
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP1625 (following a hearing held at 1 Eversholt Street, London, on 24 February 2020)

The Panel:

Clive Fletcher-Wood

Hearing Chair

Members appointed from the Timetabling Pool

Toby Kemp	elected representative for Franchised Passenger Class, Band 1
Ian Kapur	elected representative for Non-Passenger Class, Band 2
Hannah Linford	appointed representative of Network Rail

The Dispute Parties:

South Western Railway Ltd. ("SWR")

Andy Roberts	Train Planning Manager
Nick Marshall	Timetable Development Manager
Andrew Pennington	Head of Planning (SWR / NR Wessex Alliance)
Cara Stimson	Head of Industry Partnerships
John Shipston	Permanent Train Services Planning Manager

Network Rail Infrastructure Ltd ("Network Rail")

Mark Sleet	Timetable Production Manager (Southern Region)
Chris A'Barrow	Head of Franchise Management
Adam Hodgson	Policy Advisor
Damian Draper	Operational Planning Project Manager

Interested parties:

XC Trains Ltd

David Fletcher	Timetable Strategy Manager
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First Greater Western Ltd.

Not represented

Observing for professional development:

Fiona Watts (SWR)

In attendance:

Tamzin Cloke	Committee Secretary ("Secretary")
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A Background and Jurisdiction

1. Dispute TTP1625 was raised by SWR by service of a Notice of Dispute on 10 January 2020 in respect of Network Rail's decisions in relation to the revised Subsidiary Working Timetable Publication for 2020. The dispute was brought on the basis that Network Rail had breached its contract with SWR in relation to the way the revised Subsidiary Working Timetable for 2020 had been established. The dispute was limited to the re-timing of fourteen Sunday services specified in the Notice of Dispute.
2. I was appointed as Hearing Chair on 27 January 2020 and I satisfied myself that the matters in dispute included grounds of appeal which may be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.
3. In its consideration of the Parties' submissions and its hearing of the Disputes, the Panel was mindful that, as provided for in ADR Rule A5, it should 'reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.
4. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 4 and as otherwise defined in this determination document:
 - "ADR Rules" mean the Access Dispute Resolution Rules and "Rule" is construed accordingly
 - Decision Criteria means Network Code Condition D4.6
 - "Chapter H" means Chapter H of the ADR Rules
 - "Part D" means Part D of the Network Code
 - "PDNS" means Priority Date Notification Statement
 - "TOVR" means Train Operator Variation Request
 - "TTP" means Timetabling Panel
 - "WTT" means Working Timetable

B History of this dispute process and documents submitted

5. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide Sole Reference Documents. The proposed Panel hearing was notified generally by means of the website and by email to those identified as potential interested parties by the Dispute Parties.
6. On 7 February 2020 SWR served its Sole Reference Document ('SRD'), in accordance with the dispute timetable as issued by the Secretary.
7. In accordance with my usual practice, having reviewed SWR's SRD I issued Directions on 10 February 2020 intended to clarify SWR's case, to elicit further information and to advise Network Rail ('NR') of issues that I wished to see addressed in its SRD. I asked SWR whether it was alleging bad faith on the part of NR, or merely unreasonableness. Further, I asked SWR whether there would be merit in any declarations of the kind requested at paragraphs 6.3 and 6.4 of its SRD, as the TTP's Observations and Guidance would cover these issues were the TTP to decide in SWR's favour.
8. On 11 February 2020 SWR responded to these Directions, clarifying the points referred to in the Directions, accepting that Observations and Guidance would suffice in respect of

paragraphs 6.3 and 6.4 of its SRD, and confirming that it was not alleging bad faith on the part of NR.

9. On 14 February 2020 Network Rail served its Sole Reference Document in accordance with the dispute timetable as issued by the Secretary.
10. XC Trains Ltd. and First Greater Western Ltd. declared themselves to be interested parties. XC Trains was represented at the hearing; the representative of First Greater Western Ltd was unable to attend.
11. On 17 February 2020 I issued further Directions, seeking further clarification of the Parties' cases and intending to narrow the issues. These Directions incorporated the Note which I am required to issue by ADR Rule H18(c). As I regarded part of NR's SRD dealing with the question of compensation as self-contradictory I set out my understanding of the relevant law and sought confirmation before the hearing as to whether NR agreed with that interpretation.
12. By way of background on this point, this was only the second TTP to be heard since the publication of the Determination by the ORR of the Appeal under Part M against the Determination of the TTP in TTP1520 ('the TTP1520 Decision'), with the first such TTP (TTP1610) being held only days before this hearing. In the event TTP1610 did not need to determine the issue of compensation. The TTP1520 Decision confirmed that a TTP is able to award compensation (in principle) against NR if there had been a breach of contract by NR, and if NR was held to have acted in bad faith and/or unreasonably.
13. Anecdotally it seemed that there was concern within NR that this might mean that each time a TTP over-turned a decision by NR compensation would be awarded to the Operator(s) concerned. It was therefore important that this TTP should reflect what had actually been decided in the TTP1520 Decision in the hope of correcting any misunderstandings about the effect of the ORR's Determination; therefore, it was thought helpful to provide further guidance to the industry to assist in future Disputes.
14. This issue was particularly important in this TTP because SWR was only seeking financial compensation from NR, rather than – as may be more usual in future – seeking an 'operational decision' from the TTP which would affect the WTT, with compensation as an additional or alternative remedy.
15. NR's response to the second Directions and Rule H18(c) Note confirmed that it agreed with my interpretation of the TTP1520 Decision. SWR responded to the second Directions on 19 February 2020. The Directions, Rule H18(c) Note and the Parties' responses appear in Annex A.
16. The hearing took place on 24 February 2020. The Dispute Parties made opening statements, responded to questions from the Panel concerning various points and were given the opportunity to make closing statements. The one Interested Party present was given the opportunity to raise points of concern.
17. I confirm that the Panel had read all of the papers submitted by the Dispute Parties and I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of the dispute process, both written and oral, notwithstanding that only certain parts of such materials are specifically referred to or summarised in the course of this determination.

