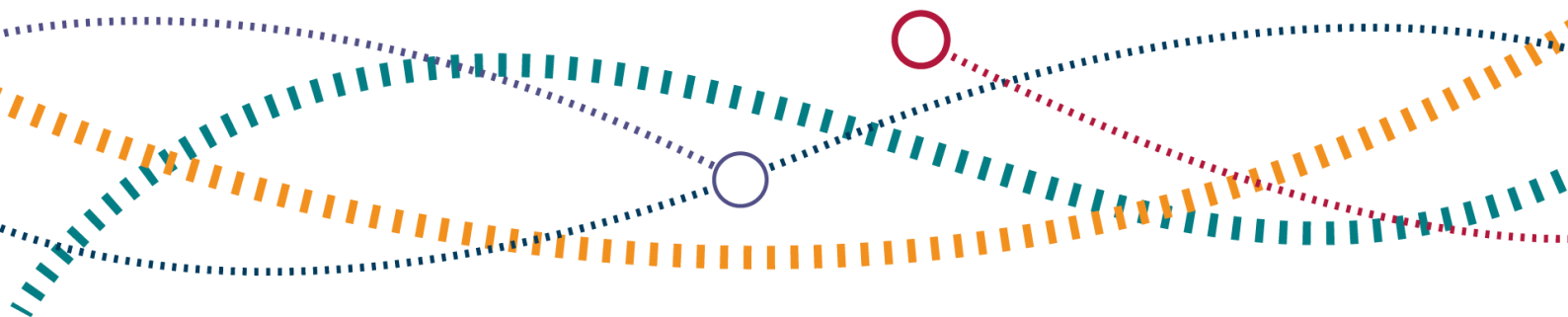




Appeal to ORR on Access Disputes Committee Timetabling Panel Determination TTP2613

ORR Determination

27 June 2025



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1. Executive Summary

- 1.1 This determination considers the appeal made by Network Rail Infrastructure Limited (“NRIL”) pursuant to Part M of the Network Code against the determination of the Timetabling Panel of the Access Disputes Committee (“the Panel”) of 26 March 2025 in respect of dispute reference TTP2613. That dispute arose from a situation whereby GB Rail freight (“GBRf”) had submitted a Train Operator Variation Request (“TOVR”) for three Train Slots the day before the Timetabling Panel was due to decide a (previous) appeal – TTP2540- also involving GBRf in relation to those same slots.
- 1.2 Freightliner Group Limited (“Freightliner”) had submitted a TOVR for the capacity shortly after the conclusion of the hearing, on 3 February and Network Rail allocated them to GBRf on the basis of Condition D4.3(c) of the Network Code - according to the order in which the submissions had been received. In TTP2613 the Panel found that Network Rail did not act in accordance with the Network Code and in guidance said that it must withdraw the Train Slots offered to GBRf, set a TOVR submission window for all affected Parties, and reconsider the TOVRs it receives during the said window.
- 1.3 Network Rail appealed TTP2613 to ORR under Part M of the Network Code and asked for the case to be expedited. After considering representations, ORR did not grant the request to expedite.
- 1.4 Our determination considers eight grounds of appeal raised by Network Rail, grouped into three themes. The first theme is the TOVR process and timing. ORR finds that TOVRs should be considered at the date of processing rather than submission. However, in the scenario at issue, Condition D3.3.5 and D3.3.6(g) of the Network Code are clear that the day of Network Rail’s receipt of a TOVR is described as day one, and that it shall notify its acceptance, rejection, or modification, of a TOVR within five working days of receipt, unless otherwise agreed between the Timetable Participant and Network Rail. There was no such agreement in this case.
- 1.5 ORR agrees with the Panel that Network Rail should not move immediately to Conditions D4.3.1(c) of the Network Code where there are two or more TOVR requests but should first apply Conditions D4.3.1(a) and (b) (the Decision Criteria) as there are a significant number of cases which could be resolved in this way.

