

HAL/TTP004

Directions issued on 24th December 2021

1. It is unusual, if not unique in my experience, for Directions to be issued before the first Sole Reference Document ('SRD') is served in any Dispute. It appears to me, however, that a number of unusual procedural aspects arise in this Dispute. The overall requirement for Disputes to be determined in a relatively swift procedure which is to be resolved as efficiently and effectively as possible (ADRR A30), and the enjoiner by the ORR in determining the appeal in TTP1064 that the procedure should lead to a 'legally robust conclusion without being legalistic' (paragraph 59), lead me to issue these Directions in the hope of reducing the burden on the Parties and giving guidance on some preliminary issues in preparing for the hearing.
2. This arises because of discussions between the Secretary and the Parties which suggest that the issues arising in this Dispute are very similar, if not exactly the same, as those determined in HAL/TTP003. As the Parties know, that Determination has been appealed to the ORR.
3. The ORR's Determination will, of course, be binding on any subsequent TTP, but cannot be considered by any TTP sitting before it has been issued. Until then, however, I am required to regard the Determination of an earlier TTP as persuasive, but not binding.
4. Mindful of the ORR's comments in its Determination in the appeal in TTPs807/808 that a Hearing Chair who is aware of a live appeal on similar facts should advise the ORR of the later Dispute, the Secretary has already notified the ORR of the hearing date in this Dispute and enquired whether the ORR might expedite the appeal in HAL/TTP003. If that appeal were to be decided before 2nd February 2022 the Parties in this Dispute would no doubt reflect on how it will influence their position.
5. As usual, I shall decide this TTP by applying the law to the facts before the TTP at the hearing. I hope that it is helpful, however, for me to observe that as a point of principle a Hearing Chair determining a Dispute which is very similar to one already under appeal would need very strong reasons to decide not to follow the previous Determination, even though that is only persuasive. This is for the practical reason that to have contradictory decisions by different TTPs on similar facts, while the first Determination is still under appeal, is likely to cause confusion at the very least.
6. I think it appropriate to advise the Parties that I am familiar with the issues in this Dispute, as I acted as Mentor to the Hearing Chair in HAL/TTP003. In this context I must, however, emphasise that this role was limited to advising on procedural issues and had ended before the hearing; I played no part in the decision reached by that TTP. Therefore I regard myself as having no conflict of interest which should prevent me from accepting the appointment of Hearing Chair in this Dispute.
7. A Party has an absolute right to plead its case as it wishes, subject obviously to the rules in the ADRR and guidance given by the ORR. But it is against the background explained above that I hope it may assist the Parties if I suggest that to the extent that their SRDs in this Dispute might merely echo those in HAL/TTP003, subject to revised dates, etc., I will be content for them to use anything in the previous SRDs which remains relevant in this Dispute, by annexing or amending documents as appropriate, so long as the pleaded cases are clear to the Panel.
8. One question that the Panel is highly likely to ask, and which the Parties are therefore invited to address in their SRDs, is that as it has proved possible to implement the decision of HAL/TTP003 and honour

the Parties' firm rights with effect from next month, then why the timetabling arrangements to achieve this should cease to be appropriate and workable from the Subsidiary Change Date in May 2022.

Signed on the original

Clive Fletcher-Wood
Hearing Chair, HAL/TTP004

Classification: Confidential

Heathrow Airport Limited: response to Hearing Chair's Directions of 24 December 2021 in the timetable dispute: HAL/TTP004 and 005

Date: 10 January 2022

Prepared by: Heathrow Airport Limited

Status: Final

1 RESPONSE TO THE DIRECTIONS

In response to the Hearing Chair's Directions Note of 24 December 2021 (the "Directions"), HAL considers it may be helpful to the Hearing Chair and the other Parties to address at this early stage some of the points raised in them. References are to paragraphs in the Directions unless otherwise stated.

2 SIMILARITY AND DIFFERENCES WITH ISSUES AND FACTS OF HAL/TTP003

Suggested and accepted similarities

2.1 A number of references are made in the Directions to the principal and factual similarities with HAL/TTP003.

2.2 HAL acknowledges the following similarities with the factual circumstances on which HAL/TTP003 was decided:

- (a) Terminal 4 will potentially remain closed for a material part of the May 2022 timetable, as it does in respect of the December 2021 timetable;
- (b) the capacity constraints at London Paddington will continue to apply, to the best of HAL's knowledge, for the duration of the May 2022 timetable, as will be the case, to the best of HAL's knowledge, for the duration of the December 2021 timetable;
- (c) each Timetable Participant has sought to exercise its firm rights to Terminal 5 during the May 2022 timetable, in all material respects, in the same way as each did in relation to the December 2021 timetable, giving rise to the same substantive timing conflicts at Terminal 5: and
- (d) just as was the case with the December 2021 timetable development:
 - (i) the Change Strategy has continued to have a bearing on the timings that the Timetable Participants have worked to and of the offers made by Network Rail on HAL's behalf, as well as on the number of submissions they have made or proposed;
 - (ii) that, in turn, has also compressed the time available to HAL in order to make its decision for the May 2022 timetable, not just because of the shorter time period between receipt of proposals and the decision date itself, but also because of the further workload involved in receiving multiple bids. Incidentally that time period has also been impacted by the HAL management time required to consider the HAL/TTP003 determination, appeal it and respond to the ORR's directions; and
 - (iii) the HAL Network Code was not formally changed, and so further inconsistencies with the relevant timings anticipated in the HAL Network Code have arisen.

Differences with HAL/TTP003

2.3 In accordance with Conditions D2 and D4 of the HAL Network Code, HAL is required to compile each New Working Timetable independently from (albeit based on as a starting point) the previous timetable and previous decisions regarding that previous (or indeed, any other) timetable – in so doing, where appropriate, making decisions by applying the Decision Criteria each time, having regard to the prevailing circumstances, and conducting itself in the manner set out in those Conditions. Therefore, while there are similarities in the factual circumstances around HAL's decisions regarding the December 2021 and May 2022 timetables, each decision HAL has taken in relation to the resulting New Working Timetable is a separate decision taken on its merits, that should be assessed by Timetable Participants on its merits and, if called for, appealed and determined on its merits.

