
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP2570 (following a hearing held in London, on 05 March 2025)

The Panel:

John Hewitt Hearing Chair

Members appointed from the Timetabling Pool

Ian Kapur elected representative for Non-Passenger Class, Band 1
Mark Sleet appointed representative of Network Rail

The Dispute Parties:

XC Trains Ltd (“XC”)

Michael Gatenby Timetable Strategy Manager
Leon Foster Senior Strategic Timetable Development Manager
David Fletcher Timetable Performance Manager
Steve Longmore Head of Planning and Performance*
Patrick Lawless Timetable Development Manager*

Network Rail Infrastructure Limited (“NR”)

Mark Judd Timetable Production Manager (Scotland and Charters)
Richard Parsons Programme Manager (Anglia Route)
Rebecca Morrison Operational Planning Specialist (Anglia Route)
James Saunders Lead Advanced Timetable Analyst

Involved Parties:

Rob Holder Network Access Manager (First Greater Western Ltd.)*
Andy Smith Senior Permanent Planning Manager (First Trenitalia West Coast Rail Ltd.)*
Chris Matthews Head of Planning (Long Term) (Freightliner Group Ltd.)
Shane Young Timetable Development Manager (Transport UK East Anglia Ltd.)*
Ben Brandon Train Planning Manager (Transport UK East Anglia Ltd.)*
Huw Rossiter Timetable Strategy Specialist (West Midlands Trains Ltd.)

**attended virtually*

In attendance:

Tamzin Cloke Committee Secretary (“Secretary”)

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A Background and Jurisdiction

1. Dispute TTP2570 was raised by XC by service of a Notice of Dispute on 19 November 2024 in respect of NR's decision regarding the New Working Timetable Publication for Subsidiary Change Date 2025. The dispute was brought on the basis that NR had put pathing time in XC's services that XC felt unnecessary. XC's letter requesting a hearing cited four separate issues. By the time of the hearing one of them had been resolved, so that only three required determination.
2. I was appointed as Hearing Chair on 06 February 2025 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 Dispute, 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
D-X has the meaning shown in Network Code Condition D2.1.5

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

SRD means Sole Reference Document

TPRs mean Timetable Planning Rules

TPs means Timetable Participants

TTP means Timetabling Panel

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 SRDs. The proposed Panel hearing was notified generally by means of the website and by email to those identified as potential Involved Parties by the Dispute Parties.
6. On 19 February 2025 XC served its SRD, in accordance with the dispute timetable as issued by the Secretary.
7. On 26 February 2025, NR served its SRD in accordance with the dispute timetable as issued by the Secretary. By this stage the remaining four items in dispute had been reduced to three.
8. On 03 March 2025, following directions issued by the Secretary on my behalf on 27 February 2025, XC served a supplemental statement of case.
9. First Greater Western Ltd., First Trenitalia West Coast Rail Ltd., Freightliner Group Ltd., Transport UK East Anglia Ltd. and West Midlands Trains Ltd. declared themselves to be Involved Parties. All were represented at the hearing.

10. On 03 March 2025 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that neither Party had raised any issues of law. I referred the Parties to my outline of the current law applicable to the appealed decisions, which was referenced in my 27 February Directions letter.
11. The hearing took place on 05 March 2025. 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 Involved Parties were given the opportunity to raise points of concern.
12. I confirm that the TTP 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

13. In its original SRD, XC requested I determine a number of points, many of which were not within the Panel’s powers under Condition D5.3.1. These requests can be found in the copy of XC’s original SRD hosted on the Committee’s website.
14. At my direction, and noting that neither Party was alleging that exceptional circumstances applied, XC narrowed down the issues in its supplemental statement of case served on 03 March 2025.
15. In its supplemental SRD, XC requested that I determine:
 - a. In respect of the Birmingham New Street decision (“**Issue #1**”) made by NR, *“instruct NR to reassess the situation with 1G71 et al with the aim of reducing the journey time and thus, an earlier arrival time (with or without the use of the operational capability of platform 7), based on the TPS, [sic] the operational capability of the network, and the specific operational instructions of the Operator (coupling process)”*;
 - b. In respect of 1M69 at Bristol Temple Meads (“**Issue #2**”), *“instruct NR to seek alternative options for 4L53 (contrary to the single option NR have presented thus far) therefore: improve the departure time and shorten the journey time of 1M69”*;
 - c. In respect of 1N69 at Stansted Airport (“**Issue #3**”), *“instruct NR to [p]lan the movement of train schedules in accordance with the TPRs therefore: seek better options for 1N69 (including those already submitted by XC) that improve the path and reduce journey times, to depart this schedule closer to or at the time[s] that were bid by XC at D40/PDNS”*.
16. NR asked me to uphold its decisions, and also to confirm that it had acted in accordance with Part D in relation to all three issues, reaching reasonable decisions that accommodated the aspirations of all TPs.
17. In its opening statement NR said, amongst other things, *“Network Rail sees no evidence of exceptional circumstances within CrossCountry’s claims and have produced, within our*

defence papers, Decision Criteria's [sic] that would still be accurate should the Chair request that we re-examine our decisions."

