

Directions 14 October 2018

ACCESS DISPUTES COMMITTEE

The Hearing Chair has reviewed the Sole Reference Documents provided by DB Cargo (UK) and First Greater Western ("FGW") and has asked me to issue the following Directions to elicit clarifications which will assist the Panel in its consideration of the issues and also assist Network Rail in the preparation of its response Document:-

To DB Cargo

- In para 5.5 of its Sole Reference Document DB Cargo suggests that the fact that as in this instance the majority of the RoUs would be taken within the 5 days allowed for an appeal denies it the right of appeal, this seems to be a misunderstanding. What could be argued is that it is denied the right of any effective appeal because of the lack of a specific procedure within Chapter H of the ADR Rules to deal with urgent applications in relation to, for example, short notice RoUs. While a Hearing Chair has broad powers to amend the procedure in conducting a Timetabling Panel hearing, including abbreviating timescales, it might be preferable to refer specifically to permitting urgent applications, similar to seeking injunctive relief in the Court. Is DB Cargo seeking Observations and Guidance to this effect?

- If so, would this satisfy DB Cargo's para 6.1(a)? This question is asked because Network Code Condition D3.5.2 entitles Network Rail to 'prescribe [for itself]....such time periods as are reasonably practicable in the circumstances' and to notify affected Timetable Participants of its decision as soon as practicable.

- While Network Rail clearly notified affected Timetable Participants of its decision as soon as practicable, Network Rail's right to set timescales involving reasonable practicability do not appear to distinguish between what is reasonably practicable for Network Rail, which wanted the RoUs for its own purposes, and the needs of DB cargo's customers (and FGW's passengers in the other Disputes), which were clearly not served by such a late decision, in which there is no evidence of Network Rail having informed the operators of how it applied the Decision Criteria, assuming that it made any attempt to do so.

- This very short section in Condition D5.5 does not draw this distinction, but if an urgent relief procedure were to be incorporated in Chapter H of the ADR Rules, would this be necessary?

- In para 6.2(b) DB Cargo seeks a Determination that the RoUs were not 'reasonable 'emergency' Restrictions of Use'.... While this statement may accord with the industry's understanding of when RoUs should be imposed at such short notice, is DB Cargo able to point to any authority to this effect?

To Network Rail

- Would Network Rail oppose Guidance and Observations suggesting that a specific procedure for applications for urgent relief should be incorporated into Chapter H of the ADR Rules?

To FGW

- FGW's Sole Reference Document refers at a number of points (eg para 2.1) to a change in the Timetable Planning Rules, but does not explain what change was made to the TPRs, when, and in what way this failed to follow the procedure required by the Network Code. Will FGW please explain its position on this point, both to enable Network Rail to reply and to assist the Panel's understanding.
- The Determination sought by FGW under the heading 'Principle' (para 6.2) argues that the Decision Criteria (including its Objective) and train operator objections must be considered before there is any change to the TPRs. Condition D3.4.4 already includes these requirements, so it is difficult to understand what a Determination to this effect could add.
- Turning to the second part of para 6.2, while the Decision Criteria are clearly required to be applied to any change in TPRs, it is difficult to understand how the Considerations could be applied to any decision relating to any change to the TPRs, as TPRs are of general application, rather than being applied to individual bids. Will FGW please clarify what it seeking in this respect.
- Under the heading 'Specific Conclusion' there are four sections. The first has already been covered above in the section relating to DB Cargo. The second again requires an explanation of what change of TPRs FGW claims has occurred. The third seems to have been covered by the question posed to DB Cargo and Network Rail.
- The fourth section, the reference to 'exceptional circumstances' presumably refers to the powers of a Panel set out in Condition D5.3.1, but given the questions set out above it is not clear what 'alternative decision' the Panel could make in these circumstances. Again will FGW please clarify this point.

General

DB Cargo and FGW should respond to me regarding these Directions by 12 00 on Thursday 18 October 2018, copying their responses to the other recipients of this e-mail.

