

Directions and Rule H18(c) Note – 10 Aug 20

I am grateful to all Parties for their timely submissions.

These Directions require specific actions in some cases by Parties. Some paragraphs within these Directions are intended to help the Parties prepare for the hearing by setting out the process which the Panel might adopt in dealing with some topics.

For Network Rail

The nature of these Disputes

1. I note that in paragraph 4.4.3 of NR's Response to GBRf, paragraph 4.2.11 of its Response to Freightliner, and in a number of other paragraphs it is suggested that these are Access Disputes rather than Timetabling Disputes, but on each occasion Network Rail takes this point no further than what appears to be an observation.
2. In the interests of ensuring that time is used productively on the hearing date, it must be clarified **as soon as possible** whether Network Rail is intending to submit that the Panel has no jurisdiction to determine these Appeals.
3. I hope that without prejudicing the hearing of any application that Network Rail wishes to submit, which will be decided on its merits, that Network Rail will note that the Secretary's e-mail on 1448 on 22 Jul 20 (relating to GBRf, and similarly in relation to Freightliner) invited Network Rail to advise her within five Working Days if it had any objection to the matter being progressed as a Timetabling Dispute. No objection was raised by Network Rail, so at first sight it would appear that Network Rail is estopped from raising such an objection now.

Network Rail's duties under the *Wildlife and Countryside Act 1981* ('the Act')

4. Will Network Rail please confirm whether the work on the bridges will be achieved solely by rail access, or will require road access?
5. Behind this question is my understanding that Network Rail is defined as statutory undertaker by S28G of the Act. Under S28H a statutory undertaker is only required to give notice to Natural England, '*...before carrying out, in the exercise of its functions, operations likely to damage any of the flora, fauna or geological or physiographical features by reason of which the site of special scientific interest is of special interest*'.
6. Noting that Network Rail's request was submitted under S28H, will Network Rail please confirm **by 1700 on Wed 12 Aug** how it has assessed that the bridge repair work will be likely to cause damage of the kind set out in S28H, so requiring consent from Natural England. What damage does Network Rail think that the work is likely to cause, and why?
7. If, alternatively, Network Rail differs from this interpretation of its duties, please explain why.

Possible consequences of quashing Network Rail's Decision to impose the RoUs

8. At various points in its Responses, including for example paragraph 4.2.19 of its Response to GBRf, Network Rail the possibility of closure of the line, but without giving any particulars of this drastic course. The Panel will wish Network Rail to explore further **at the hearing** the likelihood of such an eventuality, what might trigger it and the likely consequences.

9. Network Rail will, no doubt, wish to ensure that it has access at the hearing to someone qualified to deal with these issues.

Capacity Studies

10. At a number of points in both its SRDs Network Rail submits that in following the D3.5 procedure it is not required to carry out a Capacity Study by the Network Code.
11. In paragraph 4.2.13 of its Response to GBRf, however, Network Rail states that it did agree to carry out a Capacity Study in relation to the RoUs that are the subject of these Disputes.
12. It will assist the Panel if Network Rail will explain **at the hearing** whether it accepts that GBRf was entitled to rely on its agreement to carry out a Capacity Study, whether or not this is a requirement of the Network Code.

Paragraph 4.2.1 (of the Response to GBRf)

13. In relation to the point argued in 4.2.1 of its Response to GBRf the I hope that it will assist Network Rail to prepare for the hearing by drawing its attention to the Determination of TTP773 on this point.
14. I understand that the Direction in paragraph 6.2 of TTP has led to the provision of a draft Access Impact Matrix being incorporated into an Annex to the National TPRs. The Panel will wish to understand **at the hearing** the extent to which this requirement has been observed in the consultation of these RoUs.
15. A further authority which Network Rail may wish to review in preparation for the hearing is the ORR's Determination in TTP102.

Network Change

16. I am grateful to Network Rail for providing the history of the TSRs in the affected area in response to the first Directions. I note that the TSRs have in most cases lasted for more than 6 months, so amounting to Network Change as defined in Part G of the Network Code.
17. Will Network Rail please confirm **by 1700 on Wed 12 Aug** whether the Network Change procedure has been implemented in respect of any TSR falling within the Part G definition.

Detailed issues relating to the RoUs

18. NR's traffic remarks show an additional 55 minutes for running wrong line through Single Line Working, and 10 minutes for right-line running (for freight, and rather less for passenger/ECS). The Panel will wish to understand **at the hearing** how these numbers have been deduced as they seem rather high to some observers. The number of trains that can be accommodated by SLW clearly drives the number of trains that have to be diverted once the maximum threshold has been reached: has the possibility of planning on a train-by-train basis been considered, rather than apply blanket allowances that might not be needed?
19. There are clearly two scenarios – SLW over the Down line and SLW over the Up, which are not the not the same - the former requires Up trains to propel back over the crossover at Manea (and preventing trains going the other way until Ely station is reached), whereas the latter is much easier, with facing crossovers and the direct effect being limited to the Ely West Jn to Manea section. Why is the same allowance being proposed for both scenarios?
20. One further point of detail: during period of SLW over the Down line, it is necessary for Up trains to reverse back over No.13 crossover at Manea. How much space is there between M21 signal (the possession entrance point) and M12 signal (which allows the shunt move from the Down to the Up line)? Is this sufficient to accommodate the normal length of intermodal trains that use the route or does it imply that such trains would have to be shortened in this scenario?

