



To: the Office of Rail and Road (**ORR**)

To the Respondents, Freightliner Group Ltd

And to the Interested Parties: GB Railfreight Ltd and DB Cargo (UK) Ltd

By Email to: [REDACTED]

2<sup>nd</sup> April 2025

Dear Sirs

## NOTICE OF APPEAL UNDER PART M OF THE NETWORK CODE (TTP2613)

### 1. NOTICE OF APPEAL

1.1. Under Condition 5.2.1 of Part D of the Network Code, Network Rail Infrastructure Limited (the **Appellant**, referred to as **NRIL** in this notice of appeal) is appealing the determination of the Timetabling Panel of the Access Disputes Committee dated 26 March 2025 and received on 27 March 2025 (the **Determination**) in respect of TTP2613 on the following grounds:

**Ground 1** - The Determination is wrong in law because the Chair erred in relying on the date of receipt of a TOVR as the relevant time for determining the outcome of the TOVR. On the facts of the current case the TOVR did not result in the Train Slots being offered to GB Railfreight (i.e. the TOVR was accepted) until 26 and 27 February 2025.

**Ground 2** - The Determination is wrong in law because the Chair erred in finding that NRIL:-

- (i) did not act in accordance with Condition A1.5 (Good Faith) – “The Access Parties shall, in exercising their respective rights and complying with their respective obligations under this code (including when conducting any discussions or negotiations arising out of the application of this code or exercising any discretion under it) at all times act in good faith.”; and
- (ii) breached ADR Rule A9(b) (Good Faith) – “b) conduct themselves in good faith with the objective of resolving the dispute;” and
- (iii) breached Clause 2.1 (erroneously stated as 2.4 in the Determination) of the Freightliner Track Access Contract. Alternatively, if the erroneously stated Clause 2.4 was intended to refer to the duty of good faith in Clause 4.2 if the Freightliner TAC that the chair erred in finding that NRIL breached Clause 4.2.

**Ground 3** - The Chair erred in concluding that NRIL acted in breach of ADR Rule A9(h) in that NRIL did not co-operate with a reasonable request of the Allocation Chair, the Forum, the Secretary and each other”, whether in respect of the GB Railfreight Ltd (GB Railfreight) TOVR submitted on 3 February 2025 or any other matter.

**Ground 4** - The Determination is wrong in law because the Chair erred in determining:-

- (i) that processing and acceptance of the GB Railfreight TOVR submitted on 3 February 2025 amounted to the TOVR and its acceptance as being a “dispute resolution process”; and
- (ii) that the acceptance of the GB Railfreight TOVR on 3 February 2025 was a step designed or transacted by NRIL “to delay, frustrate or avoid determination or resolution of the dispute.”

**Ground 5** - The Determination is wrong in law because the Chair misdirected himself and/or erred in the interpretation and/or application Network Code Conditions D4.3.1(b) and (c).

**Ground 6** - The Determination erred in concluding that exceptional circumstances applied.

**Ground 7** - The Chair misdirected himself in relation to Network Code Condition D5.3.1.

**Ground 8** - The Chair erred in giving guidance the effect of which if followed would place NRIL in breach of the Network Code, be adverse to the commercial interests of NRIL, TOC/FOCs and the end users of the railway and, in making the guidance binding.



- 1.3. Unless otherwise defined, the terms used herein adopt the definitions provided under the Network Code (the **Code**).
- 1.4. The evidence in support of this Notice of Appeal, comprising a (1) a copy of the Determinations of TTP2613 and TTP2540 with Annexes (including the submissions made therein by NRIL, and the other Dispute Parties); (2) the Sole Reference Documents and Responses served in both TTP2613 and TTP2540, together with their appendices is attached to this Notice of Appeal, together with an index of the same.

## 2. IMPORTANCE OF APPEAL AND URGENCY: REQUEST TO EXPEDITE

- 2.1. NRIL respectfully submits that this appeal should be dealt with on an expedited basis and accordingly makes a request for the ORR to expedite this appeal under Condition M6.1.1 of the Network Code.
- 2.2. The Determination is based upon an incorrect application of the Network Code and of the ADDR such that the determination is wrong and founded from an erroneous basis. Furthermore, the guidance provided creates a position which requires NRIL to act in a manner contrary to the Network Code and contrary to the interests of NRIL freight operators and the end user of rail freight services, by preventing operation of trains for a period of time following a TTP determination and following receipt of a TOVR which prima facie results in a timetable conflict.
- 2.3. Accordingly, NRIL proposed that the ORR sets the timetable as follows:
  - 2.3.1. by 4 April 2025, the ORR decides whether the appeal may proceed under Condition M4.1.1;
  - 2.3.2. by 10 April 2025, the Respondents and any Interested Parties serve any notice and evidence under Condition M5.1.1; and
  - 2.3.3. by 17 April 2025, the ORR makes its Decision in respect of the Appeal.