2.4 In addition, there are also a number of key factual differences with the circumstances on which HAL/TTP003 was decided which undermine any presumption that the issues are exactly the same. HAL wishes to draw the Panel's attention to these:

- (a) the timing of the multiple proposals made or submitted to HAL for May 2022 is different from the timing of the proposals made or submitted for December 2021. This gives rise to wholly different analysis and the conclusion that the May 2022 proposals have a different status under the HAL Network Code from the proposals submitted for December 2021. This, in turn, results in different duties being placed on HAL under the HAL Network Code with respect to the May 2022 proposals, and different prioritisation requirements between the May 2022 proposals themselves;
- (b) the New Working Timetable has not yet been published by Network Rail for May 2022 – it will be published on 21 January 2022 in keeping with the Change Strategy. In contrast with the conclusions in the HAL/TTP003 determination, the publication (or otherwise) of the New Working Timetable is not critical to the status of the proposals HAL has received for May 2022 and so its treatment of them;
- (c) given the further time that has passed since the HAL/TTP003 determination was published, in making its decision in relation to May 2022 timetable, HAL has had the opportunity to undertake and procure further insight and analysis, and passenger and performance data than was available and time permitted for when it made its decision for the December 2021 timetable;
- (d) while HAL does consider the HAL/TTP003 determination was wrong in a number of material respects and, as the Directions note, it is the subject of an appeal, HAL made clear in paragraph 1.4 of its decision document of 17 December 2021 for the May 2022 timetable that it has considered the observations made in that determination and, where appropriate, referred to them in carrying out its process for making its decision for May 2022 and in that document itself; and
- (e) not just distinct from the December 2021 timetable fact base, but perhaps uniquely in the context of timetable development, the Timetable Participants received two conflicting offers on 17 December 2022 for the May 2022 timetable, one from HAL directly, and one from Network Rail purportedly on HAL's behalf, although sent in error and without HAL's authority. This has resulted in the issue of two diametrically opposed appeal notices in respect of HAL's decision for the May 2022 timetable. HAL and Network Rail continue to work together to rectify this issue, but in the meantime, there are significant legal and procedural questions that must be considered as a result of this which were not a factor in the context of HAL/TTP003.

Latitude to reach a different decision

2.5 A TTP's powers are prescribed in Condition D5.3 of the HAL Network Code and the Access Dispute Resolution Rules (ADRR), particularly Chapters A and H. Under these provisions, the TTP is required to make an independent evaluation of any dispute before it against, and only against, the requirements of the Underlying Contract, the HAL Network Code, the relevant law, and the relevant factual evidence, in so doing, having regard to previous TTP determinations as persuasive authority, but not being bound by them (Rule A7(a) of the ADRR). HAL believes these important reference points serve to ensure that a TTP does not prejudice its determination, that it is fair (Rule H14(b) of the ADRR) and is reached on the basis of the legal entitlements of the Dispute Parties and upon no other basis (Rule 5 of the ADRR).

- 2.6 On this basis, HAL does not agree that, as per paragraph 5, a Hearing Chair *'would need very strong reasons to decide not to follow the previous Determination'*, if that determination is *'only persuasive'*.
- 2.7 HAL has reached the same overall decision for both the December 2021 and May 2022 timetables, and there are some similarities with the fact base on which the HAL/TTP003 determination was reached, but there are also some important factual differences. And these factual differences should properly be taken into account. In addition, while HAL's position is that both decisions should be upheld as compliant with the HAL Network Code in light of the prevailing circumstances in which they were taken and documented, HAL accepts the ORR might conclude otherwise, including that the December 2021 timetable decision was the right one, but nevertheless, the process or rationale for it was flawed. Either way, because of the distinguishing facts in paragraph 2.4 above and the other points made in this paragraph 2, it would be an incorrect starting point to assume that the HAL/TTP003 determination has direct application to, or necessarily speaks to, HAL's decision for the May 2022 timetable, or that it leaves the Panel little latitude to reach a different decision.

3 PARAGRAPH 8 QUESTION

Paragraph 8 trails a question the Panel is highly likely to ask concerning why the timetable arrangements mandated by the HAL/TTP003 determination cease to be appropriate and workable for the May 2022 timetable, and invites the Parties to address this in their SRDs. HAL welcomes the opportunity to address this question in its SRD and will duly do so.

4 IMPACT OF ORR DETERMINATION OF APPEAL OF HAL/TTP003 DETERMINATION

- 4.1 Paragraph 4 rightly suggests that if the ORR decides the appeal of HAL/TTP003 before the scheduled hearing date of 2 February 2022, the Parties in this Dispute would wish to reflect on how it will influence their positions.
- 4.2 HAL has since discussed with the Secretary the potential impact of the ORR's decision being made in the middle of proceedings for this Dispute, and has seen the email of 7 January 2022 from the ORR to the dispute and interested parties for HAL/TTP003, that it expects to make its determination in a matter of weeks. HAL is also cognisant of the request in MTR's Notice of Dispute requesting that the Panel expedite the determination process. Nevertheless, HAL believes it would be in the interests of all parties to have an opportunity to receive and reflect on the ORR's decision. HAL therefore invites the Panel to consider granting, if and when the ORR's decision is made during the course of these proceedings, a possible deferral of the hearing and/or extensions of time for the Parties to submit or update their SRDs to allow for this.

Heathrow Airport Limited
10 January 2022

Second Directions letter

FINAL

HAL/TTP004 and HAL/TTP005 DIRECTIONS DATED 11TH JANUARY 2022

1. There is clearly nothing to prevent a Party from serving a response to Directions which is not dealing with points specifically addressed to that Party; I anticipate that some points within HAL's Response of 10th January 2022 may assist MTR in focusing its SRD on the key points.
2. In the hope of avoiding any misunderstanding, I think that it will assist if I deal now with points addressed to me and the discharge of my role as Hearing Chair.
3. I do not dissent from a word of HAL's paragraph 2.5; it sets out at greater length the same point as I made in the first sentence of paragraph 5 of the Directions issued on 24th December 2021. I had hoped that those Directions made it clear that there will be no question of this TTP pre-judging anything.
4. It appears, however, that different conclusions can be drawn from the same words. As the Parties will understand, a Determination of an earlier TTP is of persuasive authority in a later TTP, which can obviously differ if it reasons for doing so. I have no reluctance to decline to follow an earlier TTP if there is good reason not to do so. But I remain of the view that if similar issues arise in the later TTP, which knows that these issues are currently under appeal, then the later TTP would be well advised to be cautious about reaching a different conclusion for the practical reasons explained in the earlier Directions. If appropriate and justified by the law and the facts, however, then of course the later TTP should be prepared to differ from the decision(s) of the earlier TTP.
5. As a minor example of this, which might assist the Parties in preparing for this TTP, in the last two HAL TTPs the Hearing Chair expressed the view that it was open to the Parties to amend Part D, while finding in each case as a matter of fact that there had been no such agreement (HAL/TTP002 paragraph 56, HAL/TTP003 paragraph 158). I respectfully disagree with both Hearing Chairs. While in a normal commercial contract negotiated between businesses there will usually be complete freedom to re-negotiate terms, Part D is not a normal commercial contract. It is a multilateral contract whose terms are approved by the ORR. Whether referring to Part D of the Network Code, or HAL's Part D, it can only be amended with the consent of the ORR, not at the behest of the Parties.
6. While this does present practical problems in the current circumstances, in which the industry is following procedures which are not complying with the provisions of Part D in all cases, mindful of the duty placed on a TTP to reach findings, '*...based on the legal entitlements of the Dispute Parties and on no other basis.....*' (ADRR A5) in my view a TTP remains bound to regard the provisions of Part D as still applying.
7. In my view the timings in any TTP need to remain flexible, while remaining aware of the pressures of the timetabling process. As matters unfold and it becomes clearer when the ORR might determine the appeal I will of course consider any application for a deferral made by either Party (or both Parties) in the light of the circumstances applying at the time.
8. To avoid any future misunderstanding, it seems to me that paragraph 2.4(b) of HAL's response is failing to distinguish between the publication of the New Working Timetable to operators, in accordance with Part D, and its publication in the sense of public timetables being released for the public at large. It is my understanding that publication of the New Working Timetable in dispute in the Part D sense took place on 17th December 2021; its release to the public does not fall within the Part D mechanism and is not relevant to this Dispute.

