

TTPs 1383, 1384, 1385

Note from the Hearing Chair

I am grateful to DB Cargo and FGW/GWR for their responses to the Directions issued on 141018. I am working in Toronto today and I am not sure whether the Secretary is available, which I why I am issuing this Note myself.

The DB Cargo and FGW responses appear to me to have simplified the issues considerably. I hope that it is not over-simplifying them to say that both Parties now appear to claim no more than that in relation to the RoUs which are the subject of these Disputes Network Rail failed to comply with the relevant provisions of Part D, and/or the section of the Engineering Access Statement quoted by FGW.

Neither Party is seeking compensation through the TTP process, as is clearly a correct approach on both their parts, but it seems to me that they wish to record formally their discontent at the process adopted in this case by Network Rail, and to obtain Observations and Guidance through this process which might propose a method (or methods) of dealing with similar situations in the future.

In this context I note the approval expressed by the ORR of a TTP making a declaratory ruling in the ORR's Determination of the appeal against the Determination in TTP 102.

It may assist Network Rail if the case made by DB Cargo and FGW is reduced to these Claims being expressed this simply, so moving away from the Sole Reference Documents served by DB Cargo and FGW, the latter having certainly been overtaken by FGW's response to the Directions of 141018.

Are DB Cargo and FGW content to proceed this way? Will both Parties please confirm their position as soon as possible.

If so, then without seeking to constrain Network Rail in drafting its Sole Reference Document, it seems to me that Network Rail has two options open to it. The first is to set out why it asserts that DB Cargo and FGW are wrong, and to explain how in Network Rail's view it did comply with the requirements of Part D and the Engineering Access Statement in relation to these RoUs.

If, however, Network Rail concedes that it cannot credibly argue that it did comply with Part D and the Engineering Access Statement in this instance, then it needs no more than 2 or lines to record that concession.

In that event the purpose of the hearing will be to hear proposals from the Parties, which in this case include one TOC and one FOC, for steps which the Panel might take to record its findings, any remedies available, or what Observations and Guidance might be appropriate.

The possibility of recommending an abbreviated procedure similar to obtaining injunctive relief in Court has already been canvassed. This would obviously take time to be implemented, even if agreed by the industry. It would therefore also be useful to hear the view of the Parties on the extent to which the powers of a Hearing Chair to amend the TTP procedure (reinforced by the ORR, for example, in paragraph 46 of its Determination of the appeal against TTP 1064) might be sufficient to establish an abbreviated procedure which would provide an effective right of appeal to Operators in similar circumstances.

Once again, however, these comments are not intended to constrain the way in which Network Rail presents its case, but it does seem to me that if it is now as simple as it appears, then there is now no need for Network Rail to draft a long Sole Reference Document dealing with the cases originally pleaded by DB Cargo and FGW.

Clive Fletcher-Wood

Hearing Chair
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: Thank you Clive,

That seems a very sensible way forward thank you, and GWR supports this approach.

Many thanks.

: Robert Holder | Network Access Manager | Great Western Railway
4 Millfield Street | Swindon | SN4 4JH

I am grateful to Rob Holder for the response on behalf of GWR/FGW.

While we have not yet heard from DB Cargo, in the light of their response to the Directions of 141018 I think that it is a safe assumption that Network Rail ('NR') can adopt an abbreviated Sole Reference Document suggested in yesterday's Note.

A further point arises. The extract from the Engineering Statement circulated by GWR provides (at 1.5.1.3) authority for the proposition that short-notice RoUs (and similar) should be limited to, '....urgent safety requirements or other emergency situations....' which I was seeking. I assume that NR will therefore wish to explain in its Defence its interpretation of the situation that it was facing and how it could be regarded as fitting within this description. The other Parties will, no doubt, wish to make submissions on this point at the hearing.

Clive Fletcher-Wood

Hearing Chair
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Clive

Many Thanks for this, in reference to your first point DB Cargo are happy to proceed in this way.

And to the subsequent query "The possibility of recommending an abbreviated procedure similar to obtaining injunctive relief in Court has already been canvassed. This would obviously take time to be implemented, even if agreed by the industry. It would therefore also be useful to hear the view of the Parties on the extent to which the powers of a Hearing Chair to amend the TTP procedure (reinforced by the ORR, for example, in paragraph 46 of its Determination of the appeal against TTP 1064) might be sufficient to establish an abbreviated procedure which would provide an effective right of appeal to Operators in similar circumstances".

"As indicated in its responses to the Hearing Chair's Directions, DB Cargo (UK) Limited ("DB Cargo") considers that the long term solution to this issue would be by way of an amendment to Chapter H of the ADRR to include a procedure for urgent applications supported by Observations and Guidance from a Hearing Chair. However, in the short term if the powers of the Hearing Chair under ADR Rule H20 to amend the procedure to be followed by the Parties in the TTP could be used to achieve the same result then this would be supported by DB Cargo. The main issue for DB Cargo with this 'short term' approach, however, would be if one Party was able to challenge the Hearing Chair's amendment of the procedure as a preliminary issue possibly as a tactic to delay any hearing on the substantive issues giving rise to the urgent application in the first place until it is too late."

Many Thanks
Graham

Graham White
Access Manager South
DB Cargo (UK) Ltd

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Note from the Hearing Chair

In the light of the position reached following the recent exchanges I hope that it will assist Network Rail ('NR') in drafting its response and the Parties to prepare for the hearing if I set out my view of what the Panel is likely to be able to achieve next week.

A decision on the facts

The first question will be to decide as a matter of fact whether Network Rail complied with the provisions of Part D and/or the Engineering Access Statement in imposing the RoUs when it did.

If NR concedes that it did not comply, then that will decide that point.

If NR argues that it did comply, then it will obviously explain its case, with supporting evidence, in its Sole Reference Document.

The issue of circumstances in which NR is entitled to abbreviate the Part D procedures is actually a separate question. In my e-mail of 1156 (EDT) on 191018 I suggested that NR would wish to explain its interpretation of the position in relation to, '....urgent safety requirements or other emergency situations....' as referred to in the Engineering Access Statement. This will not necessarily be determinative, however, as my reading of D3.5 suggests that even if an abbreviated process is justified, all the steps set out in D3.4 still need to be taken.

As a result a finding that the situation faced by NR justified the description of an 'emergency situation' would not of itself justify failing to comply with D3.5.

Any decision of this kind by NR will inevitably be fact-specific. It is open to question as to whether a Panel's guidance on whether a particular decision by NR was or was not justified as being an 'emergency situation' would be of benefit to the industry.

Flowing from the decision on the facts

What I hope may particularly assist NR in its drafting will be my view that the Panel will not be in any position to reach a binding Determination on remedies, as it is clearly beyond the power of any Panel to implement changes to the Access Dispute Resolutions Rules ('the Rules').

What I think the Panel can achieve is to set out any recommendations on proposed amendments to the Rules in its Observation and Guidance.

I have also asked the Parties to make submissions on whether the extent of a Hearing Chair's power to abbreviate the procedure might provide an effective remedy in an urgent situation. For the avoidance of doubt, any views reached by the Panel on this point would also be Observations and Guidance, in that they would not bind any future Panel, which could choose to be guided by them or ignore them. If in a future dispute a Panel did choose to follow any procedure which this Panel might recommend, then that future Determination would be appealable, so clarifying the extent of a Hearing Chair's power in these circumstances.

NR's submissions on this point in its Sole Reference Document should be drafted on the basis that the Panel's views on remedies will have no greater status than explained in this Note and cannot be binding.

Clive Fletcher-Wood

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