- 1.6 The second theme ORR has considered is Network Rail's conduct. There appears to be no conclusive evidence to indicate that Network Rail failed to act in accordance with Condition A1.5, ADR Rule A9(b) and Clause 2.1 of the Freightliner Track Access Contract. However, the issue of whether Network Rail acted in good or bad faith is not material to the substantive matters to be determined in this appeal and ORR has made no finding. In addition, whilst ORR considers that the acceptance by Network Rail of GBRf's submission of their TOVR had the potential to frustrate the TTP2540 dispute resolution process, because TTP2540 had been completed by the time Network Rail made the decision to process GBRf's TOVR, there was no such frustration.
- 1.7 The final theme is the powers of the Timetabling Panel. ORR considers that the Panel was entitled to find the circumstances "exceptional" and to substitute an alternative decision in place of Network Rail's decision. Whether or not it did this, the Panel did not, in ORR's view, exceed its powers under Condition D5.3.1. Likewise, ORR finds that the guidance provided by the Panel was not mandated and although it has limited application, if Network Rail were to reach an agreement to follow the guidance, it would not be in breach of the Network Code.

2. Background

2.1 This determination considers the appeal made by Network Rail Infrastructure Limited (“Network Rail”) pursuant to Part M of the Network Code (“Part M”) against the determination of the Timetabling Panel of the Access Disputes Committee (“the Panel”) of 26 March 2025 in respect of dispute reference TTP2613 (“the Determination”).

2.2 The Determination resulted from an appeal by Freightliner Group Limited (“Freightliner”) and concerned Network Rail’s allocation of three Train Slots to GB Railfreight Ltd (“GBRf”). The three Train Slots had been the subject of a previous TTP2540 determination of 12 February 2025.

2.3 The three Train Slots were:

- (i) 4L24(SX) 05:36 East Midlands Gateway GBRf – London Gateway GBRf (arr. 12:01)
- (ii) 4L24(SO) 04:55 East Midlands Gateway GBRf – London Gateway GBRf (arr. 12:23).
- (iii) 4M24(SX) 16:32 London Gateway GBRf – East Midlands Gateway GBRf (arr. 23:33).

2.4 Network Rail originally allocated the Train Slots to GBRf in May 2022. On 11 November 2024 it issued a Failure to Use Notice to GBRf under Condition D8.5 of the Network Code. This had followed a request by Freightliner for Network Rail to investigate a potential failure to use.

2.5 GBRf appealed the Failure to Use Notice to the Panel, resulting in the TTP2540 Determination. TTP2540 found that the Failure to Use Notice had been correctly issued under D8.5 of the Network Code, which Network Rail may use when it reasonably considers that Train Slots are not being used. The Panel found that Network Rail had confirmed that the relevant Train Slots had not been used since 3 November 2022 and upheld the Notice, thus releasing the capacity. The Panel noted that GBRf had a potential future use for the capacity, however, its customer had not committed itself at the time of Network Rail’s D8.5 Notice, nor were any trains running.

2.6 The Panel noted that following its determination (TTP2540), the capacity would be released, and GBRf would be free to take part in a Part D Train Operator Variation Request to secure the Slots.

2.7 A Train Operator Variation Request (TOVR) is part of the process through which Network Rail develops the Working Timetable. The rules for timetable change are set out in Part D of the Network Code. Train operators will secure the majority of their Train Slots through the bi-annual process set out in D2. In the period between bi-annual revisions of the Working Timetable, train operators or Network Rail can seek to vary it using the process set out in D3. D3 sets out that train operators can bid for Train Slots after D26 by submitting a TOVR to Network Rail.

2.8 Schedule 5 of a Freight Track Access Contract sets out an operator's rights and services. In addition to its Firm and Contingent rights, paragraph 2.3 contains a freight operator's right to operate Train Operator Variation Services. These services are ones for which the operator does not hold Firm or Contingent rights, and are limited by paragraph 2.3.2 to 12 months' duration. This freight specific feature of a Track Access Contract reflects the fast paced nature of the industry and need of operators to react quickly to changing market conditions. Where such services are expected to operate in excess of 12 months, specific rights should be sought.

