TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP2468
(following a hearing held in London, on 31 July 2024)

The Panel:

Clive Fletcher-Wood Hearing Chair

Members appointed from the Timetabling Pool
Andy Roberts elected representative for Franchised Passenger Class, Band 1
Maria Lee appointed representative of Network Rail

The Dispute Parties:

Freightliner Ltd. and Freightliner Heavy Haul Ltd. ("FL")
Chris Matthews Timetable Strategy and Rail Industry Manager
Barnaby Nash Track Access Manager
Robin Nelson Timetable Planning Manager – Intermodal

Network Rail Infrastructure Limited ("NR")
Rhiannon Saegert Customer Support Manager (Lead representative)
Adam Hodgson Policy Advisor
Megan Holman Customer Manager
Laura Mason Customer Manager
Georgie Newby Senior Commercial and Customer Relationship Manager

Involved parties:

Alistair Tait Direct Rail Services Ltd. ("DRS") *(attended virtually)*
Ian Kapur GB Railfreight Ltd. ("GBRf")

In attendance:

Tamzin Cloke Committee Secretary ("Secretary")
Nigel Oatway Committee Secretariat

Observers for professional development
Isaac Cole; Sarah McCarthy; Anthony Scott (all from NR)

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A Background and Jurisdiction

1. Dispute TTP2468 was raised by Freightliner Group (representing both Freightliner Ltd. and Freightliner Heavy Haul Ltd.) by service of a Notice of Dispute on 27 June 2024 in respect of NR's decision to issue a Network Code D8.5 Notice for the removal of unused Train Slots (a 'Failure to Use' Notice) ('FTU'). The dispute was brought on the basis that FL disagreed with the Decision and argued that NR had no entitlement to issue the Notice, as the non-use was due to circumstances beyond FL's control, namely an alleged failure on the part of NR to maintain the published route gauge to W8 standard.

2. I was appointed as Hearing Chair on 05 July 2024 and I 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 Dispute, 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:

ADC means the Access Disputes Committee
ADR Rules mean the Access Dispute Resolution Rules and "Rule" is construed accordingly
Chapter H means Chapter H of the ADR Rules
Licence means a licence granted under section 8 of the Railways Act
ORR means the Office of Rail and Road
Part D means Part D of the Network Code
SRD means Sole Reference Document
TAA means Track Access Agreement
TTP means Timetabling Panel
WTT means Working Timetable

B History of this dispute process and documents submitted

5. 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 Involved Parties by the Dispute Parties.

6. This was, as I understood the position, the first Dispute relating to a D8.5 Notice to reach a TTP. In the circumstances I thought it appropriate to offer guidance to the Parties on a number of points, including legal issues, to assist them in drafting their SRDs. The Directions issued on 09 July 2024 included setting out a preliminary view that as well as determining whether NR had acted reasonably in issuing the D8.5 Notice, the TTP was entitled and required to look at the Dispute more broadly, including establishing why FL had not been able to operate W8 gauge services.

7. Further Directions were issued towards making the hearing as efficient and effective as possible. All the Directions can be found on the ADC's website.

8. On 18 July 2024 FL served its SRD, in accordance with the dispute timetable as issued by the Secretary.

9. On 25 July 2024 NR served its SRD in accordance with the dispute timetable as issued by the Secretary.

10. Direct Rail Services Ltd. and GB Railfreight Ltd. declared themselves to be Involved Parties. Both were represented at the hearing, however due to technical issues DRS was not able to attend the first part of the hearing. I confirmed to DRS that I did not - and do not - believe there was any prejudice resulting from DRS not being able to observe the first part of the hearing. When DRS was able to join, its representative was provided with a summary of the proceedings so far.

