

**Clarification of the Determination in TTP2591 pursuant to
Condition D5.3.2 of the Network Code**

A. Background

1. TTP2591 was a Dispute brought by Freightliner ('FL') against the Decision by Network Rail ('NR') to reject a Train Operator Variation Request ('TOVR') to operate 4L73 MO and 4L73 MSX from Tinsley Intermodal Terminal to London Gateway. NR's refusal was on two grounds: firstly, that the TOVR was non-compliant, as the passage of 4L73 through South Tottenham Station required a headway margin of 6" as set out in the Timetable Planning Rules ('TPRs'), which conflicted with the passage of 5Q98 through South Tottenham. As 4L73 and 5Q98 only shared the same track for a very short distance, and did not share a common signal, FL contended that the 3" allowance for a 'fouling move' at South Tottenham was the appropriate margin to apply.
2. The second reason for rejection was that regardless of this claimed non-compliance, safety constraints at a number of level-crossings on the proposed routing of 4L73 meant that this train could not be safely accepted into the Working Timetable ('WTT').
3. The Dispute was heard on 09 April 2025. The documents relating to the Dispute, including the Determination, are available on the website of the Access Dispute Committee ('ADC'). The Determination was dated 24 April 2025, but as it was not issued until after 1700 on that day, the effective date was 25 April 2025.
4. The hearing was divided into two sections, firstly to decide whether the TOVR was compliant. At the end of the first part of the hearing I stated that I found that the TOVR had been compliant. The hearing then turned to the safety issues, with my announcing at the end of the hearing that I was not upholding NR's rejection of the TOVR on those grounds.
5. The wording used in the Determination was:
6. *166. FLL's TOVR for 4L73 was compliant with the TPRs in force at the time of the TOVR and NR's Decision; 167. NR's Decision to reject the TOVR for other reasons, beyond the issue of whether the TOVR was or was not compliant, is not upheld.*
7. As recorded in the Determination, after the hearing had concluded I was asked if 4L73 should therefore be accepted into the WTT, to which I replied that this seemed to be the logical conclusion to be drawn from my decision.

B. Subsequent Events

8. In her normal dealings with industry parties, the Secretary of the ADC was advised by FL that although 4L73 had been operating since the Hearing, this was only on a Short-Term Plan ('STP') basis and that in spite of discussions between FL and NR, NR was still refusing to accept 4L73 into the WTT.

9. FL therefore issued a further Notice of Dispute on 11 June 2025, based on FL's claim that NR was failing to comply with the Determination. In the Notice of Dispute, FL proposed that it should be dealt with by an Access Dispute Adjudication ('ADA'), although this had not been agreed by NR.

10. FL also commented in its Notice of Dispute that it believed that there is a difference of opinion between the Parties as to how the Determination should be interpreted, so that if any further guidance was available, FL would be 'accommodating' of my providing this, as this might help to resolve the issue.

C. This Procedure

11. Although there is no record of the process ever having been used, D5.3.2 gives NR a power in relation to a Determination under D5.3.1(a) – '*giving general directions to NR specifying the result to be achieved but not the means by which it shall be achieved*' – to apply to '*the relevant appeal body*', in this case the TTP, to '*make such further orders as it shall consider appropriate in order to provide the parties with guidance as to the interpretation and application of such general directions*'.

12. If there is a misunderstanding of the Determination by either Party, or indeed both Parties, then it seemed to me that clarification might avoid the further Dispute now commenced by FL needing to be taken to a hearing. I am, however, also conscious of the time limit for referring FL's latest Notice of Dispute to Allocation should this become necessary.

13. The provisions of D5.3.2 clearly confer a power on a Hearing Chair which can only be exercised after the conclusion of a Hearing and the issue of the Determination. Given this, I assume that the power of a Hearing Chair to vary procedure under Access Dispute Resolution Rules ('ADRR') Rule H20 still subsists.

14. At my suggestion, therefore, the Secretary of the ADC wrote to NR, saying that if NR wished to request clarification under D5.3.2, I would waive the time limit under D5.3.3 (requiring NR to make its request for clarification within five Working Days of 'the relevant decision'), so long as FL agreed to my waiving the time limit.