2.9 The hearing for TTP2540 occurred on 3 February. GBRf had submitted a TOVR for the Train Slots on 2 February. Victra Railfreight Limited (Victra Railfreight), and Freightliner each submitted a TOVR for the capacity on 3 February.

2.10 When assessing and processing those applications, Network Rail relied on Network Code Condition D4.3. It allocated the capacity on the basis of D4.3(c) - according to the order in which the submissions had been made, with the Train Slots going to GBRf.

2.11 Freightliner considered that Network Rail's decision contradicted the principles outlined in TTP2540. This was due to GBRf's TOVR submission being made before the hearing chair had reached his conclusion in TTP2540 – which was an appeal concerning the removal of the Train Slots from GBRf. Freightliner appealed Network Rail's actions to the Panel, which reached the Determination (TTP2613).

2.12 The Determination provided guidance to Network Rail on how it could conduct itself in future similar scenarios (which Network Rail had requested it to do). It determined that Network Rail should withdraw the Train Slots offered to GBRf. TTP2613 further found Network Rail did not act in accordance with both the Network Code (in particular Condition A1.5 and ADR Rules A3(h), A9(a) and A9(b)), which is incorporated by reference in FLL's TAC, and Clause 2.4 of FLL's TAC.

The Determination of TTP2613

2.13 The Determination found that:

“80. NR did not act in accordance with both the Network Code (in particular Condition A1.5 and ADR Rules A3(h), A9(a) and A9(b)), which is incorporated by reference in FLL’s TAC, and Clause 2.4 of FLL’s TAC.

81. Exceptional circumstances applied.

82. 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.

83. NR should pay damages to FLL, those damages to be assessed by another relevant forum in default of agreement between the Parties. Those damages may include FLL’s costs in these proceedings. It will be open to NR to seek a contribution to any such award of damages from GBRf, in which case GBRf should be joined in those proceedings as a Party on the application of NR to the relevant forum appointed to conduct any assessment of damages.”

2.14 The Determination also provided guidance to industry on three matters:

- What NR should do following the hearing of a disputed Condition D8.5 Failure to Use Notice
- What should have taken place following NR’s receipt of GBRf’s appeal under D8.5.3
- What prevents an incumbent operator accepting a Condition D8.5 Notice, and immediately submitting a TOVR for the same capacity

Network Rail’s Grounds of Appeal

2.15 Network Rail’s appeal to ORR asked that the Determination in TTP2613 dated 26 March 2025 be set aside. It also requested ORR to make declarations on three aspects of the Panel’s Determination:

- 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).
- 2) NRIL’s application of Condition 4.3.1 of Part D of the Network Code was correct in so far as it could not accept multiple Rules compliant TOVRs into the timetable and so processed in order of submission per Condition D4.3.1(c).
- 3) NRIL did not act in a manner contrary to the Good Faith requirements.

2.16 Network Rail set out eight grounds of appeal:

“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 GBRf (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)*
- ii) Breached ADR Rule A9(b) (Good Faith)*
- iii) Breached Clause 2.1 (erroneously stated as 2.4 in the Determination) of the Freightliner Track Access Contract.*

Ground 3 - The Chair erred in concluding that Network Rail 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:

- iv) 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*
- v) 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. The Determination found that exceptional circumstances existed. It then did not substitute an alternative decision per D5.3.1(c) and instead gave directions to Network Rail specifying the result to be achieved.

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.”

Freightliner’s Respondent Notice

2.17 The Part M process sets out a right of parties to a dispute to provide a Respondent Notice to any relevant appeal. Freightliner submitted its Respondent Notice on 23 April¹.

2.18 Freightliner considered this to be a significant case, with the Determination seeking to protect the integrity of both the D8.5 process and the outputs of a Timetable Panel hearing. It requested that ORR should dismiss the appeal in full and uphold the Determination. In support of its position Freightliner provided analysis and views on each of Network Rail’s eight grounds of appeal.

