

IN THE MATTER OF PART D OF THE NETWORK CODE

AND IN THE MATTER OF THE ACCESS DISPUTE RESOLUTION RULES

AND IN THE MATTER OF TIMETABLING DISPUTES: TTP 1331 and TTP 1376

BETWEEN:

GB RAILFREIGHT LIMITED ("GBRf")

v

NETWORK RAIL INFRASTRUCTURE LIMITED ("Network Rail")

Network Rail Sole Reference Document

1. INTRODUCTION

- 1.1 This is Network Rail's Sole Reference Document served pursuant to the Direction in the Access Disputes Committee's email dated 11 October 2018 (14:25 hrs) and in response to the GBRf Sole Reference Document served on 23 October 2018.
- 1.2 The issues raised by the GBRf Sole Reference Document and in particular the issues as to the jurisdiction and powers of the TTP, as well as the large number of train slots now in issue, means that Network Rail has had to exceed the 10 page limit for a Sole Reference Document in order to address the required issues.
- 1.3 The matters in the GBRf Sole Reference Document and which GBRf puts before the TTP arise out of the preparation of the December 2018 Working Timetable and in particular what is known as the D26 Weekday Timetable offered on 8 June 2018 ("**the D26 Weekday Timetable**") and the subsequent development of the December 2018 Working Timetable in the form of the D16 Hybrid Timetable offered on 17 August 2018 ("**the Hybrid Timetable**").
- 1.4 The Hybrid Timetable, which will be the December 2018 Working Timetable, is due to come into effect on 9 December 2018 (and the planned recovery of the publication of the Informed Traveller Timetable ("**the ITTT**") to TW-12 is being delayed, with the ITTT reverting to TW-6 for the majority of the December 2018 timetable period).
- 1.5 The matters in the GBRf Sole Reference Document and which GBRf puts before the TTP fall into two categories:
 - 1.5.1 Various requests for the determination of what are described as "points of principle" that are said to arise in the context of the preparation of the December 2018 Working Timetable and in particular the Hybrid Timetable; and
 - 1.5.2 The 73 disputed train slots as set out in Appendix D to the GBRf Sole Reference Document.
- 1.6 Network Rail responds to the matters in the GBRf Sole Reference Document as follows:
 - 1.6.1 Its response to the GBRf request for the determination of "points of principle" by the TTP and why such is outside of the TTP's jurisdiction and/or powers;
 - 1.6.2 An explanation of the preparation of the December 2018 Working Timetable; and

1.6.3 Its response to the GBRf disputed train slots as set out in Appendix D.

2. JURISDICTION AND POWERS OF THE TTP

2.1 GBRf has requested that the TTP "*clarify points of principle and determine accordingly*". The "points of principle" are said to be:

2.1.1 "5.2: ... *does [the] Panel agree that NR has no authority to alter the due date of D-26 without prior authority afforded under D2.7?*";

2.1.2 "5.2: ... *does [the] Panel agree that NR may not change or revoke a Train Slot already offered at (the correct) D-26 without mutual consent, and that Network Rail is in breach of contract for acting as it has?*";

2.1.3 "5.6: ... *request the panel ... to determine to that effect ...*" that "... NR is not entitled to ignore Access Proposals made to it, there being no such provision in Part D that permits it to do so"; and

2.1.4 "6.1: ... *a determination of breach of contract on other matters where the Panel considers that this applies*".

2.2 Network Rail's position is that the TTP does not have the jurisdiction or power to address these or any "points of principle". In short, the TTP's jurisdiction relates to the determination of disputes relating to the contents of the New Working Timetable and the allocations of capacity made within it, and not issues relating to the production of the New Working Timetable itself.

2.3 GBRf's Notice of Dispute dated 22 June 2018 (TTP 1331) ("**the First Notice of Dispute**") is said to be made pursuant to D2.7.2 of the Network Code and to be in relation to what is described as "*the December 2018 Timetable offer, as offered to GBRf on Friday 8 June 2018*" (i.e. the D-26 Weekday Timetable).

2.4 As appears above and in more detail below, the D26 Weekday Timetable will not be the December 2018 Working Timetable. As a result, any disputes as to the contents of the D26 Working Timetable are not the subject of any relevant dispute before a TTP.

2.5 GBRf's Notice of Dispute dated 23 August 2018 (TTP 1376) ("**the Second Notice of Dispute**") is said to be made pursuant to D2.7.2 and D3.6 of the Network Code and is said to be in relation to "the December 2018 Timetable". The December 2018 Timetable is the timetable published and offered on 17 August 2018 in the form of the Hybrid Timetable.

