

**TTP2318 and TTP2320 (Second Hearing)**  
**Network Rail Sole Reference Document**

**1. DETAILS OF PARTIES**

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

- (a) GB Railfreight Limited (“GBRf”) whose Registered Office is at 3rd Floor, 55 Old Broad Street, London, EC2M 1RX (“the First Claimant”);
- (b) Freightliner Limited (“FL”) whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ (“the Second Claimant”);
- (c) Freightliner Heavy Haul Limited (“FLHH”) whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ (“additional dispute party/parties”);
- (d) First Greater Western Limited (“FGW”) whose Registered Office is at Milford House, 1 Milford Street, Swindon, Wiltshire, SN1 1HL (“additional dispute party/parties”);
- (e) XC Trains Limited (“XC”) whose Registered Office is at 1 Admiral Way, Doxford International Business Park, Sunderland, SR3 3XP (“additional dispute party/parties”); and
- (f) Network Rail Infrastructure Limited (“NR”) whose Registered Office is at Waterloo General Office, London, SE1 8SW (“the Defendant”).

1.2 Involved parties to this dispute include DB Cargo (UK), Northern Trains, Transpennine Trains, Arriva Rail London, Govia Thameslink Railways and First MTR South Western Trains.

**2. CONTENTS OF REFERENCE**

2.1 The Sole Reference includes:

- (a) Observations on the procedure, powers and jurisdiction of the TTP under the ADRR
- (b) Responses to paragraphs 11 to 17 of the 7th Directions
- (c) Further comments
- (d) The decisions of principle sought from the Chair in respect of:
  - (i) legal entitlement; and
  - (ii) remedies
- (e) Appendices

**3. OBSERVATIONS ON THE PROCEDURE, POWERS AND JURISDICTION OF THE TTP UNDER THE ADRR**

3.1 For clarity, NR does not wish to sustain any objections to the procedure being adopted in this ongoing Timetable Panel (TTP) matter, though would make the following observations in response to the invitation by the Chair to do so (paragraph 13, 8th Directions).

- 3.2 NR agrees that the purpose of a timetabling panel is drawn widely in rule H1, and is *"to determine disputes referred to it by parties to an access agreement which incorporates Part D ... which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity in [the access agreement]"*. These TTPs are such disputes, each of TTP2318 and TTP2320 concerning issues of timetabling and the allocation of capacity in Week 40.
- 3.3 The Chair has wide powers to determine the procedure, and (see H20), the Chair may *"give directions as to any or all aspects of the procedures to be followed"*, and *"make or amend the procedure to be followed by the parties"*. The Chair's directions must follow the Principles in Chapter A, which require the Chair to reach a determination on the basis of the legal entitlements of the parties, in accordance with the law, including as regards the Chair's determinations and decisions on procedure. Although generally the timetable and procedure is for *"an oral hearing lasting no more than one day"* (H21(d)), the Chair can direct otherwise, so the Chair can direct a second day of hearing.
- 3.4 The overriding objective for administration of TTPs (H16) requires that it should be *"proportionate to"*, a number of matters including *"the objective importance of the dispute to the Dispute Parties"*, *"the complexity of the issues"* and *"the significance (if any) of the issues involved to the railway industry"*. Thus the Chair should not turn small disputes into large disputes, but the Chair can (provided their decision on that is not unreasonable) administer the TTPs in such a way as to recognise the complexity of the issues, and their significance to the industry.
- 3.5 H9 requires the Chair to have regard that any determination which may affect the production of the operational timetable must be *"made within the necessary timetables to allow that timetable to be published"*. An urgent decision was required here, justifying a swift Determination. The Interim Determination granted remedies to the Claimants giving a D5.3.1(a) direction to NR to *"...find suitable paths for the disputed services, without specifying the means by which it is to be achieved"*. After some considerable time and intervention (see paragraph 5.5), some – but not all – Train Slots central to these disputes were found. The Chair noted in paragraph 6 of the Interim Determination, that the parties needed a written Determination of the *"Week 40 issues"*. TTP2318 and TTP2320 only concerned Week 40. So the question arises as to whether, once the Chair has decided the *"Week 40 issues"*, was there anything left to decide? The remedy available under D5.3.1(a) had been granted.
- 3.6 In the 4th Directions, the Chair identified five specific issues to be determined at the Second Hearing. Four of these issues have now fallen away (being the subject of consultation within the industry), but the fifth remains. That concerned flexing, and that subject is further addressed in the seven questions set out in the 7th Directions.
- 3.7 H51(j) states that the Chair's determination should comprise, as regards their decision, the *"decisions and conclusions reached, distinguishing clearly between (i) decisions upon legal entitlement; (ii) decisions upon remedy; and (iii) guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy"*. The decisions on remedy were given in the Interim Determination, and no other remedies have been sought. That leaves the *"decisions on legal entitlement"* under point (ii). NR agrees that the Chair can issue a further Determination which determines only the Chair's decisions on legal entitlement arising under Week 40 (being the subject of the appeal), insofar as the questions now put do that.
- 3.8 Point (iii) above has become known as *"Observations and Guidance"* and is used to give comment on matters of interest to the industry. There is a distinction to be made between *"Observations and Guidance"*, which will not be binding under H51(j)(iii), and the Chair's decisions upon legal entitlement and remedy which will. The Chair has power to make such observations and give guidance to the Dispute Parties, as the ADRR provide for that. These Observations and Guidance do not determine the legal entitlement of the parties. They are similar to a judge's remarks in a Court Judgment which are known as *"obiter dictum"*. Under English law *"obiter dictum"* are comments/observations made by a judge which don't require a decision, and do not create binding precedent.

