
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP2540 (following a hearing held in London, on 03 February 2025)

The Panel:

Matthias Kelly KC SC Hearing Chair

Members appointed from the Timetabling Pool

Peter Warhurst elected representative for Franchised Passenger Class, Band 2
Richard Parsons appointed representative of NR

The Dispute Parties:

GB Railfreight Ltd (“GBRf”)

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

Network Rail Infrastructure Limited (“NR”)

Sarah McCarthy Customer Relationships Executive (GBRf)
Georgie Newby Senior Customer and Commercial Manager
Adam Hodgson Timetable Policy Manager
Rob Neep Customer Relationships Executive (Freightliner)

Freightliner Group Ltd. (“Freightliner”)

Chris Matthews Head of Planning (Long Term)
Peter Graham Policy and Government Affairs Director
Mary-Kate Irving Senior Legal Counsel

Involved Parties:

Quentin Hedderly Regulatory Specialist (DB Cargo (UK) Ltd.)
James Tierney General Manager - Intermodal (Maritime Transport Ltd.)

Observing for professional development:

Neringa Zasimaviciute (NR)

In attendance:

Tamzin Cloke Committee Secretary (“Secretary”)

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A Background and Jurisdiction

1. Dispute TTP2540 was raised by GBRf by service of a Notice of Dispute on 19 November 2024 in respect of NR's decisions in relation to Removal of Train Slots (not holding Access Rights) using Network Code Condition D8.5. The dispute was brought on the basis that GBRf disagreed that NR had behaved reasonably in making the decision, which is a requirement of Condition D8.5¹.
2. On 18 December 2024, Freightliner notified the Committee Secretary that it considered itself to be a Dispute Party under ADR Rule H19, as it had initially contacted NR about the Train Slots in dispute using Condition D8.5.5. The Secretary notified GBRf and NR accordingly.
3. Following some lengthy preliminary discussion about hearing and submission dates, I was formally appointed as Hearing Chair on 07 January 2025 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.
4. 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'.
5. The abbreviations used in this determination are set out in the list of Parties above, in this paragraph 5 and as otherwise defined in this determination document:

ADR Rules mean the Access Dispute Resolution Rules and **Rule** is construed accordingly

Decision Criteria means Network Code Condition D4.6

Chapter H means Chapter H of the ADR Rules

Part D means Part D of the Network Code

SRD means Sole Reference Document

TTP means Timetabling Panel

B History of this dispute process and documents submitted

6. 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.
7. On 21 January 2025 GBRf served its SRD, in accordance with the dispute timetable as issued by the Secretary.
8. On 28 January 2025, NR and Freightliner served their SRDs in accordance with the dispute timetable as issued by the Secretary.
9. DB Cargo (UK) Ltd. and Maritime Transport Ltd. declared themselves to be Involved Parties. Both were represented at the hearing.
10. On 29 January 2025 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that the relevant issue of law was whether NR had behaved reasonably in issuing the failure to use notice under Network Code Condition D8.5.

¹ Network Code D8.5(c), "NR acting reasonably, considers that Train Slots are not being used".

11. The hearing took place on 03 February 2025. The Dispute Parties submitted opening statements, responded to questions from the Panel concerning various points and were given the opportunity to make closing statements. Given that the issue was straightforward, and had been thoroughly explored during the hearing, no Party wanted to make a Closing Statement. The Involved Parties were given opportunities throughout to raise points of concern.
12. At the close of the oral hearing, and following an adjournment where I considered the matter, I indicated to the Parties that I had reached the conclusion that NR had behaved reasonably and its decision should be upheld under Network Code Condition D5.3.1(b). I did so because all Parties were keen to know what the outcome of this dispute was as soon as possible. I then also confirmed that I would provide my written reasons at a later stage. These are those reasons.
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 the course of this determination.

C Outcomes sought by the Dispute Parties

14. In its SRD, GBRf requested I determine that:
 - i. In respect of the decision made by NR, “the Considerations” in Condition D4.6.2 should have, and had not, been applied at the point of making the decision under Condition D8.5 relating to Train Slots 4L24 and 4M24;
 - ii. On the basis of the evidence provided in GBRf’s SRD, that the decision made by NR to remove the three Train Slots in question was flawed and should be withdrawn;
 - iii. GBRf’s SRD was silent as to whether exceptional circumstances applied.
15. NR asked me to uphold its decision, and also for guidance on whether considering future use of Train Slots by an incumbent is part of NR’s duties to act “reasonably” when considering if there has been a Failure to Use under Condition D8.5.
16. NR additionally submitted that GBRf’s request (paragraph 14(ii) above) required me to find that exceptional circumstances existed. NR submitted that exceptional circumstances did not apply.
17. Freightliner requested that I determine that NR had acted “reasonably and correctly”, and that the decision should be upheld. Freightliner’s SRD was silent as to whether exceptional circumstances applied.

