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## ***TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE***

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### **Determination in respect of dispute reference TTP2591**

(following a hearing held in London, on 09 April 2025)

#### **The Panel:**

Clive Fletcher-Wood                      Hearing Chair

#### Members appointed from the Timetabling Pool

Mark Walker                      elected representative for Franchised Passenger Class, Band 3  
Hannah Linford                      appointed representative of Network Rail

#### **The Dispute Parties:**

##### Freightliner Ltd ("FLL")

Chris Matthews                      Head of Planning (Long Term)  
Barnaby Nash                      Resource Strategy Manager

##### Network Rail Infrastructure Limited ("NR")

Nick Coles                      Timetable Production Manager – Freight  
Rory James                      Operational Planning Manager  
Richard Parsons                      Programme Manager (Timetable Development)  
Daniel Fisk                      Health & Safety Manager (Public & Passenger)

#### **Involved Parties:**

*Unable to attend*                      (Arriva Rail London Ltd.)  
Matt Wardrobe                      Planning Improvement Manager (GB Railfreight Ltd.)  
Robert McCarthy                      Head of Train Planning (Govia Thameslink Railway Ltd.)  
Shane Young                      Timetable Development Manager (Transport UK East Anglia Ltd.)  
David Fletcher                      Timetable Performance Manager (XC Trains Ltd.)

#### **In attendance:**

Tamzin Cloke                      Committee Secretary ("Secretary")

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## A Background and Jurisdiction

1. Dispute TTP2591 was raised by FLL by service of a Notice of Dispute on 21 February 2025 in respect of NR's decision regarding rejection of Train Operator Variation Requests made by FLL. The dispute was brought on the basis that FLL felt NR had misinterpreted the Timetable Planning Rules and level-crossing risk assessment requirements in rejecting FLL's proposals.
2. I was appointed as Hearing Chair on 26 February 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.
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;

**Decision Criteria** means Network Code Condition D4.6;

**Chapter H** means Chapter H of the ADR Rules;

**NWT** has the meaning shown in Network Code Condition D2.1.6;

**ORR** means the Office of Rail and Road;

**Part D** means Part D of the Network Code;

**SRD** means Sole Reference Document;

**TAC** means Track Access Contract;

**TCRAG** means Timetable Change Risk Assessment Group;

**TOVR** has the meaning shown in Network Code Condition D3.3.1;

**TPR(s)** mean the Timetable Planning Rule(s);

**TTP** means Timetabling Panel;

**WTT** means the 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. Due to a number of conflicting priorities, including other Timetabling Disputes, the Dispute Parties' submission timescales were twice amended at the request of the Dispute Parties.
7. On 24 March 2025 FLL served its SRD, in accordance with the revised dispute timetable as issued by the Secretary.
8. On 25 March 2025 I issued Directions summarising my understanding of FLL's submission and asking: FLL to clarify what practical remedy it was seeking (see paras 17 to 19 below); both Parties to confirm that their understanding of the relevant signalling matched the TTP's; NR to respond to a number of points in its SRD. This, and the following two Directions, can be found on the Committee's website.
9. On 27 March 2025 FLL, in response to my first Directions, served a revised SRD, amending Section 6.

10. On the same day I issued a second set of Directions raising some further points to be addressed, and outlining the three overarching questions that the TTP eventually covered during the hearing.
11. On 03 April 2025, NR served its SRD in accordance with the revised dispute timetable as issued by the Secretary.
12. On 04 April 2025 the Dispute Parties were advised – for the purposes of ADR Rule H18(c) – that there was clearly an open question in this dispute as to the most appropriate way of alerting operators to potential restrictions on bids on a given route for safety reasons relating to the infrastructure; this had the potential to become a legal issue, or issues, depending on progress at the hearing.
13. In the same note I raised further points to be addressed during the hearing, asked NR to clarify its stance on Network Code D5.3.1(c) as a matter of urgency, and asked the Parties to prepare split opening statements, separately addressing the different overarching questions to be considered during the hearing.
14. Arriva Rail London Ltd., GB Railfreight Ltd., Govia Thameslink Railway Ltd., Transport UK East Anglia Ltd. and XC Trains Ltd. declared themselves to be Involved Parties. All, save Arriva Rail London Ltd., were represented at the hearing.
15. The hearing took place on 09 April 2025. The Dispute Parties made two opening statements at my request, to deal successively with the two separate questions that had been highlighted, 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.
16. 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**

17. In its original SRD, FLL requested I find that NR had breached FLL's TAC. FLL argued that there was no practical remedy available, and instead stated that FLL had incurred additional costs by making alternative operational arrangements, and that it would like costs awarded due to the claimed breaches of contract.
18. At my direction on 27 March 2025, having identified several alternative practical remedies in my First Directions that would avoid an ongoing costs award, FLL submitted a revised Section 6 ("Decision sought from the Panel") to its SRD.
19. FLL's updated Section 6 provided more detail as to the alleged costs incurred and asked that costs be awarded *"until the first reasonable point at which the train plan can be amended"*. FLL noted its train plan and diagram cycle runs on a quarterly basis and could not be amended outside that schedule without incurring further cost. FLL was now asking, if I found that NR's decision had been incorrect, for a direction that NR should reconsider its decision, with the aim of including FLL's TOVRs in the timetable.
20. NR requested that I uphold its decisions rejecting the TOVRs, with specific reference to NR's TPR interpretation and level-crossing risk assessment. NR further asked that I determine that NR acted reasonably by considering level-crossing safety risk in its decision-making process, and *"that level-crossing risk, where suitably evidenced, provides acceptable and reasonable grounds for rejection of an Access Proposal under Condition D4.6.1"*.

21. NR sought a determination that it had acted in accordance with the Network Code and had not breached FLL's TAC. It was not seeking costs, but asked me to determine that FLL had not incurred any additional costs as part of the TOVRs being rejected or, if I found it had, then the additional costs were "*partly of their [FLL's] own making*".
22. Both Parties agreed that exceptional circumstances did not exist.

#### **D Relevant provisions of the Network Code and other documents**

23. The versions of the Network Code Part D and the ADR Rules dated 19 November 2024 were applicable to these dispute proceedings.
24. Conditions D3.3.1, D3.3.3, D3.3.6, D3.3.8 and D4.6 were particularly relevant and are appended in Annex A.

#### **E Submissions by the Dispute Parties**

25. FLL's written opening statements can be found at Annex B.
26. NR's written opening statements can be found at Annex C.

#### **F Oral evidence at the hearing**

27. In my opening remarks I confirmed that we were to proceed as already notified to the Parties: firstly, to decide whether the TOVR for 4L73 was compliant, and to give my decision on that point. We would then consider NR's application of the Decision Criteria, which led it to reject the TOVR. Did either of these issues represent a breach of contract by NR which would entitle FLL to an award of damages? After that, I had proposed a non-adversarial discussion to identify possible solutions to the issue whereby NR might be unwilling to accept bids for paths into what operators would think to be white space in the WTT, and how operators should be aware of such potential problems.
28. The compliance issue had been described as the First Question, and will be referred to as Q1 in this Determination. The Decision Criteria/safety question will be referred to as Q2, and the issue of communicating to operators information to inform Part D bidding processes as Q3. In the event, Q2 and Q3 being so closely aligned, the discussion on Q2 often turned naturally to Q3, so when Q2 was finalised, all Parties felt that Q3 had been discussed sufficiently.
29. I observed that in spite of the length of time since Part D was first drafted, we had been unable to find any precedent of a TTP having to decide whether a specific movement attracted the value of a headway or a junction margin.
30. As a preliminary issue, I confirmed that NR was not advancing any argument that a TTP could only quash a Decision of NR in exceptional circumstances, as NR's SRD appeared to suggest (at 5.1). NR confirmed that this argument was not being submitted, having apparently been copied from a very old document.
31. I reminded the hearing that it was not within the power of a TTP to produce a new definition of headway or junction margins; I could only decide on the facts of this case which was the correct value to apply to 4L73. If any more general points were to emerge, we could deal with them only in Observations and Guidance.

