

GBRf's response to the Directions Note was received via email on 08 July 2021. Network Rail's response is contained within its Sole Reference Document.

Good afternoon Tamzin,

GBRf have given further clarity as required by the Hearing Chair, I have added to the paragraphs in question for clarity. At the time of the lodged dispute, GBRf believe the references to be correct.

1. Paragraph 4.2 of GBRf's Sole Reference Document states that the disputed Decision was made under Condition D3.4 and D3.5. Network Rail's Decision document (Appendix 3.2) states it was made under Condition D3.5. Condition D3.4 relates to consultations that take place by TW-26 (Condition D3.4.7). Condition D3.5.1 states that it applies to access arranged "with less than 12 weeks notice or otherwise outside the process described in Condition D3.4". Please can both Parties, either separately or jointly, confirm at which TW-stage the Decision was issued for the affected weeks and, in that case, whether any affected weeks should have been issued under D3.4, or whether they were all - per Network Rail's Decision notice - issued under D3.5.

At the time of the Decision (27th May 2021) this was less than 12 weeks notice for the first instance of the proposed possessions so week 10 would be 07th June 2021 (just 1 week after the decision), therefore we felt that we had to dispute under D3.4 to cover these weeks up to week 21.

GBRf feel that the remainder weeks from weeks 11 to 44 are to be covered by D3.5 as these possessions are contained in the same decision post 12 weeks.

3. The powers of dispute resolution bodies in relation to Part D are laid out in Condition D5.3.1 and ADR Rule H50. GBRf's para 6.1(c) requests that the Panel 'strike down' Network Rail's decision. There is no express provision enabling the Panel to 'strike down' a decision of Network Rail. Please can GBRf clarify whether it is asking the Panel to substitute an alternative decision applying the 'exceptional circumstances' test and, if so, what it contends are the exceptional circumstances upon which it seeks to rely (under D5.3.1(c)). If not, please can GBRf clarify how D5.3.1 and ADR Rule H50 apply to its request. The recent ORR Determination of TTP1520 is linked here; paragraphs 40 to 62 may be of help to this dispute. NR may also wish to address this point in its Sole Reference Document.

GBRf has appealed the decision made by Network Rail to take a regular possession without having thoroughly considered the impact this could have upon operators, including GBRf, and is of the view that NR should be directed to reconsider its decision on this basis. Should the panel be minded to do so, GBRf would consider this to be Panel giving general direction to Network Rail but not the means by which it shall be achieved, thus Condition D5.3.1 (a) is applicable. If the Panel is of the view that by doing so it would have, in effect, substituted an alternative decision, then GBRf is of the view that 'Exceptional Circumstances' have arisen that would enable Condition 5.3.1 (c) to apply. Given the potential impact that Network Rail's decision could have on its customers, something which thus far has been ill-considered, GBRf would expect Network Rail to work within the timescales set out in Condition D2.2 of the Network Code. This would enable a full assessment of the impact of the proposed

access and an accurate application of the Decision Criteria, pursuant to Condition D4.6, in achieving the objective. GBRf asserts that it is unusual and not typical (so therefore exceptional) for Network Rail to issue a Decision to take multiple, repeated possessions with potentially long term implications at such truncated timescales and without an accurate application of the criteria set out in Condition D4.6 of the Network Code.

Regards,

Darren Pell
Engineering Access Manager, GB Railfreight