

Interim Determination in respect of dispute references TTP2318 and TTP2320
(following a hearing held in London, on 15 November 2023)

Introduction to the Interim Determination

1. This is an Interim Determination of these Disputes, with full written reasons.
2. When these Disputes were registered, the referring Parties requested an expedited hearing, as the Disputes related to the Week 40 offer. For this reason the usual timescales for a TTP hearing were abbreviated.
3. On reviewing the Parties' Sole Reference Documents, and the responses to Directions that I had given, it became clear that there was no common understanding between the Parties on the correct interpretation of a number of issues in Part D of the Network Code. As only one example, there was a clear disagreement between the Parties as to whether Network Rail (NR) has powers to flex WTT passenger services in order to accommodate bids for diverted freight paths and whether NR was merely entitled to exercise those Flexing Rights which it accepted that it did have, or whether it was under any obligation to do so. Further, although NR stated in its Sole Reference Documents that it had applied the Decision Criteria in both TTPs, it contradicted this by saying during the hearing that it was under no duty to apply the Decision Criteria in these circumstances.
4. Therefore, exercising the powers available to me as a Hearing Chair to vary the procedure to be followed (so long as I was respecting the Principles of the ADR Rules and of Chapter H (Rule H20)), I noted in the Fourth Directions, issued on 10 November 2023, a list of longer term and policy issues that I thought had already been raised by these Disputes by that date. As I did not think that they could be dealt with adequately at the scheduled hearing, for the reasons set out in the Fourth Directions, I therefore ordered that the hearing on 15 November 2023 would be limited to the paths referred to in each Dispute, with the longer term issues to be dealt with at an adjourned hearing, after the Parties (and any other interested Resolution Service Party) would have had time to give full consideration to these important issues. I further clarified my approach after the TTP hearing and with fuller reference to the ADR Rules, in the Sixth Directions, a copy of which is appended to this determination (Annex D).
5. My perception of a lack of common understanding on all the issues listed in the Fourth Directions was reinforced strongly by statements made during the hearing on 15 November 2023. At the end of that hearing I therefore sought the assistance of the Parties to develop the list of longer term issues further, as discussed below.
6. That process will take time, but in the meantime the Parties need a written Determination of the Week 40 issues, not least in case any Party wishes to appeal any aspect of the Determination of the Week 40 issues. Therefore, again exercising my powers to vary the Chapter H procedure, I have decided to issue this Interim Determination to dispose of the decisions relating to the Week 40 paths. After the adjourned hearing, the date for which has not yet been decided, I shall issue a final Determination, which will incorporate this Interim Determination.
7. In the event of any Appeal against this Interim Determination I trust that the ORR would not refuse to consider it on the grounds that there was not yet a final Determination of these Disputes.

The Panel:

Clive Fletcher-Wood Hearing Chair

Members appointed from the Timetabling Pool

Quentin Hedderly elected representative for Non-Franchised Passenger Class
Maria Lee appointed representative of Network Rail

The Dispute Parties:

GB Railfreight Ltd. ("GBRf")

Tom Mainprize Head of Timetabling
Ian Kapur Head of Strategic Access Planning
Andrew Pearson Amended Schedule Planning Manager

Freightliner Ltd. ("FL")

Chris Matthews Timetable Strategy and Rail Industry Manager
Robin Nelson Timetable Planning Manager – Intermodal

Network Rail Infrastructure Limited ("NR")

Nick Coles Timetable Production Manager – Freight
Andy Simpson Operational Planning Manager
Rory James Operational Planning Manager

Interested parties:

DB Cargo (UK) Ltd. ("DBC")	<i>(unable to attend)</i>
First Greater Western Ltd. ("GWR")	Rob Holder (for TTP2320 only)
Northern Trains Ltd. ("Northern")	Andrew Allwright
TransPennine Trains Ltd. ("TPT")	William Murchison
XC Trains Ltd. ("XCTL")	Scott Stephens

In attendance:

Tamzin Cloke Committee Secretary ("Secretary")

Table of Contents

A	Background and Jurisdiction	page 4
B	History of this dispute process and documents submitted	page 5
C	Outcomes sought by the Dispute Parties	page 6
D	Relevant provisions of the Network Code and other documents	page 7
E	Submissions by the Dispute Parties	page 7
F	Oral evidence at the hearing	page 7
G	Analysis/Observations and Guidance	page 13
H	Determination	page 15
Annex A	Opening statements for TTP2320	page 16
Annex B	Opening statements for TTP2318	page 19
Annex C	The Access Impact Matrix, from the applicable National TPRs	page 24
Annex D	Sixth Directions	page 26

A Background and Jurisdiction

1. Dispute TTP2318 was raised by GBRf by service of a Notice of Dispute on 27 October 2023 in respect of NR's decisions in relation to the Informed Traveller offer for Week 40, 2023. The dispute was brought on the basis that GBRf disagreed with the Decision due to the impact on its business, namely the volume of biomass services to Drax power station that had been significantly amended or rejected, and its view that, consequently, Network Rail had failed to apply the Decision Criteria appropriately in making its Decision. GBRf requested that the hearing be expedited owing to the limited time between the Notice of Dispute and Week 40.
2. I was appointed as Hearing Chair on 31 October 2023 and satisfied myself that the matters in dispute included grounds of appeal which may be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.
3. Following the submission of GBRf's SRD (see para 8) on 07 November 2023, Freightliner Limited ("FL") served a Notice of Dispute on very similar grounds to those included in TTP2318, objecting to the rejection of one of its services (4O50), also as part of NR's decisions in relation to the Informed Traveller offer for Week 40, 2023. FL's dispute was allocated reference TTP2320.
4. Given the proximity of the Week 40 timetable, with the consent of the Parties, on the grounds that the disputes concerned the same or similar subject matter and that it would be in the interests of efficient and fair resolution to do so, the Allocation Chair ordered on the afternoon of the 07 November 2023 that TTP2318 and TTP2320 should be heard together.
5. In its consideration of the Parties' submissions and its hearing of the Disputes, I was mindful that, as provided for in ADR Rule A5, the TTP should 'reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.
6. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 4 and as otherwise defined in this determination document:
 - "ADR Rules" mean the Access Dispute Resolution Rules and "Rule" is construed accordingly
 - "Chapter H" means Chapter H of the ADR Rules
 - Decision Criteria means Network Code Condition D4.6
 - "GWML" means Great Western Mainline
 - "ORR" means the Office of Rail and Road
 - "Part D" means Part D of the Network Code
 - Restriction of Use (possession) has the meaning defined in the model Track Access Contract
 - "SRD" means Sole Reference Document
 - "TPRs" means Timetable Planning Rules
 - "TTP" means Timetabling Panel
 - "WTT" means Working Timetable