32. FLL then gave its first opening statement, which appears at Annex B.
33. Before NR gave its opening statement, I sought confirmation from FLL on a point made in its opening statement, that since the start of this Dispute GBRf had agreed to a proposed flex to 5Q98 which would permit 4L73 to operate even if applying the value for a headway, which FLL confirmed was the case.
34. NR then gave its first opening statement, which appears at Annex C.
35. My first question addressed NR's reference to converging and diverging margins, to understand how relevant they might be to the situation at South Tottenham, where the trains converged and diverged over a very short section of track, where there was no signal common to both trains.
36. NR made it clear that one factor on which it was relying was the reference in the National TPRs to two trains passing a Timing Point in the same direction. It was agreed that these were complicated definitions and that no definition could cover all circumstances.
37. I drew NR's attention to the fact that section (b) of the Decision Criteria document said that 4L73 was compliant. (Words to the right of this box were discussed under Q2). The author of the document explained that this was a typographical error, and it should have said that the TOVR was not compliant.
38. The revised values for different moves through South Tottenham which appear in the draft TPRs for 2026 were discussed. Although more time would be allowed for the movement of 4L73 under these new TPRs, it was observed that this Dispute turned on the value applying at the time of the TOVR.
39. NR felt that the absence of a definition for a fouling move meant that one had to default to the position of a Technical Headway, which led me to seek enlightenment on whether there was a definition of a fouling move. It appeared that there wasn't such a definition. It was explained that the two trains performed an X-shaped manoeuvre, or as observed 'a kissing X', in which they were operating along the same length of track for only 161 metres having converged at the west end of South Tottenham Station, diverging immediately at the east end.
40. There was a further discussion about defining a fouling move, during which I explained that if the matter had been clear-cut the possibility of recourse to D3.3.8 might have arisen, but NR's arguments couldn't simply be dismissed, and required careful consideration. Given this, I did not see how D3.3.8 could have been engaged in these circumstances.
41. The Panel then examined the National TPRs further, pointing out that NR was relying on the first sentence of 1.5.1, whereas by reading further the emphasis was on the signalling, giving examples (other than in relation to ETCS, which is not relevant here) all concentrating on when signals would step back up to a green aspect. As the signals controlling entry to South Tottenham (S13 and S16) each give authority to move either on to the line towards Blackhorse Road, or towards Tottenham South Junction, but there is no common signal seen by both drivers, it was difficult to understand how the headway definition could be the correct one to follow.
42. This led to my observing that the high-water mark of NR's case was the wording of 1.5.6, saying that if there is no converging or diverging margin, then the Technical Headway must be applied; but if the timing for a fouling move is not a converging or diverging margin, then what is it?
43. NR's response was that it was not a suitable margin, which I said that I regarded as a different point.
44. FLL observed that if there was a diamond crossing at this point this issue wouldn't be in dispute, but the crossing manoeuvre of the two trains was effectively the same manoeuvre.

45. Further questions from the Panel led to an agreement that the moves were clearly neither simply converging or diverging moves (in the normal understanding of these terms), but they were conflicting, hence the description as a fouling move. FLL confirmed that the speed restriction for 4L73 on entering South Tottenham Station from Seven Sisters was 10 mph.
46. No Party wanted to make any further observations, so we concluded the discussion Q1, to consider my decision on this point.
47. After a short adjournment my decision on Q1 was announced: that the TOVR was compliant, as the correct value to be applied was that for a fouling move, i.e. a junction margin, not for a headway.
48. As I had divided the hearing into separate sections to decide Q1 and Q2, I made further opening remarks relating to Q2. My first point was that the Panel entirely accepted NR's submission that the Considerations had to be seen as following the Objective, with its emphasis on safety. I went on to say that any TTP must approach any issue of safety very carefully and with respect, but that safety issues were not out-of-bounds. I quoted my own words in the Determination of ADA20, that in some cases a Party might regard a safety issue as a trump card which could not be questioned, but that this was entirely inappropriate, as there are few absolutes in safety law.
49. I also thought it helpful to explain my own experience in safety matters, having acted for Train Operating Companies and/or insurers after Southall, when I attended every day of the Public Inquiry; Ladbroke Grove, where I was on site 90 minutes after the accident and was an advocate in Part I of Lord Cullen's Inquiry; Hatfield; Potters Bar; Elsenham; Ufton Nervet; Pump House Crossing No 2; and had faced families at more Inquests than most railway managers. I went on to say that Elsenham was an example of balancing risks relating to level-crossings; for all the obloquy poured on NR, and the substantial fine, I regarded the risk assessment reached to leave gates protected by a bright light and very loud alarm unlocked, rather than locking them with the risk of trapping users trackside, as the correct solution. I also mentioned that I had chaired TTPs (2318/2320) in which we had not accepted NR's safety arguments, and had been supported on appeal by the ORR.
50. The key point was to emphasise how seriously the Panel would take any safety argument, but it would not treat such arguments as a trump card which could not be questioned.
51. FLL made its second opening statement, which is at Annex B.
52. NR then made its second opening statement, which is at Annex C.
53. The Panel started by exploring whether the Decision Criteria document had been drafted before or after the Decision was reached. One reason for asking this was that Appendix G of NR's SRD, covering the same ground, referred to assessments made in March 2025, so well after the decision. NR stated that the main facts in Appendix G were covered in the e-mail to FLL rejecting the TOVR, but that Appendix G had been specifically compiled for the hearing, so also contained "subsequent" [which the TTP took to mean post-decision] information.
54. I then commented on the structure of the document, and that the issue of level-crossings appeared in it repeatedly, including in sections clearly unrelated to the point. The Panel had already concluded that it would be recommending that any template used by NR for Decisions involving the Decision Criteria should not be limited to the Considerations alone, but should have an additional box entitled 'the Objective', or D4.6.1. This would allow safety considerations to be set out in their own right, with all relevant facts, rather than inserting safety issues into inappropriate headings.

