

TTPs1572/3 – Directions dated 10 Oct 19

The Hearing Chair is grateful to Network Rail for providing its SRDs in relation to both of these Disputes.

These Directions are issued to assist the Parties in preparing for the hearing, by indicating to them the areas in which the Panel will be assisted by their submissions. It is hoped that the Parties will be better able to prepare submissions if they have advance notice of some of the areas that will need to be addressed (which is not to be interpreted as limiting the Panel from raising other issues if it sees fit).

Network Rail is to be prepared to explain at what stage it became apparent that the planned (and agreed) 14 hour possession in Week 30 would not be sufficient to complete the work required for the already delayed electrification of the South Wales Main Line. What contingencies were already included in the programme?

Network Rail's SRDs argue that this 52-hour possession is essential for these works, but without explaining whether any consideration has been given to completing the work in a series of shorter possessions. This is especially relevant in the light of Network Rail's comment that handing back the Reliefs would severely impact the quantity of work which could be completed. The Panel will wish to explore this issue.

Similarly the Panel will wish to understand why the work cannot be divided into western and eastern sections, thus potentially creating diversionary routes.

In relation to both FOCs Network Rail says that 'engagement has taken place' in relation to this possession; the Panel will need to determine whether this amounted to the level of consultation required by D3.4.4.

Network Rail's comments on the powers available to the Hearing Chair are dealt with in the accompanying Rule 18(c) note.

TTPs1572/3 – Rule H18(c) Note

Seen in isolation these Disputes, like similar ones with which Panels are familiar, can be categorised as involving contractual interpretation, so being issues of mixed fact and law.

At this stage, of course, the Panel has reached no conclusions, and the following remarks must be seen in this light. But if the Panel were to conclude that Network Rail has failed to comply with the requirements of Part D in respect of variations with less than 12 weeks' notice, then this will not be the first time that such a conclusion has been reached.

In paragraph 5.7 of its SRD DB Cargo draws attention to the observation in the Determination of TTP1521 that, '*I am mindful of the danger of creating a precedent incentivising.....Network Rail to believe that it can safely fail to perform its contractual obligations simply by waiting until a sufficiently late stage in the Timetabling process*'. My understanding is that DB Cargo included this quotation to support its contention that short timescales should not be a factor in the final decision; Network Rail states that DB Cargo has adduced no evidence to support a suggestion that Network Rail's decision has been deliberately delayed. The Panel will need to decide what relevance, if any, TTP1521 has to these Disputes.

Any Determination of a TTP is only of persuasive authority on a subsequent TTP, but in this context I also draw the Parties' attention to the Determination of TTPs1383-5, heard on 30th October 2018. That Panel (which I chaired) had no difficulty in concluding that the right of appeal conferred by Part D even in relation to short-notice decisions by Network Rail must mean an effective right of appeal. Again that authority is only persuasive, regardless of who chaired the Panel.

What does bind a TTP is a Determination by the ORR on a Regulatory matter. In this context the Parties may be assisted in preparing for the hearing, particularly in considering submissions that they might wish to make as to possible remedies, by reviewing the ORR's Determination in the Appeal against TTP102 (available on the Committee's website).

Even though that TTP was dealing with the former *Procedure for Altering the Rules of the Route/Rules of the Plan*, I shall advise the Panel in these Disputes that the ORR's conclusions on the weight to be placed on time considerations and the need to follow the procedure set out in Part D remain binding on us. I hope that it will assist the Parties to be aware of this advice which will be given to the Panel.

In both its SRDs Network Rail draws attention to the limitation of the powers of a Panel. In the DB Cargo SRD, for example, Network Rail says, '*The Timetabling Panel can only substitute an alternative decision in place of a challenged decision by Network Rail in exceptional circumstances. DB Cargo has not argued that exceptional circumstances exist. No exceptional circumstances exist*'.

While the first sentence in italics accurately reflects D5.3.1(c), I hope that this argument by Network Rail is not going so far as to suggest that the Panel does not have the power simply to quash a decision by Network Rail. If Network Rail is seeking to make such a submission I draw its attention to the ORR's dismissal of such an argument in its determination of the appeal against TTP1064.

Clive Fletcher-Wood
Hearing Chair, TTPs1572/3