



Office of Rail and Road
GB Railfreight Ltd
Freightliner Ltd
Freightliner Heavy Haul Ltd
DB Schenker Rail (UK) Ltd
First Greater Western Ltd

Network Rail Infrastructure Limited
Cottons Centre
Cottons Lane
London
SE1 2QG

T: [REDACTED]

By Email and Post

08 July 2015

Dear Sirs

NOTICE OF APPEAL UNDER PART M OF THE NETWORK CODE

1 NOTICE OF APPEAL

- 1.1. Under Part M of the Network Code, on 18 June 2015, Network Rail Infrastructure Limited (the **Appellant**) served a notice of appeal in relation to paragraphs 6.1.1, 6.1.2, 6.1.3 and 6.1.5 of a determination of the Timetabling Panel of the Access Disputes Committee dated 12 June 2015 in respect of TTP807 and TTP808 (the **Determination**).
- 1.2. As part of this notice, the Appellant sought an extension of time to formulate and serve further detailed grounds of appeal. The Office of Rail and Road (ORR) granted this request, allowing an extension for the submission of the Appellant's appeal to 9 July 2015.
- 1.3. This notice, together with the Appellant's notice dated 18 June 2015,¹ constitutes the Appellant's complete Notice of Appeal in accordance with Clause 3.1.1 of Part M of the Network Code (the **Notice of Appeal**).
- 1.4. Unless otherwise defined, the terms used herein adopt the definitions provided under the Network Code (the **Code**).

¹ See Exhibit 1, Notice of the TTP807 and TTP808 Appeal dated 18 June 2015.

1.5. The evidence in support of this Notice of Appeal is attached to this notice as an exhibit.

2 SUMMARY

2.1. The Appellant wishes to appeal the following paragraphs of the Determination, which provide:

6.1.1 That Timetable Planning Rule changes may not be implemented if the associated Network Change has not been established and implemented under Condition G.10 of the Network Code. Accordingly the present decision by Network Rail published on 2 March 2015 in relation to Timetabling Planning Rules 2016 at West Ealing together with the consultation document dated 13 February 2015 shall be withdrawn.

6.1.2 This determination does not prevent Network Rail proposing TPRs changes but these should be conditional upon the Network Change being established and implemented, and the changes to the Rules need to state whether TPRs changes are subject to the implementation of Network Changes.

6.1.3 This determination does not remove the onus upon Network Rail and Timetable Participants to discuss and to agree TPRs values in the absence of established Network Change.

...

6.1.5 ... If I had been able to support the Network Rail decision on 2 March 2015 then the reasons set out at paragraph 6.1.1 of this determination would have prevented me from doing so.²

2.2. The Appellant believes that paragraphs 6.1.1, 6.1.2, 6.1.3 and (in part, as outlined below) 6.1.5 of the Determination are wrong and should be struck out for the reasons set out in detail below, summarised as follows:

² Paragraphs 6.1.1 to 6.1.5, Exhibit 2, the Determination.

- 2.2.1. the Determination relies on paragraph 5.1 of a determination of the Timetabling Panel of the Access Disputes Committee dated 8 December 2014 in respect of TTP371, TTP513, TTP514, TTP570 and TTP571. This paragraph was struck out by the ORR (then referred to as the Office of Rail Regulation) in its decision dated 11 June 2015 in respect of the Appellant's previous Appeal of the determination relating to TTP371, TTP513, TTP514 and TTP570 and TTP571 (the **TTP371 Appeal**)³;
- 2.2.2. the Determination thereby directly conflicts with the TTP371 Appeal;
- 2.2.3. the Determination also conflicts with Access Dispute Resolution Rule A7 which provides, *inter alia*, that '*in reaching its determination each and every forum shall:...(b) be bound by any relevant decisions of the ORR on a regulatory issue and any relevant decision of the courts*';
- 2.2.4. in the alternative, and in any event, paragraphs 6.1.1, 6.1.2, 6.1.3 and (in part) 6.1.5 introduce an express link between a Timetable Planning Rule (TPR) change under Part D of the Code and a Network Change under Part G of the Code which does not presently exist in the Code;
- 2.2.5. this link will create a precedent in the form of a TTP determination which is likely to have a significant detrimental impact on the operation of Parts D and G of the Code;
- 2.2.6. this Determination is therefore of importance to the industry as a whole. The relevant paragraphs should be struck out, as the ORR determined in the TTP371 Appeal.
- 2.3. The Appellant therefore asks the ORR to hear an appeal in respect of paragraphs 6.1.1, 6.1.2, 6.1.3 and 6.1.5, and then to remove paragraphs 6.1.1, 6.1.2, 6.1.3 and (in part) 6.1.5 from the Determination.

