TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Final Determination in respect of dispute references TTP2318 and TTP2320
(following a hearing held in London, on 15 February 2024)

The Panel:

Clive Fletcher-Wood	Hearing Chair

Members appointed from the Timetabling Pool

Quentin Hedderly	elected representative for Non-Franchised Passenger Class
Richard Parsons	appointed representative of Network Rail

The Dispute Parties:

GB Railfreight Ltd. ("GBRf")

Tom Mainprize	Head of Timetabling
Ian Kapur	Head of Strategic Access Planning

First Greater Western Ltd. ("GWR")

Matt Cambourne	Head of Train Planning

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
Matt Allen	Head of Timetable Production
Adam Hodgson	Policy Advisor

XC Trains Ltd. ("XC")

Lee Tuttle	Head of Planning

The Involved Parties:

Arriva Rail London	Jack Alder
DB Cargo (UK) Ltd.	*(unable to attend)*
First MTR South Western Trains	Andrew Pennington
Govia Thameslink Railway Ltd.	Robert McCarthy
Northern Trains Ltd.	Andrew Allwright
TransPennine Trains Ltd.	William Murchison

In attendance:

Tamzin Cloke	Committee Secretary ("Secretary")

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A Background and Jurisdiction

1. The full background and jurisdiction of these disputes can be found in Annex A, which is the Interim Determination for TTP2318 and TTP2320.

2. I had previously 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. In its consideration of the Parties' submissions and its hearing of the Disputes, the Panel was mindful that, as provided for in ADR Rule A5, it should 'reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.

4. 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
– "CRC" means the Class Representative Committee
– Decision Criteria means Network Code Condition D4.6
– "NWT" means New Working Timetable
– "ORR" means the Office of Rail and Road
– "Part D" means Part D of the Network Code
– "PfC" means Proposal for Change, as defined in Part C of the Network Code
– Restriction of Use (possession) ("RoU") has the meaning defined in the model Track Access Contract
– "SRD" means Sole Reference Document
– "STP" means Short Term Plan(ning), as outlined in D3 of the Network Code
– "TP" means Timetable Participant
– "TPRs" means Timetable Planning Rules
– "TTP" means Timetabling Panel
– "WTT" means Working Timetable

B History of this dispute process and documents submitted

5. The history of this dispute process and documents submitted, up to and including 15 November 2023, can be found at Annex A.

6. On 16 January 2024 NR served its SRD, in accordance with the amended dispute timetable as issued by the Secretary.

7. On 06 February 2024 the remaining Dispute Parties served their SRDs in accordance with the amended dispute timetable as issued by the Secretary. These were helpfully separated between one SRD from the freight operators and one from the passenger operators.

8. Arriva Rail London Ltd.; DB Cargo (UK) Ltd.; First MTR South Western Ltd.; Govia Thameslink Railway Ltd.; Northern Trains Ltd. and TransPennine Trains Ltd. declared themselves to be Involved Parties. All, save DB Cargo (UK) Ltd., were represented at the hearing.

9. Between the first and second hearings six Directions Letters were issued, as follows. All Directions Letters can be found on the Committee's website.

10. On 22 November 2023, in response to an email from NR to the Secretary raising an objection to the process I had outlined for resolving the disputes (namely, two separate hearings) and asking for a meeting with me, I issued the Sixth Directions, clarifying the legal thinking behind this decision. That reasoning appeared in the Interim Determination (Annex A).

11. On 30 November 2023, in response to submissions made by several of the Dispute and Involved Parties (all had the opportunity to comment, not all made submissions), I sent Seventh Directions containing a suggested final list of issues to be determined and inviting NR to comment by 07 December 2023. NR was also asked to propose a date by which it could provide a SRD to address the list of issues to be determined.

12. NR responded on 07 December 2023, advising that it could submit a SRD by 19 January 2024, however it said it was taking urgent legal advice on the process I had adopted and reserved its right to object on the basis that it considered that I had no power or jurisdiction to determine matters beyond the hearing on 15 November 2023. NR also reserved the right to withdraw from the Disputes on that basis. NR had no comment on the content of the questions.

13. On 11 December 2023 I responded, via the Eighth Directions, stating that whilst a Claimant could withdraw its claim at any stage, I did not consider that NR had the right to withdraw from proceedings. If it were to do so the Disputes would continue. While I would be required to achieve fairness and would ensure that views expressed by then by NR were tested in the second hearing, I could not act as an advocate for NR. Further, that course of action did not strike me as helpful to the industry, nor would it comply with the duty of cooperation laid on all industry parties by the ADR Rules (A9(a) and (b)). These Directions confirmed the format that the SRDs should take, using my powers under Rule H16 to vary the procedures, and also set deadlines for submission of SRDs and notification of any further Dispute Parties or Involved Parties. NR later withdrew from its suggestion that it might withdraw from the Disputes, and re-confirmed this orally on the hearing day.

