

## **CHAPTER H – DETERMINATIVE PROCESS RULES – TIMETABLING PANEL**

### **Purpose**

- 1 The purpose of a Timetabling Panel is to determine disputes referred to it by parties to an access agreement which incorporates Part D of the Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity including restrictions of use and train slots, in:
  - (a) such an access agreement; or
  - (b) the Access Conditions incorporated by reference in the access agreement in question;

### **The Timetabling Pool**

- 2 The Committee shall establish (and have administered by the Secretary) a pool of panel members for the TTP called the Timetabling Pool. The Timetabling Pool shall be primarily made up of individuals with expertise and experience in train services planning and the timetabling development process including the allocation of capacity which will allow them to understand and advise Hearing Chairs upon Timetabling Disputes.
- 3 Individual members of the Timetabling Pool shall be appointed by the following Bands and Classes:
  - (a) two members by each of the three Bands of the Franchised Passenger Class;
  - (b) two members by each of the two Bands of the Non-Passenger Class;
  - (c) two members by the Non-Franchised Passenger Class; and
  - (d) four members by Network Rail.

The members referred to in (a), (b) and (c) shall be appointed by the method used to elect members of the Class Representative Committee under Part C of the Network Code.

- 4 If the numbers of individuals nominated for appointment under Rule H3 (a), (b) and (c) exceeds the numbers specified then one or more election(s) shall be held as required, in each case in accordance with the relevant provisions of Part C of the Network Code.
- 5 Individual members of the Timetabling Pool shall commit to:
  - (a) sit on any Timetabling Panel when requested to do so by the Secretary subject only to diary commitments;
  - (b) hear disputes impartially in accordance with the Principles.

### **Disputes to be decided by a Timetabling Panel**

- 6 Subject to Rule H7 and 8, any dispute which is to be submitted to a Timetabling Panel under these Rules, shall proceed according to this Chapter H.
- 7 Following service upon the Secretary of the Notice of Dispute in relation to a Timetabling Dispute in accordance with Rule B2, any Involved Party may apply to the Hearing Chair for a ruling that:

- (a) the dispute is not a Timetabling Dispute and should be referred to allocation in accordance with Rule B9; and/or
- (b) some aspects of the dispute or issues raised by the dispute are not matters of timetabling, timetable change and/or capacity allocation and are not properly resolved by a Timetabling Panel and consequently should be reserved for determination by another dispute resolution process.

Any such application shall give the reasons relied upon by the applicant in support of the application and be made as soon as possible after the applicant has become aware that a Timetabling Dispute has been notified to the Secretary.

- 8 Upon an application being made in accordance with Rule H7 the Hearing Chair may give such directions as he determines are appropriate to resolve the application and, where appropriate, to remit the dispute or aspects of the dispute to allocation in accordance with Chapter B. Such directions may include, as appropriate, a direction on whether aspects of the dispute which are not referred to a Timetabling Panel should be resolved concurrently or sequentially with any TTP process.
- 9 In taking his decision in accordance with Rule H8 the Hearing Chair shall have regard to the following:
  - (a) there is a presumption that disputes for which a Timetabling Panel is identified in the relevant provisions of the Underlying Contract as the body to determine disputes are Timetabling Disputes and should be resolved in accordance with this Chapter H. Consequently the Hearing Chair shall not allocate a dispute ostensibly falling within such a provision other than to a Timetabling Panel without first inviting written representations from the Involved Parties on his intention to do so and giving proper consideration to any representations made;
  - (b) any determination which may affect the production of the railway operational timetable must be made within the necessary timescales to allow that timetable to be published; and
  - (c) Network Rail may only make adjustments to a timetable which affects train slots allocated to a train operator who is not a party to a dispute, with the assent of all affected parties, or to give effect to a decision of a Timetabling Panel or the ORR.