18. At no time during the dispute process did XC assert that there were 'exceptional circumstances' within the meaning and context of Condition D5.3.1(c). Accordingly, even if XC makes out its case on all or some of the dispute issues, the only remedy available to the TTP is that in Condition D5.3.1(a). In effect, that remedy is to direct NR to reconsider its decision to ascertain whether XC's desired result can be achieved. This principle was emphasized by the ORR in its appeal decision in TTP1520 published on 30 January 2020 – paragraph 44 in particular.
19. Where NR asserts that, if directed to reconsider its decision it would do so but that it would arrive at the same conclusion, it renders the direction of the TTP rather futile and of limited practical value. This is a point which the Parties and all other operators need to have in their minds when pursuing Timetable Disputes. All parties involved in a dispute also need to have in their minds the obligation set out in ADR Rule A9(b) to conduct themselves in good faith with the objective of resolving the dispute.
20. Of course, where, during the course of the dispute process, new evidence or information comes to light, and if NR is directed to reconsider a decision it is expected that it will do so on the basis of all the latest information and evidence before it at the time of its reconsideration.

D Relevant provisions of the Network Code and other documents, and the legal principles to be applied

21. The versions of Part D and the ADR Rules dated 05 August 2024 were applicable to these dispute proceedings.
22. Conditions D2.4, D2.6, D2.7, D4.6 and D5.3 were particularly relevant and are appended in Annex A.
23. NR has entered into Track Access Contracts (TAC) with TPs who wish to run trains on NR's infrastructure. Each TAC may be different in form, but what is common is that they all adopt and apply the provisions of the Network Code and, in particular, Part D with regard to Timetable Disputes. Part D imposes duties and obligations on NR and allows it some discretion when making decisions. Thus, NR is a commercial decision-maker for the purposes of the law of contract. Two leading authorities give guidance on the approach to adopt where a party asserts that the decision-maker has not complied with its contractual obligations. These are:

Braganza v BP Shipping Limited & Anor [2015] UHCS 17; and

Abu Dhabi National Tanker Co v Product Star Shipping Limited ("Product Star") No2 [1993] 1 Lloyd's Rep 397

These authorities were helpfully summarised in the context of Timetable Disputes by Mr. Matthias Kelly KC SC in his decision in TTP2540, in particular in paragraphs 39 – 43. I respectfully endorse and adopt that summary so do not need to repeat them in full here. In particular, the TTP must consider whether, in respect of each of the three issues in question, NR in reaching its decision:

- a) Exercised its discretion honestly;
 - b) Made it in good faith; and
 - c) Did not act arbitrarily, capriciously or unreasonably.
24. In arriving at its conclusions, the TTP must have regard to the evidence and information that was before NR at the time it made each decision. It is not for the TTP to consider what decision it would have made if it were the decision-maker. It is not for the TTP to consider fresh or new information or evidence that has, or may have, come to light post the decision having been made. This was emphasised recently by Foxtan J in *Hayes v Pack & Ors* [2025] EWHC 402 (KB). In particular, having considered a number of authorities including *Braganza*, he said at paragraph 9(iv) *“When a challenge to such a decision is brought in court proceedings, the issue for the court is not whether, on the evidence before it, it would have reached the same answer, but whether the decision fell within the scope of the contractually permissible decisions open to the decision-maker. In more recent contractual discretion cases, that is usually described as an obligation not to reach an arbitrary, perverse or irrational decision...”*
- At paragraph 27 the judge said: *“... the court must be astute to ensure its findings go no further than those necessary to determine the dispute. If, for example, the court concludes that the finding of the contractual decision-maker was one reasonably open to it on the evidence before it, it will not be necessary, and frequently will not be appropriate, for the court to offer a rival view based on the different evidence and arguments it has heard.”*
25. The assembly of the timetable is an evolutionary process. Condition D2 provides for the bi-annual revision of the timetable. In very broad terms, each New Working Timetable is offered to TPs at Week D-26. Prior to that, between Weeks D-64 and D-60, NR is required to consult with TPs in respect of any proposed changes to the Rules. No later than D-59 NR is to provide all TPs a draft of the revised Rules. By D-54 TPs may make representations to NR in respect of any changes they propose or objections they may have to the draft Rules. Between D-54 and D-44 NR is to consider the representations and objections made.
26. Where a TP proposes to make changes to existing services or to add a new service, then in accordance with Condition D2.3 it must notify NR no later than D-55 and there is provision for consultation to take place.
- All TPs must by D-40 notify NR of their requirements for the New Working Timetable, known as an ‘Access Proposal’. By Condition D2.4.4 Access Proposals given by D-40 are given priority in the compilation of the New Working Timetable. Any Access Proposal submitted by D-28 and any revised Access Proposal submitted under Condition D2.4.1(c) by D-26 *“will be incorporated into the New Working Timetable as far as reasonably practicable, taking into account the complexity of the Access Proposal including any reasonable foreseeable consequential impact on the New Working Timetable and the time available before the end of the Timetable Preparation Period, and in accordance with the principles set out in Condition D4.2.”* The Timetable Preparation Period is D-40 to D-26. During this period all TPs are able to have access to the evolving draft of the New Working Timetable.
27. In practice, a great deal of work is undertaken in an endeavour to reach a mutually acceptable solution wherever that may be possible. This process usually involves a number of tweaks or flexes to Train Slots and many of these will affect other TPs to some extent or another. These tweaks or flexes are made by NR using its ‘Flexing Right’ which is a defined term set out in the Network Code at D1.

