

**IN THE MATTER OF PART D OF THE NETWORK CODE
AND IN THE MATTER OF TIMETABLING DISPUTE TTP1880**

BETWEEN

GB RAILFREIGHT LIMITED

CLAIMANT

V

NETWORK RAIL INFRASTRUCTURE LIMITED

DEFENDANT

RULE H18(c) LEGAL NOTE

Preliminary Issue - Parameters of the Dispute

1. In the light of an appeal under Part D of the Network Code being premised upon a Timetable Participant being “dissatisfied with any final decision of Network Rail in respect of a Network Rail Variation” (Condition D 3.4.16 and D 3.5.3), and in light of an appeal lying only against a “decision” (Condition D 5.1.1), it is presently understood that the dispute is confined to the Defendant’s decision of 27th May 2021.
2. I take note of the comments made, on the ambit of a dispute, at Paragraph 8.3.6 of the determination in TTP376/TTP377.
3. The Claimant is therefore invited to confirm the effect and consequence of the following parts of its Sole Reference Document (‘SRD’):
 - a) The last two sentences of Paragraph 4.6;
 - b) The last sentence of Paragraph 4.9.

4. The Defendant will be invited to respond to any submissions made by the Claimant if it so wishes.
5. Subject to resolution of the above Preliminary Issue, I have considered the contents of both parties' SRDs, and have identified the following matters falling for the Panel's determination at the hearing:

Issue 1 – whether the Defendant's Decision amounts to a Network Rail Variation

6. It seems to be common ground between the parties that the section of track to which the dispute relates is unused, and one through which no trains currently pass. The Defendant submits that “the late change proposed and disputed only impacts upon unused white space on the planning graph.”¹ The Claimant submits that this will nonetheless impact on its “ability to secure the requirements of a customer, and amend it should that prove necessary.”²
7. The terms “Working Timetable” and “Network Rail Variation” seem to be predicated upon the existence of train movements and Train Slots, the latter being defined as “a train movement or series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement”³ and therefore not, or at least not explicitly, to an unused section of the network. The term “Restriction of Use” is defined as “a restriction of use of all or any part of the network”⁴ and is therefore open-ended.
8. Against this backdrop, the Panel will need to determine whether the Defendant's decision amounts to a “Network Rail Variation” for the purposes of Conditions D 3.4 and 3.5.
9. The Panel will further need to consider what effect its determination of this Issue has, in the specific circumstances of this dispute, on the Defendant's requirement to

¹ Para 4.2.1 D SRD

² Para 5.5 C SRD

³ Definitions table in Condition D 1.1

⁴ Condition A 1.1

consult (Condition D 3.4.8) and the application of the Decision Criteria (Condition D 4.6).

Issue 2 - Consultation

10. The Claimant accepts that the Defendant consulted with it for the purposes of its duties in Condition D3.4 and, presumably, D 8.6.⁵
11. The issue for the Panel is therefore whether the consultation was adequate and/or sufficient. I am not aware of any specific authorities on point, but note that the Panel's determination in TTP271 establishes that, as a matter of principle, in order to find against Network Rail, "the Panel would have to be satisfied that Network Rail had failed in the execution of one of the procedures to which it is contracted through the Trade Access Agreements and the Network Code, or that it had made a capricious decision, which did not take into account either the facts of the case, or the guidance embodied in the ... Decision Criteria."
12. It seems, therefore, that the Panel will need to decide whether, while consulting with the Claimant, the Defendant had taken into account the facts of the case and the guidance in the Decision Criteria. In a more overarching sense, the Panel will need to be satisfied that the Defendant, as a contractual fact-finder, acted reasonably in the *Wednesbury* sense (see below).

Issue 3 – the Decision Criteria and *Wednesbury* Reasonableness

13. The Panel will need to determine whether, and to what extent, the Defendant took into account the Objective, as defined in Condition D 4.6.1, in making its decision. To this end, it is noteworthy that the Objective incorporates "the overall interest of current and prospective users."⁶
14. The Panel will need to scrutinise the way in which the parties have weighed the Decision Criteria in relation to the facts of this dispute.⁷

⁵ Para 5.1 C SRD

⁶ My emphasis

⁷ Appendix 5.2 C SRD and Annex G D SRD

15. However, it will be for the Defendant to establish that it had properly applied and weighted the Decision Criteria with reference, in particular, to the following factors:

- a) The Defendant's duty to provide its employees with a safe working environment while conducting necessary patrolled maintenance;
- b) The impact of the possession on the Claimant's freight operations, and the existence of Section 4 possession opportunities at existing and/or other times.

16. In addition to the Decision Criteria, which are non-exhaustive in nature, it seems that the Defendant's position in this case is that of a contractual fact-finder. Accordingly, the Defendant's decision must be shown to have been reasonable in the *Wednesbury* sense. In particular, the Panel will need to determine whether the Defendant took all relevant matters into account. To this end, I have regard to the Supreme Court's decision in *Braganza v BP Shipping Ltd* [2015] 1 W.L.R. 1661, which I attach to this Note for the parties' consideration and the preparation of submissions ahead of the hearing.

Issue 4 - Remedy

17. The Panel's powers are confined to those set out in Condition D5.3.1 and Rule H50 of the ADRR. To this end, I take note of Paragraphs 40-62 of the ORR's determination in TTP1520 which was sent to the Parties with the note of my directions.

18. In the event that the Panel upholds the Claimant's appeal in principle, it will welcome the parties' further submissions on whether or not "exceptional circumstances" pertain to this dispute, which would enable the Panel to substitute an alternative decision to that of the Defendant under Condition D 5.3.1(c). It is my understanding that there is no definition of the term "exceptional circumstances" within the Network Code.

Alexander Rozycki

Hearing Chair

12th July 2021