

Second Directions and Rule H18(c) note, issued on 03 March 2025

1. I am grateful to the parties for the service of their documents.
2. I have considered those documents and I have not identified any issues of law raised by either party.
3. XC now seeks to appeal three decisions which it asserts were made by NR within the context of Network Code Part D. This code obliges NR to make contractual decisions which often involve an element of the exercise of discretion. In previous Directions dated 27 February 2025 I outlined the current law applicable to that situation. In its Supplemental SRD XC has asserted that all three decisions were made arbitrarily and/or capriciously.

Dispute Item 1

In #2.1.12 of its supplemental SRD XC requests that the Panel directs NR, pursuant to Network Code D5.3.1.(a), to reassess the decision taking into account the matters mentioned therein.

Dispute Item 2

In #2.2.9 of its supplemental SRD XC requests that the Panel directs NR, pursuant to Network Code D5.3.1.(a), to seek alternative options for 4L53 taking into account the matters mentioned therein.

Dispute Item 3

In #2.3.6 of 2.1.12 of its supplemental SRD XC requests that the Panel directs NR, pursuant to Network Code D5.3.1.(a,) to plan the movement of train schedules in accordance with the TPRs and to seek better options for 1N69 taking into account the matters mentioned therein.

4. At the moment, and without the benefit of further argument at the hearing, I am not persuaded that the Panel has the power to direct NR to plan movement of train schedules in accordance with the TPRs, but the Panel does have the power to direct that NR reassess each of the decisions having regard to the points raised by XC. If NR were to do so those decisions may or may not be changed.
5. XC does not assert that there are 'exceptional circumstances' within the meaning of Network Code D5.3 in any of the three disputed decisions. Consequently, if the hearing were to take place the Panel will be limited to either:
 - a. directing NR to reassess one or more of the disputed decisions, on whatever basis may be appropriate; or
 - b. directing that a challenged decision of NR shall stand.
6. If NR were willing to reassess each of those decisions (i.e. voluntarily undertake the only remedy now available to XC), it will no longer be necessary to hold the hearing.
7. The parties must be clear that if the hearing takes place, the role of the Panel is to consider whether the decisions were reasonably open to NR based on the evidence and information that was (or ought reasonably to have been) before NR at the time each decision was made. It is not for the Panel to offer a rival view based on different evidence or arguments that might be before it. The exercise before the Panel does not involve a point of law, but it does involve a consideration of the factual evidence surrounding the making of each disputed decision and the proper application of the contractual principles and obligations.

Further Directions

8. In these circumstances I direct that:
 - a. NR shall as soon as possible and by no later than **11:00 Tuesday 4 March 2025** notify both XC and the ADC whether or not it is willing to reassess (all or some of) the disputed decisions on the basis set out in #3 above and if so it shall state within what time period it will do so. If what may be proposed, including the time period, is acceptable to XC it is expected that XC shall promptly withdraw those decisions no longer in dispute.

- b. If the hearing in relation to Dispute Item 1 were to proceed, XC shall, by no later than **15:00 Tuesday 4 March 2025** file with the ADC and serve on NR further evidence with regards to a 13-car train on platform 7 at Birmingham New Street. In #4.2.1 of NRs SRD it raises a perceived risk of drivers querying the route, or a risk of operational incidents. The evidence required is judgements/statements from XC Safety and Drivers' teams in support of the safety of what XC proposes.

[Signed on the original]

John Hewitt
Hearing Chair TTP2570