2.6 D2.7.2 of the Network Code concerns an appeal against the New Working Timetable:

"Any Timetable Participant affected by the New Working Timetable shall be entitled to appeal against any part of it All such appeals shall be conducted in accordance with Condition D5".

2.7 Condition D5 is concerned with appeals and in particular D5.1.1 provides:

"Where an appeal is expressly authorised by this Part D, a Timetable Participant may refer a decision for determination by a Timetabling Panel in accordance with ADRR".

2.8 Accordingly, GBRf can appeal under D2.7.2 of the Network Code against a **decision** of Network Rail **as to a part of the New Working Timetable**: the jurisdiction of the TTP under D2.7.2 is limited to determining appeals from Network Rail decisions as to parts of the New Working Timetable. In other words, it is limited to determining specific capacity allocation disputes that arise as a result of the contents of the New Working Timetable.

2.9 In contrast, D3.6 of the Network Code addresses "Timetable Variations", as defined, by consent. It provides:

"Notwithstanding anything stated in this Condition D3, where Network Rail and all affected Timetable Participants have so consented in writing, a Timetable Variation may be made without the need for compliance with such of the requirements of this Condition D3 as are specified in the consent".

- 2.10 D3.6 is concerned solely with a "Timetable Variation" by consent. A "Timetable Variation" is either a Train Operator Variation (D3.1.1) or a Network Rail Variation in order to facilitate a Restriction of Use (D3.1.2). See D3.1.1 and D3.1.2.
- 2.11 The Second Notice of Dispute is **not** concerned with Timetable Variations as defined in the Network Code and, given that it deals with Timetable Variations made by consent, D3.6 does not provide for any right of appeal.
- 2.12 Accordingly, Network Rail submits that D3.6 is of no relevance to GBRf's dispute: no decision of Network Rail arises from it and no relevant dispute can arise pursuant to it. It is noted that no reference is made to D3.6 in GBRf's Sole Reference Document.
- 2.13 Therefore, what has to be determined is whether GBRf has validly raised any issue under D2.7.2 of the Network Code in respect of a decision of Network Rail in relation to part of the New Working Timetable.
- 2.14 In this context, Network Rail stresses that the only **relevant** timetable is the timetable published and offered by Network Rail on 17 August 2018 in the form of the Hybrid Timetable and which, as stated above, is due to come into effect on 9 December 2018. It is the only timetable that is intended to come into operation.¹
- 2.15 Accordingly, if and insofar as GBRf seeks to appeal a decision of Network Rail under D2.7.2, it must be on the basis that GBRf accepts that the Hybrid Timetable is the New Working Timetable as referred to in D2.7.2: there is no other right of appeal. If GBRf does not accept that, then there is no jurisdiction in the TTP because the TTP's jurisdiction under D2.7.2 is confined to disputes as to parts of the New Working Timetable.
- 2.16 It is clear from the GBRf articulation of its alleged "points of principle" (set out above) that GBRf's complaint is **not**, (or is not solely), an appeal against a decision of Network Rail in relation to any part of a timetable actually proposed by Network Rail or the New Working Timetable. GBRf's alleged "points of principle" do not constitute an appeal against a decision of Network Rail but appear to be addressed to the way in which the December 2018 Working Timetable, in the form of the Hybrid Timetable, was put together.
- 2.17 Accordingly, GBRf appears to be advancing a wholesale complaint about the procedure whereby the December 2018 Working Timetable in the form of the Hybrid Timetable has come to be published. What GBRf appears actually to be complaining about is the replacement of the D26 Weekday Timetable with the December 2018 Working Timetable in the form of the Hybrid Timetable.
- 2.18 However, as discussed above, GBRf's right of appeal relates to the New Working Timetable. GBRf's position appears to be that the December 2018 Working Timetable in the form of the Hybrid Timetable either is, or is not, a valid New Working Timetable. Whether it is or is not a valid New Working Timetable is not a dispute that falls within D2.7.2 of the Network Code or the jurisdiction of the TTP.
- 2.19 GBRf appears to be arguing that Network Rail was not entitled to issue the Hybrid Timetable and it seeks to establish that the issuing of the Hybrid Timetable amounted to a breach of the Network Code and to a breach of contract.
- 2.20 The circumstances by which the December 2018 Working Timetable in the form of the Hybrid Timetable came to be issued are detailed below. As appears below, this was not

¹ Although this is plainly outside the TTP's jurisdiction, the other point that GBRf has made (in addition to asserting that Network Rail was not entitled to issue the Hybrid Timetable) is in asserting that the D26 Weekday Timetable was contractually binding. It was not: it was, as GBRf themselves note, an offer when it was published and was not a final decision of Network Rail for the purposes of D4.7 of the Code.

simply a unilateral decision attributable to Network Rail: it was the result of significant collaboration and consultation within the industry, overseen by the Secretary of State for Transport and ultimately the acceptance by the Secretary of State for Transport of the recommendation of Andrew Haines, the then Network Rail CEO designate.

