

Directions issued on 09 July 2024

1. Rule H18(c) of the Access Dispute Resolution Rules ('ADRR') requires a Hearing Chair to provide a note of relevant issues of law raised in any dispute following submissions of the statements of case. A Hearing Chair has the power to adapt the Part H procedures so long as in doing so he/she reflects the Principles of the ADRR and of Chapter H.
2. In the circumstances of this Dispute – as I understand them from the limited information so far available – it appears to me that both Parties may be assisted in drafting their Statement of Case ('SoC') if I offer some legal observations now. These are obviously preliminary opinions which might be revised once I have heard any submissions to the contrary.
3. The Secretary advises me that the Dispute has arisen because the Claimants, Freightliner and Freightliner Heavy Haul (together 'FL') wish to operate trains of W8 gauge in the disputed Train Slots. According to Network Rail's ('NR') published information, trains of this gauge should be able to operate on the lines concerned (between Huddersfield and Stalybridge), but FL's own enquiries indicate that recent engineering work has in fact reduced the loading gauge in places, thus preventing FL from using the Train Slots concerned with W8 gauge rolling stock. No Network Change recording this alteration has been established to date.
4. The information in paragraph 3 above has been provided to the Secretary in her normal day-to-dealings with potential Claimants and Network Rail. FL will, I am sure, understand that its case, if I have understood it correctly, must be included in its SRD, with supporting evidence.
5. NR has served a Notice under D8.5, which is headed 'Removal of Train Slots obtained by a Train Operator that are not being used'. I have not seen NR's Notice, but I have seen the counter-notice served by FL, as required by D8.5.2, in accordance with which FL has also commenced this Dispute. It appears to be common ground that the disputed Train Slots were included in the Working Timetable, but they are not underpinned by any Quantum Access Rights.
6. The issue to be determined, therefore, is whether NR, '*acting reasonably, considers that the Train Slots are not being used*' (D8.5(c)).
7. At one level it could be argued that as the Train Slots cannot be used for physical reasons, then NR must be acting reasonably to conclude as a matter of fact that they are not being used, and that it is therefore reasonable for NR to reach this conclusion.
8. My preliminary conclusion on this point, once again subject to submissions, is that the TTP is entitled and required to look at the issue more broadly, to enquire whether the physical bar to FL using the Train Slots has occurred for reasons that are themselves a reasonable exercise of NR's powers and in fulfilment of its duties.
9. A factor influencing my thinking is FL's assertion in its counter-notice that NR 'must' refer to the expectations of Condition J4. FL then uses examples from J4.3 to support its case in the counter-notice.
10. It appears to me that FL's contention that NR 'must' follow J4.4 requires qualification. Firstly, because in the Appeals against TTPs507/8 the ORR determined that there is no contractual link between Part D of the Network Code and Part G. My assumption from this is that the ORR would be likely to reach a similar conclusion in respect of Part J.
11. In determining TTP1069 (see 5.10), I concluded that even where a contractual link did not exist between different Parts of the Network Code, an operational link could (and in that case did) exist.
12. A decision under D8.5 is a decision by NR to which D4.6 applies, so requiring NR to achieve the Objective and apply any of the Considerations that are relevant. Given that NR has made its D8.5 Decision on the basis of non-use of the Train Slots by FL, however, I am not immediately persuaded that the Decision Criteria will assist either Party.
13. All this said, there is no guidance within Part D as to what amounts to acting reasonably on the part of NR in deciding that the disputed Train Slots are not being used. This is one of my reasons for concluding that the TTP should look more widely than merely the physical inability of FL to use the

Train Slots. It must examine why this is the case and whether this sheds any light on whether in NR's decision to issue the D8.5 Notice it was acting reasonably.

14. Even if there were a contractual link between Parts D and J, Part J is clearly not directly applicable to this Dispute, because it is entirely devoted to the transfer of Access Rights between freight operating companies ('FOCs'). This is not the case here, as there are no Access Rights involved. This is why I query FL's assertion that NR 'must' refer to the expectations of J4. But even though I do not support FL's conclusion that NR 'must' do so, I regard it as perfectly reasonable for either Party to use J4 as guidance in assisting the TTP to decide whether NR has acted reasonably, and has therefore complied with D8.5(c).
15. In the light of my conclusions so far, I should point out that although I think it reasonable for either Party to use J4 as guidance in shaping its case, neither Party is limited only to examining to the provisions of J4. Therefore, it is my view the TTP is entitled and required also to consider whether it is reasonable for NR to rely on any actions (or lack of action) on its part which may have led to the non-use of the Train Slots.
16. I must emphasise that all these views are preliminary on my part and intended to assist the Parties. It is open to any Party to submit that my preliminary conclusions on these points should not be accepted.
17. Given that it seems impossible for FL to use the Train Slots for the moment at least, no doubt FL will explain in its SRD what remedies it is seeking, should the TTP decide the Dispute in FL's favour.

Signed on the original

Clive Fletcher-Wood

Hearing Chair

TTP2468