For Freightliner

21. Both GBRf and Network Rail have submitted that ‘exceptional circumstances’ as defined in D5.3.1(c) have arisen in Dispute TTP1706, albeit for different reasons.
22. It will be helpful if Freightliner will confirm before the hearing (**and no later than by 1700 on Wed 12 Aug 20**) whether it submits that ‘exceptional circumstances’ also arise in TTP1708. If so, does Freightliner rely on the reasons advanced by GBRf, the reasons advanced by NR, both sets of reasons, or any different reasons (which should be explained)?

For all Parties

Developments since the submission of Sole Reference Documents

23. The Hearing Chair assumes that further discussions will have been taking place between the Parties. It would assist the Panel if all Parties could provide a brief summary **by 1700 on Wed 12 Aug 20** of how many services of both Freightliner and GBRf have still not been accommodated with end-to-end paths through the SLW, or have been found diversionary routes.

The Panel’s approach at the hearing

24. It may help the Parties to recognise that while the history of Manea Bridge will be relevant to some issues, including whether ‘exceptional circumstances’ apply, the Panel will not intend to apportion blame to any Party for the current situation. Its task will be to deal with the current Disputes to reach a Determination based on the legal entitlements of the Parties.

The weighting of the Considerations within the Decision Criteria

25. At various points Network Rail objects to both FOCs referring to certain Considerations as being most important (or similar words). Network Rail points out, correctly, that the Considerations are of equal importance.
26. As all Parties understand, it is Network Rail’s duty to identify which Considerations apply in any given case and then to weight them appropriately. It is hardly surprising that any Claimant’s weighting will differ from that of Network Rail, but again to save time at the hearing, my interpretation of the wording used by the FOCs is that they submit that the Considerations to which they refer are those that they say as most important to them in these Disputes; they are not seeking to challenge the clear authority setting out the equal status of the Considerations in principle.

The authority of TTP210

27. GBRf refers to TTP210 in its SRD, Network Rail responds by submitting that GBRf has not fully quoted the relevant paragraphs and in any event seeks to cast doubt on the relevance of this TTP.
28. In the interests of saving time at the hearing, I remind the Parties that the decision of one TTP is only of persuasive authority in another TTP; in other words the later TTP is not bound to follow an earlier decision. In any event, TTP210 was not directly on point, as it was dealing with amendments to the Rules of the Route (now Engineering Access Statement).
29. That said, the Panel would be entitled – if appropriate once it has heard the evidence and submissions of the Parties – to adopt some of the reasoning in the relevant paragraphs, while accepting that they must be read as a whole.

The ability of the Claimants to use their assets for other work

30. In paragraph 4.2.27 of its Response to GBRf (and similarly in 4.2.14 for Freightliner) Network Rail responds to the point about the use of assets by the FOCs by saying that there is nothing to stop the FOCs using their assets elsewhere rather than sitting idle.
31. If Network Rail wishes to pursue this point at the hearing the Panel will wish to hear its submissions on the practicability of a FOC finding alternative work for assets intended to be dedicated to services affected by the RoUs at this degree of notice.

For GBRf

The decisions sought by GBRf and Network Rail

32. In paragraph 5.4 of its Response to GBRf Network Rail asks the Panel to confirm that GBRf's request in paragraph 6.1(d) is imposing a decision which places unenforceable obligations on Network Rail and Natural England.
33. I had interpreted GBRf's request as solely being directed at Network Rail, to develop a fuller understanding of the existing restrictions at Manea and to investigate potential mitigation measures. I had not seen this request as purporting to place any obligation on Natural England, who, as Network Rail observe, are not a party to the Network Code. (This is linked with my Direction to Network Rail on its duties in this area).
34. **Will GBRf please confirm by no later than 1700 on Wed 12 Aug 20 whether the Hearing Chair has correctly interpreted this request.**
35. In paragraph 5.5 of its Response to GBRf Network Rail requests that the Panel should confirm that GBRf's request in 6.1(d) falls outwith the powers of a TTP.
36. I imagine that if the sentence ended after the word 'successfully' in the third line, Network Rail might not have difficulty in accepting the suggested words and would probably submit that it has engaged in considerable and meticulous planning. Any words of this kind in the Determination would obviously be no more than declaratory.
37. If GBRf wishes to pursue 6.1(d) at all, and particularly as drafted, it will need to explain to the Panel how the Panel's powers would permit it to deal in its Determination with any issues of additional costs and lost revenues.
38. **Will GBRf please confirm by no later than 1700 on Wed 12 Aug 20 whether it wishes to pursue its request in paragraph 6.1(d), either with the proposed amendment or at all.**

Rule H18(c) Note

Rule H18(c) requires me to 'identify and to itemise in written form....all relevant issues of law raised by the dispute'.

The principal issue of law that has arisen is whether 'exceptional circumstances' have arisen in these Disputes. That said, both GBRf and Network Rail submit that 'exceptional circumstances' have arisen, albeit each relies on different reasons for making this submission.

The remaining issues are ones of contractual interpretation.

[Signed on the original]

Clive Fletcher-Wood
Hearing Chair TTP1706, 1708