



**System Operator**



Network Rail Infrastructure Limited  
Network Rail  
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NW1 2DN

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

**To the Respondents,** Freightliner Group Ltd (“FLL”)

**And to the Interested Parties:** GB Railfreight, Govia Thameslink Railway, Arriva Rail London, Greater Anglia and Cross Country Trains

**By Email to:** [REDACTED]

25 June 2025

Dear Sirs

**NOTICE OF APPEAL UNDER PART M OF THE NETWORK CODE (TTP2591)**

**1. NOTICE OF APPEAL**

1.1 Pursuant to rule H58 of the Access Dispute Resolution Rules (“ADRR”) contained in Network Code Part R and, per Network Code Part M, Network Rail Infrastructure Limited (the Appellant, herein after referred to as NRIL) is appealing the “Clarification of the Determination in TTP2591 pursuant to Condition D5.3.2 of the Network Code” issued by the Timetabling Panel of the Access Disputes Committee dated 19 June 2025 (“the Clarification”) on the following grounds:

Ground 1 – The TTP erred in concluding the parties had reached agreement on 4L73 being added to the timetable and, erred in placing reliance on the purported agreement when clarifying the interpretation and application of paragraph 167 of the Determination.

Ground 2 – The Chair erred in giving clarification:-

- (i) which exceeded the permitted scope of clarification contained in Network Code Part D 5.3.2;
- (ii) the effect of which is to re-write/amend the original Determination to include an outcome that was not previously determined;
- (iii) in circumstances where the obligations in relevant safety legislation fall on NRIL as employer and network operator, not on a tribunal

1.2 Had the wording at paragraph 51 of the Clarification been included in the Determination, NRIL would have appealed the Determination for the reasons set out herein and in particular with regards to the safety matters set out in Ground 2(iii).

1.3 This notice and the attached documentary evidence constitutes NRIL's complete Notice of Appeal in accordance with Condition 3.1.1 of Part M of the Network Code (the Notice of Appeal).

1.4 Unless otherwise defined, the terms used herein adopt the definitions provided under the Network Code (“the Code”).

1.5 The evidence in support of this Notice of Appeal, comprising (1) a copy of the Determination in TTP2591 (2) the Further Notice Of Dispute dated 11 June 2025 (3) the correspondence between the Appellant, FLL and the ADC/TTP in the period 11 to 19 June 2025 including the First Supplementary Directions, is attached to this Notice of Appeal, together with an index of the same.

2. **FACTS AND BACKGROUND**

2.1 The following chronology of facts is relevant to the appeal:-

Date	Event
14 February 2025	NR rejected FLL's TOVR in respect of 4L73
21 February 2025	FLL issue a Notice Of Dispute (TTP2591)
9 April 2025	TTP Hearing
24 April 2025	<p>Determination issued which at section H stated:-</p> <p><b>H Determination</b></p> <p>165. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.</p> <p>166. FLL's TOVR for 4L73 was compliant with the TPRs in force at the time of the TOVR and NR's Decision;</p> <p>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.</p> <p>168. In neither issue can NR be regarded as having behaved unreasonably in the arguments that it submitted, so I do not regard NR having been in breach of contract under either head. Therefore FLL has no entitlement to damages.</p> <p>169. No application was made for costs.</p>
	Neither NRIL or FLL appealed the Determination such that the Determination as ordered is binding on the parties.
11 June 2025	FLL issue Notice Of Dispute alleging NRIL had failed to comply with the 24 April 2025 Determination in TTP2591. FLL stated its position that "Network Rail has failed to reconsider its Decision to reject the TOVR."
12 June 2025	<p>ADC wrote to NRIL and FLL asking:-</p> <ul style="list-style-type: none"><li>• NRIL if they agreed to request a clarification per Part D5.3.2 together with a request for the time limit in D5.3.3 to be disapplied; and</li><li>• FLL if they agreed to the D5.3.3 time limit being disapplied</li></ul>
12 June 2025	NRIL provided the request for clarification and request for the time limit to be disapplied. FLL also agreed to the time limit being disapplied.