3 FACTS AND BACKGROUND

- 3.1. On 3 March 2015 and 9 March 2015 respectively, GB Railfreight Ltd (GBRf) and Freightliner Ltd and Freightliner Heavy Haul Ltd (together, FL) issued a Notice

³ See Exhibit 3, the TTP371 Appeal.

of Dispute to the Access Disputes Committee, which were duly registered as TTP807 and TTP808.

- 3.2. On 23 April 2015 the Allocation Chair, pursuant to Access Disputes Resolution Rule B20, ordered that TTP807 and TTP808 should be heard and resolved together.
- 3.3. At and around the same time as TTP807 and TTP808 proceeded to the Timetable Panel hearing, First Greater Western Ltd (**FGW**) and DB Schenker Rail (UK) Ltd (**DBS**) were also each joined as a Dispute Party. They, together with GBRf, FL and the Appellant, are the **Dispute Parties**.
- 3.4. TTP807 and TTP808 relate to the Appellant's decision to amend and make certain additions to the TPRs around the West Ealing area. As outlined in the document entitled "*Amendment to GW103 and GW174 Timetable Planning Rules 2016, Sections 2.1, 5.2.1, 5.3 and 5.4-Decisions*"⁴ circulated to the Dispute Parties on 13 February 2015, the Appellant proposed various TPR amendments and additions around West Ealing in relation to, *inter alia*, headway values, junction margins, sectional running times and platform lengths.
- 3.5. Such changes to the TPRs are to apply over the 2015 Christmas period, as this provides the Appellant with the necessary time needed to complete these works (a minimum 10 day possession is required) and ensures that the critical path of works for the Crossrail programme is followed. If this work were not to be carried out over the 2015 Christmas period, the next opportunity the Appellant will have to complete such work is during the 2018 Christmas period, given that other work is timetabled for the 2016 and 2017 Christmas periods which is incompatible with the work required at West Ealing. Such a delay would mean that the Crossrail programme would be unable to meet its committed finish date of September 2018. FGW would also be at risk of breaching its own franchise commitment to operate new services which require the new infrastructure at West Ealing from no later than May 2016.
- 3.6. In conjunction with the proposal to amend the TPRs, the Appellant has also proposed a Network Change, initially issued to the Dispute Parties on 5 August

⁴ See Exhibit 4, Amendment to GW103 and GW174 Timetable Planning Rules 2016, Sections 2.1, 5.2.1, 5.3 and 5.4.

2014, for a new layout at West Ealing.⁵ At present, there is a double junction at West Ealing between the Relief lines and the Greenford branch line. The altered physical layout will convert this double junction into a single lead junction, and create a new bay platform at West Ealing station from which the Greenford branch passenger service will in future depart and at which it will terminate.

- 3.7. At the date of this Notice of Appeal, this proposed Network Change has neither been established nor implemented.
- 3.8. Each of the Dispute Parties served a sole reference document to the Access Dispute Committee. At the hearing which took place on 1 June 2015 all the Dispute Parties apart from DBS also provided written opening submissions.
- 3.9. As is apparent from such submissions, the main issue between the Dispute Parties was the relationship between Parts D and G of the Network Code. The specific issue considered was whether TPR changes could be implemented if an associated Network Change had not been established and implemented under Condition G.10 of the Network Code. GBRf, FL and DBS submitted that the Appellant could not implement a TPR decision document in respect of a Network Change prior to the establishment of the associated Network Change under Part G of the Network Code.⁶ In contrast, the Appellant submitted that both Parts D and G are separate and distinct parts of the Network Code; Part D being related to timetabling and Part G covering the commercial settlement between the Appellant and Access Beneficiaries as a result of changes to the Network affecting their businesses.⁷ FGW submitted that, in this instance, it is "*...necessary to have the Timetable Planning Rules in place to provide a robust timetable, and it is not necessary to have the infrastructure in place to enable the Timetable Planning Rules (that refer to through services) to be in place.*"⁸
- 3.10. Various other substantive issues were also raised in the submissions including, *inter alia*, the interpretation of Condition D.2.2.7 of the Network Code and whether the Appellant had supplied sufficient evidence to substantiate the newly

⁵ See Exhibit 5, letter dated 5 August 2014 from Appellant to various parties regarding the proposed G1 Network Change.

