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## **ACCESS DISPUTES COMMITTEE**

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To: Network Rail Infrastructure Ltd ("Network Rail")  
Abellio Scotrail Ltd  
DB Cargo (UK)  
First Greater Western Ltd ("FGW")  
Transport for London ("TfL")  
GB Railfreight Ltd ("GBRF")  
Serco Caledonian Sleepers Ltd  
East Coast Main Line Company Ltd ("East Coast")  
Stagecoach South Western Trains Ltd ("SWT")  
XC Trains Ltd ("XC")  
Arriva Rail North Ltd ("ARN")

From: Hearing Chair  
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London NW1 2DN  
  
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e-mail: sec.adc@btconnect.com  
  
Ref: ADC/TTP  
Date: 31 March 2017

Copy to: All other Timetable Participants

Dear Sirs

**Directions relating to Timetabling Disputes TTP1064, TTP1065, TTP1066, TTP1068, TTP1069, TTP1070, TTP1071, TTP1072, TTP1073 and TTP1075**

These Directions are given pursuant to the Hearing Chair's powers under Access Dispute Resolution Rule H20, to assist all the Dispute Parties (and in some cases Timetable Participants which are not currently Dispute Parties) to deal with these Disputes. They follow my initial review of the Sole Reference Documents ("SRDs") of the Dispute Parties and consideration of the letter of 29 March 2017 from Eversheds Sutherland (International) LLP ("Eversheds") which is attached for ease of reference.

Timetable Participants not yet involved in these dispute arrangements will find the SRDs on the Access Disputes Committee website ([www.accessdisputesrail.org](http://www.accessdisputesrail.org)).

I should observe that it is essential that this process is fair and complies with the Principles of the Access Dispute Resolution Rules, but that it is also important to ensure that these Disputes are determined in sufficient time to be reflected in the timetable planning cycle, which is not paused while these Disputes are being determined.

1. From my review I consider that these Disputes can be divided into four heads:
  - A. Issues of principle relating to Version 2 of the Timetable Planning Rules for 2018 (the "2018 TPRs").
  - B. Points of detail flowing from and dependent on the issues of principle under Head A above.
  - C. Detailed points relating to the 2018 TPRs which are not related to the objections in principle under Head A.

- D. Other issues, including the Dispute (from DB Cargo and GBRf) relating to the alleged failure of Network Rail to comply with the Determination of an earlier Timetabling Panel and (from TfL) whether a Party can recover costs claimed to be abortive.

To assist the Parties a table is annexed indicating how I consider that the individual claims can be divided into these Heads.

2. While a Hearing Chair may give Directions to advise Parties how they may assist the Panel in drafting SRDs or a Defence, of course a Party cannot be constrained in the way in which it constructs its own pleadings. However, it seems to me that the SRDs in Disputes TTP 1064, 1066, 1068, 1069, 1070, 1071, 1073 and 1075 raise a common complaint concerning an alleged failure by Network Rail to comply adequately or at all with the consultation requirements in Part D of the Network Code relating to the construction of Timetable Planning Rules. Although it is not explicitly pleaded in Disputes TTP 1065 and 1072, this issue of principle appears nonetheless to be a point underlying these Parties' claims.

Given this, I am not immediately persuaded that drafting a Defence to this common issue raised by so many Parties is as difficult a task as Eversheds' letter of 29 March 2017 appears to suggest. If, however, Network Rail chooses to repeat the same points in separate Defence documents it is of course at liberty to do so, although this appears to be a less productive and more time-consuming way of proceeding.

It will assist the Panel if Network Rail provides, possibly as an Annex to its Defence to the Head A claims, a brief explanation of the methodology used in "TRIP" and the extent to which the TRIP process depended on "ODA".

In making this request I accept that in my interpretation these are not in themselves contractual documents, but they are clearly an important input into the contractual process within Part D of the Network Code.

3. Four Parties (FGW, East Coast, XC and ARN) move on from the argument on principles, each seeking that the whole version of TPRs should be struck down, to detailed issues. Each of these detailed issues only applies to one part of the routes over which these TOCs operate (and East Coast and ARN both concentrate on route LN600).

**FGW, East Coast, XC and ARN are to confirm by close of business on Tuesday 4 April 2017 whether their claims in detail rest only on this route LN600 and FGW is to confirm whether its claim in detail relies on the routes cited in its SRD, recognising that extending the detailed claim to other routes would entitle Network Rail to expect more time to prepare its Defence.**

4. **All Timetable Participants are to note that in a number of these claims the Panel is being asked to strike down the 2018 TPRs completely. Such a decision would obviously affect all Timetable Participants, who are therefore reminded of their right to declare themselves as Interested Parties if they so wish.**
5. Now that the shape of the overall dispute situation is clear, it is possible to give Directions on the timetable for the designated hearing days. My assessment is that it will take at least one day to determine Head A, but that Head B (for DB Cargo, FGW, TfL and XC) is so closely linked with Head A that all Parties involved must also be prepared to deal with this Head on the first hearing day, i.e. 20 April 2017.