#### **TTP Process**

- 10 The TTP process in respect of a dispute shall commence upon the receipt by the Secretary of the Notice of Dispute in relation to a Timetabling Dispute in accordance with Rule B2.
- 11 Upon commencement of the TTP process in respect of any dispute, the Secretary shall appoint a Timetabling Panel in accordance with Rule H12 and send to all the parties to the dispute, and publish upon the access disputes website, a notice of the appointment of a Timetabling Panel. This notice shall contain sufficient information regarding the matter under dispute that any other Resolution Service Party will be able to determine whether or not it should seek to be recognised as a Dispute Party. The Secretary shall also give the parties notice of the Hearing Chair who has been appointed.
- 12 A Timetabling Panel shall:
  - (a) be appointed by the Secretary;

- (b) consist of a Hearing Chair and ~~three~~four members selected from the Timetabling Pool; and
- (c) in each case include one of the members of the Timetabling Pool appointed by Network Rail, one member of the Timetabling Pool from one of the three Bands of the Franchised Passenger Class ~~and Non-Franchised Passenger Class and~~, one member of the Timetabling Pool from one of the two Bands of the Non-Passenger Class ~~and one member of the Timetabling Pool from the Non-Franchised Passenger Class. In the event that a member of the Timetabling Pool from the Non-Franchised Passenger Class is not available an additional member of the Timetabling Pool from the three Bands of the Franchised Passenger Class shall be appointed in substitution.~~

13 The Secretary shall appoint each Timetabling Panel in a manner that:

- (a) is in accordance with the Principles as set out in Rule A 5 - A10 and this Chapter H.
- (b) over time rotates (as evenly as is reasonably achievable given inevitably differing levels of other commitments of individuals) the individuals from the Timetabling Pool hearing disputes subject to any preferences as to the utilisation of their own employees expressed by any organisation which employs two or more such individuals; and
- (c) is in accordance with any further guidance issued to the Secretary by the Committee.

14 A Timetabling Panel shall:

- (a) provide determinations on the basis of the expertise of a knowledgeable peer group with relevant railway expertise;
- (b) endeavour to reach fair, rapid and inexpensive determinations of disputes drawing on that expertise; and
- (c) where appropriate, take the initiative in ascertaining the facts and law relating to the dispute.

15 Members of the Timetabling Pool are chosen because of their particular railway expertise as described at Rule H2. They shall exercise their functions impartially and not on behalf of any specific organisation, Band or Class.

16 It is an overriding objective of these Rules that disputes referred to a Timetabling Panel shall be administered in a way which is proportionate to:

- (a) the objective importance of the dispute to the Dispute Parties;
- (b) the complexity of the issues;
- (c) the significance (if any) of the issues involved to the railway industry; and
- (d) the need to ensure that the production processes for the railway operational timetable are not disrupted to the potential detriment of third parties.

Accordingly the Hearing Chair shall (where appropriate) adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of

subject matter, timescales and significance. All procedures adopted must reflect the Principles and this Chapter H.