- 2.21 In this context, GBRf has not provided the TTP with an account of the process of industry collaboration and consultation or of how or why the Hybrid Timetable came to be the December 2018 Working Timetable. Such matters are of fundamental importance both to a proper understanding of the background to the matters that GBRf seeks to put before the TTP and also to why the issues raised are beyond the jurisdiction and powers of the TTP. A summary of the circumstances leading to the issuing of the Hybrid Timetable are set out below.
- 2.22 Network Rail does not accept GBRf's position that the issuing of the Hybrid Timetable was a breach of the Network Code and/or a breach of contract.
- 2.23 In short, the Hybrid Timetable is the December 2018 Working Timetable that was published and offered by Network Rail in order to perform and comply with its obligations: (i) in its licence conditions, and in particular paragraphs 2.1 to 2.9 thereof, (ii) in the various track access agreements to which it is a party, and in particular the standards of performance provided in clause 4 thereof, and (iii) in relation to the establishment of a timetable in the Network Code and in particular D1. Whether the publication of the Hybrid Timetable by Network Rail is in compliance with its obligations in (i) to (iii) is not a matter within the jurisdiction of the TTP.
- 2.24 Furthermore, it will be apparent to the TTP that, in order to reach any determination on any of the issues at (i) to (iii) in paragraph 2.23 above, or any issues relating to a breach of the Network Code and/or breach of contract, a considerable amount of factual evidence would be required, from a wide range of industry participants.
- 2.25 This is not the type of issue to be determined in the short timeframe which is (rightly and understandably) allowed for in a timetabling dispute.
- 2.26 Further, any findings in relation to any of the issues at (i) to (iii) in paragraph 2.23 above, or any issues relating to a breach of the Network Code and/or breach of contract, would potentially have significance for a wide range of parties, none of whom are before this TTP. It is to be noted that no other Timetable Participant has advanced a TTP dispute in respect of the decision to adopt the Hybrid Timetable as the December 2018 Working Timetable. This is an issue on which those other Timetable Participants, and possibly others such as the ORR and the Department for Transport, are relevant parties and are entitled to be heard.
- 2.27 The industry has recognised the importance of achieving the most risk-free timetable as possible for December 2018. Timetable participants participated in the development of the timetable through the PMO Steering Group and the participants recognised that there were compromises required for the good of the industry.
- 2.28 The TTP is plainly not in a position to reach any determination about the industry-wide collaboration and consultation and the resulting decisions or their effect, or whether Network Rail's publication of the Hybrid Timetable was in compliance with its obligations in (i) to (iii) in paragraph 2.23 above or is a breach of the Network Code and/or a breach of contract.
- 2.29 Any such decision in relation to points of principle would have far-reaching consequences and disrupt the progress made by the industry. Similarly, as set out at paragraph 4 below, any award by the TTP which finds in favour of GBRf in respect of anything but a minority of train slots will undo months of collaborative work by the industry.
- 2.30 Further, and of fundamental importance, it is no part of any TTP's function or jurisdiction to carry out investigations of this sort or to determine the sort of "points of principle" which GBRf seeks.

