

## **TTP1625 - Network Rail reply to Directions and Rule H18(c) Note to be issued on 17 Feb 20**

Please see Network Rail's comments in red below each point

### Directions

1. The Hearing Chair is grateful to Network Rail ('NR') for the prompt submission of its Sole Reference Document ('SRD').

2. Both Parties refer to the Sunday Main Line Scheme having been approved by the Wessex TCRA, '*...subject to the outcome of risk assessments on the impact to track, category, power availability and track circuit reliability*' (SWR 5.1.2, NR 4.1.3). None of these topics is mentioned again in either Parties' SRD. **Will both Parties please either confirm by 1200 on Wed 19 Feb whether any of these issues is relevant to the remaining points in Dispute, or explain which points are relevant and in what way.**

**Network Rail in including this statement was responding to the statement made in South Western Railway's Sole Reference Document (SWR 5.1.2). Network Rail does not believe that this statement is relevant to the dispute. Network Rail reserves the right to further respond to this point after seeing South Western Railway's response as South Western Railway raised this point initially.**

3. While it is agreed that none of the services for which SWR is seeking compensation required the 'Sale of Access Rights', as they were existing services which already had Access Rights, the question of the Sale of Access Rights is relevant in deciding, against the complex background leading to this Dispute, whether NR behaved unreasonably if the Panel were to decide that there was a breach of contract on NR's part.

4. In this context NR seeks to draw a distinction between new Access Rights 'not being granted' and the sale of new Access Rights 'not being supported' (for example in 4.2.5 of NR's SRD). **The Panel will be assisted at the hearing by an explanation from NR as to the distinction between these two concepts.**

**Where Network Rail and an operator agree on an amendment to the Track Access Contract (i.e. for changes to access rights) a submission is made to the ORR under section 22 of the Railways Act 1993. Where Network Rail and an operator are not in agreement then the operator has the opportunity and right to submit to the ORR their own application for the contract terms they want under section 22a of the Railways Act. South Western Railway chose not to do so in this instance.**

5. In 4.3.10 NR refers to a recommendation that an SWR representative with authority to make decisions on flexing should be present at Milton Keynes throughout the period in which the revised Access Proposal was being dealt with, but that this only occurred on 3

days during a 7 week period. **Will SWR please confirm at the hearing whether the recommendation to which NR refers was jointly agreed, or whether it was only a recommendation by NR, and whether NR is correct in saying that the representative was only present at Milton Keynes for 3 days during this period.**

6. To assist the Parties to prepare for the hearing the Panel will also wish to explore whether SWR was 'directed' to prepare a revised proposal (SWR 5.1.9) or whether it did so of its own volition (NR 4.3.5).

#### Rule H18(c) Note

7. The Hearing Chair is required by Rule H18(c) to 'identify and itemise..... all relevant issues of law' raised the Dispute following the submission of statements of case.

8. I note that in paragraph 4.3.6 of its SRD NR quotes from paragraph 7.2 of the Determination of TTP834. I hope that it will assist the Parties if I invite them to read on from NR's quotation, particularly paragraph 7.3. To understand these paragraphs more fully the Parties are also encouraged to read paragraph 6.4.4.

9. As the Parties will be aware, while a TTP is bound to follow any decision of the ORR (or the Court) on a regulatory matter, the Determination of one TTP is only of persuasive authority on another TTP, especially when the section being quoted is part of the Observations and Guidance section of a Determination. I hope that it will assist if I make it plain at the stage, however, that I regard paragraph 7.3 of TTP834 as still being a correct statement of the legal duties placed on NR.

10. A further point of law arises in relation to the power of a TTP to award compensation. With respect, NR's submissions on this point seem self-contradictory. In paragraph 4.3.11 NR states that, '*[A TTP] therefore has no jurisdiction to award compensation against Network Rail*'. In 4.3.12, however, NR

states that compensation is not payable because there has been no breach of contract by NR, and in 4.3.13 NR submits that there is no power to direct compensation in accordance with D5.7 because NR has not acted in bad faith or unreasonably. If 4.3.12 and/or 4.3.13 are right, then 4.3.11 cannot be right.

11. At an early stage after this Dispute was listed, at my request the Secretary drew the Parties' attention to the recent Determination by the ORR of the appeal against TTP1520. I referred to that Determination in the Directions issued on 10 Feb 20, following which SWR confirmed that it was not alleging that NR has displayed bad faith, but that it was alleging that NR has behaved unreasonably.

12. Like any TTP, this Panel will approach the hearing with no preconceptions and will reach its decision solely on the legal entitlements of the Parties. The Panel will be informed by the evidence given at the hearing to expand on and explore the Parties' SRDs and Opening Statements.

13. It may assist the Parties to prepare to deal with any issue of compensation if I set out my interpretation of the position since the ORR's Determination in TTP1520. Again emphasising that the minds of the Panel are open at this stage, if the Panel were to decide that there has been a breach of contract on the part of NR, and if the Panel subsequently concludes that NR has acted in bad faith or behaved unreasonably, then the Panel can order that compensation may be due in principle to SWR, with the amount to be determined in a separate Dispute if it cannot be agreed.

14. While I should observe that in strict theory a TTP could find that NR had acted in bad faith even if this is not alleged, the fact that SWR has confirmed that it is not alleging bad faith in this Dispute suggests to me that the Panel is highly unlikely to want to explore the issue of bad faith any further itself.

15. In summary it is my view that paragraph 4.3.11 of NR's SRD is simply wrong. Paragraph 4.3.12 would be correct if the Panel were to decide that there has been no breach of contract. In that event the Panel would not need to examine bad faith and/or unreasonableness; but if the Panel were to decide that there has been a breach of contract it would then have to decide further whether NR had acted in bad faith or, as would be relevant in this case, that NR had acted unreasonably. Only if this stage were to be reached could the Panel order that compensation should be paid.

16. In summary, therefore, I regard paragraph 4.3.11 as wrong; paragraphs 4.3.12 and 4.3.13 are correct statements of the law if the Panel were to decide that there has been no breach of contract, or if there has been a breach of contract that NR has nonetheless behaved reasonably.

**17. To avoid the need to discuss this issue any further at the hearing, NR is to confirm to the Secretary and to SWR by 1200 on Wed 19 Feb whether it agrees with my analysis at paragraphs 9 and 10 above. If not, NR is to explain the basis on which it reaches any different interpretation and the authorities on which it relies for doing so**

**Network Rail agrees with the Chair's analysis in paragraphs 9 and 10. Network Rail also agrees with the Chair's summary specifically paragraph 15. In TTP1520 the ORR did not determine that a breach of contract automatically constitutes unreasonable behaviour.**

**The hearing of TTP1610 is being held on Wednesday 19 February. If that were to reach a different result, then Network Rail reserves the right to make further submissions.**