12 June 2025	First Supplementary Directions issued by ADC stating amongst other things:-  “The appropriate start point is for NR and FL to set out their understanding of how the Determination of TTP2591 is to be interpreted, in other words, what should be the practical consequences of the Determination.”
13 June 2025	FLL’s response to the First Supplemental Directions. FLL’s position on what should be the practical consequences of the Determination was stated to be:-  “Network Rail would rescind it’s [sic] Decision to reject the TOVR, and instead accept it.”
17 June 2025	NRIL’s response to the First Supplemental Directions. NRIL’s relevant position was stated as:-  <ul style="list-style-type: none"> <li>• The Determination did not uphold Network Rail’s original decision, nor did it substitute it with a new decision.</li> <li>• NRIL’s rejection of the TOVR was not upheld.</li> <li>• In the absence of a directive to include 4L73 into the timetable, the TOVR remained open and those circumstances required NRIL to reconsider the TOVR and make a new decision whether to accept or reject the TOVR</li> </ul>
19 June 2025	Written Clarification

### Determination

Relevant to the issue in this appeal is the following wording of the Determination:-

“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.”

### FLL’s Further Complaint

There are two distinct elements to FLL’s further complaint as described in the 11 June 2025 Notice Of Dispute:-

1. That the TOVR has not been re-determined by NRIL:-
  - 11 June 2025 – “Network Rail has failed to reconsider its Decision to reject the TOVR.”
  - 13 June 2025 – “Network Rail would rescind it’s [sic] Decision to reject the TOVR ...”
2. That following the redetermination the TOVR was not accepted – 13 June 2025 – “Network Rail would rescind it’s [sic] Decision to reject the TOVR, and instead accept it”

### Clarification

The Code at Part D5.3.2 states [emphasis added]:-

“Where general directions have been given in accordance with Condition D5.3.1, the relevant appeal body may, on the application of Network Rail brought in accordance with Condition D5.3.3,

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.”

The Clarification stated:-

#### **“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.”

At paragraph 50 of the Clarification (set out above) the TTP Chair acknowledges that at the Determination the TTP had the power to make a D5.3.1(a) order which could have specified that 4L73 must be accepted into the timetable. The Clarification acknowledges that despite that power, the TTP made a determination which did not go as far as to mandate 4L73’s acceptance into the timetable.

It is clear from the extracts of the FLL and NRIL responses to First Supplemental Directions set out above that both parties were clear on and indeed agreed upon the Determination requiring the TOVR to be reconsidered. The difference between the parties was whether the Determination mandated NRIL to accept the TOVR and introduce 4L73 into the timetable.

In clarifying that point, the TTP was only permitted to clarify the interpretation and application of the actual wording used in the Determination. In ordering by way of Clarification that 4L73 “should be accepted into the WTT”, for the reasons set out below, the TTP erred, exceeding the powers available to a TTP when clarifying a D5.3.1(a) general direction.

### **3. GROUNDS OF APPEAL**

#### **Ground 1 – No Agreement**

- 3.1 Without prejudice to NRIL’s position that the clarification was limited to the Determination wording of “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.” such that the TTP was wrong to clarify and rely on its view that the parties had reached a binding agreement during the course of the TTP, NRIL makes the following points in relation to the alleged agreement.
- 3.2 At several points throughout the Clarification the TTP refers to an alleged agreement by NRIL that 4L73 would be accepted into the timetable. Most notably at paragraph 49 the Clarification states “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.”
- 3.3 NRIL’s position is that there was no such agreement that 4L73 would be included in the timetable. Relevantly the following paragraphs from the Determination demonstrate that the NRIL representatives did not reach an agreement with FLL nor did the TTP confirm that the parties had reached any agreement.

“84. I then set out the three options in Q2: that I could uphold NR’s Decision; uphold it with qualifications; or to decide that I would not uphold it. In the last case did FLL think that it would be entitled to run 4L73? FLL thought that it would be entitled to do so, so I questioned whether the draft TPRs would affect this. FLL responded to say that they would not be in force until December 2025 or May 2026 (later corrected to December 2026 being more likely) and in

constructing the NWT NR would be entitled to use its flexing rights without agreement, although the necessary flex had already been agreed between the operators.

85. NR felt that there would probably be different perspectives between Capacity Planning and Anglia Route, but that they would accept the train into the timetable. It would then come to TCRAg, which would lead to a decision that it would not be accepted by the Route. I asked where power would lie in those circumstances, and was told that it had never been tested to the knowledge of those at the hearing.

