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31 January 2019

Dear Katherine,

**APPEAL UNDER PART M OF THE NETWORK CODE BY DB CARGO (UK) LIMITED
IN RESPECT OF DETERMINATIONS TTP1331 & 1376 OF THE TIMETABLING PANEL**

I am writing in regard to ORR's letter dated 18 January 2019 ("**the letter**") in respect of the above matter. In the letter at paragraph 4(c), ORR gives DB Cargo (UK) Limited ("**DB Cargo**") an opportunity to respond to the submissions made in the Respondent's Notices (dated 12 December 2018 & 9 January 2019) ("**the notices**") on two specific issues:

- (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.

This letter sets out DB Cargo's responses on the submissions made in the notices on these two issues.

Jurisdiction

Access Dispute Resolution ("**ADR**") Rule H1 sets out the purpose of a Timetabling Panel in the following terms:

"The purpose of a Timetabling Panel is to determine disputes referred to it by parties to an access agreement which incorporates Part D of the Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity including restrictions of use and train slots, in:

- (a) such an access agreement; or*
- (b) the Access Conditions incorporated by reference in the access agreement in question"*

ADR Rules H6 to H9 set out the disputes to be decided by a Timetabling Panel. ADR Rule H6 states that:



“Subject to Rule H7 and 8, any dispute which is to be submitted to a Timetabling Panel under these Rules, shall proceed according to this Chapter H.”

ADR Rules H7 and H8 allow Involved Parties after the Notice of Dispute is served to apply to the Hearing Chair for a ruling if they consider that the dispute (or some aspects of it) is not a Timetabling Dispute. Upon receipt of such application, the Hearing Chair may give such directions as he/she determines are appropriate to resolve the application and, if necessary, to remit the dispute (or aspects of it) to allocation in accordance with Chapter B of the ADR Rules. In making such a direction, ADR Rule H9(a) reminds the Hearing Chair of the presumption that disputes for which a Timetabling Panel is identified in the relevant provisions of the Underlying Contract as the body to determine disputes that are Timetabling Disputes should be resolved in accordance with Chapter H of the ADR Rules.

DB Cargo considers that purpose in ADR Rule H1 provides a very wide scope for the Timetabling Panel to determine any type of dispute that arises out of or in connection with issues of timetabling, timetable change and the allocation of capacity including restrictions of use and train slots. Furthermore, following the issue of the Notices of Dispute DB Cargo is unaware that any Involved Party had applied to the Hearing Chair for a ruling pursuant to ADR Rule H7 (i.e. arguing that some or all of the issues to be considered in TTP1331 & TTP1376 were not Timetabling Disputes). Consequently, DB Cargo submits that the wide scope afforded by ADR Rule H1 together with the fact that no Involved Party had applied for an ADR Rule H7 ruling means that the Timetabling Panel did have jurisdiction to determine the issues presented in TTP1331 & TTP1376 with the possible exception of dealing with the consequences were there deemed to have been a breach of a track access contract. DB Cargo argues that its view is supported further by ADR Rule H6 which states that any dispute which is to be submitted to a Timetabling Panel under these Rules **shall** (emphasis added) proceed according to Chapter H of the ADR Rules.

In the notices, rather than consider ADR Rule H1, Network Rail appears to have alternatively concluded that a Timetabling Panel’s powers are limited to those set out in Condition D5.3.1 of the Network Code which states:

“In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail and Road (as the case may be) may exercise one or more of the following powers:”

- (a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;*
- (b) it may direct that a challenged decision of Network Rail shall stand;*
- (c) it may substitute an alternative decision in place of a challenged decision of Network Rail;*

provided that the power described in (c) above shall only be exercised in exceptional circumstances.”

DB Cargo considers that such a view is erroneous and would counter-argue that Condition D5.3.1 merely sets out three discretionary powers that a Timetabling Panel

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can exercise if it so wishes. It “*may exercise*” one or more of the powers set out in Condition D5.3.1(a) to (c) or it may decide to exercise none of them. Condition D5.3.1 does not, however, state that these are the only powers available to the Timetabling Panel, nor does it seek to limit the very wide scope afforded by ADR Rule H1. This view is supported further by the provisions of Condition D5.1.1 which states:

*“Where an appeal is expressly authorised by this Part D, a Timetable Participant may refer a decision for determination by a Timetabling Panel **in accordance with the ADRR.** (emphasis added)”*

It also appears from the Determination of TTP1331 & TTP1376 (“**the Determination**”) that the Timetabling Panel also mistakenly, in DB Cargo’s view, took the same narrow view of its powers, seemingly without reference to its wider purpose under ADR Rule H1. This is evidenced by the following example extracts from the Determination:

- *“In any event, clear guidance is given by Condition D5.3 as to the powers of the Panel. Condition D5.3.1 provides.....”(paragraph 73)*
- *“The Panel was satisfied that the powers set out in Condition D5.3.1 do not extend to let the Panel determine:
(a) issues relevant to the production of the New Working Timetable;
(b) the points of principle advanced by GBRf;
(c) matters of contract, namely whether the D-26 Weekday Timetable is contractually binding on the Dispute Parties or a breach of the Network Code.”*
(paragraph 74)

Curiously, these comments were made despite the Determination also stating in paragraph 72 that “*Network Rail is in breach of the Network Code*”.

