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By email

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Subject: Respondent's Notice to Network Rail's Appeal under Part M of Network Code – TTP2613

Dear John,

1. Introduction

This Respondent's Notice sets out Freightliner Limited's (Freightliner) response to Network Rail Infrastructure Limited's (NR) Notice of Appeal dated 2 April 2025 in respect of Determination TTP2613. Freightliner maintains that the Determination was both lawful and justified, and that the appeal should be dismissed.

We are grateful to Network Rail for providing, in its appendices, a comprehensive set of materials from the original dispute and hearing. These documents clearly set out the timeline and context for the Determination, and they support many of the findings made by the Hearing Chair.

This is a significant case – the Hearing Chair's Determination rightly sought to protect the integrity of both the Condition D8.5 process, and the outputs of a Timetable Panel Hearing, from being undermined by cynical attempts to frustrate it. Upholding NR's appeal would risk rendering the Condition D8.5 Failure to Use mechanism effectively unworkable, and lead to a stagnation of unused capacity on the Network.

Under NR's logic, an operator in receipt of a Failure to Use notice could immediately submit a TOVR for the same unused path. As the incumbent operator is the only one who can have a bid accepted for capacity that conflicts with its own train slots, NR would be obliged to process this bid within 5-days. NR confirms in its documentation that its Capacity Planning function does not distinguish between TOVRs submitted into capacity held by Train Slots subject to a Condition D8.5 Notice, and those that are not - as such there would be an expectation that this bid would be accepted and an offer issued to the incumbent with an unused train slot within five working days. Meanwhile, any other operator seeking that same capacity would be unable to submit a compliant TOVR due to the resulting conflict in the timetable.

This creates a perverse incentive for an incumbent operator to submit a TOVR for an identical Train Slot immediately upon receiving a notice pursuant to Condition D8.5, thereby effectively resetting the D8.5 timescales. Such a loophole, which was exploited in TTP2613, would fundamentally undermine the purpose of the D8.5 regime and destroy the level playing field that Part D is intended to provide. This is precisely why good faith obligations exist — to prevent such gaming of the process.

This Respondent's Notice sets out Freightliner's response to NR's Notice of Appeal dated 2 April 2025 in respect of Determination TTP2613. Freightliner maintains that the Determination was both lawful and justified, and that the appeal should be dismissed.

2. Response to Each Ground of Appeal

Ground 1 – Timing and Processing of TOVRs

NR repeatedly asserts that the date of *acceptance* of a TOVR is determinative, rather than the date of *receipt*. This ignores the practical reality that the receipt date determines processing order under Part D. Indeed, NR themselves applied that approach, prioritising GBRf's bid because it was received first. To now downplay the relevance of the receipt date contradicts the process NR actually followed.

NR claim that the Chair "erroneously conflated" the date of receipt and the date of acceptance and misapplied Part D. However, Part D must be interpreted alongside the Network Code's good faith obligations. The submission of a TOVR for what NR acknowledge is for 'identical capacity' on the eve of a dispute hearing, where the validity of that very capacity was in question, was a clear attempt to frustrate the resolution process. The mechanical application of D4.3, which NR seek to promote, without regard for good faith fundamentally misses this context.

Moreover, NR did not argue in TTP2613 that the acceptance date should override the receipt date. This argument appears to have been introduced for the first time in the appeal and was not raised with the Hearing Chair.

Ground 2 – Good Faith and Corporate Conduct

NR's Ground 2 is explicitly framed around the Chair's finding that NR breached its good faith obligations. In its appeal NR state that "*As can be seen by the written determinations in TTP 2540 and TTP2613, no reference is made to any explicit conduct by NRIL which could be said to amount to bad faith."*

Yet, the Determination is crystal clear on this point. Paragraph 59 states:

"*NR, for its part in accepting the TOVR which had been submitted the day before the TTP2540 hearing and subsequently processing it must, inevitably, take its share of the blame because it went on to re-allocate those Train Slots back to GBRf. There has been a breach of the duty to avoid using the dispute resolution process to frustrate or avoid the consequence of a determination. But my main finding against NR is that, corporately, it was guilty of a breach of faith*."

NR claim there was no clear finding. But this quote directly and unambiguously identifies both the conduct and the breach.