C Outcomes sought by the Dispute Parties

18. In its sole reference document, SWR requested the panel to determine that:

(a) NR should pay compensation to SWR in line with the revenue loss forecast from the increased journey times;

(b) NR had displayed disregard for Network Code Part D and associated industry timetable development processes in the way it chose to deal with issues relating to the impact of making changes to the services planned to be operated in the May 2020 Timetable and that the hearing chair order Network Rail to propose a set of measures to avoid a repeat occurrence at those timescales;

(c) NR's Southern Region and Capacity Planning functions did not work in a coherent and timely manner in dealing with the issues relating to the impact of making changes to the services planned to be operated in the May 2020 Timetable and that NR should propose a set of measures to avoid a repeat occurrence.

19. As explained above, however, before the hearing SWR had accepted that its requests in (b) and (c) above could be dealt with in the TTP's Observations and Guidance.

20. Network Rail asked the Panel to determine that: it has adhered to Network Code Condition D2.6.3 and has acted in accordance with the duties and powers set out in Condition D4.2; accordingly no compensation be awarded; and that NR did not display disregard for Part D.

D Relevant provisions of the Network Code and other documents

21. The versions of the Network Code Part D and the ADR Rules dated 26 September 2019 were applicable to these dispute proceedings.

22. Conditions D2.6, D4.2 and D4.6 were particularly relevant and are appended in Annex "B".

E Submissions by the Dispute Parties

23. SWR's opening statement and that of NR are appended in Annex "C".

F Oral evidence at the hearing

24. Even though the interpretation of the TTP1520 Decision had been clarified in the written exchanges before the hearing, I thought it helpful to open the hearing with some general comments, followed by specific comments relating to this Dispute. I explained that as soon as the TTP1520 Decision had been published a discussion had been started between the Allocation Chair and some Hearing Chairs on how this was to be interpreted and applied in future TTPs. Although this discussion had reached a shared understanding, I emphasised that none of us was bound by that understanding, but that it might assist the Parties and the industry to know that our view was that – as NR had submitted in this case – there was no automatic link between a TTP over-turning a challenged decision of NR and an award of compensation. In TTP1520 it was quite clear that there had been a breach of contract. In any similar cases in future it is likely that compensation would be actively considered, but this would not necessarily be the case in different circumstances. If NR simply failed to apply the Decision Criteria in any future dispute when it should have done so a TTP might

conclude that there had been a breach of contract, but if a TTP differed from NR's weighting of the relevant Considerations, or differed in its view of which Considerations were applicable, then that could not automatically be assumed to amount to a breach of contract on NR's part. But even when a breach of contract had occurred, a TTP would then have to find that NR had acted in bad faith and/or unreasonably before it could award compensation. I suggested that this might prove to be a high hurdle.

25. Turning to this Dispute, I observed that SWR was not seeking any operational decision in its favour, only compensation. To achieve this it needed to persuade the TTP to find that there had been a breach of contract by NR and that NR's conduct had been unreasonable (as SWR had, sensibly in my view, confirmed that it was not alleging bad faith).
26. Both Parties were asked if they wished to add anything to my opening remarks, but neither wished to do so.
27. As will be clear from Part B of this Determination, by the start of the hearing the issues had been narrowed between the Parties. After hearing the opening statements I explained that I saw two different time periods that might need to be considered: the period leading up to SWR's submission of its revised proposal for the May 2020 WTT, submitted to NR on 11 November 2019 ('SWR's Alternative Submission')(5.1.8 of SWR's SRD), and the period after that submission. I sought clarification from SWR as to whether it was impugning anything done or not done by NR in progressing SWR's Alternative Submission. After some discussion SWR eventually confirmed that it was not claiming any remedy from the way in which its Alternative Submission had been handled.
28. In the light of SWR's stance on this point I suggested that the Dispute therefore turned solely on the proper interpretation of the letter of 25th October 2019 from Jon Halsall, Managing Director Southern Region, to Andy Mellors, then Managing Director of SWR ('the Halsall Letter'): was this an instruction with which SWR had to comply? If so, did that amount to a breach of contract? If so, had NR behaved unreasonably? If the answer to each question was 'yes' then SWR would succeed; if the answer to any of those questions was 'no', then SWR's claim would fail.
29. Both Parties agreed with this formulation of the issue which the TTP had to decide.
30. It was put to SWR that in effect its Alternative Proposal was a TOVR, with which SWR eventually agreed. We queried whether there was any way in which SWR's PDNS priority could have been protected when its Alternative Proposal was submitted. We did not need to go into this too deeply, but felt that there was no way in which this could have been achieved under Part D. Similarly it was not up to the Panel to suggest alternative ways in which the problem facing SWR could have been addressed.
31. In discussing the effect of the Halsall Letter, SWR submitted that it was in an instruction from the Regional MD which SWR interpreted as taking precedence over the timetable development process. NR's position was that on its own wording this was not the case; to support this argument NR pointed to the reference in an e-mail from Andy Mellors to Paul Harwood and others dated 5th November 2019, and a further e-mail from Andy Roberts dated 6th November 2019, both of which refer to SWR having been 'asked' to submit a revised bid. NR submitted that both these e-mails illustrated SWR's contemporaneous understanding of the Halsall Letter, which was that it was a suggestion or request, not an instruction.

