

Fifth Directions issued on 30 July 2024

1. The Hearing Chair has made it clear that he, at least, is still not fully aware of the circumstances which led to FL being unable to operate W8 gauge trains between Huddersfield and Stalybridge on route MVL3. This is despite his specifying in earlier Directions that the position should be explained prior to the hearing. He considers that the hearing will be both more efficient and more effective if the Panel and the Parties start with a shared understanding of the facts.
2. Therefore, as this information has not yet been provided, but is in his view important, he proposes to start the hearing, before the Parties' Opening Statements, by inviting NR (with any necessary assistance from FL) to give a short presentation explaining:
 - What information was published about the gauge on route MVL3 before August 2022?
 - Why it was thought necessary for FL to undertake gauging assessment work commencing in August 2022?
 - Were the non-compliances with W8 gauge revealed by this gauging assessment work only those shown in Appendix A to the Short-Term Network Change Notice issued on 04 January 2023?
 - Whether these non-compliances meant that the original gauging information was wrong, or whether later work on the infrastructure had led to the non-compliances, without the published information being corrected?
 - Why the Short-Term Network Change Notice was issued for a 2-year period, particularly given the indication in paragraph 3.5 of NR's SRD that W12 clearance is unlikely to be achieved before 2032?
 - What does NR currently assume is to happen when the Short-Term Network Change Notice expires?
 - What work would be required to restore W8 gauge clearance on route MVL3?
 - The reasons for FL's objections, and whether any other operator objected?
 - What response, if any, did NR provide in response to FL's objections and what took place following the issue of that Short-Term Network Change Notice?
 - The current status of the services which DRS wishes to run in the disputed Train Slots.
3. The Hearing Chair's intention is that this presentation should be purely factual; he hopes that the facts themselves will not prove contentious, but he will obviously allow FL to make any subsequent observations that it may have. The Panel will be able to ask questions of both Parties.
4. What is to be made of these facts, how they are to be interpreted, their legal significance and what assistance they may offer to the Panel will be addressed later in the hearing, relying on submissions from the Parties, but that stage can only be reached once there is a shared understanding of the facts.
5. Should there be any doubt at this stage as to the relevance of these facts, on considering the issues raised in this Dispute the Hearing Chair has reached a preliminary conclusion that for Part D to be effective, both in long-term and short-term WTT construction, operators must be able to rely on information published by NR concerning the condition, capacity and/or capability of the Network. This not only covers gauging, but issues such as the length of loops and sidings, and line speeds, merely as examples. He will, of course, be prepared to consider any submission contradicting this preliminary view.
6. In this context, the Parties may wish to refresh their memories on the views expressed by the ORR in its letter:
<https://www.orr.gov.uk/sites/default/files/2023-11/independent-reporter-work-on-network-capability-letter-2023-07-24.pdf>.
7. Therefore the Parties will not need to re-state the facts in their Opening Statements; these will enable the Parties to set out their understanding of the consequences of the agreed facts, the legal entitlements of each Party, and the remedy/ies that each is seeking.
8. As already explained, the TTP will need to determine whether its examination should be limited purely to the words of D8.5, or whether to reach a conclusion as to the reasonableness of NR's Decision it should look more widely at the underlying circumstances leading to NR's Decision to issue the D8.5

Notice. If it is submitted that the Panel should be limited to no more than the words of D8.5, then there would be merit in determining this as a preliminary issue.

9. If it is determined that the TTP should look more widely, then the Panel will need to decide which legal entitlements of the Parties are engaged in that examination. In particular, the Panel will need to decide whether the preliminary conclusion of the Hearing Chair set out in paragraph 5 above amounts to a legal entitlement in favour of any operator, and therefore in favour of FL in this Dispute.

[Signed on the original]

Clive Fletcher-Wood

Hearing Chair TTP2468