86. As an internal matter, NR felt the decision would probably lie with System Operator, which could over-rule the Route. Doubtless the Route would then say that the System Operator had assumed responsibility for any associated safety risk. Reverting to an earlier discussion on consistency, it had been observed that there did not appear to be consistency within NR, but as each situation (to accept/reject a TOVR) turned on its own circumstances, could that be expected?

87. NR then explained possible internal discussions further, in which the System Operator would want to listen to the judgment of a safety professional. FLL queried the earlier reference to using the TCRAg process to reject 4L73, as in constructing the NWT NR would be required to apply Part D to accommodate all Access Proposals within the legal rights of the applicant for those Train Slots, at the point at which the NWT was being constructed. Therefore, it might actually be that – in circumstances where 4L73 had limited, or nil, flexibility in the schedule – NR could choose to use its contractual Flexing Right to move another operator's Train Slot away from that time period completely, to mitigate the impact of including 4L73 in the NWT.

88. Whether the removal of strategic rail slots might assist was discussed, although I observed that an unused slot did not contribute to barrier downtime. It was clear that the Parties disagreed as to what strategic rail slots, if any, existed in the relevant area, and to what extent they should be formally removed if they remained unused. To the TTP, this further underlined NR's key role in transparently advertising available capacity within the timetable."

- 3.4 Although the TTP in its Clarification relies upon the following wording from paragraph 85 of the Determination to evidence NRIL agreement i.e. "NR felt that there would probably be different perspectives between Capacity Planning and Anglia Route, but that they would accept the train into the timetable." The TTP erroneously omits to reference the remainder of paragraph 85 which stated "It would then come to TCRAg, which would lead to a decision that it would not be accepted by the Route. I asked where power would lie in those circumstances, and was told that it had never been tested to the knowledge of those at the hearing."
- 3.5 The discussion noted across paragraphs 86 to 88 further makes the point that at no point did NRIL reach a firm view that NRIL would accept 4L73. Quite the opposite. The text shows there would be considerable further discussion, debate and assessment of whether 4L73 could safely be accepted into the timetable as requested in the TOVR. The discussion referred to demonstrates that the TOVR decision would remain entirely within NRIL's remit and responsibility and would be subject to compliance with NRIL's safety obligations.
- 3.6 In the circumstances the TTP was wrong to conclude that NRIL and FLL had reached an agreement at the TTP hearing that 4L73 would be accepted into the timetable.
- 3.7 Furthermore the TTP was wrong to place reliance on a purported agreement (none existing in any event) when giving its clarification, in circumstances where the clarification was limited to the interpretation and application of the NRIL decision to reject the TOVR being not upheld. In moving to clarify that 4L73 should be accepted the TTP has erred in overlooking or disregarding the due process required of NRIL when faced with an TOVR, for which we refer to Ground 2(iii) below.

#### **Ground 2 (i) – Exceeded The Power To Clarify**

- 3.8 As set out in full above, D5.3.2 of the Code provides that the TTP may make such further orders as it shall consider appropriate in order to provide guidance "as to the interpretation and application" of a general direction.
- 3.9 Relevant to the issue in this appeal, the determination stated at paragraph 167 of the Determination "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.”. It was that paragraph and wording of the Determination which was the subject of the Clarification.