D Relevant provisions of the Network Code and other documents

18. The versions of the Network Code Part D and the ADR Rules dated 05 August 2024 were applicable to these dispute proceedings.

19. Conditions D4.6 and D8.5 were particularly relevant and are appended in Annex A.

E Submissions by the Dispute Parties

20. GBRf's Written Opening Statement can be found at Annex B.

21. NR's Written Opening Statement can be found at Annex C.

22. Freightliner's Written Opening Statement can be found at Annex D.

F Oral evidence at the hearing

23. It was common ground between the Parties that the following series of events had occurred:

- i. On 11 November 2024, under Part D8.5, notice was served by NR to GBRf, using the "non-use" provisions of D8.5;
- ii. On 19 November 2024, GBRf served a counternotice to NR's D8.5 Notice, explaining what it saw as its "*expected likely new contract for these Train Slots*";
- iii. On 06 December 2024, GBRf confirmed to NR that the expected commercial contract, would be "*using these Train Slots from end to end*";
- iv. On 16 December 2024, NR reaffirmed its decision to remove the GBRf Train Slots.

24. Following questioning, it was also common ground between the Parties, with reference to paragraph 16 above, that exceptional circumstances did not apply.

25. At the start of the hearing, and with reference to my Rule H18(c) note circulated by the Secretary, I advised the Parties that what a clause such as "acting reasonably" means in a commercial contract has been considered many times before by the Courts. Perhaps the most authoritative decision to date is *Braganza (Appellant) v BP Shipping Limited and Anor (Respondent)*. That was a dispute which was heard and determined by the Supreme Court on appeal from the Court of Appeal on 10 November 2024. It is reported under the reference [2015] UKSC 17. I discuss it further in Section G, below.

26. Having reminded the Parties of that decision, I asked a number of questions of each Party to establish the views of each as to whether, in their view, NR did have evidence upon which it could reach its decision. All ultimately agreed it did. GBRf added the caveat that while it agreed there was such evidence before NR, it did not agree that NR had reached the right decision. Everyone, in addition, agreed that the evidence was cogent, as NR had made appropriate enquiries and had established that the last time the Train Slots had been used was 03 November 2022. In addition, GBRf had held the Train Slots since May 2022. All agreed that NR did not behave arbitrarily, did not behave maliciously, did not act capriciously, nor did anyone allege that NR had acted in bad faith. No one alleged that NR had behaved dishonestly.

27. There was some disagreement as to whether NR was perverse in its decision. GBRf were of the view that because NR had not applied, in its submission, the Decision Criteria set out in Network Code Condition D4.6, that meant that it was procedurally flawed and therefore would have to be set aside. GBRf argued that could be seen as being irrational on the part of NR.

