



George Mackintosh  
Network Rail Infrastructure Limited  
Network Rail,  
2nd Floor,  
One Eversholt Street,  
London,  
NW1 2DN

**To:** the Office of Rail and Road (**ORR**)

**To the Respondents,** Freightliner Group Ltd, and GB Railfreight Ltd

**And to the Interested Parties:** XC Trains Ltd, DB Cargo (UK) Ltd, Govia Thameslink Railway, Abellio East Midlands, and Abellio East Anglia

**By Email and Post**

2 September 2020

Dear Sirs

**NOTICE OF APPEAL UNDER PART M OF THE NETWORK CODE (TTP1706 & TTP1708)**

**1 NOTICE OF APPEAL**

1.1. Under Condition 5.2.1 of Part D of the Network Code, Network Rail Infrastructure Limited (the **Appellant**, referred to as **NRIL** in this notice of appeal) is appealing the determination of the Timetabling Panel of the Access Disputes Committee dated 24 August 2020 and received on 25 August 2020 (the **Determination**) in respect of TTP1706 and TTP1708 on two grounds, namely that:

1.1.1.A Capacity Study is not mandatory whenever a Restriction of Use is sought under paragraph 3.4 or 3.5 of Part D of the Network Code contrary to the apparent suggestion in paragraphs 70, 72 and 87.3 of the Determination; and

1.1.2.NRIL has followed the appropriate decision criteria contrary to paragraph 73 of the Determination and NRIL was entitled to take into account the severe consequences for all parties of being unable to undertake the Urgent Works within the required timescale when making its decision in accordance with D4.6.

1.2. This notice and the attached documentary evidence constitutes NRIL's complete Notice of Appeal in accordance with Condition 3.1.1 of Part M of the Network Code (the **Notice of Appeal**).

1.3. Unless otherwise defined, the terms used herein adopt the definitions provided under the Network Code (the **Code**).

1.4. The evidence in support of this Notice of Appeal, comprising a (1) copy of the Determination of TTP1706 & TTP1708 with Annexes A to C (including the submissions made therein by NRIL, and the other Dispute Parties); (2) the Sole Reference Documents and Responses served in TTP1706 and 1708, together with their appendices is attached to this Notice of Appeal, together with an index of the same.

## 2 IMPORTANCE OF APPEAL AND URGENCY: REQUEST TO EXPEDITE

- 2.1. NRIL respectfully submits that this appeal should be dealt with on an expedited basis and accordingly makes a request for the ORR to expedite this appeal under Condition M6.1.1.
- 2.2. The Determination suggests that a Capacity Study should have been undertaken by NRIL so as to enable Access Beneficiaries being asked to agree to Restrictions of Use to understand which of their scheduled services can be accommodated on the Network so as to enable them to respond appropriately before Network Rail reaches any decision on Restrictions of Use.
- 2.3. If a Capacity Study is a mandatory requirement before NRIL can make a decision under Condition D3.4 or D3.5 of the Code then it:
  - 2.3.1. changes the current established practice;
  - 2.3.2. impacts ongoing and forthcoming consultations on Restriction of Use;
  - 2.3.3. means NRIL will be unable to obtain urgent access pursuant to D3.5 so as to complete urgent and safety critical maintenance and renewals works on short notice given that Capacity Studies are complex and usually take around 16 weeks to prepare; and
  - 2.3.4. means that if NRIL is unable to obtain urgent access it increases the likelihood of NRIL needing to close parts of the Network completely on safety grounds, which NRIL considers to be an option of last resort, given the adverse impact on all parties concerned.
- 2.4. The impact of the consequences outlined at 2.3 above means that it is necessary to obtain urgent clarification and a binding determination on the position.
- 2.5. NRIL needs to take urgent possessions of the Network from time to time to fulfil its obligations for the Network. The Determination asserts that NRIL has not followed the appropriate decision criteria under D4.6. NRIL submits that this is wrong. The consequence of the Determination is that the commercial interests of the Claimants have been attributed more weight than the need for Urgent Works and the serious safety and economic consequences of what will happen if those Urgent Works cannot be carried out in the required timescale. Accordingly NRIL needs urgent clarification and a binding determination on how it is to balance the competing commercial interests of TOCS/FOCS whilst ensuring a safe and resilient Network by the application of the decision criteria under D4.6. This is consistent with Part A1.1, which states as follows:

*"The paramount objective in the railway industry is to operate a safe and secure railway on which the elements of risk to safety and security are reduced to a level as low as reasonably practicable. Nothing in this code shall be interpreted or construed as compromising that objective".*
- 2.6. If it is left as it is, there is also a risk that the Determination will create a precedent which is likely to have a significant detrimental impact on the operation of Part D of the Code as it may operate to prevent NRIL from achieving part of the Objective set under Condition D4.6.1, specifically the "safe carriage of passengers and goods" through the inability to obtain possessions on less than 12 weeks' notice.
- 2.7. In the short time since the Determination, in two instances where NRIL is seeking possessions on less than 12 weeks' notice TOCs are making their consent to possessions conditional on receipt



of guarantees from NRIL as to capacity that cannot be provided without a Capacity Study. It is submitted that insisting on the requirement for a Capacity Study in all cases would be contrary to Paragraph 2.4.3 of the National Timetable Rules 2020 which provides that *where a need arises to amend the Engineering Access Statement/Timetable Planning Rules to cater for urgent safety requirements or other emergency situations, all parties concerned will co-operate in accelerating the normal timescales* in this Procedure commensurate with the urgency of the circumstances.

2.8. Accordingly, NRIL proposes that the ORR sets a timetable as follows:

2.8.1. by 4 September 2020, the ORR decides whether the appeal may proceed under Condition M4.1.1;

2.8.2. by 11 September 2020, the Respondents and any Interested Parties serve any notice and evidence under Condition M5.1.1; and

2.8.3. by 18 September 2020, the ORR makes its Decision in respect of the Appeal.

### 3 SUMMARY

3.1. NRIL appeals the Determination on the following grounds:

3.1.1.A Capacity Study is not mandatory whenever a Restriction of Use is sought under paragraph 3.4 or 3.5 of Part D of the Network Code contrary to the apparent suggestion in paragraphs 70, 72 and 87.3 of the Determination; and

3.1.2. NRIL followed the appropriate decision criteria contrary to paragraph 73 of the Determination and NRIL was entitled to take into account the serious safety concerns identified and the severe consequences for all parties of being unable to undertake the Urgent Works within the required timescale when making its decision in accordance with D4.6.

### 4 FACTS AND BACKGROUND

#### The need for the replacement of timbers

4.1. As explained in the opening submission of NRIL (page 26 of the Determination), over recent years NRIL has had a number of issues with wheel timbers forming part of assets, such as bridges, on the Network. Some have failed in service, and one contributed to the derailment of a freight train (Gospel Oak to Barking, on 26 January 2020).

4.2. As a result, NRIL has revised its processes, appointing dedicated timber inspectors, improving training, and using new inspection equipment. This identified a high volume of timber renewals being required over the next two years. Determining the exact date by which timbers must be replaced is complicated by the fact that the deterioration of soft wood timbers is not uniform, and depends on multiple factors. Accordingly accurately estimating the remaining life of timbers is very difficult. Renewals will be carried out using hardwood, which has a longer life expectancy than the softwood used in the past. Softwood timbers have an expected life of 5-10 years, depending on loading and environmental factors. Hardwood timbers have a life expectancy of up to 25 years.

4.3. In April 2020, NRIL completed a timber inspection on the wooden structures known as the Manea bridges (the Bridges). This identified an urgent need to replace certain timbers that will be life

expired by the end of 2020, and other timbers which will require replacement before their life expiry in 2021. Specifically, there are 85 pairs of wheel timbers on the Bridges which are in various stages of rot and are unable to provide the required level of strength to hold the rail to the wheel timbers and which urgently require replacement (Urgent Works). These are categorised as follows: 20 red timbers which became life expired in week 26 2020; 31 orange timbers which require replacement by the end of summer 2020; and 34 yellow timbers which required replacement within 2 years of inspection (i.e. 2022).

- 4.4. Whilst the Bridges have been subject to previous inspections by NRIL, it was only as a result of the April 2020 inspection which adopted the revised process and used the new equipment (specifically, a timber density probe), that the timbers in the Bridges were identified/ classified as being in need for replacement within such a short timescale.
- 4.5. If the Urgent Works are not completed, and the Bridges remain in their current state, they will pose significant safety risks for all parties concerned and could, potentially, result in a derailment.

