

Office of Rail and Road
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Date: 6 February 2019
Your ref:
Our ref: LOMASK\161318-001126
Direct: +44
Email:

By email:

Dear Sirs

Appeals under Part M of the Network Code by GB Railfreight Limited ("GBRf") and DB Cargo (UK) Limited ("DB Cargo") in respect of decisions TTP1331 and TTP1376

1. Thank you for your email dated 4 February 2019.
2. Network Rail limits its response, as requested, to addressing the new points raised by DB Cargo's letter dated 31 January 2019. Network Rail maintains its position as set out in its Response Notices in full.
3. The points raised by DB Cargo on the second page of their letter, relating to paragraphs 7 and 8 of Chapter H of the ADRR ("H7 and 8") are, with respect, misconceived.
4. This dispute was raised – by GBRf and not DB Cargo – as an appeal under D2.7.2 which allows "*Any Timetable Participant affected by the New Working Timetable...to appeal against any part of it*". The jurisdiction of the TTP under D2.7.2 is limited to determining appeals from Network Rail decisions as to parts of the New Working Timetable. The entire process before the TTP, and therefore before the ORR, depends on an implicit acceptance by GBRf – and DB Cargo – that the Hybrid Timetable is the New Working Timetable as referred to in D2.7.2: the TTP is concerned only with the contents of the New Working Timetable and not other timetables. There is no other right of appeal and a failure to recognise that is an error of law which would have far-reaching consequences. DB Cargo is seeking to distract the ORR from this fundamental position.
5. DB Cargo did not raise any issues before the TTP, and GBRf did not raise the procedural issue which DB Cargo now seeks to raise. Had either party made express reference to H7 and 8, the Hearing Chair would have dealt expressly with the argument. DB Cargo was fully aware of the nature of the case being put and was in a position to make any points it wished to. It should not be allowed to raise unmeritorious procedural points at this late stage when it failed to do so at first instance.
6. In any event, the effect of Network Rail's submissions in its Single Reference Document in TTP1331 and TTP1376 (dated 1 November 2018) was in effect to comply with the provisions of H7 and H8, albeit that those provisions were not expressly mentioned.

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7. H7 and 8 set out a provision by which a party who considers that a dispute is not a Timetabling Dispute may apply to the Hearing Chair, who then is entitled to make "*such determinations as he determines are appropriate*".
8. The clear purpose behind such a provision is to give the parties a chance to make submissions on whether or not a dispute falls within the remit of the TTP, and to give the Hearing Chair discretion to undertake active case management of those claims that are wrongly brought as Timetable Disputes.
9. Network Rail made detailed and lengthy submissions as to why it considered that the "points of principle" aspects of TTP1331 and TTP1376 did not fall within the remit of the TTP. These were set out in its Single Reference Document to TTP1331 and TTP1376 dated 1 November 2018.
10. Network Rail set out a clear position that aspects of the dispute or issues raised by the dispute were not matters of timetabling, timetable change and/or capacity allocation and so were not properly to be resolved by a Timetabling Panel. In other words Network Rail clearly made applications which were in substance pursuant to H7. There is no requirement that this be spelt out or that such an application take any particular form: all parties concerned were in no doubt as to Network Rail's position.
11. Almost the entirety of the hearing before the TTP was devoted to these arguments – not least since GBRf failed to advance any detailed case on the particular train slots which it was purportedly appealing.
12. The Hearing Chair then considered Network Rail's submissions, and concluded that he did not have jurisdiction, as explained by Network Rail, to consider the "points of principle" raised by GBRf. At that stage it was open to him to re-allocate the dispute: he chose not to do so (and was not invited to do so by DB Cargo or GBRf). He therefore exercised his discretion, as provided for in ADRR Chapter H Part 8.
13. It follows that the matter was handled in exactly the way contemplated by the ADRR. DB Cargo's argument is therefore wholly without merit.
14. In any event, the procedure set out at H7 and 8 in no way establishes or expands the jurisdiction of the TTP.
15. As Network Rail has repeatedly pointed out (and as the TTP rightly accepted), the TTP's jurisdiction in this case derived from D2.7.2 of the Network Code. DB Cargo does not even refer to this provision. If the TTP has no jurisdiction in respect of part of the dispute referred to it, nothing the parties do or fail to do can alter that position. Again it would be a fundamental mistake of law to conclude otherwise.
16. Moreover, it is implicit in DB Cargo's apparent acceptance (referred to as a "possible exception") that the TTP does not have the power to determine the consequences of the alleged breach of contract (see page 2 of DB Cargo's letter, third paragraph halfway down), that DB Cargo accepts that there are some matters that are inherently outside of the jurisdiction of the TTP, irrespective of whether any express application has been made of the procedure in H7 and 8. We would also note that any claim for damages for breach of contract depends implicitly not on the contents of the New Working Timetable but on other timetables – this points to the fact that DB Cargo has entirely ignored the requirement for the TTP to found its jurisdiction under D2.7.2.
17. Further and by way of reminder, Network Rail's position as regards the relevance of Chapter H1 of the ADRR to the TTP's jurisdiction is as set out in paragraph 3.18 of its Response Notice to GBRf. In summary, it considers that H1 simply sets out a description of the purpose of the TTP. It does not provide the basis of jurisdiction.

That must come from the provision under which the appeal is made, in this case D2.7.2.

18. We consider that the remainder of DB Cargo's arguments on jurisdiction have already been addressed by Network Rail's previous submissions.
19. For completeness however, we also note that DBC says that it has been put to some inconvenience as a result of the replacement of the D-26 Weekday Timetable by the Hybrid Timetable but, whether or not that is the case, it cannot conceivably affect the question of the TTP's jurisdiction.

Yours faithfully

Eversheds Sutherland (International) LLP

Cc:

GBRf ()
DBC ()