B History of this dispute process and documents submitted

7. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide SRDs. The proposed Panel hearing was notified generally by means of the website and by email to those identified as potential interested parties by the Dispute Parties.
8. On 03 November 2023 GBRf served its SRD, in accordance with the dispute timetable as issued by the Secretary. Following review of GBRf's SRD, Directions were issued on 03 and 07 November, seeking to clarify GBRf's submission and assist NR in drafting its own submission. These Directions can be found on the Committee's website. At this stage the gulf between the Parties on a number of matters of interpretation of Part D had become apparent; the Directions reflect this.
9. The second Directions included a reminder to NR of the ORR's comment within its Determination of the Appeal by NR against the Determinations in TTPs 1706 and 1708 (which I chaired) that NR needed to be 'fully informed' when exercising the Decision Criteria (set out in D4.6).
10. On 08 November 2023 FL served its SRD, in accordance with the dispute timetable as issued by the Secretary. Third Directions were issued following receipt of FL's submission, which led to NR being granted an extension for its own response to TTP2320.
11. On 10 November 2023 NR served its SRD for TTP2318 in accordance with the dispute timetable as issued by the Secretary, and on 13 November 2023 served its SRD for TTP2320 in accordance with the revised dispute timetable as issued by the ADC Office Administrator.
12. Following NR's response to TTP2318, on 10 November, fourth Directions were issued, to obtain clarity regarding a Section 5 possession on the Hope Valley route in Week 40 and, for the first time, to identify and split out the questions of policy and interpretation, which were to be dealt with at the reconvened TTP hearing.
13. Following NR's response to TTP2320, on 13 November, fifth (the last before the hearing) Directions were issued, asking FL to confirm urgently whether it had not bid amendments for Week 40, as NR was asserting that as FL had not done so it was therefore unable to dispute NR's Decision. FL responded on the same day, accepting that it had not submitted a bid, but that it did not do so because of an agreement with NR that a bid was not required in the circumstances. I dealt with this matter as a preliminary issue at the start of the hearing of TTP2320 (see paras 34 to 38 below). In the same note, the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that there were no relevant issues of law and the issues to be determined at the hearing concerned matters of contractual interpretation.
14. Further, on the day before the hearing I became aware for the first time of the letter published by the ORR on 22 February 2022, which included clear directions to NR of the expectations of the ORR as to how NR should consider the Decision Criteria set out in D4.6, and that NR should evidence this consideration in any dispute. The Secretary arranged for the ORR's letter to be circulated to the Parties on that day as a reminder.
15. DB Cargo (UK) Ltd.; First Greater Western Ltd., Transpennine Trains Ltd., Northern Trains Ltd., and XC Trains Ltd. declared themselves to be interested parties. All, save DB Cargo (UK) Ltd., were represented at the hearing. First Greater Western Ltd. only attended proceedings for TTP2320, not having an interest in TTP2318.

16. The hearing took place on 15 November 2023. The Dispute Parties made opening statements, responded to questions from the Panel concerning various points and were given the opportunity to make closing statements. The interested parties were given the opportunity to raise points of concern.
17. I confirm that the Panel had read all of the papers submitted by the Dispute Parties and I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of the dispute process, both written and oral, notwithstanding that only certain parts of such materials are specifically referred to or summarised in the course of this determination.

C Outcomes sought by the Dispute Parties

18. In its SRD, GBRf requested the Chair to determine that:
 - a. Under Condition D3.4.4(b), Network Rail had not applied the Decision Criteria when making capacity decisions on conflicting services. In making its decisions, Network Rail had therefore inaccurately evaluated the impact that its decision would have on GB Railfreight and Drax power station. GBRf stated that the decision reached did not offer a reasonable compromise given alternatives GBRf believed were available, and the proximity of the access in Week 40 (a closure of the Transpennine route at a location known colloquially as the 'Eye of the Needle' (at Mirfield), which resulted in operators needing to divert via the Hope Valley line);
 - b. Network Rail be instructed to use its Flexing Rights wherever it needed to in order to achieve the Objective in Network Code Condition D4.6.
 - c. Network Rail should not implement the Week 40 possession until due process had been fully exhausted, taking into account full application of the Decision Criteria and use of Flexing Rights in Network Code Part D.
19. Following clarification sought via a Directions Note, dated 03 November 2023, GBRf clarified that it was of the view that NR should be directed to "rework the [train] plan by using the fullest extent of its Flexing Rights along with appropriate and transparent use of the Decision Criteria", but that it was not seeking cancellation of the Transpennine possession, nor did it feel - at that stage - that there were exceptional circumstances that could lead to a direction being given under Network Code Condition D5.3.1(c).
20. NR asked me to determine that it had not acted unreasonably in the preparation of the Week 40 Informed Traveller offer, and that its Freight Informed Traveller team had reasonably, and correctly, met all of its contractual obligations under Part D, including the application of its Flexing Rights.
21. Further, NR requested that I should uphold its timetabling decision. NR did not believe that there was sufficient time to rework the timetable, if it was given a direction under Network Code Condition D3.5.1(a), and nor did it feel there were exceptional circumstances in this case. NR noted GBRf did not seek cancellation of the 'Eye of the Needle' possession.
22. In its SRD, FL asked me to confirm that in reaching the Decision to reject FL's Access Proposal, NR had not conducted itself in accordance with Part D of the Network Code, and the disputed Decision should be "retracted". FL wished me to direct NR to reconsider the Decision, including alternative options for FL, using the Decision Criteria, or that I, as Chair,

reach a Decision in the hearing on how the Decision Criteria should be applied by NR in this instance.

23. FL further requested that I should confirm that, when dealing with amendments for a Restriction of Use, NR must apply its Flexing Right to all services in order to accommodate train slots, and including passenger services.
24. In its separate response for TTP2320, NR alleged that FL had failed to make a revised Access Proposal. Accordingly, NR asked me to determine that FL had no right of appeal, under Condition D3.4.12.
25. Should I find that FL was allowed a right of appeal, NR asked me to determine that it had correctly met its contractual obligations under Part D, including the application of its Flexing Right. It also asked for a determination stating that the absence of specific Traffic Remarks in a possession do not absolve an operator from the requirement to bid a revised Access Proposal in D3.4.
26. Neither FL nor NR (in the matter of TTP2320) felt that any exceptional circumstances applied.

D Relevant provisions of the Network Code and other documents

27. The versions of the Network Code Part D and the ADR Rules dated 13 March 2023 were applicable to these dispute proceedings. The most relevant Part D Conditions are referenced in this determination.

E Submissions by the Dispute Parties

28. The Parties' opening statements appear at Annexes A and B, respectively for TTP2320 and TTP2318.

F Oral evidence at the hearing

29. The evidence summarised below solely relates to the issues determined in this Interim Determination; hardly surprisingly, during the hearing the Parties veered on to matters that will form part of the final determination on a number of occasions; each time I reminded them that longer-term issues were not for resolution during the hearing, and that we were there solely to consider the disputed services in Week 40, not the underlying dispute(s) relating to Network Code interpretation. Nevertheless, I took their comments into account and they will inform the next set of Directions I issue in this matter, after this Interim Determination.
30. My introductory remarks included reiterating comments I had made in the Directions letters, namely that these disputes had raised significant underlying issues of policy and practice, of importance to the industry. I confirmed that it would not have been practical to determine those broader issues by the date of the hearing, and reminded the Parties that the sole business of the day was to deal with GBR's disputed paths in Week 40 (TTP2318) and whether or not FL's appeal could go ahead (TTP2320) followed by, if FL was successful, dealing with its disputed path in Week 40. I provided an outline of how the remaining issues in disputes would be resolved after this Interim Determination was issued. I reminded the Parties that it was open to them to appeal this Interim Determination, should they so wish.

31. Given the preliminary issue raised by NR with regard to TTP2320, I advised the Parties that I would first consider whether FL was entitled to bring its appeal to Dispute in the first place. Once TTP2320 was dispensed with, I would consider TTP2318. The Parties raised no objections to reversing the usual order, including my suggestion that NR should provide its opening statements before each freight operator, due to there being outstanding questions for NR to address regarding Part D consultation, and the Decision Criteria, which the freight operators would undoubtedly wish to respond to in their statements.
32. With regard to whether FL was entitled to its appeal, I advised the Parties that this was a legal issue, arising from a clear failure by FL to comply with Part D, but a failure resulting from and relying on a statement made by NR, in writing, in 2019 and submitted by FL as part of its response to the Fifth Directions (which can be found on the Committee's website).
33. Upon questioning, NR accepted the accuracy of the email exchange relied upon by FL. NR advised that the agreement was made for pragmatic reasons, as a "concession... made at the time", but NR had since wished to terminate this agreement. Its representative said that this point had been raised with FL, but accepted that matters had not progressed any further.
34. Following this further evidence, I gave my decision on this preliminary point. In circumstances in which the Parties had adopted this custom and practice, even though it does not comply with Part D, I had to decide whether it was open to NR to have engaged in discussions in good faith with FL seeking to identify a path for this service, but then when a Dispute was raised could NR rely on the failure to submit a bid to prevent the Appeal from being heard?
35. In answering this question I was guided by the ORR's Determination in the Appeal of HAL/TTP003. I regard a Determination of a Heathrow Airport Limited ('HAL') Appeal as binding when the contractual terms in dispute are the same for HAL as on the National Network.
36. As a matter of simple fairness, or applying equitable principles, where FL had continued to rely on the custom and practice adopted by both Parties, I did not regard it as equitable for NR to engage in good faith negotiations with FL to identify a suitable path for 4O50, and only at this late stage to point to a failure to comply with Part D as blocking this Dispute, when that failure was a result of the continued reliance by FL on the agreement between FL and NR.
37. The facts in HAL/TTP003 are not the same, but the principle articulated by the ORR was that the Parties in that Dispute should have acted as if bids which were not technically valid had been valid. I regard my decision that FL's Appeal should be allowed to proceed as logically following the principle set out by the ORR.
38. On this basis I allowed FL's appeal to proceed and the Parties then gave their opening statements, which are at Annex A.
39. My first question to NR concerned a potential solution to the dispute, offered by FL, which NR had mentioned in its SRD. NR advised that, due to workload and timescale pressures, it would not know the outcome until Friday 17 November. The solution involved FL cancelling another service and 'stitching' that cancelled path with the intended path for the service in dispute - 4O50.

