



Determination by the Office of Rail and Road:

**Appeal pursuant to Part M of
the Network Code against a
Determination of the
Timetabling Panel of the
Access Disputes Committee,
dated 20 November 2018
(TTP1331 and TTP1376), by GB
Railfreight Limited on the
allocation of Train Slots under
the New Working Timetable**

12 April 2019

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Introduction

1. This determination by the Office of Rail and Road (“ORR”) concerns the appeal made by GB Railfreight Limited (“GBRf”) pursuant to Part M of the Network Code (“Part M”) against the determination of the Timetabling Panel of the Access Disputes Committee (“the TTP”) dated 20 November 2018 in respect of disputes reference TTP1331 and TTP1376 (“the Determination”)¹.
2. ORR issued a separate determination concerning this appeal on 13 March 2019 (“ORR’s March Determination”) in which ORR considered, amongst other things:
 - (a) whether the TTP was correct in determining that TTP1331 and TTP1376 raised issues which were outside its jurisdiction; and
 - (b) if not, whether the Hybrid Timetable properly took effect as the New Working Timetable.
3. In respect of the above issues, ORR concluded that the TTP was not correct in determining that it did not have jurisdiction in relation to a number of matters and ORR concluded that the Hybrid Timetable did properly take effect as the New Working Timetable.
4. In the Determination, the TTP stated that it was not required to consider the 63 Train Slots disputed by GBRf because the Train Slots were substantially drawn from the D-26 Weekday Timetable and this was not within the TTP’s jurisdiction. The TTP had determined that the timetable published at D-26 (“the D-26 Weekday Timetable”) had been superseded by the Hybrid Timetable.
5. In light of the above conclusions by ORR, this determination gives consideration to GBRf’s appeal regarding its dissatisfaction with the TTP’s failure to consider 63 Train Slots that were disputed with Network Rail on the basis that they were drawn from a superseded timetable. GBRf submits that the Train Slots which it considered should be included in the New Working Timetable were relevant to both the D-26 Weekday Timetable and the Hybrid Timetable.
6. The issues raised by DB Cargo (UK) Limited in its appeal regarding the Determination were addressed fully in ORR’s March Determination. This determination only deals with GBRf’s appeal regarding Train Slots it had requested.

¹ Capitalised terms in this determination shall have the meaning given to them in the Network Code unless otherwise stated.

Background to the Determination

7. The detailed background to the Determination is set out in paragraphs 26 to 36 of ORR's March Determination. In summary, the key relevant facts for the purposes of this determination are that:
 - (a) There were extensive revisions to the May 2018 Working Timetable during the May 2018 Timetable Period.
 - (b) On 8 June 2018 (D-26 for the purposes of the December 2018 Working Timetable), Network Rail published a timetable that offered weekday trains only (the D-26 Weekday Timetable).
 - (c) In a letter to industry, sent on 8 June 2018, Network Rail explained that it would issue the timetable for weekend trains at D-22 and that it intended to publish and offer the timetable at the Principal Exchange Date in December in two parts. Network Rail also provided a table containing proposed dates for this process.
 - (d) Following concerns about whether the D-26 Weekday Timetable could be successfully implemented, and a period of industry collaboration, Network Rail published a Hybrid Timetable which was implemented on 9 December 2018. The Hybrid Timetable included a timetable for both weekday and weekend trains.
 - (e) Network Rail stated that, for the purposes of the Hybrid Timetable, the decision as to which operators would continue with their D-26 offered timetable and which would have their May 2018 timetable rolled over was undertaken on a risk profile basis.
 - (f) On 22 June 2018, GBRf served a Notice of Dispute ("TTP1331") regarding Network Rail's decision (offer) made on 8 June 2018 in respect of the D-26 Weekday Timetable. On 23 August 2018, GBRf served a further, second Notice of Dispute ("TTP1376") regarding Network Rail's Hybrid Timetable, which Network Rail stated had replaced the D-26 Weekday Timetable.
8. The TTP heard both disputes together on 8 November 2018. GBRf's and Network Rail's submissions are summarised in paragraphs 35 and 36 of ORR's March Determination.
9. A description of the Network Code, and a number of relevant provisions in it, are included in paragraphs 7 to 25 of ORR's March Determination. In addition, it is relevant for the purposes of this determination that Condition M7.1.1 of the Network Code states that (where there is an appeal to ORR):

"Every appeal will be limited to a review of the decision of the lower tribunal unless the Office of Rail and Road considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing".

