

**Dispute Party: Heathrow Express Operating Company Limited**

**Timetable Dispute: HAL/TTP0005**

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**Claimant Submission to Timetabling Panel**

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**13 January 2022**

1. **DETAILS OF PARTIES**
   1. The names and addresses of the parties to the reference are as follows:-
      1. Heathrow Express Operating Company Limited, whose Registered Office is at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW ("HEOC") ("the Claimant"); and
      2. Heathrow Airport Limited, whose Registered Office is at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW ("HAL") ("the Defendant").
   2. In respect of HEOC, please send all correspondence in relation to this matter to Sophie Chapman [redacted]; with a copy to Andy Darbyshire, [redacted].
   3. Parties that might be concerned other than as a Dispute Party are:
      1. MTR Corporation (Crossrail) Limited, whose Registered Office is at Providence House, Providence Place, London, N1 0NT ("MTR");
      2. Network Rail Infrastructure Limited, whose Registered Office is at 1 Eversholt Street, London NW1 2DN (“NR”);
      3. First Greater Western Limited, whose Registered Office is at Milford House, 1 Milford House, Swindon, SN1 1HL; and
      4. Rail for London Limited, whose Registered Office is at 5 Endeavour Square, London E20 1JN.
2. **THE CLAIMANT’S’ RIGHT TO BRING THIS REFERENCE**
   1. As stated in HEOC’s Notice of Dispute dated 23 December 2021, this matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Condition D5.1 of the HAL NetworkCode, and pursuant to the Track Access Contract between HEOC and HAL dated 17 May 2018*.*
3. **CONTENTS OF REFERENCE**

This Sole Reference includes:-

* + 1. The subject matter of the dispute in Section 4;
    2. A detailed explanation of the issues in dispute in Section 5;
    3. In Section 6, the decisions sought from the Panel in respect of (i) legal entitlement, and (ii) remedies; and
    4. Appendices and other supporting material.