So they may be useful, but no more than that. They are not binding because they do not determine the legal entitlements or remedies of the parties: they are Observations and Guidance only.

- 3.9 Furthermore, NR notes that the Office of Rail and Road (ORR) has considered the jurisdiction of TTPs<sup>1</sup> in March 2019. ORR decisions are binding on the Chair under A7(b). In paragraph 96, the ORR stated: "*...despite having jurisdiction to come to conclusions on matters of contract, points of principle and the production of the New Working Timetable, we conclude that the TTP's jurisdiction is limited to determining the appeal against the New Working Timetable. The Network Code does not empower the TTP to make binding pronouncements on the interpretation or operation of the Network Code, or on the compliance of [NR] with its contractual obligations, to the extent not necessary for it to determine the appeal before it against the New Working Timetable.*" Though TTP2318 and TTP2320 relate to amendments to the Working Timetable, these comments about jurisdiction still apply.
- 3.10 The Chair must therefore stay within these requirements. The Chair's Final Determination can only determine the remaining issues of the legal entitlements between the parties as regards the issues arising from Week 40, being the appeal before the TTP. The Chair may give Observations and Guidance to the dispute parties to the extent that the Chair has anything to say beyond that, setting that out separately. If the Chair goes beyond that, the Chair risks trespassing on matters best dealt with in consultation between the ORR and the industry. NR notes that the Chair is aware of this risk, and that the Chair removed four of the original five questions on the basis that they were being consulted on within the industry.
- 3.11 The Chair has stated, and NR agrees, that the questions in paragraph 17 of the 7th Directions can only be the subject of Observations and Guidance.
- 3.12 NR has considered the remaining questions, and comments as follows for the assistance of the Chair:
- (a) The questions at paragraphs 11, 12, 15 and 16 concern legal entitlements, and should be dealt with only as regards determining the dispute parties' legal entitlements arising out of the appeal of Week 40.
  - (b) The question at paragraph 13 is a request for evidence as to whether (or not) NR has such a policy. It does not concern the legal entitlements of the parties, or Observations and Guidance.
  - (c) The questions at paragraph 14 are requests for evidence of records of past NR decisions. They do not concern the legal entitlements of the parties, or Observations and Guidance.
- 3.13 The Chair's Final Determination as regards the seven questions in the 7th Directions should reflect this, or (if not) give reasons why the Chair does not agree.