## 3. FACTS AND BACKGROUND

- 3.1. Due to the transfer of shipping container traffic from the Port of Felixstowe to London Gateway, there has been increased competition from freight operators seeking to secure Train Slots and access to London Gateway. In this case, multiple freight operators have submitted competing requests for capacity.
- 3.2. TTP2613 is the second dispute to be heard by the Access Dispute Committee in relation to three specific Train Slots:
  - **4L24HD [SX] 05:36 East Midlands Gateway GBRf – London Gateway GBRf (arr. 12:01)**
  - **4L24HD [SO] 04:55 East Midlands Gateway GBRf – London Gateway GBRf (arr. 12:23)**
  - **4M24ED [SX] 16:32 London Gateway GBRf – East Midlands Gateway GBRf (arr. 23:33)**
- 3.3. The above listed Train Slots (previously held by GB Railfreight) were the subject of a Notice issued by Network Rail under Condition D8.5 of the Network Code. This Notice was issued to GB Railfreight on 11 November 2024, stating that it was NRILs intention to remove these Train Slots from the timetable on the basis that the tests set out under Condition D8.5.1(a), (b) and (c) had all been met.
- 3.4. GB Railfreight responded to NRIL within 10 Working Days stating that they disagreed with the Notice and, at the same time, referred the matter for determination in accordance with the ADDR.
- 3.5. The hearing of (TTP2540) was held on Monday 3 February 2025. The Determination issued following this hearing was that NRIL had acted reasonably in issuing the Notice under Condition D8.5. Post hearing, 22 days after the hearing, on 25 February 2025 NRIL removed the Train Slots from the timetable and was then looking to re-allocate them. Although the NRIL team would have been aware of a TOVR from GB Railfreight having been submitted to the relevant email in-box, it was one of a number of TOVRs which remained unactioned. Individuals within NRIL became aware of the existence of the GBRF TOVR and its relevance in the days after the conclusion of the hearing for TTP2540. The GB Railfreight TOVR related to a reoccupation of identical capacity afforded by the Train Slots that were the subject of TTP2540.
- 3.6. It was also established that Victa Railfreight Ltd (Victa Railfreight) had also submitted a TOVR to NRIL which was received by NRIL on Monday 3 February 2025. A third, and final TOVR was submitted to NRIL by Freightliner Group Ltd (Freightliner). It is Freightliner's own position that its TOVR was submitted two minutes after the hearing of TTP2540 and so, Freightliner had pre-emptively



Network Rail Defence submission to TTP2613.

- 3.7. In the days following the conclusion of the hearing for TTP2540, NRIL became aware of competing bids and the distinctive timing of each and, it chose to verbally notify GB Railfreight and Freightliner that competing bids had been made, that GB Railfreight was ahead in the queue and, informed both that the intention was to process these in line with Condition D4.3.1 of the Network Code.
- 3.8. NRIL had undertaken preliminary work on each of the TOVRs to ascertain whether any of the submissions contained non-compliances with the Timetable Planning Rules (TPRs) and Engineering Access Statement (EAS) together known as 'the Rules'. As standalone submissions, only the GB Railfreight TOVRs were Rules compliant. The Victa Railfreight and Freightliner TOVRs were not compliant with the Rules.
- 3.9. NRIL enacted the Determination of TTP2540 in removing the Train Slots from GBRf, creating 'white space' on the graph on Tuesday 25 February 2025.
- 3.10. NRILs understanding of Network Code Condition D4.3.1 is and was at the material time that:-
- (i) in the first instance, NRIL is entitled to exercise its Flexing Right (D4.3.1(a)). On assessing the TOVR from GB Railfreight it was apparent that the submission was Rules compliant and as such no Flex (or modification under D3.3.3) was required. Thereafter NRIL considered the application of the Decision Criteria and concluded that none were relevant to the circumstances (per D4.6.3). NRIL's interpretation is that the Decision Criteria is not further applicable in making a decision whilst processing the GBRf TOVR. As such the TOVR was accepted into the timetable (D3.3.3). NRIL then assessed the TOVRs from Victa Railfreight and Freightliner respectively but had to reject these requests as to accept these under Condition D4.3.1(b) which states that NRIL
- "...shall not accept a Train Operator Variation Request if to do so would give rise to any conflict with any Train Slot already scheduled in:
- (i) the New Working Timetable...or the relevant Working Timetable...:or,
  - (ii) the Rules"

3.11. Freightliner objected to this NRIL decision and raised dispute TTP2613.

### Determination

- 3.12. The Determination timeline following the hearing is relevant to this appeal in further demonstrating the errors made and the impact of the errors on NRIL and relevant rail users. In summary:-
- (i) At the hearing the Chair made clear verbally that NRIL did not need to take any immediate action to give effect to the decision. All three NRIL representatives left the hearing in the clear understanding, having heard the Chair clearly state, that NRIL could wait for the full written determination before taking any action on the determination outcome.
  - (ii) On 20 March 2025 NRIL received an e-mail from the Secretary of the Access Disputes Committee which states amongst other things "In the meantime he has asked me to convey to NR in particular that you shouldn't feel rushed into making a decision, and the guidance note will make it clear that NR is not directed to take any action until after you have receipt of the full written determination."
  - (iii) On 21 March 2025 NRIL received the post hearing note in accordance with the ADC's process for very short notice TTP appeals.
  - (iv) On 25 March 2025 NRIL were contacted by the Access Disputes Committee regarding GB Railfreight continuing to run trains in the disputed Train Slots and, expressing the Access Dispute Committee's view that no trains should be using the Train Slots.
  - (v) On 26 March 2025 the full written Determination was received, which per the guidance contained within it, if given effect to, would result in a further period of time where the Train Slots could not be used.