32. NR was not entirely clear on how it interpreted the Halsall Letter and how it could be made to fit into the Part D process, but this did not suggest that NR was moving away from its principal argument that the Halsall Letter was not an instruction to SWR.
33. As mentioned above, SWR's position was that the Halsall Letter had been an instruction. But when pressed to explain exactly what breach of contract was alleged to have flowed from the Halsall Letter SWR asked us to consider its outcome, rather than the Halsall Letter itself. Eventually SWR submitted that the effect of the Halsall Letter was no more specific than a failure to comply with D4.6.
34. In the Directions dated 17 February 2020 I sought an explanation from NR of its view that it was possible to distinguish between refusing new access rights and not supporting such an application. NR's response did not directly deal with this point, and it might be considered to be a distinction without a difference, but SWR confirmed that while it was still considering a Section 22A application for additional rights (which do not form part of this Dispute) it had still not submitted such an application.
35. SWR was also reminded that unreasonable behaviour by NR, if proved, was not on its own sufficient to obtain an order for compensation; a finding of unreasonable behaviour had to follow a finding that there had been a breach of contract.
36. Neither Party thought it necessary to make a closing statement.

G Analysis/Observations and Guidance

37. This Dispute emerges from a complex position in which SWR was seeking to bid for several timetable enhancements and additional services in its PDNS for the 2020 Subsidiary Timetable.
38. Throughout this Dispute NR had maintained the line endorsed in TTP834, that the sale of access rights to any bidder is an entirely separate process to the construction of the WTT governed by Part D. Regrettably it seems that in the discussions between the Parties leading to this Dispute this distinction may have become blurred.
39. In this context it is important to emphasise that no TTP will wish to do anything to discourage co-operation between NR and Operators or bidders, such co-operation is important in the interests of the industry and its customers. Nor does any TTP wish to see every interaction between industry parties become legalistic, but the duty of a TTP is to decide a Dispute on the basis solely of the legal entitlements of the Parties, which requires the TTP to analyse after the event the legal effect of the dealings between the Parties involved.
40. We concluded that in the various discussions taking place between the Parties the distinction between the sale of access rights and the Part D process was lost. (As a personal view I must confess that I am uneasy about references to a 'sale of access rights', as in most cases NR does not have the discretion to choose whether or not to sell any particular rights, which the phrase appears to suggest. If rights have been approved or directed by ORR then it is NR's duty to incorporate those rights into the WTT. How it achieves this may well involve NR using its discretion, but it has no discretion about whether to 'sell' paths to utilise rights which have been granted. Nonetheless, I shall continue to use the phrase in this Determination).

41. As was agreed at the hearing, the submission of SWR's Alternative Proposal was a TOVR; as such it lost the priority accorded to SWR's PDNS bid. It appeared to the TTP that neither Party had considered the legal consequences of the actions which they had taken, including the effect of the loss of PDNS priority. The TTP accepted that both Parties were acting in good faith throughout, but that cannot affect our conclusion on the consequences of their decisions in this Dispute.
42. The TTP had no difficulty in concluding that the Halsall Letter was not an instruction. Therefore it could not have been a breach of contract, so the issue of unreasonableness did not arise.
43. Had the Panel decided otherwise, however, it would have had then to ask itself the question as to whether such an instruction in relation to the construction of the WTT was one which could properly have been given by a Regional MD. As already discussed, NR had referred in this Dispute to the distinction drawn in TTP834 between the sale of access rights and the Part D process; this TTP does not question that distinction. But the Part D process rests with Capacity Planning within NR. While several TTPs have reminded NR that it has a single, indivisible legal identity, this Dispute does suggest that there may be a dislocation within NR between the role of Regions and the fact that responsibility for the Part D process rests with Capacity Planning. As Guidance, all industry parties will be assisted by understanding this distinction and not muddling the different functions of the sale of access rights and construction of the WTT under the Part D process.

H Determination

44. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, **I determine that** SWR is not entitled to compensation in respect of the re-timing of the fourteen services listed in its Notice of Dispute.
45. No application was made for costs.
46. I confirm that so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Clive Fletcher-Wood
Hearing Chair
03 March 2020