15. NR confirmed that it did wish to submit a D5.3.2 request; FL confirmed that it agreed to the time limit being waived.

16. I felt that the most appropriate start point in these circumstances was to establish whether there is a misunderstanding between the Parties of the practical implications of the Determination. Therefore, I issued First Supplementary Directions on 12 June 2025, inviting both Parties to set out their interpretation of the practical implications of the Determination by 1200 on Tuesday, 17 June 2025.

17. I am grateful to both Parties for their responses.

D. The Parties' Interpretations

18. FL's response appears at Annex A. In summary, FL said that as the TTP had not upheld either of NR's reasons for rejecting the TOVR, it expected that NR would rescind its Decision to reject the TOVR and instead accept it.

19. NR's response appears at Annex B. In summary, it agrees with interpretation of the Determination as falling under D5.3.1(a), but, with respect, represents a misunderstanding over the effect that a D5.3.1(a) decision may have.

E. Comments on NR's response

20. Even before seeing NR's response, I had reflected on my concern that recent TTPs, as interpreted subsequently, seemed to have risked drifting into a situation in which a D5.3.1(a) decision was seen as no more than requiring NR to re-visit the decision in dispute. In this context see the second bullet of NR's response.

21. Not only does NR's response represent (in my view) a misunderstanding of the outcome of this TTP, in my view it does not properly reflect the effect that a D5.3.1(a) decision might have in appropriate circumstances.

22. While I agree with NR that paragraphs 150-154 of the Determination record a discussion after the hearing had formally ended, I note that NR considers that while paragraph 150 represents a non-binding view, on re-reading that paragraph, it still seems to me to reflect my clear understanding – explained further below – that the outcome of the hearing was to require 4L73 to be admitted into the WTT.

23. Turning to NR's fifth bullet, I agree that the outcome could have been more plainly expressed in Section H of the Determination, but I explain below some of the reasons for this. Still, in this bullet, any directive to direct NR to re-route 4L73 specifically along the West Anglia Main Line would have amounted to a D5.3.1(c) decision which would not have been permissible as exceptional circumstances did not apply. It is important that no such detailed direction was given.

F. This Clarification

24. At its simplest, of course, this Clarification is intended to provide the guidance requested by D5.3.2. In order to do so, I think it necessary to discuss the distinction between D5.3.1(a) and D5.3.1(c) decisions, and to set out my understanding of the true meaning of the words in D5.3.1(a), which, as mentioned above, seem recently to have been misunderstood by some parties.

G. Analysis

25. With the benefit of hindsight, I accept that the Section H of the Determination would have benefitted from a fuller record of what I believe had been agreed, but that does not affect what I regarded as the outcome, which I had thought was understood by both Parties.

26. At the end of the hearing, and in drafting the Determination, I had clearly in my mind the discussion between the Parties recorded in paragraph 84 and the first part of paragraph 85 of the Determination. This discussion followed my explanation that I saw three options open to me to determine the Dispute: to uphold NR's Decision; to uphold it with qualifications (in other words upholding the Decision with criticism as to how it had been reached); or not to uphold the Decision. I then sought the views of the Parties as to what the effect would be of my not upholding NR's Decision, specifically asking if the Parties felt that 4L73 would then be entitled to be accepted into the WTT.

27. FL's response was that it would, going on after I queried the effect of draft TPRs discussed at the hearing which will revise the junction margins at South Tottenham to say that these would not be in effect until at least December 2025; that NR would be entitled to exercise its flexing rights in constructing the WTT; but in any event, FL had already reached an agreement with the operator of 5Q98 which overcame the conflict between the two trains.

28. NR's response was that '...there would probably be different perspectives between Capacity Planning and Anglia Route, but that they would accept the train into the timetable'.

29. The discussion next turned to reviewing possible tension between different parts of NR when, at some later stage, the admission of 4L73 into the New Working Timetable would arise. That, however, was clearly an issue that would only arise after the Determination had been put into effect. There was also a reminder in this discussion that regardless of the possibility of views differing within NR, NR is one legal entity.

