

TTP2318 and TTP2320

Eleventh Directions and Rule H18(c) Note, issued on 07 February 2024

1. I am grateful to all Parties for the service of their Sole Reference Documents in TTP2318 and TTP2320.
2. In the hope of assisting the Parties in preparing for the hearing, and in response to GBRf's question, ADR Rules H45(d) and (e) require the Parties to make opening statements, unless the procedure is varied by the Hearing Chair. Given the volume of papers already submitted in this case, I am happy to dispense with the requirement for opening statements for any Party that wishes to do so, particularly in the interests of using everyone's time most efficiently on the hearing day. Also see paragraph 7.
3. As all Parties will know from previous Directions, a TTP is bound by any ORR Determination, whilst the Determination of another TTP is only of persuasive authority. I have already drawn the attention of the Parties to TTP493/494/495. I must also draw the Parties' attention to the ORR Determination of TTP1174, as I regard aspects of that Determination as being binding in respect of some issues in TTP2318 and TTP2320, which are similar. In particular, the Parties should read paragraphs 59 to 68 (on the Decision Criteria) and 80 to 97 (on NR's Flexing Right).
4. Following an exhaustive review of the TTP archive, this is the last TTP that I will draw the Parties' attention to, unless the Parties wish to raise anything else themselves.
5. There are two points which I hope that it might be helpful to remind the Parties. Firstly, in respect of NR's SRD, the Interim Determination not only found failings in NR's application of the Decision Criteria, but also in the consultation process in both TTPs. Either of these on its own would have led to the same decision.
6. Secondly, noting paragraph 5.1 in the Freight Operating Companies' SRD, this TTP is solely concerned with the disputes raised under references TTP2318 and TTP2320. I cannot give broad directions of the type requested in paragraph 5.1, but could - if the outcome of the hearing supported this - make findings to the effect that in the particular circumstances of the issues under dispute one Party should, or should not, have taken a specific action to comply with Part D of the Network Code.
7. I think that the most effective use of time at the hearing will be for the Panel to identify the remaining topics in dispute, for example (but without limitation) the applicability of the Decision Criteria, and NR's powers to flex (whether defined as Flexing Rights or found elsewhere in Part D); then to invite all Parties to set out any refinement in their thinking since submitting their SRDs, following which the Panel will ask questions. The Parties will then be able to ask any questions left outstanding.
8. As far as Rule H18(c) is concerned, I do not think that any matter of law arises in the hearing listed for 15 February 2024, we shall be examining matters of contractual interpretation. One question of contractual interpretation which will assist is whether D3.4.9 confers a free-standing power on NR, or whether it only applies in conjunction with the other provisions in D3.4.

[Signed on the original]

Clive Fletcher-Wood
Hearing Chair TTP2318 and TTP2320