28. All Parties agreed that NR did take all relevant matters into account, however GBRf were of the view that whilst matters may have been taken into account, insufficient weight was given by NR to its contract or, as GBRf had described it, its future or potential contract with Maritime Transport as an end-user of rail freight. GBRf contended, in its SRD and during the hearing, that NR's decision in this instance differed from a previous case where NR had withdrawn its D8.5 Notice following GBRf providing evidence of future use of the Train Slots in question. GBRf said it was "unusual" and "irrational" for NR to have taken a different course of action in the case before me.
29. It was confirmed later in the hearing that the previous case related to a Train Slot that had been in the timetable for 16 days prior to NR issuing a D8.5 Notice and that, in that instance, GBRf held a signed contract to operate services for an end-user using the Train Slot(s). Ultimately, although all Parties agreed that there was a difference between 16 days and over two years of non-use, GBRf felt that NR's reasoning in the previous case (that there was a clear commercial need from an end-user) should also apply in the case before me. Both Freightliner and NR were clear that they felt the two cases were not comparable. I agree that the two cases are not comparable because the previous case related to a Train Slot that had been in the timetable for 16 days prior to NR issuing a D8.5 Notice and that, in that instance, GBRf held a signed contract to operate services for an end-user using the Train Slot(s). Ultimately, each case has to be judged on its merits and the previous case upon which GBRf relied was clearly distinguishable for those reasons.
30. All Dispute Parties agreed that NR did not take any irrelevant material into account.
31. That covered all the aspects of what could be said to be a reasonable / unreasonable analysis of a decision-making process.
32. There was then some brief discussion, similar to discussion that took place during TTP2468, on the Parties' views as to whether the 13 week 'non-use' period in Network Code Part J could act as guidance for NR when considering the meaning of 'non-use' under Condition D8.5.
33. The Panel Members then asked questions of the Dispute Parties. There was discussion about whether NR should have applied Condition D4.6 (the Decision Criteria) in reaching a decision under Condition D8.5. Freightliner took a different view from GBRf; it contended that applying the Decision Criteria would not have changed NR's decision. This was revisited later in the hearing, when both freight companies gave their views on which of the Considerations under D4.6 should have been applied, and how they should have been weighted.
34. GBRf then confirmed, in response to questions from the Panel, that it had applied for Access Rights for the Train Slots in question (not yet approved), and that the period of non-use, from November 2022 to the present, was unusual, however submitted that this was due to long lead times in the intermodal freight sector, particularly for ordering rolling stock. It also confirmed that on the date that NR took the decision under D8.5 it did not have a signed contract with Maritime Transport enabling it to re-commence operation of the Train Slots.
35. NR confirmed, in response to my question, that if its decision was upheld, any Timetable Participant could bid for the then-available capacity, including GBRf, Freightliner and Maritime Transport.

36. The Involved Parties were invited to make comments. Maritime Transport stated that it was in favour of the Train Slots being held by GBRf rather than Freightliner, but in response to my questions confirmed that it would not have accelerated its commercial processes to provide GBRf with a signed contract at the point NR made its decision. Maritime also felt that NR had a duty of reasonableness under D8.5 not just to liaise with the relevant Timetable Participant, but also the customers of that Timetable Participant to ascertain future use, which it felt was a relevant consideration under D8.5.

G Analysis/Observations and Guidance

37. At the heart of this dispute is the use or otherwise made by GBRf of three Train Slots which were allocated to it in May of 2022. The Train Slots in question are:

- i. 4L24(SX) 05:36 East Midlands Gateway GBRf – London Gateway GBRf (arr. 12:01).
- ii. 4L24(SO) 04:55 East Midlands Gateway GBRf – London Gateway GBRf (arr. 12:23).
- iii. 4M24(SX) 16:32 London Gateway GBRf – East Midlands Gateway GBRf (arr. 23:33).

38. Reading D8.5 gives rise to a simple, straightforward question, namely: Did NR act reasonably in considering that the Train Slots were not being used by GBRf? That is the question which I indicated in advance to the Parties would be the main issue before the Panel. All of the participants and Involved Parties agreed that was the sole question for determination, namely whether NR had behaved reasonably in serving a Notice of non-use.

39. As discussed above, I had indicated I would rely on *Braganza*. That case provides relevant guidance which all the Parties were familiar with, since I had made available to the Parties a full copy of the Judgment in that case. In fact, each Party was already aware of the provisions of the case, it having been referred to in a variety of decisions made by Hearing Chairs of this Committee beforehand, including the decision in TTP1880, chaired by Alexander Rozyski.

40. In *Braganza*, the Supreme Court was concerned with what it means to say that the decision by a contractual factfinder, must be a reasonable one. In other words, what is the meaning to be attributed to a contractual term where a decision taken by one of the parties to the contract must be capable of being described as a reasonable one.

41. In respect of a contract which provides for one of the contracting parties to make a decision based on a discretion (as is the case here), it has been held by the Supreme Court that the discretion must be exercised honestly and in good faith, and that the power to decide must not be exercised arbitrarily, capriciously or unreasonably.

42. In *Abu Dhabi National Tanker Co. v Product Star Shipping Limited (“Product Star”) (No. 2)* [1993] 1 Lloyd’s Rep 397 at page 404, Leggatt LJ dealt with the question of reasonableness in a commercial context viewed as against reasonableness in Judicial Review proceedings. He said:

“The essential question is always whether the relevant power has been abused. Where A and B contract with each other to confer a discretion upon A, that does not render B subject to A’s uninhibited whim. In my judgement, the authorities

show that not only must the discretion be exercised honestly and in good faith but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably”.

