

TTP2470 and TTP2471

Network Rail Limited Defence Submission

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 Offices are at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW ("HEOC") (the "Claimants"); and
 - (b) Network Rail Infrastructure Limited whose Registered Office is at Waterloo General Office, London SE1 8SW ("Network Rail") ("the Defendant").
- 1.2 Network Rail agree with the list of potentially affected third parties as listed within the Claimants Sole Reference Document.

2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant's Sole Reference includes: -

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
- (b) A detailed explanation of the Defendant's arguments in support of its position on those issues where it disagrees with the Claimant's Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant's Sole Reference.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fail to be determined as part of the dispute.
- (a) The decisions of principle sought from the Chair in respect of
 - (i) legal entitlement, and
 - (ii) remedies.
- (b) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

- 3.1 Network Rail acknowledge and agree that these disputes are being brought in relation to a timetable offer made to HEx in respect of Week 26 (Sunday 22nd September 2024 - possession 3767989) and Week 27 (Sunday 29th September 2024 – possession 3766425). These possessions relate to the facilitation of ongoing HS2 works.
- 3.2 As with similar recent disputes, the relevant arguments being made by HEx are that Network Rail has failed to consult, failed to account for their responses, reduced their services (from 4tph to 2tph)

disproportionately to other impacted operators, changed their departure times and that Network Rail's actions are inconsistent with the contractual purpose.

- 3.3 Network Rail note that none of these are new arguments, and all have been discussed in various preceding dispute hearings.

4 EXPLANATIONS FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE

4.1 Issues where the Defendant accepts the Claimant's Case.

- 4.1.1 Given the paucity of substantive detail within HEx's SRD submission, Network Rail accept the details around the subject matter of the dispute (i.e. that it is the timetable offers for Weeks 26 and 27 in dispute).
- 4.1.2 Network Rail note that HEx acknowledge that these possessions are required and in fact have brought no dispute against the possession itself. This dispute appears to be limited to the decisions to reduce the number of services that HEx can run (2tph vice 4tph) and changes made to their departure times for the two trains offered.
- 4.1.3 Network Rail agree that the Network Code is applicable in this scenario as incorporated into the Supplemental Agreement that applies to restrictions of use to facilitate HS2 works.
- 4.1.4 Network Rail accept that the unregulated HEx Track Access Agreement affords them rights to run 4tph and notes that if services are not offered, compensation regimes exist for HEx to claim through.
- 4.1.5 Network Rail are pleased to note that HEx are not claiming that our actions have been in bad faith, are irrational or capricious.

4.2 Issues where the Defendant qualifies or refutes the Claimant's Case.

- 4.2.1 Within the HEx SRD (Para 5.2(a)) it is claimed that carrying out the proposed works should not disproportionately disadvantage HEx compared with others.

Network Rail raise two issues with this. Firstly, that decisions are reached based on the application of the Decision Criteria under Condition D4.6, and secondly that the notion of 'proportionate impact' is not something we are specifically compelled to consider.

It is submitted that the application of the Decision Criteria could lead to a justified decision for the holistic timetable which does disproportionately impact one, or a number of operators. Network Rail would also note that whilst HEx seem to be claiming that there is a disproportionate impact on them, they have provided no argument, rationale or explanation as to why they believe this to be the case.

For any decision challenged, Network Rail are expected to be able to present sufficient evidence to substantiate its position. It is submitted that the Claimant in any dispute hearing should be held to the same standard, and that this standard has not been reached within the SRD submitted by HEx.

4.2.2 Within the HEx SRD (Para 5.2(b)), it is claimed that Network Rail have failed to account for the commercial impact on HEX (Condition D4.6(f)). No explanation has been provided to this effect and as such it is difficult for a specific rebuttal to be made. As with the above, Network Rail would query what specific information Hex believe should have been accounted for, that was either available to Network Rail or provided by HEx that has not been considered. Was this unspecified information available to Network Rail at the time the Capacity Study was proposed, consulted upon, and then published, or before the timetable offer was made? No such evidence appears to have been included within the SRD or the Appendix documents.

