

TTPs1572/73 – Directions

These Disputes arise from a very short-notice Restriction of Use imposed by Network Rail. From the documents which I have seen I conclude that the two freight operators tabling the Dispute have acted promptly.

The Disputes concern Week 30; the only day before then on which it is possible for a Timetabling Panel to convene while allowing time for the Parties to present their respective case is Tuesday, 15th October. In spite of strenuous efforts the Committee's Secretary has been unable to identify three members of the Timetabling Pool able to sit, as required by Rule 12(b) of Chapter H of the Access Dispute Resolution Rules.

Rule 16, however, entitles me as Hearing Chair to '*...adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of subject matter, timescales and significance....[which]...must reflect the Principles and this Chapter H*'. Further, Rule 20 confers upon me '*...the power at any time to make or amend the procedure to be followed by the Parties in the TTP...*' subject again to the Principles, Chapter H and any mandatory time requirements.

To quote from the Determination of TTPs1383-5, '*While the limits of a Hearing Chair's power to amend procedures have not, as far as I am aware, been tested, in the Determination of the Appeal against TTP1064 the ORR reminded the industry of these powers.*'

In TTPs 1383-5, within the section devoted to Observations and Guidance, the Panel concluded that in those sections of Part D devoted to abbreviated timescales all the references to an operator's right to appeal decisions made by Network Rail must be understood to confer an effective right of appeal. While the Determination did not use these words, it was intended to convey the thought that an effective right of appeal was not to be blocked by strict compliance with the Rules in Chapter H, especially given the power conferred on a Hearing Chair to amend them if necessary.

In paragraph 37 of the Determination of TTPs1383-5 I discussed the problems faced if the Secretary was unable to assemble a full Panel, or any Panel at all, going on to say that if necessary I would sit on my own, hearing a Dispute by telephone, to reach a Determination, encouraging whichever Party was disappointed to appeal my decision to obtain guidance from the ORR on this important point.

In these Disputes we are facing the position in which the Secretary has succeeded in assembling a Panel of two members of the Timetabling Pool. I am reminded that these members are required to exercise their functions '*...impartially and not on behalf of any specific organisation, Band or Class*' (Rule 15). My own experience as a Hearing Chair gives me complete confidence that members of the Timetabling Pool will act in this way, however few are available to sit.

I am reinforced in this opinion by Rule 17, making a Panel quorate if one member of the Timetabling Pool is unavoidably absent on the day of a hearing, although I am not reaching the decision in these Directions relying on Rule 17.

I NOW DIRECT that TTPs1572/73 will be heard by a Panel consisting of me as Hearing Chair and only two members of the Timetabling Pool.

The Rules in Chapter H do not confer any right of appeal prior to the final Determination of the Dispute (Rule 58). Nor is there sufficient time for a Reference to the ORR, even if these circumstances were governed by Chapter C (which I doubt is the case). Any Party aggrieved by these Directions must therefore wait until the final Determination before being able to appeal against this case management decision. While a ruling from the ORR even on this relatively limited exercise of my powers to amend the procedure for a TTP would be useful, the Parties will, no doubt, recollect that a timetabling decision by Network Rail is binding unless overturned by a Timetabling Panel; in that event the Panel's decision remains binding unless overturned by the ORR, which could not be achieved before Week 30.