

Access Disputes Committee

TTPs2042, 2043 and 2044

Directions issued on 24 May 2022

1. I am grateful to the Claimants for submitting their Sole Reference Documents (SRDs).
2. There is very little time available for Network Rail to draft its SRD, so I think it productive to ensure that it only deals with points that are strictly relevant. To this end these Directions only deal with the remedies sought by the Claimants, and GBRf in particular.
3. Remedies only come into play, of course, if the Claimants' case that the consultation before NR issued Version 2.2 of the Timetable Planning Rules ('TPRs') in dispute did not comply with the requirements set out in the Network Code, which incorporates the National TPRs by reference. Parties should note therefore that any discussion of remedies at this stage does not indicate any preconceptions on the part of the Panel, as NR's SRD has not yet been filed.
4. At Annex A I attach a document which draws together the remedies sought by the Claimants. In 6.1 of its SRD TfW asks the TTP to conclude that the consultation did not comply; 6.1 to 6.3 of Freightliner's SRD spells out steps that the TTP would take to reach that same conclusion. GBRf's SRD impliedly invites the TTP to reach that conclusion. There can be no doubt that such a conclusion is within the powers of the TTP.
5. The first part of TfW's 6.2, Freightliner's 6.4 and the first part of GBRf's 6.1 ask that Version 2.2 should be withdrawn. There can be no doubt that it is within the powers of a TTP to quash a decision by NR (see paragraph 61 of the ORR's Determination of the Appeal against TTP1064). If, and again I emphasise if, the TTP were to find the consultation inadequate, then by quashing NR's decision it would effectively 'withdraw' Version 2.2.
6. As a personal view, I am never in favour of enjoining Parties to comply with the rules in future within a Determination, although comments to this effect may well find a place in Observations and Guidance.
7. What I do not understand, however, is GBRf's reference to 5.3.1(c) of the Network Code, referring to 'exceptional circumstances'. For the reasons set out above, I am firmly of the view that the power to quash a decision is exercised under 5.3.1(a), not 5.3.1(c). Therefore exceptional circumstances do not need to exist to quash any NR decision.
8. Even if a consultation found not to comply with Part D amounted to exceptional circumstances, on which I would require some persuasion, 5.3.1(c) empowers a TTP to substitute its own decision in place of the original decision made by NR, if exceptional circumstances exist. No alternative 'decision' has been suggested by any of the Claimants, they merely want the decision to issue Version 2.2 quashed, and for NR to re-run the TPR exercise, complying with Part D in doing so.
9. There **I direct** that NR need not address 5.3.1(c) in its SRD. GBRf has leave to amend its SRD if it wishes. It might simply end Section 6 after the second sentence of 6.1. If so, it is to confirm this as soon as possible.
10. Alternatively, GBRf may submit at the hearing its reasons for suggesting that 5.3.1(c) applies, and what alternative decision it wishes the TTP to make, but in this context I draw the attention of GBRf to paragraphs 42 and 45 of the ORR's Determination of the Appeal against TTP1064).

[Signed on the original]

Clive Fletcher-Wood
Hearing Chair
TTPs2042, TTP2043 and 2044

Annex A

TfW

The Panel is asked to determine that Network Rail has not followed or has incorrectly applied Clauses 1.2.7 and 1.3.2 of the 2023 National Timetable Planning Rules and Condition D2.2.7 of the Network Code in its consultation of, and subsequent decision to publish the TPR changes.

As a result of the decided principle above, Network Rail should withdraw the Decision and work with operators to develop new proposals (if it wishes), to apply to a later Timetable Period (the earliest such Timetable being the May 2023 Timetable) and in accordance with the processes in the Timetable Planning Rules and the Network Code.

Freightliner

6.1 Freightliner asks that the Panel should confirm that in reaching the Decision to revise the Final Rules, Network Rail has not conducted itself in accordance with the process described in Network Code Condition D2.2, or National TPR Section 1.2 and 1.3.

6.2 Freightliner asks that the Panel should confirm that Network Rail have not provided sufficient evidence to Timetable Participants as to how values issued in this Decision have been calculated.

6.3 Freightliner asks that the Panel should confirm that, further to Paragraph 6.1, Network Rail have not provided any evidence that they have applied the Decision Criteria outlined in D4.6.2 correctly, thereby failing to properly consider the objections and interests of Timetable Participants, and that, as a result, the Decision to publish the Final Rules has been reached without proper consideration of the impact.

6.4 Freightliner request that the paenl should direct Network Rail to withdraw the Decision to implement the changes contained within Version 2.2. Freightliner believe that it is within the powers of the Panel as per Condition D5.3.1 (a) to direct this.

6.5 Freightliner asks the panel to direct Network Rail that sufficient evidence must be presented to operators, along with a timetable impact study, before the changes included in Version 2.2 are re-proposed. Again, Freightliner believe that it is within the powers of the Panel as per Condition D5.3.1 (a) to direct this.

GBRf

6.1 GBRf is of the opinion that the contents of Version 2.2 should be withdrawn, the TPR exercise completed and then reconsulted for the next available timetable change date at which it could be reasonably implemented. GBRf believes this would be within the powers of the Panel under Condition D5.3.1(a). Given the nature and the timing of Version 2.2, GBRf believes that exceptional circumstances do however apply, should it prove necessary to determine alternatively under Condition D5.3.1(c).

6.2 GBRf believes exceptional circumstances apply in that the proposal was made at a late stage outside of Part D timescales, is of considerable size and complexity, is not in a state of completion and is not in accordance with the stipulations of the National TPR provisions.

6.3 In reaching its determination, the Panel is asked to consider whether D2.2.7 could be applicable in these circumstances given the points mentioned in paragraph 6.2; in other words, could NR have been “acting reasonably” as required by D2.2.7? GBRf believes that it could not have been.