43. That was cited with approval in Braganza by Baroness Hale at paragraph 18 of her Judgment. The conclusion I draw from those cases is that the decision must be:
- i. Reached as a result of the discretion being honestly exercised;
 - ii. made in good faith;
 - iii. must not be arbitrary, capricious or unreasonable.
44. In assessing reasonableness, I have had regard to whether the decision-maker did have cogent evidence upon which to base the decision. In my view, the decision-maker did because NR learned that the Train Slots were not being used. That fact² was never challenged in the hearing. NR did take appropriate steps to investigate.
45. NR issued a Failure to Use Notice on 11 November 2024 in relation to these three Train Slots. It was quite clear that the sole reason for issuing the Notice was the fact that the identified Train Slots were not being used. It was agreed that there was a clerical error in the initial Notice in which NR incorrectly referenced DB Cargo (UK) Ltd. as the third party that had requested that NR investigate a potential failure to use. That was queried and NR reissued the Notice with the correct details to reflect the fact that it was Freightliner who submitted this request. That Notice was reissued on 06 December 2024.
46. That clerical error which was contained in the initial Notice, was agreed by all Parties (in my view quite rightly), did not in any way impact or bring into question the validity of the Notice issued under Condition D8.5. NR took the view that GBRf's rationale within their response to the Notice was that they did not feel that it was reasonable for NR to relinquish the paths as, according to GBRf, an active and live tender process³ was still to be decided by Maritime Transport for this traffic. I would merely comment that that was a prospective use in the future. When I asked questions of Maritime Transport, they clearly indicated that they were in discussions but had not legally committed to use the capacity available. Thus, they were in the position where it might have been used or it might not have been used. There was no firm commitment at the time upon which NR could have reached the conclusion that while the Train Slots had not been used, they were likely to be used in the future.
47. NR did make enquiries as to the level of use. There is before me (Annex E to this determination) an email from the Capability and Planning Department of NR which provided a “fairly simple answer” – “no runs for all three headcodes since at least 03 November 2022” – “4L24(SX) is on the list for the upcoming round of CMRG”. Thus, it was apparent that GBRf had not used these runs since “at least 03 November 2022”. Thus all three headcodes had not been used for just over two years.
48. Looking at D8.5, it is my view that this is a straightforward binary question that faced NR, namely were the Train Slots being used? The answer clearly was no on all of the evidence. The only point that GBRf could attempt to make was that they had the hope of using them in the future. But that was not certain. By the time the matter came before me, I understood Maritime Transport had committed to use the Train Slots. However, given that I have

² That the slots were not being used and the only use recorded was on 03 November 22.

³ A “tender” process is not an agreed contract.

upheld NR's decision as being reasonable in the circumstances, that capacity will now be released, and GBRf or Maritime Transport are, so far as I am aware, free to take part in a Part D Train Operator Variation Request to secure the Slots.

The role of the Decision Criteria

49. In its SRD GBRf relies⁴ on the Network Code D4.6.1 and says that “NR is required to decide *any matter*⁵ in part D on the basis that its objective shall be to share capacity on the network for the safe carriage of passengers and goods in the most efficient manner”.
50. NR says in its SRD that “*In our experience application of the Decision Criteria has never been requested for a D8.5 Notice because most (if not all) of it is not applicable*”. That is as may be⁶ but the obligation on NR is achieving the Objective. The Decision Criteria help focus the decision on achieving the Objective. NR goes on in its SRD⁷ to say that it undertook to “run checks on these Train Slots prior to making its decision. These checks confirmed that these services have not and are not running. GRBf are arguing that they may run in the future. GBRf remain silent within their SRD as to whether the trains have ever run or are currently running”.
51. I agree with NR that the use of the present tense in D8.5(c) is significant.⁸
52. During the hearing, GBRf placed some reliance on its argument that, in its submission, the Decision Criteria had not been applied and that rendered the process “flawed”.⁹ The Decision Criteria are set out in D4.6 of the Network Code. It is worth bearing in mind at D4.6.1 the Code provides:
- “Where NR is required to decide any matter in this Part D its objective shall be to share capacity on the Network for capacity on the network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective and providers of railway services (“the Objective”)”*
53. The wording of D4.6.2 is “*In achieving the Objective NR shall apply **any or all of the considerations** [my emphasis] in paragraphs (a) – (l) below.*” It then sets out the considerations. The structure of these provisions is designed to assist NR in achieving the Objective. Thus, it can be said that the Objective is central in decision-making and the words “*any or all*” imply that not all the considerations will always be relevant. The overriding objective¹⁰ is sharing capacity to achieve safety, efficiency, and economical use of the Network as set out in D4.6.1.
54. I have come to the conclusion that NR is obliged¹¹ by the Code¹² (an integral part of the contract) to achieve the Objective and that it should do so by applying the considerations (set out in the Decision Criteria). Those are broad in their scope. The obligation on NR is to

⁴ At paragraph 5.2 under the heading “Network Condition D4.6”.

