TTP1573 – Supplementary Rule H18(c) Note – 14th October 2019

On 10th October 2019 I issued a third set of Directions and a Rule H18(c) note. Since then I have conducted further research into those Timetabling Panels which did reach a Determination, including those appealed to the ORR; at my request the Secretary has also reviewed a number of recent Disputes concerning short-notice possessions or other Restrictions of Use which were registered, in some cases were listed for a hearing, but which in the event were settled before the hearing date (sometimes very close to the hearing date).

Following this research I think it helpful to issue this Supplementary Rule H18(c) note, still intended to assist the Parties by indicating areas which the Panel will want them to address in their submissions.

In the previous note I referred to the fact that the Panel will need to decide whether the 'engagement' with DRS which Network Rail says occurred amounted to the level of consultation required by D3.4.4.

This may be a fine distinction, but eventually the Panel will be faced with a binary decision as to whether the consultation was or was not sufficient to satisfy D3.4.4.

Again I wish to emphasise that the Panel is approaching this question with no preconceptions and its decision will not be reached until it has heard the Parties' submissions, but if the Panel were to conclude that Network Rail had not discharged the duties placed on it by D3.4.4, then that would amount to a breach of contract on the part of Network Rail; any decision reached by Network Rail based on a breach of contract would arguably be unlawful.

This raises a question as to whether a Panel concluding that Network Rail had failed to satisfy D3.4.4 need go any further. If the decision by Network Rail under appeal was based on a breach of contract, should the Panel then examine the consequential question as to whether Network Rail has applied the Decision Criteria appropriately? Or should the Panel, as a matter of law, conclude that a Network Rail decision based on a breach of contract must therefore be quashed without any further examination, because it was an improper decision for Network Rail to have reached?

My research has not identified any direct authority on this question, which has been crystallised in my mind by this Dispute. That said, in TTP1064 I commented (in the first paragraph in section 6.3) that if a Panel were to conclude that consultation had been a sham, the appropriate remedy would be to order Network Rail to revert to a previous set of TPRs, in other words to strike down the decision by Network Rail in that appeal. While TTP1064 was appealed to the ORR, and paragraph 18 of the ORR's Determination refers to section 6.3 of the TTP's Determination, it was dealing with a different issue within section 6.3. Therefore I do not suggest that it can be argued that the ORR either supported or disagreed with the point that I made.

However, I have already drawn the Parties' attention to the ORR's Determination of the appeal against TTP102. Paragraph 34 of this Determination suggests how the Panel in TTP102 could have proceeded, including making a declaratory ruling that Network Rail had no legal entitlement to impose the disputed possessions unilaterally without following the correct procedure (in that case relating to Rules of the Route/Rules of the Plan). This paragraph goes on to suggest that the Panel could then have, '*....proceeded to consider the appropriate remedy in the light of the circumstances pertaining at the time of the hearing*'. The question may therefore arise at this hearing as to what the appropriate remedy might be in the light of the circumstances pertaining at the time of the hearing. The Parties should therefore be prepared to make submissions to the Panel on this question if this point is reached.

Clive Fletcher-Wood
Hearing Chair, TTP1573