55. The issue of Anglia Route having more level-crossings in absolute terms than any other Route was discussed, which was hardly surprising given its geographical features. Anglia's views on level-crossing risk might therefore be further developed than other Routes, which led to the question of whether Anglia had a policy on level-crossings that was not a national policy.
56. NR's initial answer to this question was 'yes'. My comment at this point was concern about operators bidding in good faith into what they thought was white space, not realising that NR might have safety concerns that would lead to a bid, whether an Access Proposal or a TOVR, being rejected, thus meaning that the apparent white space was not actually white space. In response, NR's initial answer was qualified to say that Anglia Route does not have a fixed position, but assesses TOVRs on a case-by-case basis. The Route holds a list of high-risk crossings which it provides to Capacity Planning. The Route had no objection to operators seeing this list, but it is not currently published. NR agreed that this meant that operators submitting a bid could not see into NR's mind on this important issue. NR felt that they should not be able to do so, because NR did not know what it had to assess until it received a bid.
57. The discussion then turned to NR's use of the words 'risk appetite', and the need to ensure (in general terms) that risk aversion was not limiting capacity. NR then refined its earlier point to say that there is no single crossing on the Anglia Route on which there is a blanket ban on further traffic at any time, day or night. However, in further discussion, Anglia Route expressed neutrality on sharing the information with operators, whereas FLL agreed that this information would be useful.
58. At this point I observed that the discussion had reached the issues in Q3, but I was happy to continue in this area.
59. At this point Anglia Route felt that its list of crossings was no more than identifying those crossings and the times at which it would want to make an assessment before reaching a Decision. I reiterated my view that such a document would be particularly useful to freight operators. They would then have a better understanding of NR's sensitive points, which would be especially useful given the restricted hours for rail access to London Gateway.
60. After a brief discussion about NR under-rating FLL's commercial interests in the Decision Criteria document, we then turned to the question of which were the busiest hours at those crossings for which this information was offered. It was agreed that 4L73 was not scheduled to use any of these crossings during its busiest hour, although at one crossing it would do so at a time when barrier closed time was ramping up towards the peak hour. Other criteria were discussed, such as comparing a stated 'slow train', a Class 4 freight, to a passenger train scheduled to stop at a crossing near a station. Another concern of NR's was that of widespread Network disruption following any incident of crossing abuse. NR accepted, however, that this was a remote risk.
61. Another of NR's considerations was stated to be infrastructure degradation arising from the passage of 4L73, which led to a query as to whether this was not compensated for by Track Access Charges. NR felt, however, that service levels had been enhanced over infrastructure which had not been improved.
62. The question of the extent to which any TOVR was subjected to a rigorous assessment process relating to level-crossings was discussed. NR could not guarantee that every TOVR went through this process, depending on how it was handled within NR. It was completely accepted by the NR representatives that to the outside world NR is one entity, regardless of its internal organisation. This was in relation to NR being pressed on the consistency of its approach across the Network as a whole.
63. In this context, NR felt that the process adopted by Anglia was a forerunner, which would be adopted elsewhere. North West and Central Route has crossings close to their limit and would like a similar



system. In effect, some TOVRs needed to go over to Anglia to be assessed. While operators might not like this, they would eventually see a similar process throughout NR.

64. The question was then widened to cover other areas, and beyond TOVRs. It was felt that the long-term planning process did involve operators satisfactorily through the TCRAG process, where problems were discussed, but that this didn't apply to the short-term planning process, which was of greater interest to Freight Operating Companies than Train Operating Companies.
65. In Anglia, however, 50% of the uplift had arisen from TOVRs which NR said then found their way into the WTT without going through the TCRAG process.
66. The next point discussed was that there was no national standard for the acceptable downtime for barriers. It is obviously a factor to be included within a risk assessment, and an example was cited of the ORR recently refusing to grant a Level-Crossing Order for a proposed upgrade because of excessive downtime. The ORR had subsequently relented, because better data had been provided, so enabling the crossing to be upgraded.
67. NR agreed that there was no standard to which it could point and that individual risk assessments were required.
68. The question was then posed as to whether there was one crossing at which it could be said that 4L73 was the one train that would be the straw that broke the camel's back. In answering this question, the discussion turned to the Tilbury Loop, which had attracted 87 additional TOVRs between the relevant WTT being offered and the hearing date. Some were amendments of existing WTT paths, or TOVRs amending other TOVRs, but none had been through the TCRAG process. But nobody could tell NR when this process would stop. While NR was not seeking to limit TOVRs, the question arose of the effect of just 'one more train'. The upshot was a huge increase in freight traffic and volume over the last five years. Every other TOVR than 4L73 had been accepted through mitigation, but one factor was that 4L73 would operate on the West Anglia Main Line. At Wharf Lane and Windmill Road, adding 4L73 to the other 400 trains per day did lead NR to the conclusion that this was the one train too many.
69. Examples of mitigation measures were then discussed.
70. The Panel turned back to 4L73 and examined the details of its proposed path over the key crossings. In this context it was suggested by NR that a congested infrastructure declaration was not appropriate where restrictions might only be required for two hours per day.
71. Once again, we were reminded that much of this discussion related to Q3, and the desirability (or need) for operators to be aware of NR's perception of constraints. I reminded NR that nothing that I was saying was criticising the process being adopted by NR, but related to the visibility of the process, or the publicity that it was receiving.
72. A question then obtained confirmation that other Routes and Regions had level-crossing risk managers similarly engaged, even though job titles might differ. An issue was the different ways in which high risk crossings had been identified over time.
73. In discussing how these issues could be conveyed to operators, it was suggested that the General Capacity Constraints section in the relevant TPRs might be appropriate.
74. The Panel then turned to the length of time that NR had taken to make the Decision, commenting in particular on the importance of rail freight in the national supply chain. NR explained that several meetings had taken place, particularly because the proposed path went from the East Coast Main Line to

the West Anglia Main Line, to reach London Gateway at the end of the permitted bracket. Not only was there a window for arrival at London Gateway which had to be met, but also one for the departure from Tinsley at 0115. The proposal reused the previous path of 4L73 to Felixstowe as far as possible.

75. This led to a discussion as to whether NR was sufficiently well informed to be able to weigh Consideration (j), the efficient use of operators' assets, appropriately. Attention was drawn to NR having given this low importance. In response, NR accepted that it wasn't sure that this had been directly discussed. NR explained that it had been highly co-operative with FLL since the announcement of freight shipping moving from Felixstowe to London Gateway, but this still didn't confirm whether there had been a direct conversation. FLL confirmed NR had been co-operative, but said the plans had been at such an early stage FLL would not have been able to provide NR with the necessary information at that time.
76. At this point it was put directly to NR that the Decision appeared to be pre-determined and predicated on the level-crossing risk, so whatever was set out in the Decision Criteria document, all the other Considerations were rated as low in comparison. This was not directly addressed by NR, as the discussion reverted to the utilisation of assets.
77. The Panel then compared NR's approach as set out in Considerations (b) and (j), with NR effectively saying under (j) that if 4L73 could not run it would have no impact on FLL's assets as FLL could reallocate its assets elsewhere, whereas (b) (ensuring that the spread of services reflects demand) was not properly reflected as there was a demand, because FLL had a contract to run the train. In effect, it was suggested that every Decision was being made on the issue of level-crossings, which does not meet the entirety of the Objective.
78. At this point NR expressed the view that it was being hoisted on its own petard; under pressure to respond quickly to TOVRs, but then risking censure if it came to a hearing with a Decision Criteria document containing typos or other errors. In this case, NR had exposed its thinking for industry comment and disagreement.
79. My response was that we had already explained why we felt that D3.3.8 could not be imposed where discussions were continuing. As I felt that external lawyers rarely assisted a TTP, my preference was for documents to be drafted by railway managers; therefore I accepted errors and never expected perfect drafting, so long as it explained the thinking behind the document. Where NR could possibly attract censure is if it made up its mind on one factor and then bent the Decision Criteria to fit that factor, and that there is potential for criticism for being overwhelmed by one issue and then not looking at the Decision in the round. The Panel then observed that in the period of three months that the Decision had taken, a more rounded view could have been expected.
80. It was then confirmed that 4L73 was a re-routed service, rather than being extra traffic. A long discussion followed on where the path fell within the use pattern at the Windmill Lane crossing and confirming that in most cases the length of barrier downtime in any hour represented a total time, during which barriers will have been raised and lowered. NR pointed out that continually opening and closing barriers increased the possibility of signaller error. This led back to the question of TOVRs not being included in the TCRA process; not that they were deliberately circumventing it. While NR was doing the right thing, there was a need to avoid undue risk adversity.
81. In answer to a question from the Panel, NR explained that the London Gateway Port Harbour Empowerment Order was not considered before the Decision was reached, as NR only became aware of it later. The restrictions in the Order are beyond NR's powers, which the port operator was trying to have amended. However, NR's internal legal advice was that it had no option but to comply with the Order.