In summary, and for the reasons stated above, DB Cargo disagrees with Network Rail’s position (and the Determination) that the Timetabling Panel did not have jurisdiction to rule upon the matters presented in TTP1331 & TTP1376.

Hybrid Timetable

DB Cargo strongly disagrees with Network Rail’s (and the Timetabling Panel’s) position that the Hybrid Timetable constitutes the New Working Timetable for the purposes of Part D of the Network Code. Network Rail (and the Timetabling Panel) appears to form this view on the basis that the Hybrid Timetable was the only timetable that was to (and did) take effect on 9 December 2018. DB Cargo can find support for this view in Part D of the Network Code and indeed could find no adequate explanation either in the Determination.

DB Cargo also disagrees with Network Rail’s suggestion in the notices that “*no one can be affected by a timetable that is not going to be implemented*”. Upon receipt of the New Working Timetable, a Timetable Participant would carry out a considerable amount of planning work based on the Train Slots contained therein in ensuring that its resource

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diagrams and plans are adjusted to reflect the timings offered. If the New Working Timetable is subsequently withdrawn and replaced by a different timetable (in this case the Hybrid Timetable), the Timetable Participant has not only incurred abortive cost and effort but it then has to start its planning work all over again.

Network Rail's assertion that "*the TTP did not, nor was it entitled to, come to any conclusion as to whether the Hybrid Timetable was a New Working Timetable that had been reached through compliance with the processes set out in the Network Code. That question is one of legal and contractual analysis and the TTP itself recognised that it did not have jurisdiction to decide it*" is also not supported by DB Cargo. On the contrary, DB Cargo would expect this issue to be exactly what the Timetabling Panel should have determined using the wide scope afforded to it by ADR Rule H1 (see previous section of this letter) rather than seemingly accepting that the New Working Timetable is in effect any timetable that Network Rail says it intends to implement at the relevant Change Date, irrespective of the processes used to develop that timetable. DB Cargo submits that both Network Rail and the Timetabling Panel were wrong in this respect.

DB Cargo submits that Part D of the Network Code is clear that the New Working Timetable is defined in Condition D2.1.6 of the Network Code. In summary, this provides that timetable production in respect of any Timetable Change Date begins with the Prior Working Timetable (this is the timetable that was issued at D-26 in the process related to the immediately preceding Timetable Change Date). The Prior Working Timetable is provided to Timetable Participants at D-45 (Condition D2.3.6) and undergoes a process of amendment in accordance with Condition D2 of the Network Code. During this period of amendment ("the Timetable Preparation Period") it is referred to as the New Working Timetable (Condition D2.6.1). The New Working Timetable is then published at D-26 (Condition D2.7.1). On the relevant Change Date the New Working Timetable becomes the Working Timetable (Condition D2.1.6).

It is clear from the timetable development process set out in Part D and summarised above, the New Working Timetable forms a stage in the timetable development process with obligations on Network Rail to carry out actions at key milestones (e.g. "*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.*" (Condition D2.7.1)).

The Hybrid Timetable on the other hand did not follow the timetable development process set out in Part D of the Network Code, nor did it adhere to the decisions processes and prioritisation that Network Rail is required to apply pursuant to Condition D4.2 of the Network Code during the timetable development process. Just because Network Rail withdrew the New Working Timetable that was issued at D-26 and then subsequently at D-16 replaced it with another timetable ("the Hybrid Timetable") developed under processes outside of Part D of the Network Code, does not make the Hybrid Timetable a "New Working Timetable".

Part D of the Network Code provides that the New Working Timetable is the timetable published by Network Rail at D-26. It can of course be varied after publication in

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accordance with the relevant procedures set out in Part D of the Network Code, but it cannot be withdrawn after D-26 and replaced by another separate timetable or timetables developed under processes outside of Part D. Whatever the Hybrid Timetable was, DB Cargo submits that it was not the New Working Timetable.

The legal entitlements of the parties in respect of the timetable development process are set out in Part D of the Network Code. The Hybrid Timetable was not developed using this process. Although DB Cargo understands the reasons why Network Rail introduced and imposed the Hybrid Timetable (i.e. as a means of addressing the well published difficulties that had arisen from the previous May 2018 Working Timetable) it considers that these actions should not be given legitimacy as “legal entitlements” under Part D of the Network Code. DB Cargo submits this is exactly what the Determination has achieved and is why it has decided to challenge it.

DB Cargo is concerned that if it is left unchallenged, the Determination would create a precedent that would conceivably allow for any timetable issued by Network Rail at any point after D-26 to become the New Working Timetable for the purposes of Part D of the Network Code, provided only that Network Rail considers that that timetable is the one that would take effect on the relevant Change Date. For the avoidance of doubt, and despite allusions to the contrary in the notices, DB Cargo is not seeking to overturn the Hybrid Timetable for December 2018. It is instead actually seeking to ensure that the “Hybrid Timetable” approach remains a short term “one-off” action in response to an exceptional set of circumstances that arose with the May 2018 Working Timetable and that it does not become a legitimate legal entitlement for Network Rail to continue to adopt under Part D of the Network Code at any time in the future.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nigel Oatway', with a horizontal line underneath.

Nigel Oatway
Access Manager