4.2.3 As per the Chairs First Directions, Network Rail have accounted for the determination from TTP2435 et al, noting that:

- The determination conclusively found in Network Rail's favour on all issues.
- That Network Rail provided a comprehensive timeline detailing consultation undertaken regarding the Capacity Study and this was accepted by the dispute parties.
- That HEx was present at that hearing, chose not to become involved as a dispute party and when afforded the opportunity to offer comment, declined to do so on.
- The Capacity Study output was deemed to be justified and rational based on the information presented to Network Rail from all partes.

4.2.4 On the basis of the determination for TTP2435 et al, Network Rail query the validity and benefit of this dispute hearing.

It is accepted that HEx retain an unfettered right to bring a dispute regarding decisions taken by Network Rail.

However, it is submitted that there is no factual or substantive difference between the information presented in this dispute, and TTP2435. Logically, if the Capacity Study output was deemed rational and justified, and there has been no substantive change in the evidence available, the Timetable Offer must also be rational and justified (in so far as the two match).

TTP2435 provided persuasive precedent which we would ask the Chair to consider fully and carefully in this case. It is Network Rail's contention that in seemingly ignoring this precedent (or at least Failing to explain why they believe it should not be applicable in this case) HEx's insistence in pursuing this hearing is itself both irrational and capricious, presenting as a "dispute for the sake of disputing".

4.2.5 Network Rail refute the allegation that our actions are inconsistent with the contractual purpose. The HEx argument appears to be founded on the grounds that to offer anything short of the 4tph that their contract entitles them to is evidence of an inconsistency.

It is submitted that Part D of the Network Code (applicable via the Supplemental Agreement) allows for decisions to be made which are 'at odds' with the contract, in this case, the offering of less services than the Track Access Agreement permits. It is submitted that in this dispute (and those preceding it) there is no evidence supplied by HEx to demonstrate that their contractual rights have been or are being ignored.

- 4.2.6 Network Rail have consulted with Timetable Participants as outlined in the HEx email dated 06 October 2023 (Appendix 6, Page 4). As part of this, Network Rail accepted submissions from MTR in accordance with the Decision Criteria justified in D4.6.2 (b) & (c) in that they expressed significant safety concerns regarding overcrowding at Paddington low level due to the number of services terminating between Westbound services.

As has been the case in prior Two Track Timetables, Network Rail has utilised a base Capacity Study to build from. All operators understand this position. On 6 October 2023 HEx issued an email to Network Rail confirming that a paper (we have not been privy to) had been shared with the HEOC Executive Team and that they had accepted the departure timings of xx22 and xx52. In the same email, HEx instructed GWR to submit proposals on their behalf from Week 41 onwards utilising these timings (HEx Appendix 6). Network Rail have received no communication or notification from HEx (or GWR) to indicate that this was for a set period of time (it is not end dated) or to notify us that HEx had changed their mind/ position regarding the acceptance of these departure times. It has been made clear to HEx that this position will not change until and unless there is a significant change in the timetable. Network Rail has not seen any evidence from HEx that is substantive enough to warrant changing these departure times/ the timetable structure. It is submitted that on the basis of the above, the flex to the departure times has been consulted in line with D8.6.

We have continued to consult with HEx to find alternative service patterns. A xx10 and xx40 proposal for the main line Blocks was rejected by HEx on the basis that it provided inconsistent timings each alternating week for their customers. HEx have since abandoned their argument about requiring consistent departure times across main line and relief line blocks by agreeing that Network Rail can return services to WTT paths of xx25 and xx55 for ML blocks. This has been formally offered for Week's 25 and 29.