ORR’s Handling of the appeal

2.19 The appeal was received on 2 April, five Working Days after the TTP2613 Determination of 26 March 2025.

2.20 Further to Condition 6.1.1 of Part M of the Network Code, Network Rail asked that it be heard on an expedited basis. ORR noted that Network Rail had not set out reasons in support of that request or explained any prejudice it may experience if the appeal were to be conducted in accordance with standard procedure. We requested that reasons for the request be provided by close of business on 3 April. Network Rail responded to this request on 3 April.

2.21 On 4 April and in accordance with Condition 6.1.2 of Part M of the Network Code, ORR gave Freightliner an opportunity to make any representations in response on the request for expedition. At the same time Freightliner was reminded that under Condition 5.1 of Part M, within 10 Working Days of service of a notice of appeal a Respondent may serve on the Appellant, any other Respondent and ORR a notice stating that it opposes

¹ [Respondents Notice to Network Rails Appeal under Part M of the Network Code TTP2613 FL230425](#)

the appeal and attaching any evidence that Respondent wishes to rely on. ORR noted that if a decision was taken to expedite the appeal, this period may be reduced.

2.22 Freightliner provided an initial response the same day. It set out that while it did not object to the appeal or the expedition of it, it did object to the timescales proposed by Network Rail. This was explained as being due to “Network Rail’s appeal documentation containing a number of what we believe to be material inaccuracies which require considerable assessment and evidencing before we can provide a full and accurate response. This will simply not be possible in the timescales proposed.” Freightliner provided justification in support of the request in line with Condition 5.1.2 of Part M.

2.23 Freightliner considered Network Rail’s reasons for expedition to have largely been mitigated by the actions of all the Parties agreeing a practical solution to allow one of the operators’ services to operate in the interim in line with Part D. We did not seek further information on this.

2.24 On 8 April we notified Network Rail that having considered its request, and the views of Freightliner, we did not consider that a requirement for the case to be expedited had been established. On the same date we agreed to Freightliner’s request for additional time to prepare its Respondent’s Notice. The Respondent’s Notice was served on 23 April.

2.25 In hearing this appeal ORR has referred to Part D of the Network Code and Schedule 5 of the parties’ track access contract.

3. ORR's Consideration of the Appeal

Consideration of the grounds of appeal

3.1 As several of Network Rail's grounds of appeal necessitate similar considerations or are linked, ORR considers it useful to review these on a thematic basis.

TOVR process and timing

3.2 Network Rail claims that the Panel was incorrect to state that the GBRf TOVR of 2 February 2025 should have been rejected because it was received "*at a time when the Train Slots remained allocated*" prior to the TTP2540 appeal being determined (paragraph 67 of the Determination). Network Rail has said it should base its decision on the circumstances as at the time it processes a TOVR, not at the date of its receipt.

3.3 Part D sets out timescales for processing TOVRs. Condition D3.3.5 states that the date of receipt of the application is day one of the timescale set out in Condition D3.3.6. Condition D3.3.6 states that an application must be accepted, rejected or modified within 5 working days of receipt (or longer if extended by agreement). Therefore, the Network Code envisages that a TOVR will be assessed within those five days. This reflects the role of TOVRs, in this case specifically for freight operators, in accommodating quick changes to the Working Timetable outside of the substantive Part D process.

3.4 Network Rail has explained that it does not work to the timescales set out in Condition D3.3.6. In section 4 of its SRD² for TTP2613, Network Rail stated: "*NR assess TOVRs against the state of the timetable at the moment in time that they are processed. Due to significant work volumes, NR do not (and cannot) process all TOVRs on the day that they are received. The Network Code recognises this position by allowing differing response times under Condition D3.3.6 and also allows for extensions to response times via consent. Allowing these timescales vice [sic] requiring an immediate response means that TOVRs are assessed against the timetable state at the point of processing*". Paragraph 29 of the Determination also notes that Network Rail's average response time to a TOVR is 15 days.