The Determination

10. In the Determination, the TTP stated that it was not required to consider the 63 Train Slots disputed by GBRf because the Train Slots were substantially drawn from the D-26 Weekday Timetable and this was not within the TTP's jurisdiction². The TTP determined that the D-26 Weekday Timetable had been superseded by the Hybrid Timetable³.
11. A detailed summary of the TTP's determination is contained in paragraphs 37 to 43 of ORR's March Determination.

ORR's handling of the appeal

12. ORR's handling of the appeal from 27 November 2018 until 11 February 2019 is contained in paragraphs 44 to 59 of ORR's March Determination.
13. On 13 March 2019, ORR published its determination (ORR's March Determination) on GBRf's and DB Cargo (UK) Limited's appeals, in which it considered (i) whether the TTP was correct in determining that TTP1331 and TTP1376 raised issues which were outside its jurisdiction, and (ii) if not, whether the Hybrid Timetable properly took effect as the New Working Timetable.
14. ORR concluded, amongst other things, that the TTP was incorrect to conclude that its jurisdiction prevented it from determining issues relevant to the production of the New Working Timetable, points of principle advanced by GBRf or matters of contract. ORR considered that the TTP was required to consider these matters to the extent necessary to properly hear GBRf's appeal. ORR stated that the TTP was required to consider whether the D-26 Weekday Timetable or the Hybrid Timetable should be treated as the timetable which was capable of appeal under Condition D2.7.2.
15. ORR also concluded that the Determination was correct in finding that the Hybrid Timetable properly took effect as the New Working Timetable despite not agreeing with the reasoning set out in the Determination.
16. On 13 March 2019, ORR also issued an accompanying letter to GBRf and Network Rail. In that letter, ORR stated that, having considered all relevant circumstances, ORR was minded to conclude that it could not proceed to make a determination in relation to GBRf's entitlement to the specific Train Slots without holding a re-hearing in relation to GBRf's disputed Train Slots and that it was not in the interests of justice for ORR to hold such a re-hearing.

² Section H, paragraph 75 - 76 of the Determination

³ Section H, paragraph 71 of the Determination

17. This would mean that ORR would not make a determination or direct remedy in relation to the specific Train Slots, but only in so far as it could determine the matters appealed by way of a review of the Determination. The letter stated that, should GBRf or Network Rail wish to make any representations in relation to the impact of ORR concluding this appeal without making a determination in relation to the specific Train Slots, these should be sent to ORR by 5pm on Monday 25 March 2019.
18. On 26 March 2019, GBRf and Network Rail confirmed that they had no further representations to make.

GBRf's appeal in relation to the Train Slots

19. GBRf's Notice of Appeal, dated 27 November 2018, stated that, in addition to the issue of the TTP's jurisdiction, GBRf wished to appeal the TTP's failure to consider GBRf's schedule of 63 disputed Train Slots because the TTP mistakenly considered that they were drawn from a superseded timetable⁴.
20. GBRf submitted that the TTP had erred in its decision not to consider all of the 63 disputed Train Slots on the basis that they were derived from the D-26 Weekday Timetable. GBRf stated that those Train Slots were "...also directly and inextricably related to the Hybrid Timetable/New Working Timetable ..."⁵. GBRf submitted that 61 of the 63 Train Slots disputed by GBRf had issues that were common to both the D-26 Weekday Timetable and the Hybrid Timetable⁶.
21. GBRf noted that the TTP directed Network Rail to review Train Slot 0E05 because GBRf had Firm Rights. GBRf submitted that it was not the only Train Slot with Firm Rights which had not been considered by Network Rail⁷.
22. GBRf submitted that the TTP's suggestion that GBRf should bid under the Short Term Planning arrangement or submit a Train Operator Variation Request for the 63 disputed Train Slots was not adequate recourse⁸. GBRf loses any effective right of appeal if Network Rail has ignored Access Proposals and the TTP shrinks from its responsibility of ordering a remedy⁹.

