

Second Directions, issued on 07 November 2023

1. These Directions follow those issued on 3rd November 2023, but do not alter those Directions.
2. As the Parties will understand, the Panel will need to determine whether Network Rail ('NR') has complied with the consultation requirements set out in Condition D3.4.4, which itself requires NR to apply the Decision Criteria set out in Condition D4.6.
3. To assist the Panel, **I direct that a document recording the consultation process should be submitted prior to the hearing.** This should identify what passed between the Parties and the dates of relevant decisions. Given the time constraints, I suggest that this should be drafted by GBRf, based on (and expanding where necessary) the details set out in its Statement of Case ('SoC'). This should include a column to enable NR to record whether it agrees or disagrees with the information provided by GBRf. The parties should liaise between them as to when GBRf will pass the first draft to NR; **the final version should be submitted to the Secretary by 1700 on Monday, 13th November 2023.**
4. If either Party wishes to propose any alternative method for providing this information to the Panel, please advise the Secretary as soon as possible.
5. In the same document, the Parties should submit an agreed definition of what constitutes a Capacity Study, or (if they cannot agree) each setting out their definition of what constitutes the same. This follows GBRf's contention that the Capacity Study output did not meet its definition of a Capacity Study. The Panel would be grateful if this could be explained by reference to the Access Impact Matrix.
6. **The Panel will wish NR to explain in its SoC how it submits that it has complied with Condition D3.4.4, or alternatively to make any admission that it did not do so adequately, or at all.**
7. **Further, the Panel will require an explanation of how NR identified the relevant criteria within the Decision Criteria and how it weighted those regarded as relevant.** GBRf states that NR has not provided GBRf with any information about its application of the Decision Criteria thus far; **will NR please confirm whether this is correct in its SoC.**
8. It might be helpful to point out that while the facts differ, subject to any submissions made by the Parties the Panel will have in its mind the ORR's Determination of TTPs 1706 and 1708, which included the statement that, '*...Network Rail needs to be properly informed when exercising the Decision Criteria.*' (See para 64).
9. **The Panel will also need to know what flexing rights exist that might free capacity to provide extra paths to GBRf to meet its rights, and what consideration (if any) was given by NR to exercising these flexing rights. NR should deal with this issue in its SoC.**
10. In this context I note that in the document submitted (in part) as Appendix 5.3 of GBRf's SoC there are a number of references to adjustments to passenger services (see paragraphs 6.2 and 7.2), although without any discussion of how these changes would be imposed or agreed. This document is dated 13th January 2023; its conclusion regarding Freight Diversions (at paragraph 7.4) expresses optimism that there is sufficient capacity, albeit scarce, to provide diversionary paths for all diverted freight services.
11. The Panel will wish to understand why this optimism appears to have been unjustified. (GBRf refers to this point in Paragraph 6.5 of its SoC). **Will NR please explain the extent to which the conclusions of the Capacity Study have been applied. Please also explain the apparent disconnect between the**

output of the Capacity Study and the Decision which is the subject of this Dispute. Is GBRf correct in its contention that NR's Informed Traveller planners had not seen the Capacity Study?

12. **The Panel will also wish to understand whether any other diversionary routes are available than the Hope Valley line and whether these possibilities have been examined.**
13. While I recognise that GBRf's SoC has been produced quickly, in a fast moving environment, **the Panel will need to know exactly what remains in dispute at the time of the hearing.** In this context I am having difficulty in reconciling the figures set out in paragraphs 4.4 of GBRf's SoC (saying that 36,000 tonnes needed to be moved, I presume during the period of the possession in dispute), 4.6 (saying that paths had only been identified for 4,800 tonnes), and 5.7 (referring to an outstanding shortfall of 7,200 tonnes, so implying that satisfactory paths have now been identified for 28,800 tonnes). **This can be clarified at the opening of the hearing.**
14. The first Directions sought to establish what remedies GBRf was seeking that would be practicable for the Panel to include in its Determination. That was drafted against my assumption that there is insufficient time for a D5.3.1(a) order, simply giving general directions to NR, to be effective; and my concern about the ability of a TTP to give an order of the kind suggested in Paragraph 6.1(c) of GBRf's SoC, which appears to suggest leaving the Dispute open until '*due process has been fully exhausted*'.
15. As the Parties will know, the initial options open to the Panel are to determine that NR's Decision should stand, or to give a general direction under D5.3.1(a), although I have explained above my concerns about whether a D5.3.1(a) order could be effective in the time available. **If NR considers that such an order could be effective it should explain why in its SoC.**
16. If the Panel was not persuaded that exceptional circumstances had arisen, but concluded that a D5.3.1(a) order was not practicable in the time available, then it would have to allow NR's Decision to stand. In this event it would be open to the Panel to reach a finding that NR was nonetheless in breach of contract. In that event it would be open to GBRf to seek an award of damages against NR. As a reminder to the Parties, a TTP may decide that an Operator is entitled to an award of damages in principle, but the amount of the award must be the subject of a further Dispute if the Parties cannot agree on the amount of damages flowing from the breach of contract.
17. **GBRf is to confirm by 1700 on Monday, 13th November 2023 whether it would wish to seek such an award in principle if the Panel were to determine that NR was in breach of contract, but was left with no option but to allow NR's Decision to stand.**
18. A Panel may only substitute an alternative decision if it decides that exceptional circumstances have arisen. As yet, neither Party has made any submission on this point and clearly the Panel has no pre-conceptions on this point. In the first Directions I postulated a Determination ordering NR to cancel the possession if it was determined that exceptional circumstances had arisen. NR will no doubt wish to point out in its SoC the penalties that would arise if such an order were to be given. **If, however, either Party can identify before the hearing any alternative remedy which might be imposed by the Panel which would permit GBRf to exercise its rights while not affecting the possession, it would assist the Panel and the Parties if any such proposal(s) were submitted to the Secretary by 1700 on Monday, 13th November 2023.**

[Signed on the original]

Clive Fletcher-Wood

Hearing Chair TTP2318