28. Condition D2.7.1 requires the New Working Timetable to be published at D-26, subject only to variations made in the course of the appeal process described in Condition D2.7. D2.7.2 entitles a TP lodge an appeal within twenty working days of its publication. Condition D2.7.3 entitles a TP to seek further information from NR, regarding the New Working Timetable, to assist it with a potential appeal. Critically, in this case, Condition D2.7.4 provides: *“Network Rail shall promptly make all revisions to the New Working Timetable required by all appeal decisions, and shall notify all Timetable Participants upon completion of those changes.”*
29. I pause here to observe appeal decisions are those made by the ORR or by a TTP. The ORR or a TTP may only substitute an alternative decision in place of a challenged decision in ‘exceptional circumstances’. Thus, post D-26, NR may only make revisions to the New Working Timetable if it is directed to do so by the ORR or a TTP. In doing so, NR need not seek or obtain consent from any TP to effect the revision.
30. In practice, following publication of the New Working Timetable at D-26, NR receives a number of requests from TPs to make further tweaks to the timetable and it was common ground that NR strives to achieve a consensus. This is illustrated in the present case, because evidently XC originally had 70 or so points of dispute with NR. These were worked through and most (about 66) were resolved, no doubt with a bit of give and take by all parties concerned, prior to the hearing being requested. However, in doing so NR is reliant upon the cooperation of TPs and may only make further changes post D-26 with the consent of those TPs affected by a proposed flex. Post D-26 NR no longer has the benefit of its Flexing Right unless directed by a TTP, using its powers under D5.3.1(c), or an ORR decision.

E Submissions by the Dispute Parties and the information/evidence provided by them

Issue #1

31. This issue concerns the use of platform 7 at Birmingham New Street Station and whether it can safely accommodate a 13-car train. It was common ground that two trains 1M69 and 1G71 were both bid at Priority Date D-40 to use platform 7. At that time, they were 2x 5-cars forming 1x 10-car. XC submitted a revised Access Proposal on 18 September 2024, post D-40, the main purpose of which (for the purposes of Issue #1) was to reallocate the units working 1M69. This changed from a 5-car to an 8-car. XC says that the new operation in the supplementary bid for 1G71 (5-car) and 1M69 (8-car) attaching to form a 13-car, then departing as 5D69 via the Coventry/WL lines, uses the same schedules as they were bid at Priority Date D-40. Thus, XC says the new operation continued to satisfy the operational criteria for accommodating a 13-car on the full length of platform 7.
32. At D-26 NR returned an offer to XC which added several minutes’ pathing into the schedule for 1G71. XC asserts in its SRD that 5 minutes were added. NR in its SRD asserts 4 minutes were added. The offer also re-platformed both 1G71 and 1M69 (5-car and 8-car) into platform 9. XC was unhappy with that offer, and there followed a series of communications.
33. Some of these are included within the appendices to the Parties’ SRDs. Of course, all of these are post the decision made by NR at D-26. It was common ground that no dialogue or correspondence took place between the Parties post submission of the revised Access

Proposal, and prior to the decision being made. NR did not notify XC of its intention as to the use of platform 9, or of its exercising its right to flex, and of the consequences of doing so. This is unfortunate, because the TTP has to consider the reasonableness of the decision based on the information that NR had, or ought reasonably to have had, before it at the time it made its decision.

