

## **TTP2725 and (elements of) TTP2722**

### **Rule H18(c) Note issued on 09 December 2025**

Having studied the submissions of the Parties, I think it may be helpful to issue this note which is intended to assist the Parties, as it raises issues the Panel will wish to have the Parties address at the hearing.

I wish to emphasise that the Panel are approaching the issues with an entirely open mind and this note merely seeks the assistance of the Parties in reaching a determination of the issues

The Panel will have to address the issue of Consultation and engagement in the process by the Parties.

1. Can each Party define what they understand the word consultation as used in the Network Code (e.g. D3.4.3, D2.3, D2.3.3, D2.3.4, D2.3.5, D2.4.3)
2. What does the consultation process involve?
3. Is there a duty upon the “consultee” to engage with the process and, if so, what does that engagement involve?
4. To that end I have asked the Secretary to circulate the following:
  - (a) R v London Borough of Brent, ex parte Gunning, reported in 84 LGR 168 (The “Gunning” criteria)
  - (b) R v North and East Devon Health Authority, ex parte Coughlin (2001) QB 213
  - (c) R v SoS for Business and Trade (2023) EWHC 1781 (Admin) per Linden J, copy supplied (reaffirms the applicability of Gunning)
5. The four relevant principles derived from Gunning may be summarized as
  - (a) The consultation must be at a time when the proposals are at a formative stage
  - (b) The proposer must give sufficient reasons for the proposal to permit of intelligent consideration and response
  - (c) Adequate time must be given for consideration and response
  - (d) The product of the consultation must be conscientiously taken into account in finalising the proposals
6. In the Coughlin case the Court of Appeal confirmed the validity of the Gunning criteria. The ASLEF case is a more recent example of the same.
7. I have also asked the Secretary to draw each Party’s attention to the following TTP’s
  - (1) TTP773 (paras 5.4, 5.5, 5.6.2)
  - (2) TTP102 (paras 18-20) & ORR Appeal
  - (3) TTP350 (paras 4.2.24 & paras 7.4.1 to 7.4.2)
  - (4) TTP1706 / TTP1708 and ORR letter to the Industry
  - (5) TTP1880 (paras 53-59)
  - (6) TTP03 and TTP271
8. In the event that the Panel decided that the consultation was inadequate, what the remedy should be. In doing so should account be taken of any disruption which may be caused to the Network and those who use it (passengers, freight end-users etc.).
9. Can GBRf supply details of the commercial/economic impact of the proposed possessions upon it?
10. What obligations are imposed upon those who are consulted?
11. If the Panel should decide that if the consultation process was deficient but that GBRf had not effectively engaged with the consultation process what should be the

- outcome? Should the Panel conclude that a failure to adequately consult in that situation made no difference and that the disputed decisions should stand?
12. What proposals did, or does, GBRf make to facilitate the work?
  13. What proposals has NR made, or now makes, to facilitate GBRf operations during the relevant period?
  14. I emphasise that the Panel have not reached any conclusions and merely seek the assistance of the Parties in deciding the issues
  15. My view is that the issues which arise for determination are
    - (a) Was there adequate consultation by NR?
    - (b) Was there engagement and co-operation by GBRf
  16. The Parties are reminded of the following provisions of ADR Rules governing the principles and operation of the determination procedure: A3(f); A3(h); A9(b); A9(c).

[Signed on the original]

Matthias Kelly KC  
Hearing Chair TTP2725 and (elements of) TTP2722