⁴ Paragraph 4.2 of GBRf's Notice of Appeal

⁵ Paragraph 20 of GBRf's Notice of Appeal

⁶ Paragraphs 23 - 24 of GBRf's Notice of Appeal

⁷ Paragraph 25.2 of GBRf's Notice of Appeal

⁸ Paragraphs 26-27 of GBRf's Notice of Appeal

⁹ Paragraph 28 of GBRf's Notice of Appeal

23. In relation to the three Train Slots which the TTP considered, GBRf noted that the TTP did not identify the valid reasons for Network Rail's decision to reject Train Slots 6L13HA and 4V52DA¹⁰.
24. In addition to its requested remedy that ORR provide guidance on the correct application of Part D of the Network Code, GBRf also sought a remedy from ORR that provided remedies for the disputed Train Slots on a train by train basis¹¹. GBRf provided a reason for appealing the decision in relation to each Train Slot. Reasons included the omission of Train Slots in the Hybrid Timetable which were included in the D-26 Weekday Timetable, a failure to explain a rejection by reference to the Decision Criteria, a failure to offer Train Slots which are consistent with the Timetable Planning Rules and a failure to offer Train Slots which are consistent with Firm Rights.

Network Rail's response

25. In response, Network Rail opposed the appeal and submitted that the TTP's determination was correct. Network Rail submitted that:
 - (a) the TTP was correct in its decision not to consider the 63 disputed Train Slots¹²; and
 - (b) in any event, in view of wider industry considerations and the passage of time, it is neither practicable nor possible for Network Rail to review the 63 disputed Train Slots¹³.
26. In respect of the disputed Train Slots, Network Rail submitted that:
 - (a) Network Rail agreed with the TTP's determination that it was not required to consider all the disputed Train Slots because they were drawn from the D-26 Weekday Timetable and that for business-critical Train Slots, GBRf is able to bid under Short Term Planning arrangements or submit a Train Operator Variation Request¹⁴.
 - (b) The D-26 Weekday Timetable was never a final decision of Network Rail for the purposes of Condition D4.7 and, due to various concerns about the deliverability of the D-26 Weekday Timetable, an industry decision was taken, sanctioned by the Secretary of State for Transport, to proceed instead with the Hybrid Timetable¹⁵. This meant that freight operators would have their May

¹⁰ Paragraph 25.1 of GBRf's Notice of Appeal

¹¹ GBRf's submission on remedies, dated 4 January 2019 (by email)

¹² Paragraph 1.8.2.2 of Network Rail's Response to GBRf's Appeal to ORR

¹³ Paragraph 1.8.2.3 of Network Rail's Response to GBRf's Appeal to ORR

¹⁴ Paragraphs 4.12 and 4.13 of Network Rail's Response Notice to GBRf's Appeal to ORR

¹⁵ Paragraph 4.3.4 of Network Rail's Response Notice to GBRf's Appeal to ORR

2018 timetable rolled over and would not proceed with the offer under the D-26 Weekday Timetable. Decisions made in relation to their Access Proposals became moot¹⁶.

- (c) GBRf's position that the TTP did have jurisdiction to consider the 63 disputed Train Slots because GBRf considered that the Hybrid Timetable did not supersede the D-26 Weekday Timetable "[...] shows a fundamental misunderstanding of the Hybrid Timetable and the exceptional industry circumstances that led to it"¹⁷. It was not possible for rolled over operators to be offered the Train Slots that they had requested in Access Proposals or been offered at D-26, due to the recognised need to de-risk the December 2018 timetable change¹⁸.
- (d) The preparation of the Hybrid Timetable did not involve the usual consideration of the operator's Access Proposals, but was a different process made necessary by exceptional circumstances. The treatment of GBRf's Access Proposals is not a relevant question¹⁹.
- (e) GBRf was given the opportunity to identify priority slots for inclusion in the Hybrid Timetable and did not identify the 63 disputed Train Slots as priority slots²⁰.
- (f) If every rolled over operator brought a TTP dispute in respect of the trains that they had requested in the Access Proposals that did not appear in the Hybrid Timetable, the disruption to the industry agreed approach would be obvious and it would have been impossible for Network Rail to comply with its obligations under its licence and provide a deliverable timetable change²¹.
- (g) It is not now possible to reconsider the 63 disputed Train Slots without causing serious prejudice to the successful implementation of the December 2018 Timetable and/or significant disruption to the schedules of other operators²².
- (h) GBRf is seeking to use the TTP process to undermine the industry agreed decision to adopt the Hybrid Timetable.²³
- (i) The disputed Train Slots were raised extremely late in the process²⁴. Further, GBRf did not make any serious attempt to request a decision in respect of the