Signed on the original

Clive Fletcher-Wood
Hearing Chair, HAL/TTP004 and HAL/TTP005

HEOC response to Second Directions

Classification: Confidential



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BY EMAIL

12 January 2022

Without Prejudice and Commercially Confidential

FAO:

Richard Butler, Allocation Chair: Access Disputes Committee

Clive Fletcher-Wood, Hearing Chair: HAL/TTP0004 and HAL/TTP0005

Tamzin Cloke, Secretary: Access Disputes Committee

HALTTP/0004 and HALTTP/0005

We refer to the Directions given in respect of the disputes with the above references on 4 January 2022 and (in response to a letter sent to the Chair by Heathrow Airport Limited ("HAL") on 10 January 2022) on 11 January 2022.

Heathrow Express Operating Company (HEOC) wishes to make the following points for consideration by the Chair.

1. HEOC has reflected on the correspondence and decision by the Chair to hold hearings HAL/TTP0004 and HAL/TTP0005 together. On reflection, this is a mistake and HEOC requests that the matters be held with separately. Indeed, to try to deal with them

together would be essentially impossible, due to the nature of the submissions being made by HEOC under HAL/TTP0005, as explained below.

2. HAL/TTP0004 (the dispute raised by MTR) and HAL/TTP0005 (the dispute raised by HEOC) are not "equal and opposite" disputes. From a legal point of view, they are fundamentally different – although, of course, they relate in the end to the same question as to what should be the content of the May 2022 timetable.
3. HAL/TTP0005 essentially raises questions of procedure in respect of three separate pieces of correspondence sent on 17 December 2021. It must be heard before HAL/TTP0004, which HEOC expects is likely to raise questions of substance which arise based on the answer to the procedural question raised by HAL/TTP0005 (HEOC expects that to be the case, although it is of course a dispute raised by MTR).
4. If there is something approaching an "equal and opposite" pair of disputes then it is HAL/TTP0004 and HAL/TTP0003 (which is currently subject to appeal), although HAL has identified some aspects of difference in its letter to the Panel of 10 January 2022.
5. Without prejudice to the content of the actual submissions which HEOC will make under HAL/TTP0005, HEOC will in essence ask the Panel to determine which parts of the correspondence sent on 17 December 2021 are valid and which are not. This is in order to determine which is the valid timetable offer that all parties should be considering, and to make a decision in respect of the procedural conduct of Network Rail in the context of the HAL Network Code.
6. HEOC is not asking the Panel to consider in HAL/TTP0005 the nature of firm rights or the content of the timetable itself, nor the way in which the Decision Criteria were applied by HAL. (Those questions were considered in HAL/TTP0003 and will be reconsidered in the pending appeal of that decision to ORR, and it is likely that they will be relevant again under HAL/TTP0004.)
7. For these reasons, the Panel should address the points raised in HAL/TTP0005 before those which HEOC expects will be raised under HAL/TTP0004. Indeed, HAL/TTP0004 (being MTR's likely objection to the timetable which Network Rail should have issued on 17 December 2021 but failed to do) becomes a "live" question only following the resolution of HAL/TTP0005 (which invites the Panel first to recognise the nature of the procedural mistake made on 17 December 2021 and to resolve the error appropriately).
8. Due to the way in which the HAL Network Code is worded, HEOC has of course raised dispute HAL/TTP0005 on the basis that HAL/NR, in determining the New Working Timetable provided in the offer sent on 17 December at 15:54, have not followed the Decision Criteria outlined in Condition D4.6 of the HAL Network Code. HAL had in fact followed the Decision Criteria properly; but the way in which the Decision Criteria were "not followed" is that the offer issued by Network Rail 15:54 did not contain the correct details. Both HAL and Network Rail acknowledge this.
9. Therefore, the Panel should resolve HAL/TTP0005 separately first, and as soon as possible.

10. In respect of HAL/TTP0004, the ORR has today advised that it will issue a determination regarding the HEOC appeal in respect of HAL/TTP0003 by 21 January at the latest. HEOC requests that the Panel should delay the timing of the submissions for the appeal hearing in respect of HAL/TTP0003, or given that the deadline for submissions is 13 January, allow for updated submissions after receipt of the ORR determination.

Please send all correspondence in relation to this matter to me with a copy to Andy Darbyshire, ~~XXXXXXXXXXXXXXXXXXXX~~ [number redacted].

Yours faithfully

A handwritten signature in black ink, consisting of the letters 'S' and 'C' followed by a horizontal line and a vertical stroke.

