

Directions and Rule H18(c) Note – 8 October 2021

I am grateful to all Parties for their timely submissions. I refer below to Heathrow Airport Limited as HAL and MTR Corporation (Crossrail) Ltd as MTR.

These Directions require specific actions in some cases by Parties. Some paragraphs within these Directions are intended to help the Parties prepare for the hearing by setting out the process which the Panel might adopt in dealing with some topics. These Directions are not intended to provide an exhaustive survey of the matters which the Panel may wish to explore.

Unless specified otherwise any expression which is capitalised is intended to be a reference to the relevant term as defined by Part D of the HAL Network Code.

Preliminary matters – for all Parties

1. I set out below my approach to a number of preliminary matters which arise out of the Parties' correspondence with the Secretary and their submissions.

Time of Appeal

2. I note that in correspondence with the Secretary, HAL had suggested that the jurisdiction of the Panel was not engaged because MTR had not complied with the requirements of Condition D 2.7.2 (namely the entitlement to appeal so long as the appeal is lodged within twenty Working Days of the publication of the New Working Timetable ("NWT")). I note that HAL has not pursued the point in its response dated 6 October 2021. On that basis I work on the basis that the Panel need not decide the point.

Approach to Part D

3. The Parties have directed the Panel's attention to Part D of the HAL Network Code in connection with the so-called "Change Strategy", characterised as a revised timetable planning process in light of the Covid-19 pandemic.

4. In order to assist the Parties I set out my preliminary view on this question below, though I emphasize that my view is provisional only and does not take into account any further submissions which the Parties may make.

5. I remind myself of, and draw the attention of the Parties to, the observations of the ORR in its decision on the appeal in TTP1064:

"...the dispute resolution mechanism contained in the ADR rules and Part M of the Network Code is not intended to operate like commercial litigation and neither the TPP nor ORR is set up to deal with disputes argued in this way. The processes are intended to lead to a legally robust conclusion without being legalistic...if these processes start to take on the adversarial characteristics of commercial litigation, we have concerns that it will become increasingly difficult for the TPP or ORR to conduct industry appeals. In future cases, we hope the parties will bear this in mind."

6. The starting point is that the process for establishing the NWT is set out in Part D of the HAL Network Code. The ORR made clear in its appeal decision in connection with the determinations in TTP1331 and TPP1376 that the provisions of Part D set out a mandatory process for the development of the

NWT which is intended to provide “stability and certainty” for the industry (paragraph 137). Whilst efforts to co-operate within the industry during the Covid-19 pandemic should be lauded, it follows from the above that the Panel must necessarily determine whether HAL has followed that process.

7. Consistent with the requirements of Part D, MTR submitted an Access Proposal at D-40 in which it Exercised its Firm Rights.

8. HEOC did not do so. However, a Party may Exercise a Firm Right either by submitting an Access Proposal by the Priority Date in accordance with Conditions D 2.4 and D 2.5 or in consequence of a Rolled Over Access Proposal (“ROAP”), namely where an Access Proposal was submitted in a previous revision of the Working Timetable which resulted in Train Slots being included in the Prior Working Timetable, and which the relevant Timetable Participant does not seek to vary in the NWT. As a matter of practice Timetable Participants may proactively submit ROAPs but as a matter of interpretation I consider that a ROAP is made whether formally submitted or not. I am not aware of any binding authority on the point.

9. It follows that when HAL made decisions about the NWT in accordance with Condition D2.2 both Parties had submitted Access Proposals which carried equal priority when Condition D4.2.2(d) is taken into account. I am not aware of any binding authority which stipulates that a proactive Access Proposal takes priority over the Exercise of a Firm Right via a ROAP. If I am wrong in that view, both Parties had submitted bids by the revised (though invalid) date of 9 July 2021. In passing I should say that I don’t consider that the 9 July 2021 submissions should be considered as Train Operator Variation Requests. Where such a request has in view a NWT (as they would here), on a common sense view there must be a published NWT otherwise there is nothing which can be varied.

10. On any basis, subject to the clarification which the Panel seeks about HAL’s exercise of its Flexing Right in order to increase capacity (to the extent that HAL did exercise its Flexing Right), the Panel’s focus must be on HAL’s application of the Decision Criteria, as required by Condition D4.6, in the compilation of the New Working Timetable.

11. I would ask that HAL confirm by no later than **1700 on Monday 11 October** which timetable was considered the Prior Working Timetable and within that timetable how many tph HEOC and MTR ran into Heathrow T5.

12. I would also ask HAL to confirm by no later than **1700 on Monday 11 October** that its Appendix 1 to HAL/TTP002 remains correct.

13. If the Parties do not accept that the position is as I have set out, it would assist the Panel if any Party which does not agree would provide the Panel with succinct written submissions on this point by no later than **1700 on Monday 11 October**.

For HAL

Detailed issues relating to the Decision Criteria

14. It is HAL’s duty to identify which Decision Criteria Considerations apply in any given case and then to weigh them appropriately. It is not surprising that the claimant’s approach to the application of the Decision Criteria differs from HAL’s.

15. The Panel will wish to understand **at the hearing** which of the Considerations specified in Condition 4.6.2 HAL identified as relevant (or irrelevant); what factors HAL considered when it decided which were relevant; what weight HAL gave to those Considerations which they assessed to be relevant; and whether HAL then applied the requirements of the Code correctly.

(A) Commercial considerations

16. In its observations on the application of Consideration (f), HAL has set out its overall assessment which, it has concluded, required HAL to balance competing commercial interest to a degree, as well as HAL's own commercial interest. It is said that continuing with the existing timetable provides the best balance of those commercial interests.