#### **Urgent steps taken by NRIL following April 2020 inspection**

##### April 2020 Inspection

- 4.6. NRIL obtained the results of the timber inspection in April 2020. On receipt of the inspection report, NRIL identified that it needed to undertake urgent renewals work and replace wooden timbers in the Bridges and identified 5 DEFCON potential options (see Appendix C3 to NRIL's Submission in 1706), which were then evaluated by NRIL.

##### Geographical Restrictions

- 4.7. An additional complexity that NRIL needed to take account of when considering potential options for the renewals work is that the Bridges sit in the Ouse Washes Special Area of Conservation (**SAC**), the Ouse Washes Special Protected Area (**SPA**), and the Ouse Washes RAMSAR Wetland (**RAMSAR**). The SAC and the SPA are protected under the Wildlife and Countryside Act 1981, and the Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) (together the **Habitats Regulations**). The Bridges are also located in a Site of Special Scientific Interest (**SSSI**).
- 4.8. Having carried out a Habitats Regulations Screening, and then an Appropriate Assessment, of the sites under the Habitats Regulations in June 2020 as regards the potential impact of the Urgent Works on the SAC, SPA and SSSI, NRIL was then obliged to consult with Natural England in order to obtain an Assent from Natural England to carry out the Urgent Works (see Appendix B2 to NRIL's Response in TTP 1708). Natural England granted an Assent on 6 July 2020, permitting the Urgent Works to be carried out between mid - July and the end of October 2020.
- 4.9. The time period of up to the end of October 2020 is driven by the requirement to avoid the most sensitive periods for breeding and wintering birds, as noted in paragraph 4.2.14 (j) of NRIL's Sole Reference Document in TTP1708. It is also determined by flooding of the area during the winter months, to levels which exceed NRIL's platform working height (as noted in paragraph 4.3.2 of NRIL's Response in TTP1708, and in NRIL's Opening Statement (page 26 of the Determination).

##### DEFCON 4

- 4.10. Whilst NRIL identified 5 DEFCON potential options initially, DEFCON 4 was the only realistic option that would enable the Urgent Works to be completed within the terms of the Assent. The

other 4 DEFCON potential options were not considered feasible after the completion of further analysis by NRIL and so were discounted.

- 4.11. Whilst DEFCON 4 provided for a 28 day blockade, it also provided for the complete replacement of red, orange and yellow timbers in 2020, and Single Line Working on weekdays. It anticipated only 4 weekend two line blocks. By contrast, DEFCON 0, which was ultimately directed by the Panel, required a two line block for 24 weekends, and had a greater risk of complete blockade being necessary for an extended period of time, if assets were to fail.
- 4.12. NRIL considered DEFCON 4 was the only means of achieving its objective under D4.6.1. NRIL considered DEFCON 4 was the only means by which the Urgent Works could be done without closing completely the relevant part of the Network which would have been much more disruptive to the Access Beneficiaries. Accordingly NRIL considered it was the only way in which to strike a balance between urgently addressing the serious safety concerns identified by NRIL and the commercial interests of the TOCs and FOCs in the most efficient and economical manner. As part of this, NRIL considered the capacity issues that would arise out DEFCON 4 and this formed part of the consultation process with the TOCs and FOCs. NRIL did not prepare a formal Capacity Study because NRIL was able to comply with its obligations under D4.6 without preparing one. Preparing a Capacity Study would have elongated the timescale of the process given that they generally take 16 weeks to prepare reducing the notice period to the Access Beneficiaries of the timetable variation. Given the need for the Urgent Works to be completed within a very short timescale a Capacity Study would have caused delay whilst failing to improve the decision making process. DEFCON 4 represented the only way for the Urgent Works to be completed within the Assent without a likely line closure.
- 4.13. Accordingly NRIL commenced the procedure under D3.5 based on the proposed DEFCON4 option which was subject to consultation under D3.5 of the Code. This was communicated to the Access Beneficiaries on 21 May 2020.
- 4.14. After consultation, NRIL published its decision and continued to plan for the implementation of DEFCON 4.
- 4.15. DEFCON 4 was predicated on maintenance works starting on 5 September 2020 which now is not possible due to the Determination. Accordingly NRIL is left with no practical alternative at this stage but to replace as many timbers as possible by adopting DEFCON 0. However it will not be possible to replace all of the timbers categorised as red prior to the end of October 2020 and if an extension to the Assent is not granted by Natural England it is likely that all the timbers will not be replaced before the end of their life. This will mean that NRIL will need to consider severe speed restrictions and or closing of part of the network on safety grounds. This is the very outcome that NRIL sought to avoid by adopting DEFCON 4. As previously identified, such action will be more disruptive to the Timetable Participants than DEFCON 4.
- 4.16. For ease of reference, NRIL's application of the Decision Criteria to DEFCON 4 (please refer to the application of the Decision Criteria by NRIL at Appendix 4.4 of 1706 and Appendix 5 of 1708) against the option of line closure is set out below.