- 2.31 In terms of the jurisdiction of the TTP, GBRf has no right of appeal in relation to the publication of the Hybrid Timetable, or any decision as to whether it is the December 2018 Working Timetable: there is no such right in D2.7.2. The only right of appeal GBRf has is in respect of part of the New Working Timetable and insofar as GBRf accepts the Hybrid Timetable is the New Working Timetable. Accordingly, the TTP has no jurisdiction to determine the sort of "points of principle" which GBRf seeks.
- 2.32 The TTP has extensive experience of dealing with the contents of the New Working Timetable and issues relating to the allocation of slots within the New Working Timetable, and is uniquely placed to weigh up the competing arguments of a FOC (or TOC) against those of Network Rail in relation to part of a timetable, an allocation of capacity, and to determine whether a particular detailed timetabling decision is properly to be implemented in all the circumstances and, if not, what should be implemented in its place. The TTP's experience and expertise lies in resolving detailed disputes as to part of a timetable and on the allocation of capacity.
- 2.33 The TTP is not the proper forum for determining whether Network Rail has complied with its obligations or there has been any breach of contract on Network Rail's part in relation to the publication or issue of the New Working Timetable. There would be far-reaching implications for many other parties if the TTP were to be tempted to delve into such matters and it is probable that such matters could only be resolved by the intervention of the ORR and/or other dispute resolution forums (i.e. arbitration or the High Court).
- 2.34 The fact that the TTP is not the appropriate forum to determine such matters is amply demonstrated by considering the powers which the TTP does have on an appeal under D2.7 of the Network Code.
- 2.35 D5.3.1 provides that the TTP 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."*
- 2.36 These powers point to the pragmatic nature of the TTP's role i.e. to assist in the allocation of capacity in certain narrow and carefully prescribed ways. The determination of far-reaching principles is no part of the TTP's role. The TTP's jurisdiction is to determine disputes concerning the contents of the New Working Timetable but it has no jurisdiction to determine what version of a timetable is properly to be treated as the New Working Timetable.²
- 2.37 Network Rail accepts that if and to the extent GBRf has a specific complaint about any part of the Hybrid Timetable (i.e. specific train slots), then, on the basis that GBRf accepts that the Hybrid Timetable is the New Working Timetable, it can bring its case to the TTP.
- 2.38 However, even on that basis, there are practical difficulties with the approach taken by GBRf.
- 2.39 First, it is clear (and is acknowledged by GBRf) that slots in the Hybrid Timetable GBRf seeks to change or acquire are ones which may conflict with other operators' schedules that have been offered (and have accepted). The TTP cannot properly determine such issues in the absence of representations from those other operators.

²The powers described in H50 of the Code can only arise in the context of a dispute where the TTP has jurisdiction and as explained, D2.7 means that such a dispute is limited to determining proper allocation within the New Working Timetable.

- 2.40 Secondly, it is clear from many of the complaints advanced by GBRf that, whether or not GBRf are seeking slots now given to and accepted by other parties, in relation to the slots sought, other parties would be affected by their proposed relief as a result of the knock-on effect of what GBRf seeks.
- 2.41 Accordingly, there are two possible situations: (i) where the slot has been offered and already accepted by another party – and it is clear from paragraphs 5.1 and 5.2 of GBRf's Sole Reference Document that there are such situations which they know about; and (ii) situations where other parties' timetables would or might change even if that party has not been offered or accepted a slot.
- 2.42 Note also that by Chapter B Rule 3 of the ADRR a Notice of Dispute is to list all parties concerned by the matters to the dispute (whether parties to the dispute or not). No such notification is set out by GBRf in their Notices which are both therefore defective for these reasons as well.
- 2.43 Irrespective of whether the Notices are defective for that reason, there are further practical difficulties. If the appeal is to proceed, the other parties affected need to be given notice and the opportunity to make representations and to become parties to the dispute.

Mr Clive Fletcher-Wood's TTP Directions Hearing

- 2.44 GBRf issued various Notices of Dispute in connection with the May 2018 Working Timetable. They are identified by TTP 1233, 1237, 1240, 1270, 1288, and 1291. They were consolidated with various Notices of Dispute in connection with May 2018 Working Timetable issued by Freightliner, Freightliner Heavy Haul and DB Cargo.
- 2.45 Mr Clive Fletcher-Wood was appointed as the TTP Hearing Chair and following Directions issued on 20 March 2018, he held a Directions Hearing on 27 April 2018. The purpose of the Directions Hearing was to determine the extent to which a TTP could assist in the determination of *inter alia* contractual issues such as an alleged breach of contract. It was Network Rail's case, as articulated both in written submissions before the Directions Hearing and orally at the Directions Hearing, that a TTP did not have the jurisdiction and power to determine contractual issues.
- 2.46 Mr Fletcher-Wood, in his letter to the parties dated 27 April 2018 following the Directions Hearing, made clear that he accepted Network Rail's position. He said:
- "... I recognise that a Timetabling Panel would not necessarily have the jurisdiction to address all aspects of the case".*
- 2.47 Mr Fletcher-Wood went on to refer the Notices of Dispute back to the ADRR Allocation Chair.
- 2.48 GBRf, in requesting the TTP to hear and determine these alleged "points of principle", has simply ignored both Network Rail's clear position on a TTP's jurisdiction and power to determine contractual issues such as the "points of principle" and Mr Fletcher-Wood's ruling on the point.

3. THE PREPARATION OF THE DECEMBER 2018 WORKING TIMETABLE

General background

- 3.1 On 8 June 2018 (being D-26), Network Rail issued to all operators a timetable to take effect in December 2018, which offered weekdays but did not formally offer weekend slots i.e. the D26 Weekday Timetable.
- 3.2 On 6 July 2018 Network Rail wrote to all timetable participants to confirm that it would issue a revised timetable for December 2018 being the Hybrid Timetable.
- 3.3 In summary, the Hybrid Timetable offered certain operators the timetable offered on 8 June 2018, but for other operators it consisted of a roll-over of their May 2018 Working Timetable. The Hybrid Timetable was issued on 17 August 2018.