#### **4. RESPONSES TO PARAGRAPHS 11 TO 17 OF THE 7th DIRECTIONS**

- 4.1 The First Hearing in these disputes determined the short-term issues relevant to the cases (i.e. Train Slots disputed by the First and Second Claimant in Week 40 of the timetable). The subject matter in dispute for the Second Hearing is to determine the legal entitlements of parties during the development of the Timetable Week when amending the Working Timetable to accommodate Network Rail Variations with at least 12 Weeks Notice.
- 4.2 This dispute arises over the interpretation of the following clauses in the Network Code:

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<sup>1</sup> ORR Determination dated 13 March 2019 on the appeals of TTP1331 and TTP1376 (Appendix A)

- D1.1.11 definition of “Flexing Right”
- D3.4.11 the interpretation of NR’s authority to modify, accept or reject revised Access Proposals
- D4.4.1 how NR makes decisions in the course of implementing D3.4 (or D.3.5)

4.3 The First Hearing did not address whether NR was in breach of contract on exercising its Flexing Right and the First or Second Claimant have at no point stated what NR’s Flexing Right is or evidenced that it was not exercised. Because the TTP did not get to these points at the First Hearing, it gave rise to an Interim Determination concentrated on NR’s use of the Decision Criteria without sufficiently demonstrating if the Decision Criteria was in play (or not).

#### **Q.11**

*Is NR correct in saying that if a freight service diverted in connection with a NR Variation under D3.4 cannot be accommodated on the diversionary route NR is under no duty to apply any Flexing Rights to other operators’ services to accommodate the diverted freight services, nor is it required to apply the Decision Criteria in respect of such services?*

4.11.1 It is the NR position that if a freight service diverted in connection with a Network Rail Variation under Condition D3.4 cannot be accommodated on the diversionary route then NR is under no duty to apply any Flexing Rights to other operators’ services to accommodate the diverted freight service, nor is NR required to apply the Decision Criteria in respect of such services.

4.11.2 Paragraphs 4.11.3 to 4.11.12 set out NR’s view of the process when planning the timetable in respect of Network Rail Variations with at least 12 Weeks Notice, and the Flexing Rights that NR is afforded when processing such changes. It is NR’s view that Q.11 is best answered by explaining the process step by step. The response to Q.16 (paragraphs 4.16.1 to 4.16.7) explains further our entitlement to flex.

4.11.3 Condition D3.4 sets out the steps that should be followed when planning the timetable in respect of Network Rail Variations with at least 12 Weeks’ Notice (i.e. the Informed Traveller planning process). Condition D4.4 sets out the steps that should be followed when making timetable decisions concerning Network Rail Variations. These steps apply equally to both freight and passenger operators as Timetable Participants.

#### **4.11.4 Step 1 (Condition D3.4.7)**

Further to the final versions of the Engineering Access Statement (EAS), NR publishes the Draft Period Possession Plan (DPPP) by TW-30. This provides to operators the details of disruptive and non-disruptive possessions and highlights the expected effect on operators. The Access Impact Matrix can be used to determine whether access requires a capacity or timetable study. It is worth noting that the process here infers that any outstanding issues with the EAS have been resolved. Where operators do not have the detail of the initial impact of the EAS disruptive possession on their business, the opportunity to dispute exists through Condition D2.2.8. It is widely known that behaviours across the industry are not to hear access disputes related to the EAS in a timely manner, meaning that outstanding issues with engineering access can roll into the amended timetabling process.

#### **4.11.5 Step 2 (Condition D3.4.8)**

After the DPPP has been issued, a four-week period follows where NR consults the disruptive and non-disruptive possession plan with affected operators and seeks to agree the Network Rail Variations to the access plan. This should include consultation with both directly and indirectly affected operators. During the period of consultation, NR and operators should finalise:

- (a) The removal of possession opportunities on diversionary routes
- (b) Any relevant Traffic Remarks

(c) Those parties directly and indirectly impacted

(d) The information in connection with the amended timetable specification\*

*\*The resulting "Structure of Amended Train Plan" will include confirmation of whether NR requires an operator to make a revised Access Proposal (rAP). These comments should include the principle of the amended timetable, any agreed thinning of services by operators, any agreed allocation of capacity by operators and any additional running time to be added for signal disconnections, single line working and/or safety speeds. This information could be the conclusion or recommendation of the outcomes of a capacity study or trains meeting for all affected operators, which may cite capacity constraints where they exist.*

**4.11.6 Step 3 (Conditions D3.4.8 and D3.4.9)**

NR publishes the information in the above bullet points (a) to (d) via the Confirmed Period Possession Plan (CPPP) by TW-26. Following the CPPP, NR may require that any operator submit a revised Access Proposal (rAP) to facilitate the planning of the CPPP.