11. On 26 July 2024 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that so far as there were any relevant issues of law, the issues to be determined were ones of contractual interpretation. In response to statements made by both Parties in their submissions prior to the hearing I confirmed that it was clear that as a matter of law there is no contractual link between Part D and Part G of the Network Code, and I assumed that the same applied between Part D and Part J. I noted, in my view, this did not bar the Panel from using guidance from Part J to the extent that it might assist, nor from being informed about the Part G process where it might be relevant on the question of NR's reasonableness in issuing the D8.5 Notice. Likewise, just as Part J is not an authority, so neither Party was limited to the provisions of Part J in its submissions. In considering reasonableness in this Dispute, I anticipated that the Panel would want to look beyond any guidance that could be gleaned from Part J. In the Directions issued with the Rule H18(c) Notice, the question as to whether the status of any section of track amounted to a legal entitlement in favour of an operator was specifically raised.

12. The hearing took place on 31 July 2024. 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 Involved Parties were given the opportunity to raise points of concern.

13. 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 this determination.

C Outcomes sought by the Dispute Parties

14. In its SRD, FL requested I determine that NR had acted unreasonably in issuing the D8.5 Notice, and that the Notice should therefore be rescinded.

15. On 29 July 2024, in response to my Third and Fourth Directions, FL advised that if NR was found in breach of contract it would also wish to seek damages for the loss of income that had arisen from the inability to operate the Train Slots, as well as the costs FL incurred in conducting further detailed survey work following the initial identification of the gauging issues.

16. NR asked me to uphold the D8.5 Notice and to confirm that it had acted reasonably.

D Relevant provisions of the Network Code and other documents

17. The versions of the Network Code Part D and the ADR Rules dated 22 February 2024 were applicable to these dispute proceedings.

18. Condition D8.5 is appended in Annex A. The Annex also includes extracts from FL's TAA and NR's Licence to which the attention of the Parties was drawn in Directions before the hearing.

E Submissions by the Dispute Parties

19. FL's Opening Statement is attached as Annex B.

20. NR's Opening Statement is attached at Annex C.

F Oral evidence at the hearing

21. In Directions issued on 30 July 2024 I requested a brief factual presentation from NR to answer questions relating to the inability of W8 trains to use the route between Huddersfield and Stalybridge, for which I had been asking since the Second Directions. This was to ensure that there was a common understanding between the Panel and the Parties on how this situation had developed. This presentation was given between FL's Opening Statement and that of NR.

22. NR confirmed that prior to August 2022 that part of route MVL3 between Stalybridge and the Route boundary with NR's LNE Route at Springwood Junction was published as W8 in the Sectional Appendix. From the boundary to Diggle was published as W7, with exceptions set out in the Sectional Appendix. FL advised that it carried out gauge clearance work because it had last operated W8 trains on this route in about 2018.

23. NR stated that the non-compliance with the published gauge arose from both track and structural degradation and maintenance works over time. NR was still trying to ascertain exactly what had happened. Potential options to restore W8 gauge included a combination of track renewals to lower the track, realignment and possible slab track where lowering may not be feasible. The Short-Term Network Change notice issued in January 2023 had been for a 2-year period, as that was the longest period permitted for Short-Term Notices.

24. A point discussed early in the hearing was NR's contention that the Train Slots included in the WTT had no legal right to run, as they had been rolled over from WTT to successive WTTs, even though under Clause 2.3 of Schedule 5 of FL's TAA they should have appeared in the WTT for no longer than 12 months. In response to a question in Directions, NR stated that had the trains been presented (with no gauging problems) they would not have been permitted to run. This is discussed further below. At this stage, however, I observed that the WTT is constructed by NR, so if these Train Slots should not have been rolled forward from WTT to WTT, then the responsibility for this and the remedy lay in NR's hands.

25. I also commented on a point made in NR's Opening Statement, which would bring the hearing to the question of whether NR was in breach of contract.

26. The hearing then turned to the remedy initially sought by FL, that the FTU Notice should be rescinded. FL was pressed on how rescission would assist, given that it had no business requiring it to use these Train Slots, whether of W8 or any smaller gauge. FL commented that it had an aspiration to use the Train Slots and wanted the capacity available to it to operate a service for a customer. FL agreed, however, that it had not used the Train Slots, because it could not do so with the assets available to it. This would apply until NR restored the Network to its published capability, which FL agreed would take time.