- 17 The Timetabling Panel shall, in the case of absence on the day of one member (unless it is the Hearing Chair), be quorate to hear a dispute with any ~~two~~three of the ~~three~~four selected members of the Timetabling Pool present.
- 18 The Hearing Chair:
  - (a) has oversight of the effective case management of a dispute which has been referred to a Timetabling Panel;
  - (b) has responsibility to ensure that all procedures of the Timetabling Panel (at, before and after TTP hearings) are being implemented fairly and effectively in respect of each dispute;
  - (c) will review each dispute following submission of statements of case to identify and to itemise in written form for consideration by the other Panel Members all relevant issues of law raised by the dispute a copy which shall be provided promptly to the Dispute Parties;
  - (d) will make a final determination of the dispute referred to a Timetabling Panel and prepare a written determination which is legally sound, appropriate in form, and otherwise compliant with this Chapter H;
  - (e) may, where reasonable to do so, delegate the performance of any of his functions (with the exception of making the determination of the dispute and acting as Hearing Chair at any hearing) in any dispute to the Secretary, however, such delegation shall not affect the obligations and responsibilities of the Hearing Chair set out in this Chapter H.
- 19 Any Resolution Service Party can by notification to the Secretary at any stage become a Dispute Party if it fulfils the definition of a Dispute Party, provided that the prior consent of the Hearing Chair is obtained in order for such a Resolution Service Party to become a Dispute Party if such notification is made after any directions hearing pursuant to Rule H25.
- 20 Upon appointment the Hearing Chair may give directions as to any or all aspects of the procedures to be followed. The Hearing Chair shall have the power at any time to make or amend the procedure to be followed by the parties in the TTP. The directions shall be in accordance with the Principles and this Chapter H and with any mandatory time requirements.
- 21 Unless the Hearing Chair directs otherwise (and subject to each party's right to apply for alternative or revised directions at all stages), the following timetable and procedure shall apply:
  - (a) if the parties agree to submit a joint reference they shall, within 14 days of notification of the appointment of the Hearing Chair, submit a joint reference in accordance with the template format for a joint reference (found on the access disputes website) as may be adapted by the Hearing Chair in respect of a particular dispute;
  - (b) if the parties do not agree to submit a joint reference in accordance with (a) above,

- (i) each claimant shall within seven days of notification of the appointment of the Hearing Chair produce and serve upon all Involved Parties a sole reference which shall include:
- (A) names, registered address and any relevant correspondence address (including email address) of the Dispute Parties;
  - (B) the subject matter of the dispute;
  - (C) identification of the provision(s) of the Access Conditions or any Underlying Contract under which the reference is made;
  - (D) identification of any other provision(s) of the Access Conditions or any Underlying Contract which the claimant believes are also relevant to the dispute;
  - (E) a summary of the nature and circumstances of the dispute in sufficient detail for the other Dispute Party or Resolution Service Parties to identify the issues and whether they are likely to be materially affected;
  - (F) the decision sought;
  - (G) the remedy claimed;
  - (H) an authorised signature of the referring party; and
  - (I) copies of the following Documents which shall be annexed and cross referenced to the reference:
    - 1) the relevant extracts of contractual Documents containing the provision(s) under which the referral to the Timetabling Panel arises and/or provision(s) associated with the substance of the dispute; and
    - 2) any other Documents referred to in the reference.

and which shall be in accordance with the template format for a sole reference (found on the access disputes website) as may be adapted by the Hearing Chair in respect of a particular dispute.

- (ii) each defendant shall within seven days of service on it of such sole reference produce and serve upon all Involved Parties a response which shall include:
- (A) a schedule identifying those parts of the reference that it agrees with and those that it disagrees with;
  - (B) the reasons for any disagreement including any further references to provisions of the Access Conditions and Underlying Contracts not dealt with in the reference;
  - (C) details of any other related claim;
  - (D) the decision and, (if relevant) any remedy sought from the Hearing Chair;
  - (E) an authorised signature of the responding party; and

(F) copies of the following Documents which shall be annexed and cross referenced to the response if not dealt with in the reference:

- 1) the relevant extracts of contractual Documents containing the provision(s) under which the referral to Timetabling Panel arises and/or provision(s) associated with the substance of the dispute; and
- 2) any other Documents referred to in the response.

and which shall be in accordance with the template format for a response (found on the access disputes website) as may be adapted by the Hearing Chair in respect of a particular dispute.

(c) the Dispute Parties shall send any additional information requested by the Hearing Chair, unless directed otherwise, to the Secretary not later than seven days prior to the hearing;

(d) an oral hearing lasting no more than one day shall be conducted.

22 Provided that such extension has no adverse effect upon the date fixed for an oral hearing, the parties may agree an extension of any timescales of up to seven days in respect of any stage. For any period beyond that extension a party may seek an order from the Hearing Chair for an extension of time for any of the stages specified in the directions. The Hearing Chair shall make his decisions on any request for an extension of time based upon the Principles and this Chapter H.