14. Owing to difficulties in securing a suitable hearing date the submission deadlines were amended with the consent of all Parties by the Secretary, via email, on 20 December 2023. At the same time this necessitated changing the NR Timetabling Pool Member on the Panel (from Maria Lee to Richard Parsons). In many TTPs this would be extremely undesirable, however in TTP2318 and TTP2320 detailed knowledge of the first hearing was not necessary to deal with the separate question of legal entitlements. None of the Parties raised any objection to this substitution.

15. On 29 December 2023 I clarified, via the Ninth Directions and in order to assist the Parties with drafting their SRDs, that there was likely to be a distinction to be made between a contractual Flexing Right as defined in Part D, and all powers of NR to amend the existing WTT services in order to allocate capacity on routes affected by a Network Rail Variation.

16. On 18 January 2024, following my review of NR's SRD, I issued Tenth Directions, indicating that my preliminary view was to agree with NR's interpretation of the powers available to the Panel, that I was "required to determine the legal entitlements of the original Claimants in these TTPs relating to NR's Decisions in Week 40's STP" only. To assist, I also drew the attention of the Parties to the persuasive authority emerging from TTP493/494/495 relevant to these TTPs, in addition to TTP1331 and TTP1376, which had been raised by NR.

17. Following the submission of the two remaining SRDs, I issued final (and Eleventh) Directions on 07 February 2024. The freight operators having already indicated their willingness not to make opening statements, I confirmed that none of the Dispute Parties needed to make statements given the paperwork already submitted. I drew the Parties' attention to the ORR appeal determination of TTP1174, which was a binding authority where relevant. I also reminded the Parties that the Interim Determination had not only found failings in NR's application of the Decision Criteria, but also in the consultation process in both TTPs and reminded the operators that the determination would be solely confined to the disputes raised under references TTP2318 and TTP2320. Therefore I would not be able to give the broad directions requested in the freight operators' SRD. I also provided an indication of how I would like to progress through the remaining issues on the hearing day.

18. In the Eleventh Directions the Dispute Parties were advised – for the purposes of Rule H18(c) – that I did not think that any matter of law arose in the 15 February hearing. Instead I would be examining matters of contractual interpretation. One question of contractual interpretation which I flagged as important was whether D3.4.9 confers a free-standing power on NR, or whether it only applies in conjunction with the other provisions in D3.4.

19. The hearing took place on 15 February 2024. The Dispute Parties all waived their right to make opening statements. I suggested that it might be more constructive to treat the hearing as more of a debate than a conventional Dispute hearing; I am grateful to all Parties for the constructive way in which they acted on this proposal. The Parties responded to questions from the Panel concerning various points and were given the opportunity to make closing remarks. The Involved Parties were given the opportunity to raise points of concern.

20. 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

21. In its SRD, NR requested I determine that:

    (a) NR's interpretation of its Flexing Right under Conditions D3.4 and D4.4 was correct and was applied compliantly by NR in TTP2318 and TTP2320;

    (b) any breaches of contract by NR in TTP2318 and TTP2320, still determined to be present in the matter, related to factors outside of NR's Flexing Right. NR requested that these remaining breaches (if any) be clarified in the Final Determination.

22. NR sought Observations and Guidance on when a TTP dispute should be raised, and whether issues like those in TTP2318 should be more properly addressed via a dispute (and early hearing) against the engineering access, or whether disputing the Timetable Offer (as GBRf had done) was more appropriate.

23. In their SRD the freight operators asked that I determine that:

(a) when consulting on any RoU NR must consult all operators, including those indirectly affected, noting the significant geographical scope that might be involved for long-distance services;

(b) when validating revised Access Proposals for Severity 1-3 Restrictions of Use, where a full timetable study has not, and will not, be created, NR must, in the first instance, apply its Flexing Right pursuant to D4.4.1(a) to enable revised Access Proposals to be accommodated on diversionary routes;

(c) when validating revised Access Proposals for Severity 1-3 Restrictions of Use, NR must, where a revised Access Proposal cannot be accommodated in compliance with the relevant Rules, apply the Decision Criteria against all services, whether directly or indirectly affected by the RoU;

(d) when constructing an amended timetable for Severity 4 Restrictions of Use, NR should follow the process described in Network Code Conditions D3.4.8 to D3.4.12.