**4.11.7 Step 4 (Condition D3.4.10)**

By TW-22, NR provides operators with notification of the requirement to bid a rAP and the aspects of the Access Proposal that need to be revised. It has been industry practice now for many years that this is done via the Structure of Amended Train Plan comments section in the CPPP and that this is sufficient information for operators to understand if their trains are affected by the possession and if they are required to submit a rAP.

**4.11.8 Step 5 (Condition D3.4.10(c))**

By TW-18, operators bid a rAP to NR for processing.

**4.11.9 Step 6 (Condition D3.4.11 and D3.4.12)**

During the development of the amended timetable, NR liaises with affected operators to discuss their rAP submissions, any changes that are required to co-ordinate other operators' rAPs, and any services that cannot be accommodated (i.e. NR modifies, accepts or rejects submissions). When NR has decided to modify or reject a Train Slot, the reasons for this will be provided in writing to the relevant operator.

Decisions are made as follows:

- (a) Decisions are made in the same way for all service types – there is no differentiation between freight and passenger services.
- (b) NR is entitled to exercise its Flexing Right when responding to a rAP to enable a fit-for-purpose amended timetable plan to be developed and offered.
- (c) NR's entitlement to its Flexing Right is only applicable to schedules bid via a rAP, meaning that NR does not have a Flexing Right it can exercise over those operators who have not been engaged in the above process and who have not been requested to submit a rAP.
- (d) To enable NR to flex WTT services on a diversionary route, the indirectly affected operator on the diversionary route will need to have been consulted with between publication of the DPPP and CPPP and advised of the requirement for them to make a rAP. If the operator has not been consulted through the process, NR is not entitled to flex their WTT service. NR can only make a change to the indirectly affected operator by consent.

- (e) The Decision Criteria can only be used to decide between the inclusion of, or use of flex for, train services included in rAPs (or if an operator fails to bid when asked to do so by NR, in which case NR is then entitled to make a change).
- (f) As NR does not have an entitlement to flex a WTT train slot of an indirectly affected operator that has not been asked to bid a rAP, there is no decision to be made to amend their WTT service, hence the Decision Criteria cannot be applied.

#### 4.11.10 **Step 7 (Condition D3.4.13)**

No later than TW-14, NR shall notify affected operators of its decision and make a timetable offer for the Timetable Week in question.

#### 4.11.11 **Step 8 (Condition D3.4.14)**

No later than TW-13, operators respond to NR with an offer response outlining their support or challenge to NR's timetable offer. NR reviews any counter proposals and challenges from operators and, where possible, makes further amendments to the amended timetable.

#### 4.11.12 **Step 9 (Condition D3.4.15)**

At TW-12, NR publishes its amended timetable for the relevant Timetable Week.

#### **Q.12**

If NR is correct in this opinion, then does this interpretation of Part D only apply to freight services, or does it apply to any diverted train?

- 4.12.1 NR's application of Part D, as described in response to Q.11 (paragraph 4.11.9(a)), is applicable to all service types – no differentiation is made between freight and passenger services.

#### **Q.13**

If, however, NR is not correct in its interpretation of Part D on this point, is this in fact an NR policy?

- 4.13.1 It is not an NR policy to treat freight and passenger services differently when planning/amending the timetable. The approach taken by NR in applying its Flexing Right when responding to Network Rail Variations is explained in response to Q.11.

#### **Q.14**

To assist in answering these questions, does NR or any operator have any record of NR flexing WTT services to accommodate past diversions, whether of passenger or freight services?