- 4.1. The Determination is wrong in law because the Chair erred in relying on the date of receipt of a TOVR as the relevant time for determining the outcome of the TOVR. On the facts of the current case the TOVR did not result in the Train Slots being offered to GB Railfreight (i.e. the TOVR was accepted) until 26 and 27 February 2025, well after the 3 February 2025 hearing in TTP2540 and, after the removal of the train slots the subject of the dispute in TTP2540.
- 4.2. Paragraph 42 of the Determination states “Thus, the Train Slots were not vacant/available to be obtained by way of a TOVR on 02 February 2025. GBRf’s TOVR should have been rejected by NR as being in conflict with Condition D4.3.1(b).”
- 4.3. Of the factual chronology and of NRIL’s application of Network Code Condition D4.3.1 the Determination states at paragraph 67 “This view is incorrect, because D4.3.1(b) meant that GBRf’s TOVR (and, indeed, Victa Railfreight’s TOVR) should not have been accepted as it was made at a time when the Train Slots remained allocated.”
- 4.4. The GB Railfreight TOVR in issue was sent to NRIL on Sunday 2 February 2025. It was received into a group mailbox used by the relevant NRIL team. Network Code Condition D3.3.4 states that “Where a Train Operator Variation Request is received: (a) on any day which is not a Working Day; and/or (b) after 10:00 hours on a Working Day; it shall be deemed to have been received on the next Working Day thereafter.” Accordingly, the relevant TOVR was received by NRIL on Monday 3 February 2025. NRIL had also received a TOVR from Victa Railfreight on 3 February 2025. No action was taken with either TOVR at that time or at any time until 26 February 2025, the day following NRIL’s action to implement the outcome of TTP2540.
- 4.5. On 25 February 2025 NRIL removed the Train Slots from GB Railfreight in compliance with the Determination.
- 4.6. On 26 February 2025 NRIL processed the three TOVRs from each of GB Railfreight, Victa Railfreight and Freightliner, beginning with the first which had been received i.e. GB Railfreight’s TOVR. GB Railfreight’s TOVR was accepted and, as described in para 3.11 above, the Victa Railfreight and Freightliner TOVRs were rejected.
- 4.7. At paragraph 58 of the final written Determination the Chair states [emphasis added] “In TTP2540 there was an appeal against the issue by NR of a Condition D8.5 Notice. An appeal was lodged by GBRf, and it had the effect of ‘freezing’ NR’s decision until the TTP had made a determination. That determination was made on 03 February 2025, when the decision was orally announced at the conclusion of the hearing. In my view, to accept the TOVR from GBRf (who were contesting the notice) made on the day before the hearing was in breach of Condition D5.4.1. That provides: “Save where expressly stated otherwise in this Part D, where an appeal to a Timetabling Panel pertaining to this Part D is pending, the relevant decision of Network Rail shall remain binding until such time as the Timetabling Panel determines otherwise”.
- 4.8. NRIL’s position is:-
  - (i) The Network Code does not prescribe any timescales or periods for TOVRs to be submitted. By their very nature, they are permissible to be made at any time to take account of the need for variations which arise from time to time.
  - (ii) When the TOVRs were received is not when they were accepted. There was a period of 23 days from the date of receipt to the date of acceptance.
  - (iii) When considering if a TOVR can be accepted, NRIL is required to consider the working timetable at that time i.e. the time it is being offered/accepted.
  - (iv) As is apparent from the chronology, at the time NRIL considered the TOVRs and offered the GB Railfreight TOVR (26 February 2025 for Dec 24 and 27 February for May 25), the Train Slots were not allocated to GB Railfreight, having been removed from them on 25 February 2025.
  - (v) The Chair was wrong to conclude that accepting a TOVR is a breach of D5.4.1. The relevant Condition provides that “where an appeal to a Timetabling Panel pertaining to this Part D is pending, the relevant decision of Network Rail shall remain binding until such time as the Timetabling Panel determines otherwise”. In fact NRILs decision to serve a Network Code Condition D8.5 notice remained binding and, was not overturned by the outcome of TTP2540 and, was ultimately given effect to. However, that is a different and separate matter to the receipt of new TOVRs in respect of the Train Slots once the Network Code Condition D8.5 notice took effect.





not have been accepted as it was made at a time when the Train Slots remained allocated.”, NRIL’s position is that the Chair erred in conflating the date when the TOVRs were “made” i.e. submitted by the FOCs/received by NRIL and, the date on which the TOVR was offered/accepted. There were here, as there often are, intervening events between receipt and acceptance e.g. withdrawal, non-compliance, urgent maintenance requirements, all of which can impact whether a TOVR is accepted. Accordingly, the position at the date of offer/acceptance is the relevant time for consideration and not when the TOVR was made or submitted.