⁶ Paragraphs 3.1.1, 3.1.2, 3.2.1 and 3.3.1, Exhibit 2, the Determination.

⁷ Paragraph 3.4.7, Exhibit 2, the Determination.

⁸ Summary point 3, Exhibit 6, FGW's written submission in respect of disputes TTP807 and TTP808.

proposed TPR values as part of its consultation with the Dispute Parties. Such issues, and the parts of the Determination on such issues, are not the subject of this Notice of Appeal. For the avoidance of doubt, the Appellant does not seek to challenge each and every issue raised between the Dispute Parties and addressed in the Determination. This Notice of Appeal appeals the Determination's findings on the interaction between Parts D and G of the Network Code, as explicitly outlined in this Notice of Appeal.

3.11. The Determination was issued on 12 June 2015. In relation to the main issue between the Dispute Parties, the Hearing Chair determined:

6.1.1 That Timetable Planning Rule changes may not be implemented if the associated Network Change has not been established and implemented under Condition G.10 of the Network Code. Accordingly the present decision by Network Rail published on 2 March 2015 in relation to Timetable Planning Rules 2016 at West Ealing together with the consultation document dated 13 February 2015 shall be withdrawn.

6.1.2 This determination does not prevent Network Rail proposing TPRs changes but these should be conditional upon the Network Change being established and implemented, and the changes to the Rules need to state whether TPRs changes are subject to the implementation of Network Changes.

6.1.3 This determination does not remove the onus upon Network Rail and Timetable Participants to discuss and to agree TPRs values in the absence of established Network Change.

...

6.1.5 ... If I had been able to support the Network Rail decision on 2 March 2015 then the reasons set out at paragraph 6.1.1 of this determination would have prevented me from doing so.¹⁹

4 GROUNDS OF APPEAL

The Determination directly conflicts with the TTP371 Appeal

¹⁹ Paragraphs 6.1.1 to 6.1.5, Exhibit 2, the Determination.

4.1. In the Determination, the Hearing Chair referred to the determination of TTP371, TTP513, TTP514, TTP570 and TTP571 dated 8 December 2014. He quoted and relied on paragraph 5.1 of that determination which had found that "A *Timetable Planning Rule change related solely to a Network Change should not be put into effect before the associated Network Change is implemented.*"¹⁰ In referring to this quotation the Appellant adopts the Hearing Chair's definition used throughout the Determination, "Determination TTP371".

4.2. Relying on Determination TTP371, the Hearing Chair then concluded:

"I confirm that I have placed weight on Determination TTP371 which appears to me to be entirely logical. I therefore determine in relation to the first issue that the present decision by Network Rail dated 2 March 2015 in relation to TPRs 2016 at West Ealing should be withdrawn (together with the consultation document dated 13 February 2015) because those TPRs changes are not explicitly conditional on the associated Network Change being implemented under Condition G10."¹¹ (emphasis added)

4.3. However, as the Determination reports, the Hearing Chair, the Panel representatives and the Dispute Parties were all aware that Determination TTP371 was subject to an appeal to the ORR, which had been accepted by the ORR for hearing on 13 March 2015, and in respect of which the ORR's decision was believed to be imminent. So as to avoid any potential inconsistency between the Determination and the TTP371 Appeal, prior to 1 June 2015 the Appellant orally requested that the Access Dispute Committee delay the hearing until after the ORR's decision on Determination TTP371 was released. There was also no reason why the Hearing needed to be heard as matter of immediate urgency. The Appellant's request was refused, with no justification being provided as to why the hearing could not be postponed.

4.4. The hearing proceeded to be held on 1 June 2015. The Hearing Chair also disregarded the fact that Determination TTP371 was subject to appeal, noting

¹⁰ Paragraph 5.4, Exhibit 2, the Determination.