Sophie Chapman

Business Lead

Heathrow Express

~~XXXXXXXXXXXXXXXXXXXX@heathrow.com~~

Third Directions letter (paragraph 12 was later withdrawn as it was overtaken by events)

HAL/TTP004 and HAL/TTP005

Directions dated 13th January 2022

1. I have read the letter from Heathrow Express Operating Company Limited ("HEOC") dated 12th January 2022.
2. As an observation, it is inappropriate for a party to mark procedural documents in any Dispute, never mind one in which exchanges between Parties are made available on the ADC website, as 'Without Prejudice and Commercially Confidential'. I am therefore ignoring these markings. HEOC may wish to consider whether their incorrect use might prejudice its position in another context, but I should emphasise that as I am ignoring them HEOC has suffered no prejudice in this Dispute.
3. HEOC's letter appears internally inconsistent, in that in paragraph 6 it says, inter alia, that, '*HEOC is not asking the Panel to consider in HAL/TTP0005 the way in which the Decision Criteria were applied by HAL*', yet in paragraph 8 it says '*HEOC has of course raised dispute HAL/TTP0005 on the basis that HAL/NR, in determining the New Working Timetable provided in the offer sent on 17 December at 15:54, have not followed the Decision Criteria outlined in Condition D4.6 of the HAL Network Code. HAL had in fact followed the Decision Criteria properly; but the way in which the Decision Criteria were "not followed" is that the offer issued by Network Rail 15:54 did not contain the correct details. Both HAL and Network Rail acknowledge this.*'
4. Further, the only paragraph explaining the Dispute in HEOC's Notice of Dispute dated 23rd December 2021, also incorrectly carrying markings claiming to be without prejudice and commercially confidential, sets out the Dispute as follows: '*HEOC brings this dispute on the basis that HAL/NR, in determining the New Working Timetable provided in the offer sent on 17 December at 15:54, have not followed the Decision Criteria outlined in Condition D4.6 of the HAL Network Code.*'
5. I am therefore left confused as to what HEOC is actually disputing, as there are clearly contradictions between its Notice of Dispute and even within its letter of 12th January 2022. In paragraph 8, as explained above, HEOC says that HAL had not followed the Decision Criteria, but then goes on to say that in fact HAL did so properly. For clarification, the extent to which the Decision Criteria are identified as relevant, and how they are applied, comes before the mechanics of the offer process. Subject to any submissions, it does not seem to me that the offer process can be regarded as '*not following*' the Decision Criteria; they are two separate steps in the same process. HEOC appears to be conflating two different issues here.
6. When appointed to chair HAL/TTP005 together with HAL/TTP004, my first question – to myself, while awaiting HEOC's Sole Reference Document ("SRD") – was what right an Access Beneficiary might have to dispute an offer which honoured its Firm Rights, as I understand to be the position for HEOC at the end of 17th December 2021. I was awaiting the service of HEOC's SRD before posing any questions by way of Directions to explore this question.
7. The structure of the ADC's process is to determine Disputes of substance between industry parties. A TTP may, and often does, have to consider the validity of the process used by Network Rail, and indeed by Access Beneficiaries, but it only does so in order to reach a legally robust but not legalistic decision on questions of substance before it.
8. I am not aware of any TTP having been invited to determine the validity of the bid and offer process in isolation, especially in circumstances in which, as I have previously commented, the industry as a whole is not complying with the provisions of Part D. While I shall of course listen to any submissions on the

point, my preliminary view is that there would be little point in doing so and it would not meet the principles and purpose of the Access Dispute Resolution Rules.

9. The Allocation Chair has commented as follows on HEOC's letter of 12th January 2022, *'With the consent of the parties, I've ordered that the two disputes "should be resolved together on the grounds that they concern the same or similar subject matter", and I don't understand HEOC to be disputing the "same or similar subject matter" condition. Their point seems to be that it would be procedurally undesirable to deal with both matters at the same hearing. My order gives (or perhaps just confirms) the flexibility of the Hearing Chair to hold staged hearings ("without affecting the powers of the appointed Hearing Chair to control case management and to determine questions concerning staged hearing of different aspects of these disputes") so it will be for [the appointed Hearing Chair] to decide whether there's substance in the suggestion that HAL/TTP0005 should be heard first. There's no need to change the order of 4 January.'*
10. As any Dispute unfolds it is my normal practice to decide, in consultation with the Parties where appropriate, the order in which issues are to be taken and indeed whether there should be separate hearings to determine liability and remedies (which I am not suggesting here). As the ORR has committed itself to determining the appeal against HAL/TTP003 by 21st January 2022 it seems likely at least that the outcome of that appeal will influence the Parties in HAL/TTP003. Of course I am unable to predict the outcome of the appeal, or how the Parties will react, these are matters which will need to be kept under review to determine that Dispute as efficiently and cost-effectively as possible if it is not settled.
11. The need to finalise the May 2022 Working Timetable will not permit any significant delay in the TTP process, although I shall of course listen to any applications for the current dates to be revised. I am, however, puzzled by paragraph 10 of HEOC's letter, asking that the Panel in this TTP should delay the timings of submissions for the appeal hearing in respect of HAL/TTP003. That appeal is within the hands of the ORR, not this TTP.
12. If HEOC is seeking to delay its submissions due today, my first comment is that by yesterday, when HEOC wrote its letter, I would have imagined that its SRD would have been nearly complete. I think it appropriate to require HEOC to serve its SRD as required, not least to help me to understand exactly what is in dispute. At the moment that is far from clear.

Signed on the original

Clive Fletcher-Wood
Hearing Chair HAL/TTP004 and HAL/TTP005

Fourth Directions letter

HAL/TTP004 and HAL/TTP005

Fourth Directions dated 13th January 2022

1. Since issuing the first Directions of today's date I have seen the letter from Heathrow Airport Limited ('HAL') sent today.
2. I welcome any settlement between Parties, especially one which will permit all bids and Firm Rights to be honoured.
3. In these circumstances I suggest that a stay should be ordered immediately, as suggested by HAL. This will leave both Disputes open, just in case the final arrangements suggested by HAL cannot be achieved for any reason, but with the expectation that both Disputes can eventually be withdrawn.
4. Will MTR and HEOC please confirm as soon as possible whether they have any objection to the proposed stay being ordered.

Signed on the original

Clive Fletcher-Wood
Hearing Chair HAL/TTP004 and HAL/TTP005

HEOC response to Fourth Directions



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BY EMAIL

13 January 2022

FAO:

Richard Butler, Allocation Chair: Access Disputes Committee

Clive Fletcher-Wood, Hearing Chair: HAL/TTP004 and HAL/TTP005

Tamzin Cloke, Secretary: Access Disputes Committee

HALTTP/004 and HALTTP/005

We refer to the fourth Directions letter in respect of the disputes with the above references, received on 13 January 2022.

We support the proposal that a stay should be ordered immediately as suggested by HAL and agree that both Disputes should be left open in case the final arrangements suggested by HAL cannot be achieved for any reason.

We therefore confirm that HEOC has no objection to the proposed stay being ordered.

Please send all correspondence in relation to this matter to me with a copy to Andy Darbyshire,
[REDACTED]

Yours faithfully

A handwritten signature in black ink, appearing to be 'S. Chapman', followed by a horizontal line.