NR acknowledged that, corporately, they were aware of the TOVRs and that these related directly to the reoccupation of the very same capacity under dispute. While individual representatives at the Hearing of TTP2540 may not have known, NR as an organisation did. In their own opening statement to TTP2613, NR accepted that GBRf's submission of the TOVR on the eve of the hearing 'could have been of relevance' to TTP2540. Regardless of what NR may or may not have known at the time of the Hearing, they were nonetheless complicit in accepting the GBRf TOVR — an action the Chair clearly identified as an attempt to frustrate the process. They accepted this TOVR in full knowledge of the circumstances in which it had been submitted and Freightliner agrees with the Hearing Chair that consequently NR must share the blame and is guilty of breach.

It is therefore difficult to reconcile NR's current suggestion that the Chair's determination was unclear or irrational. NR did not uphold its obligations of transparency and good faith, and the Chair addressed that in clear terms.

Ground 3 – ADR Rule References

NR's references in Ground 3 are difficult to engage with. We cannot find reference in the ADRR Rules to Rule A9(h). Could this be clarified please.

NR go on to state that a breach of A9(b) requires a "*reasonable request*." That is incorrect. A9(b) simply states that parties must act in good faith with the objective of resolving the dispute. There is no qualification requiring a prompt. That aligns with Freightliner's view that good faith is a continuous and fundamental requirement under both the Network Code and the Track Access Contract.

Ground 4 – Attempt to Frustrate the Process

Ground 4 overlaps with other appeal grounds identified. NR claims there was no attempt to frustrate the process as the TOVR was accepted after the hearing. But that misses the point: the TOVR was submitted cynically, and NR's decision to process it — despite acknowledging it could have been relevant to TTP2540 — made them complicit.

In TTP2540, the Chair laid out a clear bidding process that would follow after he upheld the validity of NR's D8.5 Notice. He was clear that bidding should follow the hearing:

- *"GBRf is, as I have pointed out, free to bid again in the **upcoming round**." (Para 57, TTP2540)*
- *"However* obligation*, given that I have upheld NR's decision as being reasonable in the circumstances, that capacity will **now be released**, and GBRf or Maritime Transport are, so far as I am aware, free to take part in a Part D Train Operator Variation Request to secure the Slots." (Para 48, TTP2540)*

NR did not appeal this Determination. Instead, they processed a TOVR for identical capacity submitted prior to the hearing. That conduct disregarded the clear process and expectations set by the Chair and directly contributed to the need for TTP2613.

NR's assertion that it was GBRf who submitted the TOVR is beside the point. NR must still uphold good faith obligations in how it processes such bids, and was within its powers to Reject the TOVR submitted by GBRf on these grounds.

Ground 5 – Misapplication of D4.3.1

NR's argument here repeats their mechanical reading of D4.3.1 — that the GBRf TOVR was received first and therefore accepted. But that only holds if it is in-keeping with the good faith obligations.

The Chair rightly recognised that where a TOVR is submitted in the shadow of a live dispute — for identical capacity, and timed to likely frustrate that process — the good faith obligations also need to be considered. The context matters, and the Chair applied D4.3.1 accordingly, recognising that fairness had been compromised.

Moreover, NR ignored the bidding expectations and process outlined by the Chair in TTP2540 — i.e. a bidding process that would follow post-Determination. NR did not appeal that outcome, and yet then did not follow the process outlined.

Ground 6 – various matters

Network Rail now claim there were no exceptional circumstances. However, that view is inconsistent with their own position during the hearing. In their defence submission, NR explicitly stated:

> "In the event that NR's decision is not upheld, NR seeks additional direction and guidance regarding its application of the relevant aspects of the Network Code."
>
> "NR would welcome direction and guidance on the bearing, if any, that the application and/or completion of a Condition D8.5 Failure to Use matter should have on NR's decisions concerning TOVRs under Condition D4.3."

This request for guidance acknowledges that the situation was novel and unclear – precisely the kind of context where the Chair may find exceptional circumstances and issue directions to ensure fairness.

NR also claim (in paragraph 4.44 of their appeal) that Freightliner failed to identify what ADRR Rules were breached or why this amounted to exceptional circumstances. This is incorrect. In our hearing submission, and during the hearing itself, we identified breaches of the ADRR's disclosure obligations, ADRR Rules A3(h) and A9(b) and of Network Code A1.5.