I would not regard it as practicable to proceed to any of the other Heads on the first hearing day. Given this, **the time for Network Rail to file its Defence in relation to Heads C and D is extended to 26 April 2017**. I hope that this will assist Network Rail in dealing with the resourcing issues referred to in Eversheds' letter of 29 March 2017.

6. While a Hearing Chair is not required to identify issues of law until after the Defence is filed, it may assist Network Rail in preparing its Defence if I indicate issues which I have already identified as likely to be raised. Without limitation, these are:
  1. Whether it is necessary or appropriate for a Timetabling Panel to reach a Determination which does no more than state that Network Rail must comply with existing Network Code 'rules'.
  2. If a submission that Network Rail has failed to comply with an earlier Determination is accepted in a later Timetabling Panel hearing on the same facts, does this amount to 'exceptional circumstances' as defined in Network Code Condition D5.3.1?
  3. Is it within the power of a Timetabling Panel to order that sums paid to Network Rail by an Access Beneficiary to carry out modelling work, which are now claimed to be abortive because of the effect of the 2018 TPRs, are to be repaid to the Access Beneficiary? Or, as an alternative, can the Timetabling Panel order that any future modelling work is to be carried out by Network Rail at no further charge?
7. While this is more a matter of procedure than of law, it may help the Parties if I explain that in determining Head A I shall suggest that the Panel should first consider, in each case, whether Network Rail has discharged its duty to consult with Timetable Participants as required by Part D of the Network Code. If the Panel concludes that Network Rail has not discharged this duty, then it is likely to conclude that the only satisfactory remedy is to order that the 2018 TPRs concerned should not be implemented.

If, however, the Panel concludes that the consultation was satisfactory in any given instance, it will then need to consider whether the Timetable Planning Rules concerned comply with the Decision Criteria.

8. Returning to the issue of fairness, Eversheds suggests that Network Rail is disadvantaged by having less time to prepare its Defence than the Claimants had to prepare their SRDs. This appears to suppose that Access Beneficiaries start drafting an SRD as soon as a Dispute is registered. In fact it is my understanding that SRDs are rarely if ever drafted until a Dispute is listed for a hearing, but in any event in these Disputes Network Rail has already been granted more time to prepare its Defence than the Access Dispute Resolution Rules envisage.

Without dealing with every point of detail in Eversheds' letter of 29 March 2017, in the light of the understanding that now exists of the points to be determined in these Disputes, I still see no requirement for a Directions Hearing before the first hearing day. As explained above, that day will deal principally with Head A, while needing to be prepared with the more limited Head B.

When Network Rail files its Defence to Heads C and D, further Directions will be issued if it is thought that they will assist. The question of further Directions can of course be discussed at the first hearing day.

There is one outstanding point made by Eversheds which requires consideration, but which it has not yet been possible to consider properly if these Directions are to be issued today. That is the argument in paragraph 12.2 of the letter of 29 March 2017 that some points made in some SRDs were not referred to in the related Notice of Dispute.

This requires further consideration and I shall revert to it in due course. My immediate reaction, however, especially in the light of the volume of correspondence between the Parties on all the issues raised in these Disputes, is that Network Rail is unlikely to succeed in any argument that it was not aware of the concerns being raised by Timetable Participants and has therefore been taken by surprise by any of the issues in the SRDs.

9. GBRf appears to have tried to assist Network Rail and the Panel by dividing its claim into three separate documents. I see no objection to this, but to the extent that it requires any amendment to Chapter Part H Rules, I provide retrospective authority for this process.
10. I do not think it appropriate to release to Dispute Parties the details of my case management discussions with the Secretary.
11. I welcome the fact that Eversheds takes no exception to the fact that I was formerly in practice with Mr Tucker of Burges Salmon LLP. To answer the question posed in paragraph 13 of Eversheds' letter of 29 March 2017: while in practice (thus up to 2009) I advised a number of the operators involved in these current Disputes, but in each case the advice was given when the operator concerned was under different ownership, or operating an earlier franchise; those concerned were First ScotRail, Great Western Trains then FGW, GBRf when in FirstGroup ownership, and First/Keolis Transpennine. I have not advised any of these operators under their current ownership and/or franchise arrangements; further, my advice primarily related to safety, external disputes and customer relations issues, I did not advise on any questions relating to timetabling.