- 3.4 GBRf's reference, while mentioning these matters, does not attempt to explain the background or reasons why this was necessary. Network Rail provides this explanation and context below.
- 3.5 In summary:
- 3.5.1 It is well known that the implementation of the May 2018 Working Timetable was severely disrupted, leading to detrimental impact on passengers and on the industry's reputation.
 - 3.5.2 As a result, there was significant political and public pressure on the industry as a whole to avoid any repeat of these difficulties in the implementation of the December 2018 Working Timetable.
 - 3.5.3 To minimise the risk of repeat, there was an industry-wide collaboration and consultation process, requested by and overseen by the Secretary of State for Transport as to the industry's readiness to implement the December 2018 Working Timetable.
 - 3.5.4 The Hybrid Timetable was the end product of this industry-wide collaboration and consultation. It was adopted on the understanding that the recommendation of the Hybrid Timetable would be accepted by the Secretary of State for Transport, as it subsequently was.

Chronology

- 3.6 Due to the need for extensive revisions to the May 2018 Working Timetable during the May 2018 Timetable Period, there was limited capacity within Network Rail to prepare the December 2018 Working Timetable.
- 3.7 Various options to address this circumstance were developed and discussed including delaying the timetable change date to February 2019. The decision was taken by Network Rail, and discussed with the industry, to publish the D26 Weekday Timetable at D-26, with weekend trains to follow at D-22.
- 3.8 In addition, there were significant concerns about the ability of the industry to deliver the December 2018 timetable change.
- 3.9 Consequently, in this unprecedented situation, in parallel with the publication of the D26 Weekday Timetable, it was agreed at a meeting between Network Rail, the Department for Transport, representatives of the train and freight operating companies, and the Rail Delivery Group, that Andrew Haines, CEO designate of Network Rail, would consider various options to de-risk the deliverability of the December 2018 timetable change and would present these options to the Secretary of State for Transport. In particular, the Secretary of State for Transport was keen to see a "zero-risk" approach to the December 2018 timetable change in the context of infrastructure delivery.
- 3.10 On 8 June 2018, when Network Rail published the D26 Weekday Timetable, it confirmed that it was continuing to engage with the Government and the industry in respect of the December 2018 timetable change **[Appendix 1]**.
- 3.11 There followed a period of industry collaboration and consultation to analyse the preparedness of the operators and Network Rail for the December 2018 timetable change.
- 3.12 As a result of the industry collaboration and consultation, concerns were identified about whether the D26 Weekday Timetable could be successfully implemented. A number of potential options were considered, including rolling over all operators' May 2018 timetables until May 2019, and developing the Hybrid Timetable, whereby "low-risk" operators would proceed with their D26 Weekday Timetable slots, and "high-risk" operators would have their May 2018 timetable rolled over. These options were discussed with industry representatives.

- 3.13 On 20 June 2018, Andrew Haines made his recommendation to the Secretary of State for Transport and recommended developing the Hybrid Timetable. This was followed up in writing on 22 June 2018. The other options under consideration carried an unacceptable level of risk. The Hybrid Timetable represented the most realistic approach for the industry to de-risk the December 2018 timetable change to meet the wish for "zero-risk".
- 3.14 The Secretary of State for Transport formally endorsed the approach on 9 July 2018.
- 3.15 The decision as to which operators would continue with their D26 offered timetable and which would have their May 2018 timetable rolled over was undertaken on a risk profile basis:
- 3.15.1 Operators whose D26 timetables were considered high risk or dependent on major infrastructure upgrades would be rolled-over.
 - 3.15.2 Freight operators and CrossCountry had to be rolled over because of the risk associated with the long-distance and cross-route nature of their operations, and their interactions with other operators.
- 3.16 It was accepted by Network Rail that some limited changes would be required to the rolled-over operators' May 2018 timetables. In this process the particular interests of the freight operators and CrossCountry would be recognised. As a result, Network Rail asked the rolled over operators to provide their key changes needed to implement the Hybrid Timetable, and considered these in order of priority. This process with respect to GBRf is set out in further detail below.

