ACCESS DISPUTES COMMITTEE

The Hearing Chair (Mr Clive Fletcher-Wood) has asked me to pass you the following Note, which is issued under ADR Rules A9 and A10:-

"The Parties will recollect that the first iteration of this Dispute related to Network Rail's ('NR') claim that the Notice of Dispute was defective. It was in relation to that question that I drafted a Rule H18(c) Note which was issued to the Parties on 22 December 2017, shortly before it was agreed by the Parties to put this question in abeyance while they sought to settle the details of the disputed paths. A further copy is attached for ease of reference.

The Claimant's Sole Reference Document ('SRD') refers to that question at paragraph 4.3, saying that '*Following an initial dispute raised by the Defendant in respect of the Notice of Dispute issued by DB Cargo that was subsequently resolved amicably*'.

I do not know know the terms of that settlement, what should therefore be included in the Determination of this Dispute as being agreed between the Parties, and what else might need to be dealt with as Observations and Guidance. While not part of the one remaining disputed path (1Y46), it would be helpful if the Claimant could set out its views on this point to the Secretary and to NR by 16 00 on Monday 18 June 2018, to allow NR to address them in its SRD.

I assume that NR's SRD will explain its selection and application of the Decision Criteria in relation to the services which have led to the re-timing of 1Y46 which is the subject of this Panel hearing on 2 July, as well as in relation to 1Y46 itself."

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TTP1198 – ADR Rule H18(c) Matters of law

I am required by Access Dispute Resolution Rule H18(c) to set out for the benefit of the Parties any issues of law raised by the dispute. As the currently listed hearing in this Dispute is dealing only with a preliminary point of law I hope that it will be helpful to explain the background as I see it.

As DB Cargo's response was not due to be served until the final working day before Christmas this note was drafted before I had seen DB Cargo's response. It is not to be taken as commenting on or responding to that that response, nor pre-judging the issues, but I think it necessary to explain the context leading to the issue of law to be determined at this stage of this Dispute.

There are two questions arising from this preliminary point: the first concerns the drafting of the Notice of Dispute, the second concerns its service. In other words it must be asked whether the Notice of Dispute is valid, and, if so, whether it was validly served. If the answer to the first question is no then the second question will not need to be determined in this Dispute, although an answer to it within the Observations and Guidance section of the Determination may assist the industry.

Any dispute resolution process which is compliant with Article 6 (of the European Convention on Human Rights) must necessarily rely on rules governing the procedure to be adopted in resolving disputes. These rules must themselves obviously be Article 6 compliant.

It is, nonetheless, important that procedural rules should not themselves create unfairness; on occasion therefore they must be applied with a degree of flexibility, to ensure that a party is not blocked from a hearing of its substantive case because of a trivial breach of a procedural rule which of itself creates no unfairness for the other party or parties.

The Principles governing the Access Dispute Resolution Rules ('ADRR') are set out in Chapter A. They include the intention that the determination procedure for disputes should:

'*provide a relatively swift and easy to access disputes process*' (A3(c))……..

which will:

'*allow parties to resolve disputes as efficiently and effectively as possible*' (A3(f)).

The consequences of procedural default are dealt with in A16, which states that a Forum (in this case a Hearing Chair) may [my emphasis] order a defaulting party to comply with its obligation; ……..; or order that a dispute can proceed to determination without one or more steps being taken which have not been taken because of procedural default…..

This puts beyond doubt a Hearing Chair's power to waive a procedural default, if the circumstances justify doing so and so long as the dispute can still be resolved without any unfairness to any party.

Timetabling Disputes are dealt with in Chapter H of the ADRR. A Timetabling Panel ('TTP') shall [again my emphasis] '*endeavour to reach fair, rapid and inexpensive determinations of disputes drawing on that expertise*' (H14(b)).