¹⁶ Paragraph 4.3 of Network Rail's Response Notice to GBRf's Appeal to ORR

¹⁷ Paragraph 4.20.1 of Network Rail's Response Notice to GBRf's Appeal to ORR

¹⁸ Paragraph 4.20.4 of Network Rail's Response Notice to GBRf's Appeal to ORR

¹⁹ Paragraph 4.15 of Network Rail's Response Notice to GBRf's Appeal to ORR

²⁰ Paragraph 4.3 of Network Rail's Response Notice to GBRf's Appeal to ORR

²¹ Paragraph 4.20.7 of Network Rail's Response Notice to GBRf's Appeal to ORR

²² Paragraph 4.21 of Network Rail's Response Notice to GBRf's Appeal to ORR

²³ Paragraph 4.22 of Network Rail's Response Notice to GBRf's Appeal to ORR

²⁴ Paragraph 4.8 of Network Rail's Response Notice to GBRf's Appeal to ORR

Train Slots and did not make representations in relation to them when given the opportunity to do so²⁵.

27. Network Rail added that GBRf appears to be asking ORR to undertake a full re-hearing of the disputed Train Slots and that this is not the normal process for an appeal under Part M of the Network Code, which provides that ORR's role is limited to a review of a decision of the TTP²⁶.

GBRf's reply

28. In reply to Network Rail's response:

- (a) GBRf confirmed that it is not specifically seeking a full re-hearing, but this would depend upon ORR's consideration²⁷.
- (b) GBRf had no expectation that any disputed Train Slot other than one notified by it as priority would be ignored by Network Rail²⁸.
- (c) It would be "*against fair challenge to Network Rail's decisions*" if proper determination was precluded because of the potential impact on other operators²⁹.
- (d) GBRf refuted Network Rail's assertion that the case was brought too late and that no serious effort was made to request a TTP decision in respect of the Train Slots, that this was an integral part of the Sole Reference Document, but that this was swept aside by the TTP because of its decision regarding the Hybrid Timetable³⁰.

ORR's consideration of the appeal

29. ORR has carefully considered the issues relating to this ground of appeal and has considered in detail the Determination and the entirety of the submissions made by GBRf and Network Rail.
30. ORR considers that this ground of appeal raises the following issues:
- (a) whether the TTP was correct in determining that it was not required to consider the 63 Train Slots disputed by GBRf;
 - (b) if the TTP was not correct, whether ORR should proceed to make a determination in relation to the 63 Train Slots; and

²⁵ Paragraph 4.16 of Network Rail's Response Notice to GBRf's Appeal to ORR

²⁶ Paragraph 2.18 of Network Rail's Response Notice to GBRf's Appeal to ORR

²⁷ GBRf letter to ORR, dated 29 January 2019, page 5

²⁸ GBRf letter to ORR, dated 29 January 2019, page 4

²⁹ GBRf letter to ORR, dated 29 January 2019, page 4

³⁰ GBRf letter to ORR, dated 29 January 2019, page 4, 6

- (c) if the ORR should make such a determination, what that determination should be.