27. While FL did not accept that NR had acted reasonably in issuing the FTU Notice, it did accept that the Train Slots had no Access Rights and had not been used for several years. In relation to its wish to retain Train Slots in the WTT which it accepted that it could not use in the foreseeable future, I commented that although I could not immediately recollect which TTP was involved, I did remember criticising NR for filling the WTT with Slots for the Network Service Trains, which it knew that it was not going to use, thus preventing the use of that capacity by other operators. I saw FL's comment in the same light. [AFTERNOTE – This was in TTP625 et al].

28. Although at the stage of exchanging SRDs, and in later Directions, there had been a discussion about the relevance and admissibility of the provisions of Network Code Condition J4, to assist in deciding whether NR

had acted reasonably, in the event Part J was not referred to during the hearing beyond FL's Opening Statement, which repeated points FL had already made.

29. Given my view, expressed in Directions, that the first issue was whether the FTU Notice had been issued reasonably, with the second issue before the Panel being the underlying reasons which had prevented FL from using the Train Slots with W8 gauge trains, I felt that the hearing would be assisted by the Panel reaching a decision on the first issue at this stage. Therefore, I announced that I had determined that NR had behaved reasonably in issuing the FTU Notice.

30. At this point there was a discussion as to whether I should reach a determination on the point advanced by NR, that regardless of all else, FL had no legal right to operate trains in the disputed Train Slots, and that NR would have refused to let them run. Even though the argument had been alluded to in NR's SRD, I was not convinced that it was properly before the Panel in this hearing, given my view that the two issues to be determined were whether NR had acted reasonably in issuing the FTU Notice, and whether the underlying reason preventing FL from using the Train Slots was the gauging issue. I accept, however, that this was a finely balanced decision on this point. Were these circumstances to arise again, then I suggested that it would be more appropriate for a Dispute to be registered to reach a specific determination on the issue. I advised I would, however, refer to it in Observations and Guidance.

31. In moving on to the question of whether the fact that the physical constraints on the infrastructure meant that the published W8 gauge was not actually available, I reminded the hearing that reasonableness was not relevant in reaching a decision on whether there was a breach of contract. We were seeking to establish what FL's legal entitlements were in this respect.

32. In the Second Directions I had anticipated that NR would wish to refer in its SRD to the relevance of its TAA with Freightliner and the conditions of its Licence in its SRD. In later Directions, to assist the Parties, I set out the provisions from these two documents, which appear at Annex A.

33. Opening the second section of the hearing, I commented that it was clearly an accepted fact that the published information concerning gauging was incorrect, which I assumed that FL would regard as a breach of contract. FL confirmed that it did take this view. Unsurprisingly, however, NR did not agree.

34. I explained that I saw two limbs to this issue: firstly, whether there was a breach of the terms of FAA's TAA, secondly whether a breach of NR's Licence could amount to a breach of contract in its dealings with FL. On the second point, I explained that it was a Condition Precedent of the TAA that each Party had a *Railways Act* Licence (clause 2.3 of the preamble). In my view this provision had to be regarded as a continuing duty on both Parties to observe the conditions of the relevant Licence throughout the life of the TAA. Therefore, a failure to comply with the Licence became a breach of contract.

35. Using a deliberately different example, postulating making an Open Access application to operate on the South-Western Mainline, I made the point that a bidder would be entitled to rely on information in the Sectional Appendix in devising a train plan, so the Sectional Appendix, whether referring to line speeds or gauge, became an essential building block to enable Part D to work in constructing a WTT, whether on a short-term or long-term basis.

