

TTP2280 TTP2352 and TTP2413

Second Directions and Rule H18(c) Note – 8 April 2024

I am grateful to all Parties for their timely submissions and to GB Railfreight Limited for its reply to my First Directions sent by email on 28 March 2024, and in addition to GB Railfreight for its letter this afternoon. I refer below to GB Railfreight Limited as GBRf, and Network Rail as NR.

I understand that it is common ground that GRBf may bring these references to a TTP (I assume under Condition D2.2.8 or Condition D3.4.16).

By order dated 26 March 2024 the Allocation Chair has joined references TTP2352 (NR's decision to take amended access in Week 18, 2024), TTP2413 (NR's decision to take late notice access in Week 18, 2024), and elements of TTP2280 (NR's decisions regarding the Engineering Access Statement 2024, version 4 relating to possessions in Week 18 (P2024/3756238 & 2842903) and Weeks 21/22 (P2024/3734374 & 3734378)).

By its response to my First Directions on 28 March 2024, I understand that GBRf does not contend that exceptional circumstances apply to this reference for the purposes of Condition D5.3.1(a).

These Directions require specific actions in some cases by Parties. 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. I am aware that Part D was re-issued with effect from 22 February 2024 such that the reference in TTP2413 was made under the current version of the Code, and references in TTP2280 and 2352 were made under Part D in force from 1 June 2022. The Parties are asked to indicate **at the hearing** whether they consider that any relevant provision has changed in substance insofar as it relates to these references.

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. I should emphasize that this is only a preliminary view, not having heard submissions from the Parties.

The Parties will know that the overriding objective (Rule H15) requires that disputes referred to the Panel should be administered in a way which is proportionate to (amongst other things) the need to ensure that the production processes for the railway operational timetable are not disrupted to the potential detriment of third parties. I consider that it is important to ensure that resources are used effectively.

If my reading of the Parties' SRDs is correct (for which see further below) I understand that NR accepts that it is at present in breach of contract (non-compliance with Condition D3.4.10) in Week 18. However, I understand that NR has agreed to apply Condition D3.4.9 to all three weeks (18, 21 and 22).

I note that GBRf seeks costs and damages arising from these disputes. It is important to be clear about the breach alleged. I understand that this is a failure by NR to comply with Condition D3.4.10. Were the compensation payable under Schedule 4 of its TAC not adequate, I consider that the compensation payable would need to be assessed on the basis of the principles of the law of England and Wales. Although not binding on me, I regard the decision of the Panel in TTP1521 as persuasive in its analysis (see paragraph 82.4). Given NR's undertaking (if I have understood its position correctly) to apply Condition D3.4.9 to possession in all three weeks it is far from clear to me that now is the most appropriate time to consider the

question of breach or remedy (it would be for GBRf to prove its loss), since it must follow that there may be no breach which sounds in damages following the completion of the amended timetable offer process (i.e. conclusion of D3.4.12 to D3.4.15 and the D4.4 processes).

In response to a request from me for confirmation, GBRf has confirmed to the Secretary that the reference in its statement of today's date that "...it is still within Network Rail's gift to produce Decision Criteria grids for specific circumstances..." (my emphasis) is a reference to a desire to see a Decision Criteria grid for every headcode, in other words a separate grid for each train which it is going to run in each of the three weeks. I note that the relevant decisions here are decisions to take Restrictions of Use. I note that this is not a matter which is advanced in GBRf's SRD as the subject matter of a relevant dispute and is not, therefore, a submission to which NR has had an opportunity to respond. I have not heard submissions, but I consider that this is a novel submission and my provisional view is that I would not for that reason be inclined to address this point as part of these references (I note that under Rule H18(b) I am required to ensure that procedures are implemented fairly). In passing, I also note that there is limited value in NR producing a Decision Criteria grid now for Week 18 when NR will be required to apply the Decision Criteria as part of the D3.4.12 to D3.4.15 process.

