

Fourth Directions issued on 26 July 2024 and Rule H18(c) Note

Directions

1. I am grateful to NR for service of its SRD, together with the accompanying documents.
2. In order to save time at the hearing, I record once again now what I had hoped was clear from the earlier Directions, that I recognise that there is no contractual link between Part D of the Network Code and Part J. With respect to NR, paragraph 4.2.3 of its SRD is effectively repeating paragraph 10 of my first Directions in this Dispute. I am very familiar with the Appeal to which my attention is drawn by NR, as I was the Hearing Chair in those TTPs.
3. I remain of the view, however, that given the lack of other authorities on the interpretation of D8.5, it is reasonable for either Party to seek guidance from Part J. The Panel will then have to decide how much weight it puts on any use of Part J for guidance, but it can only be guidance and not any kind of binding authority. This point also applies when reviewing the later paragraphs 4.2.4 to 4.2.6.
4. I note that NR explains in 4.3.1 that the disputed Train Slots should not have been maintained in the WTT ('Working Timetable') for as long as they have, on which I comment further below.
5. Paragraph 4.3.3 is useful background information, but as NR is aware, this TTP is not required to determine whether DRS or FL should have priority, even if FL were to come forward with bids for traffic that it could operate on this route.
6. Linked with paragraph 4 above, I expect NR to explain at the hearing whether 4.4.4 is saying that because the Slots had been allowed to remain in the WTT for longer than permitted by Clause 2.3 of FL's Track Access Agreement ('TAA') (which is replicated in FLHH's TAA), and were not underpinned by Access Rights, then if FL had sought to operate trains in these Slots that were within gauge, NR would have refused to let them run?
7. These points are made in the hope of simplifying the issues to be addressed at the hearing. Again in the hope of simplifying matters, I refer both Parties to paragraphs 7 and 8 of the first Directions. At one level it is unarguable that NR behaved reasonably in issuing the D8.5 Notice. But in my view the Panel is entitled - and indeed required - to enquire into the reasons why FL was not able to run services in the WTT for which it had at least potential traffic. While again accepting that there is no contractual link between Part D and Part G, the Panel must be informed of the circumstances which meant that it was impossible for FL to operate W8 gauge trains on this route.
8. Nobody has yet made this explicit, but I am assuming that the route was advertised as being capable of being used by W8 gauge trains, but that the work carried out between August and December 2022 (according to NR's Appendix 1) confirmed that this was not actually the case. I expect NR to explain in its Opening Statement how this position has arisen, if my assumption is correct
9. Also in 4.4.4 NR submits that, 'It is important to emphasise, in relation to the Chair's Second Directions (Point 13) that Network Rail do not consider the status of this section of the network as relevant under the Track Access Agreement with Freightliner. Timetable Panel Hearings are based on the legal entitlements of the parties involved'.
10. While of course NR is correct in saying that the TTP must determine the Dispute on the basis of the legal entitlements of the Parties, the Panel will wish to examine whether the status of any section of track over which FL is entitled to operate (whether or not a particular service has Access Rights) is in fact a legal entitlement arising from FL's TAA.
11. To determine this, at the hearing the Panel will wish NR to explain its position, given the terms of Clause 4.1 of FL's TAA, under the heading General Standard of Performance, attached as an Annex to these Directions.
12. Similarly, the Panel will wish NR to be prepared to explain at the hearing how this situation can be regarded as complying with Sections 5.7 and 5.8 of NR's Licence, also attached.
13. The Panel will also expect NR to explain what happened between the issue of its Short-Term Network Change Notice in January 2023, with FL objecting in the same month, and the application by DRS in June 2024.

Rule H18(c) Note

At risk of repeating myself yet again, it is clear that as a matter of law there is no contractual link between Part D and Part G of the Network Code; I assume that the same applies between Part D and Part J. In my view this does not bar the Panel from using guidance from Part J to the extent that it might assist, nor from being informed about the Part G process where it might be relevant on the question of reasonability.

As I have also previously pointed out, just as Part J is not an authority, so neither Party is limited to the provisions of Part J in its submissions. In considering reasonableness in this Dispute, I anticipate that the Panel will want to look beyond any guidance that can be gleaned from Part J.

The matters for determination are therefore those of contractual interpretation.

[Signed on the original]

Clive Fletcher-Wood

Hearing Chair TTP2468