*(a) maintaining, developing and improving the capability of the Network;*

- 4.16.1. unless the Urgent Works are completed the issues identified would continue to affect timetable delivery, there was major risk of failure affecting timetable sustainability and a real risk to safety.

*(b) that the spread of services reflects demand;*

- 4.16.2. DEFCON 4 would accommodate as much capacity as possible, taking into account NRIL's obligation under D4.6.3.

*(c) maintaining and improving train service performance;*

- 4.16.3. Unless the Urgent Works were completed, train speed restrictions would continue and the likelihood of a major incident occurring will increase.

*(d) that journey times are as short as reasonably possible;*

- 4.16.4. the temporary disruption of DEFCON 4 would allow the longer term removal of speed restrictions, therefore making journey times as short as possible.

*(e) maintaining and improving an integrated system of transport for passengers and goods;*

- 4.16.5. Without intervention, uncontrolled loss of capability at Manea would become more likely. This would not be consistent with an integrated system and would have consequential effects on other routes.

*(f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware*

- 4.16.6. Whilst NRIL recognised that DEFCON 4 would affect the commercial interests of the parties, it considered that these were outweighed by the serious safety issues identified and the risks posed to all parties and that a planned possession that was realistic and would remove and replace all the affected timbers would be less disruptive to all parties.

*(i) mitigating the effect on the environment;*

- 4.16.7. If the Urgent Works were not completed as proposed, the risk of catastrophic failure was increased, with the likely consequence of extended loss of rail access, which would also increase road haulage and Felixstowe port traffic.

#### Urgent action taken by NRIL

- 4.17. Paragraph 54 of the Determination states as follows:

*"Digressing: the Panel was not impressed by the length of time that appears to have elapsed between this information being available to Network Rail and any real steps being taken towards rectifying these problems."*

- 4.18. It is clear from paragraphs 4.6 to 4.15 above that NRIL acted very swiftly:

- 4.18.1. by investigating and analysing its approach to inspections post the January 2020 derailment;
- 4.18.2. developing and implementing a new approach to inspections;
- 4.18.3. identifying timbers that were near the end of their life at the Bridges;



- 4.18.4. considering the viability of 5 potential DEFCON options for replacement of the timbers;
  - 4.18.5. starting the Part D process based on DEFCON 4 and consulting and engaging with TOCS/FOCs on DEFCON 4; and
  - 4.18.6. issuing its decision – giving 7 weeks' notice before the works would start.
- 4.19. All of these steps were undertaken by NRIL during lockdown despite the significant additional operational challenges created by Covid-19 and lockdown.
- 4.20. Accordingly NRIL considers the Panel was wrong in suggesting that a significant period of time elapsed between this information being available to NRIL and any real steps being taken by NRIL towards rectifying these problems. Furthermore had NRIL interposed an additional step of preparing a Capacity Study it could have taken 16 weeks to prepare which would have elongated the period between identification of the need for the Urgent Works, NRIL being able to record the Timetable Variation in the Short Term Plan and commence the Urgent Works.

### Relevant procedure and provisions

- 4.21. Paragraphs 3.4 and 3.5 of Part D of the Code provide NRIL with the ability to plan Restrictions of Use. Paragraph D3.4 sets out a procedure where NRIL's variation is made with at least 12 weeks' notice; paragraph D3.5 deals with urgent variations on less than 12 weeks' notice. In either situation, paragraph D3.4.4 provides that any decisions made by NRIL under Part D must apply the *"Decision Criteria in accordance with Condition D4.6"*.

