

HEARING CHAIR'S RESPONSE TTP2191

Background

GBRf submitted a Notice of Dispute (ND) on 8/3/23 regarding Formal Decision (FD) dated 2/3/23 made to extend a blockade to take advantage of proposed Industrial Action (IA). The IA was subsequently cancelled, but the original access footprint was not restored. GBRf asserts loss of reputation, inability to service customers, heavy loss of income and insufficient notice given. GBRf alleges NR made the decision a considerable period of time before FD without involvement of operators. GBRf alleges insufficient consideration of their position by NR and detrimental impact of relationship with NR. GBRf alleges the culture of NR does not focus on planning blocks with a view to keeping freight services moving. NR submits that the FD was made appropriately and reasonably.

GBRf have sought guidance on a way forward in this and other similar disputes. The Hearing Chair (HC) has made no findings on the facts of this case as the evidence has not been tested and it would not be appropriate as the dispute has not been determined.

Chronology of events

23/10/21 The original possession footprint created and published in version 1 of EAS.

20/6/22 Footprint amended to extend the possession from 16 to 26 days and issued.

15/2/23 RMT announced IA to commence from 02:00 on 16/3/23 until 01:59 on 17/3/23 and Action Short of Strike (ASOS) for both Operations and Maintenance over a period of 6 weeks.

11/3/23 P2023/3429981 (Stalybridge blockade) commenced at 00:30 for 26 days.

23/2/23 Transpennine Route Upgrade (TRU) programme revisited haulage plan as IA would cause issues to original plan.

24/2/23 GBRf sent 2 emails to NR enquiring about impact of IA and indicating it would not agree to further disruption to services.

24/2/23 NR advised TRU of GBRf's position.

24/2/23 NR requested additional access via a Disruptive Access Form and requested comments by 2/3/23 to enable publication of Weekly Operating Notice (WON). Notice given that once access agreed it would not be possible to give back regardless of whether IA cancelled.

27/2/23 Freight Access Working Group (FAWG) chaired by TRU. GBRf did not attend.

27/2/23 Email GBRf to NR indicating not in position to agree further late notice possession on basis that changes bring additional risk to services.

2/3/23 Deadline for responses and Formal Decision issued under Condition D3.5.

3/3/23 WON, namely the official notice in Rules and Regulations, issued.

7/3/23 IA cancelled.

8/3/23 Services planned around the possession and offered back. Services as per KRS. Offer not disputed by GBRf.

8/3/23 TRU programmed asked to review possibility of reverting back to the original possession footprint. Refused on grounds of safety.

8/3/23 GBRf submitted ND to ADC pursuant to Conditions D3.5.3 and D5.1 and indicated the view was that it was unlikely to go to a hearing due to time constraints. Dispute on basis that GBRf disagreed with Week 50 Possession number 3429981. Request that Notice of Dispute expedited "because of the significant impact this possession will have on our service, resources and business. Network Rail have amended the footprint of a possession based on the recent rail disputes, these current disputes are not cancelled and Network Rail are intending to take the same footprint despite our objection." GBRf indicated there may be two other interested parties.

9/3/23 PICOP brief held.

9/3/23 Request from GBRf to review possibility of introducing Single Line Working to enable a number of their services to run.

9/3/23 NR internal discussions and decision not possible to introduce without causing significant disruption.

9/3/23 Further conversations with TRU to amend footprint with view to allow some of GBRf services to run. Teams call with TRU and AMEY (principal contractor) and declined on grounds of safety.

9/3/23 NR advised GBRf amended plan not supported by TRU and AMEY.

10/3/23 HC appointed and it being clear not possible to arrange hearing before possession to take place on 16/3/23 suggested utilising ADR Rule H16 invited submission with view to issuing guidance to assist in future planning and interpretation of Part D. Parties invited to confirm happy to proceed in this way.

11/3/23 P2023/3429981 (Stalybridge blockage) commenced at 00.30 for 26 days.

13/3/23 FAWG meeting held and GBRf attended.

15/3/23 Email from GBRf asking for access to be removed. Possession already commenced and extension planned.

16/3/23 Directions email issued:

No hearing will take place for TTP2191 and no determination issued.

Parties to provide summary documents outlining main issues. GBRf to serve documents by 16:00 on 23/3/23 and NR to serve response by 16:00 on 31/3/23. The summary documents to be no more than 2 sides of A4.

Parties' Positions

Following receipt of summary documents a number of focussed questions were put to the parties and the following was established:

GBRf

- 1) GBRf did not lodge ND immediately on receipt of FD because discussions were in progress between GBRf and NR and wanted to give these discussions a chance.
- 2) The reason for the delay in lodging ND in part due to there being no fast track system and because there was no time to engage the whole dispute process. GBRf saw its ND as an official objection rather than the start of the dispute process.
- 3) If a fast track system had been in place the ND would have been lodged more quickly.
- 4) GBRf's view of a fast track system is that it is of concern that without the ability to formally dispute a possession due to timescales NR will adopt the approach of preventing/altering a plannable possession causing unacceptable levels of impact on customers and business.
- 5) GBRf's view is that NR has been making the plans much earlier than the official request without any involvement by operators.
- 6) GBRf seeks a process that instructs the affected industry partners to be part of consultation from the start and prior to any official requests being made thereby providing information about plans to enable early identification of the impact and mitigating options and risks.
- 7) GBRf's view is that there would have been no alteration to the actual possession even if there was a fast track system in place. However, a fast track system would have provided the opportunity to have a written determination. Importantly, the dispute process is not always about just recouping costs/damages, sometimes it is about reaching a considered determination that influences industry change/process to prevent such things happening again.
- 8) GBRf's view is that a fast track system is possible, workable and desirable. GBRf suggests a diluted version of the Sole Reference Document to reduce the response times for the affected operator(s) and NR. The ND should be submitted on the next working day after FD and prompt issuing of decision.