82. The discussion then turned to how quickly TPRs could be amended. The gist of the Parties' contributions was that whilst they felt TPRs could be amended after D-26, doing so might not be desirable.
83. Neither Party wanted to make a closing statement, as they felt that the Panel had understood all their points.
84. I then set out the three options in Q2: that I could uphold NR's Decision; uphold it with qualifications; or to decide that I would not uphold it. In the last case did FLL think that it would be entitled to run 4L73? FLL thought that it would be entitled to do so, so I questioned whether the draft TPRs would affect this. FLL responded to say that they would not be in force until December 2025 or May 2026 (later corrected to December 2026 being more likely) and in constructing the NWT NR would be entitled to use its flexing rights without agreement, although the necessary flex had already been agreed between the operators.
85. NR felt that there would probably be different perspectives between Capacity Planning and Anglia Route, but that they would accept the train into the timetable. It would then come to TCRAg, which would lead to a decision that it would not be accepted by the Route. I asked where power would lie in those circumstances, and was told that it had never been tested to the knowledge of those at the hearing.
86. As an internal matter, NR felt the decision would probably lie with System Operator, which could over-rule the Route. Doubtless the Route would then say that the System Operator had assumed responsibility for any associated safety risk. Reverting to an earlier discussion on consistency, it had been observed that there did not appear to be consistency within NR, but as each situation (to accept/reject a TOVR) turned on its own circumstances, could that be expected?
87. NR then explained possible internal discussions further, in which the System Operator would want to listen to the judgment of a safety professional. FLL queried the earlier reference to using the TCRAg process to reject 4L73, as in constructing the NWT NR would be required to apply Part D to accommodate all Access Proposals within the legal rights of the applicant for those Train Slots, at the point at which the NWT was being constructed. Therefore, it might actually be that - in circumstances where 4L73 had limited, or nil, flexibility in the schedule - NR could choose to use its contractual Flexing Right to move another operator's Train Slot away from that time period completely, to mitigate the impact of including 4L73 in the NWT.
88. Whether the removal of strategic rail slots might assist was discussed, although I observed that an unused slot did not contribute to barrier downtime. It was clear that the Parties disagreed as to what strategic rail slots, if any, existed in the relevant area, and to what extent they should be formally removed if they remained unused. To the TTP, this further underlined NR's key role in transparently advertising available capacity within the timetable.
89. FLL queried the position on the additional costs that it had incurred, and would continue to incur, if the TTP were to uphold NR's Decision; if it continued to use Plan B in order to mitigate the risks NR had identified, even though it would be entitled to use its preferred routing, would its extra costs be reimbursed? NR's response was that this would be a commercial decision for FLL.
90. The discussion returned to the question of increasing freight traffic, which brought the problem of how the 'one train too many' should be identified. This was against an aspiration, advised to the TTP, to increase freight services into London Gateway from ten per day to 20, 40, or even mention of 50, although these comments were not examined in any detail.
91. I observed that we entirely recognised that problem, but my responsibility was to make a decision based narrowly on 4L73, both in terms of Q1 and Q2.

92. NR commented that there had been little discussion on the Thameside route, this discussion was on the West Anglia Main Line, but it was the Thameside route where the problems were anticipated as traffic to London Gateway increases.
93. After this further discussion I queried whether either Party now wanted to make a closing submission. Neither did, although NR pointed out that any NR inconsistencies that had been exposed during the hearing were justified, given the “prevailing circumstances” on Anglia Route. NR further said it was concerned that the discussion so far seemed to be suggesting that if a TOVR was compliant with Part D, including the TPRs, it should be regarded as being entitled to operate, when there was previous TTP precedent that other factors could be taken into account.
94. I observed that it was accepted that NR has a duty to run a safe railway, everybody has a duty to run a safe railway, but the biggest duty lies on NR, as it runs the infrastructure. I didn't think a passenger operator would differ from the view that NR's responsibility was greater, because it is more exposed to the behaviour of the public. Therefore, NR is perfectly entitled to bring the Objective into the consideration of any train path. It is the Objective, and there were a number of previous occasions on which I had brought the Objective in as being the overriding issue. The Considerations flow from the Objective.
95. NR regarded that as helpful, because with regard to FLL's contention that NR had breached its TAC, NR's Decision was actually predicated on A1.1 and D4.6.1 of the Network Code. Granted that NR used a level-crossing risk assessment to reach that Decision, but NR said there was nothing in those documents that prescribes or proscribes NR from using whatever source of information it deems appropriate.
96. I agreed with this, because the acceptance or rejection of a TOVR had to be fitted into the duty to run a safe railway, which had not been in dispute from the beginning. But the question facing the TTP was whether NR had made the right Decision in relation to 4L73 with the available data at the time.
97. NR then raised the point that, not knowing how many TOVRs it might receive, and accepting that each decision must be on the basis of the specifics placed before the Panel, all NR would ask me to consider, as part of my decision, was, if NR's Decision to reject a TOVR in individual circumstances was incorrect, how could NR ever make a correct Decision about a single train that contributed to a wider safety concern?
98. I accepted that as a valid point. Going back to words used earlier, was this train 'the straw that broke the camel's back', or was it the next one, or is it the next two, or the next three? This is where the Panel was coming back to a desire to see a clear policy emerging with whichever Route is affected by it. Anglia is at that point, because of the problems it faces geographically, but to see a clear policy, for example, that, 'We have now reached capacity on this crossing within this time frame,' that is then published, then potentially the industry would be heading towards TPRs, which bidders could see and contest it if they wish, but they could then appeal. The chances of an appeal being successful under those circumstances would probably be much more limited than in circumstances where it's an ad-hoc decision. NR responded that it was happy with that thought process.
99. At this point I asked if any of the Involved Parties wished to make any observations.
100. XC's representative said that he was not a safety expert, but strongly supported the view that any restriction on the number of trains or time of trains at any given crossing should be documented to be obvious to operators, either through TPRs or the Network Change process. The Panel commented that the capacity of the infrastructure should be evident from the Sectional Appendix and the TPRs, which came back to my possibly simplistic view that an operator should only be able to see white space in the

WTT if it really was white space. XC emphasised the need for this to be the result of consultation; nothing should be imposed.

101. I commented that the important point was that however it was achieved, there needed to be a method whereby NR's genuine safety concerns could be exposed to the rest of the industry, so that operators would know where a bid, whether an Access Proposal or TOVR, was likely to be rejected. NR queried where it would be left if the operating community rejected proposed restrictions, to which the response was that both TPR changes and Network Change proposals were subject to an appeal process.
102. Using the examples of Greater Anglia's work on level-crossing risk at the start of its franchise, and the work done to increase freight services to Felixstowe, NR expressed a concern that this was not a new issue, but that every crossing needed to be looked at by experts, so it was nearly impossible to say exactly how many trains can run across a given crossing.
103. With general agreement that the discussion was sufficiently deep into Q3 that it was worth completing it then, rather than after deciding Q2, I observed that the issue might best be summarised as, 'Should NR's thinking be exposed to operators to inform bids better'? NR felt more comfortable with this formulation than by the possibility of TPRs varying from hour to hour.
104. That said, the Panel still considered General Capacity Constraints. The Panel noted that Section 5.2.2 of the route-aligned TPR documents, entitled "General Capacity Constraints", is already used to publish constraints on service quantum or maximum service levels over specific lines of route due to various constraining factors, and suggested that level crossing constraints could also appear in this section.
105. I commented that this TTP was not going to find a solution at its hearing. It would highlight the problem, suggest possible solutions, then recommend that the industry should examine the problem. Given the obvious issues, both from NR's and operators' perspectives, I was surprised that this hadn't come before a TTP before now.
106. We then adjourned so I could reach my decision on Q2.
107. Having given that, after the hearing was closed I was asked whether 4L73 should be accepted into the WTT. This issue is set out in full in the Analysis section.