- 4.14.1 NR Capacity Planning teams are committed to bringing about as many positive planning outcomes as possible for operators. NR Capacity Planning teams routinely flex WTT services to accommodate diversions, both freight and passenger. Paragraphs 4.14.2 to 4.14.6 provide five examples of such flexes.

#### 4.14.2 **Example 1**

##### **Freight diversion leading to flex of passenger WTT service (Appendix B)**

Date:	July 2023
Diverted operator:	Freightliner Heavy Haul (FLHH)
WTT operator:	Govia Thameslink Railway (GTR)
Nature of NR request:	Flex sought of passenger operator to move their WTT for a freight diversion

#### 4.14.3 **Example 2**

##### **Freight diversion leading to flex of passenger WTT service (Appendix C)**

Date: August 2023  
Diverted operator: DB Cargo (DBC)  
WTT operator: West Midlands Trains (WMT)  
Nature of NR request: Flex sought of passenger operator to move their WTT for a freight diversion

#### 4.14.4 **Example 3**

##### **Freight diversion leading to flex of freight WTT service (Appendix D)**

Date: November 2023  
Diverted operator: Freightliner Intermodal (FLIM)  
WTT operator: Freightliner Heavy Haul (FLHH)  
Nature of NR request: Flex sought of freight operator to move their WTT for a freight diversion

#### 4.14.5 **Example 4**

##### **Freight diversion leading to flex of passenger WTT service (Appendix E)**

Date: April 2022  
Diverted operator: GB Railfreight (GBRf)  
WTT operator: Northern Railway (Northern)  
Nature of NR request: Flex sought of passenger operator to move their WTT for a freight diversion

#### 4.14.6 **Example 5**

##### **Passenger diversion leading to flex of freight WTT service (Appendix F)**

Date: October 2023  
Diverted operator: First Greater Western (FGW)  
WTT operator: GB Railfreight (GBRf)  
Nature of NR request: Flex sought of freight operator to move their WTT for a passenger diversion

#### **Q.15**

Is an amendment to a schedule required as a direct or indirect result of a Restriction of Use a Part D3.3 Train Operator Variation, as NR suggested during the first hearing, or a Network Rail Variation under Part D3.4?

- 4.15.1 An amendment to a schedule required as a direct or indirect result of a Restriction of Use is *not* a Part D3.3 Train Operator Variation – it is a revised Access Proposal (abbreviated ‘rAP’ earlier in this document) in response to a Network Rail Variation under Part D3.4. Condition D3.4.9 details this clearly:

*“To facilitate the planning of any Network Rail Variation, Network Rail may require that any Timetable Participant shall submit a revised Access Proposal in respect of any Train Slot.”*

#### **Q.16**

Part D entitles NR to exercise Flexing Rights; is there an implied duty on NR to do so if otherwise Access Proposals cannot be accommodated?

- 4.16.1 Part D defines what a Flexing Right is, who can use it, and what it involves, so this is what all parties to this dispute have agreed. Part D defines “Flexing Right” as:

*“a right, exercisable by Network Rail in allocating a Train Slot in the New Working Timetable or a relevant Working Timetable, to vary a Time 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;"*

- 4.16.2 This definition sets out that NR has a Flexing Right, and what that Flexing Right is. Other parts of Part D then detail where that Flexing Right is applied.
- 4.16.3 This dispute concerns Network Rail Variations with at least 12 Weeks Notice. Condition D4.4.1 (Decisions concerning Network Rail Variations) states that:
- "In making any decision in the course of implementing the procedures set out in Conditions D3.4...[NR] (a) is entitled to exercise its Flexing Right when responding to an Access Proposal submitted under Condition D3.4.10; (b) may not effect any Network Rail Variation to the extent that the variation is inconsistent with the Rules; (c), shall, subject to the over-riding principles set out in sub-paragraphs (a) and (b) above, apply the Decision Criteria in accordance with Condition D4.6".*
- 4.16.4 The aforementioned Condition D3.4.10 refers to the submission of "revised Access Proposals" (rAPs). As such, Part D is therefore very clear, in this context, as to when and where NR can use its Flexing Right. The process for establishing and processing rAPs is outlined by NR in earlier paragraphs 4.11.3 to 4.11.12.
- 4.16.5 Part D does not contain a general duty to compel NR to use its Flexing Right and NR contends that this TTP cannot and should not re-write Part D where a matter is clearly dealt with, within Part D already.
- 4.16.6 NR has a Flexing Right, which is expressly defined and which it can exercise. Part D also states when that Flexing Right can be exercised. As regards Network Rail Variations, this is set out in Condition D4.4.1. NR has no "general duty" (whether express or implied) to exercise its Flexing Right.
- 4.16.7 Notwithstanding the above, and as stated earlier, NR Capacity Planning teams are committed to bringing about as many positive planning outcomes as possible for operators.