Whether the TTP should have considered the Train Slots

31. The TTP stated that “*Having concluded that the Hybrid Timetable is the New Working Timetable, then the Panel was no longer required to consider the GBRf schedule of disputed Train Slots because they were substantially drawn from the D-26 Weekday Timetable*”³¹.
32. GBRf appeals this conclusion on the basis that the TTP had “*a mistaken belief that [the Train Slots] were drawn from a superseded timetable*”³².
33. In ORR’s March Determination we concluded that Condition D2.7.2 of the Network Code envisages that there is a particular version of the New Working Timetable which is subject to the appeal process and that the TTP cannot make a determination in an appeal without having formed a view on the timetable which is the relevant starting point for the purpose of the appeal process³³.
34. It follows from the above that it would not be within the TTP’s jurisdiction to determine appeals in relation to previous versions of the New Working Timetable, created before the timetable which is the relevant starting point for the purpose of the appeal process. In any case, this would be academic and would appear to serve no useful purpose.
35. We concluded in ORR’s March Determination that the TTP was correct to determine that the Hybrid Timetable properly took effect as the New Working Timetable against which appeals could be brought under Condition D2.7.2³⁴. Therefore, if the Train Slots were disputed solely in relation to the D-26 Weekday Timetable, we would have agreed with the TTP that it need not have considered them. Indeed, we would have concluded that it would have been outside the TTP’s jurisdiction to consider appeals in relation to the D-26 Weekday Timetable.
36. However, in our view it was clear in GBRf’s submissions before the TTP³⁵ (and is clear before us³⁶) that GBRf is requesting remedies in relation to particular Train Slots which it has requested and which have not been offered to it in the Hybrid

³¹ Section H, paragraph 76 of the Determination

³² Paragraph 4.2 of GBRf’s Notice of Appeal

³³ Paragraph 95(g) and (h), ORR’s March Determination

³⁴ Paragraph 135, ORR’s March Determination

³⁵ See, in particular, paragraphs 4 and 6 and Appendix D of GBRf’s Sole Reference Document

³⁶ GBRf’s submission on remedies, dated 4 January 2019 (by e-mail)

Timetable. The dispute is not an academic dispute relevant only to the D-26 Weekday Timetable and it continues to be relevant to the timetable which was implemented.

37. Network Rail submits that the D-26 Weekday Timetable process and the Hybrid Timetable process were separate and that GBRf's Access Proposals are not relevant in the consideration of the Hybrid Timetable and so consequently cannot be the subject of an appeal³⁷.
38. ORR finds no support for this submission in the wording of the Network Code. On the contrary, Condition D2.7.2 provides simply that an affected Timetable Participant is entitled to appeal against any part of the New Working Timetable (other than in respect of specified International Freight Train Slots) provided the appeal is in time. As stated in ORR's March Determination, the Hybrid Timetable was the New Working Timetable for the purposes of the Network Code and was therefore subject to the appeal process. It is valid because it took effect under the Network Code. There is no provision which entitles the TTP to treat the issuing of the Hybrid Timetable as a different process, such that Access Proposals which proceeded it are not relevant.
39. On its face, GBRf has raised a dispute because it considers that Train Slots it requested should have been given to it in the New Working Timetable (which became the December 2018 timetable) and those Train Slots have not been given to it. GBRf's complaint falls squarely within the type of appeal which is envisaged in Condition D2.7.2. That does not mean that the complaint will succeed, but it should have been considered by the TTP.
40. On this basis, ORR concludes that the TTP was incorrect to determine that it was not required to consider the 63 disputed Train Slots raised by GBRf in its appeal.

Whether ORR should determine the Train Slots

41. Any conclusion that the TTP was incorrect to refuse to consider the relevant Train Slots does not mean that GBRf is entitled to those Train Slots. Whether GBRf is entitled under the Network Code would clearly require a determination from ORR on the matter.
42. As noted above, Condition M7.1 of the Network Code provides that "*Every appeal will be limited to a review of the decision of the lower tribunal unless the Office of Rail and Road considers in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing*".
43. The determinations set out in ORR's March Determination were made on the basis of a review of the Determination. Similarly, our determination of GBRf's ground of

³⁷ Paragraph 4.15 of Network Rail's Response Notice to GBRf's Appeal to ORR

appeal on whether the TTP should have considered the disputed Train Slots is made on the basis of a review of the Determination.