- 3.10 All parties including the Chair agreed as part of the Clarification process that the determination at paragraph 167 of the Determination was a general direction pursuant to the Code Part D5.3.1(a), namely that the Determination gave “general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved”
- 3.11 Accordingly, as the NRIL rejection decision had not been upheld as a valid decision, the outcome of the Determination in so far as paragraph 167 was that the NRIL decision to reject the TOVR needed to be set aside by NRIL. How NRIL achieved that position was a matter for NRIL and the TTP could not give directions on the means by which it will be achieved.
- 3.12 Accordingly the scope of the Clarification permitted to be given by the TTP was limited to giving guidance on the interpretation and application of NRIL’s decision to reject the TOVR not being upheld.
- 3.13 Where a rejection decision is not upheld it is NRIL’s position that the rejection decision needs to be set aside. FLL use the language of “rescinded” in their 13 June 2025 written response to Supplementary Directions dated 12 June 2025. Although the language is different the net outcome is the same. The written submissions show that both NRIL and FLL agree that the effect of the Determination was for NRIL’s rejection decision to not have effect.
- 3.14 Where the rejection decision has been set aside / rescinded such that it no longer has effect, the TOVR has not been determined and the decision making process of whether to accept, modify or reject the TOVR needs to be completed or re-taken by NRIL.
- 3.15 FLL’s position in writing appears to agree with/support that view. In that regard in its Notice Of Dispute dated 11 June 2025 FLL stated [emphasis added] “Network Rail has failed to reconsider its Decision to reject the TOVR”.
- 3.16 NRIL draw to ORR’s attention that FLL were factually incorrect to say NRIL had failed to reconsider its decision. FLL were and are aware that NRIL has been progressing a detailed reconsideration process, taking into account the feedback from the Determination and reviewing its safety assessment through an objective process. That detailed reconsideration is ongoing and the parties are in regular dialogue regarding its progress.
- 3.17 In its Clarification the TTP has issued guidance that “4L73 should be accepted into the WTT.” That clarification is wrong as it:-
  - 3.17.1 Disregards that NRIL are required to re-determine the TOVR following the original decision not being upheld;
  - 3.17.2 Fetters NRIL’s ability to reject the TOVR for any reason or to modify it per the power contained in D3.3.3. The TTP has made clear that it is “not empowered to give any direction as to how this shall be achieved”. That creates a wholly unsatisfactory position where regardless of the requirements and legal duties on NRIL when considering TOVRs and, regardless of material factors which may exist or have arisen since the TOVR was rejected or since the Determination and, regardless of the power to modify or reject the TOVR, the outcome of NRIL’s process must always result in the TOVR for 4L73 being accepted;
  - 3.17.3 Disregards the passage of time since the TOVR and the potential that intervening events during that period must be given due consideration and which might prevent NRIL from accepting the TOVR for 4L73.
  - 3.17.4 Disregards the obligations of NRIL regarding safety as further expanded on in Ground 2(iii) below.
- 3.18 As demonstrated above, NRIL and FLL both agreed that the next step was for the TOVR to be re-determined. In that regard no clarification was required.

- 3.19 In so far as the difference between the parties, namely whether or not the TOVR must be accepted, by mandating that it should be accepted the TTP has gone beyond clarifying the interpretation and application of paragraph 167 of the Determination (which was limited to the rejection decision not being upheld) and, has wrongly sought to fetter NRIL's decision making process. As further described in Ground 2(iii) the obligations in relevant safety legislation fall on NRIL as employer and network operator and, not on a TTP.
- 3.20 The rights of NRIL when considering a TOVR per D3.3.3 are "Network Rail shall have the power to accept, reject or modify [the TOVR]". The position is not as binary as accept or reject and the TTP was wrong to fetter or seek to fetter that power and NRIL's decision making process.
- 3.21 The Clarification at paragraph 50 accepts that the TTP Determination could have mandated 4L73 to be accepted as part of its Determination, but that it did not do so. The Determination was not appealed and the parties are bound by the Determination wording as originally drafted. Accordingly the Clarification now seeks to clarify a matter which was very clearly not included in the Determination wording, such that the Clarification exceeds the power of clarification contained in D5.3.2.
- 3.22 As referenced above, the Clarification wording at paragraph 51 materially changes the Determination such that had that wording originally been included in the Determination NRIL would have appealed the Determination for the reasons set out herein. In exceeding its permitted power of clarification the TTP has now materially amended the Determination to the detriment of NRIL outside of the timescale permitted for an appeal. The erroneous Clarification is prejudicial to NRIL in circumstances where the TTP accepts that it could have originally included the Clarification wording of paragraph 51 in the Determination but it chose not to and it now seeks to amend the Determination despite the clear ongoing safety issues and prejudice to NRIL that such a decision would cause.

**Ground 2 (ii) – the Clarification re-writes / amends the original Determination to include an outcome that was not previously determined;**

- 3.23 The Determination is wrong in law because the order made via the Clarification goes beyond clarifying the interpretation and application of the wording of paragraph 167 of the Determination and, amends and supplements the Determination to introduce a further mandatory Determination order.
- 3.24 The Clarification at paragraph 51 orders that 4L73 should be accepted into the timetable.
- 3.25 In ordering that 4L73 should be accepted the TTP has gone beyond giving guidance on the interpretation and application of the Determination at paragraph 167. NRIL repeats the matters set out above that the effect of the Determination wording was that the TOVR rejection decision (i) needed to be set aside and the TOVR re-determined; and (ii) that NRIL and FLL both agreed with that course of conduct.
- 3.26 By adding a new mandatory order requiring NRIL to accept 4L73 the TTP has wrongly done more than clarify paragraph 167 of the Determination in breach of the limits set out in D5.3.2.

