



Dispute Party: Heathrow Express Operating Company Limited

Timetable Dispute: TTP2244 and TTP2245

**Claimant's Submission to Access Panel
Sole Reference Document**

26 July 2023

Note to the Chair: HEOC received an email from NR on 25 July 2023 (Appendix 1, item 1.11) regarding its review of passenger data. As at the date of this reference, HEOC has not received the information which is referred to therein and it has not had the opportunity to discuss further with NR.

1. DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows:-

- (a) Heathrow Express Operating Company Limited, whose Registered Office is at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW (the Claimant under this Sole Reference but referred to as "**HEOC**" herein); and
- (a) Network Rail Infrastructure Limited, whose Registered Office is at Network Rail, Waterloo General Office, London, United Kingdom, SE1 8SW ("**Network Rail**" or "**NR**") and MTR Corporation (Crossrail) Limited, whose Registered Office is at Providence House, Providence Place, Islington, London, N1 0NT ("**MTR**") (each a "**Defendant**" and together the "**Defendants**").

1.2 In respect of HEOC, please send all correspondence in relation to this matter to Jyoti Chander [REDACTED] with a copy to Paul Fowler [REDACTED]

1.3 Parties (other than as a Dispute Party) that may be concerned with this timetable dispute TTP2244 and TTP2245 (this "**Dispute**") are:

- (b) Heathrow Airport Limited, whose Registered Office is at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW ("**HAL**");
- (c) First Greater Western Limited, whose Registered Office is at Milford House, 1 Milford House, Swindon, SN1 1HL ("**GWR**");
- (d) Freightliner Limited, whose Registered Office is 6th Floor The Lewis Building, 35 Bull Street, Birmingham, United Kingdom, B4 6EQ;
- (e) Direct Rail Services Limited, whose Registered Office is Herdus House Ingwell Drive, Westlakes Science & Technology Park, Moor Row, Cumbria, CA24 3HU;
- (f) DB Cargo Services Limited, whose Registered Office is Lakeside Business Park, Carolina Way, Doncaster, South Yorkshire, DN4 5PN;
- (g) Locomotive Services Ltd, whose Registered Office is 6th Floor Capital Tower, 91 Waterloo Road, London, United Kingdom, SE1 8RT;
- (h) GB Railfreight Limited, whose Registered Office is 55 Old Broad Street, London, EC2M 1RX;
- (i) West Coast Railway Company Ltd, whose Registered Office is Off Jesson Way, Cragbank, Carnforth, Lancashire, LA5 9UR;
- (j) Colas Rail Limited, whose Registered Office is 25 Victoria Street, London, England, SW1H 0EX;
- (k) DC Rail Limited, whose Registered Office is 26 Leigh Road, Eastleigh, England, SO50 9DT; and/or
- (l) Rail Operations UK Limited, whose Registered Office is Wyvern House, Railway Terrace, Derby, England, DE1 2RU;