30. Therefore, it seemed to me that there was a clear understanding between the Parties as to the outcome if I did not uphold NR's rejection of the TOVR, which was that 4L73 would be accepted into the WTT.

31. In this context, I note that in its Determination of the Appeal against TTP371 et al, the Office of Rail and Road ('ORR') made the point that it expects parties, '*...to be fully engaged in and give careful consideration to what they agree in such ADRR processes*' (referring in that case to the relevant TTPs under appeal). On this basis TTPs are, in my view, entitled to rely on agreements reached between parties at a hearing, whether or not the details appear in Section H of the Determination.

- ***Distinguishing a D5.3.1(a) decision from one under D5.3.1(c), and the true interpretation of the words in D5.3.1(a)***

32. Neither Party suggested that exceptional circumstances applied in this Dispute, with which I agreed. I expressed the view in the Determination that a TTP could conclude that exceptional circumstances had arisen, even if that was not submitted by either Party, but in that event the TTP would have to explain its provisional view at the hearing and seek submissions on the point from the Parties before it could reach such a conclusion.

33. This did not apply in this TTP, so the Determination cannot be categorised as a D5.3.1(c) decision. It did not uphold NR's Decision, so was obviously not a D5.3.1(b) decision. Therefore, it must have been a D5.3.1(a) decision, as NR accepts. (In any event, the provision under D5.3.2 for NR to seek clarification only applies to D5.3.1(a) decisions).

34. But where is the line to be drawn between the practical effect of a D5.3.1(a) decision and one made under D5.3.1(c)? As already mentioned above, in a number of recent hearings Parties have suggested that a D5.3.1(a) decision is, in effect, no more than a direction to NR to re-visit its original decision in the light of the TTP over-turning the Decision (or parts of the Decision) of NR in dispute. This impression may be reinforced by statements reported to have been made by NR representatives in recent hearings, that if the original decision were to be remitted back to NR, it would merely make the same decision again. If this became a standard procedure it would make the TTP process an irrelevance in most cases. This is unlikely to be satisfactory to operators; it certainly does not comply with the Principles of the ADRR.

35. The wording of D5.3.1(a) does not limit a decision under it merely to requiring NR to re-visit its original consideration. The wording is, the TTP *'may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved'*. If the draftsman's intention was that D5.3.1(a) was to go no further than directing NR to re-consider the issue, then different words would have been used. My conclusion is that directing NR by *'specifying the result to be achieved'* must entitle a TTP to go further than merely directing NR to re-consider the original Decision, even if such a direction might be the most appropriate order in some disputes.

36. In this context I note that in its Determination of the Appeal against TTP1331 et al, the ORR stated that D5.3.1 is *'permissive not restrictive'* (paragraph 98). In its Determination of the Appeal against TTP1064, the ORR stated that it considered that while, *'....the wording of limbs (a) to (c) of Condition D5.3.1 could in future be clarified'*, it seemed clear to the ORR that *'...the power to give a general direction under D.5.3.1(a) encompasses the power to quash a decision of Network Rail'*.

37. Where does quashing a binary decision under D5.3.1(a) leave the Parties? In this Dispute, as the TOVR was held to be compliant, it should have been accepted into the WTT, unless other issues arose. The TTP fully accepted NR's right to apply the safety issues in the Objective to examining the TOVR, but did not uphold NR's Decision on this point.

38. Simply remitting the matter back to NR could well lead to NR making the same Decision, leading to another dispute which would be likely to reach the same conclusion in an unproductive circular loop. It is not always easy, however, to distinguish between quashing a binary decision, with a D5.3.1(a) direction, from substituting an alternative decision, so falling foul of the restrictions on D5.3.1(c).

39. In its Determination of the Appeal against TTP1520, the ORR discussed some aspects of what might bring a Determination into the D5.3.1(c) category, concluding that the degree of detail ordered by the TTP in that Determination had crossed that line. It also referred back to TTP985, which reversed a binary decision, but pointed to the particular circumstances of that Dispute, in which NR had specifically invited the TTP to substitute its own decision if it did not agree with NR.

