

TTP2318 and TTP2320

Eighth Directions, issued on 11 December 2023

1. I am grateful to Network Rail ('NR') for its response to the Seventh Directions.

Network Rail's position

2. It is, of course, open to NR to take legal advice (as it is to any other Party). A Hearing Chair cannot give legal advice to any Party, but where relevant should explain to the Parties the basis on which he (in this case) is proceeding, or the reasons for his case management decisions. It is on this basis that I trust that NR's legal advisers will be cognisant of the over-riding duty of a TTP to, '.....reach its determination on the basis of the legal entitlements of the Dispute Parties and on no other basis' (ADRR, A5), while also complying with the one of the duties of a TTP Hearing Chair set out in ADRR, H9(c) that, '*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*'.
3. In these TTPs these duties were in conflict. It was for this reason that as early as the Fourth Directions I concluded that there was insufficient time to determine the legal entitlements of all the Parties at the hearing listed for 15 November 2023 ('the First Hearing'). Therefore I directed that the First Hearing was only to determine the issues of the disputed paths, relying on assumptions explained in Directions, which were not tested at the First Hearing, so holding over the determination of the legal entitlements of the Parties to permit proper consideration of the issues arising from these TTPs by all Parties and the Panel.
4. It is on this basis that I do not regard the First Hearing as having concluded the TTPs, as was explained in Directions before the hearing and at the hearing itself. The First Hearing determined the short-term questions of the disputed paths, but it did not – nor was it intended to – determine the legal entitlements of the Parties. In my opinion the TTPs remain live until that point is reached. It is clear that the Claimants wish to have their legal rights determined; I comment below on other Parties.
5. It was open to NR to have appealed the Interim Determination, asking the ORR to declare that it was in fact a final Determination, thus ending the TTPs' powers; NR did not do so. It will, of course, be open to NR to appeal the final Determination.
6. The outstanding questions are not arcane points of only limited interest and importance. Simply to take one example: NR asserted at the First Hearing that in seeking to identify paths for services diverted because of Restrictions of Use it is under no duty to flex WTT services, nor do the Decision Criteria come into play in these circumstances (Although the paths in question involved freight services, I did not understand that NR was restricting its interpretation only to diverted freight trains). Is this a correct description of the legal entitlements of the Parties? It had not been advanced by NR this starkly until the First Hearing, so the Claimants had not come prepared to address it.
7. This question alone was obviously of interest to operators other than the Claimants who attended the hearing, especially if this assertion represents an interpretation of Part D which has been adopted within NR. I regard the TTPs as being under a duty to provide a determination of such legal entitlements, for the benefit of the industry as a whole, not just these Dispute Parties.
8. I trust that I have made it plain that in examining such questions issues might arise which are beyond the power of a TTP to determine, but in such cases we are required to offer Observations and Guidance which might benefit the industry as a whole (ADRR, H51(j)(iii)).

9. While a Claimant can bring a TTP to an end at any time by withdrawing its claim, I do not regard NR as having a veto over an existing TTP by refusing to participate any further. I have a duty to, '*...ensure that all procedures of the Timetabling Panel (at, before and after TTP hearings) are being implemented fairly and effectively in respect of each dispute*' (ADRR, H18(b)). If NR were to withdraw, I would regard it as my duty to ensure that NR's submissions made prior to any such withdrawal were tested at the hearing, but I could go no further, and could not act as an advocate for NR.
10. NR's right of appeal would not, in my opinion, be affected if it were to withdraw from a TTP before the final Determination. An appeal could lie against both the procedural and the substantive decisions reached in these TTPs. If an appeal against the procedural issues were upheld, then I assume that the ORR would strike down the substantive decisions as being ultra vires. But if the appeal against the procedural issues failed, then these TTPs will not have had the assistance of further input from NR in reaching its substantive decisions. That does not strike me as helpful to the industry, nor as complying with the duty of co-operation laid on all industry parties by the ADRR (A9(a) and (b)).

