

Network Rails Supplemental Statement of Case TTP1610

1 DETAILS OF PARTIES

- 1.1 The parties to the Supplemental Statement of Case are the same as listed in Network Rail's Sole Reference and the definitions in Network Rail's Sole Reference apply to this statement of case.

2 CONTENTS OF STATEMENT

- 2.1 This Statement of Case is in reply to AWC's Supplemental Statement for TTP1610 and sets out comments on the following matters that remain in dispute:

- (a) AWC claims that Network Rail has breached the Network Code. This is not accepted by Network Rail, for the reasons set out in our Sole Reference Document (SRD) and will be expanded upon in this document.
- (b) Network Rail will address: (i) the jurisdiction of the TTP; (ii) AWC's assertion that damages (compensation) is payable for the alleged breach of its track access contract; and (iii) the comments made by the ORR in paragraphs 67, 68, 70 and 72 of its decision on the appeal in TTP1520, and why the power of a TTP does not extend to compensating AWC in the current circumstances.
- (c) Network Rail will look to explain further our use of Flex and why this has been necessary in this case.
- (d) We will further comment on the schedules in dispute from page 5 of our SRD and AWC's list of 39 Flexes attached to the Supplemental Statement of case (pages 5 and 6).
- (e) We will further address how our decision to use flex is independent to that of priority for inclusion.

- 2.2 Network Rail has had very limited time to produce the Network Rail reply. In the light of the time limitations, it has sought to address the main issues raised by the Hearing Chair and AWC. In the event that it has not addressed any issues raised by AWC or has any other issue which it considers relevant to this dispute, it reserves the right to bring further issues to the attention of the TTP and to make further oral submissions the TTP Hearing.

- 2.3 Network Rail only addresses below whether compensation should be awarded pursuant to Part D 5.7.1. It does not address issues in relation to the to the assessment of compensation, or issues such as limitation on liability, as these do not appear to be relevant issues for the TTP to consider in the current context. However, Network Rail reserves the right to address these types of issues at a later date, if required.

3 POWER OF TTP IN RELATION TO DAMAGES/COMPENSATION

- 3.1 The primary purpose of a TTP Dispute is for the Timetable Panel to assess issues relating to the rail network timetable and assist the industry in establishing a timetable for the network. Primarily, this involves adjudicating on issues such as: altering, removing or adding a Train Slot; facilitating variations to the New Working Timetable/Working Timetable; and other arrangements in relation to procuring access to the network.
- 3.2 Where timetable disputes occur between Network Rail and an operator in relation to Network Rail's management of the timetable, the process set out in Part D of the Network Code and the Access Dispute Adjudication Rules ("ADRR") are devised in such a way that the primary focus is to expeditiously and inexpensively resolve the timetable issue in question.
- 3.3 Chapter H of the ADRR, paragraph 1, sets out that "The purpose of a Timetabling Panel is to determine disputes referred to it by parties to an access agreement which incorporates Part D of the Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity including restrictions of use and train slots in: (a) such an access agreement; or (ii) the Access Conditions incorporated by reference in the access agreement in question".
- 3.4 Chapter H of the ADRR, paragraph 14, states that: "A Timetabling Panel shall: (a) provide determinations on the basis of the expertise of a knowledgeable peer group with relevant railway expertise; (b) endeavour to reach fair, rapid and inexpensive determinations of disputes drawing on that expertise; and (c) where appropriate, take the initiative in ascertaining the facts and law relating to the dispute".
- 3.5 A TTP should therefore be a timely and cost-effective forum, where decisions are reached rapidly using the expert technical knowledge of the Panel.
- 3.6 Network Rail understands that it is not the proper function of a rapid resolution process, which has as its central aim the resolving of practical timetabling issues in a timely and efficient way, to consider detailed legal issues and/or disputes of significant financial importance.
- 3.7 The determination procedures under the ADRR reflect that other more comprehensive processes, which can include extensive documentation and/or witness evidence, are available should a party pursue that route.
- 3.8 Network Rail has, in the past, used lawyers on TTP matters where issues were of such importance to Network Rail that it was necessary for Network Rail to be legally represented. The TTP forum, as a whole, has discouraged legal representation due to the rapid and inexpensive nature of the forum.

