

TTP2318 and TTP2320

Fifth Directions and Rule H18(c) Note, issued on 13 November 2023

1. I am grateful to Network Rail for the service of its Sole Reference Document in TTP2320.
2. As the Parties will recollect, these TTPs were joined because of common issues thought to be arising in them. As set out in the Fourth Directions, those longer-term issues will not now be dealt with at the hearing on 15 November 2023, but will be adjourned to a later date. It is now too late in my judgement to sever the TTPs, but I intend to treat them as separate Disputes at the hearing.
3. To that end, we shall deal with one TTP first, then the other. My current proposal is to deal with TTP2320 first, but I shall be open to submissions on this point. One consequence of this is that NR will wish to prepare separate opening statements (as already advised this morning), rather than try to deal with both Disputes in one statement.
4. The first question to be asked in TTP2320 is whether FL is able to bring this Appeal, or not. **Will FL please confirm as soon as possible whether it accepts that it did not bid for a path for 4O50.** If there was no compliant bid, this will require me to strike a fair balance between the apparent failure of FL to comply with the Part D bidding process in this instance, against the decision by NR not to raise any objection to the Notice of Dispute (see NR's email of 1707 on 07 Nov 23). In striking this balance I will need to consider whether NR's email was an express waiver of FL's procedural defect, and what can be expected of NR in what has always been accepted to be a short-notice Dispute. In other words, was the author of NR's email able to be fully informed of the circumstances of this Dispute by the time that the email needed to be sent?
5. If the requirement of fairness means that I decide that NR did not waive its rights to object, then TTP2320 will be at an end and the following paragraphs will only apply to TTP2318. They will apply, however, if I do allow TTP2320 to proceed.
6. In the hope of assisting the Parties to draft their opening statements, the Panel will need to decide in each case (subject to my comments above) whether NR has satisfied the consultation requirements in Part D. As part of this process it will be helpful if agreement can be reached on where each possession sits in the Access Impact Matrix, which will assist to establish the extent of NR's duty to consult.
7. The next question to be addressed by the Panel will be NR's identification of which criteria within the Decision Criteria were relevant in each Dispute, and the weighting applied by NR to the criteria selected.
8. If the Panel were not to uphold NR's Decision in either case (on which it has no preconceptions), it will need to decide what remedies are practical in each case and will wish to establish the views of the Parties on this point.
9. In particular, in relation to TTP2318, the Panel will wish to understand why the Section 5 possessions cannot be eased to allow three trains through.
10. NR has not fully addressed paragraphs 7 or 9 of the Second Directions (which applied only to TTP2318), explaining the application of the Decision Criteria to the rejected trains (not the application of the Decision Criteria to the access proposals). Nor is it clear what flexing rights exist that might provide capacity for GBRf, regardless of whether NR is willing to flex passenger services to be able to offer additional paths to freight operators.
11. For the purpose of the hearing to determine the short-term issues, I propose to proceed on the basis that D4.4.1(a) means that not only is NR entitled to exercise its Flexing Rights in response to an Access

Proposal submitted under D3.4.10, but that it should do so if exercising NR's Flexing Rights would permit the Access Proposal to be accommodated. Whether or not this interpretation is correct will be remitted to the adjourned hearing on policy issues, for the reasons explained in the Fourth Directions. But explaining this approach in the short-term may assist NR in preparing for the hearing.

12. Subject to submissions at the hearing, given the way in which these Disputes have developed it might be more productive in each case for NR to set out its position on each of these points first, with the Claimant responding, rather than have the Claimant seeking to address issues (such as the Decision Criteria) in its opening statement, when at this stage (in some cases) it is not fully informed of NR's position.
13. As far as Rule H18(c) is concerned, I do not think that any matter of law arises in the hearing listed for 15 November 2023, we shall be examining matters of contractual interpretation.

[Signed on the original].

Clive Fletcher-Wood
Hearing Chair, TTP2318 and TTP2320