

SECOND DIRECTIONS LETTER and RULE H18(c) NOTE issued on 14 Sep 20

1. I am grateful to Network Rail for submitting its Sole Reference Document ('SRD').
2. To avoid any waste of time by the Parties in preparing for the hearing I wish to reiterate my comment in paragraph 14 of the Directions issued on 07 Sep 20, that any reference to Network Change or Network Change Variation will only be relevant to the extent – if any – that it sheds light on the Decision under appeal, which only concerns Week 29.
3. Therefore I have no hesitation in accepting Network Rail's submission (at 5.7 – 5.12 of its SRD) that it is not within the power of this TTP to reach any decision on issues relating to Network Change, nor to make any declaration relating to Network Change.
4. Paragraph 4.1.3 of Network Rail's SRD states that, '*Richard McClean, Grand Central's Managing Director and Grand Central's representative on the AOB was contacted by Ed Akers of Network Rail via 'phone shortly after the AOB meeting to discuss the proposal and position of the AOB, and to invite a response to the proposal. No response was received to the Minutes distributed on 20th August 2020*'. **Will Grand Central please confirm by no later than 1700 on Wed 16 Sep 20 whether it accepts that this telephone call was made, and explain what response – if any – was provided to Network Rail either during that telephone call or before the submission of Grand Central's rejection of Network Rail's Request of 24 Jul 20.**
5. **In relation to the quotation in paragraph 4, will Network Rail please explain by the same time what response it thinks Grand Central might have provided to the Minutes of the AOB meeting on 23 Jul 20, which were distributed only after the Notice of Dispute had been issued.**
6. **Will Network Rail please confirm by the same time whether the word 'not' is missing from line 5 of paragraph 34 of the Witness Statement of Toby Patrick-Bailey.**
7. It may assist the Parties to prepare for the hearing if it is confirmed now that the Panel's view is that in the event of a TTP disagreeing with Network Rail's application of the Decision Criteria, either because Network Rail has not considered relevant Considerations, or because the TTP applied different weight to relevant Considerations than Network Rail, that will not of itself lead a TTP to conclude that Network Rail behaved unreasonably or with bad faith. It will always be a question of degree, but clear evidence of unreasonable behaviour on the part of Network Rail will be needed to take the TTP from reaching a different decision to the TTP deciding that Network Rail had behaved unreasonably. As a specific example I cite TTP985: the Panel over-turned Network Rail's decision as it decided that the considerations had been weighed incorrectly. If asked then whether Network Rail had behaved unreasonably in that case I would have had no hesitation in saying that was not the case.

RULE H18(c) NOTE

1. The principal question of law arising in this Dispute is the extent of the powers available to a TTP to award damages to a Claimant in a Dispute.
2. The provisions set out in D5.7.1 are clear and do not appear to be questioned by the Parties in this Dispute. This provision applies if a TTP overturns the Decision of Network Rail under appeal, and then only if the TTP also decides that in reaching the Decision Network Rail behaved unreasonably or displayed bad faith.
3. The question arises as to whether there is an entirely separate power for a TTP to award damages to a Claimant if Network Rail is found to be in breach of contract. If so, a breach of contract claim does not need to rely on a finding of unreasonableness or bad faith; if the contract has been breached it has been breached. The damages flowing from any breach will be calculated according to specific provisions of the contract, if any, or otherwise in accordance with general principles of English law. Only in a very limited number of cases, which I do not anticipate applying within the railway industry, will the motives of the Party in breach be relevant.
4. There are two relevant authorities of which I am aware, the Determination of the ORR in TTP1520, which is binding on any TTP on a Regulatory issue, and the persuasive authority of TTP1521, which was not appealed to the ORR. The same Hearing Chair decided both TTP1520 and TTP1521.
5. In paragraph 5.4 of its Sole Reference Document Network Rail submits that a '*...TTP does not have the power to award damages in all cases where it determines that Network Rail has acted in breach of the track access contract*'. With respect to Network Rail, the subsequent paragraphs seem to me to conflate the provisions of D5.7.1 and the question of a finding of a free-standing breach of contract.
6. In TTP1520 the ORR referred (in paragraph 63) to assessing whether D5.7 applied and whether the award of compensation was correct. In paragraph 65 the ORR turned to Network Rail's assertion that the TTP had not made any finding of unreasonableness, saying that, '*... the TTP was not required to address D5.7.1 specifically because the grounds for their decision are clearly set out in paragraphs 105 to 106*'.
7. In paragraph 66 the ORR did not agree that compensation should be the subject of separate proceedings, also considering the powers of a Hearing Chair. In the next paragraph the ORR considered whether D5.7.1 prevented compensation, deciding that it did not and that Network Rail had behaved unreasonably so compensation was payable. The inference to be drawn from these paragraphs is that the ORR thought that an award under D5.7.1 was admissible in TTP1520. The ORR did not say that the award was actually made pursuant to D5.7.1.
8. The question therefore arises as to whether the award in TTP1520 was actually made pursuant to D5.7.1. I cannot find any reference to D5.7.1 in the TTP's Determination of TTP1520, so it does not seem to me that the TTP considered that it was awarding compensation under D5.7.1, even though the ORR's Determination makes it clear that it would have been entitled to do so.
9. Paragraph 68 of the ORR's Determination reads (in full): '*With regard to the size of the award, any remedy awarded by a TTP must be limited to the legal rights of each party, which are contained within the relevant track access contract. So, whilst the TTP was entitled to award compensation on the basis that an award for breach of contract is contemplated by the track access contract and is in accordance with the law, the TTP went too far in its determination by stating that the award was "without limitation," which is contrary to the cap clearly set out in Clause 11.5*'.
10. I interpret this as confirming that an award may be made by a TTP in the event of a breach of contract even if D5.7.1 is not engaged. I am reinforced in this view by the Determination of TTP1521, in which an award for three distinct breaches of contract was made against Network Rail and not appealed.

11. As mentioned above, TTP1521 is only of persuasive authority. In general terms I think it undesirable for there to be contradictory authorities by differently constituted TTPs, even if they are only persuasive. My principal reason for following the decision of TTP1521, however, is that I regard paragraph 68 of the ORR's Determination of TTP1520 as providing authority for the proposition that a free-standing finding of breach of contract without reference to D5.7.1 can be made by a TTP. Further, however, I am unable to find any reference to D5.7.1 within the Determination of TTP1521, so can only conclude that D5.7.1 was not in anyone's minds in that TTP; the awards made in TTP1521 were made solely because of a conclusion that Network Rail was in breach of contract as a free-standing right for a Claimant to recover on these grounds.
12. For the avoidance of doubt, in TTP1746 the evidence suggests - subject to submissions on the day - that the Panel is unlikely to conclude that Network Rail simply failed to address the Decision Criteria (as was the case in paragraph 82.1 of the Determination of TTP1521). I have commented in the Directions issued with this Note that a decision by a TTP that it did not agree with Network Rail's application of the Decision Criteria cannot automatically lead to a finding of unreasonableness under D5.7.1; similarly, my interpretation is that if a TTP differs from Network Rail on the application of the Decision Criteria it will not automatically amount to a breach of contract on Network Rail's part. The application of the Decision Criteria by Network Rail would have to be manifestly and grossly inappropriate to reach such a conclusion. In TTP1746, therefore, again subject to submissions at the hearing, any finding that Network Rail is in breach of contract is likely to rest on the issue of the adequacy of consultation, itself discussed at length in TTP1521.
13. The other issues raised in TTP1746 are primarily ones of contractual interpretation.

[Signed on the original]

Clive Fletcher-Wood
Hearing Chair TTP1746

14th September 2020