

Access Disputes Committee

TTP2192 and TTP2193

Directions issued on 15th March 2023

1. At this stage of these Disputes I have seen no more than the Notices of Dispute raised by GBRf and extracts from the spreadsheets indicating points discussed between the Parties in attempting to ensure that slots are made available for the services in dispute. Nonetheless, in the light of the very abbreviated timescale in which these Disputes are to be decided, I hope that it might assist both Parties if I set out some thoughts on the principles which might apply in reaching a Determination, to avoid any Party's Sole Reference Document seeking unachievable remedies.
2. I wish to emphasise that I am only considering procedural possibilities; I am not in a position to form even any provisional views on the merits of either Party's claim.
3. Both Parties will be aware of the right of a TTP to quash a Decision by Network Rail, but the question in that event would be, what next? As the dates for the disputed services are so close, then it does not seem practical to adopt the remedy under D5.3.1(a), of merely giving general directions to Network Rail, as there would be insufficient time for any revised process to be implemented, even if this were realistic given the discussions that have already taken place between the Parties.
4. A TTP can only substitute an alternative decision if the 'exceptional circumstances' referred to in D5.3.1(c) are held to apply. Such a Determination would require the TTP firstly to find that exceptional circumstances did apply, but also to have decided that there was an alternative decision (or decisions in each case) that identified achievable slots complying with TPRs and the rights of other Operators (after Network Rail had applied any relevant flexing rights). A TTP should not seek to impose an alternative decision which cannot be achieved in practice.
5. The possibility must also be considered of a finding that Network Rail was in breach of contract. This would be especially relevant if the TTP concluded that Network Rail had failed to comply with Part D in its handling of the bids in dispute, but that the TTP was unable to identify an alternative decision to be substituted for Network Rail's decision.
6. The ORR's Determination of the Appeal against TTP1520 may assist the Parties, both in relation to exceptional circumstances, but also the circumstances in which a TTP might find that there has been a breach of contract. Paragraphs 63-72 set out the ORR's view on this latter point. In summary, a TTP may decide that an award of damages is due in principle from Network Rail to an affected Operator, without having to find that Network Rail acted in bad faith, but that the TTP is not entitled to assess the damages payable if the Parties are unable to agree on an appropriate sum. If the Parties are unable to agree on the appropriate award of damages then a fresh Dispute to determine this must be commenced under the Access Dispute Resolution Rules.
7. For the avoidance of doubt, I reiterate the point that these Directions are only discussing possible procedural issues, not the merits of either Party's case. But I hope that they might assist the Parties to understand my interpretation of the possible remedies available, to avoid any Party's Sole Reference Document seeking unachievable remedies.

Signed on the original.

Clive Fletcher-Wood
Hearing Chair
TTP2192 and TTP2193