- 4.2.7 In relation to the HEx supplemental statement of case issued 19/07/2024, Network Rail refute the argument forwarded by HEx that there is no entitlement to utilise flexing rights. The Supplemental Agreement incorporates all of Part D in respect of HS2 possessions. It remains Network Rail's position that the utilisation of Condition D3.4 and/or D3.5 allows for the flexing of paths in the Working Timetable to facilitate a Restriction of Use. We would rely on the observations and guidance issued as a result of TTP2318 and TTP2320 in this respect. To argue that Network Rail do not have an entitlement to flex in this scenario is further evidence of a misreading of the Network Code and an apparent unwillingness to take account of existing relevant persuasive precedents.
- 4.2.8 Network Rail also wish to draw the Chair's attention to the HEx assertion within their Supplemental Statement of Case that "There are nil flexing rights within their Track Access Agreement with Network Rail relating to departure times. HEx does not believe that the HS2 Supplemental Agreement imports any flexing into its working timetable." Both HEx and Network Rail are signatories to this Supplemental Agreement (most recently signed 31 May 2024) and our understanding is that HEx wish to retain confidentiality over the contents of this document. Whilst we will not disclose copies of this Agreement without the consent of HEx, Network Rail must point out that under Clause 4 amendments are made to the original Schedule 2 (Clause 2.9 specifically) which expressly and clearly permit Network Rail to alter quantum, frequency, pattern (including departure and/or arrival times). To continue to misrepresent the contents of this Agreement is verging on acting in bad faith.

- 4.2.9 It is also noted that HEx have submitted a revised Statement of Case on 19/07/2024 in which their only argument appears to have been reduced to whether or not the flex to the departure times was consulted by Network Rail. This represents a further variation on the arguments that have shifted both before and after the submission of the SRD and affords Network Rail very limited time to try and address this specific issue and deal with the resulting 4th Directions from the Chair.
- 4.2.10 Network Rail submit that the Capacity Study is not a binding decision – neither Network Rail nor Timetable Participants are bound by the outputs. Rather, they are indicative positions of what is likely to happen if there is no substantive new evidence (that can be considered within a reasonable timeframe). Network Rail’s position regarding the Capacity Studies for all of the Sunday Two Track Timetables has been that the Study will be used as a base model and amended over time as the scenario requires and new information is fed in. To this effect, Network Rail submit that HEx is aware that in the event of no new evidence, that the current base Capacity Study is rolled forwards to each applicable Timetable Week. As in per TTP2435 et al, Network Rail contend that the Capacity Study has been consulted in detail, including the application of the flex to the HEx departure times (see email dated 06 October 2023). The Capacity Studies were re-issued to impacted operators on 15th and 16th May 2024.
- 4.2.11 Network Rail also note that Capacity Study catch up meetings are held once every four weeks. HEx are one of the invitees to these meetings. At these meetings, progress regarding Capacity Studies is discussed, and operators afforded the opportunity to comment.
- 4.2.12 GWR are contracted by Network Rail to prepare Capacity studies as a supplier – and has done so for a number of years going back to CP5. The production of a study is an iterative process and GWR liaises with other affected Operators. For items in inner Thames Valley, the Decision Criteria issued in 2023 and updated on 16th May 2024 inform the allocation of capacity between Operators.
- 4.3 Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination.**
- 4.3.1 Regrettably, the subject matter of this dispute is not a new matter but rather an issue that has continued to be brought before a Hearing Chair on a few occasions (albeit for differing timetable weeks). Some of these previous hearings have resulted in determinations confirming that (if justified) Network Rail are permitted to reduce the service offering to HEx to 2tph.
- 4.3.2 The HEx SRD omits any comment on the Capacity Study itself, perhaps a tacit acknowledgement of the outcome of TTP2435 et al. As has been discussed in previous hearings, Network Rail have had to deal with the challenge of balancing (amongst many considerations) performance needs against the demand for any given level of service. As part of the Capacity Study process, all impacted operators have provided Network Rail with passenger demand numbers to assist in reaching a decision on capacity, and capacity allocation. The numbers presented by HEx evidence that there is no reason to offer more trains. Network Rail have previously presented an argument that any increase above 10.5tph comes with a disproportionate performance risk. It has also been acknowledged by Network Rail that a balance has to be struck and compromises made to the performance of this section of the network to allow more services to run to meet demand (resulting in the 14.5tph decisioned).
- 4.3.3 Network Rail also note that in the first set of Directions issued for this matter, HEx have been instructed to set out why they believe the persuasive precedent set in TTP2435 et al is not applicable

in this matter, but that they have failed to do so. HEx subsequently confirmed (as a response to the second set of directions) that they are not challenging the principal decision from TTP2345 et al raising further questions as to the benefit of this hearing when that determination is accepted.