44. We have considered whether ORR could proceed to determine whether Network Rail was correct to refuse the requested 63 Train Slots³⁸ on the basis of a review of the TTP's determination. Having considered all the circumstances, we conclude that we could not make such a determination on the basis of a review. In particular:
- (a) The TTP determined that it was not required to make a determination in relation to the Train Slots. There is no decision on these matters for ORR to review. Equally, GBRf's appeal to the TTP raised a number of arguments in relation to Network Rail's consideration of Train Slots under the Network Code³⁹. The determination sets out no analysis in relation to these issues for ORR to review.
 - (b) ORR does not consider that the submissions and evidence before it would be sufficient for it to make a determination in relation to these Train Slots. The schedule of Train Slots setting out the remedies GBRf is seeking sets only a very brief summary of the issue in relation to each Train Slot.
 - (c) For example, where it is stated that Network Rail has failed to comply with the Timetable Planning Rules, it is not stated what the non-compliance is. Where it is stated that Network Rail has failed to offer slots which are consistent with Firm Rights, the particular rights and the infringement of them are not described.
 - (d) Where GBRf submits that it has been provided with no reason for the rejection of a Train Slot which was included in its Access Proposal, ORR does not consider that the failure to give a reason necessarily entitles GBRf to a particular Train Slot. This would again be a further area where it appears to ORR that further information would be needed for it to reach a determination, by way of a re-hearing of the dispute.
45. It appears to ORR that these factors, taken together, mean that it could not proceed by way of review and could only proceed to determine the Train Slots through a re-hearing of the dispute.
46. GBRf also criticises the TTP's determination that Train Slots '*6L13HA and 4V52DA had been rejected by Network Rail for valid reasons*'. However, these were not

³⁸ ORR's understanding is that there are actually now fewer than 63 Train Slots in dispute and would need to confirm the precise number.

³⁹ GBRf's Sole Reference Document, paragraph 5

included in the 63 Train Slots included within GBRf's ground of appeal⁴⁰ and so do not strictly fall for determination⁴¹.

47. As noted above, under Condition M7.1 of the Network Code, ORR should only conduct a re-hearing where it considers that, in the circumstances of an individual appeal, it would be in the interests of justice to do so.
48. We do not consider that a specific list of criteria should be applied in determining what is in the interests of justice. What justice requires will depend upon the circumstances of the individual case.
49. There are a number of relevant points which suggest that to conduct a re-hearing would be in the interests of justice. In particular:
 - (a) Condition D2.7.2 provides a mechanism for Timetable Participants to appeal against the New Working Timetable. Where a Timetable Participant has made an Access Proposal for a particular Train Slot to be given to it, it should generally be able to argue a rejection of its proposal on appeal before the TTP and, on further appeal, to ORR.
 - (b) ORR considers that the Network Code envisages that the appeal process will be complete before the relevant timetable is implemented. While that has not occurred here, it does not appear to ORR that the delay was caused primarily by GBRf. We also note that we have concluded in ORR's March Determination that Network Rail did not meet the timescales to comply with its obligations under the Network Code to make a final decision by D-26⁴².
 - (c) In addition, even though further detail would be needed for ORR to make a determination, GBRf has raised what appear to be some arguable points.
50. However, in this appeal there are a number of relevant points which suggest that to conduct a re-hearing would not be in the interests of justice. In particular:
 - (a) It was not a formal ground of GBRf's appeal that GBRf was entitled to the relevant Train Slots. The relevant ground of appeal was that the TTP had incorrectly failed to consider those Train Slots. It appears from GBRf's Notice of Appeal that its concern was to appeal the principle at stake, rather than the Train Slots in this particular case. It was not until we requested that GBRf

⁴⁰ Paragraph 4.2 of GBRf's Notice of Appeal, Section H, paragraphs 76 - 77 of the Determination and Appendix E to Network Rail's Response Notice to GBRf's Appeal to ORR

⁴¹ Even if these Train Slots were properly part of GBRf's appeal: (1) On **4V52DA** GBRf submits that it has been provided with no reason for the rejection. For the reasons set out above, ORR does not consider that it could determine this matter by way of review and could only proceed to determine the Train Slot through a re-hearing of the dispute. (2) On **6L13HA**, for the reasons set out in ORR's March Determination, we do not agree that the D-26 Weekday Timetable was binding. An appeal on the basis of this reason therefore fails.