40. There followed a number of questions about the geographical limits of the available infrastructure (a two track railway on the GWML, between Paddington and Reading), in order to understand whether NR had explored every option available to it, including the use of alternative ladders for weaving 4O50 to and from the two track section. NR advised that the issue was not, as had previously been thought, the single lead at Acton Wells Junction, but capacity on the two track section itself. NR confirmed that there was no alternative routing for 4O50 around the possession. NR confirmed that a capacity study had been produced, but it arrived too late to inform FL that it needed to do anything other than what FL was expecting to do, namely not bid the service and let NR 'weave' 4O50 through the two track railway, relying on the 2019 agreement.
41. At this stage I asked NR to confirm when the Decision Criteria had been applied, which ones had been identified and how they had been weighted. NR confirmed that the Decision Criteria had been in the planner's mind at the time of making the decision (and this was recorded in the rejection email to FL, submitted as part of NR's SRD), but that only three of the Decision Criteria had been considered, these had been given equal weight and that there had been no consideration of D4.6.2(f) (commercial interests of FL). D4.6.2(e) (integrated system of transport) and D4.6.2(j) (enabling operators to utilise their assets efficiently) had been considered, but only in the context of passenger services.
42. There followed some considerable, and detailed, discussion about why it wasn't possible to path 4O50 through the two track railway and why, according to NR's SRD, identifying a path for 4O50 would necessarily result in cancellation of three to five passenger services. I explained to NR that, given the mixed pattern of passenger services in that area, including all-station stopping trains, I found it difficult to understand why a single 75mph Class 4 service could not be accommodated at all without cancelling such a large number of passenger trains. NR explained that the key issue was platforming arrangements at Reading, which in turn created junction margin issues, meaning there was no gap big enough for 4O50 to be accommodated. It was NR's view that there needed to be a limit on the number of consequent amendments to WTT services as a result of diverted services otherwise, NR stated, it ran the risk of "spiralling out in a galaxy of amendments to retrospectively make the timetable work". I explained to NR that, this notwithstanding, I was still struggling to understand why the inclusion of 4O50 resulted in such significant consequences for other operators' services.
43. FL then answered a series of questions. It confirmed that 4O50 had no other viable diversionary route, due to the gauge of the service (W10), and that it had already cancelled or diverted as many services as it could away from the two track railway. With regard to the capacity study, FL stated that - in its view - this was not fit for purpose, either in terms of consultation (the study had included one freight train an hour, in a standard pattern, which FL said was not representative of freight services in the area, nor adequate over the busy Christmas period) or timeliness, as it had arrived after FL's TW-18 bid for Week 40 had been finalised (albeit at TW-19), so FL said it had no opportunity to revisit the bid and include amendments to 4O50. In any event, FL had immediately written back to NR to say it disagreed with the capacity study. FL confirmed that it did not wish to see the engineering access cancelled, and that - prior to the Informed Traveller process - it had not understood from either the possession footprint, or Traffic Remarks, that 4O50 would not be able to run. Freightliner understood this to be a 'standard' possession, with 'standard' amendments applying.

44. At this stage there was some disagreement between the Parties, in response to questions from the Panel, as to how cooperative and collaborative each had been during the process of planning for Week 40, and dealing with issues such as capacity studies generally. NR seemed to accept that the consultation process for Week 40 had, perhaps, been less than adequate, but said this was also partly due to failures by FL. NR agreed that the freight community's business model meant, generally, freight operators could not be as forthcoming regarding future service levels, or the likelihood of using WTT paths, as passenger operators could.
45. The Panel and I then asked a series of questions about attempts by NR to accommodate 4O50 to date, to understand what level of Flexing Right - if any - NR had considered and attempted to use. NR stated it had spent five hours working on 4O50 and had been in touch with passenger operators, to no avail. GWR was the only relevant passenger operator present; its representative stated, in response to a question from me, that having checked this point on the morning of the hearing, its Head of Short Term Planning could find no record of any contact. I advised NR that, whilst I was realistic enough to know that expecting a paper trail for every discussion would be unreasonable, nonetheless I would have to take note of what GWR had said.
46. Prior to concluding TTP2320 NR, in response to questions from the Panel about NR's approach to Week 40, stated that it was NR's understanding that there was no requirement to flex WTT services to accommodate diverted services, and said that it would not necessarily have to apply the Decision Criteria if there was a conflict between a diverted train and one in a WTT slot on the same route, because Condition D3.4.11 gives NR the right to "modify, accept or reject a revised Access Proposal" so long as it provides "written reasons for its decision." In NR's view there was, therefore, no need to apply the Decision Criteria when using the process in D3.4.11 to D3.4.15, as long as it provided a brief explanation to the operator about its decision. It was NR's contention that its application of the Decision Criteria for 4O50 was therefore adequate.
47. There was no clear answer in response to my question as to whether FL's bid was an Access Proposal in response to a Network Rail Variation, thus triggering the application of the Decision Criteria.
48. NR and FL confirmed they had no questions for each other and neither wished to make a closing statement as they were satisfied that the Panel had understood all the issues in dispute. There was an adjournment, following which I provided a brief oral outline of my decision in TTP2320. The hearing then continued, addressing TTP2318.
49. Prior to the opening statements (which were given by NR, then GBRf, and can be found at Annex B), the Parties confirmed that NR was working on further suggestions from GBRf for services which were not foul of a Section 5 maintenance possession on the Hope Valley route, but that there was no update on progress by NR. The three services that were foul of the Section 5 possession could only be resolved by the alteration to, or cancellation of, that possession. Between the opening statements I reminded the Parties that I would not revisit common issues that had been dealt with under TTP2320, and this was accepted.
50. The first series of questions were for NR: given the nature of the work on the Transpennine route, the volume of traffic that needed to divert via the Hope Valley line, and the nature of that traffic (in GBRf's case biomass fuel for Drax power station over the 'high burn' Christmas and New Year period), why was there a routine maintenance possession shutting the Hope Valley for a period of time? I was not underrating the seriousness of the

work that was being undertaken in the Section 5 possession (resolving S&T non-compliances and a 600 yard rail defect), but it was extremely difficult to understand why the diversionary route had not been deconflicted, either at an earlier stage in access planning, or now when it had become critically obvious that there were essential services that needed access to Drax power station during the Christmas period. NR advised it could not explain why deconfliction had not taken place earlier, and that discussions were ongoing internally with NR's North West and Central Region, to understand whether the maintenance work could be moved or cut back. There was nothing further NR could share.