Sophie Chapman
Business Lead
Heathrow Express
[REDACTED]

Fifth Directions letter

HAL/TTP004 and HAL/TTP005

Fifth Directions dated 17th January 2022

1. In the light of the notification from HAL dated 13th January 2022, and having considered the comments from the Parties, I agree that a stay in this Dispute would be sensible at this stage.
2. I share the hope that a solution will be found which will enable the Firm Rights of HEOC and MTR to be honoured, but given the limited time available before the May 2022 Working Timetable must be finalised, and to ensure that progress to a hearing (if one should eventually be required) is orderly, I think it prudent to re-list the hearing for 16th or 17th February 2022. The Secretary is seeking to establish which of these dates will be convenient to the Parties and will notify the Parties once she has done so.
3. The date by which HAL must file and serve its Defence is therefore now extended to 1600 on 10th February 2022.
4. The Parties have liberty to apply for these Directions to be varied.

Signed on the original.

Clive Fletcher-Wood
Hearing Chair
HAL/TTP004 and HAL/TTP005

Sixth Directions letter

HAL/TTPs 004 and 005

Sixth Directions issued on 21st January 2022

1. The Parties will no doubt have seen the ORR's Determination of the Appeal by HAL and HEOC against the Determination of HAL/TTP003.
2. In that Determination there is a comment by the ORR (at paragraph 97) that the possible use of an additional platform at Paddington by HEOC may allow all Firm Rights to be accommodated, which of course we already know from HAL would be a relevant consideration in HAL's consideration of its ability to accommodate all Firm Rights in the May 2022 Timetable. I do not know how much progress has been made in this respect.
3. For the moment I propose to hold to the current date listed for the hearing, 17th February 2022.
4. If it is necessary for a hearing to be held, then I think it only fair to permit MTR to amend its SRD to reflect the ORR's Determination if it wishes to do so. MTR will need time to reflect on whether it thinks this necessary. I now direct that any amended SRD which MTR wishes to serve should be filed and served by 1600 hours on Thursday, 3rd February.
5. The time by which HAL must serve its Defence remains unchanged from the Fifth Directions.
6. The Parties have liberty to apply for these Directions to be varied.

Signed on the original.

Clive Fletcher-Wood
Hearing Chair
HAL/TTPs 004 and 005

MTR response to Sixth Directions

RE: Hearing of HAL/TTP004 and HAL/TTP005 Other IMs/HAL x

← Jonathan James 
to me, Sophie, Michael ▾


Dear Tamzin

In response to the Sixth direction Issued by the chair, I have attached a revised submission document.

The only amendment made to the submission is the addition of (k) Appendix 11.

We note the positive discussions that have taken place recently regarding the May 2022 timetable and platforming arrangements at Paddington.

Thanks very much.

Jonathan James
Head of Contract Management
MTR Elizabeth line

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mtrElizabeth line | 

HAL response to Sixth Directions

Heathrow
Making every journey better

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Hearing Chair
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By email only

07 February 2022

Dear Hearing Chair,

HAL/TTP004 and HAL/TTP005 – further stay

We write to update you on developments since the issue of the sixth Directions on 21st January 2022.

In light of the agreement to free up platform availability at London Paddington, the Dispute Parties have verbally agreed in principle to enter into a Timetable Variation by Consent for the May 2022 timetable to accommodate the Timetable Participants' Firm Rights to Terminal 5. We await written confirmation of this.

Network Rail is undertaking the timetabling work necessary to reflect this variation to HAL's original 17th December 2021 decision, and advises that it is hoping to complete this work by 11th February 2022.

After the Dispute Parties have confirmed they are satisfied with the resulting timetable, they will document the Timetable Variation by Consent and we expect the Dispute Notices will then be formally withdrawn. Our current expectation is that we will be able to reach this outcome in the w/c 14 February 2022.

Whilst we have continued to prepare our Response and intend to submit this in accordance with the fifth and sixth Directions on 10 February 2022, to avoid the ADC incurring potentially unnecessary costs, might we suggest a short further stay of the hearing date?

Yours sincerely

Michael Bradley

M Bradley

Rail Governance Manager
Heathrow Airport Limited

Seventh Directions letter

HAL/TTP004 and HAL/TTP005

Seventh Directions issued on 8th February 2022

1. I am grateful to HAL for its letter of 7th February 2022.
2. Given the progress obviously being made by HAL and MTR, and to avoid distracting management of either Party from more productive work, I agree that it is appropriate to vacate the currently listed hearing date of 17th February 2022.
3. Therefore the requirement for HAL to serve its Sole Reference Document by 10th February 2022 no longer applies.
4. Rather than set further dates now, if no settlement has been reached by 1000 on 15th February 2022 both Parties are to report to the Secretary at that time on progress and to advise the Secretary whether either Party considers that a hearing is still necessary. If this should be the case, then it will be necessary to set a date within the week beginning 21st February 2022 and for HAL to serve its Sole Reference Document very shortly after 15th February 2022.
5. Will HEOC please confirm that in the event of a settlement being reached between HAL and MTR it will withdraw Dispute HAL/TTP005.
6. The Parties have liberty to apply for these Directions to be varied.

Signed on the original.

Clive Fletcher-Wood
Hearing Chair
HAL/TTP004 and HAL/TTP005

HEOC response to Seventh Directions

Classification: Confidential



Sophie Chapman
Business Lead
Heathrow Express Operating Company Limited
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Access Disputes Committee,
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BY EMAIL

10 February 2022

FAO:

Richard Butler, Allocation Chair: Access Disputes Committee

Clive Fletcher-Wood, Hearing Chair: HAL/TTP0004 and HAL/TTP0005

Tamzin Cloke, Secretary: Access Disputes Committee

HALTTP/0004 and HALTTP/0005

We refer to the Seventh Directions given in respect of the disputes with the above references on 8 February 2022.

Heathrow Express Operating Company ("HEOC") notes the vacation of the hearing date of 17th February 2022 and wishes to make the following points for consideration by the Chair, recognising the liberty given to the Parties to apply for the Directions to be varied, and acknowledging the specific question asked by the Chair.

1. With respect to point 4, and acknowledging the progress made by the Parties in attempting to resolve the situation referred to in point 2, HEOC asks the Chair to amend this direction such that:
 - (a) the reference to "1000 on 15th February 2022" be changed to "1000 on Tuesday 1st March 2022" (as this will give HAL and MTR, together with HEOC, a more achievable date by which to complete the necessary work, given the need first for

Network Rail's work to be issued and then to allow time for the Parties to finalise the timetable variation); and

(b) the sentence commencing, "If this should be the case..." be amended to read as follows: "If this should be the case, then it will be necessary to set further dates for the service of relevant documentation and for the hearing, and this will be considered based on the report made by the Parties at that time." (as it will be easier to set appropriate dates once the extent of progress made by that time has become clear).

