

Directions, issued on 27 February 2025

Background

1. There are now three issues in dispute which both parties identify by the same numbering, 1, 2 and 3.
2. It appears the Network Rail (NR) SRD may contain information/evidence that the Claimant XC Trains (XC) may not have seen previously or been aware of. It will be helpful to the Panel to have a response by XC as to its position on the information now before it, as set out on NRs SRD.
3. The law is quite clear on decisions made by a contractual fact finder/decision maker such as NR in the present context and based on a discretion. The discretion must be exercised honestly and in good faith and the decision must not be exercised arbitrarily, capriciously or unreasonably. In this case XC will need to establish that NR has not complied with one or more of these requirements and will need to explain why.
4. In section 6 of its SRD XC sets out a wide range of outcomes it requires from the Panel. Network Code D5.3 (at page D40) sets out the powers of a Panel when determining an appeal made to it. XC are recommended to refer to D5.3 for its full terms and effect but in short a Panel is limited to:
 - i. Giving a general direction to NR specifying the result to be achieved but not the means by which it may be achieved – in essence directing NR to reconsider its decision especially in the light of new or fresh information/evidence not previously available. If a fresh decision is made by NR and is disputed by an operator, the operator may bring a fresh appeal in respect of it;
 - ii. Directing that a challenged decision of NR shall stand; or
 - iii. Substituting an alternative decision in place of a challenged decision **but only** if there are **exceptional circumstances** (emphasis added).
5. Some clarity is required over which of these remedies XC seeks.

Direction

XC shall by **16:00 Monday 3 March 2025** file with the Secretary of the ADC and serve on NR a supplemental statement of case which shall, in respect of each decision now in dispute:

1. Set out a brief commentary on its position on the points made by NR in its SRD which it considers to be wrong or in dispute;
2. Set out whether it alleges whether the decision made was made dishonestly or in bad faith or was made arbitrarily, capriciously or unreasonably and if any of these features are asserted it shall set out the evidence it relies upon in support of its contentions.
3. Clarify which of the remedies set out in Network Code D5.3 it now seeks from the Panel. If XC asserts that there are 'exceptional circumstances' within the meaning and context of D5.3.1 it shall set out all facts and matters relied upon in support of that assertion.

[Signed on the original]

John Hewitt
Hearing Chair TTP2570