51. At this stage, in response to a question, GBRf confirmed that its view had changed since submitting its SRD. Whilst pulling together the papers for the hearing (including its opening statement in Annex B), and having attended a recent meeting regarding winter power supply, it had formed the view that exceptional circumstances might now apply to TTP2318. I noted that, even if persuaded that exceptional circumstances applied, I would be reluctant to apply D5.3.1(c) if I felt I was not fully informed as to the consequences of any Determination by the TTP imposing a solution such as ordering the postponement of the Hope Valley possessions.
52. Given we were on the subject of being fully informed, I asked NR a series of questions regarding the lack of a promised capacity study confirming available capacity along the Hope Valley diversionary route during the Eye of the Needle possession. Eventually NR conceded that, a capacity study having been mandated by the Access Impact Matrix (Annex C) (the possession having required a Severity 4 study) in the National TPRs, NR could not have been fully informed when making timetabling decisions arising from that possession.
53. At this stage I also asked NR to clarify why it had criticised GBRf, in both its SRD and opening submissions, for not sending a capacity study (which during the run-up to the hearing was discovered not to apply to Week 40, and instead relate to later Transpennine blockades) which NR commissioned and issued, back to NR as part of its TW-18 bid so that NR could be informed about the capacity study it had, itself, commissioned.
54. Following another series of questions, which latterly included questions from the Panel Members after a discussion about the Decision Criteria (see para 55 below), NR confirmed there was no single method for staff in Capacity Planning at its Milton Keynes office to obtain capacity studies, or timetable study outputs, produced as a result of applying the Access Impact Matrix. It was explained that these are commissioned during the engineering planning process and are undertaken by either the access planning teams, an internal NR timetabling team, or by external consultants. The studies are then quality assured by NR, before being issued externally to passenger and freight operators. As the freight Informed Traveller team is a national team, it often relies on freight operators supplying the studies to it, due to a lack of direct relationships with NR's regional access planning teams. At this stage I commented that, on the basis of what we had already heard, the Panel was seriously questioning some aspects of NR's internal relationships.
55. After I had finished my questions about the capacity study process, I asked NR about the Decision Criteria it had applied to the trains in dispute for TTP2318. NR confirmed that it had undertaken the same exercise as for TTP2320 (see paras 41, 46 and 47 above) and agreed with me that Appendix M to its SRD only referred to the Decision to take the Transpennine access, and was therefore not relevant to the disputed Decision in TTP2318.

56. There followed a few questions to GBRf and NR about GBRf's role in the process to date. GBRf confirmed that it had not taken the opportunity - which it had had - to request the Section 5 Hope Valley possession be cut back, either at the access planning stage or timetable bidding stage. That request had been made following the joint NR/GBRf meeting in the run-up to the hearing. There was some disagreement at this point between GBRf and NR. It was commonly agreed that GBRf had not supplied terminal workings for the disputed Drax services until after the Notice of Dispute had been served, however NR interpreted D2.5.1(k) (Content of an Access Proposal, requirement to include previous and next workings) to require GBRf to have done so in its bid. GBRf contended that the wording of D2.5.1(k) (where both Parties seemed to agree the wording "railway passenger vehicles" should also include freight vehicles) says, "provided the vehicles have not left the network". As both ends of the services (Drax power station and Liverpool Biomass Terminal) were off NR's network, GBRf argued that D2.5.1(k) did not require it to supply terminal workings to NR as part of its revised Access Proposal. In any event, NR agreed with me that its planners would have understood, in the absence of this information, that the trains had tight turnaround times at Drax.
57. GBRf then answered questions regarding the shortfall of tonnage to Drax. The most up-to-date information was in its opening statement. It confirmed that Drax had already purchased biomass for Week 40, now with no way of delivering it from Liverpool to the power station unless the services were to run. In answer to later questions it further confirmed that Drax services ran in self-contained and continuous circuits, each train carrying a standard load of 1675 tonnes (net) per train, seven days per week.
58. GBRf stated that having originally said the exceptional circumstances did not apply, it was now of the view that they should. I was not immediately persuaded by this, but in any event the TTP did not know what penalties would be incurred if I ordered the postponement of the Hope Valley possession.
59. At this stage I questioned the interested parties who were present, to understand what conversations their planners had had with NR to accommodate GBRf's services. TPT, Northern, XCTL and FL all confirmed that they had not been approached by NR to flex their WTT services for GBRf's Drax services. It transpired, after a further question to NR, that NR freight planners had approached their internal NR passenger planning colleagues to see if they thought the passenger operators would be willing to consider moving their services. The NR passenger planners had explained that they did not think that the operators would be willing to move if approached, so no approach to the operators themselves had been made. All the operators present confirmed they would have been willing, and were still willing, to consider flexing and retiming their services to accommodate GBRf in Week 40.
60. GBRf and NR were then given the opportunity to question each other. Much of this strayed into the longer-term issues, however GBRf conceded, in response to a question from NR, that it could have perhaps raised a hearing request at an earlier stage, against one of the engineering access decisions, to avoid having a short-notice hearing. In making this suggestion NR acknowledged again that it should have produced a capacity study, and had not done so.
61. The Parties, and interested parties, having confirmed they had no further questions or representations to make, and GBRf and NR confirming neither wished to make a closing statement as they were satisfied that the Panel had understood all the issues in dispute, the hearing adjourned.

G Analysis/Observations and Guidance

Analysis relating to TTP2320

62. Dealing firstly with the preliminary issue as to whether FL was able to proceed with its Appeal, given that it had not submitted an Access Proposal, my decision was that it could proceed for the reasons explained above.
63. My understanding is that the duty of consultation set out in Part D applies to consultation between NR and operators; TTP2318 in particular suggested that different parts of NR were failing to consult with each other. Arguably this is not the duty of consultation set out in the Network Code, but if disputes emerge because different parts of NR do not talk to each other, it hardly helps the task of timetable planning.
64. A more obvious failure on NR's part concerns the identification and assessment of the relevant Decision Criteria. In spite of NR having been reminded of the extent of its duty, admittedly only on the day before the hearing, I was not persuaded that there was any evidence of NR having properly and adequately considered the Decision Criteria before issuing its Decision. Only three of the criteria were set out in NR's SRD, which did not even include the commercial interests of FL and with no apparent weighting having been applied.
65. Paragraph 46 above records NR's opinion that not only is it under no duty to apply Flexing Rights to accommodate diverted freight services, nor does it need to apply the Decision Criteria in such cases. This is one of the legal issues to be determined at the adjourned hearing, but just as I alerted NR in Directions that for the purposes of the hearing I would be working on an assumption concerning Flexing Rights, similarly I am working on an Assumption in this context that NR's failure to meet the bids by both Claimants amounted to decisions by NR which required the Decision Criteria to be applied.
66. There is an obvious contradiction between NR's opinion that it is under no duty to apply Flexing Rights and its claim in respect of both TTPs that there had been internal discussions within NR on the possibility of doing so. But the evidence of all the Interested Parties that they had not been approached in either case indicates a weakness in NR's processes.
67. One point raised by NR in its Appeal against TTPs1706 and 1708 was my characterisation of its application of the Decision Criteria as having been 'seriously flawed'. The ORR thought that it was not necessary to determine this point, but I have no hesitation in describing NR's application of the Decision Criteria as seriously flawed in this Dispute.
68. The decision to allow FL's substantive Appeal to succeed recognised procedural failures on FL's part, but these were outweighed by the failure of NR to comply with the consultation process required by Part D and a failure to identify the relevant Decision Criteria and to weight them appropriately.
69. It was for this reason that the TTP decided TTP2320 in FL's favour. There was no suggestion that exceptional circumstances had arisen, so the TTP was not able to impose its own solution, which in any event would not have been possible on the limited information before us. Therefore I ordered NR to find a path for 4050, while not

determining how NR should achieve this, while awarding damages to FL if this proved to be impossible.

