

## Directions 08 June 2018

### ACCESS DISPUTES COMMITTEE

The Hearing Chair (Mr Clive Fletcher-Wood) has read the Sole Reference Documents which you have provided for the Panel hearing next Tuesday and has asked me to send you the following Note, being his assessment of issues of law raised by these Disputes and also some Directions:-

1. I am required by ADR Rule H18(c) to identify any relevant issues of law raised by these Disputes (although as a matter of fact Network Rail ('NR') appears to be suggesting that offers now made have disposed of Dispute TTP1313).
2. While NR does not refer to this point in the 'Decisions Sought' section of its Sole Reference Document, in paragraphs 4.2 and 4.4 (1<sup>st</sup> bullet) NR submits an argument that Freightliner ('FL') is relying on the wrong section of the Network Code in advancing its case; which NR submits should properly have been brought under Network Code Condition D3.4.
3. The Parties are reminded that these Disputes were stated to be subject to expedited arrangements (see the Secretary's e-mail of 1534 on 29 May 2018). This includes the time available to me as Hearing Chair to consider the Dispute and draft this Note.
4. At first sight I am inclined to accept that NR's submission is correct, but I do not consider that this need have any effect on the conduct of these Disputes. The Secretary's e-mail to the Parties of 1222 on 01 June 2018 included the following section: *'I gather that Network Rail is not wishing to pursue any concern regarding the reduced documentation served by Freightliner Ltd for the Panel hearing on 12 June and is not in doubt over what is in dispute nor feeling disadvantaged for the purpose of preparing its own Sole Reference Document.'*
5. On these grounds alone I have no hesitation in saying that the Disputes can still be heard fairly as scheduled.
6. NR also objects to FL stating that it is not aware of any other Party being involved, which NR queries on the grounds that it is not possible to find more paths without affecting another Train Operator. While it has not set out any details, I understand that FL's case relies in part on NR having not exercised its flexing rights in order to accommodate FL's bids. If this claim is justified, then I do not see how any other Train Operator whose services are flexed within NR's flexing rights could regard itself as an affected Party able to join these Disputes.
7. Further, however, it seems to me that FL is challenging NR's application of the Decision Criteria in respect of FL's own paths; FL has not suggested any amendment to any other Operator's path. There can therefore be no question of the Panel purporting to order that any other Operator's path should be amended, even if Exceptional Circumstances were found to exist.
8. That said, if NR could have accommodated FL's bids by seeking to flex other Operator's services beyond the contractually available degree of flexing, then it is NR which should have identified the paths and Operators concerned in time to enable them to participate in these Disputes.

### **Directions**

1. Informal advice to the Secretary on progress that might lead to any Dispute being settled is welcome and to be encouraged, but in this case at 1500 today (8 June 2018) there seems to be a considerable degree of confusion as to how many paths remain in dispute. Any update which the Parties can provide before the hearing will assist the Panel to prepare itself.
2. As NR has already been reminded, the Panel will wish to understand NR's application of the Decision Criteria in each individual case which remains in dispute at the hearing.

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## Note to Parties 11 June 2018

The Hearing Chair has asked me to send you the following further Note under ADR Rule H18(c) and regarding issues of fact relevant for the Panel hearing tomorrow:-

1. Further to the Note issued on 8 June 2018, I have since been advised that the services still in dispute form part of FL's firm rights. The question will therefore arise as to the extent of NR's duty to accommodate an Operator's firm rights during a major blockade.
2. If FL wishes to rely on any provision within its Track Access Contract ('TAC') in relation to this point it must bring sufficient copies of the relevant section(s) of its TAC to the hearing for the Panel, Secretary and NR's representatives – 9 copies please.
3. NR's documents can necessarily only include a limited amount of detail. Although there is a reference to 2M69 East Croydon to Watford in NR's detailed table (in the first line referring to 4M04) I am interpreting this as a conflict at some point north of Willesden Junction. My interpretation of NR's table is that all the rejected paths were on the basis of attempts to identify alternative paths eastwards from Reading through Acton Wells Junction.
4. It will assist the Panel if the Parties are in a position to explain what attempts, if any, subject obviously to route availability, gauge clearance and route knowledge, have been made to identify alternative paths through for example Chertsey and South Acton or Clapham Junction; Swindon and Cheltenham; or Salisbury, Bristol and Cheltenham.

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