## **G Analysis/Observations and Guidance**

### **Analysis on Q1: Was the TOVR compliant?**

108. At the start of the hearing, those attending were reminded that in considering this question the powers of this TTP were limited to deciding on the facts of this Dispute whether or not the TOVR was compliant; we could go no further in seeking to interpret Part D.
109. The time spent on this issue, in the pleadings and at the hearing, indicates that there was no immediately clear and obvious answer; our task was to interpret the applicable Rules which the Parties agreed were ambiguous. A headway through South Tottenham Station attracts a value of 6", whereas a 'fouling move' attracts a value of 3".
110. The TTP knew that the proposed new TPRs had broken out different routes through South Tottenham Station and given them new values, in the case of the planned moves of 4L73 and 5Q98 the

new value is 4½", albeit these values were understood by the TTP to remain under discussion in the TPR Forum. In the draft TPRs this is described as a junction margin. One question that arose therefore was how a movement regarded as attracting the value for a junction margin in the any new version of the TPRs could be anything other than a junction margin when the Decision was made.

111. The new value may well be more accurate, but the TTP had to apply the value in the relevant TPRs at the time of the Decision, not least because (as discussed elsewhere) operators should be able to rely on information published by NR concerning the Network.

112. In its SRD NR relied on an extract from the National TPRs:

*Diverging or Converging Movements*

*In circumstances where trains diverge (pass or depart from one common line to different lines) or converge (arrive or pass from different lines to one common line) then different margins may apply. Any such differences will be shown as junction margins in Section 5.3 of TPRs. If there is no specific converging or diverging margin then headway must be applied.*

*Technical Headway*

*The Technical Headway is the minimum permissible time interval between two successive trains at a specific timing point on the same line in the same direction, such that the second train can meet its SRT [Sectional Running Time].*

113. As the hearing unfolded it became clear that another limb of NR's argument was that as 4L73 and 5Q98 would both pass through a common Timing Point (South Tottenham Station) travelling in the same direction, the move should be regarded as falling within the definition of headway.

114. Had both 4L73 and 5Q98 been planned to travel onwards on the same line, either towards Blackhorse Road, or towards Tottenham South Junction, then that would have been a converging move. No specific converging margin is published, so that would have attracted a headway value.

115. But in fact the trains' paths crossed at South Tottenham, either in an X shape or, as suggested in the hearing, a 'kissing X', as they approached South Tottenham Station from different directions, passed through the station and then diverged on to different lines. According to NR, they only occupy the same length of track for 161 metres.

116. During the hearing we reviewed the applicable National TPRs. One factor influencing the TTP's view was that in every example of its discussion of headways (other than the reference to ETCS, which is clearly not relevant here), Section 1.5 (of the Final TPRs for Subsidiary Change 2025 (National)) considers the case of one train following another through a number of signals, with repeated references to when any of those signals would be able to revert to a green aspect.

117. In this case, there was no common signal that would be seen by both drivers. S13 and S16, the signals controlling entry to South Tottenham Station, both provide authority to move beyond the station towards Blackhorse Road or South Tottenham Junction; there is no departure signal from South Tottenham Station. Given this, it seemed counterintuitive to describe these movements as attracting a headway value.

118. A further point considered by the TTP was that although there is no definition of 'fouling move', the two paths to be taken by 4L73 and 5Q98 inevitably meant one train fouling the move of the other, so if

this definition was not be interpreted as a junction margin, what does it mean? NR was not able to suggest any alternative meaning.

119. Taking all these points together, I decided that the planned path of 4L73 through South Tottenham Station should be regarded as attracting the value for a junction margin, not that for a headway.
120. That said, I considered that to conclude that NR's interpretation of this point amounted to a breach of contract would have required NR to have taken a position that was obviously wholly unreasonable (or to have behaved in an entirely unreasonable way). Neither was the case in this Dispute, so whilst I found in FLL's favour on this point, I cannot conclude that NR was in breach of contract.
121. The possible relevance of D3.3.8 was raised in exchanges before the hearing. While it is, we think, commonly understood that NR and operators cannot agree to vary Part D, any Party can waive its rights (see the ORR's Determination of the Appeal against HAL/TTP003). This is particularly valuable where one operator is prepared to compromise its strict rights to enable another TOVR to be included. If NR and an operator are in genuine discussions over how a TOVR might be accommodated, in our view it would be wholly inappropriate to seek recourse to D3.3.8. Technically this is a waiver of the operator's rights, but it reflects the encouragement given in so many TTPs for the Parties to continue discussions, which can lead to acceptable solutions in so many instances.

**Q2 and Q3: NR's application of the Decision Criteria; Should NR's thinking be exposed to operators to better inform operators' bids, especially TOVRs?**

122. In the light of the safety issues raised by NR, the TTP approached this question with even more care than usual when examining NR's evidence, and application of the Decision Criteria.
123. The TTP accepted without hesitation NR's view that the Objective is paramount, and that where safety issues arise the Considerations must always be identified and weighed in that light. As stated in my introductory remarks, however, a safety issue is not a trump card which cannot be questioned once played. A TTP provides determinations '*on the basis of the expertise of a knowledgeable peer group with relevant railway expertise*' (Rule H14(a)), which must be taken as an ability to question NR's experts, and reach decisions affecting safety-related issues. Many previous TTPs have also taken this view. My own experience has included a number of safety-related issues.
124. That said, any TTP should, and this one did, take full account of the views of those carrying safety responsibilities and should be very cautious if choosing not to agree with the views of those involved. In this context I comment that this was a very finely balanced decision, for which I take responsibility.
125. An early point concerned the construction of NR's Decision Criteria document. While the TTP sympathised with the manager deputed to draft it, it was clear that the level-crossing issue was inserted into the document repeatedly, under headings where this important issue simply did not belong. Considerations (c) and (d) ('Maintaining and improving train service performance', and 'That journey times are as short as possible') are merely two examples.
126. Early in the hearing I said that within Observations and Guidance we would propose that any standard templates used by NR should not only list the Considerations, but should also include a box headed 'the Objective', so that where relevant any safety considerations have their own heading and can be given due weight in their own right. So, for example (not related to this Dispute), NR might say that while all the Considerations point to a bid being accepted, the safety considerations set out in the Objective box explain why it had been rejected. This would, we suggest, highlight safety issues where they do apply and allow them to be more fully articulated.

127. Doing this would also assist NR to satisfy the requirements set out in D4.6.4.
128. Having made this point, the TTP ignored this procedural issue and concentrated on the substance of the document.
129. NR has clear duties under Part D to *'apply the Decision Criteria in accordance with Condition D4.6'* when responding to a TOVR (D4.3.1(b)). This requires NR to apply all or any of the Considerations, *'In achieving the Objective'* (D4.6.2). D4.6.3 then explains that NR must consider which of the Considerations are relevant, then to apply those it deems relevant to reach a decision which is fair and not unduly discriminatory between Timetable Participants, and where two or more of the relevant Considerations will lead to a conflicting result NR must decide which of them is or are most important and weight them appropriately (D4.6.3).
130. This TTP does not regard this as necessarily an easy task, but in this case the TTP was simply not convinced that there was sufficient (or in some instances any) evidence of this task being discharged to the standard required.
131. In this context, especially where safety issues are being balanced against the other Considerations, we are assisted by the ORR's Determination of the Appeal against TTPs1706/1708.
132. As examples of the TTP's concern: we were not persuaded that Considerations (a) and (c) were relevant at all. We noted that (b) stated that the TOVR for 4L73 was compliant, although at the hearing we were told that this was a typographical error and should have said that it was not compliant. The box alongside this says, *'A rules compliant additional service could be added to the timetable, however, in doing so would create further safety risks to all users, as detailed in all other relevant considerations'*.
133. We agreed that (d) should be assessed as Low, but felt that much of the text did not relate to this Consideration.
134. We also agreed that (e) should be graded as High, but were concerned once again with the repeated references to level-crossings, with no more than a nod to avoiding increased road traffic to London Gateway (an issue also relevant in Consideration (i)).
135. We were not sure how (f) could be graded as Low, although there has been previous experience of NR not paying sufficient regard to the commercial interests of its customers, sometimes because it is not aware of them, although in some instances without making any enquiries. FLL mentioned at the hearing a figure of increased costs being incurred by the alternative arrangements in place, which although maybe small in NR's eyes, is obviously significant to FLL. In this case we think that Consideration (f) must also be seen as linked to Consideration (j).
136. We support (i) being graded High. There is a balance to be struck between the environmental effects of one extra train bringing down crossing gates which are already heavily used, thus delaying road traffic, and the environmental benefits of moving freight by road. It is not clear, however, whether any figures are available to try to strike this balance. Yet again, however, this was subordinated to the level-crossing issue.
137. Consideration (j) should not have been graded as Low. The associated comments must be regarded as superficial; we do not think that they can be seen as any proper examination of this Consideration, and its importance to operators.
138. Regrettably, the TTP concluded that whether this document was written before the Decision, as NR stated that it was, or afterwards, it was written in an attempt to justify a decision that had already been



