

**Third Directions – issued on 23 July 2024**

1. I am grateful to FL for providing its response to the Second Directions, although they have still not clarified matters to the extent that I might wish.
2. For the avoidance of doubt, it might be worth making a point which has probably already occurred to both Parties: a TTP has no direct power or influence over the Part G process. That will be understood by the Panel throughout. Nonetheless, in reaching its decision as to whether NR behaved reasonably in this Dispute, the Panel is likely to be helped considerably by understanding the issues at stake in the Part G process.
3. The Panel will have to reach a binary decision as to whether NR acted reasonably or not in issuing the D8.5 Notice seeking to withdraw the disputed Train Slots. Though I have not yet heard any submissions, it is not difficult to conclude that if the Panel decides that NR did behave reasonably, then subject to any appeal by FL to the Office of Rail and Road (ORR), the matter will be at an end.
4. However, again emphasising that I have not heard the full range of submissions, if the Panel concludes that NR did not behave reasonably, then what? Could rescission automatically be granted?
5. This is where we come back to the issue which I mentioned in the previous Directions. The need to balance fairness between the Parties against the requirement to determine Disputes fairly. Considering this very fine line, which a Hearing Chair must follow in the discharge of his or her duties, I am reminded of the trenchant criticism which I directed at one of the Parties' external lawyers in TTP1064 et al. The ORR echoed these criticisms in its Determination of the Appeal against TTP1064. Hearing Chairs cannot have it both ways: if we do not want commercial litigators treating TTPs as a form of all-out litigation, we must recognise that some industry parties, especially smaller operators, may not have legal resources to hand to ensure that their case is pleaded fully to assist the TTP and the wider industry.
6. It is in this context that I now set out what I see as alternatives if the Panel were to decide that NR had behaved unreasonably. FL appears to be working on the assumption that the D8.5 Notice should therefore be rescinded. Yet it is clear from FL's latest submission that it would not be in a position to take up the disputed Train Slots in the near, or possibly even foreseeable, future. Again, subject to confirmation, I am told that DRS is able to take up these slots from next month.
7. The alternative, if the Panel finds that NR has behaved unreasonably, is to reach a Determination to that effect, but not to order rescission. What is in my mind is that if it proves to be the case that DRS can operate trains in these Train Slots and FL can't, then in any exercise of the Decision Criteria in the short-term between these two Freight Operating Companies (FOC), then NR would argue that it was appropriate to allocate the Train Slots to the FOC which can use them.
8. Decisions might have to be made quickly by NR, and my own view is that the path to such decision-making should be as smooth as possible.
9. Again referring to the fact that we do not want railway managers to become lawyers, and preferably in TTPs not to have professional lawyers involved, I would now query whether FL would be seeking an

award of damages if, and I emphasise *if*, the Panel were to conclude that NR had behaved unreasonably, but chose not to order rescission.

10. Again from TTP1064, it is clear that NR can only be expected to deal at a hearing with claims that have been made to it. If FL wishes to seek an award of damages in such circumstances, therefore it is to say so. It must do so as quickly as possible and point out which contract(s) have been breached, and in which way, but doing so as simply as possible.
11. While FL is making this decision, NR should continue to prepare its SRD on the original lines. If FL does come forward in the very near future seeking an award of damages, I will look favourably upon any NR application to be permitted to serve a supplementary SRD to deal with this issue alone.

*[Signed on the original]*

Clive Fletcher-Wood

Hearing Chair TTP2468