36. I referred to the extract from the preamble to FL's TAA that had been circulated before the hearing, that *'Network Rail shall maintain and operate the network in accordance with clause 4.1, with a view to permitting the provision of the services on the network using the specified equipment, in accordance with the permission to use under this contract'*, as well as the extract from NR's Licence concerning Maintaining Asset Information, asking NR if it contended that in publishing inaccurate gauging information relating to this route it was complying with the TAA and the Licence conditions. NR's response was that this was not quite what it had said, but nor was it conceding that there was any breach of contract.

37. There was then a discussion, in which I referred to a view made in an earlier TTP, not long after the ORR concluded in TTP1520 that damages could be awarded by a TTP, to the effect that if a TTP decision went against NR that would not of itself mean that NR was in breach of contract. Many TTPs turn on nuance in interpreting the Decision Criteria, so I had no hesitation in saying that not all breaches of the Network Code amount to a breach of contract.

38. In this case, however, we had the example of a route published as W8 gauge, while for reasons which were still unclear, at an unknown time, physical changes to the Network meant that it was no longer available for W8 trains. It seemed to be agreed that the correct steps had not been taken to alert operators to this situation. In response to a question from the Panel, FL confirmed that they had notified NR of their findings, and a Form RT3973 was revised by NR to record this. But it was only months later that NR issued a Short-Term Network Change Notice. While I assumed that FL regarded this as amounting to a breach of contract, NR would only go so far as accepting that going back to the earlier discussion on nuance, any failure on its part was not sufficient to be regarded as a breach of contract.

39. FL confirmed that its view was that this situation did amount to a breach of contract because the removal of published capability is enough to impact on any operator, no matter how small. In this case it had prevented FL from running a service, which was significant. Issues of this kind, such as a speed reduction, could reduce capacity. NR felt that whether FL had a legal right to run the trains was relevant, although emphasising that NR was not trying to re-open the D8.5 question. My response was that regardless of whether these particular trains had any right to run, the status of the track was relevant both to the TAA and NR's Licence. The position remained that NR admitted that it had failed to maintain the advertised gauge, but did not accept that this amounted to a breach of contract.

40. In response to a question from the Panel, FL did not agree that the preparation of an RT3973 form would be sufficient to comply with A5.7 of NR's Licence. This was because FL regarded the Sectional Appendix as the document that ultimately governs network capability, and the process for changing it is Network Change. While NR agreed that the revised RT3973 gave the correct information, it did not disagree with the contention that the Sectional Appendix should be maintained and changed through the Network Change process.

41. Neither Party felt that there was a need to make a closing statement as they felt that the Panel clearly understood the issues.

G Analysis/Observations and Guidance

42. On the question of the FTU Notice, the issue seemed relatively simple. The Train Slots had not been used for a long time and there seemed no likelihood of FL being able to use them in the foreseeable future. Whether or not any other operator wished to use them was not a point before the hearing. Given this, it was difficult to see how the Panel could reach any other conclusion that NR had acted reasonably in issuing the FTU Notice.

43. The reasons for the decision not to address the question of whether the services had a legal right to run is discussed above.

44. As far as the issue of breach of contract is concerned, any determination that NR is in breach of contract will always be a question of degree. It must be noted that the Network Code, of which Part D is an integral part, is incorporated into any operators' TAA by reference. (It is Clause 2.1 in FL's TAA). The importance of publishing and maintaining accurate information of network capability was one to which the Panel accorded a high degree of significance, especially given the importance of accuracy in the Sectional Appendix as a building block in constructing the WTT. This was reinforced by a letter on this subject from the ORR, sent to NR in 2023 and published by the ORR, which had been drawn to the Parties' attention before the hearing (and which appears

as Annex D). It was therefore not difficult to reach the conclusion that the circumstances which prevented FL from running W8 trains on this route amounted to a breach of contract.

Observations and Guidance

45. Operators only have a limited time to raise a Dispute. Only a very small number of registered Disputes ever get anywhere near a hearing, which should give time for a Claimant to consider carefully what remedy it will seek from a TTP. While I can understand why FL wished to bring this Dispute to a hearing, I never understood the practicality of seeking recission of the FTU Notice. All operators are recommended to identify remedies which are practical and capable of implementation when drafting their SRD for a TTP (or any other hearing).