1. **SUBJECT MATTER OF DISPUTE**
   1. This dispute relates to the allocation of capacity on HAL infrastructure for the May 2022 Working Timetable, and in particular to an offer of capacity set out in the New Working Timetable published by Network Rail purporting to act on HAL’s behalf which offer: (a) is acknowledged to have been made in error; and (b) in any event does not reflect the proper exercise of the Decision Criteria (which was duly undertaken by HAL and communicated to Network Rail, but which had not been adhered to by Network Rail).
   2. **Relevant Correspondence**
   3. There are three documents of relevance here, all sent to HEOC on Friday 17 December 2021, at different times. HEOC sets out below an overview of the three documents, which are referred to in this document as the “1554 Offer”, the “1944 Correction” and the “2042 Letter”. Together they are referred to as the “**17 December Correspondence**”.
   4. This dispute relates to the formal timetable offer received by HEOC on Friday 17 December 2021 at 15:54, delivered by Network Rail (NR), acting on HAL’s behalf, to Great Western Railway, acting on HEOC’s behalf (the “**1554 Offer**”).
   5. HEOC brings this dispute on the basis the New Working Timetable published in the 1554 Offer was published in error as Network Rail acted unilaterally and without authority to make such offer, and that HAL’s exercise of the Decision Criteria outlined in Condition D4.6 of the HAL Network Code (and explained in HAL’s subsequent letter of the same day – see below for details) was not reflected in the offer published by Network Rail, purportedly on HAL’s behalf. As is explained below, HAL and Network Rail both acknowledge that the 1554 Offer was made in error.
   6. Later the same day, HEOC received a letter directly from Network Rail timed at 19:44, which contained some details (but not full details) of a different offer from the 1554 Offer. However, this document was not sent to GWR in the usual formal way, did not contain full details of the offer and did not state that it specifically withdrew the 1554 Offer.  To be clear, the offer indicated by Network Rail in this second 19:44 letter (the “**1944 Correction**”) is one which HEOC would have been happy with. HEOC would not be raising a dispute had the position set out in the 1944 Correction been made as the formal offer in the usual way, instead of the erroneous 1554 Offer.
   7. The 1944 Correction was then followed by a separate letter from HAL to both MTR and HEOC at 20:42 on the same day (the “**2042 Letter**”). The 2042 Letter made it clear that the 1554 Offer had been sent in error by Network Rail and did not reflect HAL’s decision in relation to the May 2022 timetable. Specifically, it states that Network Rail’s making of the 1554 Offer was done “*in error and without Heathrow’s instruction to do so, [and was] based on Determination ref HAL/TTP003*.” As mentioned above, HAL/TTP003, with which the Panel will be familiar, was disputed by HAL and HEOC and is the subject of an ongoing appeal to ORR. Network Rail had no grounds under the HAL Network Code for making an offer otherwise than in accordance with HAL’s instructions, and it failed to do this.
   8. Copies of the 17 December Correspondence are included in Appendices 1-3.
   9. For wider context, HEOC also refers the Panel to the submissions, supporting documentation and decision of the Panel in Dispute Reference HAL/TTP003, which concerns a similar dispute in connection with the allocation of capacity on HAL infrastructure for the December 2021 Working Timetable. Copies of the relevant materials will be available to the Panel and are not attached to this submission. However, HEOC draws the Panel’s attention to the fact that the issues at stake in this particular case are more straightforward: HEOC’s submission is that, as a matter of correct procedure, Network Rail should not have issued the 1554 Offer, and that the “correct” New Working Timetable which should have been issued is that which is based on the 2042 Letter, for the reasons set out in the material attached by HAL to the 2042 Letter explaining how the Decision Criteria were applied. Both Network Rail and HAL have acknowledged Network Rail’s mistake.
   10. **Relevant Parts of the HAL Network Code**
   11. The HAL Network Code states in D2.6.3: “*In compiling the New Working Timetable, HAL shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2*.”
   12. D4.2 requires HAL to conduct itself in a given way and to apply the Decision Criteria in accordance with D4.6. It is relevant to note that:
       1. the decision-making process is therefore HAL’s to exercise, and not any other party’s; and
       2. HAL and Network Rail have entered into an agreement (please note that HEOC does not have access to this agreement and is unable to provide a copy) whereby Network Rail carries out certain duties on HAL’s behalf in connection with the timetabling process, including the publishing of the New Working Timetable as required of HAL under D2.7.1 of the HAL Network Code. So, in this case, Network Rail purported to publish the New Working Timetable on 17 December 2021 in the 1554 Offer (but in doing so was not in this case acting in accordance with HAL’s instructions).
   13. As is apparent from the 17 December Correspondence, and as mentioned above, the 1554 Offer issued by Network Rail was not based on instructions from HAL. Rather, Network Rail decided unilaterally (and without any entitlement to do so under the HAL Network Code or otherwise) to issue an offer based on the determination issued by the ADC in HAL/TTP003. (That determination, which was decided in favour of MTR, overturned the capacity allocation decision made by HAL in respect of the December 2021 timetable, which MTR argued “failed to honour” MTR’s firm rights. HAL and HEOC have appealed that decision to ORR. HEOC would draw the Panel’s attention to the letters sent to ORR by other interested industry parties (please refer to the correspondence from Network Rail, First Greater Western Limited and British Airways attached at Appendix 4). The appeal is ongoing.)
   14. Network Rail is not a “Forum” for the purposes of A7 of the HAL Network Code and the decision HAL/TTP003 is not binding on it in the way described in that part of the HAL Network Code. Network Rail’s only duty in this respect is to communicate the decision of HAL. If another party were to wish to object to a decision of HAL in respect of the way the Decision Criteria have been applied, then that would be an entirely separate matter.
   15. As is expressly described in the 2042 Letter, in respect of the May 2022 timetable, HAL considered all the relevant circumstances and applied the Decision Criteria as is required of it under D2.6.3, D4.2 and D4.6 of the HAL Network Code. HAL provided evidence of the way in which it had done so, and clearly intended that Network Rail should publish, on HAL’s behalf in the usual way, a New Working Timetable which reflected HAL’s exercise of the Decision Criteria described in the 2042 Letter. However, Network Rail unilaterally, in error, had issued the 1554 Offer which took an unauthorised, different approach. This has been expressly acknowledged by Network Rail as having been an error in the 1944 Correction.
2. **EXPLANATION OF EACH ISSUE IN DISPUTE AND THE CLAIMANT’S ARGUMENTS TO SUPPORT ITS CASE**
   1. The issues in dispute have been set out above. In summary:
      1. Network Rail should not have published the New Working Timetable in the form included in the 1554 Offer. All parties acknowledge this, as is shown beyond argument by the 1944 Correction and the 2042 Letter.
      2. The New Working Timetable issued by Network Rail should have been based on the content of the 2042 Letter. This is again beyond argument, as it is HAL’s clear decision and direction in this instance, shown in the 2042 Letter, and this principle is acknowledged by Network Rail in the 1944 Correction.
   2. This dispute has been brought by HEOC in order to comply with the applicable procedural obligations within the HAL Network Code. In practice, the HAL Network Code does not contain a directly relevant express mechanism whereby the parties can correct the mistake which has been made in this case, and so HEOC has raised this dispute in order to ensure that the appropriate corrections can be made formally by the Panel.
   3. The Panel is aware of the conflicting views of MTR and HEOC in respect of the content of the New Working Timetable, including as have been described in HAL/TTP003. Those particular views, including HEOC’s arguments and evidence in respect of the negative impact on passengers and the wider industry caused by the determination under HAL/TTP003, may need to be considered in respect of the development of the May 2022 timetable (and, possibly, by another Panel on another occasion), but are not relevant to the decision which needs to be made by the Panel in this particular dispute, and HEOC therefore does not restate them here.
3. **DECISION SOUGHT FROM THE PANEL**

HEOC requests that the Panel determines either:

* + 1. that the 1554 Offer, having been acknowledged by all parties to have been made in error, be considered withdrawn, null and void and that a revised timetable offer reflecting the principles set out in the 1944 Correction and the 2042 Letter (reflecting the proper application of the Decision Criteria by HAL) be offered in its place;

or, alternatively, if the Panel does not determine that the 1554 Offer be considered withdrawn, null and void as a result of the acknowledged error,

* + 1. that Network Rail had no grounds under the HAL Network Code to make the 1554 Offer, as Network Rail acted unilaterally and not in accordance with HAL’s entitlement (and obligation) under Part D of the HAL Network Code to determine the New Working Timetable, including on the basis of the application of the Decision Criteria, and that Network Rail’s duty was to communicate such decision of HAL by publishing the New Working Timetable; and that a revised timetable offer reflecting the principles set out in the 1944 Correction and the 2042 Letter (reflecting the proper application of the Decision Criteria by HAL) be offered in its place.

1. **APPENDICES**

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

1. **SIGNATURE**

| For and on behalf of Heathrow Express Operating Company Limited  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Signed  -----------------------------------------------------------  Print Name  Sophie Chapman  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Position  Heathrow Express Business Lead  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
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**Appendices**

**Appendix 1**

The 1554 Offer

**Appendix 2**

The 1944 Correction

**Appendix 3**

The 2042 Letter

**Appendix 4**

Letters Supporting HEOC’s position in respect of the appeal to ORR in the case of determination HAL/TTP003 from Network Rail, First Greater Western Limited and British Airways