Dates

11. I note NR's proposal, subject to its caveats, that it can provide its answers to the questions set out in the Seventh Directions by close of business on Friday, 19 January 2024. As I think it important that NR has sufficient time to co-ordinate its response to the questions, I therefore direct that NR should submit its answers by that time.
12. Similarly, those Parties responding (on which see further below) need sufficient time to respond to NR. Their Statements of Case must be filed with the Secretary and served on other Parties by **16:00 on Friday 09 February**. The second hearing is likely to fall on one of the following dates: 20 to 23 February 2024, 27 to 29 February 2024, or 01 March 2024. If any of the Dispute Parties - including any RSP who wishes to become a Dispute Party (see paras 20 and 21) - would be completely unrepresented on any of those dates they should let the Secretary know by close of business on **Friday, 15 December 2023**.

Submissions

13. NR is invited to structure its submission to set out any objections to the procedure being adopted that subsist at the date of the submission; to answer the questions set out in the Seventh Directions; then to raise any further points that it wishes to be determined at the adjourned hearing, or which it would be appropriate to include as Observation and Guidance.
14. The submissions of other Dispute Parties should deal with NR's response to the questions on a point-by-point basis (other than NR's objections to the procedure), indicating agreement, no comment, or where there is disagreement, the reasons for disagreeing with NR's interpretations; finally these submissions should raise any further points as suggested for NR above.
15. References to Part D, or to other authorities where appropriate, will assist the process.
16. It might also assist the process if the other Parties were to co-ordinate responses, say with a joint response from those freight operators participating and one from passenger operators. This is not a direction to do so, but the more submissions that there are, the less easy it is likely to be to reach the final Determination as simply as possible.
17. For the avoidance of doubt, my directions as to timing and submissions are made in accordance with my powers under ADRR H20.

Other Parties

18. XC Trains Ltd. has asked to be joined as a Dispute Party. Other operators are considering their position. This has alerted me to the fact that historically we have distinguished what have been called interested parties from Dispute Parties. Interested parties attend the hearing and can contribute at the discretion of the Hearing Chair, but are not required to make any written submissions. In my experience it is frequently helpful to have other operators present, as they can often answer questions from the TTP which help to clarify matters. I am not aware of any criticism of this process made by any of my fellow Hearing Chairs.
19. However, interested parties are not defined in the ADRR, so this process seems to have arisen through custom and practice. The Definitions section of the ADRR includes a definition of an Involved Party, as, ‘...a party directly involved in the dispute, including the Secretary, all Dispute Parties, and the Forum’, a title which I suggest should be adopted in future.
20. Chapter H requires a party wishing to be joined as a Dispute Party to obtain leave from the Hearing Chair once any directions hearing has taken place (H19). As there has already been one hearing, then I have no doubt that this Rule applies. I give leave for XC Trains Ltd. to join as a Dispute Party. I also give leave for any of the other operators which declared themselves to be an interested party prior to the hearing to join as Dispute Parties if they so wish. Other parties than XC Trains Ltd. should notify the Secretary by close of business on **Friday, 15 December 2023** if they wish to be joined as a Dispute Party.
21. Any other Resolution Service Party (‘RSP’) wishing to be joined as a Dispute Party must apply for leave, which will be considered on a case-by-case basis. It is, of course, open to other RSPs to ask to become an Involved Party if they do not wish to become a Dispute Party.
22. A query has arisen as to any possible liability for costs if a former interested party joins as a Dispute Party. While in TTP1064 (and the associated TTPs) I expressed regret in the Determination at not having imposed a costs order, I have never actually done so. In those TTPs I characterised the conduct of the representatives of one Party as displaying, ‘...a high degree of procedural quibbling’. It was that which made me regret not having imposed a costs order in those cases. In these TTPs I would only consider a costs order if a Party behaved in a manner which delayed or prejudiced the outcome of the TTP, or whose conduct increased the costs of the process unnecessarily. Any Party approaching a hearing in good faith and in a co-operative manner is, in my opinion, immune from any risk of an adverse costs order.

[Signed on the original]

Clive Fletcher-Wood
Hearing Chair, TTP2318 and TTP2320