reached to reject the TOVR, based solely on the safety concern. We felt that the conclusion was pre-ordained, and that everything available was piled into the document, however repetitively, to justify that conclusion. The second box in Consideration (b) is a good example of this, as NR has not demonstrated how it has sought to ascertain the demand being served by 4L73 and its relative importance against the other criteria. Given the criticality of rail freight in the national supply chain, and government policy of increasing rail freight as part of a wider decarbonisation agenda, NR has an obligation to consider this adequately in Consideration (b).

139. Whatever reservations we had about the Decision Criteria document itself, this was far from sufficient to enable me to reach a decision. We paid keen attention to NR's submissions on the safety issue and had no doubt about the sincerity (and passion) of those involved. One point mentioned several times by NR was its 'appetite for risk'. NR is the responsible Dutyholder for the conduct of its undertaking, co-operating with operators (and others) and requiring their co-operation in return. But if any organisation becomes unduly risk averse, it is not necessarily discharging its duties, under the general law or under its contractual obligations. We do not pretend that this is an easy path to tread; we hope that my decision is not interpreted as our thinking it is.
140. We recognise that Anglia Route has the highest number of level-crossings on the Network, and that level-crossing risk is one of Railway Safety's greatest concerns. We completely accept that the longer crossings are down for passing trains, the more risk there will be of level-crossing abuse, whether deliberate or accidental.
141. It seemed from the long discussion on this topic that there is no general principle setting out how long crossing barriers should be shut within any given hour. The examples given in this Dispute of lengthy closures illustrate why NR has the concerns that it does. One of our recommendations in Observations and Guidance covers this point.
142. We also accept that TOVRs for freight traffic are increasing, particularly in relation to London Gateway, without any specific expenditure, of which we are aware, being allocated to enable NR's infrastructure to cope with this increasing traffic. We also recognise NR's concern that squeezing 'just one more train' on to the Network becomes another 'just one more train', and yet another, so we understand NR's concern as to where this incremental increase should stop. Nor does it help that London Gateway has restricted hours during which traffic can be received.
143. Our Observations and Guidance will include recommendations on this issue. This will link with Q3.
144. All that said, I had to decide whether 4L73 was the 'straw that broke the camel's back', or the train that should be blocked as being just 'one train too many' on this route. I recognised that this itself was a very fine balance to strike, and one in which I had to pay close attention to the views of those responsible.
145. This Determination has criticised the way in which NR's Decision Criteria document was written, and concludes that NR failed to comply with the duties placed on it under Part D to identify the relevant Considerations and to place an appropriate weight on any which are in conflict. But just as we ignored the procedural defects in the Decision Criteria document to concentrate on the substance of the issues, if we had been persuaded that 4L73 was that 'one train too many', I would have upheld NR's Decision, while criticising the way in which it had been reached. I made this clear to NR during the hearing. This would, in my view, have reflected the primacy of D4.6.1 where safety considerations are relevant and sufficient to overcome all factors in favour of accepting a bid.

146. While the TTP's concern that operators should be confident that they know where bids might be affected by safety issues is discussed below, this factor had no influence on my decision whether or not to uphold NR's rejection of the TOVR.
147. After very careful consideration I narrowly decided that 4L73 was not that 'one train too many'. One factor was that for those level-crossings where the busiest hour was cited in the Decision Criteria document, 4L73 was not scheduled to pass over the crossing concerned in the busiest hour, but this is not the only factor that influenced my decision.
148. The end result, however, is that after very careful consideration, and with respect to all those contributing, I did not feel able to uphold NR's Decision.
149. Given that this decision was so finely balanced, regardless of whatever criticism we have made of NR's process, I cannot possibly conclude the NR's Decision amounts to a breach of contract.

### **A post-hearing issue**

150. After I had declared that the hearing had ended, I was asked whether I thought that 4L73 should therefore be accepted into the WTT. I replied that this seemed to me to be the logical conclusion to be drawn from my decision.
151. It was subsequently informally suggested that this was a D5.3.1(c) direction, which of course a Chair can only give if they find that exceptional circumstances apply. It cannot have been such a direction, not least because it was a reply to a question posed after the end of the hearing. More fundamentally, in its SRD FLL specifically stated that it was not submitting that exceptional circumstances applied in the Dispute, a view endorsed by NR.
152. While I think that it would be theoretically open to a Chair to find that exceptional circumstances had arisen in a Dispute, even if neither of the Parties thought so initially, this would have to be discussed in the hearing, with the Chair explaining their provisional view and inviting submissions from the Parties.
153. Nothing of this kind occurred. In the hearing exceptional circumstances were only discussed in relation to NR's apparent view in its SRD that a Chair could only quash a decision by NR in exceptional circumstances, a position from which NR withdrew even before the hearing.
154. Further, although I did not say this at the time, the possibility of my not upholding NR's Decision had been discussed at length in the hearing (see paras 84 – 92), when this interpretation seems to have been generally agreed. A point made in that discussion was that in constructing the next NWT, 4L73 would go through the TCRA process, which does not apply in the case of a TOVR.

### **Observations and Guidance**

#### Transparency on level-crossings of concern

155. Even though I did not uphold NR's Decision, the TTP recognises NR's genuine safety concerns related to increased rail traffic over level-crossings where crossings are closed to road traffic for significant lengths of time, thus increasing the likelihood of crossing abuse, which itself brings the risk of service disruption.
156. As far as the industry is concerned, however, this information is not necessarily shared with operators to keep them fully informed of routes where additional traffic might need to be restricted on safety grounds. At its simplest, this creates a risk of operators seeing what they regard as white space in

the WTT, not knowing that NR's safety concerns mean that in effect NR will not regard the white space as being available for TOVRs. TOVRs rejected on this basis, outside the process for creating NWT, will necessarily be on an ad-hoc basis and not ordinarily visible to other operators.

157. In the Anglia Route, at least, there is a list of level-crossings which could create this situation, if only at certain times of day. At the hearing NR said it had no objection to sharing this list with operators. **We recommend** that there should be a positive duty to share this information with all operators and potential bidders.
158. We are not in a position to say how this should best be done; one possibility would be under General Capacity Constraints in route-aligned TPRs. Network Change was also mentioned, although we do not necessarily think that the restrictions which we are discussing would amount to Network Change at this stage. **We recommend** that the industry should examine this issue to identify the most satisfactory way of achieving this.

