

DIRECTIONS issued on 07 Sep 20

1. I am grateful to Grand Central for its Sole Reference Document.
2. In the note circulated to the Parties on 02 Sep 20 I referred to the power of a TTP to award compensation under Condition D5.7.1. That note also referred to TTP1520, but I need to expand in these Directions on the powers which the ORR confirmed to exist in its Determination of the appeal in TTP1520.
3. The ORR held that damages could be awarded by a TTP in the event of a breach by Network Rail of an Operator's Track Access Contract. A TTP's power in this respect is limited to deciding that Network Rail should pay damages to the Operator concerned; the TTP cannot set the amount of the damages payable. If the amount cannot be agreed by the Parties a separate Dispute must be launched under the ADRR. (The ORR makes it clear that a TTP would not be the appropriate forum to assess damages).
4. Further, the ORR decided that the TTP is empowered to make such an award even if the Claimant has not requested damages. In this Dispute, however, Grand Central has sought damages as an alternative to its request that Network Rail's Decision should be overturned, even though it did not explain the basis on which it was seeking damages..
5. As the Parties will well understand, a TTP is bound by a decision of the ORR on a Regulatory issue (ADRR, A7(b)).
6. I have extracted from the ORR's website a copy of Grand Central's Track Access Contract. This is the version dated 1st August 2014, being the Conformed Copy as at 3rd March 2017. **Will Grand Central please confirm as soon as possible, and no later than by 1700 on Wed 09 Sep 20, that this is the Track Access Contract governing Grand Central's relationship with Network Rail.**
7. Assuming that this is the relevant Track Access Contract, the Panel notes that the provisions in Freightliner's contract referred to in the ORR's Determination of the appeal in TTP1520 which led the ORR to conclude that damages can be awarded for a breach of contract are replicated word for word in Grand Central's Track Access Contract.
8. Therefore there appear to be two strands to this Dispute. What I shall call Strand A will be dealing with Grand Central's request in the first part of 6.1(b) of its Sole Reference Document, that the late notice possession should be withdrawn on the grounds that Network Rail has not applied the Decision Criteria in line with D3.4.4(b), and specifically that Network Rail has given no regard to Consideration D4.6.2(f). (D3.4.8 is also relevant in this context).
9. This is of course a type of Dispute with which the Parties will be well familiar. In relation to Strand A, I assume that Network Rail will in its Sole Reference Document explain how it applied the Decision Criteria.
10. **I also direct** that Network Rail shall explain in its Sole Reference Document whether its analysis of the Decision Criteria had been reached before Network Rail made the Decision under appeal.
11. It may assist the Parties in considering their submissions at the hearing on the weighting of the relevant Considerations within the Decision Criteria to review the ORR's Determination of the appeal against TTP102.
12. **Further, Network Rail is to include in its Sole Reference Document** an explanation of what steps it has taken to address the points made by Grand Central in 4.10 of its Sole Reference Document, and to explain why Grand Central was not aware of the position by the date of its Sole Reference Document.

13. Both Parties will no doubt be aware of the effect of Condition D5.7.1, entitling a TTP to award damages if it overturns the Decision under appeal and finds that Network Rail has acted unreasonably or in bad faith. In this event, in which Grand Central would be able to operate its planned services, it is not immediately clear what losses Grand Central would suffer. If, in effect, Grand Central would not suffer losses which it would seek to recover then the TTP would not need to consider the question of unreasonableness if it were to overturn Network Rail's Decision (I do not think that bad faith would come into play). **Will Grand Central please confirm at the opening of the hearing whether in the event of the TTP overturning Network Rail's Decision it would be also be seeking damages.** (The parties should note that the inclusion of this provision does not indicate any preconception on the part of the Panel. It is included to ensure that Parties are prepared to deal with issues at the hearing which might arise).
14. In 4.20 Grand Central is alleging that Network Rail is in effect implementing the Network Change Variation before the Network Change process in respect of the variation has been completed. **Grand Central is to provide a fuller explanation of this allegation by no later than 1700 on Wed 09 Sep 20.**
15. The question of the Network Change Variation will only be relevant to the extent that it assists the Panel in understanding the decision-making process in respect of the Decision under appeal. On this basis, if Grand Central thinks that any of the documents relating to the Network Change Variation will assist the Panel's understanding then it should provide the relevant extracts with the explanation directed above.
16. The Panel will be assisted by seeing the relevant extracts of the Engineering Access Statement governing the Decision in dispute. **Will Network Rail please provide this as an Annex to its Sole Reference Document.**
17. Turning to Strand B, it will assist the Panel if Network Rail's Sole Reference Document distinguishes Network Rail's case on Strand A and Strand B separately. (The two Strands will not necessarily be taken in this order at the hearing).
18. To assist the Parties to prepare for the hearing, their attention is drawn to paragraphs 63 – 72 of the ORR's Determination in the appeal against TTP1520. As discussed above, a TTP is bound by this Determination.
19. The Parties may also wish to review the Determination of TTP1521. Sub-paragraphs 82.1 – 82.3 illustrate the breaches of contract which led to the award of damages in that case. There was no appeal in this case, so the authority of TTP1521 is persuasive rather than binding.
20. Also to assist the Parties in preparing to deal with Strand B, I should point out that in the Determination of TTP1625, within the section dealing with Observations and Guidance I said that for a breach of contract claim to succeed it was necessary to find that Network Rail had acted unreasonably or in bad faith. That statement is incorrect, the concepts of bad faith and unreasonableness are essential for a TTP to make a D.5.7.1 award, but do not come into play in relation to breach of contract: a breach is a breach, for whatever reason it occurs.

[Signed on the original]

Clive Fletcher-Wood
Hearing Chair TTP1746

7th September 2020