34. From the post-decision exchanges between the Parties it appears that NR took the view that a 13-car Voyager train was 310m in length and that platform 7 could not accommodate such a train. XC has pointed to Version 4.1 of the TPRs, dated 5 September 2024, which states the length of platform 7 is 319m. Evidently held within NR are a number of different documents which give conflicting information as to the actual length of platform 7 standage. A recently-established Network Change at Birmingham New Street records the usable length as being 319.3 metres. The TPRs record the length as 319 metres, and TPR values are, rightly, derived from an established Network Change. Another is a tool that NR planners at Birmingham New Street use, and another is records used by the signallers in the signal box at Birmingham New Street. There may be more.
35. It was not clear in the evidence what measurement was actually adopted by NR prior to it making its decision. It appears not to have been the measurement recorded in the Network Change, or the applicable TPRs.
36. Post-decision, NR has argued that it took a cautious approach and whilst it accepts that the TPRs contain values that allow a 13-car service into platform 7, it still has a number of reservations, mostly safety-related. NR stated that it agrees the TPRs need to be amended following identification of the error in platform 7 length and it proposes a review be carried out, involving all affected parties and that the results of that review be adopted for use in compiling the December 2025 New Working Timetable. It was not clear, on the evidence provided to the Panel, whether the issue was one of an error in the paperwork, or whether something has physically changed on platform 7 post-establishment of the Network Change. That will be for the industry to resolve in the upcoming review, and for NR to follow the relevant Network Code processes, as applicable.
37. By the hearing, there seemed to be agreement that the length of platform 7 was 316.2m, the length of a 13-car Voyager train is 304.1m and that a 10m signal standage is required. But there was still a dispute about the length of platform required to safely attach a 5-car and an 8-car train, whether a 2m coupling should be allowed for, and what margin for a range of errors and risks might realistically be provided for.
38. NR also asserts that in arriving at its decision it had regard to the Objective set out in the Decision Criteria and the risk to train service performance that would be brought about by allocating Platform 7 to these Train Slots. It asserts that use of Platform 9 is the most resilient option.
39. XC was highly critical of NR's response to its arguments in support of platform 7 and complained that NR had dictated its own rules contrary to the TPRs, dismissed XC operational information regarding the XC coupling process, had created unrealistic hypothetical situations, shifted its position on the operational capability of platform 7 by using varying lengths of the platform, and had raised the issue of performance late in the day to try and justify its decision. Most of these points, whether they be valid or not, concern matters raised and/or on information put forward post the making of the decision.

40. It is correct that performance was not expressly raised with XC by NR prior to the decision-making, but in the context of the evolution of the timetable this is not unusual. On the one hand, the bid was for a new service, but on the other evidently and historically Birmingham New Street offers a complex range of issues affecting performance. It would therefore be surprising to the TTP if performance was not a factor that went into the decision-making mix to some extent.
41. XC asserts that in arriving at its decision-making NR acted arbitrarily and/or capriciously. Its support for this assertion rests mainly, but not exclusively, on matters which occurred post the decision having been made.
42. The formal determination will be set out later in this document. It may be helpful to record some views the TTP has arrived at. We have given careful consideration to the rival arguments. There are more arguments and submissions than there is evidence. In particular, there is a paucity of evidence as to what process NR actually followed in arriving at its decision. It is clear that NR took into account an incorrect length of platform 7, and evidently relied upon inaccurate and informally-held data. If NR had double-checked the official data as set out in the Network Change, Sectional Appendix, or TPRs, this error may not have occurred, or, at least the discrepancy investigated and clarity sought. There is a strong inference that NR may also have relied upon inaccurate information as to what is involved in the coupling of a 13-car Voyager service. What that information was, and its derivation, was and is unclear. There is a case in support of the argument that, at the least, NR ought to have sought clarity or confirmation from XC on what the process entailed. The combination of these factors clouds the reasonableness of the decision ultimately made.
43. It is axiomatic that timetabling decisions made by NR are of the utmost importance to the industry and the contractual arrangements in place (as demonstrated by Part D) impose a high standard to be adopted by NR when making them. On this issue there is scope for the conclusion that NR fell a little short of what it was contractually obliged to do, and for the conclusion that the decision arrived at just falls within the definition of NR having acted arbitrarily. For these reasons, NR will be directed to reconsider the decision afresh on the terms set out later in this determination. In doing so, NR will be able to take into account new information that it is now before it, and will be able to seek up-to-date information from others within the industry, in order to support the robustness of the fresh decision that it will make.

Issue #2

44. This dispute concerns 1M69EX (SX) Bristol TM to Birmingham New Street. This was bid by XC at the Priority Date to depart at 19:00 – being the same departure time as the December 2024 schedule for SO and SU. In the D-26 offer NR flexed this service to depart at 18:55, i.e. 5 minutes early. This service runs 7 days per week. XC expressed concerns that the SX variant, departing 5 minutes early, would be confusing for passengers. XC also asserted that this flex causes the spread of services at Bristol Temple Meads to be lopsided with departures at 18:33; 18:55 and 19:33. It says this equates to a new spread of services being 22 then 38 minutes, compared to something more balanced in XC's bid of 27, then 33 minutes.
45. This concern was raised by XC with NR prior to the offer, and after D-26. NR's response was: *"Network Rail is flexing their rights to accommodate 4L53DA"* and *"Depart 5 minutes earlier. Run UR till Horfield and increase dwell at Bristol Parkway to 3 minutes, Pathing added at Westerleigh back to booked."* It was common ground that XC did not respond to

these comments. It is not entirely clear why it did not do so. At one point, XC said that it interpreted them to mean that NR was not willing to look at the issue any further, to find an alternative. Later, XC has complained that NR did not consider further options which might have mitigated its concerns. If XC had really expected NR to consider further options it ought to have made its position very clear and perhaps entered into a dialogue with NR to work collaboratively to try and identify possibilities.