2. **THE CLAIMANT'S RIGHT TO BRING THIS REFERENCE**

- 2.1 The HS2 Supplemental Agreement, which was entered into between (1) Network Rail, (2) HAL and (3) HEOC dated 21 December 2017 (the "**HS2 Supplemental Agreement**"), amends the track access agreement which was entered into between Network Rail and HAL dated 16 August 1993 (as amended) (the "**Track Access Agreement**"). The HS2 Supplemental Agreement concerns the operation of the Heathrow Express service (the "**HEX Service**") and HS2 Works (as defined in the HS2 Supplemental Agreement) (*Appendix 4*).
- 2.2 Unless otherwise specified, defined terms in this Section 2 shall have the meaning ascribed to them under the HS2 Supplemental Agreement.
- 2.3 The HS2 Supplemental Agreement:
- (a) applies to the construction of the HS2 Works and the carrying out of related operations which are carried out on the Infrastructure and/or have or will have an impact upon the Infrastructure (Clause 1.9.1);
 - (b) for the purposes of any Restriction of Use, any change to the Engineering Access Statement or the Timetable Planning Rules, any Network Change or any Disruptive Event connected to the HS2 Works, incorporates certain provisions of the Network Rail Network Code (the "**Network Code**") including Part D (Timetable Change) during the Relevant Period (Clause 2.1);
 - (c) includes an undertaking by HEOC to NR to be bound by Part D of the Network Code as a Timetable Participant, and NR acknowledges and agrees that HEOC is a Timetable Participant (Clause 2.3);
 - (d) states that in the event of a dispute arising out of or in connection with the HS2 Supplemental Agreement, the Parties may serve a Notice of Dispute on the other Party (Clause 7.1.1); and
 - (e) states that if the dispute is not resolved within the time periods set out in Clauses 7.1.2 and 7.1.3, the dispute may be referred for resolution in accordance with the Access Dispute Resolution Rules ("**ADRR**") (Clause 7.2).
- 2.4 This reference relates to NR's decisions of 4 July 2023 (*Appendix 1, items 1.3 and 1.4*) in respect of the following main line possessions between Ladbroke Grove and Acton West to allow HS2 Works to be carried out (each a "**Decision**", together the "**Decisions**");
- 2.4.1 EAP Reference W23-529-EP, possession P2023/3460681 in relation to Week 29 (the "**Week 29 Possession**"); and
 - 2.4.2 EAP Reference W23-520-EP, possession P2023/3460598 in relation to Week 33 (the "**Week 33 Possession**"),
- (together, the "**Possessions**").
- 2.5 HEOC submits that:
- 2.5.1 NR's proposed works in relation to the Possessions fall within the scope of the HS2 Supplemental Agreement; and
 - 2.5.2 this Dispute relates to NR's compliance with the Network Code (either Condition D3.4 or D3.5 as discussed in Section 4.13 below) and as such, it is a Timetabling Dispute for which Condition D5 and the ADRR applies.

- 2.6 This matter is referred to a Timetabling Panel (the “**Panel**”) for determination in accordance with Conditions D3.4.16 or D3.5.3 (as the case may be) and D5 of the Network Code.

3. **CONTENTS OF REFERENCE**

- 3.1 This Sole Reference includes:

- (a) The subject matter of the dispute in Section 4;
- (b) A detailed explanation of the issues in dispute in Section 5;
- (c) In Section 6, the decisions sought from the Panel in respect of (i) legal entitlement, and (ii) remedies; and
- (d) Appendices and other supporting material.

4. **SUBJECT MATTER OF DISPUTE**

- 4.1 On 6 April 2023, HEOC raised dispute TTP2207 in respect of NR’s decision regarding the timetable offer for Week 11, as a result of which HEOC saw its service reduced from four trains per hour (“**4tph**”) to two trains per hour (“**2tph**”) on 11 June 2023. The determination of the Chair was issued on 24 May 2023 (“the **TTP2207 Determination**”) (*Appendix 3*).
- 4.2 Whilst the Chair did not grant HEOC the relief sought in respect of dispute TTP2207, the Chair acknowledged HEOC’s interest in reviewing NR’s approach to managing HS2 Works in respect of future possessions. As such, HEOC issued a letter to NR on 3 July 2023 (“**Letter 1**”) (*Appendix 2, item 2.1*) to request information relating to how NR was implementing the Chair’s recommendations from the TTP2207 Determination (in respect of further two-track timetables) and specifically requested NR:
- 4.2.1 to undertake a comprehensive study to gather data and evidence regarding actual demand on relief line services between Paddington and Heathrow Airport, including intermediate stations; and
 - 4.2.2 to provide a detailed plan outlining the methodology, criteria, and timeline for conducting a performance assessment of the Sunday 2TT concept train plan, and for NR to provide copies of such information to HEOC.
- 4.3 NR provided a response to Letter 1 on 7 July 2023 (“**Letter 2**”) (*Appendix 2, item 2.2*) and noted that it “*require[s] the following steps to be completed before [it] can fully undertake a review of the two-track allocation going forward:*”
- 4.3.1 *Operators to provide actual passenger data for weeks 11, 12, 13 and 14;*
 - 4.3.2 *NR to undertake a review of the actual data supplied by operators (2 weeks after all data received);*
 - 4.3.3 *NR to share observations from Paddington for Sunday 11 June;*
 - 4.3.4 *NR to share the output of the Performance Deep Dive for Sunday 11 June;*
 - 4.3.5 *NR to share performance modelling; and*
 - 4.3.6 *NR to provide an updated Capacity Study for future two track timetable following a review of the above.”*
- 4.4 Despite NR noting that further information and performance assessments were required (and not yet completed) in respect of two-track allocations, NR nevertheless issued:

- 4.4.1 the Decisions (to which this reference relates) concerning the Possessions; for Sunday 15 October (Week 29) and Sunday 12 November (Week 33); and
- 4.4.2 the capacity studies for the Possessions via email dated 5 July 2023 (the "**Capacity Studies**") (*Appendix 1, items 1.5 – 1.7*) which each require a reduction of the HEx Service on the aforementioned days from 4tph to 2tph. When issuing the Capacity Studies, NR stated that the Capacity Studies were "based on week 11 so have been issued straight out *without the need for further assurance work*" (emphasis added) (*Appendix 1, item 1.5*).
- 4.5 NR previously requested the Possessions via two separate emails on 19 June 2023 (the "**Requests**") (*Appendix 1, items 1.1 and 1.2*) and following an internal review, HEOC notified NR on 3 July 2023 that it accepted both Possessions. HEOC's response to the Requests was provided on the basis of the information provided by NR to that date. It is important to note that such information did not specify that HEOC would be required to reduce the number of trains per hour to accommodate the Possession, nor was this specified in the Decisions.
- 4.6 HEOC was only notified of the requirement to reduce the number of trains per hour due to the Possessions on 5 July 2023 when the Capacity Studies were issued (*Appendix 1, items 1.5 – 1.7*). Upon receipt of such information, HEOC promptly responded to NR with its objections (after conducting an internal review) and formally issued its Notice of Dispute with respect to the Possessions on 10 July 2023 (*Appendix 2, item 2.3*).
- 4.7 In the TTP2207 Determination, the Chair acknowledged that one of the reasons for not granting HEOC the relief sought – the reversal of NR's timetable decision – was that among other factors, the timetable in question had already been uploaded and tickets were on sale (*Appendix 3, para 253*). With this in mind, HEOC sought to issue its Notice of Dispute as soon as reasonably practicable and prior to GWR making tickets available online for Sunday 15 October 2023 and Sunday 12 November 2023 to ensure that such practical implication did not hinder its position. It appears that GWR has now published its tickets for Week 29 online (HEOC has not been able to ascertain exactly which date the tickets were made available, but HEOC assumes that it was after 10 July 2023) and as such, NR has placed HEOC in a challenging position by notifying HEOC of the required reduction in service later than the required date.
- 4.8 Whilst NR acknowledged the information required to undertake a review of two-track allocation (as specified in Section 4.3 above), as at the date of this reference:
 - 4.8.1 NR notified HEOC on 25 July 2023 that it has analysed the passenger data provided by all operators (as specified in Sections 4.3.1 and 4.3.2 above) (*Appendix 1, item 1.11*). However, NR has not provided any evidence or further information to support its position or consulted with HEOC with respect to its finding. Despite NR eventually obtaining data from the operators, HEOC submits that NR failed to discharge its duty to ensure that it was properly informed in respect of timetabling decisions in relation to Weeks 29 and 33 as it did not obtain the required information before deciding upon the capacity allocation;
 - 4.8.2 NR has provided observations from Paddington of what occurred on 11 June 2023 and shared an analysis of the performance on 11 June 2023 (as specified in Sections 4.3.3 and 4.3.4) via an email dated 18 July 2023 ("**18 July Email**", (*Appendix 1, items 1.8 – 1.10*)). However, HEOC is not satisfied that:
 - (a) the observations are sufficient to demonstrate the deleterious impact of the 2tph service on HEx passengers at Heathrow, Paddington and the platforms. NR has not provided any data or photographic evidence to support its findings, instead it has presented limited

observations recorded by a single NR employee. NR has also failed to provide any observations from the platforms at Heathrow on 11 June 2023, which would have provided a more holistic view of the impact on the passengers' journeys; or

- (b) the analysis provided by NR is in any way sufficient to constitute a 'Performance Deep Dive'. HEOC noted that various incidents took place on 11 June 2023, as reported by NR and HEOC therefore expected NR to analyse the base timetable and how each incident had an impact on the performance. NR also failed to assess network management and use of the available infrastructure on the day in question.