Analysis relating to TTP2318

70. We then turned to TTP2318, which raised some of the same issues as in TTP2320, but in each case more obviously.
71. It was a matter of regret that there were obviously bad feelings between NR and GBRf, and that GBRf had not raised a dispute at an earlier stage. But regardless of these points, the TTP felt that there were failures which meant that NR had not discharged its duty of consultation under Part D.
72. One early point was the discussion about possession P2023/3845835 (the Hope Valley possession). With two of the Trans-Pennine routes blocked at Mirfield, it is obvious that the diversionary route through the Hope Valley, which is already constricted, would be under additional pressure. It seems incomprehensible, therefore, that possessions should be taken on the Hope Valley route during Week 40. Accentuating this, we were told at the hearing that discussions were still in progress within NR as to whether these possessions could be postponed. The Panel was unable to understand why these discussions had not taken place as soon as it was obvious that some of GBRf's services could not be accommodated, and even more so once it was clear that there was a dispute.
73. As far as the consultation process in TTP2318 was concerned, the Panel could only conclude that this could not have been adequate, if only because the Timetable Study required by the Access Impact Matrix, and also promised by NR, had not been produced. For all NR's initial protestations that it was fully informed before making its timetabling Decision, that simply cannot have been the case. Other failures in the consultation process are dwarfed by this.
74. The same failures in the application of the Decision Criteria referred to in TTP2320 apply in TTP2318; indeed the two references in NR's SRDs are identical, so both are seriously flawed.
75. The Determination in TTP2320 was therefore followed in TTP2318.

Observations and Guidance

76. As the longer-term issues have been held over for the adjourned hearing, Observations and Guidance will follow then. Some points, however, are already apparent.
77. Given the ORR's clear and repeated directions that industry parties must comply with Part D, NR should identify any other agreements that it has with operators similar to its 2019 agreement with FL and terminate them forthwith.
78. NR should give urgent consideration to the adequacy of its internal communications between different functional areas when dealing with possession planning.
79. Where NR accepts that the exercise of Flexing Rights is required and appropriate, then they must be discussed with operators likely to be affected; merely discussing this internally within NR, so relying on assumptions as to operators' reactions, is clearly insufficient.

80. The provisions of the Access Impact Matrix, and the extent to which NR complied with them, were of considerable importance in determining both these TTPs. The list of questions in the Fourth Directions included the need to define a Capacity Study and how to distinguish it from a Timetable Study. While drafting this Interim Determination, however, I have been advised that in the consultation on Version 1 of the 2025 TPRs NR is proposing a version of the Access Impact Matrix which has been completely restructured. Comments are due by 01 December 2023. As a consultation document this is clearly not a Decision by NR which can be appealed. This issue is one that is clearly better resolved by a pan-industry consultation than by any Observations and Guidance of a TTP, so it will no longer be considered in the adjourned hearing
81. Mere exhortation may be of little value, but co-operation and communication between industry parties really will assist in timetable planning.

H Determination

82. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.
83. In both TTP2318 and TTP2320, a D5.3.1(a) direction is given to NR to find suitable paths for the disputed services, without specifying the means by which it is to be achieved.
84. In the event that suitable paths cannot be identified, there is insufficient time for a further Dispute to be raised. On this basis, if no suitable paths can be found, then FL and GBRf are entitled to damages for NR's breach of contract. Any claim for damages would not return to this (or any other) TTP.
85. No application was made for costs.
86. I confirm that so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Clive Fletcher-Wood
Hearing Chair
28 November 2023

Annexes

Annex A Opening statements for TTP2320

Network Rail

Thank you everyone. NR notes that the scope of today's Timetable Panel Hearing relates to those "short-term issues", as described by the Hearing Chair, concerning the accommodation of Freightliner's 4050 service in the Week 40 Timetable Week. NR notes the "longer term issues" arising from this matter will be subject to separate proceedings at a later date.

Freightliner's main arguments in this matter centre on: NR's application of its Flexing Right; and NR's consideration and application of the Decision Criteria. NR has supplied evidence that flexing other services was a clear consideration in processing of 4050 and that the Decision Criteria was considered, applied, and underpinned its timetable decision.

In answer to the Hearing Chair (Fifth Directions letter, item 12), NR notes the suggestion that it set out its position on matters pertaining to flexing rights – in this way today's proceedings can begin on a more productive footing. Paragraphs 1.5 to 1.10 of this NR Opening Statement oblige in this respect.

Item 10 of the Fifth Directions letter requests a clearer understanding of what NR flexing rights exist in this case.

Part D of the Network Code is unclear on the application of flexing rights for Network Rail Variations (i.e. in STP) and NR contends that there is not an established definition of what flexing rights exist in the delivery of the Timetable Week (which itself is defined in Condition D3.2.1).

NR notes that the Part D definition of Flexing Right refers only to its application in the New Working Timetable or relevant Working Timetable when responding to Access Proposals and Train Operator Variation Requests, or when arising from Rolled Over Access Proposals – it does not refer to the application of a Flexing Right in response to Network Rail Variations.

In the absence of any more specific detail in Condition D4.4.1 of the Network Code (Decisions concerning Network Rail Variations), NR considers Condition D3.4.11 applies and this is our flexing right for decisions concerning Network Rail Variations.

In the event of a Network Rail Variation, NR contends that where it has asked a Timetable Participant to bid, where that Timetable Participant and all others are directly impacted by the disruptive access, NR can accept, modify or reject any of the Timetable Participants' bids under Condition D3.4.11, giving written reasons for its decision. In short, NR can enact changes to all. This is NR's flexing right in this situation.

NR contends that it has no flexing right that it can apply to indirectly affected Timetable Participants (i.e. one running in a WTT path on a diversionary route) where that Timetable Participant has not been consulted and asked for a timetable bid as part of the consultation of the Network Rail Variation. As such, the changes that NR can make to an indirectly affected Timetable Participant are limited and can only be undertaken by consent. Of note, this approach is aligned to decisions on Train Operator Variation Requests (under Condition D4.3.1) where it is clear that NR "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 answer to the Hearing Chair (Third Directions letter, item 4), two freight services were the subject of the email between NR and Freightliner, sent by NR at 11:47 on 18th October. These services were:

4O50 London Gateway Freightliner to Southampton M.C.T.
4V35 London Gateway Freightliner to Portbury Automotive

On 20th October, 4V35 was offered to Freightliner following rework performed by the NR Informed Traveller teams (Freight and Passenger).

In answer to the Hearing Chair (Third Directions letter, item 8), NR agrees with the Hearing Chair that our decision on 4O50 can only be withdrawn if there is a practical solution to the problem. NR confirms that no such practical solution currently exists, though Freightliner has submitted to NR further running suggestions for its 4O50 service on Saturday 30th December. These suggestions are now under review by the NR Freight Informed Traveller team.

In this matter, NR considers that it has satisfied the consultation requirements of Part D. In the consultation of possession 3766319, the NR Western Access Planning team note that "Freightliner did not refer to item 3766319 in their EAS Response to Western Route."

In answer to the Hearing Chair (Fifth Directions letter, item 6), and with respect to the Access Impact Matrix, NR confirms that possession 3766319 had no severity grading applied and that the associated capacity study reflected "an hourly (freight) path has been shown through the 2-track section".

NR notes Freightliner's response of 13th November to item 4 of the Hearing Chair's Fifth Directions letter, confirming they did not provide an Access Proposal for 4O50 despite being contractually obliged to do so.

Freightliner

Freightliner accept, and generally support, that there is a requirement for Network Rail to close the railway in order to complete maintenance, renewals and enhancements to the Network on a regular basis. However, where Restrictions of Use are taken, it is imperative that Network Rail, as infrastructure owner, allocate capacity in the most effective way possible to balance the number of trains, journey time and performance in order to achieve the Objective as set out in Condition D4.6.1 of the Network Code.

This dispute relates to Network Rail's allocation of capacity, and failure to consider all options available to them to make best use of said capacity – particularly the reluctance, or refusal, to amend passenger paths to accommodate diverted freight services. The focus of this dispute is Network Rail's rejection of Freightliner's 4O50 train slot (which conveys deep sea containers being moved between two of the UK's largest ports in order to meet weekend shipping departures) between London Gateway in Essex and Southampton, on Saturday 30th December 2023.