46. XC then received the offer at D-26. XC remained unhappy with the flex and took this up with NR. XC has appended to its SRD an email it sent to NR dated 15 January 2025 raising the issue and the response by NR dated 22 January 2025 which stated:
*“W&W - FLIM did not bid 4L53 at D40 – W&W have checked FLIM’s bid docs/PEX.
[T]he freight team applied the initial retiming of 1M69 between BTM & Westerleigh Jn to secure a path for FLIM’s 4L53 through Bristol Parkway area. This was a VTM item.
**The as is state was the only solution explored for securing a compliant slot for the FLIM path during PDNS.
W&W will continue a review of this scenario this week to assess whether there are any other retiming options to limit the journey increase for XC.”***
47. Evidently since that time there have been further exchanges between the Parties. To a large extent, these do not assist the TTP as they concern facts or matters which were not before NR when it made its decision at D-26.
48. NR says this proposal was a new Access Proposal by XC. The concern about passenger confusion was not expressed by XC prior to the offer. Even if it had been, NR says that there are no current timings for passengers to compare against. Similarly, the ‘spread of services’ point was not expressed by XC prior to the offer. That said, NR argues that, as it is a new Access Proposal, 1M69 reduces the gap between services, and thus spread is improved.
49. At the hearing, information was provided to the effect that Freightliner’s 4L53DA was submitted as an Access Proposal as a new bid at D-40. NR says this gave it equal priority to the bid made by XC.
50. Post-decision XC raised the allegation that 4L53DA gave rise to a conflict in the Severn Tunnel. NR asserts that contemporary information shows that to be an inaccurate claim.
51. In short, NR’s position is that it received two bids of equal priority. It considered it was entitled to exercise its flexing rights to be able to accommodate both of them in order to achieve the Objective. Thus, the priority rules set out in Network Code 4.2.2(d) did not apply.
52. At the hearing, there was some discussion about NR’s right to flex. XC accepted that NR had the right to flex and that the right was unfettered save as to the duty on NR to act reasonably in the context of the Decision Criteria, and other Part D duties. At the hearing, XC was unclear whether or not there was anything contained within its TAC which affected NR’s right to flex. The representatives present were not familiar with the material parts of their TAC. What they were clear about was that NR had the right to flex and this was not in doubt. In the event, XC argued that a flex of 5 minutes early was unreasonable. NR argues that in context it was not.
53. Again, later in this document there will be set out the formal determination on this issue. At this point it may be helpful to the parties to set out the views of the TTP. Between D-40 and

D-26, XC had been informed that in the draft New Working Timetable NR had exercised a flex of 5 minutes. XC was unhappy with that and raised its concern with NR. NR replied and explained its position. XC did not follow that up, or challenge it any further. NR confirmed its position in the New Working Timetable publication at D-26. XC then raised a number of matters which NR considered, but NR came to the conclusion there was no viable alternative. Again, post-decision facts and matters are not of immediate relevance to the quality of the decision made. In these circumstances, the TTP concludes that NR acted reasonably and fairly, given the state of play before it, when it made its decision. The TTP also concludes that, in context, the flex of 5 minutes early was well within the range of what would be reasonably open to an experienced commercial decision-maker such as NR.

Issue #3

54. This dispute concerns 1N69EV (SX) 19.27 Stansted Airport to Birmingham New Street. The schedule was offered departing 6 minutes earlier than bid. XC says the schedule is an extension to the December 2024 schedule. It was bid at D-40 to start from Stansted Airport instead of Cambridge. The bid at 19:27 was made to align with other XC services departing from Stansted.
55. When the draft New Working Timetable was issued, XC had a number of concerns at Cambridge and Stansted. When they were first raised by XC with NR is not clear on the evidence and documents provided to the TTP. There is an email dated 03 October 2024 from NR to XC and to Greater Anglia (GA) which makes reference to 'some' issues and proposes a dialogue by email and, if no resolution is reached, a meeting be convened to help achieve a resolution. By email dated 08 October 2024 to NR, XC made some comments in an 'initial assessment'. XC said: *"I realise some of these involve tweaking GA or GTR trains and that engagement with them might be needed."*
56. In an email dated 09 October 2024 to NR, XC said it had looked at the conflicts and proposed some solutions *"... incorporating flexes to some GA and XC services, to path all the trains in."* In respect of 1N69EV it said: *"1N69 Stansted Airport p2 DL19:21..."*
57. Next is an email dated 15 October 2024 from NR to XC and GA in which the writer said she had compiled some comments and suggestions. NR said it would test out some solutions the following day and would send out a meeting invitation to go through the items on the list. The email concluded by saying to XC and GA: *"Please be prepared to work through these items together to resolve some more of the issues – I'm expecting the orange items to be discussed on Thursday and hopefully share that some of the other items have now got a proposed fix."*
58. Further emails passing between NR, XC and GA are dated 12 and 14 November 2024 just before 15 November 2024 (D-26 date). Yet further emails between those three Parties are dated 03, 06, 09, 12 and 13 December (D-22 date for any appeals), which seek to find resolution on several issues, including 1N69.
59. Of some importance is the email dated Tuesday 12 November 2024 sent by XC as regards 1N65 and 1N69 in which XC proposed a solution. That was ***"1N69SX Similar to above. 1N65 to depart 19:28 to pass Coopers Lane at 19/29½ ..."***
NR replied by email dated 14 November 2024 and as regards 1N65 and 1N69 said: *"As per our Teams meeting and follow up email, the options for 1N65 and 1N69 following the*

pattern of 1N67 were suggested as a starting point and it was agreed this would be input and reinvestigated later as appropriate.”