- 4.8.3 NR has failed to share the performance modelling (as specified in Section 4.3.5). The 18 July Email noted, NR "*have received initial performance modelling outputs and are now working with the modelling team in order to understand the impact of late running on the model and the overall service resilience*" (Appendix 1, item 1.8). HEOC submits that it is unacceptable for NR to have issued the Capacity Studies without conducting the necessary performance modelling to assess the concept train plan and reach an informed view on capacity in the context of future possessions, as requested by the Chair in the TTP2207 Determination (Appendix 3, para 238). This is particularly important because NR has again relied on the concept train plan which is based on a geographic possession limit (of Ladbroke Grove to Southall East) which is larger than the area that is relevant to the Possessions (Ladbroke Grove to Acton) and as such, has failed to recognise that there is capacity on the Network to run more than 14.5 trains per hour;
- 4.8.4 NR has not provided updated capacity studies for possessions which require a two-track timetable (as specified in Section 4.3.6) and as such, NR has relied on the same data and Decision Criteria that was used to inform the Week 11 possession. As noted by the Chair in the TTP2207 Determination (Appendix 3, para 235), there were "*weaknesses in the data*" and NR has failed to rectify this; and
- 4.8.5 NR has not demonstrated why the capacity allocation is limited to only 14.5 trains per hour or clarified how the 0.5 train per hour is allocated and managed throughout the day, as raised in HEOC's Notice of Dispute (Appendix 2, item 2.3).

Contractual Provisions

- 4.9 HEOC has the contractual right to operate the HEx Service four times every hour in each direction pursuant to Paragraph 2.1 of Schedule 2 of the Track Access Agreement.
- 4.10 Clause 2.4 of the HS2 Supplemental Agreement states that the agreement or determination of any Restriction of Use or any changes to the Engineering Access Statement or the Timetable Planning Rules, or any Network Change or the occurrence and consequences of any Disruptive Event, in accordance with Clause 2 of the HS2 Supplemental Agreement shall be binding notwithstanding any provision of the Track Access Agreement.
- 4.11 NR is nevertheless bound by the procedures set out in Part D of the Network Code and as highlighted in HEOC's submission for dispute TTP2207, Clause 2.4 of the HS2 Supplemental Agreement does not give NR the right to disregard HEOC's contractual rights. Rather, this provision facilitates the mutual coexistence of the HEx Service alongside HS2 Works and ultimately, a fair balance of HEOC's and NR's commercial interests.

- 4.12 HEOC does not consider that an agreement has been reached pursuant to Clause 2.4 of the HS2 Supplemental Agreement, nor that NR has acted in accordance with its obligations under Clause 2 of the HS2 Supplemental Agreement and the relevant provisions of the Network Code (specified in Sections 4.13 and 4.14 below).

Relevant Network Code Provisions

- 4.13 NR purports in the emails setting out the Decisions (both dated 4 July 2023) (*Appendix 1, items 1.3 and 1.4*), that the Decisions are issued in accordance with Condition D3.5. However, HEOC submits that this is not the correct Network Code provision on the basis that NR provided at least 12 weeks' notice of proposed variations in advance of the relevant Timetable Weeks. As such, HEOC submits that the applicable process is set out in Condition D3.4.
- 4.14 HEOC submits that NR has not fully complied with the process specified in Part D of the Network Code, namely Conditions D3.4, 4.4.1 and 4.6 (*Appendix 5*) for the following reasons:

4.14.1 Partial compliance with Condition D3.4:

- (a) HEOC submits that NR has only complied with certain aspects of the process specified in Condition D3.4 in relation to the Possessions and as such, has not adhered to the timelines specified therein. In particular:
 - (i) NR has failed to comply with Condition D3.4.7 because although it provided each Timetable Participant with its proposals for Restriction of Use in respect of Weeks 29 and 33 by TW-30, the proposals did not refer to the requirement for HEOC to reduce the HEx Service from 4tph to 2tph on Weeks 29 and 33. Further to this, NR did not amend or supplement the proposals prior to TW-26 to specify the required reduction in service; and
 - (ii) NR has failed to comply with Condition D3.4.8 because although it consulted with HEOC in respect of the proposed Restriction of Use in line with Condition D3.4.8, during such engagement (via email and verbally), NR did not inform HEOC that the Restriction of Use for Weeks 29 and 33 would require a reduction in the HEx Service from 4tph to 2tph. HEOC's first opportunity to verbally engage with NR on this point is 2 August 2023 which falls after the date that this reference is due for submission; and
 - (iii) NR issued the Decisions in accordance with Condition D3.4.14 but such decisions also did not refer to the reduction in the HEx Service and as such, full details of the extent and nature of the Restriction of Use for Weeks 29 and 33 were not provided to the Timetable Participants.

4.14.2 Application of the Decision Criteria (Condition D4.1.1 and D4.6):

- (a) NR acknowledged in its email dated 6 July 2023 (*Appendix 1, item 1.5*), that "*the existing decision criteria still apply*". HEOC is not clear how the existing criteria can apply to the Possessions because as noted by the Chair in the TTP2207 Determination "*the decision maker must be properly informed when exercising the Decision Criteria*" (*Appendix 3, para 226*) and as noted in Section 4.8 above, NR did not obtain the required information to ensure that it was sufficiently informed.

- (b) HEOC submits that NR has failed to satisfy the Objective under Part D *"to share capacity on the Network [...] in the most efficient and economical manner [...]"* and successfully apply the Considerations under Condition D4.6.2 as required because a reduction of the HEx Service from 4tph to 2tph on Weeks 29 and 33 does not:
 - (i) maintain and improve train service performance, which is particularly critical for HEOC passengers who are reliant on the HEx Service for onward travel;
 - (ii) fairly balance or adequately consider HEOC's commercial interests against those of NR and / or other train operators. The Possessions have a detrimental impact on the reputation of the HEx Service and significant practical implications for passengers; or
 - (iii) allow HEOC to utilise its assets efficiently, in particular because HEOC incurs the same operating costs whether it is running 4tph or 2tph.

5. **EXPLANATION OF EACH ISSUE IN DISPUTE AND THE CLAIMANT'S ARGUMENTS TO SUPPORT ITS CASE**

5.1 The issues in dispute have been set out in detail in Section 4 above and are summarised as follows:

5.1.1 NR has sought to carry out HS2 Works and impose the Possessions without adequately adhering to the required processes as specified under the Network Code, namely Conditions D3.4, 4.4.1 and 4.6, and Clause 2.4 of the HS2 Supplemental Agreement; and

5.1.2 NR has failed to:

- (a) provide HEOC with the requested information, as specified in Letter 1 (*Appendix 2, item 2.1*) and its Notice of Dispute (*Appendix 2, item 2.3*);
- (b) undertake a review of two-track allocation(s) and complete the actions specified in Section 4.3 (Letter 2). As such, NR has relied upon the Decision Criteria and data that was used to inform the Week 11 timetable offer which is wholly unsatisfactory; and
- (c) carry out a sufficient assessment of the capacity allocation across the Network to ensure that (i) train operators are able to utilise their assets efficiently, and (ii) passengers experience minimal disruption during the Possessions.

5.2 This Dispute has been brought by HEOC in order to comply with the applicable procedural obligations in the Network Code and ensure that the appropriate corrections can be made formally by the Panel.