¹¹ Paragraph 5.15, Exhibit 2, the Determination.

that this was *"a matter which I have ignored for the purposes of this determination."*¹²

4.5. The TTP371 Appeal was dated 11 June 2015 and sent to the Appellant and the other dispute parties to the TTP371 Appeal, which included the Appellant and FL, on 12 June 2015. This was the same date as the Determination.

4.6. The decision to proceed with the hearing and to issue the Determination prior to the conclusion of the TTP371 Appeal was therefore premature. Furthermore, the Determination and TTP371 Appeal now provide inconsistent and conflicting decisions, as follows:

4.6.1. In the Determination, Determination TTP371 is cited as relevant and *"entirely logical"*¹³ and express reference is made to paragraph 5.1 of Determination TTP371. In the TTP371 Appeal the ORR determined that *"Paragraph 5.1 of the Determination....shall be struck out."*¹⁴

4.6.2. The Determination created an express link between Parts D and G of the Network Code, by holding that *"Timetable Planning Rule changes may not be implemented if the associated Network Change has not been established and implemented under Condition G.10 of the Network Code."*¹⁵ The Determination also stated that whilst the Appellant might propose TPR changes, these changes *"...should be conditional upon the Network Code being established and implemented, and the changes to the Rules need to state whether TPRs changes are subject to the implementation of Network Changes."*¹⁶

4.6.3. The TTP371 Appeal found that it would not be appropriate to create such a link between Parts D and G of the Network Code (either by using the words "establishing" or "implementing") given that the *"resultant interaction between Parts D and G would be inflexible"*¹⁷ and *"would*

¹² Paragraph 5.4, Exhibit 2, the Determination.

¹³ Paragraph 5.15, Exhibit 2, the Determination.

¹⁴ Paragraph 50, Exhibit 3, the TTP371 Appeal.

¹⁵ Paragraph 6.1.1, Exhibit 2, the Determination.

¹⁶ Paragraph 6.1.2, Exhibit 2, the Determination. See also paragraph 5.13, Exhibit 2, the Determination.

¹⁷ Paragraph 40, Exhibit 3, the TTP371 Appeal.

maintain a link between Parts D and G of the Network Code that was not previously stated in the Network Code."¹⁸

4.7. The Determination is therefore wrong on the basis that it directly contradicts the TTP371 Appeal and is entirely inconsistent with it.

4.8. Further, and in the alternative, the Determination does not comply with Access Dispute Resolution (ADR) Rule A7 which, as cited in the Determination at paragraph 5.8, provides:

"In reaching its determination each and every Forum shall:

(a) take note of relevant published ADA or TTP determinations (and those of any predecessor bodies) and of any other relevant tribunal excluding (to the extent referred to in (b) below) the ORR, has persuasive authority, but need not be bound by them;

(b) be bound by any relevant decision of the ORR on a regulatory issue and any relevant decision of the courts."

4.9. The TTP371 Appeal is a binding precedent pursuant to ADR Rule A7 (b) given that it is an ORR decision which preserves the deliberate lack of express link between Parts D and G of the Network Code. TTP371 Appeal is a relevant decision of the ORR on a regulatory issue for the purposes of the ADR Rules.

4.10. As the ADR provides in Rule 1 (Definitions and Interpretation), a Regulatory Issue is a "*principle, issue or process connected with the railway industry (and any interactions between such principles, issues and processes) which: (a) concerns the regulated structure of the industry as a whole or material part of it, or (b) relates to or is closely aligned with a matter on which the ORR has regulatory oversight (from time to time); or (c) is connected with ORR's duties, functions or powers as a regulator including without limitation under the Railways Act 1993 S 4.*"

4.11. By considering and holding that a link between Parts D and G of the Network Code could not be created without proper consideration within the industry, the TTP371 Appeal dealt with an issue which affects the regulated structure of the

¹⁸ Paragraph 42, Exhibit 3, the TTP371 Appeal.

industry as a whole. As such, the Determination is wrong in law and in breach of ADR Rule A7(b) by virtue of purporting to contradict binding precedent.

