

Sixth Directions, issued on 22nd November 2023

1. Network Rail ('NR') has sent an email to the Secretary requesting a meeting with the Hearing Chair to, '*...understand more clearly the powers which permit the ADC to request its proposed next action since ADC has already ruled on the matter in dispute without feeling that it needed any better understanding of policy issues*'. The text of NR's full email is attached for the benefit of all Parties.
2. It is clear policy that no Party should be able to meet a Hearing Chair while Disputes are still live. But all Parties are entitled to an understanding of my interpretation of the powers available to a properly constituted TTP.
3. Rule H1 in the Access Dispute Resolution Rules reads:
The purpose of a Timetabling Panel is to determine disputes referred to it by parties to an access agreement which incorporates Part D of the Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity including restrictions of use and train slots, in: (a) such an access agreement; or (b) the Access Conditions incorporated by reference in the access agreement in question.
4. I have no doubt that the issues raised by the Claimants in these TTPs fall within this broad definition. As the hearing was expedited because of the limited time available before Week 40, there was insufficient time to deal adequately with a number of the points arising before the hearing. Mindful of Rule H9(b), which requires, '*any determination which may affect the production of the railway operational timetable must be made within the necessary timescales to allow that timetable to be published*', therefore, for example, in the Fifth Directions I said that I would work on an assumption about NR's flexing rights, as there was insufficient time to resolve that question of contractual interpretation before or at the hearing, but it was clear at the hearing that this is a live issue between the Parties which appears not to have been brought to a TTP previously to seek a ruling.
5. The Interim Determination, to be issued as soon as possible, leaves open a number of legal questions which are within the competence and power of a TTP, regardless of the fact that the Interim Determination will give directions to NR to deal with the most urgent issues in dispute. (To assist the Parties the details of the TTP's Interim Determination of these issues was given orally at the conclusion of each section of the hearing and incorporated in a note circulated to the Parties.) My understanding is that the Claimants still wish to have these questions determined because of their impact on future access planning and possible future disputes.
6. Rule H16 requires disputes to be administered in a way which includes reflecting the objective importance of the dispute to the Dispute Parties; the complexity of the issues; and the significance (if any) of the issues involved to the railway industry. These Disputes have revealed a clear difference in the understanding of a number of points, including how diverted services should be timetabled, as well as a lack of common understanding of how Capacity Studies and Timetable Studies should be handled which I believe are significant issues for the railway industry. Looking only at the Trans-Pennine route, the extent of blockades in the near future indicates a need for decisions on contractual issues which fall within the competence of a TTP to avoid a series of future disputes which seem likely to arise if future timetable planning suffers from the same differences of understanding revealed in these Disputes.
7. It was for this reason that I sought comments from the Parties on the issues that I had set out as questions in the Fourth Directions. It seems possible that any discussion of these issues, some of which are necessarily broad, might involve areas clearly beyond the competence of a TTP to determine, in which case they might form part of the final Observations and Guidance, which - as the term implies - is a non-binding section of the determination. (This guidance is required by Rule 51(j)(iii)). But given the very stark differences revealed at the hearing between the Parties' understanding of the effect of some of the provisions of Part D, and documents such as Timetable Planning Rules and Engineering Access Statements incorporated by reference, then to have a determination on these issues of contractual interpretation, based on actual facts, seems to meet the legal requirement of finalising these Disputes as well as providing useful guidance to the industry.

8. This reasoning will appear in the Interim Determination and would, I hope, therefore be subject to the right of NR to appeal this process.

[Signed on the original]

Clive Fletcher-Wood
Hearing Chair, TTP2318 and TTP2320

Text of email from NR to ADC Secretary, dated 20 November 2023 at 16:05

[Name redacted]

TTP2318 and TTP2320: The longer term policy issues

We acknowledge receipt of the Summary of the Interim Determination and, within it, we note the longer term policy issues section. We also acknowledge that last Wednesday's hearing decided upon the short term issues in these disputes and provided relief to GB Railfreight and Freightliner respectively.

On the longer term policy issues, we are not today submitting any amendments or additions to those questions posed by the Hearing Chair, though we do feel the questions need recrafting and rebalancing.

We would like to request a meeting with the Hearing Chair to discuss the proposal for how the longer term policy issues should be dealt with. While we appreciate ADC and the Hearing Chair wanting to help with guidance on the wider policy issues that TTP2318 and TTP2320 might have highlighted, we do not think ADC the appropriate mechanism through which to discuss and decide any necessary policy changes, now that the claimants' disputes have been ruled on.

We would welcome the opportunity to understand more clearly the powers which permit ADC to request its proposed next action of Network Rail since ADC has already ruled on the matter in dispute without feeling that it needed any better understanding of policy issues.

We wish to cooperate in all matters as best we can but feel a discussion first would be to everyone's benefit at this early stage.

Kind Regards

[Name redacted]