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27 November 2018

Dear Catherine,

**APPEAL TO THE OFFICE OF RAIL AND ROAD (“ORR”) IN THE MATTER OF  
TIMETABLING PANEL DETERMINATION TTP1331 AND TTP1376**

This letter constitutes a notice of appeal by DB Cargo (UK) Limited (“**DB Cargo**”) pursuant to Condition D5.2.1 and Part M of the Network Code. DB Cargo is dissatisfied with Timetabling Panel Determination TTP1331 and TTP1376 published on 20 November 2018 (“**the Determination**”).

The underlying disputes giving rise to the Determination were between Network Rail Infrastructure Limited (“**Network Rail**”) and GB Railfreight Limited (“**GBRf**”). DB Cargo is a Timetable Participant, as defined in the Network Code and accordingly attended the hearing (as further described below) relevant to the Determination as an interested party.

References to paragraph numbers in this Notice of Appeal are taken from the Determination.

**Background**

1. On the 8 June 2018 (D-26), Network Rail issued the New Working Timetable in accordance with Condition D2.7 of the Network Code. The New Working Timetable was subsequently withdrawn by Network Rail and replaced on 17 August 2018 with another Timetable (“**the Hybrid Timetable**”).
2. GBRf issued a Notice of Dispute on 22 June 2018 in respect of Network Rail’s decisions relating to the New Working Timetable (TTP1331).
3. Subsequently, on 23 August 2018, GBRf issued a Notice of Dispute because Network Rail had issued the Hybrid Timetable with the intention of that timetable replacing the New Working Timetable (TTP1376).
4. A Timetabling Panel Hearing was held on 8 November 2018 to resolve both TTP1331 and TTP1376 and a copy of the Determination is attached to this Notice of Appeal.



5. DB Cargo is appealing the Determination because it believes it to be wrong because the Timetabling Panel determined that the Hybrid Timetable published by Network Rail on 17 August 2018 constituted the New Working Timetable for the December 2018 Principal Change Date, instead of the Timetable published by Network Rail on 8 June 2018 (at D-26) in accordance with Condition D2.7 of the Network Code.

***Issues giving rise to this Appeal***

6. DB Cargo understands that Access Dispute Resolution Rule A5 requires that:

*“Each and every Forum shall reach its determination on the basis of the **legal entitlements of the Dispute Parties and upon no other basis**. Each and every Forum shall act in accordance with the law; and all its decisions, including its determinations and decisions on procedure, shall be in accordance with the law.” (emphasis added).*

7. DB Cargo considers that those legal entitlements in respect TTP1331 and TTP1376 arise primarily from the Network Code (in particular, Part D) and the relevant track access agreement(s).

8. Despite Part D of the Network Code not including provisions allowing Network Rail to withdraw a New Working Timetable once issued at D-26 and replace it at any time with another different timetable(s), the Timetabling Panel determined that the Hybrid Timetable is the New Working Timetable.

9. The Timetabling Panel’s decision in this respect is evidenced by the following extracts taken from the Determination:

*“The Hybrid Timetable is the New Working Timetable” (paragraph 71).*

*“Having concluded that the Hybrid Timetable is the New Working Timetable” (paragraph 76).*

*“The Hybrid Timetable issued on 17 August 2018 is the New Working Timetable” (paragraph 80).*

10. As a result of determining that the Hybrid Timetable is the New Working Timetable, the Timetabling Panel effectively decided that TTP1331, which related to issues concerning the New Working Timetable that was published on 8 June 2018 (D-26) in accordance with Condition D2.7.1 of the Network Code *“cannot be the subject of any relevant dispute before the Panel” (paragraph 75).*

11. Although the Timetabling Panel determined that the Hybrid Timetable is the New Working Timetable, its reasoning for arriving at and justifying this conclusion appears to be confined to the following wording:

*“The Panel was satisfied that Network Rail was entitled to produce a Hybrid Timetable by reference to its obligations under its Licence, in the various Track Access agreements to*

...



*which it is a party and under the Network Code at Chapter D” (paragraph 71)*

12. Access Dispute Resolution Rule H51k requires the Hearing Chair in a determination to set out “*the reasons for those decisions and conclusions (including any relevant legal principles or rules of law applied)*”.

13. For such a fundamental decision of principle which has led the Timetabling Panel to, in effect, reject TTP1331, the wording in paragraph 71 set out above is wholly insufficient reasoning in DB Cargo’s view. For example, there is no explanation of which obligations under [Network Rail’s] Licence, or which obligations in the various Track Access agreements or which parts of the Network Code [Part] D were relevant in the Timetabling Panel’s thinking and conclusions in this respect.

14. In fact, the reasons for the Timetabling Panel’s conclusions are made even more confusing by paragraph 72 in which the Timetabling Panel states that Network Rail was in breach of Condition D2.7.1 [of the Network Code]. This appears at odds with the determination that the Hybrid Timetable is the New Working Timetable given that Condition D2.7.1 states the “*The New Working Timetable shall be published by Network Rail at D-26, subject only to variations made in the course of the appeal process described in this Condition D2.7.*” This suggests to DB Cargo that the timetable issued by Network Rail on 8 June 2018 at D-26 is the New Working Timetable not the Hybrid Timetable that was issued over two months later.

### **Conclusion and summary**

15. DB Cargo considers that if the Determination is left unchallenged, it could create a precedent that despite the provisions of Condition D2.7 of the Network Code (which the Timetabling Panel considered that Network Rail was in breach of), the New Working Timetable issued at D-26 can be replaced subsequently at any time by Network Rail with a new timetable (or indeed timetables) which would then become the New Working Timetable.

16. DB Cargo relies on the provisions of Part D of the Network Code to provide certainty and stability in respect of the development of timetables in order to plan its business with a reasonable degree of assurance. The Determination casts doubt on DB Cargo’s ability to rely on these provisions if they can be overridden without the agreement of the Timetable Participant(s).

17. DB Cargo considers, therefore, that the Determination is wrong, unjust and lacks proper legal reasoning to enable DB Cargo to understand the conclusions that the Timetabling Panel has reached.

18. Consequently, DB Cargo requests ORR to determine that

- the Timetabling Panel erred in describing the Hybrid Timetable as the New Working Timetable and that the New Working Timetable is in fact the timetable

...



published by Network Rail at D-26 pursuant to Condition D2.7.1 of the Network Code;

- the New Working Timetable is defined in Part D of the Network Code and is not capable of being unilaterally withdrawn and replaced with some other timetable(s) such as in this case with the Hybrid Timetable;

19. If ORR considers that it is not able to agree with DB Cargo's requests above, in order to provide clear understanding for the industry, DB Cargo requests that ORR seeks to ascertain how the Timetabling Panel was able to conclude that the Hybrid Timetable is the New Working Timetable by reference to the legal entitlements of the parties.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'N. O. S.', written over a light grey rectangular background.

**Access Manager**

cc.

Network Rail  
Network Rail  
Network Rail  
GBRf  
ADC Secretary