TTP1625 – Directions and Rule H18(c) Note to be issued on 17 Feb 20

Directions

1. The Hearing Chair is grateful to Network Rail ('NR') for the prompt submission of its Sole Reference Document ('SRD').
2. Both Parties refer to the Sunday Main Line Scheme having been approved by the Wessex TCAG, '...subject to the outcome of risk assessments on the impact to track, category, power availability and track circuit reliability' (SWR 5.1.2, NR 4.1.3). None of these topics is mentioned again in either Parties' SRD. Will both Parties please either confirm by 1200 on Wed 19 Feb whether any of these issues is relevant to the remaining points in Dispute, or explain which points are relevant and in what way.
3. While it is agreed that none of the services for which SWR is seeking compensation required the 'Sale of Access Rights', as they were existing services which already had Access Rights, the question of the Sale of Access Rights is relevant in deciding, against the complex background leading to this Dispute, whether NR behaved unreasonably if the Panel were to decide that there was a breach of contract on NR's part.
4. In this context NR seeks to draw a distinction between new Access Rights 'not being granted' and the sale of new Access Rights 'not being supported' (for example in 4.2.5 of NR's SRD). The Panel will be assisted at the hearing by an explanation from NR as to the distinction between these two concepts.
5. In 4.3.10 NR refers to a recommendation that an SWR representative with authority to make decisions on flexing should be present at Milton Keynes throughout the period in which the revised Access Proposal was being dealt with, but that this only occurred on 3 days during a 7 week period. Will SWR please confirm at the hearing whether the recommendation to which NR refers was jointly agreed, or whether it was only a recommendation by NR, and whether NR is correct in saying that the representative was only present at Milton Keynes for 3 days during this period.
6. To assist the Parties to prepare for the hearing the Panel will also wish to explore whether SWR was 'directed' to prepare a revised proposal (SWR 5.1.9) or whether it did so of its own volition (NR 4.3.5).

Rule H18(c) Note

7. The Hearing Chair is required by Rule H18(c) to 'identify and itemise..... all relevant issues of law' raised the Dispute following the submission of statements of case.
8. I note that in paragraph 4.3.6 of its SRD NR quotes from paragraph 7.2 of the Determination of TTP834. I hope that it will assist the Parties if I invite them to read on from NR's quotation, particularly paragraph 7.3. To understand these paragraphs more fully the Parties are also encouraged to read paragraph 6.4.4.
9. As the Parties will be aware, while a TTP is bound to follow any decision of the ORR (or the Court) on a regulatory matter, the Determination of one TTP is only of persuasive authority on another TTP, especially when the section being quoted is part of the Observations and Guidance section of a Determination. I hope that it will assist if I make it plain at the stage, however, that I regard paragraph 7.3 of TTP834 as still being a correct statement of the legal duties placed on NR.
10. A further point of law arises in relation to the power of a TTP to award compensation. With respect, NR's submissions on this point seem self-contradictory. In paragraph 4.3.11 NR states that, '[A TTP] therefore has no jurisdiction to award compensation against Network Rail'. In 4.3.12, however, NR

states that compensation is not payable because there has been no breach of contract by NR, and in 4.3.13 NR submits that there is no power to direct compensation in accordance with D5.7 because NR has not acted in bad faith or unreasonably. If 4.3.12 and/or 4.3.13 are right, then 4.3.11 cannot be right.

11. At an early stage after this Dispute was listed, at my request the Secretary drew the Parties' attention to the recent Determination by the ORR of the appeal against TTP1520. I referred to that Determination in the Directions issued on 10 Feb 20, following which SWR confirmed that it was not alleging that NR has displayed bad faith, but that it was alleging that NR has behaved unreasonably.
12. Like any TTP, this Panel will approach the hearing with no preconceptions and will reach its decision solely on the legal entitlements of the Parties. The Panel will be informed by the evidence given at the hearing to expand on and explore the Parties' SRDs and Opening Statements.
13. It may assist the Parties to prepare to deal with any issue of compensation if I set out my interpretation of the position since the ORR's Determination in TTP1520. Again emphasising that the minds of the Panel are open at this stage, if the Panel were to decide that there has been a breach of contract on the part of NR, and if the Panel subsequently concludes that NR has acted in bad faith or behaved unreasonably, then the Panel can order that compensation may be due in principle to SWR, with the amount to be determined in a separate Dispute if it cannot be agreed.
14. While I should observe that in strict theory a TTP could find that NR had acted in bad faith even if this is not alleged, the fact that SWR has confirmed that it is not alleging bad faith in this Dispute suggests to me that the Panel is highly unlikely to want to explore the issue of bad faith any further itself.
15. In summary it is my view that paragraph 4.3.11 of NR's SRD is simply wrong. Paragraph 4.3.12 would be correct if the Panel were to decide that there has been no breach of contract. In that event the Panel would not need to examine bad faith and/or unreasonableness; but if the Panel were to decide that there has been a breach of contract it would then have to decide further whether NR had acted in bad faith or, as would be relevant in this case, that NR had acted unreasonably. Only if this stage were to be reached could the Panel order that compensation should be paid.
16. In summary, therefore, I regard paragraph 4.3.11 as wrong; paragraphs 4.3.12 and 4.3.13 are correct statements of the law if the Panel were to decide that there has been no breach of contract, or if there has been a breach of contract that NR has nonetheless behaved reasonably.
17. To avoid the need to discuss this issue any further at the hearing, NR is to confirm to the Secretary and to SWR by 1200 on Wed 19 Feb whether it agrees with my analysis at paragraphs 9 and 10 above. If not, NR is to explain the basis on which it reaches any different interpretation and the authorities on which it relies for doing so.

TTP1625 - Network Rail reply to Directions and Rule H18(c) Note to be issued on 17 Feb 20

Please see Network Rail's comments in red below each point

Directions

1. The Hearing Chair is grateful to Network Rail ('NR') for the prompt submission of its Sole Reference Document ('SRD').

