

**The Chair's first Directions Note followed a request from Network Rail. The full exchange is copied below.**

**Email from Network Rail, received 17:32 on 23 June 2021**

Good Afternoon Tamzin,

Network Rail have noted GBRf's request to expedite dispute reference TTP1719 which was initially lodged in July 2020 in relation to Network Rail's Engineering Access Statement (EAS) Version 4 decisions for 2021.

Network Rail would ask that the Chair consider the following argument to the effect that the proposed dispute is in fact null and void on procedural grounds and as such should be struck out/discontinued.

In making this argument, Network Rail are relying upon provisions within the Network Code (Part D) and the Access Dispute Resolution Rules (Chapter A) as this is the framework providing the parties legal entitlements with regard to the process that is to be followed.

**Part D Argument**

- Network Rail initially consulted and published a possession which covered Rugby Trent Valley Jn and Nuneaton North Jn. This formed part of the EAS and when published GBRf lodged a formal dispute with ADC in July 2020 (TTP1719).
- Over the subsequent 11 months, Network Rail have made significant revisions to this possession resulting in significant easing of the possession down from nine days to two weekends (four days) covering Weeks 18 and 19.
- This decision to amend the EAS by easing the possession was published and consulted in the Draft Period Possession Plan (DPPP) at TW30 and then published in the Confirmed Period Possession Plan (CPPP) at TW26, but importantly there was no formal dispute raised by GBRf (or any other timetable participant) in relation to this amended possession implying consent with the changes made. It is submitted that GBRf are now time barred from raising such a dispute under Condition D5.
- Network Rail have since issued a timetable in relation to Weeks 18 and 19, which GBRf have not formally disputed and as such are now time barred from doing so under Condition D5.
- It would appear that on the basis that GBRf have not received a timetable offer that they are content with, and recognising that they have not lodged a formal challenge regarding the non-accommodation of certain services, they are seeking to revisit the holding dispute which was lodged almost twelve months ago in order to challenge the validity of the possession as initially published in the EAS.
- Network Rail submit that this dispute should be discontinued on the basis that GBRf are seeking a hearing which is predicated on a possession which has been significantly altered and amended over the duration of the year to the extent that the currently proposed (and undisputed) possession no longer bears any similarity to that which was initially published in the EAS.

**Access Dispute Resolution Rules Argument**

Network Rail would draw reference to Chapter A, Rule 9 (b) and (c) as well as Rule 17 in relation to this matter.

**Rule 9**

- It is submitted that in lodging a holding dispute with ADC (back in July 2020) in relation to the EAS 2021 V4, then failing to raise any formal dispute in relation to the heavily amended revised possession and failing to raise any formal dispute in relation to the timetable offer

made by Network Rail, that GBRf are not acting in good faith for the reasons described in the above 'Part D' submission. It is also submitted that in waiting until the timetable offer was made before making a decision on how they wish to proceed with this matter (essentially 5 weeks before the possession is due to take effect) that their actions are antagonistic and unduly adversarial.

#### Rule 17

- Network Rail submit that under Rule 17 there has been a procedural default, specifically under Rule 17 (c) in that GBRf have failed to abide by the Principles (A5-A10) as detailed above.

Network Rail submit that GBRf are attempting to bring a dispute regarding the non-accommodation of some of their services under the guise of a dispute regarding a planned possession and that based on the above submissions, this is not within either the spirit nor strict reading of either the Network Code nor the ADRR.

We would ask that the above be provided to the Chair for consideration and look forward to receiving their determination on whether or not this hearing is to proceed.

Yours sincerely,  
Maria Lee

### **Directions Note 24 June 2021**

The Hearing Chair notes the submissions made by Network Rail in its e-mail to the Secretary of 1732 on 23 Jun 21.

There appears to be no specific provision within the Access Dispute Resolution Rules entitling him to strike out a Dispute on procedural grounds. He notes, however, that Rule B(5) states that in the event of an objection to a Timetabling Panel the Hearing Chair 'shall consider the best way to proceed'.

Given the wide case management powers conferred on Hearing Chairs, and in the light of the Principles which include the requirement to 'allow parties to resolve disputes as efficiently and effectively as possible' (A3(f)), together with allied Principles, his provisional view is that he is entitled to strike out a claim on procedural grounds if he concludes that as a matter of law it is bound to fail. It must be more efficient and effective to do this than to open a substantive hearing with such an application, but only after the Parties have spent time in order to set out their respective cases.

It must be emphasised that this conclusion relates to the powers of the Hearing Chair, not to the merits of Network Rail's submission itself.

He therefore requires GBRf to respond to Network Rail's submission. It is, of course, open to GBRf to submit that the Hearing Chair does not have the powers that suggests in his provisional view that he has, but the Hearing Chair thinks that it would be more productive for GBRf to deal with the substance of Network Rail's submissions. It would be of greater assistance to the Hearing Chair for GBRf to concentrate on Network Rail's Part D points, rather than the arguments based on the Access Dispute Resolution Rules. Again as a provisional view, the Hearing Chair is more likely to be persuaded to strike-out GBRf's claim because of a failure to comply with Part D than the more subjective arguments relating to the Principles.