- 3.9 However, in TTP 1610, AWC seeks to claim in excess of £[redacted at request of Avanti] per year. That is a significant commercial dispute by any means. If the Panel determines that compensation is appropriate in TTP1610 it will mean that it is regularly within its jurisdiction to make orders involving significant financial impact to Network Rail. In those circumstances, Network Rail will have no option but to regularly instruct lawyers in a process that will inevitably become more legal, expensive and prolonged, defeating the purpose of TTP hearings.
- 3.10 It is in the above context that the jurisdictional powers of the Timetable Panel are primarily set out in Part D paragraph 5.3.1.
- 3.11 The powers in Part D paragraph 5.3.1 are limited to:
- 3.12 Option (a). A power whereby the Panel is empowered to give general directions that a particular result is to be achieved but not the means by which it is to be achieved. So, for example, if the Panel concluded in relation to a particular identified proposed revision that some additional consultation should be undertaken, then it could so order;
- 3.13 Option (b). This is simply to direct that Network Rail's decision stands. In effect then that is to dismiss the complaint of the Operator; and/or
- 3.14 Option (c). This option is only applicable in "exceptional circumstances" and this is the option whereby the Panel substitutes its own decision for the decision of Network Rail. There are good reasons why this would only be exercisable in exceptional circumstances. The Panel does not have the full range of material and expertise available to it (in comparison to Network Rail) in order to arrive at its own decision as to which rules should actually apply.

4 PART D 5.7.1

- 4.1 In the consideration of a timetable dispute, Part D does allow one very limited exception in which the Timetable Panel can award damages. Pursuant to Part D 5.7.1, "Where a decision of Network Rail is overturned on appeal, Network Rail shall only be liable to any Timetable Participant in damages in respect of that decision where it was made in bad faith or was unreasonable".
- 4.2 The only circumstances in which damages are therefore appropriate are where Network Rail's decision was made in bad faith or was unreasonable.
- 4.3 This is the final provision appearing in Part D 5.7 of the Network Code. Part D 5.7 is therefore drafted in such a way where the primary consideration of the Timetable Panel is to determine the specific timetable issues in accordance with the provisions in Part D 5.3.1.
- 4.4 Part D 5.7 should only be used in exceptional circumstances and, Network Rail understands that, as such, it is a remedy that is rarely, if ever, used, other than in TTP1520.

- 4.5 AWC did not in its original submissions allege bad faith and has since, rightfully, asserted that it does not allege bad faith.
- 4.6 In respect of unreasonableness, the Network Code does not appear to give any guidance about what constitutes 'unreasonableness'. This may well be deliberate as it is difficult to define, and therefore in some sense predict, circumstances which are contrary to reason.
- 4.7 What is clear is that given the purpose of the TTP explained above, and the manner in which Part D5.7.1 has been implemented, a high bar to a TTP Panel finding unreasonableness exists.
- 4.8 An analogy can be made with the standard of unreasonableness used in assessing an application for judicial review of a public authority's decision. In that context, a reasoning or decision is unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it.
- 4.9 In a civil context, courts are still very reluctant to find that a decision was unreasonable. This is particularly the case where the decision-maker is an expert, whose judgment the court would be unwilling to substitute with its own, save in the most exceptional case of blatant unreasonableness (see *R (Great North Eastern Railway Ltd) v Office of Rail Regulation* [2006] EWHC 1942, in which reference was made to the Office of Rail Regulation's expertise in a "highly technical field" which the court would be "very slow to impugn").
- 4.10 In these circumstances, the burden of finding unreasonableness is a very high one to overcome and a finding of unreasonableness should only be awarded after, following a consideration of the timetable issues in question, a Timetable Panel concludes that Network Rail's conduct is such that no reasonable person acting reasonably could have made it. AWC falls significantly short of meeting this standard.