2. Both Parties refer to the Sunday Main Line Scheme having been approved by the Wessex TCRA, '*...subject to the outcome of risk assessments on the impact to track, category, power availability and track circuit reliability*' (SWR 5.1.2, NR 4.1.3). None of these topics is mentioned again in either Parties' SRD. Will both Parties please either confirm by 1200 on Wed 19 Feb whether any of these issues is relevant to the remaining points in Dispute, or explain which points are relevant and in what way.

Network Rail in including this statement was responding to the statement made in South Western Railway's Sole Reference Document (SWR 5.1.2). Network Rail does not believe that this statement is relevant to the dispute. Network Rail reserves the right to further respond to this point after seeing South Western Railway's response as South Western Railway raised this point initially.

3. While it is agreed that none of the services for which SWR is seeking compensation required the 'Sale of Access Rights', as they were existing services which already had Access Rights, the question of the Sale of Access Rights is relevant in deciding, against the complex background leading to this Dispute, whether NR behaved unreasonably if the Panel were to decide that there was a breach of contract on NR's part.

4. In this context NR seeks to draw a distinction between new Access Rights 'not being granted' and the sale of new Access Rights 'not being supported' (for example in 4.2.5 of NR's SRD). The Panel will be assisted at the hearing by an explanation from NR as to the distinction between these two concepts.

Where Network Rail and an operator agree on an amendment to the Track Access Contract (i.e. for changes to access rights) a submission is made to the ORR under section 22 of the Railways Act 1993. Where Network Rail and an operator are not in agreement then the operator has the opportunity and right to submit to the ORR their own application for the contract terms they want under section 22a of the Railways Act. South Western Railway chose not to do so in this instance.

5. In 4.3.10 NR refers to a recommendation that an SWR representative with authority to make decisions on flexing should be present at Milton Keynes throughout the period in which the revised Access Proposal was being dealt with, but that this only occurred on 3

days during a 7 week period. Will SWR please confirm at the hearing whether the recommendation to which NR refers was jointly agreed, or whether it was only a recommendation by NR, and whether NR is correct in saying that the representative was only present at Milton Keynes for 3 days during this period.

6. To assist the Parties to prepare for the hearing the Panel will also wish to explore whether SWR was 'directed' to prepare a revised proposal (SWR 5.1.9) or whether it did so of its own volition (NR 4.3.5).

Rule H18(c) Note

7. The Hearing Chair is required by Rule H18(c) to 'identify and itemise..... all relevant issues of law' raised the Dispute following the submission of statements of case.

8. I note that in paragraph 4.3.6 of its SRD NR quotes from paragraph 7.2 of the Determination of TTP834. I hope that it will assist the Parties if I invite them to read on from NR's quotation, particularly paragraph 7.3. To understand these paragraphs more fully the Parties are also encouraged to read paragraph 6.4.4.

9. As the Parties will be aware, while a TTP is bound to follow any decision of the ORR (or the Court) on a regulatory matter, the Determination of one TTP is only of persuasive authority on another TTP, especially when the section being quoted is part of the Observations and Guidance section of a Determination. I hope that it will assist if I make it plain at the stage, however, that I regard paragraph 7.3 of TTP834 as still being a correct statement of the legal duties placed on NR.

10. A further point of law arises in relation to the power of a TTP to award compensation. With respect, NR's submissions on this point seem self-contradictory. In paragraph 4.3.11 NR states that, '*[A TTP] therefore has no jurisdiction to award compensation against Network Rail*'. In 4.3.12, however, NR

states that compensation is not payable because there has been no breach of contract by NR, and in 4.3.13 NR submits that there is no power to direct compensation in accordance with D5.7 because NR has not acted in bad faith or unreasonably. If 4.3.12 and/or 4.3.13 are right, then 4.3.11 cannot be right.

11. At an early stage after this Dispute was listed, at my request the Secretary drew the Parties' attention to the recent Determination by the ORR of the appeal against TTP1520. I referred to that Determination in the Directions issued on 10 Feb 20, following which SWR confirmed that it was not alleging that NR has displayed bad faith, but that it was alleging that NR has behaved unreasonably.

12. Like any TTP, this Panel will approach the hearing with no preconceptions and will reach its decision solely on the legal entitlements of the Parties. The Panel will be informed by the evidence given at the hearing to expand on and explore the Parties' SRDs and Opening Statements.

13. It may assist the Parties to prepare to deal with any issue of compensation if I set out my interpretation of the position since the ORR's Determination in TTP1520. Again emphasising that the minds of the Panel are open at this stage, if the Panel were to decide that there has been a breach of contract on the part of NR, and if the Panel subsequently concludes that NR has acted in bad faith or behaved unreasonably, then the Panel can order that compensation may be due in principle to SWR, with the amount to be determined in a separate Dispute if it cannot be agreed.

14. While I should observe that in strict theory a TTP could find that NR had acted in bad faith even if this is not alleged, the fact that SWR has confirmed that it is not alleging bad faith in this Dispute suggests to me that the Panel is highly unlikely to want to explore the issue of bad faith any further itself.

15. In summary it is my view that paragraph 4.3.11 of NR's SRD is simply wrong. Paragraph 4.3.12 would be correct if the Panel were to decide that there has been no breach of contract. In that event the Panel would not need to examine bad faith and/or unreasonableness; but if the Panel were to decide that there has been a breach of contract it would then have to decide further whether NR had acted in bad faith or, as would be relevant in this case, that NR had acted unreasonably. Only if this stage were to be reached could the Panel order that compensation should be paid.