24. In their SRD the passenger operators asked that I determine that NR's interpretation of its Flexing Right within its SRD was incorrect and that NR did have the authority (as described through Conditions D2 and D3) and the duty (under D4.6) to carry out amendments to any schedule when planning for RoUs, whether services were directly or indirectly affected, during the process defined in D3.4, to achieve the Objective contained in D4.6.

D Relevant provisions of the Network Code and other documents

25. 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

26. The Dispute Parties' submissions were confined to their written SRDs. All Parties waived their right to make opening statements.

F Oral evidence at the hearing

27. My introductory remarks included my hope that during the course of the hearing it would be possible for the Parties to reach agreement on most - if not all - of the remaining issues in Dispute. I reiterated comments I had made in the Directions, that all Parties involved in these Disputes - including me - had been using language too narrowly and as a useful shorthand, but that this had potentially obscured some of the legal entitlements of the Parties. As an example, by using only the defined term Flexing Right, when it might be more appropriate to refer to NR's 'broader powers to flex using Part D'. I noted that, having now read the whole of Part D multiple times in preparation for the hearing, I wished to suggest that there were two sections of Part D that govern everything NR and TPs do: D4.6 and D4.2.2.

28. I moved on to draw the Parties' attention, once again, to the ORR Appeal Determination of TTP1174, which was binding on me, which like the other authorities which had been cited,

dealt with the construction of the NWT. (Exhaustive research prior to this hearing had failed to identify any authority relating to the construction of STPs). It was against this background that I asked whether NR - in the first instance - considered that the principles outlined in the ORR Determination could be read across *in principle* to the STP process.

29. Whilst agreeing with me on D4.6, NR disagreed about D4.2.2. Instead NR said that it felt D4.4 was more appropriate to TTP2318 and TTP2320. NR felt that D4.4.1 was the "STP equivalent" of D4.2.2 and linked more clearly to the processes outlined in D3.4 and D3.5.

30. I noted that this was a direct, but very welcome, contradiction to the proposition set out in NR's SRD on the application of D4.6 to STPs. NR agreed with me that failing to take a particular decision in timetabling matters could itself be considered a decision requiring application of D4.6. NR said it felt STP and NWT matters were distinct, but that the "structure for making decisions" was D4.6. At this stage there was more discussion with NR about whether NWT principles could be read across to STP. NR's view was that, as a high level principle it was possible, but that the Part D processes and triggers for each activity were different. I advised NR that - as Part D was silent on the matter - it was possible to make an inference that the NWT principles applied to the STP, but even if it wasn't I was possibly prepared to imply a term into Part D, noting the precedent on this point provided by the ORR in TTP1174.

31. NR then stated that whilst it was under a duty to endeavour to include all revised Access Proposals, where the STP differed from the NWT was that NR felt it did not have the ability, under Part D, to amend any operator's services where that operator had not been advised (consulted) that some changes might be necessary, namely that it could not use its power under D3.4.12 to flex services. I noted that if NR, for whatever reason, failed to consult, then an operator who was affected by a failure to consult (in this case, GBRf in TTP2318) would be left without a remedy when its services were rejected due to NR's inability to amend another operator's WTT slots. NR felt that the remedy offered by the existing TTP disputes process was sufficient and that any operator who didn't have confidence that NR had properly conducted consultation prior to TW-26 should raise a TTP dispute against the engineering access for failure to consult, rather than against the STP timetable offer.

32. Noting that we would discuss the latter issue later on, I then asked NR whether it felt Condition D3.4.9 was a stand-alone clause in Part D, or whether it relied on D3.4.8. If it was a stand-alone Condition it would confer a large power on NR to amend the timetable. NR requested a short adjournment at this stage, to discuss its response, which I granted on the basis that I was hoping we would be able to end the day with agreement on all remaining issues in dispute.

33. When the hearing resumed NR confirmed that it felt D3.4.9 was not a stand-alone provision and it could not be reached without stepping through the rest of the Conditions in D3.4. At this stage NR helpfully admitted that in TTP2318 it had not, corporately, understood the impact of the Transpennine Route Upgrade Project's engineering access on the indirectly affected operators in the Hope Valley. In NR's view, as the flexing right granted to NR in D3.4.9 was contingent on the previous parts of D3.4 - which includes consultation with indirectly affected operators - it had no ability to flex those operators who hadn't been consulted. NR agreed that a correct application of Part D would have involved dialogue with all affected operators - directly and indirectly - during the access planning process, and before the STP process.

34. Having agreed aspects of the legal entitlements of GBRf and FL in these disputes, NR then agreed that meant the broad principles of the construction of the NWT read through into the construction of the STP. NR felt that its own failures earlier on in the Part D process had set the rest of the process "up to fail" and heavily restricted the ability of NR's Capacity Planning team to find a suitable solution.

