

TTP2388

GB Railfreight and Network Rail

First Directions Letter to both Parties

Terms used

“ADC” means The Access Disputes Committee

“GBRf” means GB Railfreight

“NR” means Network Rail

To enable the Panel to fully understand and deal fairly with the issues raised or likely to be raised by the Parties, can each party please address the following matters as addressed to each:

For NR

1. When did GBRf request NR not to copy it into so many emails, and asking NR to use its judgement when consulting changes to engineering access under D3.4 and D3.5?
2. If in writing, produce a copy of the document. If not in writing, provide full details so the GBRf can address the matter.
3. It is noted that:
 - (a) NR say in their email from Bryan Davey (29/2/24 @18:10) “*the engineering access team have confirmed that “no traffic has been bid and offered” on 12 Feb 2024*”.
 - (b) GBRf say in their case summary: “*8th February: GB Railfreight bid 14 test paths to Network Rail Capacity Planning using the Short Term Planning process.*”
 - (c) Can NR confirm that there was a bid from GBRf on 8/2/24?
 - (d) If so does NR accept that the statement at (a) above (“*the engineering access team have confirmed that “no traffic has been bid and offered” on 12 Feb 2024*”) is incorrect in relation to there being no bid, if GBRf did, as it claims, submit a bid for the paths in question on 08 Feb 24
 - (e) If not, what is the explanation?

4. How often GBRf has run trains (whether “test” trains or otherwise) on the sheepcote Up/Down lines in the last two years?
5. Please supply a copy of any record of the application of the Decision Criteria referred to in Bryan Davey’s email of 29/2/24 @18:10, (last line of point 1)

Resolution of the Dispute:

6. **Mitigation of loss¹ and co-operation² between the parties to resolve the dispute:** To enable the panel to determine if the parties have co-operated and attempted to mitigate their losses (should I decide there were losses incurred), please state:
 - (1) Please explain in full why it is alleged that it is not reasonably practicable³ for the proposed work to be carried out later than the time currently scheduled
 - (2) Are you (NR) prepared to work with GBRf to ensure that “test train(s)” can be run into Waterloo via Sheepcote Curves before any HS2 blockades? If so, have you contacted GBRf to discuss the issue?
 - (3) If you have so contacted GBRf when, and with what outcome?
 - (4) Set out those matters which you (NR) consider renders your decision justified and proportionate⁴ in relation to the matter, and produce any documents you rely on.
 - (5) Will NR please confirm what consideration, if any, has been given to cancelling, postponing or easing this possession and what penalties would be incurred if it were to be cancelled, postponed or eased
7. Produce any documents you wish to rely upon at the hearing by **14:00 on Wednesday 6 March** so that the panel and GBRf have sufficient time to deal with the same.
8. Will NR outline what outcome it seeks from the hearing?

¹ The common law of England and Wales imposes a duty on parties to a contractual dispute to mitigate (that is avoid or minimize) any loss which may result from a breach of contract. Failure to mitigate loss by taking reasonable steps to avoid or minimize loss will result in the loss potentially being irrecoverable.

² The Access Dispute Resolution Rules, Chapter A “Duties of Dispute parties” requires the parties to co-operate with each other and conduct themselves in good faith with the objective of resolving the dispute: R9 (a)

³ See D 3.5.2 of The Network Code

⁴ See D4.6 of the Network Code and paragraphs 13 & 14 of TT Panel decision T01, chaired by Sir Anthony Holland 9/5/2005

Directions For GBRf:

9. Did you, GBRf, request NR not to copy you into so many emails, and ask NR to use its judgement when consulting changes to engineering access under D3.4 and D3.5?
10. It is noted that:
- (a) NR say in their email from Bryan Davey (29/2/24 @18:10) “*the engineering access team have confirmed that “no traffic has been bid and offered” on 12 feb 2024*”.
 - (b) You (GBRf) say in your case summary: “*8th February: GB Railfreight bid 14 test paths to network Rail Capacity Planning using the Short Term Planning process.*”
 - (c) Can you, GBRf, confirm that there was a bid from GBRf on 8/2/24? If so produce any documents relied upon.
11. How often has GBRf run trains (whether “test” trains or otherwise) on the sheepcote Up/Down lines in the last two years?

Resolution of the dispute

12. **Mitigation of loss⁵ and co-operation⁶ between the parties to resolve the issue:** To enable the panel to determine if the parties have co-operated and attempted to mitigate their losses (should I decide there were losses incurred), please state:

- (a) Are you (GBRf) prepared to work with NR to ensure that “test train(s)” can be run into Waterloo via Sheepcote Curves before any HS2 blockades? If so, have you contacted NR to discuss the issue?
- (b) If you have so contacted NR when and with what outcome?
- (c) Will GBRf please confirm what consideration, if any, has been given to cancelling, or postponing the proposed test runs (on 18/3/24, 1/3/24 and 20/3/24⁷) and what penalties would be incurred if they were to be cancelled or postponed.

⁵ The common law of England and Wales imposes a **duty on parties to a contractual dispute to mitigate** (that is avoid or minimize) **any loss** which may result from a breach of contract. Failure to mitigate loss by taking reasonable steps to avoid or minimize loss will result in the loss potentially being irrecoverable.

⁶ The Access Dispute Resolution Rules at Chapter A “Duties of Dispute parties” **requires the parties to co-operate with each other and conduct themselves in good faith with the objective of resolving the dispute: R9 (a)**

⁷ Referred to in the email of Gareth Rawlings on 19/2/24

13. Set out those matters which you (GBRf) consider renders the decision by NR unjustified and disproportionate⁸ in relation to the matter, and produce any documents you rely on.
14. Produce any documents you wish to rely upon at the hearing by **14:00 on Wednesday 6 March** so that the panel and NR have sufficient time to deal with the same.
15. Will GBRf outline what outcome it seeks from the hearing?

Matthias Kelly KC
Panel Chair
4 March 2024

⁸ See D.6 of the Network Code and paragraphs 13 & 14 of TT Panel decision T01, chaired by Sir Anthony Holland 9/5/2005