Network Rail claim in their SRD paragraphs 4.2.3-4.2.6 that they have shown an attempt to utilise their flexing right to make best use of the available capacity. Freightliner contest this – the dialogue between Freightliner and Network Rail during the validation of this train service highlighted that Network Rail had assessed the impact of the timings first looked at, but no evidence was forthcoming that anything other than the initial conflict had been reviewed, and no investigation had been conducted into alternative solutions for the conflict. Possible alternative solutions available to Network Rail could have included retiming the passenger services directly conflicting with 4O50, or

terminating a stopping train at Maidenhead instead of Reading (where multiple other journey opportunities exist) to minimise the impact to long distance passengers, Freightliner do not believe this to be adequate in terms of the written reason for rejection required by D3.4.11, nor does it comply with the requirements of Condition D3.4.2 (a) explicitly state that Network Rail 'may make any variation to a train slot for the purposes of taking Restrictions of Use'.

Freightliner assert that Network Rail's comments through offer response that they are 'unable to flex the passenger services' do not align with the requirements of D3.4.2(a), nor do they show application of the Decision Criteria in reaching the Decision to reject Freightliner's service. Freightliner believe this is demonstrative of a wider behavioural issue within Network Rail, where there is a reluctance or refusal to amend passenger services in order to accommodate diverted freight services, and this is a challenge that is seen time and time again, although not subject to dispute previously.

Freightliner thank the Hearing Chair, Panel and Secretary for their time today, and hope to be able to conclude that Network Rail have failed to discharge their duties required through Part D sufficiently, failing to consider alternative solutions which ultimately led to the incorrect decision being made, and the Objective not being met.

Network Rail

NR notes that the scope of today's Timetable Panel Hearing relates to those "short-term issues", as described by the Hearing Chair (Fourth Directions letter, item 11), concerning the accommodation of GBRf biomass services across the Hope Valley in the Week 40 Timetable Week, as a result of possession 3774226. NR notes that "longer term issues" arising from this matter will be subject to separate proceedings at a later date.

GBRf's main arguments in this matter centre on: NR's application of its Flexing Right; NR's consideration and application of the Decision Criteria; and the existence of capacity study outputs, which GBRf believed should be applied by NR to the GBRf Week 40 Variation Bid.

NR's Sole Response in this matter evidenced both that: NR did attempt to exercise its Flexing Right; and consideration and application of the Decision Criteria did underpin NR's communications to GBRf on its Week 40 biomass rejections. Within our submission, NR has explained the clear reasons why Decision Criteria information was not explicitly shared at the time.

NR's Sole Response in this matter detailed that the capacity study outputs in this case were not fit for purpose and were not ever intended for possession 3774226. As such, NR has argued in this matter that the capacity study outputs supplied to the NR Freight Informed Traveller team are non-relevant material. However, insofar as the Panel might consider them relevant, NR has been able to evidence across its Sole Response that: GBRf did not bid in alignment with the capacity study; GBRf only supplied the capacity study unreasonably late in the planning process; GBRf only supplied their parts of the capacity study; there was not an agreement in place for this capacity study to be applied; and GBRf knew it was unrealistic that the capacity study could be applied.

Further in NR's favour, NR has demonstrated in this matter that GBRf's Week 40 Variation Bid was non-compliant on various counts but, most significantly, lacked key terminal workings information material to the dispute raised. This information was, unacceptably and unhelpfully, only supplied to NR in the short hours after GBRf served its Notice of Dispute.

In answer to the Hearing Chair (Fifth Directions letter, item 12), NR notes the suggestion that it set out its position on matters pertaining to flexing rights, identification and weighting of Decision Criteria, and Section 5 possession 3845835 – in this way today's proceedings can begin on a more productive footing. Paragraphs 1.7 to 1.16 of this NR Opening Statement oblige in this respect.

Item 10 of the Fifth Directions letter requests a clearer understanding of what NR flexing rights exist in this case.

Part D of the Network Code is unclear on the application of flexing rights for Network Rail Variations (i.e. in STP) and NR contends that there is not an established definition of what flexing rights exist in the delivery of the Timetable Week (which itself is defined in Condition D3.2.1).

NR notes that the Part D definition of Flexing Right refers only to its application in the New Working Timetable or relevant Working Timetable when responding to Access Proposals and Train Operator Variation Requests, or when arising from Rolled Over Access Proposals – it does not refer to the application of a Flexing Right in response to Network Rail Variations.

In the absence of any more specific detail in Condition D4.4.1 of the Network Code (Decisions concerning Network Rail Variations), NR considers Condition D3.4.11 applies and this is our flexing right for decisions concerning Network Rail Variations.

In the event of a Network Rail Variation, NR contends that where it has asked a Timetable Participant to bid, where that Timetable Participant and all others are directly impacted by the disruptive access, NR can accept, modify or reject any of the Timetable Participants' bids under Condition D3.4.11, giving written reasons for its decision. In short, NR can enact changes to all. This is NR's flexing right in this situation.

NR contends that it has no flexing right that it can apply to an indirectly affected Timetable Participant (i.e. one running in a WTT path on a diversionary route) where that Timetable Participant has not been consulted and asked for a timetable bid as part of the consultation of the Network Rail Variation. As such, the changes that NR can make to an indirectly affected Timetable Participant are limited and can only be undertaken by consent. Of note, this approach is aligned to decisions on Train Operator Variation Requests (under Condition D4.3.1) where it is clear that NR "shall not accept a Train Operator Variation Request if to do so would give rise to any conflict with any Train Slot already scheduled".

Item 10 of the Fifth Directions letter also requests a clearer understanding of how NR applied the Decision Criteria to the rejected trains in this case, which NR has taken to mean those three biomass services rejected for reasons not related to being foul of possession 3845835. NR believes the request of the Hearing Chair is to understand if the relevant Decision Criteria identified by NR was the same in all cases or different between the three separate cases.

NR can confirm that all three biomass services – 6E10, 6E17 and 6E09 – faced near-identical late morning or daytime issues on Line of Route NW9001, related to breaking the running plans (i.e. train diagrams) of proximate passenger services. These issues could only realistically be overcome through the cancellation of services. In each separate case, the implications on journey times, maintaining and improving an integrated system of transport, and enabling operators of trains to utilise their assets efficiently, were all in play and of equal weight.

In answer to the Hearing Chair (Second Directions letter, item 13), the original six biomass rejections remain rejected. These are:

6E10	Liverpool Biomass TML to Drax
6E27	Liverpool Biomass TML to Drax
6M77	Drax to Liverpool Biomass
6E17	Liverpool Biomass to Drax
6E09	Liverpool Biomass to Drax
6E34	Liverpool Biomass to Drax

Items in bold are those that GBRf has submitted further suggestions to NR for these services, which are now under review.

Red items were bid foul of Section 5 possession 3845835, between Bamford and Grindleford.

In answer to the Hearing Chair (Fourth Directions letter, item 3), NR confirms that consideration was given and, in light of this dispute, continues to be given, to the cancellation or postponement of possession 3845835. The possession will be used to: remedy Signals & Telecoms (S&T) asset non-compliances between Bamford and Grindleford; and rectify a 600-yard rail defect in Totley Tunnel. Failure to address either of these issues will lead to speed restrictions or closure of the line. Dialogue with NR's relevant Maintenance Delivery Unit for the area is continuing, in order to understand what flexibility there may be in moving this possession.

NR would note that in making its Week 40 Variation Bid, GBRf did not request the easement of possession 3845835 – GBRf bid foul of this possession between Bamford and Grindleford.

In this matter, NR believes it has satisfied the consultation requirements of Part D.

In answer to the Hearing Chair (Fifth Directions letter, item 6), and with respect to the Access Impact Matrix, NR confirms that possession 3774226 had a “Severity 4” grading agreed, meaning a timetable study was required. NR accepts it was unsatisfactory in its actions not to commission a timetable study for possession 3774226 despite assurances that it would.

NR continues to review the three further suggestions made by GBRf for their non-easement related biomass rejections, whilst also awaiting a further update from the relevant NR Maintenance Delivery Unit on whether an easement of possession 3845835 can be achieved.

GB Railfreight

I’ve divided this into three sections, starting with a general statement.