5 AWC SUBMISSION THAT NETWORK RAIL HAS ACTED UNREASONABLY

- 5.1 In its original submission AWC neither claimed that Network Rail had acted unreasonably or in bad faith. As set out above, one of these factors is a necessary prerequisite in order for the Panel to order compensation.
- 5.2 As AWC neither alleged unreasonableness or bad faith in its submission, Network Rail submitted in its reply that the Panel's powers were limited to Part D 5.3.1.
- 5.3 AWC only made an allegation that Network Rail had acted unreasonably after it was prompted by the Hearing Chair following the directions provided by the Hearing Chair on 12 February 2020, which asked "whether it [AWC] asserts that damages (compensation) is payable for breach of its track access contract. If so, in connection with Network Code Part D5.7.1, whether it relies upon

bad faith and/or an unreasonable decision and it shall set out all facts and matters relied upon for such assertion(s)".

- 5.4 It is important to reiterate that, up until these directions were made, AWC made no allegation of unreasonableness, itself an indication that no such unreasonableness exists.
- 5.5 AWC now asserts that its position is that: "the TTP should first consider whether an order under D5.3.1(a) could be implemented in the available time and if so, it should make such an order. Only if there are legitimate reasons why such an order could not be implemented by NR should a compensation order be made instead".
- 5.6 However, this is not the test laid out in the Network Code. No consideration of a 'primary' remedy as requested by AWC, followed by a secondary remedy of compensation in the event of the failure of the first remedy, is required.
- 5.7 The only test laid out in the Network Code for compensation/damages is unreasonableness or bad faith by Network Rail where a decision of Network Rail is overturned on appeal.
- 5.8 AWC further asserts that "NR did not conduct itself in accordance with the Network Code Conditions D4.2.1 and 4.2.2, and in so doing its decisions were unreasonable (but were not made in bad faith)".
- 5.9 AWC therefore asserts that as Network Rail did not comply with the Network Code it acted unreasonably.
- 5.10 NR submits that the setting of such a low bar as a test for 'unreasonableness' is wrong.
- 5.11 If AWC's assertion that breach of the Network Code is tantamount to unreasonableness is correct then most decisions overturned by the Panel would result in compensation or damages, as the basis of any TTP order overturning a Network Rail decision is almost always as a result of a Panel finding that Network Rail has failed to comply with the Network Code.
- 5.12 However, that cannot be the intention of Part D5 of the Network Code, otherwise the justification of unreasonableness or bad faith in Part D5.7.1 would be superfluous on the basis that a mere finding of failure to comply with the Network Code would suffice to order compensation.
- 5.13 Were the Panel to start providing declarations of this sort the reality is that it would find itself in the position of re-writing the Rules, and perhaps even the Network Code, in a significant but piecemeal way. That is not the proper function of a rapid resolution appeals process which has as its central aim the resolving of practical detailed timetabling issues in a timely and efficient way.
- 5.14 It would also open a backdoor to compensation claims without full analysis of the merits, such as is the case here.

5.15 Accordingly, the Panel does not have the power to make awards of compensation on the standard of 'unreasonableness' as set out by AWC.

5.16 In respect of AWC's submissions, it appears that the basis for unreasonableness is set out at paragraph 3.7 of its supplemental Statement of Case. Responding to each of the submissions in turn, Network Rail replies as follows:

(a) – Network Rail has explained in its Sole Submission why it does not believe the Decision Criteria to apply on a strict basis: in essence, Paragraph D4.2.2 takes priority. That is not to say that elements of the Decision Criteria are not considered. Clearly, elements of the Decision Criteria will always have some bearing, even if not strictly applied. The comments from the Hearing Chair in Annex B to Timetabling Determination of reference TTP1064 acknowledges this very situation: "We also have a feeling that by the time you get to that level of development of the TPRs you are going to have enough management effort concentrated on it that people will really have the Decision Criteria in mind, as opposed to the hundreds of thousands of decisions made every year by people where, yes, they know what the Decision Criteria are, but they're doing it on gut instinct, and that gut instinct will often be right. And it's only the very, very, very odd case that ever gets in this room, and I think it's useful for a Panel sometimes to remember that." In these circumstances 'unreasonableness' (in the sense that no reasonable person acting reasonably could have made the decision) does not apply.