⁵ GBRf emphasis.

⁶ I am not passing judgement on whether that is or is not so.

⁷ Paragraph 4.2.6.

⁸ See paragraph 63 below.

⁹ See GBRf SRD, para 5.2(g).

¹⁰ Set out at D4.6.1 in the Network Code and at paragraph 52 above.

¹¹ It is not a power to achieve, it is an obligation to achieve.

¹² Specifically D4.6.2.

achieve the Objective. It is assisted to do this by considering the considerations embraced by the Decision Criteria.

55. In my judgement that is what NR did here. These were Train Slots that had been allocated a long time before the Notice and had not been used, apart from one occasion. That is not making full use of the assets available. During the course of the hearing, all Dispute Parties agreed that what a non-use provision aimed to prevent was a “*dog in the manger*” approach, whereby one Train Operating Company – or perhaps more than one – is allocated Slots then fails to use them, when it may well be that others, such as, in this case, Freightliner, do wish to use them.
56. The point is made clear in D4.6 under the heading “The Decision Criteria”. At D4.6.1, it is said:

“Where NR is required to decide any matter, in this part its objective shall be to share capacity on the network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services (‘the Objective’).”

In my view, the Objective, as set out within the Network Code, was properly and reasonably met by NR in deciding to issue the non-use Notice.

57. It is alleged that NR did not go through, in a systemic way, the Decision Criteria. However, in my view, even if it did not that makes absolutely no difference because the outcome would have been precisely the same in any event. The fact is that GBRf was not using the allocated capacity, and the Slots fell fairly within the ambit of a “*Non-Use Notice*”. GBRf is, as I have pointed out, free to bid again in the upcoming round. NR sought to achieve, and did achieve, the Objective in D4.6.1.
58. NR, in its SRD, says, at para 4.2.7:

“GBRf argue that D4.6 is applicable but that there is no evidence of its application. In our experience, application of the Decision Criteria has never been requested for a D8.5 Notice because most (if not all) of it is not applicable. This is the first time that GBRf have raised this as an issue. While NR don’t think that application of the Decision Criteria is particularly helpful in failure to use cases, we have provided a version of the Decision Criteria that demonstrates our thinking regarding application of the same, which was Appendix 4 to its Submission.”

NR concludes: *“It is submitted that this supports the decision taken to issue the Notice.”*

59. I accept NR’s evidence that the document which it attached to its SRD does demonstrate its thinking at the time¹³ and that only consideration (e) is of some limited relevance (*maintaining and improving an integrated system of transport for passengers and goods*).
60. In my view, whether or not the Decision Criteria (D4.6.2(a) to (l)) were mechanically gone through with each individually considered does not matter because, in essence, it is clear to me that the decision which NR took was to further the overriding Objective. Had it gone through each consideration and evidenced that consideration in a contemporaneous document, that would have been of evidential but not necessarily probative value. I agree

¹³ Appendix 4 to NR’s SRD.

with NR¹⁴ that virtually all the Criteria to be considered were inapplicable in this case. It is against that background that I have concluded that the failure to record systematically going through each of the Criteria (a) to (l) would have made no difference. In my view, the overriding Objective was fully met by NR. The objective here was to make efficient and economic use of the assets, and that was not being done and could not, by definition, be done where Train Slots were allocated and not being used when some other train operator could or would use them.

61. I note in its SRD, GBRf's point that "*it is worth noting that, as anticipated, GB Railfreight has now been awarded a contract extension with these additional Train Slots starting from 1 April 2025, that needs to make use of these specific GB Railfreight Train Slots between London Gateway and East Midlands Gateway*". It is my clear view that NR can only be expected to decide on the issue which was before it at the relevant time on the facts as they had been established at the time. NR were entitled (indeed bound) to decide the issue on the material before it at the time. At the time this decision was taken GBRf hoped it might get a contract with Maritime Transport. GBRf had not used the slots since 03 November 2022 (just over two years of non-use). It was quite reasonable for NR to confine its decision-making to the facts and the realities before it at the time. It is not required to engage in speculation as to what the future may or may not hold. Nor is it obliged to give weight to an assertion that the train operator in question is in a tender process, because that process may or equally may not lead to the Train Slots being used, which is an issue for the future and not of assistance in deciding whether the slots are being used¹⁵. The decision is to be judged by what was before NR at the time it made the decision. In my view, what was before NR dictated only one outcome, namely the outcome it did decide upon: that the Train Slots were not being used.