Communications between GBRf and Network Rail

- 3.17 GBRf was aware of the industry wide difficulties experienced with timetabling. Network Rail contacted GBRf on 1 June 2018 to ask whether it would be content to see the timetable change deferred until February 2019³ **[Appendix 2]**.
- 3.18 GBRf's response was that it did not agree with a timetable change in February 2019 and preferred that the timetable was rolled over until May 2019. This was expressed to Network Rail in an email dated 2 June 2018 from Ian Kapur of GBRf **[Appendix 2]**. Mr Kapur stated:
- "I don't believe you can produce two timetables within 3 months of each other... you need to give yourselves the best possible chance to get May 2019 in a good steady state, and now is the time to start".*
- 3.19 As explained above, Network Rail was, during this period, holding discussions with industry representatives. It had no reason, in view of the correspondence above, to consider that GBRf would object to having its May 2018 timetable rolled over. Further, it had to consider the position of other operators, and the industry and passengers as a whole, rather than simply GBRf's commercial aspirations.
- 3.20 However, in late June and early July 2018, GBRf expressed to Network Rail in several emails that it did not agree with the Hybrid Timetable and would prefer to have the D-26 offer developed. As explained above, this was simply not possible in view of the industry-wide need to develop a robust and deliverable timetable, and political support for the Hybrid Timetable.
- 3.21 On 29 June 2018, by telephone, Matt Allen and Rachel Gilliland of Network Rail requested on a call with the FOCs that GBRf provide its priority slots to be included in the Hybrid Timetable. GBRf provided Network Rail with the priority schedules on 3 July 2018 **[Appendix 3]**, in response to a chasing email from Network Rail **[Appendix 3]**.

³ This was before it was decided that this option was unattractive.

Conclusion

- 3.22 As is clear from the matters set out above, adopting the Hybrid Timetable to be the December 2018 Working Timetable was the response of the industry, the Secretary of State and the Department for Transport to the exceptional circumstances. The effect of that decision was that the Hybrid Timetable replaced the D-26 Weekday Timetable and so the latter will not be implemented and has ceased to be of any relevance.
- 3.23 The Hybrid Timetable reflects the best efforts of the industry as a whole to address the political and public pressure to avoid repeating the disruption which occurred in May 2018.
4. **NETWORK RAIL'S RESPONSE TO THE DISPUTED TRAIN SLOTS AS SET OUT IN APPENDIX D**
- 4.1 Network Rail notes that GBRf's TTP dispute is being brought extremely late. The Notices of Dispute which are the subject of the TTP were issued on 22 June 2018 and 23 August 2018. It is only now, in late October 2018 and six weeks before the introduction of the December 2018 Working Timetable that the dispute is being brought before the Panel itself. The practical consequences of this are discussed further below. No explanation has been provided for this delay, which makes it, at best, highly unlikely that any decision of the Panel can be implemented in time and without risk to the implementation of the Hybrid Timetable.
- 4.2 In any event, the number of challenged trains slots identified in GBRf's Appendix D differs substantially to the number Network Rail was led to believe was in question by GBRf. Until receipt of the GBRf Sole Reference Document, Network Rail's understanding was GBRf's substantive and outstanding concerns with the December 2018 Working Timetable were limited to the two trains slots identified by Train ID 6L11HA and Train ID 6L13HA.
- 4.3 Network Rail understands (although it is not entirely clear from GBRf's Sole Reference Document and Appendix D which decisions, in the context of which train slots, are in dispute) that GBRf is disputing train slot decisions made in connection both with the preparation of the D26 Weekday Timetable and the Hybrid Timetable.
- 4.4 Network Rail has analysed the disputed train slots in three categories, which are colour coded in **Appendix 6**:
- 4.4.1 Train slots relating to the Hybrid Timetable, (in particular train slots previously offered on 8 June 2018 but not offered in the Hybrid Timetable, and RSB Roll-over train slots) (the "**Hybrid Timetable Train Slots**"). Network Rail's position in relation to each Hybrid Timetable Train Slot is set out at paragraph 4.9 below. Hybrid Timetable Train Slots are not highlighted in Appendix 6;
- 4.4.2 Disputed train slots which have been rolled over from GBRf's May 2018 timetable (the "**Rolled Over Train Slots**"). These are coded yellow in Appendix 6, and for the reasons set out in paragraph 4.10 below, Network Rail is unable to consider them further;⁴
- 4.4.3 Train slots where the disputed decision related to the preparation of the D26 Weekday Timetable. These are coded grey in Appendix 6. As explained above the D26 Weekday Timetable will not be implemented as the December 2018 Working Timetable. Disputes in relation to it are therefore moot. Network Rail has not considered these train slots further and does not comment further upon them in this Section 4.

Hybrid Train Slots

- 4.5 These are the minority of the challenged train slots, amounting to a total of 8 from a total of 73 in Appendix D.

⁴ With the exception of train 6E71GB and 6E74GB, which are under discussion between the parties.