35. At this stage the other Dispute Parties were invited to comment. XC stated that it felt D4.4.1(a) also gave NR an ability to flex services that would have resolved TTP2318 and TTP2320, i.e. the ability to flex indirectly affected operators who had not submitted a revised Access Proposal. Invited to comment on the merits of D3.4.9 versus D4.4.1, NR said it did not believe that D4.4.1 allowed it to reopen the WTT on an unlimited basis; NR could only amend services that it had asked operators to rebid. XC asked NR to explain what would happen if a train was not rebid and remained foul of a possession; would NR flex it without consent? NR stated that if it had not consulted the possession (or the requirement for the amendment) then it would have no right to take the possession. It was agreed between XC and NR that usually senior-level discussions meant that a practical solution was found to enable the possession to take place. XC felt that taking a purely contractual approach would put NR's access plan at risk; NR replied that the route access planning teams must be sufficiently disciplined to avoid such situations and reiterated that the question was one of legal entitlement, not what happened through custom and practice.

36. At this stage I reminded everyone that: everything in Part D is subject to the Decision Criteria (almost, 'the greatest good for the greatest number'); that ORR has previously given guidance stating that NR and TPs cannot vary Part D by agreement, but can waive their rights under Part D, for example agreeing train service reductions via a trains meeting, with the operator saying 'for the greater good, I can agree to this'.

37. FL spoke next and expressed concern that, if D3.4.9 required NR to have previously given an operator an idea of what to bid and Severity 1 to 3 possessions (according to the Access Impact Matrix) did not require a full timetable study, it would be impossible for an operator to know exactly what to bid; operators were reliant on NR flexing them around other services. NR felt this was a small risk, given the number of possessions that take place on the Network, and the general understanding within the planning community about the impact of regular diversions. NR reiterated that it felt it had no right to flex services that had not been bid. NR drew a comparison with D4.3, specifically D4.3.1(b) (inability to schedule Train Operator Variation Request services that conflict with WTT paths). NR said if it was possible to draw comparisons between D4.4 and D4.2 then the same should be possible with D4.3.

38. At this stage I stated that, in my opinion, Train Operator Variation Request requirements were justifiably very different - D4.3 enables an operator to amend services for commercial purposes, D4.4 enables NR to carry out necessary maintenance and other works on the Network. I asked NR how indirectly affected operators would be identified. NR confirmed that it should take place during the access planning stage. NR confirmed, again, that it felt if it failed to correctly identify, and consult with, indirectly affected operators then it had no right to flex their services. The situation could be resolved via informal means, but that was not a question of legal entitlements. I asked what legal remedy was available if NR failed to consult. NR felt the only remedy was the one exercised in TTP2318 and TTP2320, namely referral of the timetable offer to the Access Disputes Committee, but that a TTP Hearing Chair would only be able to provide guidance and would not be able to enforce changes to the indirectly affected WTT paths.

39. Asked whether this interpretation would put the industry at risk of encouraging NR to fail to consult, NR responded that would be mitigated by operators being disciplined enough to raise a dispute against the engineering access earlier in the Part D process, probably at TW-26 (Confirmed Period Possession Plan publication) if it felt it had not received assurances from NR about available capacity, or felt NR had not consulted with the right operators. NR acknowledged that there might still be a risk that an operator would accept assurances from NR that were later unable to be honoured, leading to a dispute against the STP timetable offer.

40. XC's representative asked NR to confirm how far the consultation piece went; would NR consult all the way to the south coast for access affecting freight operators in the North East. NR responded that, in the - in NR's view - extremely rare occasion that end-to-end retiming was required then that was what should happen. NR noted that, given this was the first dispute that it was aware of where this was being discussed, that indicated the process - on the whole - had worked well for 25 years.

41. GWR felt that, given that the Decision Criteria underpinned every Part D decision, and they were silent on preserving WTT paths, that the Decision Criteria and particularly the Objective gave NR the right to flex indirectly affected operators who hadn't been consulted. GWR asked if NR agreed. NR responded, with an apology for repetition, and confirmed that its view was the same: NR had no power to amend the services of any operator that hadn't been consulted.

42. At this stage I observed that it was potentially the case that NR didn't have sufficient powers to enable it to plan the STP timetable, and this might be a matter for Observations and Guidance, unless it was agreed that D3.4.9 was free-standing. I advised the Parties that I had not made up my mind on the matter, but to my view it fell more to being free-standing. I asked NR whether it felt it needed more powers within the STP process. NR responded that, so long as it followed the Part D process correctly, it had sufficient power. NR was wary of having an open-ended right to flex WTT services to build the STP timetable; there needed to be more structure and a limit to geographical flex.