Consideration of Future Use

62. NR, in its SRD and at the hearing, asked for clarity on whether it is reasonable to consider future use, as part of D8.5, as is currently drafted, in determining whether a failure to use has occurred. The rule is phrased in the present tense (**are** [my emphasis] not being used¹⁶). If it had been intended that future use should be considered the rule should have read "*NR acting reasonably, considers that the Train Slots are not being used and will not be used in the future*".
63. In my view, NR is under no such obligation to consider likely or possible future use for the reasons I have already articulated. It seems to me that that would have the effect of placing a burden upon NR to actually enquire of the relevant Timetable Participant as to whether it intends, or hopes to, or aspires to use them in the future. That would defeat the clear policy objective of D8.5, and would require NR and the Timetable Participant to potentially enter into speculation. The Timetable Participant in possession of Train Slots (in respect of which such a notice is issued) can of course inform NR that they have now got a contract and do genuinely intend to imminently use the Slot(s), it would then be a matter for NR as to what it decided to do at that point. It would not, in my view, invalidate the original decision. As I said at the outset of this determination, it is a binary decision – the Train Slots are either being used or not. There is, in my view, no obligation upon NR to go pushing the Timetable Participant that holds the Train Slots to let it know whether it intends to use them in the

¹⁴ The only decision which had to be made here by NR was whether or not the allocated Train Slots were being used. As such, on one view, the considerations had little relevance.

¹⁵ The wording of 8.5 (c) is "NR acting reasonably, considers that the Train Slots are not being used".

¹⁶ See Network Code Condition D8.5(c).

future or not. That would have the effect of transforming such a Notice into no more than a warning notice. That is not its objective or purpose.

H Determination

64. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.
65. I find that NR's decision was reasonable, was not flawed and therefore uphold NR's decision to issue the Network Code Condition D8.5, Failure to Use Notice to GBRf.
66. I find that, in taking its decision, NR achieved the Objective under Network Code Condition D4.6. See "The role of the Decision Criteria" (para 49-61 above).
67. No application was made for costs.
68. 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.



Matthias Kelly KC SC
Hearing Chair
12 February 2025

Annexes

Annex A: relevant extracts from Part D of the Network Code

4.6 The Decision Criteria

4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services (“the Objective”).

4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(l) below (“the Considerations”) in accordance with Condition D4.6.3 below:

- (a) maintaining, developing and improving the capability of the Network;
- (b) that the spread of services reflects demand;
- (c) maintaining and improving train service performance;
- (d) that journey times are as short as reasonably possible;
- (e) maintaining and improving an integrated system of transport for passengers and goods;
- (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
- (g) the content of any relevant Long Term Plan and any relevant Development Timetable produced by an Event Steering Group;
- (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
- (i) mitigating the effect on the environment;
- (j) enabling operators of trains to utilise their assets efficiently;
- (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Capacity to which the Strategic Train Slot relates; and
- (l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.

4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.

4.6.4. The Objective and the Considerations together form the Decision Criteria.

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.

Annex B: GBRf's Written Opening Statement

General Statements:

In this timetabling dispute, brought about by the application of D8.5 of the Network Code, and regarding non-use of three Train Slots between London Gateway and East Midlands Gateway terminals, GB Railfreight has stated in its Sole Reference Document that, on 6th December 2024, a contract was awarded to it to run in these slots for our customer. A simplified timeline is shown here to assist parties with the facts:

- 11/11/24 - Part D8.5 Notice served by Network Rail to GB Railfreight.
- 19/11/24 - GB Railfreight served a Counter Notice to Network Rail's D8.5 Notice explaining its expected likely new contract for these train slots
- 06/12/24 - GB Railfreight confirms with Network Rail what was always the expected commercial contract, using these Train Slots from end to end.
- 10/12/24 - Freightliner informs Network Rail of its aspirational plans.
- 16/12/24 - Network Rail re-affirms its decision to remove the GB Railfreight Train Slots.

