to the application of the ESG timetable”* (SRD, Para 5) and the Defendant’s contention that the Claimant only holds an *“expectation of rights”* (SRD, Para 4.2.8) put into play the operation of D4.2.2 (d) (iii), entitling the Defendant to prioritise other services in the event of its inability to accommodate all requested train slots in the NWT. The parties will be invited to address this point specifically at the hearing, so as to enable the Panel to make an appropriate determination.
10. Further to the above, the ORR made clear in its above determination (Para 74, 6th bullet point) that Condition D4.2.2 (d) imposes an obligation on Network Rail to consider whether or not to exercise its Flexing Right under D4.2.2 (c) prior to allocating train slots in the prescribed order of priority. The Defendant is therefore invited to reflect upon and clarify the extent to which it fulfilled this obligation prior to rejecting the trains which the Claimant had requested be included in the Dec 25 timetable.
11. As noted above, Condition D4.2.1 obliges the Defendant to, and it is in any event common ground that it must, apply the Decision Criteria set out in Condition D4.6. The question for the Panel will therefore be the extent to which the Defendant took into account the Objective, as defined in Condition 4.6.1, in making the Decision. To this end, the Panel will need to scrutinise the way in which the Defendant weighed the Decision Criteria in relation to the facts of this dispute.

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. The Panel will consider the weighting applied by the Defendant in relation in particular to the following factors:

- a) Performance and resilience of the network;
- b) The content of the ESG timetable for Dec 22;
- c) Prioritisation of trains under Condition D4.2.2 (d) (iii);
- d) Impact on the Claimant's productivity with reference to its appointment of train crew;
- e) The Defendant's obligation to exercise its Flexing Right entitlement under Condition D4.2.2 (c).

13. Furthermore, the Defendant's position is that of a contractual fact-finder, alternatively a commercial decision-maker, for the purposes of the law of contract. More broadly, bearing in mind the Defendant's application of the Decision Criteria, the Panel will therefore need to consider the extent to which the Defendant has complied with its contractual obligations. This particular point has been considered in a number of TTP determinations (by which I am not bound but can take into account). In particular, the relevant principles were aptly summarised by the Hearing Chair in TTP2570 (Para 23) confirming, with reference to the leading authorities of *Braganza v BP Shipping Ltd & Anor* [2015] UHCS and *Abu Dhabi National Tanker Co v Product Star Shipping Ltd ('Product Star')* No2 [1993] Lloyds Rep 397, that the Panel must consider whether the Defendant, in reaching its decision:

- a) Exercised its discretion honestly;
- b) Made it in good faith;
- c) Did not act arbitrarily, capriciously or unreasonably.

14. Further, it was made clear in the above determination (Para 24), with reference to a judgment by Foxton J in *Hayes v Pack & Others* [2025] EWHC 402 (KB) that the Panel must have regard to the evidence and information that was before the Defendant at the time it made the decision, not to consider what decision it would have made if it were the decision-maker. In the context of whether the Defendant discharged its contractual obligations under the above provisions of the Code, the Panel will consider more broadly whether the Defendant complied with the above principles when making its decision not to accommodate the relevant train services in the Dec 25 timetable.

Item 3 – Non-Accommodation of Trains due to Power Supply Capacity

15. The Claimant's core contention is that the Defendant failed, in rejecting the relevant trains, to consider the mitigations put forward by the Claimant and, in doing so, did not adequately apply the Decision Criteria. The Defendant's core contention is that it did explore mitigations or alternative options and by implication that it therefore properly applied the Decision Criteria.

16. Subject to any submissions made by the Parties on the point which I have raised in Para 5 above, the Panel will apply the same core legal principles set out above relating to Item 2. In particular, the Panel will have regard to the weighting that the Defendant applied with reference in particular to the power supply analysis provided by the Claimant and its contention that a diesel operation on the London Euston to Liverpool Lime Street line might have enabled at least one of the trains to run.

Remedy

17. My powers are confined to those set out in Condition D5.3.1 and Rule H50 of the ADRR.
18. The Claimant is not seeking damages and has not asserted that there are any 'exceptional circumstances' which apply for the purposes of D5.3.1 (c).
19. Accordingly, and subject to any submissions that the parties may wish to make in relation to Para 5 above, if I find in favour of the Claimant, I shall give directions to the Defendant in accordance with D5.3.1 (a) or, if I find in favour of the Defendant, I shall direct that either one or both of its decisions under challenge shall stand.

Alexander Rozycki

Hearing Chair

27th August 2025