On behalf of Clive Fletcher-Wood
Hearing Chair

Tony Skilton
Committee Secretary

Directions response from GWR, 18 October 2018

Good afternoon Tony,

Thank you for this.

Regarding the questions to GWR:

1. The Timetable Planning Rules: The "Rules" referred to is the collective term for the Timetable Planning Rules and the Engineering Access Statement combined. In this case only the Engineering Access Statement has been changed, and by the short term process set up by the process mentioned in D 3.4.3 which permits changes to engineering work plans to be treated under short term planning procedures once the New Working Timetable is published. I'm sorry that I did not make this clear in the paper. There is no change alleged to the Timetable Planning Rules. It is alleged by GWR that Network Rail failed to follow the procedure in the Network Code for changes to the Engineering Access Statement made in accordance with D3.4.3 because it failed to use and demonstrate it had used the Decision Criteria (including the Objective) in reaching its decision regarding each of the two changes referred to in the paper;
2. Principle Determination sought: Thank you for the confirmation that this process requires application of the Decision Criteria. GWR therefore withdraws its request in this respect however the second element of this sought a determination that the grounds for the decision were advised to tocs at the same time as the decision. This is so that the toc can assess whether it believes the decision is sound or whether it is to be subject to dispute, and is also to prove the Decision Criteria have been considered. Paragraph 1.5.4 of the National Rules for the 2018 timetable state that an operator needs to provide reasons for its reaction to a consultation. It follows that Network Rail needs to provide the reason for its decision, and indeed this is consistent with the requirements regarding publication of the New Working Timetable where D 3.4.11 requires Network Rail "where it modifies or rejects any revised Access Proposal, it must provide written reasons for its decision";
3. Second Part of para 6.2: This is I am sorry caused by the confusion over TPRs. The second part of GWR's 6.2 is intended to seek a determination that for consultations later than publication of the Confirmed Period Possession Plan that seek to change the Engineering Access Statement a heavy weighting given to the effect on end user (ie passenger and freight commodity or terminal company) and toc/foc/NR planning arrangements is a mandatory implication of use of the Decision Criteria;
4. Determination Conclusion: The clarity of the second request is again I regret hampered by my use of Rules rather than Engineering Access Statement; and
5. Exceptional Circumstances: Thank you for the clarification of this. GWR does not believe the decisions made were correct and if time permitted would have liked a determination that reversed the decisions in time for passengers to have the journey they were expecting. This is now academic but the exceptional circumstances do apply so in an ideal world a determination not capable of being implemented in retrospect but capable of being used as precedent would be sought.

Directions response from DB Cargo, 18 October 2018

"Tony,

Thank you for your e-mail dated 14 October 2018 containing the directions of the Hearing Chair in respect of TTP1383, TTP1384 & TTP1385. In response to the particular directions aimed at DB Cargo (UK) Limited ("DB Cargo"), it replies as follows:

"In para 5.5 of its Sole Reference Document DB Cargo suggests that the fact that as in this instance the majority of the RoUs would be taken within the 5 days allowed for an appeal denies it the right of appeal, this seems to be a misunderstanding. What could be argued is that it is denied the right of any effective appeal because of the lack of a specific procedure within Chapter H of the ADR Rules to deal with urgent applications in relation to, for example, short notice RoUs. While a Hearing Chair has broad powers to amend the procedure in conducting a Timetabling Panel hearing, including abbreviating timescales, it might be preferable to refer specifically to permitting urgent applications, similar to seeking injunctive relief in the Court. Is DB Cargo seeking Observations and Guidance to this effect?"

DB Cargo accepts that it should have argued in paragraph 5.5 of its Sole Reference Document that it is being denied the right of an "effective" appeal rather than an appeal *per se* and apologises for any confusion it may have caused in this respect. It would certainly support any Observations and Guidance that the Hearing Chair may be able to give in respect of permitting urgent applications similar to seeking injunctive relief in the Court.