3.5 In this case, the timescales were not met and no evidence has been provided to indicate that extensions were agreed with any of the applicants, as is required by Condition D3.3.6(g). In the absence of an agreement therefore, Condition D3.3.8 should

² [TTP2613 - Network Rail Infrastructure Limited Defence submission](#)

have applied and resulted in deemed acceptance of the TOVRs, assuming a situation where there was no conflict. Applying Condition D3.3.8 in this instance, all the TOVRs considered in the Determination should have been rejected as Network Rail considered that the Train Slots were not vacant at the expiry of the five day period and no evidence has been shown that an extension was agreed. Although the Timetabling Panel in TTP2540 upheld Network Rail's Failure to Use Notice at the hearing on 3 February 2025, the removal of GBRf's Train Slots was not completed by Network Rail until 25 February 2025.

3.6 Condition D5.4.1 states that Network Rail's decision remains binding until the Timetabling Panel determines otherwise. Network Rail stated its usual practice is to pause work awaiting the outcome of the hearing (paragraph 28 of the Determination) and that is what it chose to do in TTP2540. The decision to pause work on this appears to be Network Rail 'custom and practice', and is not reflected in the Code. It is regarded by Network Rail as a practical way to avoid perverse outcomes, for example an early application dealt with promptly might be rejected only for a Timetabling Panel decision to later release the train slots or conversely, be accepted and then potentially have to be withdrawn once a determination is made.

3.7 The Timetabling Panel seemed to agree with this approach, stating that all the TOVRs should have been stayed until GBRf's appeal under Condition D8.5.3 had been determined. The Timetabling Panel also stated that the stayed applications should be rejected and the parties invited to re-submit post decision. However, this would be unnecessary if the applications had been, as they suggested, stayed, and if the parties had agreed to vary the timescale in Condition D3.3.6 (which did not occur here). Network Rail could simply restart the process and time could still be allowed for other parties to submit TOVRs post-determination.

3.8 Unfortunately, in the present case, the situation was less clear because Network Rail did not follow the relevant procedures as set out in the Network Code.

3.9 At the point the Train Slots were released on 25 February 2025 Network Rail had already received three conflicting TOVRs. As set out above, in the absence of any agreement to vary the Network Rail response timescales, those TOVRs should have been rejected. This was because Network Rail's view was that the Train Slots were not vacant and acceptance of any of the TOVRs would have resulted in a conflict with the relevant Working Timetable at the expiry of the five day period. We now consider how Network Rail should act/ have acted in a scenario either where an extension had been agreed, or where the TOVRs had been re-submitted.

3.10 Network Rail should conduct itself in accordance with Condition D4.3.1:

“4.3.1 In responding to a Train Operator Variation Request, Network Rail shall conduct itself as follows:

(a) it is entitled to exercise its Flexing Right;

(b) when exercising its power set out in Condition D3.3.3 Network Rail shall apply the Decision Criteria in accordance with Condition D4.6 except that it 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 after it is published at D-26 or the relevant Working Timetable, unless it is a Strategic Train Slot or an International Freight Train Slot for which the criteria for use in Condition D2.4.8 are met and which has not already been allocated to a Timetable Participant; or

(ii) the Rules;

(c) where the Decision Criteria have been applied as set out in sub-paragraph (b) immediately above but two or more such requests would give rise to conflict were they to be accepted, they shall be prioritised in the order in which they were submitted and any conflict resolved accordingly.”

3.11 ORR agrees with the Panel that each TOVR should be capable of being assessed, and Network Rail able to make a decision, in compliance with Conditions D4.3.1(a) and (b) with Condition D4.3.1(c) being a supplemental consideration, if needed.

3.12 This is reflective of the approach that Network Rail has described itself as following in its Sole Reference Document³:

“In the first instance, NR will seek to accommodate all TOVRs, using its flexing right under D4.3.1(a). We will also ensure that we utilise the decision considerations when we are accepting, modifying or rejecting a TOVR (both D4.3.1(b) and D3.3.3).”

3.13 We stress the value of following the Network Code and Network Rail being able to evidence that it has done so. In this case, no evidence has been provided to demonstrate that the Decision Criteria in D4.6 were applied, as required under D4.3.1(b).