4.12. Without prejudice to the binding nature of the TTP371 Appeal, if the ORR finds that the TTP371 Appeal is not a regulatory issue for the purposes of ADR Rule A7(b), the Appellant submits that the TTP371 Appeal is, in any event, a relevant published ORR determination. The Determination was therefore obliged to take note of the TTP371 Appeal as having persuasive authority. The Hearing Chair wholly failed to do so, by expressly ignoring it for purposes of the Determination,¹⁹ and/or by failing to wait for the imminent decision of the ORR in order to take the TTP371 Appeal properly into account.

Importance to the Industry: Parts D and G of the Network Code are distinct and operate separately and should not be linked

4.13. The Appellant submits that Parts D and G of the Network Code are distinct and contractually separate parts of the Network Code. The Appellant refers the ORR to its previous Notice of Appeal dated 16 January 2015 in relation to Determination TTP371 and repeats in full the examples of contractual differences between Parts D and G of the Network Code outlined at paragraphs 4.2 to 4.9 of that notice²⁰.

4.14. In summary:

4.14.1. Parts D and G of the Network Code operate and apply to two separate processes. Part D refers to the process for revision of the timetable of the Network; Part G deals with Network Change and sets out the consultation and compensation process generally arising from either physical or operational changes to the Network.

4.14.2. Parts D and G of the Network Code apply different timescales. Part D provides clearly defined timescales in relation to the consultation and implementation of TPR, which must be strictly adhered to. This has an operational benefit as all Timetable Participants will be aware of the

¹⁹ Paragraph 5.4, Exhibit 2, the Determination.

²⁰ Paragraphs 4.2 to 4.9, Exhibit 7, the Appellant's Notice of Appeal in respect of Determination TTP371.

fixed Working Timetable 6 months before it comes into effect and can therefore plan accordingly. In contrast, Part G provides few timescales, and stipulates no timescales at all in relation to either the establishment or implementation of the Network Change. This allows the Access Parties affected by the Network Change to consider carefully and discuss whether the conditions of Part G have been satisfied and/or whether the Network Change should be implemented.

4.14.3. Part D of the Network Code stipulates decision criteria which the Appellant must apply when determining TPR changes. These decision criteria do not include any reference at all to whether there is a Network Change under Part G which is related to the proposed TPR changes.

4.14.4. Furthermore, Part G does not contain any criteria which require, as part of Network Change, that the decisions should include consideration of whether there are TPR changes under Part D linked to the Network Change under Part G.

4.14.5. The only instance where Part G is referred to in Part D, at Condition D6.6.1, is not applicable to the current Determination, as it addresses the separate issue of Possessions Strategy Notices. Condition D6 is also stated to be "*without prejudice to Part G*" which emphasises and preserves the distinction between Part D and Part G provided for in the Network Code.

4.15. Given such contractual differences, the Appellant submits that the Network Code deliberately does not include a link between Parts D and G of the Network Code. Paragraphs 6.1.1 and 6.1.2 of the Determination are therefore wrong as they create an inappropriate and unprecedented contractual link between Parts D and G of the Network Code by stating:

4.15.1. that TPR changes may not be implemented under Part D of the Network Code where the associated Network Change has not been established and implemented under Part G of the Network Code;²¹ and

²¹ Paragraph 6.1.1, Exhibit 2, the Determination.

4.15.2. that TPR changes should be conditional upon the Network Change being established and implemented and changes to the Rules need to state whether TPRs changes are subject to the implementation of Network Changes.²²

Importance to the industry: examples of the impact on the industry of a link between Part D and Part G

4.16. If the link between Parts D and G of the Network Code set out in the Determination at paragraphs 6.1.1 and 6.1.2 is introduced, this would lead to significant operational issues and practical uncertainties for the wider industry.

4.17. The Appellant refers to paragraphs 4.13 to 4.15, 4.25 and 4.26 of its Notice of Appeal dated 16 January 2015 in relation to Determination TTP371,²³ which provide details of such operational and practical difficulties in the event that a TPR change related solely to a Network Change is not allowed to be put into effect before the associated Network Change is implemented.