NR

- 1) The FD was issued within a reasonable time upon expiry of the consultation period and having considered all information submitted. NR followed and applied the Network Code. The term 'reasonable' is not a defined term with Network Code and as such is open to subjective interpretation and will differ on a case-by-case basis depending on the facts of any given scenario. The actions and timescales were reasonable in this case when measured against D3.5 and D8.6 requirements (sufficient information to allow comment, and a reasonable time to respond). When FD issued all pertinent options had been exhausted.

- 2) It is essential that a FD is issued prior to PICOP brief as the FD directly informs the content of the brief which is directly relevant to the safe execution of the planned possessions.
- 3) A consultation deadline for 2/3/23 was reasonable under Condition D8.6. Providing less time for operators to review and respond to the proposal would have been unreasonable.
- 4) The benefits of a fast track system are uncertain. There is nothing exceptional about identifying late change (whether that be for disruptive or non-disruptive possessions). The provisions of Condition D3.5 adequately address the issue of process, and the ADRR Annex to the Code achieves the same in relation to the dispute mechanism. Part C of the Network Code already allows for Proposals for Change to the above to be created for submission and consideration and NR would fully engage with any such submissions.
- 5) NR envisages difficulties with fast track system as follows:
 - a) Shortened timescales likely to lead to lack of detail for what are often complex decisions and a lack of time may prevent a full understanding of the issues as could not be effectively presented and argued.
 - b) A lack of resources for both parties to write submissions even if reduced or limited format.
 - c) Could a fast track system deal with disputes involving multiple dispute parties?
 - d) The potential lack of availability of a HC and panel members at such short notice is a difficulty.
 - e) The potential lack of availability of representatives for the Dispute Parties/ Interested Parties is a difficulty.
 - f) This may increase the likelihood that a HC may need to convene a hearing on their own.
 - g) A fast track system could create a form of cottage industry.
 - h) There are consequences if a HC could not be appointed in time.
 - i) There is uncertainty as to how often a fast track system would be utilised.

Conclusions and Observations

A fast track system, if it could be formulated and operated, would be of assistance in disputes with late notice decisions (regardless of the cause). GBRf is in favour of such a system. NR is not opposed but has reservations and raises valid concerns as stated above.

Situations similar to the facts in this dispute appear to be occurring more frequently. A solution would be advantageous to NR and all operators.

It is the duty of an appointed HC and panel members, presented with these circumstances, to address the issues.

It is proposed that this issue be discussed in detail at the ADC's Annual Chairs' Meeting on 28/06/23 to enable full consideration.

Any fast track system needs to operate within Conditions D3.5 and D5. A final determination giving guidance as to what could be considered "reasonably practicable" in the circumstances at an early opportunity would be of considerable assistance even if the determination was after the possession.

If it is decided at the Chairs' Meeting that a fast track system is desirable and practical, training with materials could be prepared for HCs and panel members.

In advance of the Chairs' Meeting it would be helpful if the Disputes Secretary could canvass the HCs and panel members about availability at short notice in general.

Condition D5.1.2(a) states appeal must be made within five working days of receipt of FD. If a fast track system is able to generate confidence, parties could be encouraged, if appropriate in their circumstances, to lodge an appeal on the next working day.

Condition D5.3.1 provides the power to deliver remedies sought by parties such as GBRf in this case. The timescales for the HC and panel members is extremely tight and, therefore, focussed training and sharing of best practice essential.

ADRR Chapter H states that the Timetabling Panel shall (my emphasis) consist of HC and "where possible, include one of the members of the Timetabling Pool." Chapter H Rule 12(d) provides: "A Hearing Chair may only constitute a Timetabling Panel sitting without members of the Timetabling Pool in the event that all of the parties subject to the dispute agree to the same." The problems I envisage is that the enthusiasm and willingness of HCs to do this may depend on their experience and knowledge which will be variable. In addition, the greater the number of parties the more difficult will be the possibility of obtaining their agreement. It is a potential problem that any party can veto a HC proceeding alone and thwart the process.

Chapter H Rule 20 gives power to the HC to give directions as to any or all aspects of the procedures to be followed which would include time limits for lodging (short) submissions and setting out a truncated timetable. However, this again could be delayed by a party applying for alternative or revised directions at all stages.

Notwithstanding all of the above potential problems, my view is that a fast track system should be formulated and implemented, if at all possible, subject, of course, to approval at the Chairs' Meeting. Such a system requires careful planning, consideration and collaboration. Only by trying out a fast track system will it become clear whether it is a viable solution. There will no doubt be additional bumps in the road which have not been anticipated which can be dealt with as an ongoing process.

The proposition to formulate a fast track system is not fully and completely formed but it appears to be the most practical and agile proposal in the circumstances.

A handwritten signature in black ink, appearing to read 'J. Findlay', written in a cursive style. The signature is enclosed within a simple, hand-drawn rectangular box.

J Findlay
Hearing Chair
2 May 2023