43. Transpennine Trains Ltd. requested to make an observation as it had made amendments, by consent, to enable a resolution to the practical issues in TTP2318. Its representative observed that he strongly agreed with FL that - without a full timetable study, and therefore for less disruptive pieces of access - it was not possible to make a STP bid for amendments when you were an indirectly affected operator. Transpennine services had been affected in odd hours and in inconsistent ways. He also noted that, as it was during the Christmas period, amendments were far easier to agree than at any other time of year and advance notice and consultation would usually have been necessary. He felt it was right and proper for indirectly affected operators to have their services at risk of amendment to deliver the best overall train plan, but agreed with NR that a 'free-for-all' with unlimited and unconsulted flexing rights would be unmanageable and unfair. XC's representative observed that he didn't think anyone was advocating a free-for-all and I reminded the Parties that NR's ability to flex is always constrained by the parameters of D4.6.

44. At this stage there was some disagreement between FL and NR about the potential knock-on impact of NR's position on its engineering access. FL felt that, if operators were uncertain about the timetabling outcomes, operators would dispute all access. NR felt this was taking an extreme position that would result in an extreme outcome, namely deterioration of Network quality. Following this, several earlier points, including about the

circumstances leading up to TTP2318 and TTP2320 were repeated, by NR, FL and GBRf. NR did not agree that the Access Impact Matrix, the outputs of which would inform the STP process, was part of the Network Code. I reminded the Parties that as it is published in the TPRs, it forms part of the Network Code and contractual matrix by reference.

45. FL remained concerned that, in circumstances like TTP2320 where a four track railway was reduced to a two track timetable, the indirectly affected operator would not be able to be amended because a full capacity study was not required. NR felt this was not a risk as it felt all operators were directly impacted by possessions of this nature, and therefore all operators would be consulted as a matter of course. NR felt there was also an onus on train operators to cooperate with each other, usually through trains meetings, and to agree which specific amendments needed making as that granular detail was outside NR's visibility (e.g. which services were of critical business or operational importance).

46. I asked NR whether it wanted a recommendation for any Part D amendments, or whether it was saying that Part D as-written was fine if it worked properly. NR said it would welcome Observations and Guidance - per the request in its SRD - on what could be done if Part D wasn't followed correctly, and that it would be willing to make a drafting suggestion for a Part D change to stiffen resolve and put a 'disputable point' into Part D around the issue of capacity studies. Something similar had been suggested as part of PfC 120, and could be used again. It would then be for the CRC and industry to make any required drafting amendments through the Network Code Part C (PfC) process.

47. Picking up a new point, GBRf said it felt the issue of consultation could be improved - and therefore NR empowered to use D3.4.9 more widely than at present - by use of generic Traffic Remarks in Versions 1 and 3 of the Engineering Access Statement. GBRf suggested a phrase like, 'operators may be required to have their services flexed to accommodate diverted trains over this route' would put TPs on notice, without requiring a level of detail that was impossible at such an early stage. NR agreed that some form of consultation was required for it to use D3.4.9 and reiterated that it could not flex without consultation.

48. GBRf disagreed and said it had multiple examples - both in Week 40 and other weeks - where NR had flexed without consultation. NR stated that these were irrelevant as they didn't relate to legal entitlements in Week 40. I intervened to say that NR was correct on legal entitlements, but that GBRf's examples were submitted at my request (which had gone to all operators) to assist the wider debate. It was agreed between NR and GBRf that Traffic Remarks could amount to some form of consultation, and I said this was a matter for Observations and Guidance, but NR felt it should also go further and make direct contact with an operator.

49. GWR stated that this was not just an issue for "big ticket items" but that it had been having issues with regular overnight sleeper diversions, resolving which had taken much planner and management time. It felt a generic traffic remark that enabled NR to use the flexing right in D3.4.9 would save much wasted discussion and escalation, and arrive at the same outcome.

50. Govia Thameslink Railway Ltd. requested to make an observation. It felt individual contact from NR was important for indirectly affected operators; it was not reasonable to expect it to review the Scottish engineering access documentation for impacts on the ECML South. It asked whether - if promised paths by NR that were later rejected (as in Week 40) - it would be able to dispute the engineering access at that stage (after the formal Part D

deadline for disputing the access had passed) on the basis that it had been mis-consulted. Both the Secretary and I advised the Parties that, as far as we understood the disputes process, it is not possible to dispute a Part D matter once the disputes deadline has passed. There might be an argument for breach of contract but this would not have a route via a TTP, it would be a matter for an Access Dispute Adjudication, and therefore there would be no remedy against the engineering access.