This case centres around Network Rail requiring to actively use its flexing rights and making appropriate use of the Decision Criteria, at the point of validation, as per Part D of the Network Code. This is especially the case for a Restriction of Use such as this Week 40 possession, where two out of three vital Trans-Pennine arteries are blocked, with all traffic being diverted over the sole Pennine “Hope Valley” route. Incredibly, there are two other possessions that also close this sole diversionary route as well.

Mention has been made, on both sides, of an “Eye of the Needle” capacity study (Version 2.0, dated 13th January 2023) in guiding parties on bidding and offering for Week 40. However, it is now clear that this capacity study is not relevant to the Week 40 possession and is pertinent to a blockade strategy in 2026, with new infrastructure in place to support the outcomes.

With this in mind, and as pointed out by Network Rail in its Sole Reference Document (SRD), GB Railfreight cannot understand why Network Rail has still stated in Appendix D of its SRD that “bid schedule timings do not align to Capacity Study Report...” and “bid days of operation do not align to the days of operation in the Capacity Study Report...”

GB Railfreight accepts there has been some confusion with this “Eye of the Needle” Capacity Study, and exactly to which possessions it might apply, and that it no longer plays a part in this dispute.

Flexing Rights:

With regard to the exercising of its flexing rights, in this case, GB Railfreight believes Network Rail has the power to, and should use, the fullest extent of its entitlement of flexing in order to accommodate the Objective. The Objective is “to share capacity on the Network for the safe carriage of passenger and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services”.

The Network Code definition of a Flexing Right is “a right, exercisable by Network Rail in allocating a Train Slot in the New Working Timetable or relevant Working Timetable, or option (C) to vary a Train Slot sought in any Train Operator Variation Request”. Therefore, the ability to flex is applicable to Informed Traveller variations.

In addition, and specifically with regard to Timetable Variations with at least 12 weeks’ notice, Network Rail has the ability and entitlement to flex services using Conditions 3.4.7, 3.4.8 and 3.4.9 of the Network Code but has chosen not to do so.

These conditions clearly state that Network Rail has the ability to consult directly and indirectly affected operators, by 30 weeks out, on its proposals for a Restriction of Use in respect of the corresponding timetable week. There is then a requirement to seek to agree all Network Rail Variations to be made, including alterations to the current Working Timetable of directly and indirectly affected operators. To facilitate the planning of any Network Rail Variation, Network Rail may also then require any Timetable Participant to submit a revised access proposal in respect of any train slot.

It is clear to GBRf that Network Rail has the power to flex directly or indirectly affected operators in this case.

In Section 4.2.7 of its Sole Reference Document, Network Rail states that the potential re-timing of passenger services will “break the running plan” for them. Critically, this is the situation GBRf now finds itself in with the currently rejected Liverpool-Drax-Liverpool biomass paths.

The question must now be answered - why is it acceptable for Network Rail to arbitrarily choose to break the running plan and asset usage of GB Railfreight’s services and not a passenger operator? By its own admission, Network Rail appears to be highlighting an in-built bias towards passenger operators, not least as there was no evidence of Decision Criteria being applied at the validation and subsequent rejection stage.

During a visit to Network Rail’s office, on 1st November 2023, to attempt to unlock further amended paths for GBRf, the Informed Traveller team discussed the option of flexing passenger services to accommodate biomass trains but then resisted that action on the basis that “passenger operators would not be happy with an earlier re-timing”.

In GBRf’s view, this is not a new view of life, merely another example of Network Rail not appropriately administering its flexing rights and the Decision Criteria. More examples of this can be made available in the second part of this dispute, at a future date.

Application of Decision Criteria:

GB Railfreight notes that Network Rail has supplied some notes in Appendix M entitled “Considerations applied in the proposal of Possession 3774226” and subtitled “Application of Decision Criteria”, dated 9th November 2023.

This is the first correspondence that GB Railfreight has seen on any aspect of the Decision Criteria for our amended train slots and does not go into enough detail to be classed as due consideration for making capacity decisions. Moreover, how can Network Rail be retrospectively applying the Decision Criteria?

As recently as last year, the Office of Rail & Road letter “Timetabling and Network Code Change Requirements”, (dated 22nd February 2022) clearly states that an Infrastructure Manager needs to demonstrate with evidence that it has endeavoured to comply with access proposals submitted in accordance with the Network Code through consideration of relevant options. It must also have sufficient evidence to support its consideration and application of each of the Decision Criteria. None of that has occurred in this case.

Network Rail is well aware of the significance of power station traffic and this is especially true of Drax Power Station for which Network Rail has published a video entitled ‘Freight Escape -Episode Three: Powering the Nation’.

Quotes from the joint Network Rail/ Drax video include “[Drax is] a nationally critical operation.”... “Without rail freight Drax wouldn’t be in operation.”... “ Millions of people rely on Drax for electric”... “Without rail Drax would struggle to maintain power the UK grid so badly needs.

In addition, GBRf recently facilitated a joint visit on 25th September 2023 with some of Network Rail’s Freight Informed Traveller team. The tour emphasised the criticality of the railway supply chain to Drax in supporting the generation of electricity to the UK. It is, therefore, fair to state that Network Rail, throughout the organisation including Freight Informed Traveller, is well aware of the criticality of the supply of biomass fuel to Drax, both through physical site visits and tertiary briefings that Network Rail itself has made and continues make.

On an even more serious note, Network Rail has recently been facilitating a call on behalf of the DfT briefing about Winter energy supply, held jointly with Network Rail and freight operating companies. The DfT briefing states ‘The government risk register has power supply risk amongst the most significant’ i.e. the biggest risk to electricity supply.

Network Rail is engaging with the freight community on contingency plans, the perception being that Winter power supply is finite and fragile. In these circumstances, GBRf contends that any disruption to the delivery of fuel to a power station would unacceptably increase the risk of electricity supply disruption and ultimately some blackouts.

Seven trains currently rejected means seven cities the size of York could be without power for a day.

As of 17:00 on 14th November 2023, the following is true:

9 amended loaded biomass services have been offered, equals 15, 075 tonnes of fuel

1 empty and 6 loaded biomass services are rejected, this is where the numbers are different by one, equals 11, 725 tonnes short of fuel (43%)

(tonnage also includes 1 additional loaded biomass service lost due to rejected empty train)

Taking all the above into account, GB Railfreight wishes the Panel to determine that Network Rail has not carried out its duties according to the Network Code and is, therefore, in breach of contract. GBRf requires firm direction to Network Rail to re-work the amended plan by using the fullest extent of its flexing rights and appropriate and transparent use of the Decision Criteria. Network Rail needs to do everything in its power to accommodate access requests as per the Objective.

In the event of the Panel determining breach of contract, GB Railfreight seeks an award of damages against its loss of revenue. However, the risk of under-supply, causing electricity shortage, needs to be very much borne in mind.

Thank you

	<u>Severity 1</u> Access that impacts on a single service group or single operator	<u>Severity 2</u> Access that effects multiple service groups or operators and / or where capacity is shared by operators
Capacity Study [EAP]	<ul style="list-style-type: none"> •Isolated one off pieces of access that require minor retiming of less than 10 minutes •Regular diversions for Section 5 possessions •Regular diversions for a single piece of access •TSRs that require additional [x] with minor impact on train service (journey time extension no greater than 10 minutes) •Services required to start / terminate short where the planning solution is known 	<ul style="list-style-type: none"> •2 track timetables outside of normal Section 4 times •High Output possessions with TSRs and line blockages (pattern of services required to confirm line blockage times) •TSRs that require additional [x] for more than one operator •Diversionary routes where capacity will be shared (an understanding of hourly patterns or ability to fit the WTT quantum of trains etc) •Regular diversionary routes for multiple operators (e.g. via Northampton / Hertford Loop etc) where capacity is understood •Services required to start / terminate short where the method of working is not known
Output requirements	<ul style="list-style-type: none"> •Understanding of the impact on train service group and required capacity •Understanding the impact on standard possession opportunities •Detailed Traffic Remarks by CPPP stage. If post CPPP, included as part of proposal 	<ul style="list-style-type: none"> •Detailed structure for the amended train plan stating additional time, diversionary routes, capacity restrictions by operator and allocated capacity •Understanding the impact on standard possession opportunities •Detailed Traffic Remarks by CPPP stage. If post CPPP, included as part of proposal