- 4.22. Condition D4.6.1 provides as follows:

*"Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective")."*

- 4.23. D4.6.2 then goes on to state:

*"In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(f) below ("the Considerations") in accordance with Condition D4.6.3 below:*

- (a) maintaining, developing and improving the capability of the Network;*
- (b) that the spread of services reflects demand;*
- (c) maintaining and improving train service performance;*
- (d) that journey times are as short as reasonably possible;*
- (e) maintaining and improving an integrated system of transport for passengers and goods;*
- (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;*



*(g) the content of any relevant Long Term Plan and any relevant Development Timetable produced by an Event Steering Group;*

*(h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;*

*(i) mitigating the effect on the environment;*

*(j) enabling operators of trains to utilise their assets efficiently;*

*(k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Capacity to which the Strategic Train Slot relates; and*

*(l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.*

4.24. D4.6.3 states as follows:

*"When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight."*

4.25. The Panel asserts that NRIL did not apply the Decision Criteria in D4.6 correctly. NRIL submits that this is wrong and its position remains that DEFCON 4 was the appropriate approach to undertaking the Urgent Works applying the Decision Criteria in D4.6. The consequence of the Determination is that the commercial interests of the Claimants have been attributed undue weight compared to considerations a, b, c, d, f, l, and j outlined at paragraph 4.19 above. The Claimants had 7 weeks' advance notice of the first possession under DEFCON 4. This provided adequate notice for the Claimants to make alternative contingency plans. Whilst ideally NRIL would have liked to give more notice, given the discovery of the need for Urgent Works in April 2020 realistically longer notice was not possible.

4.26. It is not feasible to complete the DEFCON 0 works within the allotted period of time and unless Natural England agrees to extend the timeframe for access, it will not be possible to replace all of the timbers before the end of their life. Consequently, this may result in the need for a combination of severe speed restrictions and parts of the Network to be closed for safety requirements. This would be extremely disruptive at short notice and have a greater impact on the Claimants' and other Timetable Participants' commercial interests, than had NRIL's decision to proceed with DEFCON4 been upheld. Further it has meant that the Objective under D4.6 is not achieved.

4.27. As it will not be feasible to complete the Urgent Works by adopting DEFCON 0, it also means that further disruptive possessions will be necessary in 2021 to complete the necessary remedial work.

4.28. The other Timetable Participants who agreed with NRIL's decision that DEFCON 4 should be adopted have expressed dissatisfaction with the Determination. They had put in place contingency plans on the assumption that DEFCON 4 would be adopted and now at very short notice DEFCON

0 is to be applied in the knowledge that it will not resolve the issues and further Restrictions of Use will be required

## Capacity Study

### Determination

- 4.29. Contrary to the suggestion at paragraphs 70, 72 and 87.3 of the Determination, there was no mandatory requirement for a Capacity Study to be undertaken in the current situation which deployed the process under D3.5 and D3.4. Further, if a Capacity Study had been obtained, it would have resulted in a significant delay.
- 4.30. Capacity Studies are complex studies which assess the maximum capacity on a specific railway line, which are then used to adjust operational requirements. Capacity Studies are prepared in the course of setting the biannual timetable changes under D2. The process to commence construction and consultation of the Engineering Access Statement starts internally within NR at 90 weeks out from a timetable commencement date in contrast with the procedure at D3.5 of the Code, which provides for temporary possession affecting only part of the Network and which is undertaken at less than 12 weeks' notice.
- 4.31. NRIL did, however, consider the issue of capacity arising out of its proposed Single Line Working approach, and the consequences that would have for the TOCs and FOCs. This was developed with continuous and ongoing consultations with the operators.
- 4.32. The complex nature of this possession, which sought to support the commercial interests of the operators by allowing services to run on a Single Working Line basis meant that all services needed to be reviewed and retimed to incorporate the Single Working Line allowances. This work usually takes around 8 weeks to identify the capacity and then how many services could run through that Single Working Line section. It is only after this work that it would have been possible to identify the services that could not have run through the Single Line Working section, to provide the operators with timings as to when the service would arrive at the other end of the section, such that it could then be considered on a national basis. This stage usually takes a further 8 weeks.
- 4.33. The result of the above is that it is not possible for NRIL to prepare a Capacity Study of this complexity to support late notice requests and a requirement to do so would mean that NRIL is unable to undertake urgent safety critical works of this nature with less than 16 weeks' notice.