- (vii) In erroneously conflating the date or receipt of a TOVR with the date it was accepted, the Chair has wrongly applied the provisions of Part D of the Network Code and in particular the rules regarding the operation of TOVRs set out in Network Code Condition D4.3. Part D is silent on the timing of TOVR bids and makes no distinction between TOVRs and TOVRs which are subject to dispute.
- (viii) The Chair wrongly disregarded Network Code Condition D4.3.1(c) applying where there is a conflict (as there was here in respect of the Victa Railfreight and Freightliner TOVRs) per D4.3.1(b). There was no conflict when GB Railfreight’s TOVR was offered on 26 February and 27 February, in so far as it could be said there was a conflict, the operation of D4.3.1(c) was correctly applied and resolved the position.
- (ix) Additionally, the Chair erred in finding that the TOVR should not have been granted at a time when “the Train Slots remained allocated”. The Train Slots in issue were not allocated at the time they were granted on 26 February 2025.

4.9. Accordingly for the reasons set out above the Chair’s Determination based on the incorrect and misapplication of Network Code Condition D4.3.1 renders the decision flawed, wrong and, the Determination should be set aside.

## Ground 2

4.10. The Determination is wrong in law because the Chair erred in finding that NRIL:-

- (i) did not act in accordance with Network Code Condition A1.5 (Good Faith) – “The Access Parties shall, in exercising their respective rights and complying with their respective obligations under this code (including when conducting any discussions or negotiations arising out of the application of this code or exercising any discretion under it) at all times act in good faith.”; and
- (ii) breached ADR A9(b) (Good Faith) – “b) conduct themselves in good faith with the objective of resolving the dispute;”
- (iii) Breached Clause 2.1 (erroneously referred to as Clause 4.2) of the Freightliner TAC.

4.11. Paragraph 80 of the Determination does not set out any reasons for the finding that NRIL did not act in accordance with, or why it is said NRIL breached the duty of good faith.

4.12. 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. Nor are there any criticisms of NRIL which in anyway suggest dishonest, capricious, underhanded, deceitful, discriminatory or biased conduct towards any of the parties or the Access Disputes Committee and its processes.

4.13. In the absence of clear written grounds being set out in the Determination, NRIL’s best understanding of why it is said they did not act with good faith is because:-

- (i) NRIL did not notify the TTP2540 hearing panel that GB Railfreight had submitted a TOVR for the Train Slots in issue in that hearing; and/or
- (ii) NRIL processed and accepted the GB Railfreight TOVR received on 3 February 2025.

4.14. NRIL’s position is that both grounds are erroneous and the finding regarding good faith at paragraph 80 of the Determination should be set aside.

4.15. In so far as notification to the panel at the 3 February 2025 hearing:-

- (a) The “dispute” at that hearing was whether NRIL had reasonably issued the D8.5 notice. The dispute was not about who the Train Slots might or would be allocated to if they were removed in consequence of the D8.5 notice.



- (c) In so far as the Chair concluded that NRIL corporately knew and ought to have notified the hearing, in finding there was not good faith the Chair wrongly found that omission amounted to a breach of the duty of good faith. While it might have been possible for someone within NRIL on the morning of 3 February 2025 to know of both the TOVRs received and of the hearing, and to have notified the NRIL representatives at the hearing, not doing so did not result in NRIL not acting with good faith. NRIL attended TTP2540 in good faith and conducted themselves at that hearing in good faith based on the representatives' knowledge at that time.
  - (d) Given the short timescales between receipt of the TOVR (effectively at 9am on 3 February 2025) which gave NRIL corporate knowledge and the commencement of the hearing at approximately 10:20am the same day, it is not reasonable for an NRIL Operational Planner to have had the requisite knowledge and awareness to link the incoming bid with the dispute and to have notified the NRIL representatives already at the hearing venue.
  - (e) Accordingly it was an irrational finding to determine that NRIL corporately did not act in good faith by not drawing the TOVR's existence to the panel's attention.
- 4.16. In so far as NRIL considered/processed the GB Railfreight TOVR received on 3 February 2025 and accepted on 26 February 2025, NRIL acted in good faith by processing and accepting the TOVR in full compliance with Network Code Condition D4.3.1 and, NRIL repeats its submissions in that respect regarding Ground 1 and Ground 4 herein.
- 4.17. At all times in TTP2540 and TTP2613 NRIL have acted honestly towards the hearing panel and to the parties who have submitted TOVRs and, in accordance with the Network Code and the ADR Rules. NRIL have not acted in a manner which could be said to be bad faith e.g. dishonestly, capriciously, discriminatory or with prejudice or bias. The absence of any such findings by the Chair evidences that point.
- 4.18. To determine that NRIL did not act in good faith was (i) an irrational decision in the circumstances of TTP2613; and (ii) an irrational and erroneous interpretation of Network Code Condition D4.3.1.