4.18. The Appellant notes that these difficulties were also acknowledged by the ORR in the TTP371 Appeal. As outlined at paragraphs 40 to 43 of the TTP371 Appeal:²⁴

4.18.1. If TPR changes relating solely to a Network Change were not to be put into effect until the associated Network Change was implemented, the ORR said that:

"...the resultant interaction between Parts D and G would be inflexible. ORR considers some examples of these effects are (and these are in line with the examples provided by Network Rail in its Appeal):

- *An inability of Network Rail to draft a timetable that would take effect immediately after the implementation of a Network Change, which might prevent use being made of new infrastructure until a subsequent timetable change date.*

²² Paragraph 6.1.2, Exhibit 2, the Determination.

²³ See Exhibit 7, the Appellant's Notice of Appeal in respect of Determination TTP371.

²⁴ Paragraphs 40 to 43, Exhibit 3, the TTP371 Appeal.

- *An inability of Network Rail to draft a timetable to replace one that could not be operated on altered infrastructure.*²⁵

4.18.2. The ORR said that it was satisfied that such a link was incorrect "...by virtue of its potential and likely effects on the industry's ability to take full and prompt advantage of Network Changes."²⁶

4.18.3. The ORR also recognised that there would be difficulties if TPR changes relating solely to a Network Change were not permitted to be put into effect before the associated Network Change is *established* (rather than implemented) stating that this would:

4.18.3.1. "...maintain a link between Parts D and G of the Network Code that was not previously expressly stated in the Network Code. ORR would need to give a full and detailed consideration to the impact of such a link and ensure that it was desirable in all of its potential consequences. This would be a significant piece of work for ORR and the industry."

4.18.3.2. "...impact on all operators. As such, ORR would need to conduct an industry consultation in order to enable the consideration referred to, above."²⁷ [i.e. paragraph 4.18.3.1 of this Notice of Appeal]

4.19. Paragraphs 6.1.1 and 6.1.2 of the Determination also create uncertainty as to what planning values the Appellant should use when constructing and/or validating a Working Timetable. For example, if the Appellant were to revise the TPRs by adding new values that only take effect from the date that the Network Change is due to be implemented, and to make these TPRs expressly conditional on this implementation, what rules should the Appellant use to build the Working Timetable, which is changed only twice a year? If the Appellant builds the Working Timetable based on the unchanged values as the new values cannot yet be used, there is a risk that trains might be removed from the Working Timetable. Alternatively, if the Appellant adopts the new values, there

²⁵ Paragraph 40, Exhibit 3, the TTP371 Appeal.

²⁶ Paragraph 41, Exhibit 3, the TTP371 Appeal.

²⁷ Paragraph 43, Exhibit 3, the TTP371 Appeal.

is likely to be a poor performing Working Timetable as the new values are applied to the unchanged Network. Another alternative would be to prepare and build two Working Timetables; one in the event that a Network Change is implemented and the other where the Network Change is not. The task of preparing and drawing up a Working Timetable is notoriously complex, demanding time and resources. This is why Part D works to strict deadlines and only envisages changes twice a year. To prepare two Working Timetables would demand even more resources so that the two alternatives could be built up and would risk creating uncertainty and confusion for all parties involved.

- 4.20. For the above reasons, the Appellant submits that paragraphs 6.1.1 and 6.1.2 of the Determination are therefore wrong as the link they create between Parts D and G of the Network Code is likely to have a significant detrimental impact on the operations of Parts D and G of the Network Code and the relevant parties' operation of those Parts. It is also likely to cause significant practical difficulties, given the foreseeable significant delays in using infrastructure whilst the Network Change is established and implemented prior to the application of TPRs. All that an Access Party would have to do in order to frustrate and delay a TPR change would be to claim that a Network Change had not been established and/or implemented.

Paragraph 6.1.5 of the Determination is wrong by virtue of its reference to paragraph 6.1.1 of the Determination

- 4.21. In the last sentence of paragraph 6.1.5 of the Determination, the Hearing Chair determined that "*...if I had been able to support the Network Rail decision on 2 March 2015 then the reasons set out at paragraph 6.1.1 of this determination would have prevented me from doing so.*"²⁸ The Appellant seeks to appeal this sentence given its reference to paragraph 6.1.1 of the Determination which, for the reasons stated above in this Notice of Appeal, the Appellant submits is wrong. For the avoidance of doubt, the Appellant does not wish to appeal either the first or second sentences of paragraph 6.1.5 of the Determination.