46. Having drawn attention to the fact that FL's Train Slots should not have been maintained in the WTT for more than 12 months to comply with the TAA, NR is recommended to identify any other examples of Train Slots remaining in the WTT longer than permitted by relevant TAAs, and rectify them.

47. During the hearing I pointed out that if the Panel were to find that there had been a breach of contract, it was entitled to award damages to FL. However, the ORR has made it clear that a TTP's power is limited to an award of damages in principle, but can go no further. It is up to the Parties to seek to agree on the amount of damages to which a Claimant is entitled, following standard legal practice. If the Parties cannot agree, a fresh Dispute must be commenced, but this would not be to a TTP. I was not aware of any dispute of this kind having been commenced.

48. While not pre-judging the issue, I observed that in this case it would be open to NR to argue that FL had suffered no loss of profit for being unable to operate W8 trains, as it was not entitled to run these trains in any event. I observed that in any event it was surprising that there should be such a fundamental disagreement between the Parties on how D8.5 should operate in such circumstances, and that they were advised to seek to resolve the issue in discussion, involving the wider industry if it were thought that these circumstances might arise elsewhere.

49. I also commented that losses proved by FL could be recovered through a Network Change claim, or in this case because of the finding of a breach of contract. But there could not be double recovery, so that any specific loss recovered through the breach of contract route could not be recovered through Network Change, or vice versa.

50. NR is recommended to review its processes for identifying circumstances which might affect the published gauge clearance on any section of track, and the processes to be followed, and how promptly, once such non-compliances are identified.

H Determination

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

52. That NR acted reasonably in issuing the FTU Notice pursuant to D8.5.

53. However, the failure by NR to maintain the published W8 gauge on this route, and to correct the published documents once it was clear that they were no longer correct, amounts to a breach of contract, both directly through failing to comply with FL's legal entitlements set out in its TAA, and indirectly because it is a breach of a Licence condition, which amounts to a breach of contract. FL is therefore entitled to an award of damages in principle, such damages to be agreed between the Parties with a fresh dispute – not to a TTP – being commenced if they cannot agree.

54. No application was made for costs.

55. 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
08 August 2024

Annexes

Annex A: Network Code Condition D8.5, extracts from FL's TAA and NR's Licence

Network Code Condition D8.5

8.5 Removal of Train Slots obtained by a Train Operator that are not being used

8.5.1 Where:

(a) A Train Operator has obtained Train Slots in the Working Timetable; and
(b) the Train Slots are not underpinned by a Quantum Access Right; and
(c) Network Rail acting reasonably, considers that the Train Slots are not being used;

then Network Rail shall notify the Train Operator of its intention to remove the Train Slots from the Working Timetable.

8.5.2 Upon receipt of a notice under Condition D8.5.1, the Train Operator shall respond to Network Rail in writing within 10 Working Days stating that it either accepts or disagrees with Network Rail's decision.

8.5.3 If the Train Operator disagrees with Network Rail's decision under Condition D.8.5.1, then in addition to its response under Condition D8.5.2, it shall also at the same time refer the matter for determination in accordance with the ADRR.

8.5.4 If the Train Operator fails to respond to Network Rail in writing within 10 Working Days of receiving a notice under Condition D8.5.1, it will be deemed to have accepted Network Rail's decision.

8.5.5 Where a Timetable Participant reasonably believes that sub Conditions D8.5.1(a) and (b) apply then it may report this to Network Rail who shall consider whether to remove the Train Slots from the Working Timetable in accordance with Condition D8.5.1.

8.5.6 Within 10 Working Days of making its decision following the process set out in Condition D8.5.5, Network Rail shall advise the Timetable Participant who made the relevant report of the outcome.