16. In summary, therefore, I regard paragraph 4.3.11 as wrong; paragraphs 4.3.12 and 4.3.13 are correct statements of the law if the Panel were to decide that there has been no breach of contract, or if there has been a breach of contract that NR has nonetheless behaved reasonably.

17. To avoid the need to discuss this issue any further at the hearing, NR is to confirm to the Secretary and to SWR by 1200 on Wed 19 Feb whether it agrees with my analysis at paragraphs 9 and 10 above. If not, NR is to explain the basis on which it reaches any different interpretation and the authorities on which it relies for doing so

Network Rail agrees with the Chair's analysis in paragraphs 9 and 10. Network Rail also agrees with the Chair's summary specifically paragraph 15. In TTP1520 the ORR did not determine that a breach of contract automatically constitutes unreasonable behaviour.

The hearing of TTP1610 is being held on Wednesday 19 February. If that were to reach a different result, then Network Rail reserves the right to make further submissions.

South Western Railway

South Western Railway
4th Floor, South Bank Central
30 Stamford Street
London
SE1 9LQ

19th February 2020

Clive Fletcher-Wood
c/o Access Disputes Committee
Floor 8
1 Eversholt Street
London
NW1 2DN

TTP1625 – South Western Railway response to 2nd Directions requested

Dear Clive,

Please find below in red a response from SWR to the 2nd set of Directions requested on 17th February 2020 in relation to TTP1625:

2. Both Parties refer to the Sunday Main Line Scheme having been approved by the Wessex TCRA, '...*subject to the outcome of risk assessments on the impact to track, category, power availability and track circuit reliability*' (SWR 5.1.2, NR 4.1.3). None of these topics is mentioned again in either Parties' SRD. **Will both Parties please either confirm by 1200 on Wed 19 Feb whether any of these issues is relevant to the remaining points in Dispute, or explain which points are relevant and in what way. Prior to the letter from John Halsall, SWR is not aware of NR providing any risk assessments in terms of the impact on impact to track category, power availability and track circuit reliability. At a Wessex Timetable Working Group meeting held on 30 October 2019, five days after the letter was received, it was fed back that the power supply was acceptable for the Sunday Main Line changes involving an enhanced frequency of service between Poole and Weymouth. Following a risk assessment, the only issue fed back at the meeting related to power supply concerns between Portsmouth and Southampton where SWR bid to operate an additional service per hour, seven days per week. No other feedback has been received in terms of the risk assessments into track category and track circuit reliability.**

However, SWR does not see this as relevant to the remaining points of the dispute.

The direction within the letter to base a revised May 2020 timetable based on a rollover of the December 2019 timetable wasn't based on specific assessment of individual schemes proposed but was a generic application to all schemes.

 South Western
Railway

South Western Railway

5. In 4.3.10 NR refers to a recommendation that an SWR representative with authority to make decisions on flexing should be present at Milton Keynes throughout the period in which the revised Access Proposal was being dealt with, but that this only occurred on 3 days during a 7 week period. **Will SWR please confirm at the hearing whether the recommendation to which NR refers was jointly agreed, or whether it was only a recommendation by NR, and whether NR is correct in saying that the representative was only present at Milton Keynes for 3 days during this period. The version of the paper NR has provided in their Sole Reference Document is a draft version to which I responded with a revised wording on the 13th November. The revisions were accepted by Matt Allen on the same day.**

The revised text stated "It is recommended that because of the level of resource required by Capacity Planning, there is an empowered SWR representative routinely in MK, or otherwise available, throughout the process who is authorised to make decisions on the flexes and amendments required in order to expedite the plan.

The first visit to MK was not productive where there were no NR managers or specialists present and the NR planners did not approach the SWR LTP Timings Manager in great numbers to work through issues identified. There were two more visits after this time which were more productive and a weekly telecon was established between the two teams. SWR fed back on this issue at the most recent Lead TOC meeting, minutes for which are yet to be issued.

There are Network Rail PCs and network connections at the SBC HQ where the SWR Train Planning Unit is based. There has always been an open invitation for NR planners to work from our offices. However, the NR planners have cited issues with graph setup in TPS when using a Citrix connection as a hurdle in doing this.

Yours sincerely,



Andy Roberts
Train Planning Manager
South Western Railway

South Western
 **Railway**

2.6 Timetable Preparation – D-40 to D-26

2.6.1 During the Timetable Preparation Period (D-40 to D-26) ("Timetable Preparation Period"), Network Rail shall compile the proposed New Working Timetable.

2.6.2 Between D-40 and D-26:

- (a) all Timetable Participants shall have access to the evolving draft of the New Working Timetable either:
 - (i) by way of "read-only" remote computer access or such other electronic means reasonably requested by a Timetable Participant ; or
 - (ii) to the extent that a Timetable Participant does not have the required systems to facilitate remote computer access, by read-only computer access upon attendance at such of Network Rail's offices specified by Network Rail;
- (b) Network Rail shall consult further with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable, and shall continue to answer enquiries and facilitate and co-ordinate dialogue as stated in Condition D2.3.4.

2.6.3 In compiling the New Working Timetable, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2.

4.2 Decisions arising in the preparation of a New Working Timetable

4.2.1 In compiling a New Working Timetable in accordance with Condition D2.6, Network Rail shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in this Condition D4.2.