### Ground 3

- 4.19. The Chair erred in concluding that NRIL acted in breach of ADR Rule A9(h) in that NRIL did not "co-operate with any reasonable request of the Allocation Chair, any Forum, the Secretary and each other", whether in respect of the GB Railfreight TOVR submitted on 3 February 2025 or any other matter.
- 4.20. A breach of ADR Rule A9(b) requires there to have been a reasonable request. No such reasonable request of the Chair, Forum, Secretary or other party to TTP2540 is identified in the final written Determination. No reasonable request having been identified, the Chair's decision is further flawed in not identifying the failure to comply with the related reasonable request. NRIL participated fully and in good faith at TTP2540 and there was no failure to comply with any of the reasonable requests which were made to NRIL and, the Chair's decision and the Determination were wrong to conclude otherwise.
- 4.21. The wording of ADR Rule A9(b) clearly requires a specific request to have been made and, there to be a specific failure to comply with the specific reasonable request. Accordingly and in so far as the Determination seeks to link the failure to disclose the existence of the GB Railfreight TOVR at the 3 February hearing, the Chair erred in so linking those points and the Chair erred in determining that there had been both a reasonable request to notify the hearing of the TOVR (which there had not) and a failure by NRIL to voluntarily notify (for which NRIL repeats its submissions for Ground 2 above).

### Ground 4

- 4.22. The Determination is wrong in law because the Chair erred in determining:-
- (i) that processing and acceptance of the TOVR submitted on 3 February 2025 amounted to the TOVR and its acceptance as being a "dispute resolution process"; and
  - (ii) that the acceptance of the TOVR by NRIL was designed or transacted "to delay, frustrate or avoid determination or resolution of the dispute."
- 4.23. ADR rule A3(h) states:-
- "The determination procedure for disputes described in these Rules is intended to: ... avoid the use by any party of any dispute resolution process to delay, frustrate or avoid determination or resolution of the dispute."
- 4.24. To breach this rule in the circumstances faced by the Chair would require:-



the cause of disputes not the process for their resolution.

- (ii) NRIL would have to have been the party using the TOVR as a dispute resolution process. Here that is also an incorrect and impossible finding. Impossible because a TOVR is not a dispute resolution process and incorrect because NRIL were processing the TOVR submitted by a third party (GB Railfreight) well after the TTP2540 dispute resolution process had ended and were doing so in compliance with the obligations placed on them by Part D3.4 of the Network Code.
  - (iii) There would have to be an underlying dispute that the TOVR was trying to frustrate or avoid the determination of the dispute. Here there was no such dispute. TTP2540 related to GB Railfreight objecting to a NRIL D8.5 Failure to Use notice. TTP2540 was determined and the dispute was resolved. The Train Slots were removed from GB Railfreight pursuant to the D8.5 notice and not pursuant to a directive or order made in TTP2540. The TTP2540 “dispute” was resolved prior to the TOVR being considered by NRIL and prior to the Train Slots being granted to GB Railfreight.
- 4.25. Determining that receipt of and/or consideration of and/or acceptance of a TOVR as being a step intended to avoid the use of a dispute resolution process is irrational. The Chair and the Access Dispute Committee are aware of the purpose and use of TOVRs and that they are not a dispute resolution process.
- 4.26. Without prejudice to those fundamental errors, NRIL also comments on the erroneous application by the Chair when viewed against the chronology of events.
- 4.27. In so far as the timing of the submission of the TOVR by GB Railfreight, there is no rule which prevents TOVRs being submitted at any time nor providing for different treatment of TOVRs depending on whether or not they are submitted in respect of Train Slots which are the subject of an access dispute. It was also GB Railfreight who submitted the TOVR not NRIL and, NRIL could not have prevented it being submitted.
- 4.28. Once the TOVR was received, it was not actioned until well after the outcome of TTP2540 was known and so the processing and acceptance of the TOVR by NRIL was not in any way part of delaying, frustrating or in any way avoiding the determination of the TTP2540 dispute or of the resolution of the TTP2450 dispute. The TTP2540 “dispute” had been determined and resolved. NRIL had implemented the consequences of the Determination by removing the paths from GB Railfreight.
- 4.29. For the avoidance of doubt the determination of the “dispute” in TTP2540 was that:-
- “Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.
65. I find that NR’s decision was reasonable, was not flawed and therefore uphold NR’s decision to issue the Network Code Condition D8.5, Failure to Use Notice to GBRf.
66. I find that, in taking its decision, NR achieved the Objective under Network Code Condition D4.6. See “The role of the Decision Criteria” (para 49-61 above).
67. No application was made for costs.”
- The future use of the train slots was not part of the TTP2540 dispute and the determination did not make any order or directive regarding that.
- 4.30. In processing the three TOVRs which had been received, such processing occurring after the Train Slots had been removed from GB Railfreight in accordance with the consequences of the determination of TTP2540, NRIL was acting in compliance with the obligations on it per Part D4.3 and it is wrong and irrational to find otherwise. Furthermore, NRIL processed the TOVRs and determined that GB Railfreight’s TOVR should be agreed and that outcome was a direct result of the correct application of Part D4.3 and to conclude otherwise is both erroneous and irrational.

### Ground 5

- 4.31. The Determination is wrong in law because the Chair misdirected himself and/or erred in the interpretation and/or application Network Code D4.3.1(b) and (c). The relevant part of the Network Code is clear.
- 4.32. D3.1.1 defines a TOVR and states that “The process to be followed where a Timetable Participant seeks a Train Operator Variation is set out in Condition D3.3.”



"3.1.3 Train Operator Variations and Network Rail Variations are collectively referred to as "Timetable Variations".

3.1.4 In considering or making any Timetable Variation, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Conditions D4.3 and D4.4."