2. In response to the question asked of HEOC in point 5, HEOC notes that the settlement (i.e. the Timetable Variation by Consent) will need to be acceptable not only to HAL and MTR, but also to HEOC itself (not least in respect of the issues raised under Dispute HAL/TTP005). Once such a settlement, satisfactory to all three Parties, has been reached and documented, HEOC will be in a position to withdraw Dispute HAL/TTP005.

Please send all correspondence in relation to this matter to me with a copy to Andy Darbyshire, [REDACTED]. In particular, please note that I am away from the business until the 21 February 2022.

Yours faithfully



Sophie Chapman

Business Lead

Heathrow Express

sophie.chapman@heathrowexpress.com

MTR response to Seventh Directions

RE: Hearing of HAL/TTP004 and HAL/TTP005 – Directions letter Other HAL/HAL x

← Jonathan James [REDACTED]
to me, Michael ▾

Hi Tamzin

MTREL did not receive the expected timetable offer on 11 February 2022.

Mike did update us to say that Network Rail was still working on the revised Paddington platform validation exercise.

We have not received any further update today, and as I am out of the office this afternoon, it seems unlikely that we will be in a position to respond at 10:00 tomorrow.

We remain hopeful that the timetable dispute will be withdrawn, subject to receiving the necessary timetable offer and associated reassurance from both HAL and Network Rail.

thanks

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mtrElizabeth line | 

HAL response to Seventh Directions

Hearing of HALTTPO04 and HALTTPO05 Other INTERNAL X

Michael Bradley
to me, Jonathan, Andrew, Sophie

Classification: Internal

Tue, 15 Feb 09:18

Dear Tamzin,

Further to the Hearing Chair's Seventh Directions Note and my telecon with your colleague, please find below details of the latest position in the two disputes. I would be grateful if you would relay this to the Hearing Chair.

NR have worked on the reprogramming of Paddington with GWR and I am pleased to be able to report that NR advise that this work has been successful, although it did overrun the original completion date. From NR's perspective, the current status is:

- The GWR part of the timetable has been reworked and is complete as each change needed was coordinated between the respective planning teams.
- The MTR part of the timetable is complete
- The HEOC part of the timetable has been reworked and may need some final review and amendment, but is also essentially complete

Both MTR and HEOC will need to review the resulting timetable and confirm that they are satisfied it works from their perspective.

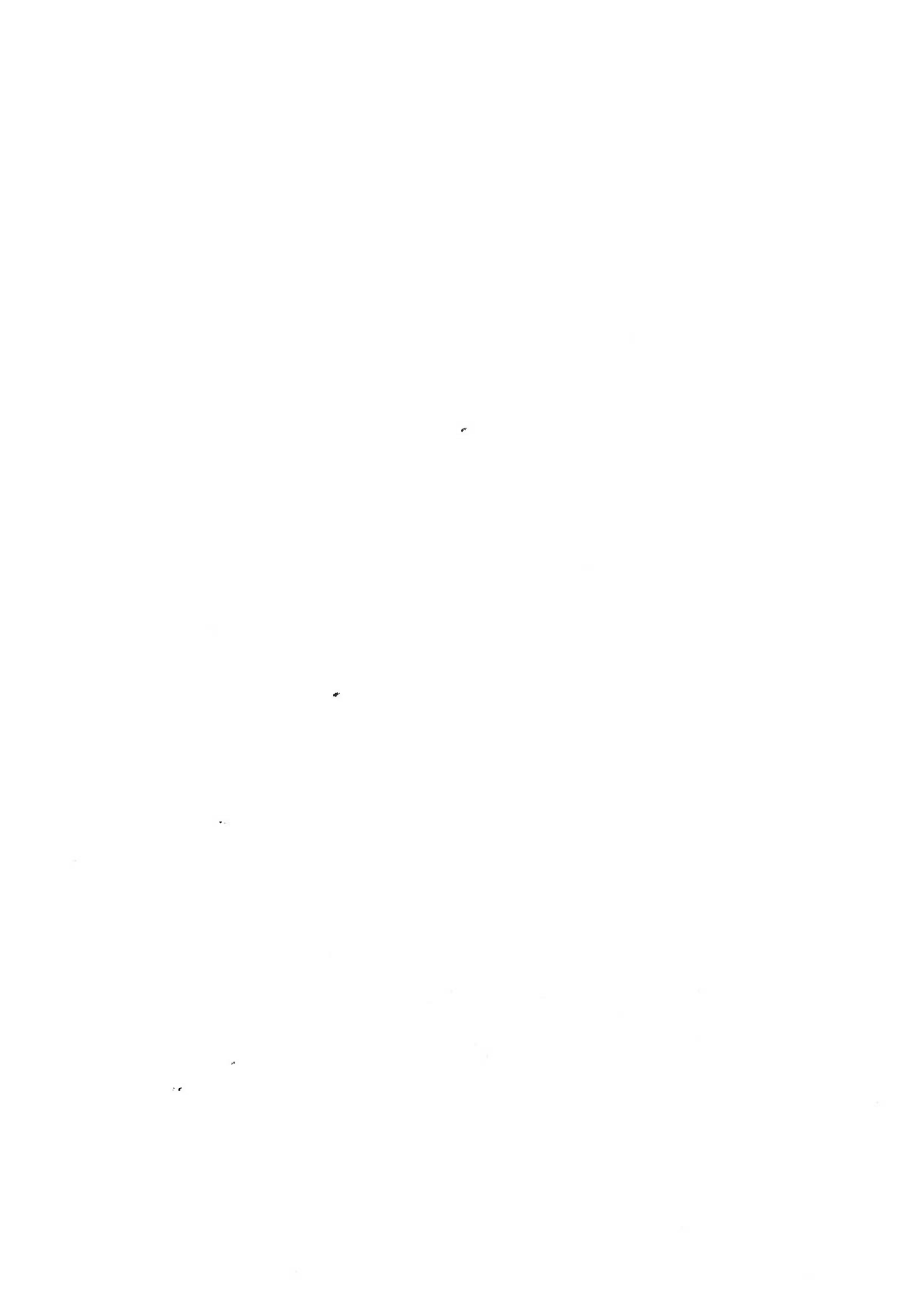
A draft Timetable Variation by Consent will be circulated today or tomorrow to MTR and HEOC which will allow for HAL's binding final decision to be revisited in order to formalise this timetable. Subject to MTRs and HEOCs approval and confirmation that they are satisfied with the revised timetable, it is anticipated that this will be signed this week or early next. The expectation then is that MTR and HEOC will be able to withdraw their respective dispute notices shortly thereafter.

I hope that the above is in order and as agreed – please give me a call if you have any questions.