⁴² Paragraph 130, ORR's March Determination

clarified the specific remedy it was seeking that it stated that it was expecting ORR to make a determination in respect of the relevant Train Slots. In doing so, GBRf set out an updated spreadsheet of the disputed Train Slots with very brief reasoning why it considered that Network Rail had failed to comply with its obligations. The level of detail set out in the spreadsheet itself does not on its own provide a satisfactory basis for ORR to determine that Network Rail has failed to comply with the Network Code in relation to its decision on the allocation of Train Slots.

- (b) The appeal relates solely to the December 2018 timetable. Although the New Working Timetable for December 2018 became the Prior Working Timetable for the May 2019 timetable, this did not prevent GBRf from making Access Proposals separately for the May 2019 timetable in respect of any Train Slots which it still seeks. Under the provisions of the Network Code, it was not disadvantaged in relation to future timetables.
- (c) The December 2018 timetable was implemented on 9 December 2018 and runs until 18 May 2019 and so much of the period has already elapsed. The benefit which GBRf would obtain were it to succeed is already significantly lessened.
- (d) On any reasonable timescale, even with the upmost cooperation and diligence by all involved, several more weeks would elapse before we would be able to make a determination. In particular, it appears to us that a consideration of whether or not Network Rail made decisions in accordance with the Decision Criteria would require detailed submissions from Network Rail. Time would be needed for further submissions to be compiled and provided.
- (e) If GBRf were to succeed in demonstrating that Network Rail had not complied with the Network Code in its consideration of these Train Slots, ORR would not automatically determine that Network Rail should revise the Working Timetable to give those Train Slots to GBRf. As Network Rail submits, and as GBRf acknowledges in relation to a number of Train Slots, changes to the Working Timetable may have an impact on the Train Slots currently allocated to other Timetable Participants or on Network Rail. We do not consider that it would be fair in these circumstances that Network Rail should be required to make a change to the Working Timetable without the impact on Network Rail and on other Timetable Participants being understood and without them being given an opportunity to make representations.
- (f) On the basis of the above points, it seems highly likely that the process for a re-hearing and subsequent implementation of any determination would run until the end of the timetable period (making the re-hearing arguably academic). Even if it did not, any benefit GBRf would receive would be Train Slots being given to it for only a few days or weeks. ORR considers that a significant amount of time and resources would be needed to complete the re-hearing and this is likely to be for limited benefit to any party.

51. Having considered all relevant circumstances in this appeal, we conclude that it is not in the interests of justice for ORR to hold a re-hearing in relation to the disputed Train Slots. This means that ORR will not make any determination in relation to the specific Train Slots and that GBRf's appeal is concluded following our determination made on the basis of a review of the TTP's decision.

Overall Conclusions

52. Having reviewed the Determination, ORR concludes that the TTP was incorrect to determine that it was not required to consider the 63 disputed Train Slots raised by GBRf in its appeal.

53. ORR considers that there are a number of factors which, taken together, mean that it could not proceed by way of review and could only proceed to determine the disputed Train Slots through a re-hearing of the dispute.

54. However, having considered all relevant circumstances in this appeal, we conclude that it is not in the interests of justice for ORR to hold a re-hearing in relation to the disputed Train Slots. This means that ORR will not make any determination in relation to the specific Train Slots and that GBRf's appeal is concluded following our determination made on the basis of a review of the TTP's decision.

ORR's Determination

56. In light of the considerations above and having considered GBRf's Notice of Appeal and other relevant documents, ORR determines in relation to GBRf's appeal on the consideration of the 63 disputed Train Slots that the Determination misconstrued Part D in finding that the TTP was not required to make a determination in relation to the disputed Train Slots.
57. ORR determines that the ground of GBRf's appeal relating to paragraph 76 of the Determination succeeds, that the paragraph is wrong and should be, in effect, struck out from the Determination.



Juliet Lazarus

General Counsel and Director of Competition

Duly Authorised by the Office of Rail and Road

12 April 2019