4.34. D4.3.1 mandates how NRIL must process TOVRs i.e. "4.3.1 In responding to a Train Operator Variation Request, Network Rail shall conduct itself as follows:"

4.35. In summary:-

- (i) NRIL may (but is not required to) exercise its Flexing Right;
- (ii) NRIL must i.e. it "shall apply the Decision Criteria in accordance with Condition D4.6";
- (iii) NRIL must not accept a TOVR where to do so "would give rise to any conflict with any Train Slot already scheduled ... or the Rules". NRIL's position is that none of these grounds applied to the relevant circumstances. On 25 February the train slots had been removed from the timetable.
- (iv) Where NRIL apply the Decision Criteria and two or more TOVRs would give rise to a conflict were they all to be accepted, the TOVRs "shall be prioritised in the order in which they were submitted and any conflict resolved accordingly."

4.36. Accordingly, in the circumstances NRIL had no discretion or other option to resolve the conflict. D4.3.1(c) clearly mandates i.e. NRIL "shall" prioritise them in the order in which they were submitted and any conflict resolved accordingly, i.e. the first in time principle is to be applied.

4.37. The Chair variously rejected the use of the first in time principle and criticised its application by NRIL e.g.:-

"67. This view is incorrect, because D4.3.1(b) meant that GBRf's TOVR (and, indeed, Victa Railfreight's TOVR) should not have been accepted as it was made at a time when the Train Slots remained allocated. FLL waited until the decision had been made before it submitted its TOVR. GBRf and Victa Railfreight did not. There was therefore not a level playing field for all those interested. That is unfair. It cannot be allowed to stand.

68. It is for those reasons, and at NR's request, that I have decided that non-binding guidance should be issued."

And

"74 ... is to eliminate what I regard as the current haphazard process of allocating capacity on the basis of 'first-come-first-served'. Each TOVR should be capable of being assessed, and NR able to make a decision, in compliance with Conditions D4.3.1(a) and (b), and by reference to the Decision Criteria, which are at the heart of decision-making within the Code."

And

"77. In my view there is no need for the wording in Condition D4.3.1(c), and consideration should be given to its removal from the Code completely. The thorough, and conscientious, application of the Decision Criteria using Conditions D4.3.1(b) and D4.6 should, in each case, produce an outcome. It is difficult to imagine how a 'first-come-first-served' approach can be acceptable."

4.38. The comments in paragraph 67 again show the Chair conflating receipt of a TOVR with acceptance of a TOVR; are a wrong application of Part D which does not prevent TOVRs being submitted pending the outcome of a TTP hearing and are wrong as when the GB Railfreight TOVR was accepted on 26 February 2025 it was not "at a time when the train slots remained allocated". They had been removed the prior day. Paragraph 74 shows the Chair wrongly concluding that all TOVRs should be capable of being assessed without reference to D4.3.1(c). Paragraph 77 shows the Chair wrongly disregarding the importance and necessity for D3.4.1(c).

4.39. Furthermore, the Chair's decision is said to be based upon a finding that the application of D4.3.1 is "unfair" and for that reason "it cannot be allowed to stand". Accordingly, the Chair erred in applying fairness as a factor in the decision and the Determination.





- 4.41. Freightliner requested exceptional circumstances be considered as part of their application. However, their position was limited and stated in general terms as “Given the pre-emptive behaviour exhibited, and that the actions leading to this Dispute are in breach of the ADRR Rules, Freightliner believe exceptional circumstances do apply in this Dispute.”
- 4.42. Freightliner’s position is wrong in several respects. Firstly, their complaint of pre-emptive behaviour relates to parties other than NRIL. It was GB Railfreight and Victra Railfreight who submitted TOVRs ahead of the TTP2540 hearing. NRIL’s actions in processing the TOVRs several weeks after the TTP2540 hearing cannot be said to be pre-emptive or exceptional.
- 4.43. Additionally, Freightliner’s position was inequitable as they had also pre-emptively prepared their TOVR in readiness for the outcome of TTP2540. Freightliner’s stated position in their written submission to TTP2613 is that they submitted their TOVR two minutes after the oral hearing finished in TTP2540.
- 4.44. Freightliner did not say which of the ADRR rules were breached and why any such breach amounts to an exceptional circumstance.
- 4.45. The Chair was wrong to accept and rely on that erroneous position in reaching the decision.
- 4.46. The Chair does not set out any explanation or rationale in the Determination at paragraphs 79 to 84 of the final written determination for why it was concluded that exceptional circumstances existed. NRIL’s position is that none existed and, the absence of any rational reasons in the Determination supports that position.
- 4.47. Without prejudice to that core position that there are no grounds set out for determining that exceptional circumstances existed, NRIL sets out why the Chair further erred.
- 4.48. The Chair erred in concluding that NRIL’s actions were pre-emptive (see para 48 of the Determination). They were clearly not. NRIL did not submit the TOVRs. Furthermore, NRIL did not process any of the TOVRs until well after the TTP2540 determination on 3 February and, did not accept GB Railfreight’s TOVR until 26 February 2025, well after the 3 February TTP2540 hearing. Accordingly, there was no pre-emptive conduct by NRIL and to find that there was, an error and an irrational finding in the circumstances that factually existed.
- 4.49. In so far as the Chair considered that TOVRs are not able to be submitted prior to or even during TTP hearings is an error in application of and/or a misdirection of the Network Code. TOVRs can be submitted at any time.
- 4.50. The Chair in TTP2613 was aware of Freightliner having acted pre-emptively by being in a position to submit a TOVR two minutes after the determination of the hearing in TTP2540 but he gave no weight to that pre-emptive conduct and failed to take it into account in the determination of TTP2613. The Chair erred in not identifying that the TTP2613 claimant had acted in a similar manner to GB Railfreight and Victra Railfreight in its pre-emptive conduct.
- 4.51. As a consequence of the errors, mis-directions and irrational decision making, the finding that there were exceptional circumstances is flawed, an irrational decision and should be set aside.