8.5.7 Conditions D8.5.1 and D8.5.5 shall not apply to International Freight Train Slots.

Extract from FL's TAA

4.STANDARD OF PERFORMANCE

4.1 General standard

Without prejudice to all other obligations of the parties under this contract, each party shall, in its dealings with the other for the purpose of, and in the course of performance of its obligations under, this contract, act with due efficiency and economy and in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced:
(a)network owner and operator (in the case of Network Rail)…

Extract from Network Rail's Licence

Maintaining asset information

5.7 The licence holder shall maintain:

(a) appropriate information about the Relevant Assets, other than (for the purpose of this condition) Relevant Assets which have been allocated to a Route Business, including information about their condition, capability and capacity; and

(b) appropriate collated information about the Relevant Assets on a network-wide basis.

5.8 The information maintained under Condition 5.7 must be accurate and readily available.

Annex B: FL's Opening Statement

This dispute has been brought before the Panel today to seek a Decision on one primary matter – whether, having failed to uphold the requirements of it's licence and maintain infrastructure to the published standard, it is then reasonable for Network Rail to remove the Train Slots held by operators, from the Timetable which they have been unable to run as a result of Network Rail's failure.

Freightliner would ask the Panel to consider the implications should they reach a decision that Network Rail's actions are reasonable – would it also therefore be reasonable to remove Train Slots when lines are closed for significant periods of time, or where other infrastructure is unavailable? Can Network Rail start removing Train Slots in a situation such as the failure of Nuneham Viaduct near Oxford or the Dawlish Sea Wall?

The train slots subject to the Failure to Use notice subject to this dispute were included in the WTT via a Train Operator Variation Request during 2020, and, having established the paths in the WTT and the resourcing costs associated with them, Freightliner sought to start operating this traffic during 2022, but while undertaking due diligence checks, found the infrastructure to be outside of the gauging requirements to operate the traffic. Although the original customer has been lost to rail as a direct result of this failure, the Train Slots have subsequently been included by Network Rail in each WTT as a Rolled Over Access Proposal, with a view to re-establishing traffic on this route when the infrastructure is returned to it's published capability.

Freightliner are of the view that, had Network Rail maintained the published capability of the route, or even taken swift action to rectify the issue when first identified, which has not been the case and is now subject to an ADA, these Train Slots would have started operating and we would not be in the situation we find ourselves in today.

Network Rail previously upheld Freightliner's position on this earlier in 2024, withdrawing a Failure to Use against the same Train Slots after Freightliner appealed the Decision. It is evident from Network Rail's SRD that the primary consideration in acting reasonably to reach the Decision that has led to this dispute is DRS seeking to start a new traffic flow on the same route. Freightliner struggle to agree with this given:

- Condition D8.5 only removes Train Slots from the WTT, it does not provide a mechanism for the transfer of Train Slots between operators, meaning that the capacity relinquished by the Train Slots could be used by any other operator submitting a TOVR, any TOVR submitted to Network Rail would then be subject to full validation to ensure compliance with the applicable Rules.

- Condition D8.5 makes no reference to future use of capacity being a consideration when reaching a Decision to remove a Train Slot.

- Plentiful capacity on the route exists for both DRS and Freightliner to hold train slots at broadly similar times. There is no evidence in NR's SRD that all options have been exhausted and that removal of Freightliners Train Slots is the only way to enable DRS to obtain the Train Slots it requires.

- DRS would, at the time the Notice was issued, have been unable to bid into the removed 4M75 train slot as a Y path existed which was not subject to a Failure to Use Notice.

Part D of the Network Code provides very little guidance on the considerations Network Rail should apply when reaching a Decision on Failure to Use. Condition D8.5.1 (c) simply states that 'Network Rail, acting reasonably, considers that the train slots are not being used'. Reasonably is defined as 'according to reason, sensible' and Freightliner consider that, to apply this, Network Rail should act in a contractual and impartial way when considering removing a Train Slot from the WTT. In order to achieve this, Network Rail should make best endeavours to consider all guidance available to it, and refer to other parts of the Contract should they assist with this decision making process.