60. The December emails show that further investigations did take place. By email dated 03 December 2024 NR to XC said, “*As noted in the email chain prior to offer we are investigating the proposals from XC to see if we can improve paths around the Stansted area*”. A proposal was put forward and thoughts on it sought. Comments were made by XC later in the day.
61. In an email dated 09 December 2024 sent by NR to both XC and GA, NR put forward an offer as regards 1N65 and 1N69 it was prepared to make, if both XC and GA were in agreement. At this point NR no longer had a right to flex and could only do so with the consent of the parties affected (under Condition D3.6.1). By email dated 12 December 2024 GA said it would accept the flexes in respect of 1N65 but not 1N69, because it had concerns it would adversely affect performance on the south of that route.
62. XC’s principal complaint was that NR failed to properly pursue the suggestions made by it on the afternoon of Tuesday 12 November 2024, at which time NR still had the right to flex other services if that was needed to resolve or mitigate XC’s concerns. This revised Access Proposal was made just three and a half days before the deadline at D-26. NR says that the days leading up to D-26 are usually very busy, if not frantic, and there was insufficient time to carry out the work required given there were still other Access Proposals that had not yet been validated. NR says it believed a 19:21 departure was a joint XC and GA proposal that satisfied both parties. In these circumstances NR scheduled a 19:21 departure in the formal offer but said it remained open to further discussion in the response period to see if an improvement for both Parties could be found. Attempts were made to try and find a consensus but, in the event, it could not.
63. XC argued that NR was unreasonable to take this line, and that NR should have found the resources to investigate its suggested 19:28 departure. NR argued that this was a very late revised Access Proposal, and that under Network Code D2.4.4 to be incorporated “... *as far as reasonably practicable, taking into account the complexity of the Access Proposal including any reasonable foreseeable consequential impact ... and the time available before the end of Time Preparation Period and in accordance with the principles set out in Condition D4.2.*”
64. XC also had a number of other criticisms, as set out in its SRD and opening statement. XC asserted that that a 6 minute early flex was unreasonable, and beyond the scope of the discretion open to NR. XC asserted that NR acted arbitrarily in making certain statements in its email, appended to the XC SRD appendix 7.3.1e and f. It is to be noted that all of these emails are dated December 2024 and January 2025 – that is, well beyond the decision date of 15 November 2024, save for the email dated 12 November 2024, which I have described in paragraph 59 above. XC also asserted that NR had acted capriciously by appearing to favour the position of GA – by appearing to change its own position based on a single operator’s feedback, whilst also changing train times compared to what was in the refresh PIF.
XC also complained that NR had acted unfairly between operators, and appeared to favour the position of GA – specifically adopting GA’s comments as their own about ‘performance concerns’.
65. Finally, on this point, at the hearing XC made great play about a possible error in a data file issued by NR at D-22 which recorded a 19:27 departure. Evidently this data file is a

creation outside of the scope of Part D and is provided by NR on an informal basis to assist the parties in understanding the outcome of the many machinations that have, or may have, taken place since the issue of the formal offer. Quite often, numerous changes will have been made, with the consent of the parties affected. It was not entirely clear whether the entry of 19:27 in the data file was a clerical/input error or a time entered in the hope that GA might agree to it but, in the event, that consent was not forthcoming.

66. I mention this point because XC put a good deal of store by and seemed to suggest that having inserted the entry of 19:27, NR could not resile from that, was bound by or was estopped from reverting to the formal offer of 19:21. I have no hesitation in rejecting XC submissions on this point. It is clear from paragraph 3 above that, as provided for in ADR Rule A5, I must reach my determination on the basis of the **legal** entitlements of the Dispute Parties and upon no other basis. The legal entitlements of the parties are as set out in Part D, in Conditions D2 and D4 in particular. The error or misinformation contained in the data file, and which was quickly corrected, can in no way affect or override or supersede rights and duties set out in Part D.
67. Where appropriate, I have recorded NR's position on a number of issues where it was convenient to do so for clarity and ease of reference. Taken overall, NR asserts there was misalignment internally within XC as to the acceptability of the offered path. It says the offered path was first suggested by XC, and then agreed by all parties. Alternatives were considered in the offer response process and the originally offered option was deemed to be optimal, and this was communicated to XC before 17:00 on Friday of D-22. NR also refutes the suggestion that performance issues are not a valid reason for accommodation of an otherwise TPR-compliant service, citing Condition D4.6.2(c), and that it is irrelevant which party first cited performance as a factor to take into account. NR maintains it has accommodated the D-40 Access Proposals received from XC, and has done so in a manner that improves the resilience of the timetable.
68. Again, later in this document there will be the formal determination on this point of dispute. At this point it may be helpful to set out the view of the TTP. It is clear that during the period D-40 to D-26, a number of issues were raised concerning the area around Stansted and this was just one of them. An understanding appeared to have been arrived at between XC and GA which satisfied both parties. At a very late stage, just three and a half days before D-26, XC submitted a revised Access Proposal. NR concluded it did not have the resources to fully consider this in detail at a very busy time and thus decided to offer what it reasonably considered to be an uncontentious and acceptable (albeit not the ultimately preferred) position of XC. It did so, in the knowledge, as it said to the parties, it would investigate the revised bid during the offer response period. It is considered that this was not an unreasonable, arbitrary, capricious or unfair position for NR to arrive at, and it was well within the scope of discretion vested in NR. It appears that XC may have had unrealistic expectations of NR and what it might reasonably have achieved in the very short period of time from the submission of the revised Access Proposal and the end of D-26.
69. Having heard the rival arguments and points raised by the Dispute Parties there was a short break. Following that, the Dispute Parties made closing submissions. Following that, informal comments were made by representatives of the Involved Parties.
70. As to **Dispute Issue #1** Avanti had concerns about performance at Birmingham New Street in general. It also had concerns about a 13-car Voyager service using platform 7 because the margins were so tight. It also accepted XC concerns about retiming of services.