I look forward to Network Rail serving its Defence regarding Heads A and B by 15 00 on Wednesday 12 April 2017.

Yours faithfully

Clive Fletcher-Wood  
Hearing Chair

PP 1.32222222  
Committee Secretary

## Annex

Table showing Heads

Dispute No.	Operator	<u>Head A</u>  Common issues of principle	<u>Head B</u> Specific issues which flow from the common issues of principle	<u>Head C</u> Free-standing issues which do not flow from common issues of principle	<u>Head D</u>  Other issues
TTP1064	Abellio Scotrail	✓			
TTP1065	DB Cargo (UK)		✓		✓
TTP1066	First Greater Western	✓	✓		
TTP1068	TfL	✓	✓		✓
TTP1069	GBRf - Part 1				✓
	GBRf - Part 2	✓			
	GBRf - Part 3	✓		✓	
TTP1070	Caledonian Sleepers	✓			
TTP1071	East Coast	✓		✓	
TTP1072	SWT			✓	
TTP1073	XC Trains	✓	✓		
TTP1075	Arriva Rail North	✓	✓		

The Secretary  
Access Disputes Committee  
Floor 8  
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NW1 2DN

Email: [sec.adc@btconnect.com](mailto:sec.adc@btconnect.com)

Date: 29 March 2017

Your ref: Tony Skilton

Our ref: SHACKLJ/PIRESC

Direct: [REDACTED]

Email: [REDACTED]  
[REDACTED]

By Email

Dear Sirs,

**Part D Claims Ref: TTP1064; TTP1065; TTP1066; TTP1069; TTP1070; TTP1071;  
TTP1072; TTP1073; TTP1075;**

1. We refer to your two emails dated 22 March 2017, timed at 17:28 hrs and 17:44 hrs, and your subsequent email of 29 March 2017 at 14:26 hrs.

**Issues arising from emails**

2. We understand the first email to be the Hearing Chair's comments rather than formal Directions. In respect of the second email we should be grateful if you would please confirm whether this is also a record of the Hearing Chair's comments.
3. As you and the Hearing Chair will appreciate, Network Rail is facing an unprecedented number of Part D claims and an extremely challenging timetable in which to respond thereto. We previously requested a Directions Hearing as the opportunity to discuss the mechanics and timing of this process would in our view have assisted in addressing these challenges.
4. We note that there has been, in the context of the current timetable, a considerable period of time between the Claimants' service of their respective Notices of Dispute and the subsequent service of their respective Sole Reference Document. In particular, each Claimant has been afforded considerably more time than Network Rail has following service of the Sole Reference Documents to prepare its response. We remain concerned that this may not allow Network Rail sufficient time to deal properly with matters and reserve the right to address the Hearing Chair on this further in due course.
5. In your email of 22 March 2017 at 17:28 hrs you refer to discussions between the Claimants and the ADC Secretary. It appears that these discussions have, at least in part, influenced the Hearing Chair's decision-making to date. We should be grateful if you would please disclose to us full details of these discussions.

**Issues to address moving forward**

6. We consider that it will be in the interests of all the parties and the efficient determination of the Part D claims if all the parties were to correspond directly with

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the Hearing Chair on the matters within his jurisdiction. We should be grateful if you would please provide the contact details for the Hearing Chair.