51. There was then some round-table discussion about whether 'holding disputes' against engineering access - subject to receipt of a suitable timetable offer - would be a solution. Opinion was split as to whether this would be helpful, as some operators used the process in this manner already, or whether it was wasteful and would artificially inflate the number of TTP references. NR felt that access disputes could be withdrawn if a written guarantee of a certain train plan was provided by NR; if that later failed to materialise then the operator could raise a dispute against the STP timetable offer.

52. I asked whether anyone had any further comments on this point. GBRf wished to reiterate FL's earlier point about operators not being able to submit a full revised Access Proposal for engineering access that led to Severity 1 to 3 outputs unless NR gave much earlier indication of the impact of the works.

53. There was some discussion at this stage about when Condition D4.6 applied to NR decisions. It was agreed that it applied to all NR decisions about timetabling and engineering access, but that NR would not be able to apply the Decision Criteria appropriately and adequately to a decision to take (or not) engineering access without some understanding of the impact of that access on the timetable.

54. We then moved on to consider what the Parties were asking for in terms of Observations and Guidance. There was agreement that D2.5.1(k) should be amended to remove the reference to "passenger vehicles" as the Parties agreed it should equally apply to freight. The Parties could not agree on whether the phrase, "provided that the vehicles have not left the network" should be removed, but did agree that would be a matter for the CRC - and industry - to resolve.

55. The passenger operators had noticed that the definition of Access Proposal in Part D erroneously referred to D2.4.1 instead of D2.5.1. It was agreed that I should make a recommendation for this to be corrected. FL noted that the National TPRs contained the correct reference to D2.5.1.

56. I asked the Involved Parties whether there was anything else they wished to say. The representative from First MTR South Western Trains Ltd. wished to express a concern about proportionality of TTP determinations and guidance; he did not wish the industry to find itself in the position that, as a result of a block at Stockport, other operators' services were being retimed in Southampton. Equally he felt that operators should not be so protected from the consequences of engineering access on other routes that they ended up with infrangible rights as that would not deliver good timetable outcomes and might "disincentivise good behaviour". He noted that the Operational Planning Practitioner and Access Planning Courses had trained 300 to 400 planners along the same principles that those present at the hearing agreed were the correct and proper interpretation of Part D. I reassured him that I was live to the issue of unintended consequences, and felt that nothing in this determination would run counter to the points he was making.

57. Arriva Rail London Ltd.'s representative reiterated a point made earlier by other operators that the issues experienced in Week 40 could also apply to much smaller pieces of access, for example those requiring outstabling at other stations. He felt that operators were caught in a difficult situation where, if they objected to access on the basis of lack of suitable train paths, they were at risk of being accused of endangering railway maintenance activities. I agreed with him that this was a key issue: how to fuse the requirements of the contract with the real world. I observed that it was almost gut feeling and identification of problems based on experience, which should have - as NR had earlier agreed - flagged TTP2318 before it was raised as a timetabling dispute. TTP2320 was less clear-cut (one train diverted on to a two-track railway). I reiterated that I was delighted that the Parties had been able to reach agreement on the legal entitlements of GBRf and FL during the hearing.

58. Arriva Rail London Ltd.'s representative raised a further question about consultation; what constituted 'adequate'? If the Traffic Remarks of a possession said that he needed to stable more units at Euston, affecting other WCML operators, would those operators be expected to notice that even if the possession wasn't directly affecting them. I advised that that might be a matter for a TTP hearing; 'adequate consultation' felt very similar to 'exceptional circumstances' in that one knew it when one saw it, but it was difficult to define in advance.

59. At this stage XC wished to make another point about D4.4.1, but through discussion it was agreed that point had been made, and resolved, earlier. It was agreed again that neither operators, nor NR, wished for the STP process to become a 'free-for-all' in terms of flex. NR clarified that it did not agree with the operators' SRDs that NR had an absolute duty to flex, but it did agree that it had a duty to consider D4.6, in deciding whether to accommodate or whether not to do so, which might require the use, or the avoidance of, flex. The freight operators also, in response to a question from the Panel about the drafting of their SRD, confirmed that they now aligned with this view.

60. The Panel also asked First MTR South Western Trains Ltd.'s representative whether he was concerned that the principles of reasonableness and the maintenance of infrangible rights - which he had raised earlier - conflicted with each other. He said he was only concerned if the determination led to an absolute expectation that NR would be required to flex, as that would make timetabling impossible. I reminded everyone that everything in timetable planning was subordinate to D4.6, so that interpretation of the expectation laid on NR was not possible.