GB Railfreight re-iterates the point that, in a previous, similar situation involving GBRf's 6L04 service, a Train Slot that was not supported by firm access rights but likely to be used with an imminent customer contract, Network Rail had stated that '...it would be unreasonable to remove the Train Slot from the Working Timetable as such course of action would not be aligned with the wishes of the relevant Freight End User.' The term "acting reasonably", which is the key point in this dispute, can be wide ranging and can take influence from many factors.

Given the same Network Rail Freight Team made a decision not to remove paths for non-use, in circumstances with impending contractual use of them, GB Railfreight believes a similar decision should be made in this case, as it would be irrational for it not to do so especially given the wishes, here, of the relevant, contracted Freight End User, which is the over-arching element.

The Considerations

Contrary to what Network Rail states in its Sole Reference Document, GB Railfreight does not need to request the Decision Criteria to be used. The Network Code makes it quite clear what Network Rail's obligations are. Network Code Condition D4.6.1 clearly states that "Where Network Rail is required to decide any matter in this Part D, GBRf's emphasis, its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective")." Network Code Condition D4.6.2 then obliges Network Rail to use "the Considerations" in dealing with any matter in this Part D, again GBRf's emphasis. The fact that Network Rail has not taken "the Considerations" into account and, critically, at the point it was making its decision when Network Rail was made aware of an impending contractual use of these Train Slots, does lead one to believe that Network Rail has not acted reasonably in making its capacity decision as to whether the three Train Slots remain in the Working Timetable or not.

Although Network Rail has since produced a table of how it sees "the Considerations" applied to this case, after the event, this cannot be seen to be justification for its original decision. Attempting to retrofit the Considerations is not due process and is in breach of the Network Code. Having reviewed the 'post decision' table of Considerations, GB Railfreight is clear this is a substantially defective view of how it sees the value of these Train Slots to GB Railfreight's newly contracted traffic. With regard to the statement in Paragraph 4.4.1 of Network Rail's SRD, GB Railfreight has never stated in its SRD that it is inappropriate for Network Rail to have applied Condition D8.5 here. That is the relevant process for non-use however the nuance being challenged by GB Railfreight is

the specific term “acting reasonably” and how that behaviour was enacted, or not, in reaching the decision.

Use of Train Slots.

In Paragraph 4.3.1 of its SRD, Freightliner states it has plans to develop new-to-rail traffic from London Gateway using the capacity relinquished by the removal of the Train Slots in question. GB Railfreight, however, already has a signed contract to use the capacity of these Train Slots, and not merely to prospectively develop new traffic. GB Railfreight has its customer at the hearing as an Involved Party and our customer can add to this should the panel wish it to do so.

Summarising, GB Railfreight’s intended use has been definitive since the 6th December 2024, with Network Rail informed on that date, whereas Freightliner’s use appears speculative. Given that Freightliner has evidenced this with Network Rail already, with references in its SRD, and that Network Rail has this in its chronology, GB Railfreight is clear that Network Rail should have applied the Considerations, along with this detail, when making the capacity decision whether or not the Train Slots are to be removed. In addition, as Network Rail states in its SRD, Freightliner wishes to use 4M24 to Wembley and a yet to be defined Train Slot forward. GB Railfreight, however, has a contract to use the Train Slots throughout as per its original Train Operator Variation Request to Network Rail. GB Railfreight is clear that the relative merits of capacity options are not specifically dealt with in Condition D8.5 of the Network Code, however the use of the “Considerations” is, and the points raised above are relevant inputs into the necessary use of the “Considerations”. In any case, not making use of the “Considerations” when required to do so in the Network Code could certainly be seen as an arbitrary decision as well as an irrational one, in this case.

Taking all of the above into account, GB Railfreight does not believe that Network Rail has:

- Acted reasonably in its reaching decision on these three Trains Slots.
- Applied the required aspects of Part D of the Network Code in reaching its decision.

As such, GB Railfreight is seeking that the panel directs Network Rail to withdraw its decision. Thank you.

Annex C: NR's Written Opening Statement

Good morning,

This dispute centres on Network Rail's decision to issue a Failure to Use Notice under Condition D8.5 of the Network Code for three Train Slots held by GB Railfreight between London Gateway and East Midlands Gateway.

Network Rail is responsible for managing the timetable and optimising the capacity available on the network. Under Condition D8.5, we have the authority to remove unused Train Slots. This rule exists to prevent inefficiencies and ensure that valuable network space is either being used or made available for other Timetable Participants who may want to use it.