17. It is, of course, correct that HAL is entitled to consider its own commercial interests, and the commercial interests of any Timetable Participant of which it is aware. However, the Panel will wish to understand **at the hearing** whether it has any financial interest in HEOC's services and the nature of any such interest. The Hearing Chair considers that HAL must declare any such interest such that the Panel can assess its bearing on the application of the Decision Criteria.

(B) Operational considerations

London Paddington

18. In its response to MTR's Sole Reference, HAL refers to platform constraints at London Paddington. The scenario which appears to be set out is that restrictions have been imposed at platform 6 to facilitate the operation of the Great Western Mainline ("GWML"), preventing HEOC's services from occupying that platform between services (at least on an exclusive basis), where previously that was possible. I also understand that HAL is of the view that those restrictions require HEOC's trains to dwell at the T5 platforms for 52 minutes of each operating hour between the start of service to 2007 Monday to Friday in order to deliver a 15-minute service.

19. The Panel will need to understand **at the hearing**:

- a. Whether HEOC has considered reducing the dwell time of 52 minutes at T5 platforms in order to accommodate MTR's Firm Rights, and if not why;
- b. Whether HEOC has the use of any other platforms at London Paddington;
- c. Whether (and if so) how this access has been factored into its assessment; and
- d. Why it is said that the loss of exclusive rights to one platform at London Paddington has the effect contended for.

20. The Panel would also like confirmation **at the hearing** of how frequently platform 6 has not been available to HEOC in the past 12-month period (i.e. to understand as a matter of fact how significant a factor this is).

Heathrow T5

21. HAL will also need to confirm **at the hearing** that both platforms are occupied at T5 for 52 minutes in every operating hour and, if so, why this is required for a 15-minute service using alternating platforms. The Panel will wish to understand whether in the exercise of HAL's Flexing Rights other possibilities have been considered which could accommodate 6tph into T5, for example:

- a. Whether T5 can take more than 4tph;

b. Whether HAL has given consideration to creating capacity at T5 by vacating a platform temporarily by returning a train to the CTA, if need be by having a driver in each cab to reduce the turn round time at the CTA; and/or

c. Alternatively, whether HAL has given any consideration to vacating T5 platforms and holding trains at the CTA in order to create platform capacity. Are there any impediments to doing that?

22. On a related point, the Panel will expect HAL to explain **at the hearing** why it considers that HEOC's Firm Rights extend to the level of platform occupation specified, to the exclusion of MTR's Firm Rights. This is a factor which appears to arise because of a factor on NR's Network (rather than HAL's infrastructure). On what basis is it said that factors on NR's Network are relevant?

HAL's Flexing Rights

23. The Panel will also wish to explore **at the hearing** what Flexing Rights exist in HAL's TACs with HEOC and MTR, and what consideration was given to exercising those rights to accommodate MTR in T5.

(C) Capacity considerations

24. The Panel will need to understand **at the hearing**:

a. Given HAL's preference for a consistent service, why it assessed that 2 tph for each operator would not achieve a consistent service;

b. What consideration HAL gave to the needs of airport workers, and passengers requiring a stopping service at for example Hayes and Harlington, Ealing Broadway, and West Ealing; and

c. Why HAL came to the conclusion in relation to the mitigation of the effect of its decision on the environment that this Consideration "has not formed part of its decision" or (noting paragraph 4.38 of HAL's response) that this factor was considered to be neutral.

25. In addition, **by no later than 1700 on Monday 11 October** the Panel wishes to see the most recent available data (current, rather than pre-Covid) which shows the breakdown of the proportion of rail passengers travelling to and from Heathrow Airport as a stopping service as distinct from a direct service, by origin and destination station if available. If it is available the Panel wishes to have the most recent available data (current, rather than pre-Covid) which shows the number and proportion of passengers who travelled by train to work at Heathrow Airport (rather than for business-related travel).

For all parties

Considerations as to remedy

26. MTR requests that the Panel direct HAL to honour MTR's existing Firm Rights (2tph in each direction to and from T5 on weekdays before 2000). HAL resists that request.

27. Depending on its conclusion, and bearing in mind the expedited nature of this Appeal, the Panel will need to consider what Determination to give in accordance with Condition D5.3.

28. It will be helpful if the Parties can confirm **at the hearing** whether they submit that "exceptional circumstances" arise here and, if so, what those circumstances are.

Developments since the submission of Sole Reference Documents

29. The Hearing Chair understands that at the request of Heathrow Airport Limited a meeting between the Parties and the Industry Timetable Assurance Programme Management Office (PMO) is likely to take place during the day on Friday 8 October. The Parties are reminded of their obligation to conduct themselves in good faith with the objective of resolving the dispute. Without making any concession to the PMO's formal lack of standing in this process, should the Parties have any update which they wish to submit in connection with this meeting they are asked to provide it by no later than **1700 on Monday 11 October**.

The Panel's approach at the hearing

30. It may help the Parties to recognise that the Panel will not intend to apportion blame to any Party for the current situation. Its task will be to deal with the current Disputes to reach a Determination based on the legal entitlements of the Parties.

Rule H18(c) Note

Rule H18(c) requires me to 'identify and to itemise in written form....all relevant issues of law raised by the dispute'.

The principal issue of law which arises is whether HAL was required to follow Part D of the HAL Network Code in the allocation of capacity in the December 2021 Working Timetable.

The Panel will also need to consider the application of Condition 4.6. This is a mixed question of law and fact.

The remaining issues are ones of contractual interpretation.

[Signed on the original]

Paul Stevenson
Hearing Chair HAL/TTP003