Paragraph 6.1.3 is wrong because it purports to extend the obligations arising under Condition D2.2.7 of the Network Code

²⁸ Paragraph 6.1.5, Exhibit 2, the Determination.

4.22. Paragraph 6.1.3 of the Determination provides:

"This determination does not remove the onus upon Network Rail and Timetable Participants to discuss and to agree TPRs values in the absence of established Network Change."²⁹ (our emphasis added)

4.23. The Appellant considers that paragraph 6.1.3 of the Determination purports significantly to extend the Dispute Parties' obligations under Condition D2.2.7 of the Network Code which do not include the words "*and to agree*". Condition D2.2.7 provides:

"Between D-44 and publication of the New Working Timetable at D-26, Network Rail may further revise the Rules where it considers, acting reasonably, such revision necessary or desirable in order to optimise that New Working Timetable. Before making any such further revisions to the Rules, Network Rail must first consult with all Timetable Participants who may be affected by the proposed changes. Network Rail will then inform all affected Timetable Participants of any such changes as soon as practicable after they are made..." (our emphasis added)

4.24. Paragraph 6.1.3 of the Determination purports to extend Condition D2.2.7 of the Network Code by expanding the parties' obligations under this condition. Pursuant to Condition D2.2.7 of the Network Code, the Appellant is only required to consult with the Timetable Participants and then inform those Timetable Participants affected by such changes; the Appellant is not required to *agree* the TPRs with *all* Timetable Participants, as paragraph 6.1.3 of the Determination provides. Again, to require agreement as well as consultation would enable Timetable Participants to frustrate the operation of Part D and any changes to TPRs, simply by refusing to agree them. The obligation under Condition D2.2.7 on the Appellant requires consultation, a well defined legal concept, rather than agreement. Consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and

²⁹ Paragraph 6.1.3, Exhibit 2, the Determination.

the product of consultation must be conscientiously taken into account when the ultimate decision is taken.³⁰

5 DECISION SOUGHT

- 5.1. The Appellant submits that this Notice of Appeal should proceed to appeal as it raises matters which are of significant importance to the industry. The grounds outlined in the Condition 4.1. of Part M of the Code do not apply.
- 5.2. The Appellant seeks that paragraphs 6.1.1 and 6.1.2 of the Determination should be overturned in their entirety on any or all of the following grounds:
 - 5.2.1. the Determination purports to rely on and apply Determination TTP371, which was struck out by TTP371 Appeal so that the Determination:
 - 5.2.1.1. directly conflicts with the TTP371 Appeal; and
 - 5.2.1.2. is in breach of Access Dispute Resolution Rule A7 by failing to be bound by a relevant decision of the ORR on a regulatory issue, and/or failing to take note of the persuasive authority of the ORR on this issue.
 - 5.2.2. paragraphs 6.1.1 and 6.1.2 of the Determination are wrong as they establish an express link between the TPR changes under Part D of the Code and Network Changes under Part G of the Network Code which:
 - 5.2.2.1. does not currently exist nor which has been provided by other precedent; and/or
 - 5.2.2.2. is likely to have a significant detrimental impact on the operations of Parts D and G of the Network Code, the relevant parties understanding of such operation, and is likely to cause significant difficulties if applied in practice.
- 5.3. The Appellant seeks that the last sentence of paragraph 6.1.5 of the Determination should be overturned as it references paragraph 6.1.1 of the

³⁰ Also referred to as "the Sedley Requirements" see, for example, Exhibit 8, *R v London Borough of Barnet, ex p B* [1994] 2 F.C.R. 781 and Exhibit 9, *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

Determination which is wrong for the reasons mentioned at paragraph 5.2 of this Notice of Appeal.

- 5.4. The Appellant seeks that paragraph 6.1.3 of the Determination should be struck out as it purports to extend the obligations of the Appellant and Timetable Participants under Condition D2.2.7 of the Network Code. The Appellant seeks that paragraph 6.1.3 of the Determination be deleted in its entirety and replaced with the following wording:

"This determination does not affect Network Rail's and Timetable Participants' respective obligations under Condition D2.2.7 of the Network Code."

Please acknowledge receipt of this Notice of Appeal.

Yours faithfully

P. P. 



Legal Counsel