- 4.6 Network Rail is looking at these challenged train slots and will continue to do so between now and the Hearing on 8 November 2018 and in the hope that it and GBRf will be able to reach agreement.
- 4.7 By way of background, GBRf identified its additional priority/business critical train slots for inclusion in the Hybrid Timetable in Ian Kapur's email to Hazel Chalk dated 11 July 2018 (16:38 hrs) **[Appendix 4]** as:
- 4.7.1 6E12GB [SX] Ferme Park-Foxton Sidings & return;
 - 4.7.2 6E13GB [SX] Ferme Park-Foxton Sidings & return;
 - 4.7.3 6E14GB [SX] Ferme Park-Foxton Sidings & return;
 - 4.7.4 6E77GB [SX] Ferme Park-Foxton Sidings & return;
 - 4.7.5 6L11HA [SX] Ferme Park-Foxton Sidings & return;
 - 4.7.6 6L13HA [SX] Ferme Park-Foxton Sidings & return;
 - 4.7.7 6L14HA [SX] Ferme Park-Foxton Sidings & return;
 - 4.7.8 6E31PD [SX] WEMBLEY EFOC-Ferme Park; and
 - 4.7.9 6E32GF [SX] WEMBLEY EFOC-Ferme Park.
- 4.8 Of these eight additional priority/business critical train slots, only two are listed in Appendix D – 6L11HA and 6L13HA. The other six are included in the Hybrid Timetable. Prior to the receipt of GBRf's Sole Reference Document Network Rail understood that GBRF's concerns in relation to the Hybrid Timetable were limited to the two slots.
- 4.9 Additional Hybrid Timetable Train Slots were identified in GBRf's Sole Reference Document. In the table below, Network Rail sets out its position on each of the Hybrid Timetable Train Slots.

GBRF Priority Items (GBRF Train Slot Previously offered on 08/06/17, but subsequently withdrawn)

- | | |
|--------|---|
| 6E32GC | This was a "priority" train slot requested by GBRf that was not offered in the Hybrid Timetable, Network Rail has investigated the possibility of offering GBRf the train slot and has sent a proposal to GBRF for review. |
| 6L11HA | This was a "priority" train slot requested by GBRf. It was offered by Network Rail to GBRf on 23 October 2018. |
| 6L13HA | This was a "priority" train slot requested by GBRf. It was rejected by Network Rail in its letter to GBRf dated 15 August 2018 [Appendix 5] It was rejected because The path submitted at PDNS contains a headway non-compliance with 5E62HA approaching Alexandra Palace. |

RSB Rollovers

- 0E05GA This was not a "priority" train slot requested by GBRf. However and consequent on receipt of the GBRf Sole Reference Document, Network Rail has investigated the possibility of offering GBRf the train slot.
- The train slot cannot be offered because it has a headway non-compliance between Haughley Jn and Chippenham Jn with 2W05HK, a junction margin non-compliance with 2W21HK at Haughley Jn, a headway non-compliance against 3S60HB from Soham to Ely and a head on clash with 2L79HE on the single line between Soham and Ely.
- 4V52DA This was not a "priority" train slot requested by GBRf. However and consequent on receipt of the GBRf Sole Reference Document, Network Rail is investigating the possibility of offering GBRf the train slot and will respond to GBRf as soon as it reasonably can.
- 5D56EA This was not a "priority" train slot requested by GBRf. However and consequent on receipt of the GBRf Sole Reference Document, Network Rail is investigating the possibility of offering GBRf the train slot and will respond to GBRf as soon as it reasonably can.
- 6F76EA This was not a "priority" train slot requested by GBRf. However and consequent on receipt of the GBRf Sole Reference Document, Network Rail has investigated the possibility of offering GBRf the train slot and has sent a proposal to GBRf for review.
- 6M76EA This was not a "priority" train slot requested by GBRf. However and consequent on receipt of the GBRf Sole Reference Document, Network Rail has investigated the possibility of offering GBRf the train slot and has sent a proposal to GBRf for review.