Best regards,

Mike

M Bradley
Rail Governance Manager



Eight Directions letter

HAL/TTP004 and HAL/TTP005

Eighth Directions issued on 23rd February 2022

1. I understand that an agreement has been reached in principle on a timetable offer which honours the Firm Rights of both Parties in these Disputes, but that HAL supposes that a formal tripartite agreement must be reached before the Disputes can be withdrawn.
2. To the best of my knowledge this has not previously been tested in any dispute, so there is neither a binding nor any persuasive authority on this point.
3. As the Hearing Chair appointed to determine these Disputes I hope that it might be helpful for me to set out my preliminary view.
4. Considering the evidence put before TTPs in my experience, we have almost exclusively relied on exchanges of emails between Parties. While some of these have been less formal than others, so long as the meaning of any email is clear, to my knowledge no TTP has seen any objection to this way of carrying out construction of the Working Timetable.
5. The Network Code (in this case HAL's) requires a Train Operator Variation Request to be agreed, but does not set out any form in which such agreement should be recorded. I do not see this as being a lacuna in the Code. In principle agreement could be expressed orally in a telephone call, although for evidential purposes it is obviously preferable for there to be a written record.
6. Requiring excessive formality to record an agreement does not seem to me to meet the objective of dealing with disputes cost-effectively and does create a risk of incurring costs unnecessarily.
7. As always, Parties are entitled to reach their own decisions and if need be this issue could be tested in a short Directions hearing, but I hope that in the light of my comments above this will not prove necessary.
8. Further, I understand that HEOC has not been able to respond to queries for a week because of half-term. I draw HEOC's attention to provision D1.1.8 of HAL's Network Code in relation to this point.

Signed on the original.

Clive Fletcher-Wood
Hearing Chair
HAL/TTP004 and HAL/TTP005

Ninth Directions letter

HAL/TTP004 and HAL/TTP005

Ninth Directions, issued on 24th February 2022

1. The principal purpose of these Directions to correct the comment that I made in the Eighth Directions, that oral consent would be sufficient to record assent to a proposed Timetable Variation (although I observed that for evidential purposes a written record would be preferable).
2. I refer to D3.6.1 in HAL's Network Code, which states that *'Notwithstanding anything stated in this Condition D3, where HAL and all affected Timetable Participants have so consented in writing, a Timetable Variation may be made without the need for compliance with such of the requirements of this Condition D3 as are specified in the consent [my underlining]. Such a variation is referred to as a "Timetable Variation by Consent"'*.
3. Nothing specifies the way in which that written consent is to be recorded. The purpose of words that I have underlined is not immediately clear to me, but I remain of the opinion that no more is required than an e-mail from each Dispute Party to confirm that the Timetable Variation has been agreed, regardless of the requirements set out in Condition D3. I do not consider that it is open to any Party to insist on any particular method of recording agreement by another Party.

Signed on the original.

Clive Fletcher-Wood
Hearing Chair
HAL/TTP004 and HAL/TTP005

HAL response to Eighth and Ninth Directions



Hearing Chair
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By email only

25 February 2022

Dear Hearing Chair,

HAL/TTP004 and HAL/TTP005 – HAL Response to Eighth Directions

We write in response to the eighth and ninth Directions issued on 23 February 2022 and 24 February 2022 respectively (the Directions).

We thought it would assist each of the Chair, MTR and HEOC to provide a written explanation of why HAL has proposed the approach that it has to put in place a timetable for May 2022 that reflects the re-platforming work at Paddington, which everyone has indicated they are comfortable with (the Acceptable Timetable). The Dispute Parties all agreed to proceed under Condition D3.6.1 to put in place a Timetable Variation by Consent to achieve this (the Variation).

We initially proposed that the parties enter into a Timetable Variation by Consent in the form of a short tripartite written agreement. MTR has a different approach to implementing the Acceptable Timetable, but as we explain in this letter, we cannot meet certain of MTR's specific requests to document the conclusion of these disputes in the way they would prefer.

The Directions consider one aspect of the discussions between HAL and MTR – the form of the Variation. There are more substantive issues between us that we are concerned with, and we address them in this letter as they inform our position as to why we consider a more formal approach is appropriate.

Form of the Variation

Among other things, MTR has objected to the Variation we have issued because it was in tripartite form. They have pointed to the fact that the track access agreements are bilateral. However, the Variation does not seek to change the terms of either of those agreements. It seeks to change a single timetabling decision that affects each of the Dispute Parties. It is therefore entirely appropriate, and in accordance with Condition D1.1.8, to effect the required change in a way that is most efficient for all of them – a single document containing the same terms that everyone signs.

While everyone is agreed that the focus should be on trying to bring these disputes to an end, we believe that because the arguments in them have not been fully aired, it means that the need for the tripartite nature of this settlement is perhaps not clearly understood. We believe this issue also goes to form.

As was apparent from the MTR Sole Reference and the second directions, both MTR and the Chair appear to be of the understanding that the New Working Timetable was published by Network Rail under Part D on 17 December 2021. As we explain below, we do not agree that Network Rail published the New Working Timetable on that date as Condition D2.7.1 requires.

If however, the timetable issued by Network Rail on that date had been published under Condition D2.7.1, such that it is binding, it would be HEOC, not MTR, who should be most concerned to achieve a settlement before consenting to withdraw its dispute. That is because that timetable did not include its fifth train in circuit (and on the wider network, the re-platforming work at Paddington), whereas it did contain MTR's Firm Rights to Terminal 5 as it requested.

It is important for all concerned that the Variation is clear as to what the Acceptable Timetable is being varied from, and because of the conflicting disputes, that there is common understanding that everyone is in agreement on the way forward. Nevertheless, in the interests of trying to end these disputes as quickly as possible for everyone's sake, we have amended the Variation so that it is executed separately in bilateral form.

Condition D3.6.1 states that what a Timetable Variation by Consent evidences is our consent and the consent of all affected Timetable Participants to the Timetable Variation they have agreed to make. Part of that consent obviously goes to the form it is given in, and the Directions note that nothing is said about that in the HAL Network Code. That means that the form, just as the content, will be the product of negotiations between the parties, in which one party might insist on a formal agreement to record their consent, and another insist on a mere email or letter exchange.

The Chair mentions he is unclear as to the wording in Condition D3.6.1 that is underlined in the ninth Directions. As a Timetable Variation by Consent is either a Train Operator Variation or a HAL Variation, both of those are ordinarily subject to specific rules set out in Condition D3 as to timing and content. We believe the underlined wording in the ninth directions prescribes that the parties can avoid complying with any or all of those rules, provided they have set out which ones in the Timetable Variation by Consent. In other words, the Timetable Variation by Consent is documenting the rights and obligations they are agreeing to waive. This, we believe, is another reason for taking a more formal approach than a simple email or letter exchange, and we have duly provided for this in the Variation.