My interpretation of this provision, in which in my view the word 'inexpensive' incorporates the expectation that most TTPs can be settled without legal representation, is that in the time-bound process of a TTP a greater degree of flexibility may be expected than in disputes which may move at a slower pace, always so long as that flexibility does not import any unfairness.

Further, in the Appeal to TTP1064 I note that the ORR commented that the TTP process should lead to a '*legally robust conclusion without being legalistic*' (paragraph 59).

The only other authority with relevance to this question that I have been able to locate is the ORR's Second Determination in TTP244. Although that was dealing with bids for the construction of the Working Timetable,

a basic principle was set out by the ORR in paragraph 58. It reads (in part), '*It should be emphasised that the Code sets out a clear set of obligations and rights on the part of Network Rail and train operators which govern the timetabling process. While ORR has no wish to see parties embroiled in unnecessary bureaucracy, it is clear that the process for the development of the 2008 FWT was conducted with considerable informality and, in some instances, disregard for the formal contractual processes*'.

The ORR went on (in paragraph 61) to remind the industry that if industry parties do not think that procedures set out in the Network Code are practical then there are processes which can be used to initiate change. (Although the ADRR were in fact changed in 2010, the principle still stands.)

Notices of Dispute are dealt with in Chapter B of the ADRR. The relevant paragraphs read:

B2 A Resolution Service Party wishing to refer a dispute shall serve a written Notice of Dispute on the Secretary and shall serve a copy of the Notice of Dispute on every other party to the dispute.

B3 The Notice of Dispute shall, unless otherwise advised by the Secretary, normally be in accordance with the template for a Notice of Dispute (found on the access disputes website) and shall do all of the following:

(a) state the contract and the relevant contractual clause under which the reference is made (or such other basis for the reference under these Rules);
(b) list the other parties concerned whether as a Dispute Party or otherwise;
(c) summarise the basis of claim including a brief list of issues;
(d) state whether the Dispute Parties have already agreed on a determination procedure, or, if not, specify the referring party's initial preference for a determination procedure, including, if it believes it is a Timetabling Dispute, a statement to this effect; and
(e) state whether exceptional circumstances exist requiring an expedited hearing or process.

B4 Valid service of a Notice of Dispute on the Secretary in accordance with Rule B2 shall amount to the issuing of proceedings relating to the dispute for the purposes of all relevant limitation periods or provisions……

The question of law to be decided in this preliminary hearing is whether the principle of flexibility discussed above goes so far as to entitle a Hearing Chair to apply the powers available to him/her under Rule A16 to determine that DB Cargo's Notice of Dispute dated 01 December 2017 is a valid Notice of Dispute, and, if so, whether it was validly served. Both questions have to be answered in the affirmative if the Dispute is to proceed to a full TTP hearing.

I hope that it may assist the Parties if I refer them to paragraphs 6.8.1 and 6.8.2 of the Determination of TTP1064 and paragraphs 5.9.1 and 5.9.2 of the Determination of TTPs1065, etc. These paragraphs primarily deal with a response to Network Rail's submissions in those TTPs which queried the validity of Notices of Dispute for reasons that were never clearly explained. The comments in these paragraphs primarily refer to the fact that the provisions of the template offered on the ADC's website are not entirely aligned with the provisions of Part B of the ADRR dealing with Initiating a Dispute and Allocation.

More specifically I also direct the attention of the Parties to the Directions which I issued on 04 April 2017 in TTPs1064, etc., which included a reference to the Notice of Dispute issued by DB Cargo in TTP1065. A copy of these Directions can be found on ADC;s website.

I explain above that this note is not seeking to address DB Cargo's Response, but I welcome the assurance that both Parties are seeking to identify a pragmatic way forward. It would be open to Network Rail to withdraw its objection to DB Cargo's Notice of Dispute to allow the issues in dispute to be determined by a TTP if they cannot be settled (but obviously vacating the date set to deal with this preliminary point). But in doing so Network Rail could ask the TTP to provide Observations and Guidance on this point for the benefit of the industry, which will of course be published.