7. Absent formal Directions, our understanding of the timetable moving forward is as follows:
  - 7.1 Network Rail is to prepare and serve its response(s) by 3pm on 12 April 2017;
  - 7.2 The TTP Hearing will take place on 20 April 2017; 27 April 2017; 8 May 2017; and 16 May 2017. We are however concerned by the suggestion in your 15 March 2017 email as to the scope of the first day of the TTP Hearing (as confirmed in your email on 22 March 2017 at 17:28 hrs). In particular, we do not understand on what basis a decision has been made by the Hearing Chair to "... deal with the matter of methodology ...". We believe the best way to proceed is a matter for a Directions Hearing following Network Rail's response to the Sole Reference Documents. We reserve Network Rail's right to address the Hearing Chair on the issue and consequential Directions; and
  - 7.3 On receipt of the Claimants' Sole Reference Documents, the Hearing Chair will identify the common issues and, following discussion with the parties, consider the merits of a joint hearing on the common issues before giving any necessary Directions to reflect that. We agree that until the Sole Reference Documents have been properly considered, identifying the common issues, if any, is not possible and we reserve Network Rail's right to address the Hearing Chair on the issue and consequential Directions.
8. To meet the 12 April 2017 deadline for its response to each of the claims, Network Rail has had to mobilise considerable resource at significant cost. We have taken the view that the only sensible way to organise this resource, absent clarity in this preparation phase of either: (i) the detail of the Claimants' claims (and you will appreciate that the detail in the Notices of Dispute is varied and on occasions very limited); or (ii) on the common issues, has been to assign resource to individual Claimants' claims and with the intention of producing an individual response to each Sole Reference Document. In this regard, Network Rail assumes it will have the full ADRR Chapter H 23(b) 10 page plus appendices allowance per response.
9. We mention this because of your emails of 15 March 2017 and 29 March 2017 which suggest that Network Rail is to consolidate the Claimants' submissions in the various individual Sole Reference Documents into a single response document which is annotated against the operators' submissions. We are unclear precisely what is intended here. In any event, absent both: (i) a Direction that the Claimants prepare their Sole Reference Documents in a uniform manner to facilitate consolidation (or any formal Direction requiring Network Rail to prepare a single response or explaining precisely how that is to be achieved); and (ii) more time than is currently allowed for in the Directions timetable, it is neither possible nor reasonable to expect Network Rail to consolidate the Claimants' submissions in the various individual Sole Reference Documents into a single document. In the limited time available, we consider that Network Rail is entitled to focus on understanding and responding to the points made in the Sole Reference Documents and not on the presentation of the Claimants' claims. Any consolidation or collation exercise in respect of those claims where we are instructed will need to follow service of Network Rail's Responses to the individual Sole Reference Documents and should be the subject of appropriate directions which can only be given once the parties' respective positions have been set out.
10. In so far as the suggestion of some form of consolidated document is to be pursued, this is a matter which will need to be discussed at a Directions Hearing. For the avoidance of doubt, we see no reason why the burden of creating any such document, if necessary and appropriate, should not be the responsibility of the Claimants, rather than Network Rail. In response to the point made in the final

paragraph of your email of 22 March 2017 at 17:44 hrs, the Claimants are all substantial private sector organisations with access to and the means to fund resource.

#### **Evidence received**

11. We confirm that we have received Sole Reference Documents from the following Claimants:
  - 11.1 Abellio ScotRail ("ASR");
  - 11.2 DB Cargo;
  - 11.3 Three claims from GB Railfreight;
  - 11.4 Serco Caledonian;
  - 11.5 East Coast Mainline;
  - 11.6 South West Trains;
  - 11.7 XC Trains;
  - 11.8 Arriva Rail North; and
  - 11.9 First Greater Western.
12. Having reviewed the Sole Reference Documents received, we raise the following points:
  - 12.1 GB Railfreight has served three Sole Reference Documents. We do not understand the basis of this approach and cannot see that it is permitted either by Part D or the Access Dispute Rules. Further, this increases our concern that the current Directions do not allow Network Rail sufficient time to deal properly with the claims;
  - 12.2 We refer to our letter dated 15 March 2017 in which we expressly reserved all Network Rail's rights. Our preliminary review of the Sole Reference Documents indicates that in respect of some of the Claimants' claims, the Sole Reference Documents contain issues which are new and not the subject of the relevant Notice of Dispute. As such, they do not appear to have been appealed in accordance with Part D2.2.8. We also have concerns as to whether at least some of the Notices of Dispute were validly served and as to whether some or all are valid Notices of Dispute in various other respects. We will reflect on these points further during the preparation of Network Rail's responses but, in the meantime, continue to reserve all Network Rail's rights in respect of all matters including, but not limited to, the foregoing; and
  - 12.3 The documents appended to the Sole Reference Documents of some Timetable Participants amount to hundreds of pages. We therefore put the Hearing Chair on notice that, whilst Network Rail will endeavour to address the various Sole Reference Documents served as best as possible, it is simply not possible to deal with all of the documents relating to the dispute.

#### **Other issues**

13. We note that Burges Salmon, in their 21 March 2017 email (14:14 hrs), set out that the Hearing Chair is a former partner of Burges Salmon and former colleague of Mr Tucker (who represents ASR). The issue is further addressed by the Hearing Chair in your email of 22 March 2017 at 17:28 hours. We have no difficulty or



Date: 29 March 2017  
Your ref: Tony Skilton  
Our ref: SHACKL/PIRESC  
Page: 4

concern in this regard at all. As the issue has been raised however, we should, for good order, be grateful if the Hearing Chair would please confirm that he has not previously advised any of the Claimants.

Yours faithfully,



**Eversheds Sutherland (International) LLP**

cc.