3.14 ORR considers that in a significant number of cases the consideration of the Decision Criteria in D4.6 would enable Network Rail to reach an evidence based decision where there are competing TOVRs. Condition D4.3.1(c) is of value where competing

³ Ibid fn. 2

applications are otherwise equal, but should not be applied before attempts have been made to use the Decision Criteria.

3.15 In circumstances where competing applicants do not have quantum access rights, and where the outcome of any reliance on D4.3.1(c) is not considered by an applicant to be just or appropriate to the circumstances, it remains open to those applicants to seek either firm or contingent quantum access rights (reflective of the relevant train slots) within their track access contract. In such cases ORR would consider the merits of an application under section 22A of the Railways Act.

Network Rail's conduct

3.16 The Hearing Panel Chair acknowledged that the Network Rail representatives present at the hearing were not aware of the GBRf TOVR submitted the day before. There appears to be no conclusive evidence to indicate that Network Rail failed to act in accordance with Condition A1.5, ADR Rule A9(b) and Clause 2.1 of the Freightliner Track Access Contract. ORR considers the legal threshold for a finding of bad faith to be high and does not have the evidence to do so, although it is acknowledged that the judgement is at least partly subjective. It is noted that the issue of whether Network Rail acted in good or bad faith is not material to the substantive matters to be determined in this appeal. ORR considers that it would have been useful for the Panel to clearly set out the request(s) with which Network Rail did not cooperate.

3.17 Network Rail's fourth ground of appeal incorrectly states that the Panel accepted that the GBRf TOVR created a new dispute resolution process. However, it is clear that the Panel considered the 2 February 2025 GBRf TOVR to be part of the TTP2540 dispute resolution process. ORR considers that the acceptance by Network Rail of GBRf's submission of their TOVR had the potential to frustrate the TTP2540 dispute resolution process. However, because the TTP2540 dispute had been completed by the time Network Rail made the decision to process GBRf's TOVR, in this case there was no such frustration.

Powers of the Timetabling Panel

3.18 Network Rail claims that the Panel incorrectly interpreted Condition D5.3.1 which provides that:

"In determining any appeal pursuant to this Part D, any Timetabling Panel...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.”

3.19 The term “exceptional circumstances” is not defined in the Network Code. As such, ORR considers that what may constitute exceptional circumstances will turn on the facts of a particular case. It is for the Panel (or, as the case may be, ORR) to determine whether such exceptional circumstances exist.

3.20 Turning to the particular circumstances of this case, Network Rail suggests that the Panel did not substitute an alternative decision as per Condition D5.3.1(c) therefore the question of whether exceptional circumstances applied would not have made a difference to the outcome of the hearing.

3.21 However, all parties agreed that this situation was unprecedented and Network Rail asking for guidance for this unprecedented situation indicates that exceptional circumstances did, in fact, apply and the Panel was entitled to substitute an alternative decision in place of the challenged decision (if it chose to do so).

3.22 Network Rail goes on to claim that the Determination exceeds the powers of the Panel under Condition D5.3.1(a) as it has specified the result to be achieved but also specified the means for it to be achieved. ORR considers that the intention of the Panel was to use the power under paragraph (c) to substitute Network Rail’s decision to accept GBRf’s TOVR with a rejection. We consider this to be a reasonable interpretation. However, even if the Panel’s determination was made under paragraph; (a), given the guidance is non-binding (see below), the power was properly exercised under this paragraph.

3.23 The guidance provided by the Panel at paragraphs 69 to 76 of the Determination is non-binding, although its use is strongly advised by the Hearing Panel Chair. It was provided as per Network Rail’s request and the Panel stated that it was to put some rigour into the process where Part D is silent. There appears to be nothing in the Network Code to prevent Network Rail agreeing to follow the guidance, or part of it, particularly if agreed pursuant to Condition D3.3.6. ORR understands that this is what has happened since the Panel’s Determination.

4. ORR's Conclusions and Determination

4.1 ORR's conclusions on Network Rail's eight grounds of appeal are set out below. We find that the TTP2613 Determination shall not be set aside.

Ground 1 – 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.