The conduct and decision-making surrounding this case were without precedent in our experience. It was therefore wholly appropriate for the Chair to consider the matter exceptional.

NR also mischaracterise the Chair's findings on pre-emption. In paragraph 4.48 of their appeal, NR state that "The Chair erred in concluding that NRIL's actions were pre-emptive... They were clearly not. NRIL did not submit the TOVRs." But this misses the point. The Chair was clear that it was the combination of GBRf's TOVR (submitted the day before the TTP2540 hearing) and NR's decision to process it that had the effect of pre-empting the outcome of TTP2540. That is not a legal error — it is a statement of fact.

NR also wrongly state that Freightliner claimed to submit its TOVR "two minutes" after the hearing (they wrongly make this reference three times in their appeal document). We said – and the documentation provided by NR fully supports this – that we submitted our TOVR "immediately" after the oral determination.

Moreover, NR's claim that the Chair "gave no weight" to Freightliner's supposed pre-emptive conduct (paragraph 4.50) is misplaced. No such concern was raised by NR during the hearing. This is a wholly new argument, introduced for the first time in this appeal. It is entirely inappropriate to suggest that the Chair erred by failing to address a point that was never put to him.

Finally, NR's assertion that Freightliner acted pre-emptively simply because the TOVR must have been prepared in advance entirely misses the point. Freightliner had been preparing a TOVR since November 2024 – a reflection of how long this dispute process had been running – in readiness to submit it when the capacity became available. Once the oral determination confirmed the Train Slots would be removed, the TOVR was submitted. It clearly did not pre-empt the outcome of TTP2540, as it followed the verbal Determination of the Chair. Suggesting that such standard, responsible planning was somehow improper is, frankly, bizarre.

Ground 7 – Use of Chair's Powers

NR argue that the Chair did not substitute a decision. This is incorrect. The Chair expressly directed NR to withdraw the Train Slots offered to GBRf and to reconsider the TOVRs by applying the considerations in Condition D4.6. That is, by any ordinary reading, a substitute decision — undoing a flawed allocation and requiring a fresh decision-making process to be applied properly.

The Chair did not direct NR to allocate capacity to any particular operator – and rightly so, given that multiple parties were seeking the same paths. Instead, he restored the proper process, ensuring that NR would apply the relevant provisions fairly and transparently, after the conclusion of the dispute. That was a lawful and proportionate use of his powers.

Ground 8 – Guidance

NR now seeks to contest the guidance issued by the Chair, despite having explicitly requested such guidance in their own defence submission:

"NR would welcome direction and guidance on the bearing, if any, that the application and/or completion of a Condition D8.5 Failure to Use matter should have on NR's decisions concerning TOVRs." (NR Defence Submission, Appendix 2)

NR's interpretation of the guidance issued by the Chair is also flawed:

- Guidance 1: The suggestion that trains "would not be able to run" during the reallocation window is inaccurate. Trains continued to run on STP paths during this period, which is a sensible and proportionate outcome while a fair process was arranged.
- Guidance 2: Freezing TOVRs during a D8.5 dispute is entirely logical. It prevents a situation where an operator in receipt of a failure to use notice removes a train slot from the timetable and simultaneously bids it back in — essentially gaming the process. This type of cynical conduct would undermine the integrity of Part D. And as 'Failure to Use' concerns unused capacity, the impact on customers would be negligible as the slot is not being used.

3. Outcome Sought

We respectfully request that the ORR:

- Dismiss Network Rail's appeal in full;
- Uphold the Determination of TTP2613;

This is an important issue. If NR's position were accepted, it would allow an operator to receive a D8.5 notice, submit a cynical TOVR for identical capacity, and have it processed before any rival could bid without conflict. That would render D8.5 meaningless. It is precisely why good faith obligations exist.

We are acutely aware that this is already a protracted process and of the need to maintain industry confidence. Accordingly, we remain committed to supporting the customer of the path and continue to offer solutions to ensure the train can run and the freight volume move by rail, irrespective of the outcome.

As ever, please let me know if you would us to clarify any of this submission or provide further information.

Yours sincerely,

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Policy & Government Affairs Director
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