61. The hearing concluded with thanks to all for the agreement that it had been possible to reach through discussion, and a reminder that the onus was not just on NR but also on TPs to engage constructively with the process so that NR had access to the right information at the right time.

G Analysis/Observations and Guidance

Analysis

62. As already explained, exhaustive research had identified a number of authorities, both binding and persuasive, dealing with NR's duties and responsibilities when constructing the NWT, but this appeared to be the first Dispute which was required to define NR's duties and responsibilities in constructing STPs to reach a hearing. It was therefore important that

the Panel should decide the extent to which the authorities relating to the NWT applied to constructing STPs.

63. I do accept NR's view that this suggests that on the whole the system has worked well for 25 years, but that this often resulted from informal discussions and operators being willing to waive their legal entitlements. Therefore the Panel felt that clarity on the duties and rights flowing from TPs' legal entitlements would assist the industry.

64. At a relatively early stage of the hearing there was general agreement that regardless of anything that had been said in Parties' SRDs, all timetable planning was governed by the Objective and requires NR to comply with D4.6 in relation to the Objective and the application of the Decision Criteria. The discussion around D4.2.2 concerned the words that, '*Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals…*'. While I agree with NR's submission that D4.4 is specifically related to Network Rail Variations, nonetheless I conclude that the general enjoinder that NR should wherever possible accommodate all Access Proposals submitted to it can be read into the Objective when NR is planning STPs. Paragraphs 31 and 34 above indicate NR agreeing to this proposition during the hearing. It is on that basis that I concluded that D4.6 and D4.2.2 were the predominant Conditions which NR is required to observe.

65. I reached this conclusion because on reviewing Part D, while there are specific sections dealing with Train Operator Variations (D4.2) and Network Rail Variations (D4.3), I could find nothing to suggest that the overall general principles set out in D4.6 (as incorporating the general principle in D4.2.2) differed in any way between constructing STPs and the NWT. Indeed D4.6 is referred to in both D4.2 and D4.3, although in the latter case subject to the over-riding principles set out in D4.4.1(a) and (b).

66. If this reasoning is wrong, then I reach the same conclusion by implying a term into Part D, which is required for business efficacy.

67. The discussion on the requirement for NR to consult TPs whose services it might wish to flex using D4.4.1(a) was extremely important; especially as this Condition only applies to those TPs required by NR to submit a revised Access Proposal under D3.4.10. As discussed during the hearing, there was a risk of a perverse incentive being placed on NR by encouraging it to fail to consult potentially affected TPs if NR's powers arose only under D4.4, thus preventing it from flexing services which would free capacity for diverted trains.

68. As recorded above, there was a lengthy discussion on the remedies available – or not – to TPs whose services could not be accommodated because of a failure by NR to consult TPs whose services might be flexed to provide capacity. This brought the question of D3.4.9 to the fore: is it a free-standing power, or does it only apply if the previous steps in D3.4 have been completed?

69. It could be argued that if it were intended to be an entirely free-standing power, then why would D4.3 be needed at all? While D1.1.10(b) reminds us that headings are for convenience only and shall not affect interpretation, headings can nonetheless assist a reader. Although at first sight there appears to be a degree of duplication between D3.4 (and D3.5) and D4.4, this is explained by the fact that D3 is dealing with Variations to the WTT, while D4 is dealing with Decisions by NR. In effect, therefore, D3 is setting out the process to be applied, and D4 how NR shall reach Decisions; these provisions are therefore complementary, rather than mere duplication.

70. Reviewing D3.4.9 on this basis, as D3.4.3 – D3.4.7 concentrate on Variations arising from amendments to the Rules, the only D3 provision which must be read in conjunction with D3.4.9 is D3.4.8. D3.4.8 reads, '*After TW-30 but by TW-26, Network Rail shall consult with each Timetable Participant affected (directly or indirectly) by the Restrictions of Use proposed pursuant to Condition D3.4.7 and shall seek to agree all Network Rail Variations to be made*'. It is this provision on which NR relies in saying that it can only flex services if it has consulted the TP concerned.

71. While D3.4.8 requires NR to seek the agreement of TPs to proposed Network Rail Variations, the draftsman must have had in mind the real possibility of agreement not being reached, either by a TP resisting proposed flexing, or a diverted TP being refused a path at all, as examples. I conclude therefore that the real purpose of D3.4.9 is to come into play where agreement cannot be reached between NR and TPs. However one interprets it, it confers a very broad-ranging power on NR, as it reads, '*To facilitate the planning of any Network Rail Variation, Network Rail may require that any Timetable Participant shall submit a revised Access Proposal in respect of any Train Slot*'.

