

Senior Executive, Access and Licensing
Tel:
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19 December 2018

Network Rail Infrastructure Limited

GB Railfreight Limited
DB Cargo (UK) Limited

By email only

Dear Sirs,

Appeals under Part M of the Network Code by GB Railfreight Limited (GBRf) and DB Cargo (UK) Limited (DB Cargo) in respect of decisions TTP1331 and TTP1376

1. We have received detailed representations from Network Rail via its legal advisors Eversheds LLP on the appeal notices served by GBRf and DB Cargo in respect of the above decisions of the Timetable Panel. The nature and complexity of the issues associated with both appeals means we are still considering whether ORR should hear them and we will not resolve this question until January. We realise this is disappointing for all parties concerned but we are progressing as quickly as we can.
2. We have, however, reached decisions in respect of the expedition of GBRf's appeal and the ability of DB Cargo to bring an appeal as an interested party to TTP1331 and TTP1376. We would also like GBRf and DB Cargo to provide further information. These matters are set out below.

Expedition

3. GBRf asked us to deal with its appeal on an expedited basis. Whilst we agree that if we decide to hear its appeal, we should do so as quickly as possible, we do not think it would be appropriate or practical to expedite it. GBRf's appeal, if we decide to hear it, will require careful consideration of a range of difficult issues and we are aware that the 9 December 2018 timetable is already in force. If we decide to hear the appeal we will write to you again setting out the procedure we propose to follow and allow all parties the opportunity to make representations.

Standing of DB Cargo to bring an appeal

4. We are grateful to DB Cargo and Network Rail for their respective submissions (DB Cargo by letter dated 18 December and Network Rail in its representations dated 12 December and by letter dated 18 December) on the question of whether DB Cargo has standing to appeal to ORR.
5. This question is not straightforward because of a difference of language in Part D and Part M of the Network Code. DB Cargo was an interested party in TTP1331 and TTP1376. Part D at Condition D5.2.1 permits, 'a Timetable Participant' to refer a decision of the Timetable Panel to ORR. DB Cargo argues that this means any Timetable Participant may do so, whilst Network Rail asserts that, read in context, 'a Timetable

Participant' means the same Timetable Participant who brought the appeal to the Timetable Panel.

6. Part M does not use the language of 'a Timetable Participant' but refers in the main to an 'Appellant', defined in turn as a 'Dispute Party' and by further definition, an 'Involved Party'.
7. On balance, we are more persuaded by the arguments of DB Cargo, in particular because Condition D5.2.1 could have been drafted so as to clearly limit the right to refer a matter to the ORR so as to exclude persons other than Network Rail and the Timetable Participant who brought the original dispute. In addition, we note that Condition M1.1.1 refers only to the process *'by which a party dissatisfied with either a decision of a Timetabling Panel in relation to a dispute arising under Part D or a decision reached by Access Disputes Adjudication in relation to a dispute arising under Part J, can appeal the matter to the Office of Rail and Road for determination'*, meaning that there isn't consistency of expression even within Part M, the rest of which refers to an 'appellant'. The uncertainty in the drafting, ought, in our view, to be interpreted in a non-restrictive, rather than restrictive, sense. The application of Condition M4.1 will continue to prevent unmeritorious or unjustified appeals from proceeding.
8. This decision does not mean that we have decided to hear DB Cargo's appeal, only that we consider it is entitled to bring it. We will reach a decision on hearing the appeal within the same timeframe as for GBRf's appeal.

Further information

9. We would be grateful if GBRf and DB Cargo could set out for their respective appeals, with reference to Condition D5.3.1 and the powers available to ORR, the remedies each is seeking in the event ORR does decide to hear them. Please can you respond by 5pm, 4 January 2019.

Yours sincerely