71. As to **Dispute Issue #2** Freightliner supported NR's position, NR having received two Access Proposals for the same capacity at the same time with the same level of rights, both bid compliantly. It said that if NR had rejected one of the Access Proposals, rather than flex XC, then NR would have been in breach of Part D. Freightliner said it was difficult to see how NR could have made a decision that did not flex XC. GWR said that from a parochial point of view it had concerns about its London peak services reaching Bristol at the time XC services would be operating. GWR said it had always taken the view that the timetable developed in accordance with the TPRs is most important, and where trains have to be flexed they have to be optimised in accordance with the Decision Criteria.
72. As to **Dispute Issue #3** Greater Anglia said that it had worked as collaboratively as possible with XC and NR. It had flexed a number of its services, but was in support of NR on 1N69 due to the impact on GAs services. GA said it would continue to work with both XC and NR in respect of future timetables.

F Analysis/Observations and Guidance

73. To a large extent an analysis of the rival submissions and arguments of the Parties has been set out above as each dispute item was considered.
74. I have already made the overarching point about the limited remedies available to TTPs absent exceptional circumstances. Going forward, operators are urged to bear these in mind when raising formal appeals under Condition D2.7 and what might realistically be achieved. In making this point I echo comments made by my colleague Mr. Fletcher-Wood in TTP2468. The focus of an appellant should be on the dialogue with, and evidence before, NR prior to the making of the decision because it is the position of NR at that time which is under scrutiny during the course of appeal. Evidence or information which arises post-decision is rarely likely to be of relevance.
75. I also want to take this opportunity to re-emphasise the importance of ADR Rule 9(b) and the obligation of Dispute Parties to conduct themselves in good faith with the objective of resolving the dispute. This plainly involves the duty on them to continue a dialogue post the timetable decision being made at D-26 right up to (and even during) the hearing itself. This must occur, even if much of the information shared between the Parties post D-26 is not admissible in, or relevant to, matters to be considered during the hearing. Obviously, the dialogue should commence at the earliest opportunity. TTP disputes take up a good amount of time on the part of the Parties' representatives and are quite costly to the ADC and thus the industry. It is probably the case that these resources are better deployed on other matters if possible. It is also important that the Parties' representatives who prepare or respond to appeals are fully aware of the provisions of Part D and their TACs, so as to avoid seeking unrealistic or inappropriate remedies or raising irrelevant points.

G Determination

76. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.
77. **Dispute Issue #1**
NR is directed to reconsider its decision to utilise platform 9 at Birmingham New Street Station for 1G71 and 1M69, and shall consider whether use of platform 7 is compliant with relevant considerations. If it might prove necessary to obtain the consent of any third parties to the use of platform 7, NR shall use reasonable endeavours (as legally defined) to

obtain such consent(s). NR is directed to notify XC of the outcome of its reconsideration as soon as is reasonably practicable.

78. Dispute Issue #2

The challenged decision of NR shall stand.

79. Dispute Issue #3

The challenged decision of NR shall stand.

80. The SRD and Supplemental SRD of XC shall be posted on the ADC website with certain financial or commercially sensitive information redacted in the format submitted by XC.

81. No application was made for costs.

82. 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.



John Hewitt
Hearing Chair
18 March 2025

Annexes

Annex A: Relevant extracts from the Network Code

2.4 Submission of Access Proposals by Timetable Participants – before and after the Priority Date at D-40

2.4.1 A Timetable Participant shall set out its requirements in respect of the New Working Timetable in a written proposal, to be referred to as an “Access Proposal” where:

- (a) it wishes to exercise any Firm Rights and/or Contingent Rights and/or any expectation of rights to obtain Train Slots in respect of the relevant Timetable Period, where those rights were not exercised to obtain Train Slots in the Prior Working Timetable; and/or
- (b) it wishes to make changes to any Train Slot in the Prior Working Timetable;
- (c) it wishes to set out its requirements in response to a notification by Network Rail under Condition D2.4.6; and/or
- (d) it wishes to use any International Freight Train Slot where the criteria in Condition D2.4.8 are met.