Rolled Over Train Slots

- 4.10 Network Rail has not considered Rolled Over Train Slots. The reason for this as a package of works in itself but may have made consequential limited re-timings through the validation of the Hybrid Timetable.
- 4.10.1 It was inherent in the decision to adopt the Hybrid Timetable that certain operators, including GBRf, would have their May 2018 Train Slots rolled over with limited variation.
- 4.10.2 It is not possible now individually to re-consider each of the Rolled Over Train Slots.
- 4.10.3 To consider accommodating the Rolled Over Train Slots in the December 2018 Working Timetable would prejudice the aim of minimising risk as much as possible. This was the rationale for the industry-wide collaboration and consultation on the implementation of the December 2018 timetable change.
- 4.10.4 It would risk the successful December 2018 timetable change by requiring consequential amendments that could lead to:
- 4.10.4.1 Changes to the operators' Unit diagrams (which should be substantially settled by now);
- 4.10.4.2 Changes to the operators' driver roster diagrams (which should be substantially settled by now); and
- 4.10.4.3 In so far as accommodation necessitated changes to other operators' timetables, it would have a knock-on and disruptive impact on these other operators plans for the successful December

2018 timetable change. As discussed above, these other operators are not a party to this TTP and have not been given the opportunity to make representations and to become parties to the dispute.

- 4.10.5 To consider accommodating these challenged train slots in the December 2018 Working Timetable would prejudice the preparation of the May 2019 New Working Timetable. The long term timetable planning capacity with Network Rail is, in accordance with the usual planning cycle, focussing on the development of the May 2019 New Working Timetable. To consider accommodating these D26 Weekday Timetable challenged train slots in the December 2018 Working Timetable would require Network Rail resource being re-assigned, to the detriment of the May 2019 New Working Timetable. This was a risk highlighted in the preparation in the Network Rail presentation to the Operational Planning Practitioner Group on 17 August 2018 at which Jack Eagling and Ian Kapur invited but did not attend.

5. OTHER ISSUES RAISED IN GBRF'S SOLE REFERENCE DOCUMENT

Flexing Rights

- 5.1 At paragraph 5.3 of the GBRf's Sole Reference Document it appears to assert that if Network Rail has not exercised its flexing rights while attempting to validate GBRf's Access Proposals Network Rail cannot have fulfilled the Objective. This argument has no merit.
- 5.2 A Flexing Right is:

"a right, exercisable by Network Rail in allocating a Train Slot in the New Working Timetable, to vary a Train Slot: (a) sought in an Access Proposal; or (b) arising from a Rolled Over Access Proposal; or (c) sought in a Train Operator Variation Request in any way within and consistent with the Exercised Firm Rights of the relevant Timetable Participant or, where the Train Slot which is being varied is a Strategic Train Slot, in any way without limitation."

- 5.3 The Network Code provides that *"in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right"* and that the Flexing Right is a right "exercisable" by Network Rail. It is clear from this that Network Rail has discretion as to whether to use its Flexing Right in a given circumstance. Network Rail does not have to exercise the right. Furthermore, Network Rail is not required to use a flexing right to the fullest extent in every instance. Were this to be the case it would have significant implications on the time required to review every schedule bid for inclusion into a New Working Timetable. The position is that the exercise of the Flexing Right is subject to the discretion of Network Rail in the context of the Objective and the Decision Criteria.
- 5.4 Network Rail is not required to use the Flexing Right, nor is it necessary for a flexing right to be used to resolve every timetabling conflict. This is a matter for Network Rail, if necessary, to consider in the context of each case. Where Network Rail has chosen not to exercise its flexing right during the preparation of the Hybrid Timetable, GBRf has been provided with an Intent to Reject letter that explains the decision making process in line with the Objective in D4.6.2.

TPR non-compliance

- 5.5 GBRf also asserts at paragraph 5.3 of its Sole Reference Document that train slots cannot be rejected based on non-compliance against the Timetable Planning Rules. This argument also has no merit.
- 5.6 Network Rail can reject train slots that are not compliant with the Timetable Planning Rules in accordance with D4.2.2 (a):

- 5.6 Network Rail can reject train slots that are not compliant with the Timetable Planning Rules in accordance with D4.2.2 (a):

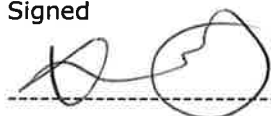
"a New Working Timetable shall conform with the Rules and the applicable International Freight Capacity Notice applicable to the corresponding Timetable Period".

- 5.7 If a train slot conflicts with the Timetable Planning Rules then Network Rail will look to implement a timetabling solution in the first instance. However, it reserves the right to reject a train slot from the timetable if the use of Flex Entitlement is not in line with Decision Criteria considerations, or Flex Entitlement has already been used to its fullest extent.
- 5.8 In this instance Network Rail can decide who is allocated capacity based on priority for inclusion in line with access rights (D4.2.2 (d)) or, if train slots have equal rights for inclusion in the New Working Timetable, by using the Decision Criteria to decide which train slot to reject.

Signature

For and on behalf of *Network Rail Infrastructure Limited*

Signed



Print Name

KATHERINE MCMAHUS on behalf of MATT ALLEN

Position

PROGRAMME MANAGER