**Length of References, Responses and Joint References and method of service**

23 The length of every reference and response shall be in proportion to the nature and complexity of the dispute. Unless otherwise agreed by the Hearing Chair, the maximum length of submissions shall be as follows:

- (a) a joint reference shall be no longer than 20 pages; and
- (b) a sole reference or response shall be no longer than 10 pages.

24 The normal method of service shall be electronic to the Secretary and other Dispute Parties.

**Directions Hearing**

25 The Hearing Chair, may at any time (on his own motion or that of any party) require the Dispute Parties to participate in a directions hearing to decide, after hearing representations from the Dispute Parties, any issues relating to the procedures adopted for the dispute including:

- (a) the procedures most appropriate to the dispute, subject to compliance with the Principles and this Chapter H;
- (b) the nature of the issues in dispute;
- (c) an outline timetable;
- (d) the process and details of the preparation, submission and amendments of statements of case;

- (e) whether any Document disclosure procedures shall be required to take place;
- (f) the basis and timing in which witness evidence, if any, is to be prepared and exchanged; and/or
- (g) the appointment by the Hearing Chair of assessors.

#### **Documents**

- 26 Although Documents reasonably requested should be provided in compliance with the directions specified at Rule H21, disclosure will not ordinarily be ordered. However, the Hearing Chair, whether or not on the application of any Dispute Party, has the power to:
- (a) order any Dispute Party to provide by way of formal disclosure and inspection, Documents which it controls and which are relevant to the dispute; and
  - (b) specify the formalities, detail and timings involved.
- 27 The Hearing Chair shall exercise this power in accordance with the Principles and this Chapter H.
- 28 No party shall be obliged to produce any Document which would be privileged from production in any proceedings in an action in the courts.
- 29 Requests and applications to the Hearing Chair for disclosure may be made at any stage of the dispute but (whenever practicable) should be made at the time of or shortly following submission of the relevant joint reference or sole reference or response giving rise to the request. The timing of any request (by reference to the date when it could first reasonably have been made) may be taken into account by the Hearing Chair when considering a request.
- 30 Without prejudice to any other action open to the Hearing Chair, the Hearing Chair shall be entitled to draw any inference he wishes from any failure to provide adequate or full disclosure by any party or disclosure in accordance with the terms of directions given by him.
- 31 When considering a request for disclosure, the Hearing Chair will consider the commercial sensitivity of the information requested and may exercise his discretion not to grant full disclosure.

#### **Witness evidence**

- 32 Subject to any alternative direction from the Hearing Chair, a Dispute Party may rely on any witness evidence it believes to be relevant in its statements of case and at any TTP hearing provided that either a witness summary or a witness statement has been served on all other Involved Parties at least seven days before the hearing.
- 33 A witness summary shall identify in overview the issues on which the witness will give evidence and a summary of the evidence he will give in respect of each such issue. Witness summaries shall be signed by the witness.
- 34 Written witness statements will not normally be required. However if the Hearing Chair permits or requires witness statements to be submitted he shall specify the formalities, detail and timings involved.

### **Assessors**

- 35 The Hearing Chair may appoint one or more assessors to facilitate the determination of a dispute. Any such assessor may be (without limitation):
- (a) a technical assessor with a specific area of expertise relevant to one or more issues in the dispute; and/or
  - (b) a legal assessor.
- 36 Assessors may help undertake the procedural management of the dispute and prepare such report(s) and guidance on such issues as the Hearing Chair may direct.
- 37 The Hearing Chair shall provide to the Dispute Parties the terms of reference, qualifications and experience of any assessor appointed and a summary of his advice.
- 38 The Hearing Chair shall not be bound by the views of an assessor but shall be required to explain his reasons for disagreeing with those views.