40. In TTPs'1718/20 I concluded that exceptional circumstances did apply, thus entitling me to substitute the TTPs' decision for that of NR. But in those TTPs the decision that I substituted was one selected from a range of options available, it was not a binary decision. Although these TTPs were appealed to the ORR, the appeal did not raise any points concerning D5.3.1(c), so these TTPs are only persuasive on this point.

41. In seeking to strike this potentially difficult balance, I start by reminding myself that the ORR believes that a TTP can quash a decision made by NR. If this power is to be real, rather than merely illusory, then if the Decision which has been over-turned has only one other alternative, then in my view expecting NR to adopt that alternative is still exercising the D5.3.1(a) power, not the D5.3.1(c) power. This is particularly so where the direction is general in nature, with different ways of putting it into effect. I recognise, however, that this can be a very subtle distinction, which applies in the circumstances of this Dispute, but which might not apply in different circumstances.

42. I am assisted in drawing this distinction by the fact that NR's response reinforces this point; again as mentioned, if I had directed that 4L73 should be routed along the West Anglia Main Line that might have been a D5.3.1(c) decision. In this case, even if exceptional circumstances had applied, the TTP did not have sufficient information to give such a detailed direction. But no such direction was given.

43. This situation appears to add weight to the ORR's view in TTP1064 that the wording of D5.3.1 would benefit from clarification to ensure that there is a common understanding as to the powers available to a TTP.

44. All this, however, follows the fact that both Parties agreed at the hearing on the practical outcome if I did not uphold NR's Decision, which was the case. In paragraph 31 above I reminded the Parties of the ORR's expectation that they will consider carefully agreements made before a TTP.

45. Further, the circumstances of this Dispute required me to answer two questions, firstly whether the TOVR was compliant. Having answered that in the affirmative, if the safety issue had not arisen, then NR would have had no choice but to accept 4L73 into the WTT. This highlights the tension in deciding whether a Determination falls under D5.3.1(a) or D5.3.1(c).

46. After an extremely careful examination of NR's Decision on the safety issues, I was unable to uphold NR's Decision on this point. As the ORR makes clear, a TTP is entitled to quash a decision of NR, but the consequences of doing so will vary depending on the details of the decision being quashed.

47. My overall conclusion, therefore, having considered the interpretations submitted by the Parties, is that requiring NR to accept 4L73 into the WTT, which was the outcome of the hearing, is exercising the D5.3.1(a) power available to a TTP. This is because determining that NR should admit 4L73 into the WTT is a general direction to NR specifying the result to be achieved, but is not directing the means by which it shall be achieved. NR's response explains that, as I had anticipated, there may be a number of options by which 4L73 can be admitted into the timetable, including re-timing possibilities, or re- routing. Those are the means by which the result shall be achieved, which may not be included in a D5.3.1(a) determination. I accept that it would have been more satisfactory to have recorded this more fully in Part H of the Determination, but in my view that does not affect the outcome of the hearing or the understanding of the Parties at the time.

48. The distinction between this and a D5.3.1(c) substitution of an alternative decision may be very fine indeed in some cases, but the distinction does exist, and I believe that the Determination and this clarification do not cross the boundary into the forbidden territory of D5.3.1(c).

H. Appropriate Orders to Provide Clarification

49. I remind the Parties that it was agreed by the Parties at the Hearing that if I did not uphold NR's Decision, 4L73 would be accepted into the WTT.

50. Had I included words to that effect in Section H of the Determination, in the circumstances of this case and in the light of the power of a TTP to quash a Decision of NR, then for the reasons explained above I would have regarded that direction as falling under D5.3.1(a), specifying the result to be achieved, but not the means by which it shall be achieved. The absence of these words in Section H of the Determination, however, does not affect the fact that Parties had agreed in the Hearing on the practical effect of the decision not to uphold NR's Decision, which I had understood and was recorded in the Determination. My post-hearing comment recorded in the Determination should, I suggest, have put this beyond doubt.

51. Therefore, 4L73 should be accepted into the WTT. I am not empowered to give any direction as to how this shall be achieved.

I. Further Steps

52. If on the basis of this clarification NR accepts 4L73 into the WTT then I assume that both Parties will regard the matter as settled, so enabling FL to withdraw its Notice of Dispute dated 11 June 2025.