### Permanent Timetable

- 4.34. D2.2.1 states as follows:

*"Both the Timetable Planning Rules and the Engineering Access Statement... are revised on a bi-annual basis, each revised version being operative for the same Timetable Period as the Working Timetable to which they relate."*

- 4.35. Section 1 of the National Timetable Planning Rules states:

*"This section describes the process to be followed to enable agreement between Network Rail and Timetable Participants of detailed train timings and associated information for publication in the National Rail Timetable (NRT) and Working Timetables."*

*"1.1.2 The timetable planning process for **the Permanent Timetable is governed by Part D** of the Network Code (last amended in July 2017). In the event of a conflict, the Network Code*



*takes precedence over Track Access Agreements with individual Timetable Participants and the Engineering Access Statement /Timetable Planning Rules." (emphasis added)*

*"1.1.3 The detailed planning **process leading up to each timetable change date, of which there will two a year**, will consist of a Period to determine the Engineering Access Statement and Timetable Planning Rules, with a timetable consultation period and then a submission of Access Proposals by Timetable Participants. Key dates in the planning process are shown in Appendix A." (emphasis added)*

4.36. Section 1 of the Engineering Access Statement 2020 states:

*"The contents of Engineering Access Statement are determined by Network Rail through informal consultation with Train Operators and Integrated Planning Managers in Network Rail, with the aim of achieving the optimal balance between access to the network for train operations and access for maintenance, renewal and enhancement work. **This is followed by formal consultation with Train Operators in accordance with Access Condition D2, leading to the issue by Network Rail of the Final Engineering Access Statement.**" (emphasis added)*

4.37. It is therefore clear from the wording of the above paragraphs of Part D and sections of the National Timetable Planning Rules that the creation of the Engineering Access Statement is part of the planning process for the permanent timetable and bi annual timetable revision process as prescribed by para 2 of Part D and a Capacity Study is not a mandatory requirement where Network Rail needs to effect changes to the Working Timetable pursuant to paras 3.4 and 3.5 of part D.

4.38. Section 7 of the National Timetable Planning Rules states:

*"7.1.1 This section sets out the introduction of the Access Impact process to be followed to enable agreement between Network Rail and the Timetable Participants for delivering Capacity Study Requests relating to the EAS.*

*7.1.2 The Access Impact Matrix was created by Network Rail and Crosscountry to jointly resolve Access Dispute TTP773. The Access Impact Matrix grades Capacity Studies by severity. Operators will grade their Capacity Study requests from the Engineering Access Statement on their Operator Response Sheet.*

*7.1.3 Network Rail can challenge the grading and a revised or the original grading should be agreed by all parties. Network Rail and the relevant Timetable Participants will jointly agree a delivery date for the requested Capacity Study. Extensions to the delivery date of the requested Capacity Study will need to be agreed by Network Rail and the relevant Timetable Participant."*

4.39. The wording of section 7 above does not state that Capacity Study Requests are mandatory where Network Rail needs to effect changes to the Working Timetable pursuant to paras 3.4 and 3.5 of part D.

#### Short Term Planning

4.40. Section 2 of the Section 1 of the National Timetable Planning Rules relates to Short Term Planning and states:



## 2.1 Introduction

2.1.1 This section describes the process to be followed to enable agreement between Network Rail and Timetable Participants of short term amendments to the Permanent Timetable.

2.1.2 The timetable planning process for short term planning is governed by Part D of the Network Code (last amended in July 2017). In the event of a conflict, the Network Code takes precedence over Track Access Agreements with individual Timetable Participants and the Engineering Access Statement / Timetable Planning Rules.

2.1.3 Network Rail Timetable Variations are planned by Network Rail on a week by week basis. Each week of a Working Timetable is referred to as a "Timetable Week" (TW). Each Timetable Week commences at 00:01 on a Saturday and expires at 24:00 on the following Friday. The sequence of events by which variations are finalised is designated by a series of milestone dates and steps, all of which refer to a week in the period prior to the commencement of TW. So, for example, "TW minus 12" (or "TW-12") refers to the 12th week prior to the start of a given TW. Where in this Part D any step or event is required or stated to occur by any week designated in this way, it must occur no later than 5pm on Friday of the preceding week. So, for example, a step which is required to occur no later than "TW-12" must occur no later than:

(a) 5pm on Friday;

(b) in the week commencing on the Sunday which occurs 13 weeks prior to the commencement of week TW.

2.1.4 Not later than D-26, Network Rail shall provide to all Timetable Participants a calendar pertaining to each TW, showing the milestone dates which will apply (pursuant to this Condition D3) to the planning of all Timetable Variations in respect of that TW.