### **Experts**

- 39 A Dispute Party can rely, as of right, upon expert evidence completed prior to the date of the reference. Where a Dispute Party wishes to exercise this right it shall attach such evidence to its first Statement of Case and the other Dispute Parties shall be entitled to a direction that they may commission expert reports responding to the particular issues covered by such evidence.
- 40 When considering whether and to what extent to permit the Dispute Parties to commission further expert reports, the Hearing Chair shall consider what evidence is reasonably required to determine the dispute, the Principles and this Chapter H.
- 41 The reports of experts shall state:
- (a) the full remit against which the report has been prepared;
  - (b) the identity, qualifications and experience of the person(s) preparing the report;
  - (c) the extent (if any) to which the expert has previously been involved in the subject matter of the dispute and current or recent professional connections with any of the Dispute Parties.
- 42 At any hearing the Hearing Chair, other Panel Members, and/or any assessor appointed, may address questions directly to any experts.
- 43 The Hearing Chair shall determine in accordance with the specific requirements of the dispute whether the expert evidence is dealt with either by consideration of reports only or by the attendance and examination of one or more of the experts to answer questions upon their reports, by telephone, conferencing facilities or by any other means.

### **Hearing Conduct**

- 44 The hearing will be chaired by the Hearing Chair who may, in his absolute discretion make any order in respect of procedure at the hearing which he considers appropriate including whether to admit additional evidence (including oral evidence) from any party and the degree to which weight should be given to such additional evidence.

- 45 Subject to any contrary direction of the Hearing Chair, the following procedure shall be adopted at hearings:
- (a) the Timetabling Panel will meet in the absence of the Dispute Parties to discuss issues arising from the papers submitted by the Dispute Parties;
  - (b) the Timetabling Panel will confirm to the Dispute Parties the extent to which it has read the papers submitted by the Dispute Parties;
  - (c) the Hearing Chair, the other Panel Members and any assessors shall declare any relevant interests;
  - (d) the claimant's representative will make an opening submission of its case of not longer than 10 minutes, referring if necessary to witness or expert evidence which the claimant wishes the Timetabling Panel to consider;
  - (e) the respondent's representative will also make a brief opening submission of its response and/or counterclaim of not longer than 10 minutes, referring if necessary to additional witness or expert evidence which the respondent wishes the Timetabling Panel to consider;
  - (f) if a written witness statement has been provided, the witness will not be required to read out his statement unless the Hearing Chair decides otherwise. If any witness summary has been provided the Hearing Chair shall direct how the evidence shall be admitted and may require the witness to provide his evidence in full orally before cross examination. The Hearing Chair shall direct whether any further witness evidence shall be allowed;
  - (g) if expert evidence is used, the expert will not be required to read out his report unless the Hearing Chair decides otherwise. Whenever expert evidence is being given by any individual that individual shall state that he is giving expert evidence and the basis upon which he claims expertise in the relevant matter;
  - (h) the Hearing Chair, other Panel Members and any assessor may put any relevant questions to the representatives, witness(es) and expert(s);
  - (i) Dispute Parties may put questions to any witness(es) or expert(s) in their capacity as witnesses or experts, and when any representative is acting as a witness he shall make that clear; and
  - (j) at the conclusion of questions, representatives may make closing submissions of not more than 10 minutes.
- 46 The hearing shall be conducted with the Dispute Parties present. Following conclusion of the submissions, the Dispute Parties will withdraw to allow the Timetabling Panel to consider the evidence and arguments (with any assessor). The Dispute Parties shall remain available to allow the Hearing Chair, other Panel Members and any assessor to put any additional questions.
- 47 The Secretary will, unless otherwise directed by the Hearing Chair, make a full note of the evidence given to the hearing. The Hearing Chair may in his discretion direct in advance that a full transcript is taken.
- 48 The Hearing Chair may, subject to any specified requirements of any Access Condition and legal requirement, reserve his determination from the hearing until a later date.