#### No standards to give guidance

159. We were given no evidence of any national (or other) standards specifying the maximum period for which barriers should be closed to road traffic, whether generated by the industry or outside agencies such as the ORR, the Department for Transport or the devolved administrations. We recognise that this would be a complex task, which would have to depend on a number of factors, such as the pattern of rail traffic across any given crossing, and with variations required depending on the classification of the road concerned (an A road, a B road, or an unclassified road). It would also require variations to reflect different patterns in urban and rural areas.
160. However difficult the initial task might be, it would undoubtedly assist NR in discharging its duties by providing objective support for Decisions such as this. **We recommend** that NR should lead a review of this issue, consulting any external authorities such as the ORR, Department for Transport and Rail Safety and Standards Board, as appropriate.
161. One area in which this would assist relates to my conclusion that 4L73 was not that 'one train too far' to be prevented from running. But with further TOVRs apparent, if not already submitted, how is NR to recognise which is the 'one train too far'? As was clear during the hearing, this is not a simple matter, as there will be periods during the day when additional TOVRs will be easily accommodated, while they cannot be at peak periods. This is where objective standards would greatly assist, particularly noting the comments in para 98 above.

#### Increased freight traffic, especially to London Gateway

162. Nor was anyone at the hearing aware of any plan to cope with increased traffic to London Gateway (with a further extension to the port announced during the life of this TTP). Whatever environmental arguments support London Gateway being served by rail, it seems unlikely that this can be achieved in the light of the current constraints on the Network. This is particularly the case given the restricted hours during which London Gateway is permitted to receive rail traffic. This issue goes beyond the rail industry alone and is a matter of Government policy. Observations and Guidance by a TTP cannot influence Government policy; we can merely hope that the tension in this area is receiving attention at the appropriate level.

#### How to apply the Objective and the Considerations

163. On a procedural point, **we recommend** that any templates used within NR when preparing a Decision Criteria document should also include a box to include the Objective. This could be at the

beginning or the end of the Considerations; my own preference would be to have it at the end, to make the argument over safety issues clearer and more obvious, particularly in any instance in which the Considerations might point in favour of accepting a bid, but where safety issues could over-ride that conclusion.

#### The definition of headways and junction margins

164. We noted that it was beyond our power to provide any revised definitions of headways or junction margins, so that if any points were to emerge, we could only deal with them in this section. We had already noted that no previous Dispute had arisen concerning these definitions. We reached a decision on the facts of this case, but the wording in dispute, which was agreed to be ambiguous, no longer appears in the draft TPRs, as each possible move through South Tottenham Station has been assessed to provide a specific value for each move. Therefore, I did not feel that any further Observations and Guidance were needed on this point.

### **H Determination**

165. Having carefully considered the submissions and evidence and based on my analysis of the legal and contractual issues, my determination is as follows.
166. FLL's TOVR for 4L73 was compliant with the TPRs in force at the time of the TOVR and NR's Decision;
167. NR's Decision to reject the TOVR for other reasons, beyond the issue of whether the TOVR was or was not compliant, is not upheld.
168. In neither issue can NR be regarded as having behaved unreasonably in the arguments that it submitted, so I do not regard NR having been in breach of contract under either head. Therefore FLL has no entitlement to damages.
169. No application was made for costs.
170. 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  
24 April 2025

## **Annexes**

### **Annex A: Relevant extracts from Part D of the Network Code**

#### **3.3 Train Operator Variations after D-26**

3.3.1 Where a Timetable Participant seeks a Train Operator Variation, it shall submit to Network Rail a written request, referred to as a "Train Operator Variation Request".

3.3.3 From D-26 and during the relevant Timetable Period, a Timetable Participant is entitled to make a Train Operator Variation Request and Network Rail shall have the power to accept, reject or modify it, subject to the timeframes set out in Conditions D3.3.6 and D3.3.7 below and acting in accordance with Condition D4.3.

3.3.6 Except in relation to a Train Operator Variation Request which includes a One Stop Shop Service which is dealt with in Condition D3.3.7, Network Rail shall notify its acceptance, rejection or modification of a Train Operator Variation Request, by the following latest times:

- (a) as soon as reasonably practicable, where the request is to operate a Train Slot on day 1 or day 2.
- (b) by 15:00 hours on day 1, where the request is to operate a Train Slot on day 3;
- (c) by 10:00 hours on day 2, where the request is to operate a Train Slot on day 4;
- (d) by 15:00 hours on day 2, where the request is to operate a Train Slot on day 5;
- (e) by 15:00 hours on day 3, where the request is to operate a Train Slot on day 6;
- (f) by 10:00 hours on day 4, where the request is to operate a Train Slot on day 7;
- (g) where (a), (b), (c), (d), (e) or (f) do not apply, within five Working Days of receipt of the request unless otherwise agreed between the Timetable Participant and Network Rail, where the parties acting reasonably, consider the volume of changes requested and the timescales over which the variations are required to operate.

3.3.8 Where Network Rail fails to notify its response to a Train Operator Variation Request in accordance with Condition D3.3.6 and the request, if accepted, would not give rise to any conflict with:

- (a) the New Working Timetable after it is published at D- 26; or
- (b) the relevant Working Timetable; or
- (c) the Rules,

it shall be deemed to have accepted the request.

#### **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.

## **Annex B: FLL's written opening statements**

### **Opening Statement #1**

The reason for this dispute is Network Rail's decision to reject a TOVR submitted by Freightliner on the basis that it was non-compliant with rules, and also that it failed Network Rail's own internal level-crossing risk assessment. So, on the issue of the rejection due to TPR non-compliance, we believe the issue of TPR interpretation is an unfortunate item to need to bring to dispute. Freightliner still maintain that this is a conflicting move at South Tottenham, and therefore a junction margin applies rather than a headway. Both South Tottenham West Junction and South Tottenham East Junction are marked as reference points only in the TPRs, and they have no influence on the planning of trains. The TPR entry for South Tottenham states that the margin to apply between fouling movements is three minutes, and that compares to a standard value of two minutes across the Anglia TPRs. And that is what should have been applied in this situation. NR suggest that in paragraph 3.6 of their SRD, that resolution by flexing 5Q98 was not pursued due to the relationship between Freightliner and GBRf. Not only is this incorrect, it does not address the wrongful application of the rules. For the benefit of the panel, I'm aware this has obviously come up in the Chair's directions for an explanation on this, Freightliner would like to confirm that the agreement for flex was sought from GBRf, who did not respond due to high workloads and annual leave. Freightliner therefore submitted a condition J5 failure-to-use notice on the non-utilised 5Q98 train slot, which was progressed by Network Rail pursuant to condition J4.

Concurrently, it was confirmed that the TOVR for 4L73 would be rejected due to the level-crossing risk, regardless, and that therefore, at that point, essentially rendered the flex redundant. Subsequent to the rejection being issued, GBRf agreed the flex and following that, Network Rail withdrew the condition J4 notice, and therefore, 5Q98 has remained in the working timetable since. Freightliner continue to believe that rejection of this TOVR, based on this non-compliance, is incorrect, and that Network Rail have incorrectly interpreted the rules when making this decision. Although Freightliner note this is largely a side issue, given the more fundamental challenges around level-crossing risk, which resulted in Network Rail rejecting the TOVR, regardless.

### **Opening Statement #2**

Thank you, Chair. Freightliner, and we expect every other private sector operator, rely on documentation published by Network Rail, as in the Rules and the sectional appendix, to determine the availability of capacity on the network, and thus the ability to run trains. This is fundamental to us supporting investment and the ability to commit to customer contracts. To have a separate internal process within Network Rail that operators have no input into, that can prevent that, is unworkable for the industry. Freightliner is a national operator, and knows this type of level crossing risk assessment is unique to Anglia route. Freightliner would like to reiterate that at no point have they suggested Network Rail's safety assessments are inaccurate, or sought to undermine the operation of a safe railway, but it is the case that operators cannot assess the information as it is not shared with them. Freightliner would like to address a couple of fundamental issues arising from Network Rail's Sole Reference Document, one being that Freightliner's comments in relation to the decision criteria included within our SRD were intended to provide awareness of some of the issues seen in the way Network Rail had applied them, and not to provide an alternative application which didn't consider NR's interests as suggested by Network Rail in paragraph 4.2.23 of their SRD.