4.2.2 Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:

- (a) a New Working Timetable shall conform with the Rules and the applicable International Freight Capacity Notice applicable to the corresponding Timetable Period;
- (b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;
- (c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right;
- (d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority:
 - (i) first to:
 - (A) the Firm Rights of any Timetable Participant that will subsist during the whole of the Timetable Period and which have been Exercised; and
 - (B) any rights Network Rail has for Network Services included in the Rules;
 - (ii) second to Firm Rights of any Timetable Participant, that were in force at the Priority Date but will expire prior to or during the Timetable Period and which have been Exercised, provided that Network Rail considers (acting reasonably) that new Firm Rights, substantially the same as the expiring rights, will be in force during the Timetable Period;
 - (iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided Network Rail considers (acting reasonably) they will be

Firm or Contingent Rights in force during the Timetable Period;

- (iv) fourth to any:
 - (A) rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date but before D-26 in accordance with D2.4 and D2.5. Where more than one set of rights or expectation of rights are so notified, capacity is to be allocated in the order in which Access Proposals containing details of the rights (or expectations thereof) are submitted to Network Rail; and
 - (B) Strategic Paths contained in the Strategic Capacity Statement.

4.6 The Decision Criteria

4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective").

4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below ("the Considerations") in accordance with Condition D4.6.3 below:

- (a) maintaining, developing and improving the capability of the Network;
- (b) that the spread of services reflects demand;
- (c) maintaining and improving train service performance;
- (d) that journey times are as short as reasonably possible;
- (e) maintaining and improving an integrated system of transport for passengers and goods;
- (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
- (g) seeking consistency with any relevant Route Utilisation Strategy;
- (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
- (i) mitigating the effect on the environment;
- (j) enabling operators of trains to utilise their assets efficiently;
- (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates; and
- (l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.

4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and

Network Rail. Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.

- 4.6.4 The Objective and the Considerations together form the Decision Criteria.

Annex C: Both Parties' opening statements

SWR's opening statement

This Dispute arises consequent upon South Western Railway (SWR) complying with the timetabling strategy set out by John Halsall, NR Southern Region Managing Director, in his letter dated 25th October 2019.

In this letter, Mr Halsall specified that, in order to improve performance and service resilience for passengers, the industry should develop a new proposal for the May 2020 SWR timetable, based on a rollover of the December 2019 timetable.

This directive, which was issued after discussion with SWR's Managing Director, was made at D-29; some 11 weeks after SWR submitted its Priority Date Notification Statement, in line with industry processes on Friday 9th August 2019.

One of the May 2020 timetable enhancement schemes contained within the PDNS bid involved improved Sunday Main Line services, operated by SWR, between London Waterloo, Poole and Weymouth. Arriva CrossCountry has a long-held aspiration for faster journey times on Sundays between Southampton Central and Bournemouth which can only be unlocked by changes to SWR services. Therefore, in developing the May 2020 Timetable, SWR worked collaboratively with Arriva CrossCountry to deliver a revised plan that benefitted both parties.

This scheme, relating to improvements for both TOCs Sunday services, and along with others submitted by SWR, was approved by the Wessex Timetable Change Risk Assessment Group (TCRAG) held on Tuesday 27th August 2019, subject to the outcome of risk assessments on the impact to track, category, power availability and track circuit reliability. Prior to this, an additional non-mandatory Strategic TCRAG was held on Monday 17th June 2019, with no issues identified in relation to this scheme. It was in the context of these TCRAG meetings that SWR's bid for the May 2020 timetable, including its Sunday improvements (in tandem with those of Arriva CrossCountry), proceeded.

The letter from John Halsall dated 25th October 2019 set out an expectation that the sale of Track Access Rights, required for the new services contained within the Subsidiary 2020 Timetable, would not be supported by NR if SWR applied for them, for reasons relating to operational performance. However, concerns regarding performance were not raised at either of the TCRAG meetings as an issue for the schemes proposed for May 2020. Furthermore, directions within John Halsall's letter made no reference to the role of NR's Capacity Planning team, based at its Milton Keynes office. There is no clause within Network Code D.4.2 to facilitate such a regional decision taking precedence over the Timetable Development Process, and therefore no process exists to deal with such an event.

SWR reserves the right to submit a 22A application to the ORR for the remainder of the services, originally bid at D-40, which NR has continued to state that they do not support.

The NR Capacity Planning team producing the 2020 Subsidiary New Working Timetable continued to validate the additional and amended services as bid by SWR at D-40, thereby ignoring the letter from their Southern Region colleagues with no consideration of holding off the offer to other Timetable Participants which is argued by SWR as being unreasonable.

At D-26, SWR received the NWT, together with a letter from NR Capacity Planning offering paths for all bar seven schedules bid at D-40. There was also a table within the letter detailing how the May

2020 timetable PDNS work packages were included in the Publication of the NWT, knowing that SWR would not have the support of NR Southern Region when the sale of Access Rights occurred later in the process. The offer from NR Capacity Planning also included new paths between Southampton Central and Portsmouth & Southsea despite the identification of power supply issues in response to a TCRAG action ahead of D-26.

As instructed in the letter from NR Southern Region, SWR prepared a revised proposal for the May 2020 Timetable, largely based on the December 2019 Timetable. SWR submitted this revised proposal to NR Capacity Planning on 11th November 2019.