	Severity 3 Access that effects one or more operators and that requires significant diversion or retiming (of greater than 15 minutes)	Severity 4 Double or Triple disruption to one or more operators Disruption that effects one or more operators on more than one route Severe disruption on a primary route of one or more operators
Timetable Study [EAP & Train planning]	<ul style="list-style-type: none"> •Standard hourly pattern either undeliverable or requires significant amendment (>15 mins) •Where an understanding of the impact on service patterns and connections is required (services back to booked / missing key stations etc) •Potential impact on train crew and unit resources for one or more operators (turnarounds at key stations potentially impacted etc) •Restrictive capacity and / or where booked connections are impacted at key stations (i.e. Birmingham New Street / Leeds / London Terminals etc) •Access that requires the thinning of services to provide capacity for diverted services or degraded working •Access that requires multiple operators to start / terminate at a station that has a complex method of working for turn back moves •Severe impact on ability to move Empty Coaching Stock (possessions effecting depot access or requiring significant retiming [greater than 15 minutes] or diversion) 	<ul style="list-style-type: none"> •Abnormal diversionary routes where capacity and / or the impact on train paths and connections is not easily or fully understood •SLW plans outside of Section 4 where capacity is constrained with significant journey time detriment (of greater than 15 minutes) •Where one or more operators are impacted by more than one piece of access on one or more routes •Where capacity via a diversionary route is severely restricted (single line / absolute block / congested routes / stations etc) •Where an understanding of the impact on service patterns and connections is required (services back to booked / missing key stations etc) •SX blockade of one or more operators' primary routes (WCML / ECML all line block e.g. Wigan / Watford)
Output requirements	<ul style="list-style-type: none"> •Standard hourly pattern established through detailed timings (as opposed to production of a full timetable for the specific period) •Platforming exercise to understand capacity around any restriction at multi operator stations •Single train timing exercise to understand impact on journey time detriment and / or impact of crew and resources •Train by train timing to demonstrate impact on ECS moves to ensure deliverability of train service •Detailed structure for the amended train plan stating additional time, diversionary routes, capacity restrictions by operator and allocated capacity from output of Timetable Study •Detailed Traffic Remarks for access proposed in V1 / V3 by V2 / V4. For access requested post V2 / V4 included by CPPP. If post CPPP, included as part of proposal 	<ul style="list-style-type: none"> •Full timetable study for every operator effected for the duration of the disruption (with the exception of ECS moves where not applicable) or •Standard hourly pattern to understand capacity through detailed timings (as opposed to production of a full timetable for the specific period) •End to end journeys to be assessed where applicable (e.g. services that cannot return to a booked path) with no piece of access to be treated in isolation •Decision Criteria grid populated to support capacity allocation •Detailed structure for the amended train plan stating additional time, diversionary routes, capacity restrictions by operator drawn from output of Timetable Study •Detailed Traffic Remarks for access proposed in V1 / V3 by V2 / V4. For access requested post V2 / V4 included by CPPP. If post CPPP, included as part of proposal

TTP2318 and TTP2320**Sixth Directions, issued on 22nd November 2023**

1. Network Rail ('NR') has sent an email to the Secretary requesting a meeting with the Hearing Chair to, '*...understand more clearly the powers which permit the ADC to request its proposed next action since ADC has already ruled on the matter in dispute without feeling that it needed any better understanding of policy issues*'. The text of NR's full email is attached for the benefit of all Parties.
2. It is clear policy that no Party should be able to meet a Hearing Chair while Disputes are still live. But all Parties are entitled to an understanding of my interpretation of the powers available to a properly constituted TTP.
3. Rule H1 in the Access Dispute Resolution Rules reads:
The purpose of a Timetabling Panel is to determine disputes referred to it by parties to an access agreement which incorporates Part D of the Network Code which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity including restrictions of use and train slots, in: (a) such an access agreement; or (b) the Access Conditions incorporated by reference in the access agreement in question.
4. I have no doubt that the issues raised by the Claimants in these TTPs fall within this broad definition. As the hearing was expedited because of the limited time available before Week 40, there was insufficient time to deal adequately with a number of the points arising before the hearing. Mindful of Rule H9(b), which requires, '*any determination which may affect the production of the railway operational timetable must be made within the necessary timescales to allow that timetable to be published*', therefore, for example, in the Fifth Directions I said that I would work on an assumption about NR's flexing rights, as there was insufficient time to resolve that question of contractual interpretation before or at the hearing, but it was clear at the hearing that this is a live issue between the Parties which appears not to have been brought to a TTP previously to seek a ruling.
5. The Interim Determination, to be issued as soon as possible, leaves open a number of legal questions which are within the competence and power of a TTP, regardless of the fact that the Interim Determination will give directions to NR to deal with the most urgent issues in dispute. (To assist the Parties the details of the TTP's Interim Determination of these issues was given orally at the conclusion of each section of the hearing and incorporated in a note circulated to the Parties.) My understanding is that the Claimants still wish to have these questions determined because of their impact on future access planning and possible future disputes.
6. Rule H16 requires disputes to be administered in a way which includes reflecting the objective importance of the dispute to the Dispute Parties; the complexity of the issues; and the significance (if any) of the issues involved to the railway industry. These Disputes have revealed a clear difference in the understanding of a number of points, including how diverted services should be timetabled, as well as

a lack of common understanding of how Capacity Studies and Timetable Studies should be handled which I believe are significant issues for the railway industry. Looking only at the Trans-Pennine route, the extent of blockades in the near future indicates a need for decisions on contractual issues which fall within the competence of a TTP to avoid a series of future disputes which seem likely to arise if future timetable planning suffers from the same differences of understanding revealed in these Disputes.

7. It was for this reason that I sought comments from the Parties on the issues that I had set out as questions in the Fourth Directions. It seems possible that any discussion of these issues, some of which are necessarily broad, might involve areas clearly beyond the competence of a TTP to determine, in which case they might form part of the final Observations and Guidance, which - as the term implies - is a non-binding section of the determination. (This guidance is required by Rule 51(j)(iii)). But given the very stark differences revealed at the hearing between the Parties' understanding of the effect of some of the provisions of Part D, and documents such as Timetable Planning Rules and Engineering Access Statements incorporated by reference, then to have a determination on these issues of contractual interpretation, based on actual facts, seems to meet the legal requirement of finalising these Disputes as well as providing useful guidance to the industry.
8. This reasoning will appear in the Interim Determination and would, I hope, therefore be subject to the right of NR to appeal this process.

[Signed on the original]

Clive Fletcher-Wood
Hearing Chair, TTP2318 and TTP2320

Text of email from NR to ADC Secretary, dated 20 November 2023 at 16:05

[Name redacted]

TTP2318 and TTP2320: The longer term policy issues

We acknowledge receipt of the Summary of the Interim Determination and, within it, we note the longer term policy issues section. We also acknowledge that last Wednesday's hearing decided upon the short term issues in these disputes and provided relief to GB Railfreight and Freightliner respectively.

On the longer term policy issues, we are not today submitting any amendments or additions to those questions posed by the Hearing Chair, though we do feel the questions need recrafting and rebalancing.

We would like to request a meeting with the Hearing Chair to discuss the proposal for how the longer term policy issues should be dealt with. While we appreciate ADC and the Hearing Chair wanting to help with guidance on the wider policy issues that TTP2318 and TTP2320 might have highlighted, we do not think ADC the appropriate mechanism through which to discuss and decide any necessary policy changes, now that the claimants' disputes have been ruled on.

We would welcome the opportunity to understand more clearly the powers which permit ADC to request its proposed next action of Network Rail since ADC has already ruled on the matter in dispute without feeling that it needed any better understanding of policy issues.

We wish to cooperate in all matters as best we can but feel a discussion first would be to everyone's benefit at this early stage.

Kind Regards

[Name redacted]