"If so, would this satisfy DB Cargo's para 6.1(a)? This question is asked because Network Code Condition D3.5.2 entitles Network Rail to 'prescribe [for itself].....such time periods as are reasonably practicable in the circumstances' and to notify affected Timetable Participants of its decision as soon as practicable."

"While Network Rail clearly notified affected Timetable Participants of its decision as soon as practicable, Network Rail's right to set timescales involving reasonable practicability do not appear to distinguish between what is reasonably practicable for Network Rail, which wanted the RoUs for its own purposes, and the needs of DB cargo's customers (and FGW's passengers in the other Disputes), which were clearly not served by such a late decision, in which there is no evidence of Network Rail having informed the operators of how it applied the Decision Criteria, assuming that it made any attempt to do so"

If this could be done, then this would satisfy DB Cargo's request in paragraph 6.1(a) of its Sole Reference Document. DB Cargo accepts the Condition D3.5.2 of the Network Code entitles Network Rail to "prescribe [for itself].....such time periods as are reasonably practicable in the circumstances". However, given that Condition D3.5.3 is there specifically to allow Timetable Participants to appeal such decisions if they are dissatisfied, DB Cargo would argue that "reasonably practicable in the circumstances" should take into account not only the needs of Network Rail and the relevant Timetable Participants but also the provisions of Condition D3.5.3 and ensure Timetable Participants are not denied an effective right of appeal. In this particular case, DB Cargo submits that the imposition of these Restrictions of Use took only account of Network Rail's needs. Furthermore, these Restrictions of Use were not taken for the purposes of rectifying an unexpected disruptive event (e.g. a landslip or derailment damage) when shorter timescales would be understandable. Instead they were required because Network Rail had fallen behind in its construction works. DB Cargo agrees that Network Rail's decisions concerning these Restrictions of Use should have been explained and justified by how it had applied and balanced the relevant Decision Criteria in Condition D4.6. The fact that Network Rail's decision has not been visibly supported and explained by reference to the Decision Criteria suggests that Network Rail has not complied with the provisions of Condition D4.4 and, more specifically, Condition D4.4.1(c).

"This very short section in Condition D5.5 does not draw this distinction, but if an urgent relief procedure were to be incorporated in Chapter H of the ADR Rules, would this be necessary?"

The vast majority of the decisions Network Rail is entitled to make pursuant to Part D of the Network Code have to take account of the Decision Criteria in Condition D4.6, including its decisions concerning Network Rail Variations. DB Cargo submits that the Decision Criteria are there to ensure Network Rail balances many often competing needs in the most economical and effective way in order to come to a justifiable decision. By seemingly ignoring or giving undue weight to one party's needs over another's, which DB Cargo submits is the case in respect of Network Rail's decision concerning these Restrictions of Use, Network Rail cannot be said to have taken a balanced view in coming to a decision. Consequently, DB Cargo considers that the distinction mentioned in the question would appear to be necessary.

"In para 6.2(b) DB Cargo seeks a Determination that the RoUs were not 'reasonable 'emergency' Restrictions of Use'..... While this statement may accord with the industry's understanding of when RoUs should be imposed at such short notice, is DB Cargo able to point to any authority to this effect?"

Although DB Cargo is unable to point to any authority to this effect, in making its request in paragraph 6.2(b) of its Sole Reference Document it is seeking for the Panel to determine that Network Rail's decision did not take proper account of the Decision Criteria in deciding to impose these Restrictions of Use in the timescales it had chosen. In the absence of Network Rail's justification by reference to the Decision Criteria, DB Cargo was attempting to suggest that if the Restrictions of Use were to rectify an unexpected emergency, then it is more likely that the need for taking the Restrictions of Use to shorter timescales would likely, on balance, be justified in an application of the Decision Criteria, than merely Restrictions of Use to meet an arbitrary deadline to complete construction works."

Many Thanks
Graham

Graham White
Access Manager South
DB Cargo (UK) Ltd