### Ground 7

- 4.52. The Chair misdirected himself in relation to Condition D5.3.1.

- 4.53. D5.3.1 states:-

“5.3.1 In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail and Road (as the case may be) may exercise one or more of the following powers:

- (a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;
- (b) it may direct that a challenged decision of Network Rail shall stand;
- (c) it may substitute an alternative decision in place of a challenged decision of Network Rail;

provided that the power described in (c) above shall only be exercised in exceptional circumstances.”



- 4.55. In the Determination the Chair held that NRIL had not acted in accordance with specific elements of the Network Code and the ADR Rules (paragraph 80); that exceptional circumstances applied; that “NR is to withdraw the Train Slots offered to GBRf, set a TOVR submission window for all affected Parties, and reconsider the TOVRs it receives during said window, in accordance with the guidance above.” And that damages are payable.
- 4.56. Accordingly, the Determination did not substitute an alternative decision per D5.3.1(c) and instead gave directions to NRIL specifying the result to be achieved. However, the Chair erred in specifying the means by which it was to be achieved namely:-
- (i) withdrawing the Train Slots;
  - (ii) set a TOVR submission window for all affected Parties;
  - (iii) reconsider the TOVRs received during said window, in accordance with the guidance above.
- 4.57. In specifying the result namely the withdrawal of current Train Slots and their re-award, the Chair also specified how that outcome was to be achieved, namely by way of a TOVR submission window (something which is not permitted in Part D of the Network Code) and, through applying the non-binding guidance (which is also flawed and requires action not permitted by the Network Code and, is subject to a separate ground of appeal below).
- 4.58. In addition, the Determination states at paragraph 68 that the guidance is non-binding however, at paragraph 82 the chair makes a determination mandating its use. That is an irrational decision and manifestly wrong.
- 4.59. For the reasons set out above the Chair erred in the Determination and the direction at paragraph 82 should be set aside.

## Ground 8

- 4.60. The Guidance although stated to be non-binding will, if allowed to remain, be an outcome which all other Access Dispute Panels must give consideration to and so it will at least be persuasive. However, per the submissions on Ground 7 above, the non-binding guidance is required to be binding in the current situation regarding the train slots in question. It is submitted that the guidance provided actually creates a longer administrative process and greater uncertainty for all involved.
- 4.61. NRIL makes the following points to explain why the guidance should be set aside.
- 4.62. The offending and erroneous parts of the guidance are:-

### Guidance 1

Guidance	Adverse Impact/Error
Then within 7 Working Days (or such shorter period as the Involved Parties consent to) of the decision being so notified NR shall inform the Involved Parties that an opportunity to submit a TOVR has arisen and shall set a date and time for the opening and closing of such a bidding opportunity/window; and,	<ul style="list-style-type: none"><li>(i) Such a window on re-allocation creates a period of time when trains will not be able to run in the Train Slots. That will be detrimental to NRIL both commercially and reputationally and, will be damaging to and against the wishes of the FOCs who want to use the Train Slots. The guidance is wholly adverse to the parties aims of using the Train Slots. The end user of the railway will also be adversely impacted. The likely result is that freight will move to be transported by road during this period and as such that the guidance will cause damage.</li><li>(ii) The guidance is at odds with the clearly described, well defined and well known/understood Condition D4.3.1.</li><li>(iii) The guidance is a misdirection of the Part D allocation principles, in particular with regards short notice TOVRs.</li></ul>



	exacerbate the wait for end users/ customers in understanding which operators has been granted capacity to run their trains. NRILs delivery of bidding windows and subsequent decision making, and validation process would necessitate a minimum two week period (but in all likelihood something closer to three to four weeks). The potential for multiple bidding windows following multiple Failure to Use Notices would cause further significant issues in terms of timetable delivery and overly onerous administrative burdens on NRIL.	
Thereafter NR shall decide on the allocation of capacity with reference to D4.3.1(b) and (c).	<p>The Determination variously criticises the first in time principle in D4.3.1(c) and so the guidance in this respect is squarely at odds with the concerns of the Chair at paragraphs 67, 68 and 77 of the</p> <p>Determination. NRIL are being guided to act in a manner which the Chair says should be avoided.</p> <p>The creation of bidding windows sits at odds with the industry accepted understanding of Condition D4.3.1 insofar as in the event of a deadlock between Rules compliant TOVRs, the principle of first come, first served is applied.</p>	