Ahead of the submission of the revised proposal, SWR wrote to other Timetable Participants with interacting services updating them on the situation regarding NR Southern Region and the SWR May 2020 timetable. This email informally requested their support in helping to reinstate the SWR services in paths as per the December 2019 Timetable. SWR has no evidence of NR Capacity Planning considering the option to hold off the offer at D-26 to other Timetable Participants where there could be significant conflict with the SWR services being based on a rollover of the December 2019 timetable.

A revised Publication of the New Working Timetable for May 2020 was received from NR Capacity Planning on Friday 3rd January 2020. Contained within this timetable was a number of journey time extensions to Sunday afternoon SWR London Waterloo to Poole services, which subsequently knocked onto the following SWR London Waterloo to Weymouth services. Further journey time extensions were needed to resolve TPR non-compliances when the Poole and Weymouth services were flexed by NR Capacity Planning. The revised SWR timetable for May 2020 now features 10-minute turnrounds at Poole on long-distance services, compared to 22 minutes in the December 2019 timetable. This is far from improving performance as was the stated objective in John Halsall's letter, this can be argued as adding performance risk into this service group. John Halsall's letter quotes "that our organisations drive through the following interventions to improve the performance and service resilience for passengers". The outcome in the revised May 2020 timetable is therefore unreasonable.

The revised Publication of the New Working Timetable on 3rd January 2020 has provided passengers with a service offering in May 2020 which is a degradation of what is offered in the current timetable. SWR is making a claim that NR has acted unreasonably in doing so, with System Operator failing to work in concert of the instruction of the NR Southern Region; an instruction with which SWR complied.

By responding to the contents of John Halsall's letter, dated 26th October 2019, SWR put passengers first. A revised timetable was developed providing customers with certainty of their service provision with limited impact on Informed Traveller timescales. Had SWR ignored the contents of the letter and continued to progress with the May 2020 timetable as bid at D-40, the impacts on passengers and the industry would be most detrimental if the additional access rights were not agreed and an intervention to rollback to December 2019 took place later in the process.

SWR seeks remedy in the form of compensation for the loss of revenue during the May 2020 timetable for the affected London Waterloo to Poole / Weymouth Sunday services, relating to the failure of NR to adhere to Network Code clause D2.6.3, by breaching the duties and powers set out in Condition D4.2. This approach is consistent with placing the needs of passengers at the core of SWR's decision-making as to seek change to the May 2020 timetable itself would result in a prolonged period of Informed Traveller non-compliance, reflecting that the services in dispute operate on a Sunday and are thus more susceptible to STP alterations. In seeking this remedy for

unreasonable behaviour, it will also determine that NR's Capacity Planning and Southern Region functions have not worked in a cohesive manner, to the detriment of SWR.

NR's opening statement

Good morning. In relation to the dispute that has been brought by SWR against NR, being heard today, NR submit that it has acted entirely appropriately and correctly discharged its obligations under Part D of the Network Code in compiling the New Working Timetable for May 2020.

On Friday 9th August 2019, at D-40, SWR submitted their Priority Date Notification Statement (or PDNS) to NR and NR dealt with that entirely appropriately in terms of D2.6, D4.2 and D4.6.

NR then published the New Working Timetable on Friday 15th November 2019, at D-26.

That PDNS indicated that SWR has ambitions to acquire additional Track Access Rights. Part D of the Network Code does not permit NR to make any decision regarding the sale of Track Access Rights. In the same vein, the Part D procedure cannot be influenced by NR's view on the sale of additional Track Access Rights. These two processes are separate and distinct from each other.

This submission is supported by TTP834 which determined that NR must operate both Part D and the Sale of Access Rights separately - indeed TTP834 expressly says that NR has no discretion in the timetabling process to make a decision about the Sale of Access Rights.

NR wrote to SWR on Friday 25th October 2019 to inform that it would not support the sale of additional Track Access Rights. This communication is not linked with the processes prescribed within Part D of the Network Code. NR did inform SWR that additional access rights would not be supported but that did not amount to a refusal of these additional access rights - which was perfectly reasonable given the ongoing issues with SWR's performance.

SWR have written to NR detailing their agreement with NR's concerns and stated it would submit a revised access proposal whilst simultaneously expressly reserving their right to seek additional track access rights in the future.

SWR subsequently made the decision to submit a revised Access Proposal to NR. It did not have to do so, and NR had not directed this. The decision was taken by SWR.

Having received the revised Access Proposal, NR proceeded to action this in accordance with D2.4. This timescale, size and complexity of the revised proposal meant that it was not reasonably practicable to include it in the New Working Timetable as per D2.4.4.

It is submitted that NR did not act unreasonably.

In relation to the matter of compensation being sought by SWR, it is submitted that NR is not in breach of the relevant Track Access Agreement, whether in relation to any of the issues raised in SWR's appeal or otherwise. On the basis that there has been no breach of the Track Access Agreement by NR, there can be no entitlement to compensation.

It is further submitted that as NR did not act in bad faith, or unreasonably, in relation to any of the matters raised by SWR, as per Condition D5.7, the Panel has no authority to direct payment of compensation or damages.

In closing, SWR have submitted that the decision by NR to inform a timetable participant between D-40 and D026 that access rights will not be granted is an occurrence not covered within the Network Code. NR agrees that neither the granting or supporting of access rights is covered by the Code and as such NR cannot be in breach of the Code.

The Panel is asked to find that NR discharged its obligations under Part D of the Network Code and acted reasonably.