We stand by our position to withdraw the Train Slots in question, based on clear evidence of non-use, in accordance with the established regulatory framework. We rely on information contained within our defense submission and are happy to answer any questions that the Chair or Panel may have for us. Thank you.

Annex D: Freightliner's Written Opening Statement

Good Morning,

Freightliner would like to thank the Hearing Chair for the opportunity to present our position in this dispute. We firmly believe that Network Rail acted correctly and reasonably in seeking the removal of the three train slots from the Working Timetable under Condition D8.5.1 of the Network Code.

The evidence is clear:

- These slots had not been used for a considerable period of time.
- At the time Network Rail issued the Failure to Use Notice, there was no confirmed position around future use.
- Even if the future use referred to by GBRf were to materialise, this would have been many months away.

It was therefore entirely reasonable for Network Rail to conclude that these train slots were not being used, in line with Condition D8.5.1.

Although there is no direct contractual link between Parts D and J, it is reasonable for Network Rail to apply a consistent approach when addressing similar issues. While Part D allows Network Rail greater discretion, Part J provides a clear framework for assessing usage, setting a 13-week window as the standard measure for considering use. By applying the framework mandated by Part J, Network Rail ensured a fair and consistent approach, and that these train slots were managed in line with established principles for managing capacity.

GBRf also references a past instance from 2021, suggesting Network Rail should have followed a similar approach in this case. However, two key points must be noted. First, this was an internal Network Rail decision and does not set a binding precedent. Second, Network Rail's own documentation indicates that the train slot in that case had only been in the timetable for 16 days. Network Rail would not typically consider a slot to be unused until 13 weeks of non-use had elapsed—consistent with the parameters of Part J—and therefore, it would not ordinarily have proceeded with removal.

GBRf also claims that the removal of these train slots would cause “profoundly serious reputational damage to GB Railfreight and the whole rail industry.” Freightliner has provided Network Rail with evidence from customers outlining its need for capacity to satisfy demand for new deep-sea intermodal services from London Gateway to inland terminals. From an industry perspective, these slots will continue to be used for deep-sea container transport, meaning there is no loss of rail freight capacity and no reputational damage. Furthermore, it is unclear why GBRf would enter into new contracts with customers when the capacity they claim is required was already subject to a Failure to Use notice. Any reputational impact in this case would therefore be self-inflicted.

GBRf also argues that Network Rail should have applied the Decision Criteria before issuing the D8.5 Notice. Freightliner disagrees. Condition D4.6 is intended to assist Network Rail in making trade-offs when balancing competing interests. However, the outcome under Condition D8.5 is binary—either the train slots are being used, or they are not. There is no need for Network Rail to apply weightings or balance conflicting demands when the only determination required is whether the slots are being used. Given that these slots had not been used for years, and would not be used for a considerable period of time, the only reasonable conclusion was that they were not being used and should be removed from the timetable.

Even if the Decision Criteria had been applied, the outcome would have been neutral, given Freightliner will be using these slots to move deep-sea containers to inland terminals. Therefore, any consideration would have been balanced between GBRf as incumbent and Freightliner as applicant.

In summary, the facts are clear: the train slots were not being used, and Network Rail acted reasonably in issuing the Notice under D8.5.

We respectfully request that the Chair uphold Network Rail's position, and confirm that the removal of these slots was reasonable and justified.

Thank you

Annex E: Redacted email from the Capability and Planning Department of NR, dated 26 November 2024

Subject: RE: GBRf CMRG query

OFFICIAL

Hi Anthony,

Fairly simple answer – no runs for all three headcodes since at least the 3rd of November 2022.

4L24 [SX] is on the list for upcoming round of CMRG (likely not for the first time).

Regards,

Subject: RE: GBRf CMRG query

OFFICIAL

Hi Adam,

Hope you're well, and congratulations on your award last Wednesday.

I have one last query regarding CMRG. We are currently discussing several paths that GBRf have available. We understand that they have had these paths, with slight variations, for the past two years.

If possible may you please conduct a quick search to check if GBRf has actually run a service on these paths since acquiring them? If you have the capacity to check, the paths in question are:

4L24 [SX] 05:36 East Mids Gateway Tml GBRf – London Gateway GBRf (arr. 12:01)

4L24 [SO] 04:55 East Mids Gateway Tml GBRf – London Gateway GBRf (arr. 12:23)

4M24 [SX] 16:32 London Gateway GBRf - East Mids Gateway Tml GBRf (arr. 23:33)

Kind regards,

Tony