2.4.2 Where a Timetable Participant does not intend using a Train Slot, which is included in the Prior Working Timetable, in the relevant Timetable Period, it shall notify this fact to Network Rail in writing by D-40 or as soon as practicable thereafter.

2.4.3 Access Proposals may be submitted to Network Rail during the period up to D-28, or in the case of a further or revised Access Proposal submitted under Condition D2.4.1(c), during the period up to D-26. However, Timetable Participants shall submit their Access Proposals (and any revised Access Proposals) as early as reasonably practicable in order to facilitate optimal planning of the New Working Timetable by Network Rail and to ensure optimal consultation between Network Rail and all TimetableParticipants.

2.4.4 Access Proposals submitted by D-40 (“the Priority Date”) are given priority in the compilation of the New Working Timetable in certain circumstances set out in Condition D4.2. Access Proposals submitted after the Priority Date but by D-28, and any further or revised Access Proposals submitted under Condition D2.4.1(c) by D-26 will be incorporated by Network Rail into the New Working Timetable as far as reasonably practicable, taking into account the complexity of the Access Proposal including any reasonable foreseeable consequential impact on the New Working Timetable and the time available before the end of the Timetable Preparation Period, and in accordance with the principles set out in Condition D4.2.

2.4.5 Any subsequent or revised Access Proposal submitted by a Timetable Participant shall amend an Access Proposal submitted earlier where it sets out different requirements to the earlier submitted Access Proposal regarding the manner in which a right is to be exercised. In such case the date on which the subsequent or revised Access Proposal is submitted will be treated, for the purposes of Condition D4.2.2, as the date of notification of the relevant right.

2.4.6 Where a Timetable Participant has:

- (a) submitted an Access Proposal which cannot be accommodated in the New Working Timetable; or
- (b) a Train Slot in the Prior Working Timetable which cannot be accommodated in the New Working Timetable; or

- (c) submitted a proposal purporting to be an Access Proposal but which is defective or incomplete (which may include, as an example, providing insufficient information required under Condition D2.5.1); or
- (d) submitted an Access Proposal which is within itself inconsistent with the Timetable Planning Rules,

Network Rail must notify the Timetable Participant of this fact, as soon as possible after it has become aware of it, so that the Timetable Participant has the opportunity to submit a further Access Proposal under Condition D2.4.1(c).

2.4.7 An Access Proposal in relation to all or any part of an International Freight Train Slot listed in section A of the applicable International Freight Capacity Notice may not be made under this Part D.

2.4.8 An Access Proposal in relation to all or any part of an International Freight Train Slot listed in section B of the applicable International Freight Capacity Notice may not be made under this Part D unless that proposal is in connection with a train service, the purpose of which is the carriage of goods through the Channel Tunnel or the conveyance of goods which have passed or are to pass through the Channel Tunnel.

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.

(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.

2.6.2 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.

2.7 New Working Timetable Publication – D-26

2.7.1 The New Working Timetable shall be published by Network Rail at D-26, subject only to variations made in the course of the appeal process described in this Condition D2.7.

2.7.2 Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it (other than in respect of International Freight Train Slots consulted under Condition D9.2), provided that an appeal is lodged within twenty Working Days of its publication. All such appeals shall be conducted in accordance with Condition D5.

2.7.3 Where a Timetable Participant has enquiries or requires further information from Network Rail regarding the published New Working Timetable, Network Rail shall respond fully and

promptly and where possible, taking into account the nature of the enquiry or information requested and the date this is received by Network Rail, so as to enable a Timetable Participant to comply with the timescales in Condition D2.7.2.

2.7.4 Network Rail shall promptly make all revisions to the New Working Timetable required by all appeal decisions, and shall notify all Timetable Participants upon completion of those changes.

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)-(l) 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) the content of any relevant Long Term Plan and any relevant Development Timetable produced by an Event Steering Group;
- (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 Capacity 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.

5.3 Powers of dispute resolution bodies

5.3.1 In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail and Road (as the case may be) may exercise one or more of the following powers:

- (a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;
- (b) it may direct that a challenged decision of Network Rail shall stand;
- (c) it may substitute an alternative decision in place of a challenged decision of Network Rail;

provided that the power described in (c) above shall only be exercised in exceptional circumstances.

5.3.2 Where general directions have been given in accordance with Condition D5.3.1, the relevant appeal body may, on the application of Network Rail brought in accordance with Condition D5.3.3, make such further orders as it shall consider appropriate in order to provide the parties with guidance as to the interpretation and application of such general directions.

5.3.3 Any application made by Network Rail pursuant to Condition D5.3.2 must be made within:

- (a) five Working Days of the relevant decision; or
- (b) where the said period of five Working Days would include Christmas Day, ten Working Days.