

Fifth Directions and Rule H18(c) Note – 9 May 2023

I am grateful to all Parties for their timely submissions. I refer below to Heathrow Express Operating Company as HEOC, and Network Rail as NR.

These Directions require specific actions in some cases by Parties. Some paragraphs within these Directions are intended to help the Parties prepare for the hearing by setting out the process which the Panel might adopt in dealing with some topics. These Directions are not intended to provide an exhaustive survey of the matters which the Panel may wish to explore.

Unless specified otherwise any expression which is capitalised is intended to be a reference to the relevant term as defined by Part D of the Network Code.

For all Parties

1. I set out below my approach to a number of preliminary matters which arise out of the Parties' correspondence with the Secretary and their submissions.

Chronology

2. NR has provided a chronology which it attaches as appendix A to its SRD. The Panel will wish to understand **at the hearing** whether that chronology is agreed between the Parties.

Development of Concept Train Plan

3. The Panel wishes to understand **at the hearing** whether the HS2 TAA was raised as crucial to the Concept Train Plan before it was drafted and issued on 08 January 2023.

4. The Panel also wishes to understand **at the hearing** whether the Parties consider that this is a material factor, given that the HS2 Supplemental Agreement appears to provide that Part D takes priority over the HEOC TAA where there is any inconsistency (see the Chair's provisional view as set out in his Second Directions).

The Decision

5. The Panel will wish to understand **at the hearing** whether the Parties accept that the relevant decision under consideration in this Appeal is a Network Rail Variation managed under the procedure specified in Condition 3.4, and if the procedure under that Condition was not followed in all respects, what the Parties submit is the effect. (In fact it appears that HEOC disputed NR's decision under D3.4.14 and its formal NoD, disputed the TW-14 offer made under D3.4.13 rather than the TW-12 final decision (but these are substantially the same, practically speaking, in this reference)).

6. The Panel understands that it is NR's position that it has complied with the requirements of Conditions D3.4.2 (a) and (b). The Panel will wish to understand better **at the hearing** what consultation took place, and whether it was compliant with the requirements of the Network Code.

7. The Panel will wish to understand **at the hearing** whether the Parties agree that it follows from the above that the Panel's focus must be on NR's application of the Decision Criteria in making the Week 11 timetable offer, as required by Condition D4.6.

Passenger impact and performance

8. The Panel is mindful that it has not seen the data which lies behind the approach set out at paragraphs 4.2.12, 4.2.14, 4.2.15, and 4.3.2 of NR's SRD. Can more detail be provided? The Panel will, **at the hearing**, wish to understand further whether NR's conclusions are accepted, how NR has assessed passenger demand, whether its approach is reasonable and properly informed, whether this approach has been previously disclosed to Timetable Participants, and whether further information can be provided. In particular, the Panel will **at the hearing** wish to understand whether there are limitations to the conclusions and judgments which can properly be drawn from such an approach (for example, how reasonable is it to extrapolate from "demand" data for MTR services from 2019?).

For HEOC

Application of Decision Criteria

9. HEOC does not say that exceptional circumstances applied in Week 11. HEOC states that it has been disproportionately affected and, presumably, that NR has not applied the Decision Criteria (D4.6) correctly. Accordingly, the Panel would like to understand further **at the hearing**:

- (1) Does HEOC say that NR failed to consult in line with Part D?
- (2) What would HEOC have done differently from NR when faced with the Week 11 disruption? In section 4.11 of HEOC's SRD there is a suggestion that passenger disadvantage would be reduced if "alternative [trains]" were amended. Which trains should be amended instead of HEOC's, and on what basis (with reference to D4.6 of the Network Code) would this be less disadvantageous to passengers?
- (3) HEOC has raised issues about not being able to utilise its assets efficiently. Please can more detail be provided, with supporting evidence? Is this impact more severe than would be deemed reasonably acceptable for an operator affected by a Section 7 disruptive possession?

Detailed issues relating to the Decision Criteria

10. It is NR's duty to identify which Decision Criteria Considerations apply in any given case and then to weigh them appropriately. It is not surprising that HEOC's approach to the application of the Decision Criteria may differ from NR's.

11. NR has provided its assessment of the application of the Decision Criteria fleshed out with further explanation in its SRD. The Panel will wish to understand, **at the hearing**, HEOC's submissions on NR's application of the Code. In particular, where NR says that it has taken into account evidence provided by HEOC, it will wish to understand further whether HEOC accepts this and, if not, it will wish to have further details of the evidence provided by HEOC to NR so that it can assess whether NR's conclusions are reasonable.

Rule H18(c) Note

Rule H18(c) requires me to 'identify and to itemise in written form....all relevant issues of law raised by the dispute'.

The issues of law which arise are:

- (1) Whether NR's Decision amounted to a Network Rail Variation.
- (2) Whether, as a result of the HS2 Supplemental Agreement, HEOC has agreed that relevant provisions of the Network Code apply to the Disputes Parties in connection with the management of such a variation, and any appeal.
- (3) If the Decision was a Network Rail Variation, the issues remaining are:
 - (i) whether NR conducted an adequate and/or sufficient consultation with Timetable Participants;
 - (ii) whether NR, as a contractual fact-finder, acted reasonably in making the Decision;
 - (iii) whether, and to what extent, NR took into account the Objective, as defined in Condition D 4.6.1, in making its Decision; and
 - (iv) whether the remedies the Parties sought are available to the Panel under Condition D5.3.1 and Rule H50 of the ADRR.

The remaining issues are ones of contractual interpretation.

[Signed on the original]

Paul Stevenson
Hearing Chair TTP2207