(b) - Given that it is not possible to both simultaneously apply Part D4.2.2 (a) – (c) and the Decision Criteria, AWC appear to suggest that priority should be given to the Decision Criteria. Network Rail disagrees but, in any event, no previous TTP decision on the point exists. The position adopted by Network Rail is therefore perfectly legitimate and rational. It is certainly not unreasonable in the sense that no reasonable person acting reasonably could have made it.

(c) - This point largely reiterates whether Part D4.2.2 (a) – (c) or the Decision Criteria should be given priority. Network Rail reiterates the submissions made in the previous paragraph.

(d) - It is not correct that Network Rail admits it did not consider Part D4.2.2. Network Rail specifically applied the criteria in Part D 4.2.2 (a) – (c).

(e) - Given that Network Rail's role in establishing the timetable involves considering competing interests from operators, Network Rail continuously has to balance competing financial interests and impacts on journeys. Unreasonableness does not exist purely because one operator suffers financial damage or has had its journey times impacted by a Network Rail decision. If AWC is correct, by definition, Network Rail would always be acting unreasonably where one party with competing interests with another loses out. This cannot be right.

(f) - Network Rail denies that it has failed to consult in accordance with Part D 2.6.2. Consultation is actually a more fluid and ongoing process than Part D suggests. That is a sensible and pragmatic approach: and a necessary one in light of the pressures of time. The process is not an overly formal one where each and every point is exhaustively documented by both sides in correspondence: the great majority of concerns and differences are resolved in this pragmatic way. In any event, Network Rail's conduct in relation to consultation has not been unreasonable in the sense that no reasonable person acting reasonably could have acted in the manner in which it did.

(g) -This limb appears to be a repetition of the prior issues raised by AWC. Network Rail reiterates that its conduct has not been unreasonable for the reasons set out above.

6 ORR DECISION IN TTP1520

6.1 The present circumstances differ to those in the ORR decision in the appeal of TTP1520, particularly as TTP1520 involved a very clear breach of contract in a manner that has few parallels with the current circumstances.

6.2 AWC asserts that "NR did not conduct itself in accordance with the Network Code Conditions D4.2.1 and 4.2.2, and in so doing its decisions were unreasonable (but were not in bad faith)".

6.3 However, the non-application of the Network Code cannot always be a breach of contract. For example, in assessing the Decision Criteria, Network Rail may apply Decision Criteria, or give weighting to the Considerations in a Decision Criteria, that a Panel may disagree with. In those circumstances Network Rail would not have breached the Network Code.

6.4 Here, similarly, Network Rail has applied Part D Paragraph 4.2.2, sub-sections (a) – (c). In those circumstances, Network Rail has complied with its contractual requirements. The only issue that exists is a conflict between the application of Part D Paragraph 4.1 and Part D Paragraph 4.2.2, sub-sections (a) – (c). Due to the impossibility of applying both provisions, Network Rail will always have to give priority to one of the two provisions.

6.5 In respect of the issue of unreasonableness, the ORR asserted in the appeal of TTP1520 that "In the ORR's view the findings of breach on the facts of this case indicate that Network Rail made its decision unreasonably". The ORR therefore applied a factual consideration of whether or not an issue of unreasonableness arose based on Network Rail's conduct.

6.6 This is clear when the ORR considered the factual position in the matter in question. It asserted that: "The TTP found that it [Network Rail] did not properly exercise its Flexing Right with no acceptable justification for the failure. Therefore, in the ORR's view, the TTP was entitled to direct payment of compensation".

- 6.7 This passage from the ORR suggests that, if the TTP had found that Network Rail had not properly exercised its Flexing Right (a breach of the Network Code) but that Network Rail had provided an acceptable justification for the failure, a finding of unreasonableness would not have been made and no compensation would be awarded.
- 6.8 The ORR therefore does not determine that a breach of contract/breach of the Network Code amounts to unreasonableness (and therefore compensation), as alleged by AWC.
- 6.9 This accords with the manner in which the Network Code is drafted. As set out in this submission above, unreasonableness only arises in exceptional circumstances, following a consideration of the factual issues that arise.