## Guidance 2

Guidance	Adverse Impact/Error
If NR receives an objection under Condition D8.5.3, then any TOVRs received for that capacity are put in “limbo” or “stayed” or “frozen” until the objection under Condition D8.5.3 is determined.	<p>(i) Such a “limbo”, “stay” or “pause” on the determination of TOVRs is not permitted by Part D and is adverse to Part D operating with “optimal efficiency” (D1.1.8);</p> <p>(ii) Creates a period of time when trains will not be able to run in the Train Slots. That will be detrimental to NRIL both commercially and reputationally and, will be damaging to and against the wishes of the FOCs who want to use the Train Slots. The guidance is wholly adverse to the parties aims of using the Train Slots. The end user of the railway will also be adversely impacted. The likely result is that freight will move to be transported by road and as such that the guidance will cause damage.</p> <p>(iii) The guidance is at odds with the clearly described, well defined and well known/understood Condition D4.3.1.</p> <p>(iv) The guidance is a misdirection of the Part D allocation principles, in particular with regards short notice TOVRs.</p>
In respect of the situation where NR receives an TOVRs in the intervening period between the objection under Condition D8.5.3 and the date of the hearing, it should put that Timetable Participant on notice that it should consider itself an Involved or Dispute Party for the	<p>(i) This part of the guidance serves no purpose to the implementation of the TOVR process defined in D4.3; is likely to create larger numbers of participants at TTP hearings, prolonging the determinations and delaying the consequential consideration and approval of TOVRs;</p> <p>(ii) Is adverse to Conditions D4.3 and D4.4</p>



<p>If NR's decision is upheld, then the guidance (from this hearing TTP2613) on what to do post-dispute applies.</p>	<p>This guidance renders the non-binding guidance as binding, in breach of the Chair's stated aim at paragraph 68 of the Determination and, in breach of the powers of the Access Disputes Committee. Such a decision is an irrational and manifestly wrong outcome of non-binding guidance.</p>
<p>any Party which has already made an TOVR should be required to re-submit their bid in accordance with the guidance which accompanies this decision under 'Request for guidance 1' above, should they wish to proceed with their bid.</p>	<p>This guidance creates duplication of effort and offends against the principle of operating Part D with optimal efficiency. It also achieves no meaningful positive outcome and, could penalise innocent and unaware TOC/FOCs who have submitted TOVRs ignorant of an underlying access dispute and who, per Condition D4.3.1(c) would rightfully be entitled to have their TOVR accepted.</p> <p>This guidance is also unclear as to how NRIL would come to a conclusive understanding of which Timetable Participants would need to be alerted to such a bidding window. There are no clear rules or</p> <p>Conditions within Part D that would assist NRIL in the effective policing of non-utilisation of any capacity that is subject to a 'freeze' during the enactment of a bidding window.</p> <p>Uncertainty is also created in relation to the status of the guidance and whether that takes precedence over the existing workbank.</p> <p>The notion presented within the guidance is more akin to the timetable development period between D-40 and D-26 with an expectation that nothing runs 'STP' until the 'LTP' bidding window is completed. As attempted implementation of the guidance window following TTP2613 has demonstrated, this poses a very real threat to the running of trains.</p>

## Guidance 3

Guidance 3 should be set aside as a consequence of the matters raised regarding Guidance 1 and Guidance 2.

4.63 Guidance 1, 2 and 3 should be set aside as a consequence of the Determination being set aside on appeal.

## 5. DECISION SOUGHT

- 5.1. The Appellant submits that this Notice of Appeal should proceed to appeal as it raises matters which are of significant importance to the industry as outlined above.
- 5.2. The grounds outlined in Condition M 4.1 of Part M of the Code do not apply.
- 5.3. The Appellant requests that the appeal is allowed and the Determination in TTP2613 dated 26 March 2025 is set aside.
- 5.4. The Appellant also requests a declaration from the ORR that:-
  - 5.4.1. Condition 4.3.1 of Part D of the Network Code does not require NRIL to create or administer 'bidding windows' for TOVRs submitted that relate to a Notice issued under D8.5 (whether that Notice is accepted or disputed).





System Operator

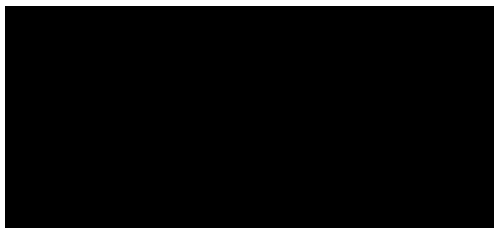


couldn't accept multiple Rules compliant TOVRS into the timetable and so processed in order of submission per Condition D4.3.1(c).

5.4.3. NRIL did not act in a manner contrary to the Good Faith requirements.

Please acknowledge receipt of this Notice of Appeal.

Yours faithfully



Timetable Production Manager – Freight  
System Operator  
Network Rail

#### APPENDICES

1. TTP2613 - Freightliner Sole Reference Document
2. TTP2613 - Network Rail Defence Submission
3. TTP2613 - Post Hearing Decision Summary
4. TTP2613 - Determination
5. TTP2540 - GB Railfreight Sole Reference Document
6. TTP2540 – Redacted Network Rail Defence submission
7. TTP2540 - Freightliner submission
8. TTP2540 - Determination