#### **Q.17**

*Should Condition D2.5.1(k) apply only to passenger trains? Given that GBRf's biomass services leave the Network at Liverpool and at Drax, should the reference to services leaving the Network be removed?*

- 4.17.1 NR notes that the present wording of Condition D2.5.1(k) is clear and expressly states that it only applies to "railway passenger vehicles", and "that the vehicles have not left the network". NR offers the following comments which could then be considered under Part C of the Network Code, by which proposed modifications to the Network Code are dealt with in consultation with the industry.
- 4.17.2 NR strongly contends that Condition D2.5.1(k) should apply to freight trains, as well as passenger trains. The reference to services leaving the Network should be removed, as should the reference to "passenger" vehicles.
- 4.17.3 NR contends that, in the planning of the timetable, it is no less important (compared to passenger services) to understand the proposed previous and next workings of freight vehicles. Previous and next workings usefully inform NR of the parameters within which it should ideally plan an operator's Access Proposal or revised Access Proposal, or, failing the ability to work within those parameters, indicate what workings may also need to be amended in relation to the Access Proposal or revised Access Proposal.
- 4.17.4 As contended by NR in its original Sole Response Document for TTP2318 (paragraphs 4.3.1 to 4.3.3), it was extremely material to the schedule rejections and amendments that triggered the dispute that NR was – at the



point of bidding – not in receipt of critical terminal workings/next workings information pertaining to GBRf's Week 40 biomass train plan. The GBRf Notice of Dispute cited 15 schedules "*Offered with insufficient terminal time*". GBRf's terminal workings were not provided at the time of the rAP and arrived with NR far too late in the process.

## **5. FURTHER COMMENTS**

- 5.1 For clarity, NR submits that there is difference between the application of its Flexing Right during the creation of the New Working Timetable (the time between PDNS at D-40 and publication of the timetable at D-26) and dealing with Network Rail Variations. Between D-40 and D-26, provided an operator has exercised their Rights, NR can apply its Flexing Right to any Train Slot in line with the definition of Flexing Right and Condition D2. This allows maximum flexibility in building a robust, high-performing timetable.
- 5.2 In contrast, the modification which can be applied to rAPs arising from a Network Rail Variation is much more limited. It is submitted that this limitation is akin to the Flexing Right applicable to a Train Operator Variation Request (TOVR) in that only the Train Slots included within the rAP can be modified. If there is a Working Timetable (WTT) path already within the timetable that is not impacted by the Restriction of Use generating the TOVR and that prevents a compliant path for the rAP being included within the timetable, NR has no right to modify the WTT path under D3.4 or D3.5.
- 5.3 It is important at this stage in proceedings to furnish the TTP with some context around the volume of change made in the weekly amended timetabling process. The planning community makes on average c.35,000 weekly amendments to the WTT due to disruptive engineering, operator resource requirements and late notice commercial changes. Strong working relationships between operators' planning practitioners, and their collaborative approach to solving problems, do very much lead to successful amended timetabling outcomes every week for the vast majority of amended plans. Disputes, like TTP2318 and TTP2320, are a fractional proportion of the amended timetabling workload undertaken. The workload is commonly completed without issue.
- 5.4 The complexities of timetable planning, uncertainty within the industry, continual change in demand and resource available to operate the timetable, mean that process errors are made or decisions are made with constantly evolving information. The long lead times for weekly possession planning in Part D do not help this and new or changed information can challenge previous decisions.
- 5.5 The volume and pace of change surrounding amended timetabling planning is relentless. It is therefore critical that the outcomes and guidance of this dispute do not negatively impact cross industry resource levels for access planners and train planners, by putting additional burdens on the quick-paced decisions that are sought on a weekly basis to plan amended timetables. Importing greater, more time-hungry, obligations on access planners and train planners will adversely affect the industry's delivery of timetables.
- 5.6 Of note, between 6th November and 24th November 2023, NR's Freight Informed Traveller team spent between 80-100 hours reviewing the four GBRf biomass services which were rejected for planning (not possession) reasons in the TTP2318 dispute. Eventually, NR was able to accommodate three of the four services into the timetable through the following actions, each action requiring numerous detailed and time-hungry verbal or written communications with the relevant party involved:
- Cancellation of 3 x Transpennine Express services
  - Terminating short 2 x Transpennine Express services
  - Manual input of 5 x Transpennine Express shunting services to balance stock
  - Cancellation of 1 x Class 3 service
  - Retime of 4 x Northern services
  - Retime of 1 x Cross Country service