- 4.3.4 In previous dispute hearings (dealing with Week 11), HEx have opined that operating 3tph confers no benefit on them. On the basis that this still holds true (and we have not been informed of anything to the contrary), it must be assumed that any increase being sought must be up to 4tph irrespective of the overall timetable impact. This approach runs counter to the Objective.

4.4 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant

- 4.4.1 Network Rail has demonstrated that it has followed the Network Code Part D throughout. It has requested up to date and relevant information from impacted operators, and where received the information has been analysed and accounted for when considering our next steps. On this basis, it is submitted that the position taken by Network Rail to date is a reasonable one.
- 4.4.2 TTP2345 et al upheld the Network Rail position in relation to the Capacity Study output – this included the decision to limit quantum to 14.5tph. Despite being afforded the opportunity, no operator present raised any further objections. The Timetable Offer issued mirrors the Capacity Study output, which has already been upheld.
- 4.4.3 In respect of whether adequate consultation has taken place, Network Rail rely on the timeline in Appendix A as evidence of actions undertaken and submit that as our actions have been in line with Part D, and the offer itself is a relatively simple one this threshold has been satisfied. Similarly, any claim (that doesn't appear to be being made) that the information contained within the documentation is insufficient does not stand up to scrutiny on the basis that the output of the Capacity Study was not appealed, and the offer matches the Study.
- 4.4.4 HEx have belatedly provided clarification (18/07/2024) that their concern regarding this matter is that Network Rail have flexed the paths for the two trains offered outside of their contractually protected departure times without consultation or agreement. It is submitted that the 'lack of consultation' argument has been conclusively disproved in TTP2435 et al and within this defence paper. It is also submitted that agreement is not a requirement when it comes to Network Rail exercising its flexing Rights.
- 4.4.5 As detailed within the Chairs Third Direction to this matter, the flex applied to the departure times decision formed part of the proposal and consultation of the Capacity Study which was subsequently replicated in the Timetable Offer for Weeks 26 and 27. It is submitted that the dispute brought by HEx amounts to a reopening of the principal decision resulting in the determination for TTP2436 and as such is unwarranted.

5 DECISION SOUGHT FROM THE CHAIR

- 5.1 Network Rail seek a determination from the Chair confirming that it has acted in accordance with the Network Code.
- 5.2 Network Rail seek a determination from the Chair confirming that it has undertaken appropriate consultation in line with the requirements of Network Code Part D.

- 5.3 On the basis of the determination of TTP2435 et al, Network Rail seek reconfirmation that the position it reached in relation to the Capacity Study was a reasonable one, and that as such the timetable offer made to all parties is also a reasonable and justified one and as such is upheld.
- 5.4 On this occasion, and based on the evidence submitted, including the persistence of HEx to push this matter to a hearing despite the clear outcome and determination of the recent TTP2435 et al, Network Rail request that the Chair consider the matter of costs in this matter, specifically that:
- HEx reimburse the costs incurred by Network Rail in reviewing, preparing for and attending this dispute hearing; and
 - HEx bear the costs incurred by the industry for convening and undertaking this TTP hearing as a direct result of its irrational and capricious behaviour.

This request is made in line with ADRR Chapter H Rules 59 and 60(a) and (b).

6 APPENDICES

Appendix A – Chronology from TTP2435 et al (updated)

Appendix B - Decision Criteria

Appendix C – Week 26 TT Offer

Appendix D – Week 27 TT Offer

Appendix E – Consultation Evidence

7 SIGNATURE

For and on behalf of
[insert full company name]

Network Rail

Signed



Print Name

Alan Muggleton

Position

Operational Planning Manager