

IN THE MATTER OF PART D OF THE NETWORK CODE

AND IN THE MATTER OF TIMETABLING DISPUTE TTP2404

BETWEEN

GB RAILFREIGHT LIMITED

CLAIMANT

V

NETWORK RAIL INFRASTRUCTURE LIMITED

DEFENDANT

RULE H18(c) LEGAL NOTE

Issue 1 – Parameters of the Dispute

1. In light of an entitlement to appeal under Part D2 of the Network Code being premised upon a Timetable Participant being “dissatisfied with any decision of Network Rail in respect of those Rules” (D2.2.8), does the Claimant have the relevant entitlement to appeal against those RoUs which fall within the 2025 Subsidiary Timetable period? These are referenced at 3.1.2, 3.1.4, 3.1.5 and 3.1.6 of the Defendant’s SRD.
2. I take note of the wording of D2.2.2 – D2.2.7 being circumscribed by reference to Timetable Change Dates (as defined in D2.1.5), but that the entitlement to appeal in D2.2.8 is not so circumscribed. In similar fashion, the obligation on Network Rail in D4.1 in respect of “any decision” and in D4.6.1 in respect of “any matter” is not so circumscribed. There is no definition of the term ‘decision’ for these purposes within the Network Code.
3. I also take note, in this regard, of the comments made by the ORR at Paragraphs 61 and 65 of its determination of an appeal by Network Rail against Determination TTP1174 on the ambit of a “decision” by Network Rail.

4. The Claimant is invited to make submissions on whether the matters referred to at 3.1.2, 3.1.4, 3.1.5 and 3.1.6 of the Defendant's SRD are properly appealable decisions under D2.2.8 with reference to the above guidance and any guidance and/or authorities to which it wishes to draw the Panel's attention.
5. The Defendant will be invited to respond to any submissions made by the Claimant if it so wishes.
6. Subject to resolution of the above issue, the following further issues fall for the Panel's determination:

Issue 2 – Consultation

7. In respect of the possessions identified by the Claimant, the parties accept that there has been ongoing consultation. The question for the Panel will be whether that consultation has been adequate and/or efficient. I am not aware of any specific authorities on point, but note that the Panel's determination in TTP271 establishes that, as a matter of principle, in order to find against Network Rail, "the Panel would have to be satisfied that Network Rail had failed in the execution of one of the procedures to which it is contracted through the Trade Access Agreements and the Network Code, or that it had made a capricious decision, which did not take into account either the facts of the case, or the guidance embodied in the ... Decision Criteria."
8. It seems, therefore, that the Panel will need to decide whether, while consulting with the Claimant, the Defendant had taken into account the facts of the case and the guidance in the Decision Criteria. In a more overarching sense, the Panel will need to be satisfied that the Defendant, as a contractual fact-finder, acted reasonably in the *Wednesbury* sense (see below).
9. The Claimant has referred in particular to the absence of a Capability Study. To this end, I note from the ORR's determination of an appeal by Network Rail against Determinations TTP1706 and TTP1708 that a Capability Study is not mandatory, but is likely to be relevant to the question of whether the Defendant has appropriately

applied the Decision Criteria in circumstances where RoUs are disruptive to freight operations (Paragraph 62).

Issue 3 – Decision Criteria and *Wednesbury* Reasonableness

10. The Panel will need to determine whether, and to what extent, the Defendant took into account the Objective, as defined in Condition D 4.6.1, in making its decision.
11. It will be for the Defendant to establish that it had properly weighted the Decision Criteria. To this end, I take heed of the ORR's formulation of the test at Paragraph 56 of its determination of an appeal by Network Rail against Determinations TTP337, 359 and 382.
12. The Defendant will be invited to explain which of the Decision Criteria in D4.6.2 it considered relevant in respect of each disputed possession and how it went about weighting them in every case.
13. In addition to the Decision Criteria, which are non-exhaustive in nature, it seems that the Defendant's position in this case is that of a contractual fact-finder. Accordingly, the Defendant's decision must be shown to have been reasonable in the *Wednesbury* sense. In particular, the Panel will need to determine whether the Defendant took all relevant matters into account. To this end, I have regard to the Supreme Court's decision in *Braganza v BP Shipping Ltd* [2015] 1 W.L.R. 1661, which I attach to this Note for the parties' consideration and the preparation of submissions ahead of the hearing.

Issue 4 – Remedy

14. The Panel's powers are confined to those set out in D5.3, D5.7 and Rule H50 of the ADRR.
15. The Claimant is invited to make submissions as to how the specific remedies which it seeks within its SRD fall within D5.3.1. Furthermore, the Claimant is invited to make submissions as to its claim for both costs and damages (6.1(e)) of its SRD) addressing the following matters in particular:

- a) On what basis within the Network Code or the ADRR it seeks an award of costs and in what amount;
- b) Which part of D5.7.1 it relies on for the purposes of damages and what amount of damages does it seek?

16. The Defendant will be invited to respond to any submissions made if it so wishes.

Alexander Rozycki

ADC Hearing Chair

18th April 2024