- Retime of 1 x DB Cargo service
- Retime of 3 x GBRf services
- Cancellation of several GBRf services

- 5.7 NR does not believe it is the intention of the procedures set out in Part D3.4 or D3.5 to provide NR with the power to alter or flex great swathes of the WTT each week to accommodate Network Rail Variations and their accompanying requests/rAPs.
- 5.8 To note, the substantive scope of NR's ability to flex operators' services is defined within their Track Access Contracts access rights.
- 5.9 NR contends that multiple instances of rework of the WTT to the level documented in the GBRf biomass remedy (paragraph 5.6 above) is not consistently achievable, realistic or sustainable.
- 5.10 NR notes that of the 39 schedules (services) forming GBRf's biomass train plan for the bank holiday weekend of Week 40, 25 services operated and 14 did not. The First Hearing established that seven schedules remained unoffered by NR at the time of the hearing. Three of these schedules could not be offered due to Section 5 possession 3845835 remaining in the train plan. Of the remaining four schedules, three were offered to GBRf and three operated.
- 5.11 NR notes that FL's 4050 (SO) service in Week 40, the single feature of the TTP2320 dispute, was eventually enabled by the cancellation of another FL service – notably, though, 4050 (SO) did not operate on the day.

## **6. DECISIONS OF PRINCIPLE SOUGHT FROM THE CHAIR**

- 6.1 NR seeks from the TTP the determination that its interpretation of its Flexing Right under Conditions D3.4 and D4.4 is correct and was applied compliantly by NR in TTP2318 and TTP2320.
- 6.2 NR seeks from the TTP the determination that any breaches of contract by NR in TTP2318 and TTP2320, still determined by the TTP to be present in the matter, relate to factors outside of NR's Flexing Right. NR requests that these remaining breaches (if any) be clarified by the TTP in the Final Determination.
- 6.3 NR has contended previously that TTP2318 should not have reached the point of Timetable dispute proceedings – NR believes GBRf should have sought to instigate Access dispute proceedings against NR if it (i) objected to engineering access proposals; or (ii) had failed to receive supplementary information promised to it relating to engineering access proposals. NR seeks Observations and Guidance from the TTP concerning the actions (and related timescales) which should be instigated by operators where NR engineering access proposals materially affect their business and cannot be accepted by the operator.

## **7. APPENDICES**

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

APPENDIX A	ORR Determination dated 13 March 2019 on the appeals of TTP1331 and TTP1376
APPENDIX B	Example 1 – freight diversion leading to flex of passenger WTT service
APPENDIX C	Example 2 – freight diversion leading to flex of passenger WTT service
APPENDIX D	Example 3 – freight diversion leading to flex of freight WTT service
APPENDIX E	Example 4 – freight diversion leading to flex of passenger WTT service
APPENDIX F	Example 5 – passenger diversion leading to flex of freight WTT service

**8. SIGNATURE**

For and on behalf of Network Rail Infrastructure Limited

A handwritten signature in black ink, appearing to read 'N. Coles', written in a cursive style.

**Nick Coles**

Timetable Production Manager – Freight

16th January 2024