Freightliner acknowledge that no direct contractual link exists between Parts D and J, but, given the latter forms part of the contract between the parties, it would seem reasonable for the guidance contained within Part J to inform Network Rail's considerations prior to making a Decision. Indeed, Network Rail seek guidance from Part J in defining a reasonable non-use period as 13 weeks, which is deemed the standard non-use period across the freight industry. Freightliner believe that, had Network Rail considered the guidance of Part J, they would not have reached the Decision to remove these Train Slots, given the Train Slots had not operated for non-economic reasons beyond Freightliner's control and that Freightliner seek to operate these Train Slots in the future.

Seeking guidance from Part J would also have assisted Network Rail in considering Failure to Use in an impartial way – Freightliner are concerned that, given Network Rail's SRD states that a higher threshold is applied to Train Slots with Access Rights, that passenger operators, who have access to a 'general approval' process to establish immediate Access Rights, are, unreasonably, being considered differently to freight operators, who, typically, need to start operating services before applying for Access Rights, and then go through an extremely drawn out process to see this through to conclusion. By way of example, two recent Freightliner applications have taken over two years to reach sign off as a result of Network Rail internal bureaucracy. Were this process to work more effectively, and the published route capability have been maintained, Freightliner would have been able to establish Access Rights for these trains resulting in these considerations being applied contractually, and as such Freightliner believes it reasonable for them to be considered in this circumstance.

Finally, Freightliner note Network Rail's position that these Train Slots cannot run due to having existed as a TOVR for more than 12 months. Freightliner do not believe this to be the case, since these Train Slots have been included in the WTT through the PDNS process as ROAPs and bear no similarity to the definition of a TOVR provided within Part D. Freightliner would assert that, having been offered a Train Slot through a Part D process, they are entitled to operate that train slot through their TAA, and as such do not believe this to be relevant to this dispute.

Freightliner thank the Panel for their time today hearing this dispute.

Annex C: NR’s Opening Statement

Good morning,

This dispute focuses on whether Network Rail is correct in its decision to issue a Failure to Use Notice under Condition D8.5 of the Network Code regarding five Train Slots held by Freightliner between York Yard South and Trafford Park, and Trafford Park and Tees Dock.

We are pleased to note that the issues that remain live as part of this dispute have been reduced to examining whether or not Network Rail have acted reasonably in its exercise of Condition D8.5 of the Network Code.

We have noted the Chair’s requirements of Network Rail within the Fourth Directions and will address these within this opening statement.

In relation to point 6 of the directions, it is correct to say that had Freightliner sought to operate trains in these Train Slots, regardless of whether they were within gauge, we would have refused to let these run on the basis that there is no contractual right for them to do so.

In relation to point 7, we reiterate that these Train Slots were added into the Timetable in 2019 and 2020 respectively. Freightliner have no right to this Train Slot within their Track Access Contract, nor have they applied for one. Freightliner only made an approach to Network Rail over the status of the network after the exemption from obtaining Quantum Access Rights had already expired. It is submitted that the status of the network at that point in time was not relevant to the status of the use of this Train Slot. Whether the gauge was W8 or not, Freightliner had, and have, no contractual right to run in this Train Slot.

In response to point 8, the section of route relevant to Appendix A of the Short Term Network Change is advertised in the Sectional Appendix as W8.

In relation to point 10 and the status of the track, we submit that this dispute is about specific Train Slots and the issuing of a Failure to Use Notice under D8.5. It is not about the legal entitlements of Timetable Participants to run any other traffic.

We note the issues within points 10 through 12 and for clarity, we amend our position accordingly to accept that the status of this section of the network is relevant under the Track Access Agreement, however submit it is not relevant to the issuing of this Failure to Use Notice under D8.5. The status of the network as a legal entitlement is currently subject to an ongoing registered ADA in relation to Part G.

