

## Directions 29 May 2018

The Hearing Chair (Mr Clive Fletcher-Wood) has decided to issue the following Directions Letter, which you will see incorporates his assessment of issues of law raised by this dispute (as required by ADR Rule H18(c)).

1. I am grateful to the Parties for their Sole Reference Documents ("SRDs"). I recognise that Network Rail ('NR') has not had the opportunity to respond to Freightliner's ('FL') SRD, but given the similarity of the arguments put forward by Abellio East Anglia ('AEA') and FL I do not think that any Party is disadvantaged by this.
2. Given the limited time available between now and the hearing on 31 May 2018, I think it appropriate to include the note on matters of law required by ADR Rule 18(c) within these Directions.
3. A question of fact arises as to when NR did become aware of a risk that the 72 hour RoU over the second May Bank Holiday in 2018 would not be sufficient for the second phase of the demolition works at the Ardleigh Green Bridge.
4. AEE says (in the third full paragraph on page 5 of its SRD) that NR's ASPRO stated that it had been in discussion with NR RAP on this issue 'for months' before the meeting on 28 March 2018; a point echoed by FL (in the third full paragraph on page 4 of its SRD). In its SRD NR is even less precise in its explanation, merely saying that this point had been raised by TfL's STIP project 'prior to [the meeting on 28 March 2018]'. Appendix A, however, suggests that NR first became aware of this on 27 October 2017.
5. **The Panel will be assisted if NR will confirm by 1700 on 30 May 2018 whether it first became aware of this risk on 27 October 2017, or by providing at the hearing any documentary evidence on which it seeks to rely to support any other date that it submits is the relevant date on which it became aware of this risk.**
6. AEA refers to other disruptive engineering works on the GEML. It would assist the Panel to understand the scale of such disruption to AEA's services.
7. **Will AEA please advise the Panel, by 1700 on 30 May 2018, of the number of weekends in the year 2017-18 that it was unable to run through services between Liverpool Street and Norwich (via Ipswich).**
8. **If FL considers that similar information about the effect of its services will assist the Panel then it should provide it by the same time.**
9. Taken at its lowest, AEA's SRD submits that the RoU which is the subject of this Timetabling Panel hearing has not been progressed efficiently, one illustration of this being the inability to plan to include the RoU in Week 11 of 2018/19 because of the short notice.
10. The fact that FL was not consulted initially, as admitted by NR, appears at first sight to support AEA's submission on this point.
11. Parties are reminded that the role of a Timetabling Panel does not extend to punishing any party for the way in which it conducts its business. That said, the Parties are also reminded that a Timetabling Panel is required to reach its decisions solely, '*...on the basis of the legal entitlements of the Dispute Parties and on no other basis*' (ADR Rule, A5).
12. Each Party has helpfully set out its interpretation of how the Decision Criteria should have been applied in this instance. The Panel will, however, wish to ask itself whether the legal entitlements of the Parties go beyond the application of the Decision Criteria in respect of any proposed RoU, but must necessarily include all the

provisions of Part D of the Network Code on the basis that a Timetable Participant's legal entitlements include an expectation that Network Rail (and other Timetable Participants) will comply with the provisions of Part D.

13. As a matter of law, the Panel will be assisted if each Party is prepared to address it on the weight, if any, which the Panel should accord in reaching its Determination to a finding – if such a finding were to be made – that the Timetable Participants (AEA and FL) could have been consulted earlier on possible dates for the RoU which would have been acceptable to them, or at least which would have been preferred to Week 14, and that the failure to consult them in sufficient time arose from a breach of the provisions of Part D.
14. Similarly, what weight, if any, should be given to the fact that a Timetable Participant (FL) was not initially included in that consultation which was taking place?
15. Further, as a matter of law, within NR's application of the Decision Criteria it refers to factors which do not directly affect the operation of the railway. One example is its inclusion within (e) of the impact of the current contraflow on the A127 on road users. In principle, not concentrating solely on this example, is it correct for such non-railway factors to be included when applying the Decision Criteria?

#### Remedies

16. To assist the Parties to prepare for the hearing, I think it worth setting out my preliminary view on the remedies open to the Panel. This is against the background of submissions made by NR in recent hearings that in the absence of Exceptional Circumstances as defined in Condition D5.3.1, a Timetabling Panel has no option but to uphold the decision of NR which is in dispute. This argument has specifically been rejected by the ORR, see paragraph 61 of the ORR's Determination of the Appeal against TTP1064.
17. In this instance I suggest that it is open to the Panel either to uphold NR's decision to take the proposed RoU in Week 14, or to quash it. While AEA and FL have canvassed dates which would be preferable, there is insufficient information available for the Timetabling Panel to identify another window for the work to be completed, even if Exceptional Circumstances had arisen.
18. In expressing this preliminary view I am not fettering the discretion of the Panel, which will of course be open to hearing alternative submissions. If, however, the Parties accept this view then time need not be spent at the hearing on the issue.

#### The conduct of the hearing

19. Again in the hope of assisting the Parties, without wishing to restrict the way in which they present their cases, in the light of the points made above, and legal issues which I have identified, I suggest that the Panel should first concentrate on the identification of which Decision Criteria are relevant in this case, the extent to which they conflict, and the weight placed on them by the Parties.
20. The Panel might take stock at that point, to conclude whether having heard the Parties' submissions it accepts that NR has carried out this exercise correctly and so whether on the basis of the identification and application of the Decision Criteria alone it considers that it should uphold or quash NR's decision.
21. If the Panel decided that it should quash NR's decision on the basis of the application of the Decision Criteria, then for the purposes of this Determination it would not need to consider what weight, if any, should be applied to any breach of AEA's and FL's legal entitlements, if such a breach had been found. Nonetheless, given the duty of a Timetabling Panel to provide Observations and Guidance, the Panel would still want to hear the Parties' submissions on this point.
22. If, alternatively, the Panel reached the conclusion that the identification and application of the Decision Criteria supported NR's decision, it would then have to consider what degree of weight, if any, should be applied to any breach of AEA's and FL's legal entitlements, if such a breach were found. Once this analysis has been concluded, the Panel would need to decide whether the weight attributed to the breach of legal entitlements amounts to a more important factor than the application of the Decision Criteria alone, so requiring the Panel to quash NR's decision on these grounds.

#### Costs

23. To avoid any time being wasted on this issue at the hearing, I think it worth saying now that nothing which I have seen so far persuades me that NR's conduct has come anywhere near the circumstances set out in either limb of the provisions in ADR Rule H60, which would be necessary before I would be entitled to consider making a costs award against NR.

Tony Skilton  
Secretary  
Access Disputes Committee

Tel: 020 7554 0601  
Fax: 020 7554 0603