4.2 The Panel stated in its guidance at paragraph 73 of the Determination that applications may be stayed “pending the outcome of a dispute resolution process”. This implied that the date of consideration of the application would also be postponed. ORR considers that it is not reasonable for Network Rail to have to look back to the circumstances at the time of submission of an application when processing it if those circumstances are no longer relevant. In principle, it is correct to say that the relevant time for determining the outcome of a TOVR is the date of its processing rather than the date of receipt.

4.3 However, we do not uphold this ground because as considered in from paragraph 3.2 above, determining the TOVR at the date of processing (rather than submission) does not affect the scenario considered in the Determination. Conditions D3.3.5 and D3.3.6(g) are clear that the day of Network Rail's receipt of a TOVR is described as day 1, and that it shall notify its acceptance, rejection, or modification, of a TOVR within five working days of receipt, unless otherwise agreed between the Timetable Participant and Network Rail. There was no such agreement in this case.

Ground 2 - The Chair erred in finding that NRIL did not act in accordance with Condition A1.5 (Good Faith); Breached ADR Rule A9(b) (Good Faith); and, Breached Clause 2.1 (erroneously stated as 2.4 in the Determination) of the Freightliner Track Access Contract.

4.4 ORR makes no finding on this ground. ORR considers that as it was not present at the hearing it is not appropriate or necessary, for the purposes of this appeal, for it to interfere with the view and determination of the Panel in relation to Network Rail's conduct. However, it is noted that the documents reviewed by ORR as part of this appeal do not appear to indicate that Network Rail failed to act in accordance with Condition A1.5, ADR Rule A9(b) and Clause 2.1 of the Freightliner Track Access Contract.

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.

4.5 ORR makes no finding on this ground. It was the view of the Panel that Network Rail did not cooperate with a reasonable request. Whilst there is no clear evidence to suggest that Network Rail did not cooperate, it also appears not to have commented in the hearing on points on which it could reasonably be expected to have a view.

Ground 4 – The Chair erred in determining: 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 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.”

4.6 This ground of appeal is upheld for the reasons given in paragraph 3.17 above. In particular, the processing of GBRf’s TOVR took place on 25 February after the hearing and publication of the Panel’s decision in TTP2540 and therefore there was no dispute resolution process for Network Rail to frustrate pursuant to ADR Rule A3(h). This point does not directly affect the outcome of the Determination.

Ground 5 –The Chair misdirected himself and/or erred in the interpretation and/or application Network Code Conditions D4.3.1(b) and (c).

4.7 This ground of appeal is not upheld. ORR agrees with the Panel that where there are multiple TOVRs for the same capacity, Condition D4.3.1(b) requires Network Rail to apply the Decision Criteria from Condition D4.6. In a significant number of cases the Decision Criteria should provide an objective and evidence based decision making tool. We consider that Condition D4.3.1(c) may play a role where competing applications are otherwise equal however, it should not be applied before Condition D4.3.1(b).

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

4.8 This ground of appeal is not upheld. ORR considers that exceptional circumstances did apply. This set of circumstances was novel and the Panel were correct to come to the conclusion that exceptional circumstances applied.

Ground 7 – The Chair misdirected himself in relation to Network Code Condition D5.3.1. The Determination found that exceptional circumstances existed. It then did

not substitute an alternative decision per D5.3.1(c) and instead gave directions to Network Rail specifying the result to be achieved.

4.9 This ground of appeal is not upheld. Given that exceptional circumstances applied, the Panel was entitled to substitute an alternative decision in place of Network Rail's decision. Whether or not it did this, as set out from paragraph 3.18 above, ORR does not consider the Panel's determination to have exceeded its powers under 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.

4.10 This ground of appeal is not upheld. The guidance provided by the Panel, although strongly recommended, was not mandated. ORR's view is that there will only be limited circumstances in which it would be appropriate to apply the guidance provided by the Panel in TTP2613. However, should suitable circumstances occur and the parties reach an agreement to follow the guidance (pursuant to Condition D3.3.6 of the Network Code), Network Rail would not be in breach of the Network Code.



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