53. If, however, NR is not content to accept 4L73 into the WTT on the basis of this clarification, then it seems to me that it would be significantly more satisfactory to both Parties for NR to submit an Appeal to the ORR to obtain a definitive ruling on the extent of a decision under D5.3.1(a), rather than for FL's Notice of Dispute to proceed to an ADA with its likely circulatory outcome.

54. An appeal under Part M must be submitted within five Working Days of the decision to which objection is made. This clarification document under D5.3.2 could be regarded as 'the decision' against which NR can appeal, but I cannot guarantee that the ORR will share my view. If NR does wish to appeal, then it is, of course, also entitled to ask the ORR to extend the timeframe under M2.1.2.

55. In the meantime, I remind the Parties that under D5.4.2, the decision of a TTP is binding unless and until it is over-turned by the ORR.

[REDACTED]

[REDACTED]

19 June 2025

ANNEXES

ANNEX A

Freightliner response to Supplementary Directions dated 12 June 2025

Freightliner thank the Hearing Chair for his time to issue Supplementary Directions following the submission of a further Notice of Dispute in relation to this.

In response to Paragraph 6, I can confirm Freightliner's understanding of the Determination of TTP2591 is as below.

Network Rail rejected Freightliner's TOVR on 2 grounds, TPR compliance and level crossing risk. The Determination found that:

- The Train Slot was TPR compliant, and therefore this was not a reason to reject the TOVR

- While the Train Slot did increase level crossing risk, Network Rail tolerated higher levels of barrier downtime later in the day, and this, among other considerations, meant the Train Slot subject to dispute couldn't be seen as the train which pushed the risk beyond the acceptable level.

Freightliner therefore understood that, with neither reason for rejection being upheld, Network Rail would rescind it's Decision to reject the TOVR, and instead accept it. Unfortunately this has not been the case.

Chris Matthews
13/06/25

ANNEX B

Network Rail response to First Supplementary Directions dated 12 June 2025

Network Rail thanks the Hearing Chair for his time and his considerations in providing further guidance as to the interpretation and application of the Determination directions of TTP2591.

In response to the Hearing Chair's *Continuation of TTP2591 First Supplementary Directions* paragraph 6, Network Rail confirms our understanding of the Determination of TTP2591 is as below:

- The Determination did not uphold Network Rail's original decision, nor did it substitute it with a new decision (i.e. it did not determine that 4L73 should be timetabled via the West Anglia Main Line route).
- Our interpretation is that the TTP exercised its powers under Part D5.3.1(a). It is therefore Network Rail's responsibility to determine next steps in the matter, which may include reconsidering the original decision.
- Paragraphs 150 to 154 of the Determination, titled '*A Post-Hearing Issue*', are particularly helpful. They confirm that the Determination did not specify what should happen to the TOVR, and that the Hearing Chair's comments in paragraph 150 represent a non-binding post-hearing view.
- The issue of exceptional circumstances was not part of the hearing. More importantly, Freightliner explicitly stated in its submission that it was not asserting exceptional circumstances in this dispute.
- Section H of the Determination does not specify a required outcome. Paragraph 167 clarifies that the rejection of the TOVR is not upheld. Network Rail's interpretation is that, in the absence of a directive to include the 4L73 TOVR via the West Anglia Main Line route, it remains open to Network Rail to re-make the decision – which may still result in a rejection of the request, though based on different or improved reasoning.
- The Hearing Chair's feedback within the Determination offers constructive guidance on how Network Rail can enhance transparency and the rationale in future decision-making processes of this kind. The Determination presents an opportunity to re-make the decision with a more robust and well-communicated justification.

Outside of its interpretation of the Determination, Network Rail wishes to note it has been in discussion with Freightliner about the operation of a three-month STP trial of 4L73 via the West Anglia Main Line route and is currently processing a multi-week STP bid for the trial from Week 13 (next week) to Week 24. Network Rail has also been permitting the operation of single-week STP bids for 4L73 via the West Anglia Main Line route, following a further risk assessment and mitigations review ahead of the proposed trial. The results of the trial will inform a permanent decision on the TOVR.

Nick Coles
Network Rail
17 June 2025