GBRf is therefore to respond to Network Rail's Part D points as soon as possible and in any event no later **than noon on Fri 25 Jun 21**. It is, of course, open to GBRf to make any submissions beyond these points that it regards as relevant.

If the Hearing Chair decides that there is to be a substantive hearing, he will be open to a request - initially from GBRf - for an extension of time to serve its Sole Reference Document.

### **Email from GBRf, received 12:01 on 25 June 2021**

Hi Tamzin, Maria

Below are our responses to Network Rail's Part D arguments.

*He therefore requires GBRf to respond to Network Rail's submission. It is, of course, open to GBRf to submit that the Hearing Chair does not have the powers that suggests in his provisional view that he has, but the Hearing Chair thinks that it would be more productive for GBRf to deal with the substance of Network Rail's submissions. It would be of greater assistance to the Hearing Chair for GBRf to concentrate on Network Rail's Part D points, rather than the arguments based on the Access Dispute Resolution Rules. Again as a provisional view, the Hearing Chair is more likely to be persuaded to strike-out GBRf's claim because of a failure to comply with Part D than the more subjective arguments relating to the Principles.*

GBRf do not disagree with the comments in which Hearing Chair makes regarding his powers. Below GBRf have responded to the Part D arguments as requested by the Hearing Chair, all responses have been purposely aligned with the arguments Network Rail have set out. GB Railfreight believe the hearing should go ahead.

- *Network Rail initially consulted and published a possession which covered Rugby Trent Valley Jn and Nuneaton North Jn. This formed part of the EAS and when published GBRf lodged a formal dispute with ADC in July 2020 (TTP1719).*

GB Railfreight are not contesting the fact the possession was correctly consulted and published during this part of the process, however our concerns were raised at Version 1 and NR has consistently advised that there would be a timetable study produced to support the access (this would have included the weekends). This has never materialised and, in the view of GBRf, is the primary reason that GBRf has received a timetable offer that it is unhappy with.

- *Over the subsequent 11 months, Network Rail have made significant revisions to this possession resulting in significant easing of the possession down from nine days to two weekends (four days) covering Weeks 18 and 19.*

The possession has been eased in the subsequent months and weeks after the T18 bidding timescales set out for variations in Part D. The matter still remains that there was no consultation prior to this significant change with GB Railfreight (I cannot answer for other operators). Had we have been consulted in this we could have gained greater understanding of the reasons why and what NR was going to reduce the access. The weekend elements under the same possession reference are unchanged, remain very disruptive and the original concerns and timetable requirements should have been honoured.

- *This decision to amend the EAS by easing the possession was published and consulted in the Draft Period Possession Plan (DPPP) at TW30 and then published in the Confirmed Period Possession Plan (CPPP) at TW26, but importantly there was no formal dispute raised by GBRf (or any other timetable participant) in relation to this amended possession implying consent with the changes made. It is submitted that GBRf are now time barred from raising such a dispute under Condition D5.*

GBRf did not have any objection to the reduction in the access, however under the same possession reference and services outlined in Version 01 EAS when this possession was first published, GB Railfreight advised what services we required a capacity study for (this included weekend services), we sent a further list in February 2021 by request of Network Rail and this has not been actioned nor was an impact Matrix been produced throughout the whole process.

- *Network Rail have since issued a timetable in relation to Weeks 18 and 19, which GBRf have not formally disputed and as such are now time barred from doing so under Condition D5.*

GBRf have received offers which are not in accordance with Network Code which is covered by an open Notice of Dispute. GBRf did not consider it to be the correct course of action to raise a second dispute on what is, principally the same issue; that NR has not sufficiently considered the impact upon GBRf's operation before reaching its decision to take the access that it desired. It is worth noting that GBRf have bid compliantly to Network Code in the correct timescales where other operators have not and have been given priority which is not in accordance with Part D.

- *It would appear that on the basis that GBRf have not received a timetable offer that they are content with, and recognising that they have not lodged a formal challenge regarding the non-accommodation of certain services, they are seeking to revisit the holding dispute which was lodged almost twelve months ago in order to challenge the validity of the possession as initially published in the EAS.*

GBRf have resurrected the dispute made over 12 months ago as Network Rail have not delivered a supporting amended timetable as they advised they would throughout the process and further down the line in February 2021. The root issue remains unchanged. Were the access not to be taken GBRf would have no issue with the timetable. GBRf has an issue with the access being sought and thus the original dispute remains relevant.

- *Network Rail submit that this dispute should be discontinued on the basis that GBRf are seeking a hearing which is predicated on a possession which has been significantly altered and amended over the duration of the year to the extent that the currently proposed (and undisputed) possession no longer bears any similarity to that which was initially published in the EAS.*

The only difference is that the original possession has lost the midweek element, GBRf raised concerns for the whole of the possession (this includes weekends). The initial dispute has never been closed and remains outstanding. GBRf is of the view that it cannot be that case the initial dispute is rendered invalid because NR has chosen to make several changes to their initial proposal whilst not addressing the concerns initially raised.

Regards,  
Darren Pell