GBRf submits that NR has lost its ability under Condition D4.4 to use its "designated flexing abilities". The flexing right in D4.4 relates to an Access Proposal submitted by a Timetable Participant. That does not yet apply here - the issue with these possession blocks is that indirectly affected operators whose rights NR needs to flex using Condition D3.4.9 will need to submit an Access Proposal, and if they have not done so already for Week 18 are at risk of being flexed using Condition D3.4.12.

The Panel would, therefore, like confirmation by **10 AM on 9 April 2024** whether NR has in its SRD conceded a breach of contract (non-compliance with Condition D3.4.10 in Week 18).

The Panel would like to understand by **10 AM on 9 April 2024** whether NR accepts that my characterisation of its SRD is correct, and whether NR accepts the (unchallenged) reasoning of the Panel in TTP 2318/2320 and therefore agrees that D3.4.9 applies to Week 18, 21 and 22.

Subject to those points, the Panel would like to understand by **midday on 9 April 2024** whether GBRf accepts whether such clarification (if forthcoming) disposes of the references which are the subject of the dispute before the Panel. If GBRf does not, it is asked to provide clarity of what remains in issue, and why it considers that a hearing in this matter would be proportionate.

Subject to the above, I set out directions below.

For all Parties

The Decisions

1. The Panel will wish to understand **at the hearing** whether the Parties accept that the relevant decisions under consideration in this Appeal are Network Rail Variations managed under the procedure specified in Condition 3.4, and that the possessions relate to relevant RoUs.
2. The Panel would like to understand **at the hearing** whether NR considers 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.

Capacity/Timetable studies

3. Separately, the Panel would like to understand at the hearing what steps have been taken to act on the ORR's letter to NR and the CRC of 20 December 2020 (a copy is attached for ease of reference). In its

Interim Decision in TTP2318 and 2320 the Panel referred to consultation on version 1 of the 2025 TPR. I understand that the latest version (version 3 of the 2025 TPRs) has now been published, but I assume (unless corrected) that this document has no bearing on these references. For present purposes, without setting any general precedent for any future dispute, are the Parties content to proceed on the basis that a Capacity Study and a Timetable Study are analogous? (I note that NR uses the terminology interchangeably in its SRD (see for example paragraphs 4.2.5 and 4.2.6)

For NR

Capacity / Timetable studies

4. The Panel would like to understand **at the hearing** whether (and if so on what basis) NR dissents from the (unchallenged) view given by the Panel in TTP2318 and 2320 that the Access Impact Matrix, the outputs of which informs the STP process, forms part of the Network Code and contractual matrix by reference. (I note in that regard that Condition D3.4.2(a) requires that a RoU must be consistent with the Rules. The “Rules” are defined as both the TPRs and the EAS)

5. The Panel would like to understand **at the hearing** whether NR accepts the reasoning of the Panel which gave guidance in TTP1706 and 1708, namely that a Capacity Study allows an Access Beneficiary to respond appropriately (i.e. in a properly informed way) before NR reaches any RoU decision. Does NR accept that it should be sufficiently fully informed when it takes a relevant decision?

6. The Panel would like confirmation **at the hearing** whether NR challenges GBRf’s assessment that P2024/375628 and 3842903 are Severity 4 within the meaning of the Access Impact Matrix.

7. The Panel understands that it is usual industry practice for a capacity study to roll forward. The Panel understands that the extended block in weeks 21/22 is a new footprint and includes a key junction but would like to understand **at the hearing** why in relation to P2024/3756238 & 2842903 NR was unable to roll forward a study from a previous block of a similar nature.

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 Decisions amounted to Network Rail Variations.
- (2) If the Decisions are Network Rail Variations, the issues remaining are:
 - (i) What is required of a proposal for a RoU under Condition D3.4.7;
 - (ii) What are NR’s obligations when it takes such Decisions?
 - (iii) The approach to be taken to Condition D3.4.9;
 - (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 primarily the proper construction of the relevant parts of the Network Code.

[Signed on the original]

Paul Stevenson
Hearing Chair TTP2280, TTP2352 and TTP2413