**Ground 2(iii) - The obligations in relevant safety legislation fall on NRIL as employer and network operator, not on a tribunal**

- 3.27 The duties under the Health and Safety at Work etc. Act 1974 and the Management of Health and Safety at Work Regulations 1999 impose obligations on NRIL, not the Chair, to properly assess and manage risk, taking into account relevant factors, data and previous event learnings. This is acknowledged in Para 94 of the Determination

*"I observed that it was accepted that NR has a duty to run a safe railway, everybody has a duty to run a safe railway, but the biggest duty lies on NR, as it runs the infrastructure"*

And at Paragraph 96

*"I agreed with this, because the acceptance or rejection of a TOVR had to be fitted into the duty to run a safe railway, which had not been in dispute from the beginning. But the question facing the TTP was whether NR had made the right Decision in relation to 4L73 with the available data at the time."*

- 3.28 The importance of NRIL making the safety decisions as the party bearing the responsibility for compliance with the statutory safety obligations is exemplified by reference to the Chair's significant safety experience and the friction between his views expressed at paragraph 49 of the Determination relating to level-crossings, which views were not ultimately shared by either the ORR or the court in the matter referred to and relied on by the Chair. Matters pertaining to safety are necessarily reserved for the duty holder (here NRIL) and the ORR in its role as safety regulator.
- 3.29 By way of further example, at Para 141 of the Determination, the Chair stated that 'there is no general principle setting out how long crossing barriers should be shut within any given hour.'. This is an incorrect position and the error has materially and erroneously impacted the TTP's Determination. The published Network Rail standard for assessing operational risks relating to changes in the train plan includes "increased barrier down time, possibly exceeding 45 minutes in every hour" as a specific criteria.
- 3.30 In assessing the TOVR NRIL's safety team opined that it would be unsafe to proceed with instating 4L73 into the timetable at the timeslot of FLL request. When NRIL initially presented at the TTP hearing the panel was not satisfied with the manner in which NRIL had reached its safety decision and with the quality of its decision making documentation. If 4L73 were to be added to the timetable at the time requested by FLL, NRIL's position is that this causes an unacceptable risk to persons who may be affected by NRIL's undertaking. Accordingly this is against the Objective and was rejected.
- 3.31 NRIL understood from paragraphs 157 and 158 of the Determination that giving greater transparency on the safety considerations which are paramount to allowing a train to run at a specific time over a specific route would be helpful to train operators. NRIL has, subsequent to the Determination, carried out work to create such a process. NRIL has re-run FLL's request for 4L73 through that process and maintains the view that an intolerable risk exists if the path were to be permanently included in the working timetable. NRIL remain in dialogue with FLL to resolve matters and to continue to explore if the safety risks identified can be resolved or mitigated so that the path can be accepted, as a TOVR and/or within the December 2025 timetable.
- 3.32 Accordingly in ordering that 4L73 should be accepted into the timetable, the TTP erred in exceeding its D5.3.3 right to clarify a general direction and, has further erred in compelling or seeking to compel NRIL to not comply with the relevant safety obligations which NR is responsible for fulfilling.

#### 4. DECISION SOUGHT

- 4.1 The Appellant submits that this Notice of Appeal should proceed to appeal as it raises matters which are of significant importance to the parties and to the industry as outlined above.
- 4.2 The grounds outlined in Condition M 4.1 of Part M of the Code do not apply.
- 4.3 The Appellant requests that the appeal is allowed and the Clarification in TTP2591 dated 19 June 2025 is set aside.

Please acknowledge receipt of this Notice of Appeal.

Yours faithfully



System Operator  
Network Rail



## **APPENDICES**

1. Determination dated 24 April 2025
2. Notice Of Dispute dated 11 June 2025
3. E-mail from ADC Secretary to the Parties dated 12 June 2025 at 8am
4. E-mail from NRIL to ADC Secretary date 12 June 2025 at 11:36
5. First Supplementary Directions dated 12 June 2025
6. Clarification dated 19 June 2025 including FLL and NR responses to First Supplemental Directions