7 CONCLUSION ON BREACH OF THE TRACK ACCESS CONTRACT

- 7.1 Network Rail submits, as it sets out above, that a high bar exists for unreasonableness. On the facts in this matter unreasonableness does not arise.
- 7.2 As a result, the Panel should not award the remedy sought by AWC in paragraph 6.2(d) of its Sole Reference Document.
- 7.3 In respect of the remedies sought in paragraphs 6.2(a) – (b), it is not clear on what basis AWC seeks these remedies and, therefore, Network Rail submits these remedies should also be rejected.
- 7.4 In respect of the re-evaluation of the decision, as sought in paragraph 6.2(c), Network Rail submits it has properly applied the Network Code and that no re-evaluation of Network Rail's decision should be directed by the Panel.
- 7.5 In respect of the remedy sought in paragraph 6.2(e), Network Rail submits that it has properly complied with the Network Code but welcomes the Panel's guidance on the conflict between Part D4.1.1 and Part D 4.2.2 (a) – (c) of the Network Code.

8 SCHEDULES IN DISPUTE

- 8.1 Network Rail has further reviewed the schedules in the dispute as section 6 of the AWC supplemental statement. Following this review, Network Rail can advise that:

(a) Network Rail has been able to remove the extended Journey time in 4 additional services. These are no longer considered part of this dispute. These 4 schedules are added to the original 19 Journey time extensions that were removed from the dispute.

(b) Network Rail after review still advises that 25 schedules have been flexed to enable the timetable to be TPR compliant. Network Rail therefore does not consider these schedules to be part of the timetable dispute.

(c) Network Rail agrees that the journey time improvements are removed from this dispute.

(d) The remaining 31 Flexes have been made in order to accommodate other access proposals from other operators. These are the subject of this dispute.

8.2 The detail reasoning of the flex for each schedule is in the attached appendix A.

9 NETWORK RAIL'S FLEX

9.1 "Network Rail Flexing Right" is defined as: "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 Slot, in any way without limitation."

9.2 "Train Slot" is defined as "a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement".

9.3 Condition D4.2.2(d) goes on to set out an order of priority for different rights, giving priority to specified "Firm Rights" and rights which Network Rail has for "Network Services", with "Contingent Rights" and other rights being given lower priority. But this is only applicable if having sort to achieve D4.2.2 (a) to (c) Network Rail is unable to include all requested Train Slots.

9.4 In this case all Flex decisions to AWC's schedules are within AWC's Track Access Contract. Network Rail has not breached the Track Access Contract of AWC or any other participant.

9.5 Network Rail's Flex is independent to that of priority for inclusion of paths. If Network Rail could not accommodate all paths using its Flex then the access rights of those paths do become relevant and the priority for inclusion would first come down to rights as set out in Part 4.2.2 (d), and then the Decision Criteria as set out in D4.6.2 if the rights were the same.

10 NETWORK RAIL'S REQUIREMENT TO DEMONSTRATE APPLICATION OF THE DECISION CRITERIA

10.1 Network Rail was directed in TTP324 as follows:

"36.1 The Decision Criteria only come into any force in those circumstances explicitly contemplated by the Network Code, where there is the potential need for Network Rail to exercise its discretion in relation to possible conflicts of priorities, for example:

36.1.1 As between the firm rights of two or more train operators....

or

36.1.2 As between the firm rights of any Train Operator and those of Network rail.... "

In this dispute AWC cannot advise Network Rail of a different solution to the Timetable that accommodates all access proposals bid to Network Rail (D4.2.2 a-c) without the journey time extensions made by Flexing the AWC services. Network Rail has not had to use its discretion between Timetable solutions, so the Decision Criteria are not in play.

11 SIGNATURE

For and on behalf of Network Rail Infrastructure Limited



Matt Allen
Head of Timetable Production

The Appendices

Please see attached spreadsheet Appendix A - May 2020 updated response.

High Level data below:

Total Flexes	Original	Revised
MBR	1	1
Grand Central	4	4
No Longer Flexed	19	23
Reduction	28	28
ScotRail	4	1
Serco caledonian Sleeper	2	2
TPR	26	25
WMT	23	23
	107	107