We have gone into detail of the facts around the Network Change in our earlier presentation.

Whilst there remains an ongoing dispute specifically in relation to Network Rail’s actions under Network Change for the section of the network described in the Short Term Network Change, we maintain that this forum is to discuss whether our actions have been reasonable under Part D. The chair has stated there is no contractual link between Part D and Part G. Should the Chair be minded to offer comment or guidance to the effect that there may be shortcomings as measured against other regulatory requirements, for example Part G or our Licence Conditions, it is submitted that neither historic error nor non-compliance with other areas of governance should prevent Network Rail from seeking to undertake the correct actions under Part D.

We maintain our decision that as Freightliner have no rights to run in these Train Slots, it must be reasonable for us to reach the decision that the Train Slots are not being used and cannot be used. We rely on the information contained within our defence submission to this matter and are happy to answer any additional questions that the Chair or Panel may have for us. Thank you.

Annex D: ORR letter to NR, dated 24 July 2023

Feras Alshaker
Director Planning and Performance

Paul McMahon
Director, Planning and Regulation
Network Rail
By email

Monday 24th July 2023

Dear Paul

Follow up to the Independent Reporter work on network capability

I am writing following the completion of an Independent Reporter review into Network Capability in June 2023. As you and I have discussed, the accurate recording of the capability of the network has been a longstanding issue. An understanding of the overall capability of the rail network is essential for meeting the requirements of Network Rail's Network Licence and to provide reliable and accurate information to operators.

The review was commissioned because of concerns about safety, performance and whether Network Rail was managing its obligations to provide information to train operators. Confidence in the quality and accuracy of network capability information is an issue for all operators. Freight train operators have highlighted a need to verify published information with different data sources and contacts before using it in their business processes and planning.

During the commissioning process, our concerns were increased by Network Rail's initial delay in finding a sponsor for this work (and indeed this lack of clear ownership and accountability appears to be at the heart of the matter).

The co-operation of the project teams during the work was good, though it is concerning that only one of the regions responded to the requests made by the Reporter, meaning that the report's conclusions are based upon limited data. In addition, a lack of resource was highlighted as preventing Network Rail from being able to fully investigate and respond to the Independent Reporter's queries of data anomalies within the time available for this review.

Further, a number of actions from the 2018 Independent Reporter review into this area had not been completed and these points do not support confidence that this critical process is being well-managed.

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This letter sets out areas where action is needed. Our draft determination specified metrics we are intending to use in CP7 to bring greater transparency to Network Rail's performance in this area and this would include a scheme for operators to report non-conformances. Ahead of this, I am seeking your confirmation of acceptance of the Independent Reporter review and its actions, these include:

- A capability baseline for CP7;
- A clear set of responsibilities and accountabilities for network capability, supported by appropriate senior-level governance and oversight; and
- Reviewing the process of managing temporary speed restrictions, to improve consistency and experience for operators.

This work is necessary because network capability is not only a core Network Licence duty but also underpins a number of specific HLOS requirements, for example the ability to improve performance and grow the volume of freight on the network.

Based on the inconsistencies identified in the Annual Return data received as part of this review, the Independent Reporter had low confidence that network capability is being reported correctly and that Network Rail's assessment of performance against the assumed baseline of the 2018/19 Annual Returns values can be relied upon.

Whilst understanding capability of the rail network is complex – it is closely linked to capacity and asset condition – it is fundamental to the Network Rail's customers' business. Based on this review findings, there does not appear to be an individual within Network Rail who is accountable for ensuring that network capability is accurately recorded and that these recommendations are implemented in a timely manner, I would be grateful if you could confirm to whom we should be addressing our concerns.

A plan for how Network Rail intends to deliver these actions before CP7 is required by 31 August 2023. To support during this process and continue the co-operative working, I can confirm that our lead for this will be Steve Dennis.

A copy of this letter will be placed on our website in due course.

Yours sincerely

Feras Alshaker