6. **DECISION SOUGHT FROM THE CHAIR**

6.1 HEOC requests that for the reasons described above and in Section 6.2 below, the Chair should determine that NR has not acted in accordance with Part D of the Network Code, nor in accordance with the HS2 Supplemental Agreement, and therefore:

6.1.1 HEOC is permitted to operate 4tph on Sunday 15 October 2023 and Sunday 12 November 2023, in accordance with its contractual right to do so; and

- 6.1.2 NR should complete the actions specified in Section 4.3 to ensure that it is properly informed when proposing any future Restriction of Use for HS2 Works.
- 6.2 The key differences between this Dispute and dispute TTP2207 that the Chair should take into account when making his determination:
 - 6.2.1 NR has not satisfied its duty to be properly informed when making timetabling decisions due to a failure to:
 - (a) consider the passenger data from train operators prior to issuing the Capacity Studies (despite having multiple weeks to do so since dispute TTP2207); and
 - (b) conduct the necessary performance assessments / modelling;
 - 6.2.2 NR has failed to provide HEOC (and other Timetable Participants) with the relevant information regarding the nature of the Restriction of Use (i.e. the requirement to reduce the HEx Service to 2tph on both Weeks 29 and 33) in line with the process under Condition D3.4, and issued Capacity Studies which do not reflect the details of the consultations that took place prior to 5 July 2023;
 - 6.2.3 NR has sought to rely on a historic and unsatisfactory application of the Decision Criteria in relation to both Possessions; and
 - 6.2.4 NR is seeking to reduce the operation of the HEx Service on two further occasions (after 11 June 2023) and is therefore continuing to damage the reputation of the HEx Service and compromise HEOC's commercial interests.

7. **APPENDICES**

- 7.1 HEOC confirms that it has complied with Access Dispute Resolution Rule H21.

SIGNATURE

For and on behalf of Heathrow Express Operating Company Limited

Signed

Jyoti Chander

Print Name

Planning & Performance Manager

Position

Date: 26 July 2023

APPENDICES

1. **Appendix 1 - Emails:**
 - 1.1 Emails dated 19 June 2023 – 3 July 2023 between NR and HEOC (Request - Week 29 – W23-529-EP - EA1310 Camden Road West Junction to Richmond)
 - 1.2 Emails dated 19 June 2023 – 3 July 2023 between NR and HEOC (Request - Week 30 - W23-530-EP - EA1310 Camden Road West Junction to Richmond)
 - 1.3 Email dated 4 July 2023 from NR to train operators (including HEOC) (Decision- Week 29 – W23-529-EP - EA1310 Camden Road West Junction to Richmond)
 - 1.4 Email dated 4 July 2023 from NR to train operators (including HEOC) (Decision- Week 33 – W23-529-EP - EA1310 Camden Road West Junction to Richmond)
 - 1.5 Emails dated 5 July 2023 – 10 July 2023 between NR and HEOC (Weeks 29 and 33 Main Line HS2 possessions between Ladbroke Grove and Acton West Capacity study)
 - 1.6 First attachment to email from NR dated 5 July 2023 (09:49) – Week 29 Ladbroke Grove Acton West ML block.
 - 1.7 Second attachment to email from NR dated 5 July 2023 (09:49) – Week 33 Ladbroke Grove Acton West ML block.
 - 1.8 Email dated 18 July 2023 from NR to HEOC (and others) (OOC 2 Track Timetable - Industry Update) (**18 July Email**)
 - 1.9 First attachment to 18 July Email – HS2 OOC Week 11 Performance Review
 - 1.10 Second attachment to 18 July Email – Thames Valley Two Track Timetable 11th June 2023 (002).pdf
 - 1.11 Emails dated 18 July 2023 - 25 July 2023 from NR to HEOC (OOC 2 Track Timetable - Industry Update - Passenger Flows)
2. **Appendix 2 – Letters**
 - 2.1 Letter 1: Letter dated 3 July 2023 from HEOC to NR (Determination of the Timetabling Panel TTP2207 re Wk11)
 - 2.2 Letter 2: Letter dated 7 July 2023 from NR to HEOC (Determination of the Timetabling Panel TTP2207 re Wk11)
 - 2.3 HEOC's Notice of Dispute dated 10 July 2023
3. **Appendix 3 – TTP2207 Determination**
4. **Appendix 4 – Extracts from the HS2 Supplemental Agreement**
 - 4.1 Clauses 1.9.1, 2.1, 2.3, 2.4, 7.1 and 7.2
5. **Appendix 5 – Extracts from the Network Code (Part D):**
 - 5.1 Conditions D3.4, D3.5, D4.4.1, D4.6 and D5