MTR has yet to explain why our proposed Variation is inappropriate, but as the HAL Network Code says nothing about the method of documenting a Timetable Variation by Consent, we believe it is a matter for the parties alone to agree on that method.

Substance of the Variation

Timetable offers

MTR asked for the Variation to be issued to it in the form of an emailed offer letter on the basis, as we understand it, that all the Dispute Parties should be doing is replicating the normal timetable offer process. The Chair also speaks in the Directions of an agreement being reached in principle on a revised timetable offer.

We issued a final decision for the May 2022 timetable on 17 December 2021. That final decision included HEOC's Firm Rights to Terminal 5 and its fifth train in circuit, but excluded MTR's Firm Rights to Terminal 5. Condition D4.7.1 establishes that a decision-maker's final decision is binding and can only be changed by agreement between HAL and all affected Timetable Participants, or by successful appeal.

A timetable offer of the kind sought by MTR: made by us to them and HEOC separately, of the kind wrongly issued by Network Rail on 17 December 2021, unsigned by either of them, would suggest that we can unilaterally change previous final decisions we have made. This would appear to contradict the clear wording established by Condition D4.7.1. When allied with Condition D3.6.1, which specifically anticipates consent being recorded in a Timetable Variation by Consent, we consider it more appropriate to document the parties' consent to vary our final decision in a formal agreement.

The timetable offer MTR is seeking

The more problematic aspect of MTR's request, is the timetable that it has demanded we offer. It wants us to make the exact same timetable offer that was wrongly issued by Network Rail on 17 December 2021. On 8 February 2022, MTR wrote to HAL, repeating the same to Network Rail on the same date, advising:

'Once we have received the Timetable Variation by Consent on or around 11 February 2022, providing the necessary certainty that the timetable originally offered to MTR on 17 December 2021 will stand, we should be in a position to withdraw our dispute.'

MTR has maintained this position since. This is unachievable for a number of reasons.

The first, and most obvious of which, is that while that timetable may reflect the services to Terminal 5 that MTR is seeking, it does not reflect HEOC's fifth train in circuit (and, on the wider network, the re-platforming work at Paddington). Making an offer that reflected that timetable would therefore be a retrograde step and inconsistent with everyone's agreement to put in place the Acceptable Timetable. Consequently, the Acceptable Timetable must 'stand' and not the timetable issued on 17 December 2021. That is why the Acceptable Timetable is referenced in the Variation.

Second, as we have explained, because the New Working Timetable was not published in the Part D sense by Network Rail on 17 December 2021, we believe that any Timetable Variation by Consent must necessarily vary HAL's decision and not that timetable.

The ORR has established (in the appeal decision of TTP Determinations 1331 and 1376) that for a New Working Timetable to be duly published in accordance with Condition D2.7.1, it must be final and it must contain the final decision of the decision-maker. See in particular, paragraphs 95 onwards of that decision.

Network Rail is our sub-contractor for timetable production, but we have not sub-contracted decision-making responsibility to it, which was confirmed to MTR and HEOC by Network Rail in its second letter on 17 December 2021. The timetable Network Rail published that day clearly did not contain our final decision, as Network Rail itself also admitted. Our final decision was set out in our Assessment Criteria document issued to MTR and HEOC separately at 8.42pm that day, which would have led to a different timetable from the one Network Rail erroneously issued.

Third, in following its timetable offer process on 17 December 2021, with an 'offer response' period ending on 7 January 2022, Network Rail did not issue a final timetable to the Timetable Participants that day even if it had correctly reflected HAL's final decision, which it did not. We understand that MTR responded to Network Rail with a number of changes to the timetable Network Rail issued on 17 December 2021. The ORR has established that a timetable offer is not consistent with a decision-maker making a final decision and that Condition D2.7.1 does not envisage the publication of timetable offers.

For all of these reasons, we do not think Network Rail published the New Working Timetable on 17 December 2021 in the Condition D2.7.1 sense. It is not therefore a valid reference point for the Variation, and because of this, there is neither reason to return to that timetable, nor restriction on changing it.

Next steps

We would hope in light of our explanation that the suggested directions hearing would not be necessary. We have written to both MTR and HEOC today with an updated draft Variation, inviting them both to either confirm their agreement to it, or to engage with us on finding the right formulation of wording that everyone is satisfied with.

Yours sincerely

Michael Bradley

M Bradley

Rail Governance Manager
Heathrow Airport Limited

Tenth Directions letter

HAL/TTP004 and HAL/TTP005

Tenth Directions, issued on 25th February 2022

1. I am grateful to HAL for its letter of today's date. I hope that further comments from me may assist in the resolution of these Disputes.
2. There is no agreement between the Parties on the status of the documents circulated on 17th December 2021. This TTP has not reached any Determination on this point, because it has not heard any evidence or submissions to enable it to do so. My comment in the Second Directions reflected my understanding at the time. My comment was not any kind of Determination and the understanding of a Hearing Chair can (and does) change during the progress of a Dispute.
3. Given the complexities of the events on 17th December 2021 it would, in my view, require a full hearing in order to decide which was the effective offer.
4. In circumstances in which all Parties have agreed on what defines as an 'Acceptable Timetable', which honours all Firm Rights, I cannot accept that a hearing for the purpose outlined above would 'allow parties to resolve disputes as efficiently and effectively as possible' (A.3(D)). At present management effort is being devoted to a question whose relevance is questionable, as I very much doubt if the circumstances of 17th December 2021 will be permitted to occur again.
5. The drafting skills of those involved should surely be able to find a form of words which agrees to the terms of the 'Acceptable Timetable', expressing this as varying whichever New Working Timetable was actually effective.
6. The TTP would be assisted by seeing the latest draft agreement in question.

Signed on the original.

Clive Fletcher-Wood
Hearing Chair
HAL/TTP004 and HAL/TTP005

HAL response to Tenth Directions

Hearing of HAL/TTPO04 and HAL/TTPO05 - Tenth Directions Other files/HAL x

↩ **Michael Bradley**
to me, Jonathan, Sophie ▾

Classification: Internal

Dear Tenzin,

Further to my telecon message to your voice mail system, I write to acknowledge receipt of the Chair's Tenth Directions and update the Chair on the discussions between the parties. Since Friday's Directions, MTR, HEOC and Heathrow have been in correspondence regarding the form and content of the Timetable Variation by Consent (Variation). In the circumstances, as the parties remain engaged in the drafting of the Variation, we do not think it helpful to share a copy of Heathrow's previous draft form with the ADC at this time, however we would hope to be in a position to update you on our progress later this week.

Best regards,

M Bradley
Rail Governance Manager



Tue, 1 Mar 10:40