72. My interpretation is that this power can be used even if NR has failed to consult affected TPs, and the use of 'Train Slot' must have envisaged flexing WTT services. It is, therefore, a very broad power, but it complements the D4.4 provisions, rather than competing with them.

73. Whatever solutions are adopted, however, the concerns of a number of Parties about any 'free for all' emerging from STP planning are recognised. It was concluded that the correct application of D4.6 would prevent any 'free for all' of this kind.

74. The discussion on when a dispute should be raised was inconclusive. Broadly, however, NR felt that raising disputes earlier would assist, possibly at TW-26. An observation on this, not offered at the hearing, was that this would require more short-notice TTPs to be resolved quickly. The Access Disputes Committee has recently developed procedures (not requiring amendments to the ADR Rules) to achieve this. NR did accept that it remained open to a TP to dispute the STP Timetable Offer, as it is not always possible for a TP (as in TTP2320) to understand, based on available information, that there will be an issue with the STP Timetable Offer at TW-26.

75. The Parties agreed that two of the proposals within PfC 120, which ultimately was not established, would assist this process. They are:

    a. Change D3.4.10 to read, "Network Rail shall specify the aspects of the Access Proposal which need to be revised and its reasons for this, with the allocation of capacity aligned to the assigned Access Impact Matrix level;"
    b. Add a new D3.4.17 (based on current Part D numbering), "Any Timetable Participant dissatisfied with any decision of Network Rail in respect of the allocation of capacity under Condition D3.4.10(b) is entitled to appeal against any part of it in line with Condition D5."

76. A recommendation that these proposals should be re-considered appears below.

Observations and Guidance

77. These TTPs were not the appropriate forum to identify the best way for NR to alert, in particular, indirectly affected operators to a possible need to have their services flexed to accommodate diverted services. The CRC is recommended to review this issue to reach a workable solution, whether that be via changes to Part D or industry agreeing a common working method. Methods suggested during the hearing day included generic Traffic Remarks, published where indirectly affected operators would see them, more consistent use of trains meetings during the TW-30 to TW-26 process as well as direct phone contact between NR and indirectly affected operators.

78. It is recommended that the two proposals from PfC 120 which were not adopted, which appear in paragraph 75 above should be re-considered in the light of the outcome of these TTPs.

79. It was generally agreed that Condition D2.5.1(k) should also apply to freight, not only to passenger vehicles. There was no agreement, however, on the provision relating to the vehicles concerned not having left the Network. This is a further point which the CRC is recommended to address.

80. The passenger operators suggested that there was a minor error in the definitions section of Part D, in defining Access Proposal as having the meaning shown in D2.4.1, which does not actually explain what an Access Proposal should be. As pointed out by the passenger operators, in fact the Contents of an Access Proposal are defined in D2.5.1, which uses that heading. It is therefore recommended that this minor amendment should be made to Part D.

H Determination

81. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.

82. The principles in Part D governing the construction of the New Working Timetable apply equally to Short Term Plans developed in response to Network Rail Variations. This finding recognises the constraints applying to Network Rail and all Timetable Participants when developing Short Term Plans, but these constraints do not alter the principles which apply.

83. Given this finding, in the development of the Short Term Plans for Week 40 in each case, the Claimants were entitled to expect Network Rail to use its best endeavours to achieve the Objective, applying the Decision Criteria to all Decisions made by Network Rail. This might require Network Rail to flex the services of both directly affected operators and any operators indirectly affected by the Restrictions of Use necessitating the Variations. For clarity, there is no 'duty to flex' as such, but Network Rail's consideration of the ways in which it can achieve the Objective in any instance of Short Term Planning must extend to identifying where flexing, either by applying the defined Flexing Right or by using any other powers in Part D entitling Network Rail to flex services, will enable it to achieve the Objective, and to use all the powers available to it in such cases.

84. During the second hearing Network Rail admitted that it had not taken these steps in the relevant Week 40 Short Term Plans. As the Interim Determination provided a remedy to the

Claimants, no further remedy is needed now. The purpose of this second hearing was to determine the legal entitlements of the Claimants, which are set out above.

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
22 February 2024

Annexes

Annex A: Interim Determination of TTP2318 and TTP2320

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")	*(unable to attend)*
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")

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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 GBRf'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 4O50, 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 4O50 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 4O50 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.

Annex B Opening statements for TTP2318

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

Annex C The Access Impact Matrix, from the applicable National TPRs

	Severity 1 **Access that impacts on a single service group or single operator**	**Severity 2** **Access that effects multiple service groups or operators and / or where capacity is shared by operators**
Capacity Study [EAP]	•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	•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	•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	•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]	•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)	•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	•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	•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]