## 2.2 Weekly Train Plan – Network Rail Variations with at least 12 Weeks' Notice

2.2.1 Network Rail is entitled to make a variation to the Working Timetable when the Network Rail Variation is for the purpose of taking Restrictions of Use which are consistent with the Rules, or as amended in accordance with the procedure shown in Condition D3.4.3

2.2.2 Network Rail must consult with all Timetable Participants likely to be affected by the amendment.

2.2.3 By TW-30 Network Rail will provide its proposals for Restrictions of Use in respect of the corresponding TW to Timetable Participants.

### Summary Position

- 4.41. Nowhere in either D3.4 or D3.5 is there a reference to the Engineering Access Statement, Access Impact process or either NRIL or the Train Operators delivering Capacity Study Requests whether relating to the Engineering Access Statement or otherwise.
- 4.42. Further Annex 1 of Part D sets out the timeline for the timetable development process and includes a specific section for the revision of the Timetable Planning Rules and the Engineering Access Statement. This is contrast with the sections of Annex 2 of Part D dealing with the timeline for NRIL Variations with at least 12 weeks' notice and less than 12 weeks' notice. NRIL variations under Condition D3 have a significantly shorter process in terms of both stages and timescales



and makes no reference to the revision of the Timetable Planning Rules and the Engineering Access Statement.

- 4.43. If Capacity Studies were mandatory requirements for NRIL variations to the Working Timetable pursuant to D3.4 or D3.5 then this would be expressly stated in part D and the annexes and the National Timetable Planning Rules.
- 4.44. In paragraph 70 of the Determination, the Panel refers to the TPR extract, and then states "Network Rail's Decision clearly falls into one of the higher levels of severity, requiring a Capacity Study". The Panel fails to explain why Condition D3.4 or D3.5 require one to be prepared. There is no reference to a Capacity Study in D3.4, or D3.5, or anywhere else in Part D, or the Code as a whole. Despite that, the Panel then goes on to say, in paragraph 72, that "Condition D3.5 makes it clear that Network Rail is required to comply with the provisions of D3.4 (other than those specifically excluded) as far as practicable.", but then follows with the statement that "*It is clear that no Capacity Study was prepared*". As explained above, there is no link between D3.4, D3.5 and a Capacity Study.
- 4.45. The Panel then states that it "found it difficult to understand how Network Rail could have considered its application of the Decision Criteria to have been fully informed without the required Capacity Study having been completed". As outlined above NRIL was able to apply the Decision Criteria without a Capacity Study and furthermore one was not required.
- 4.46. Accordingly the Panel's Guidance in paragraph 87.3 that "a Capacity Study is formally required in circumstances such as this" is incorrect.

## 5 GROUNDS OF APPEAL

### Ground 1

- 5.1. The Determination is wrong in law because the Panel erred in its interpretation of Condition D3.4 and D3.5 of the Code, and Section 1 of the National Timetable Planning Rules in finding in paragraphs 70, 72, and 87.3 of the Determination that NRIL was required to prepare a Capacity Study before making its decision under D3.5

### Ground 2

- 5.2. The Determination is wrong in law for wrongly concluding that NRIL's application of the Decision Criteria set out in D4.6 was "seriously flawed". NRIL was entitled to take into account both the safety risks identified by NRIL and the severe consequences for all parties of being unable to undertake the Urgent Works within the required timescale when making its decision in accordance with D4.6.

## 6 DECISION SOUGHT

- 6.1. The Appellant submits that this Notice of Appeal should proceed to appeal as it raises matters which are of significant importance to the industry as outlined above.
- 6.2. The grounds outlined in Condition M 4.1 of Part M of the Code do not apply.
- 6.3. The Appellant requests a declaration from the ORR that:



6.3.1.Paragraphs 3.4 and 3.5 of Part D of the Network Code do not require a mandatory Capacity Study to be prepared whenever a Restriction of Use is sought under those paragraphs by NRIL;

6.3.2.NRIL's application of the Decision Criteria was not "seriously flawed" as per paragraph 73 of the Determination; and

6.3.3.NRIL is entitled to consider the likely consequences of failing to obtain the required possession and/or being unable to undertake the necessary works when applying the objective in D4.6.1 and the considerations in D4.6.2 and D4.6.2.

Please acknowledge receipt of this Notice of Appeal.

Yours faithfully

George Mackintosh  
Head of Planning and Performance, Anglia  
Network Rail