## **Determinations**

- 49 Having considered the submissions of the parties and the advice of the other Panel Members and any assessor, the Hearing Chair shall make a determination of the dispute in accordance with Rule H51.
- 50 Subject to any other provision of the Access Conditions and Underlying Contract, the Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute including without limitation that:
- (a) one Dispute Party should take or not take specified action; or
  - (b) the meaning of an agreement or a Dispute Party's obligations under that agreement are as stated in the determination.
- 51 The Hearing Chair's determination of a dispute shall be in writing and comprise:
- (a) the date of the determination;
  - (b) the names of the Hearing Chair, other Panel Members and any assessors present;
  - (c) details of all parties to the dispute;
  - (d) details of the attendance and status of all experts, witnesses and interested parties;
  - (e) a brief summary of the dispute;
  - (f) an identification of the issues of fact and law considered by the Timetabling Panel;
  - (g) a summary of the evidence presented;
  - (h) the findings of fact made by the Hearing Chair;
  - (i) identification of any precedents considered;
  - (j) the decisions and conclusions reached, distinguishing clearly between:
    - (i) decisions upon legal entitlement;
    - (ii) decisions upon remedy;
    - (iii) guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy;
  - (k) the reasons for those decisions and conclusions (including any relevant legal principles or rules of law applied); and
  - (l) signed and dated confirmation of the Hearing Chair that the determination is legally sound and appropriate in form.
- 52 The Hearing Chair shall provide a copy of his written reasoned determination to all Dispute Parties and the Secretary. The Secretary shall send the determination to each Resolution Service Party and shall arrange for the determination to be immediately published on the access disputes website.

53 Subject to appeal in accordance with Rule H58, the Dispute Parties shall comply with the terms of the determination within such period as shall be specified in the determination.

54 If a Dispute Party fails to comply with the terms of the determination, that failure will be dealt with by way of a new dispute through the appropriate mechanism.

#### **Confidentiality**

55 Except for anything published pursuant to Rule H56, unless otherwise agreed by all parties, all Documents produced or disclosed in the course of a TTP shall be treated as confidential by the Panel Members, assessors or others present, the Allocation Chair, the Secretary and all parties and shall only be used:

- (a) for the purposes of the TTP, including any appeal or further stage in the determination procedure;
- (b) for enforcing the Hearing Chair's determination in the TTP; or
- (c) in support of a plea of estoppel (or, for determinations taking place in Scotland, of res judicata) in any subsequent proceedings.

56 Immediately upon receipt by the Secretary the following Documents shall be published on the access disputes website:

- (a) each finalised Statement of Case;
- (b) each request for further information from the Hearing Chair and all responses to such requests;
- (c) all written submissions from all parties; and
- (d) all awards and/or determinations from the Hearing Chair.

#### **Communications**

57 Communications for the purposes of the TTP may be by telephone or email (or such other means as is appropriate) and where by telephone shall be confirmed in writing wherever possible.

#### **Appeal**

58 Following a determination of a Timetabling Dispute by the Hearing Chair of a TTP any Dispute Party is entitled to appeal in accordance with the relevant part of the Access Conditions or Underlying Contract (including, as applicable, Part M of the Network Code).

#### **Costs**

59 The Hearing Chair shall have power to order one or more Dispute Parties to meet part or all of the Costs of the Timetabling Panel and of any other Dispute Party assessed by such means as the Hearing Chair shall determine.

60 An order for Costs shall only be made where the Hearing Chair is satisfied that either:

- (a) the case of the relevant Dispute Party shall have been so lacking in merit that the reference should not have been made (or defended); or

- (b) the conduct of the relevant Dispute Party before or during the reference was such as to justify an award of Costs being made against it (or them).

Any such order shall be made with due regard to the Principles and this Chapter H.

**Exclusion of liability**

- 61 None of the Allocation Chair, the Secretary, the Hearing Chair or any other Panel Member shall be liable to any party for any act or omission (including negligence) in connection with any TTP under these Rules unless the act or omission is shown to have been in bad faith.