Freightliner's TOVR was compliant with the London Gateway Harbour Enforcement Order, arriving at 19:01, which complies with the terminal operator's interpretation of the HEO. As such, Freightliner view this argument from Network Rail as irrelevant, that Freightliner are not able to operate the revised train service solution profitably and are currently operating this traffic at a significant loss, due to the high resource costs of the alternative plan. This is being done in anticipation of resolution through this dispute. It's unclear how Network Rail have reached the conclusion that this service is profitable, as Freightliner certainly do not believe this was expressed through their documentation.

Freightliner continue to assert that in rejection this TOVR, which in Freightliner's view and now the panel's view was submitted compliant with the rules, on the grounds based around restrictions not contained within any contractual document, NR have acted in breach of Freightliner's track access contract, which is predicated upon that documentation. Freightliner would like to thank the hearing chair and panel for their time today, and ask that the panel require Network Rail to reconsider their decision to reject the TOVR, while also confirming that Freightliner are entitled to claim additional costs related to the alternative plan put in place to protect the movement of this traffic by rail. Thank you.



## **Annex C: NR's written opening statements**

### **Opening Statement #1**

This dispute is being brought by Freightliner who disagree with Network Rail's rejection of the following two train slots for reasons relating to TPR compliance and level-crossing risk. Those slots being 4L73 Monday only, Doncaster to London Gateway, and 4L73 MSX Tinsley inter-modal terminal to London Gateway. Regarding the TPR compliance issue affecting 4L73, Network Rail confirms (TC 00:10:00) that the conflicting train slot is indeed, and you've just said it, 5Q98, Cricklewood sidings to Northampton. The two parties to the dispute disagree about the appropriate value to be applied at South Tottenham junction between 4L73 MSX and 5Q98 Tuesday-Friday only. Network Rail considers the relevant EA1370 headway value to be applicable, thus rendering the 4L73 train stop non-compliant, whereas Freightliner consider a junction margin to be applicable. 4L73 MSX passes South Tottenham from Seven Sisters at 16:58, only three minutes before 5Q98 passes from Harringay Park Junction. The EA1370 TPRs require a six-minute headway at South Tottenham. Freightliner has suggested that the South Tottenham three-minute junction margin could be used, as 4L73 and 5Q98 are diverging at South Tottenham East junction. Network Rail submits that this is not sufficient, as a converging margin should be used at South Tottenham. Network Rail submits that Freightliner's requested train-stop movement is not a simple crossing move where a junction margin is appropriate, but instead the relevant headway applies and should be used unless/until a more accurate value is agreed.

Network Rail's interpretation that headway applies in this matter, relies on the following authorities in the national TPRs where the following is stated. Diverging or converging movements, in circumstances where trains diverge, brackets, pass or depart from one common line to different lines, close brackets, or converge, brackets, arrive or pass from different lines to one common line, close brackets, then different margins may apply. Any such differences will be shown as junction margins, section 5.3 of TPRs. If there is no specific converging or diverging margin, then headway must be applied. The definition of technical headway in the national TPRs is as follows. The technical headway is the minimum permissible time interval between two successive trains at a specific timing point on the same line in the same direction, such that the second train can move to the SRT. Network Rail considers that for the converging train movements in question, there is no specific converging or diverging margin, therefore it follows that headway must be applied, and the headway value at South Tottenham is six minutes. Because 4L73 MSX cannot achieve a six-minute headway from 5Q98 at South Tottenham, and because no circumstances have come about which make 4L73 compliant, Network Rail has made the contractually correct decision to reject Freightliner's train slot request.

### **Opening Statement #2**

The level crossing issues. Regarding the level crossing issues relevant to this matter, Network Rail considers that the safety-based decision to reject 4L73 Monday only and then SX is both reasoned and reasonable. 4L73 traverses three level crossings, Windmill Lane, Wharf Road and Waterbeach, where the risk arising from operation of the relevant train slots exceeds Network Rail's risk appetite. The circumstances concerning each of these crossings has been documented within Network Rail's SRD submission, and includes excessive barrier downtime, a high history of incidents, and increased risks associated with adding more train services to the network. Network Rail consider that clear contractual provisions do permit the rejection of the train slots on safety grounds. Both condition A1.1 and condition D4.6.1 of the Network Code are very relevant to this matter, where it is stated respectively that, quote, 'The paramount objective in the railway industry is to operate a safe and secure railway on which the elements of risk to safety and security are reduced to a level as low as reasonably practicable.' And, quote again, '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 passenger and goods.' Network Rail has deemed that the train slots cannot be operated safely.

It is important to note that Network Rail is not in the business of preventing train services from running, freight or otherwise. Network Rail has made multiple interventions at other level crossings to mitigate additional traffic, and

Freightliner has been the beneficiary of these actions. In this matter, 4L73 is not supported for inclusion into the timetable, because the specific nature of the level crossing safety challenge at Windmill Lane, Wharf Road and Waterbeach offers no opportunity for further cost-effective mitigation. Level crossing risk on Anglia route, especially at Rainham, Grays and East Tilbury, is a known industry constraint, of which both operators and the London Gateway Port users are aware, and where Network Rail is applying mitigations. But even with these mitigations, Network Rail continues to face problems.

On 2nd April last week, [redacted], Member of Parliament for [redacted], wrote to Sir Andrew Haines, Network Rail's Chief Executive, to advise the following, and I quote, 'I'm writing on behalf of my constituent, [redacted], who has contacted me regarding the wait times at [redacted] railway station level crossing. Please find her full email to me for your consideration. I understand that on 1st April 2025, [redacted] waited three-quarters of an hour at [redacted] railway station while six freight trains and four C2C trains went through. She said that there was quite some time between the trains, and the people waiting expected the gates to open but they didn't. [redacted] has told me that this isn't the first time she's been delayed in this way, and that she doubts it will be the last. She would like an update on the situation in regards to an alternative crossing other than the footbridge, which is not a viable option for many people.' Network Rail would be happy to share this communication with the panel, and we note [redacted] full email itself does cite London Gateway traffic and the need for an underpass to overcome level crossing issues.

Network Rail has established on 1st April, that day, that [redacted] level crossing barriers were down for 51 minutes, from 13:31 to 14:22, and saw the passage of four passenger trains and five freight trains at 13:35, 13:41, 13:46, 13:47, 13:50, 14:02, 14:06, 14:16 and 14:17. Network Rail provides this anecdotal information to highlight the real-world problems arising at some Anglia route level crossings, which attract significant misuse and risk in different forms. The substance of Network Rail's decision in this matter has been that the safety risk posed by the operation of 4L73 outweighs other considerations. This is explicitly noted within parts of Network Rail's application of the decision criteria, which itself ranked maintenance and improvement of train service performance, and an integrated system of transport, and the effect on the environment, as the more significant considerations in its decision. Consistent amongst these criteria were the themes of increased barrier downtime, and level crossing misuse.

Network Rail's timetable production department and Anglia route continue to work closely evaluating new access proposals and their impact on high-risk level crossings, and are committed to improving process and information-sharing in this space, so as to arrive at more efficient and well-articulated decisions for customers. To this end, Network Rail welcomes today's discussion of this matter, and any agreements or guidance on best practice which might emerge. Thank you.