

At the start of the registration process for TTP2525, NR objected to the dispute being brought as a TTP. ADR Rule B5 requires that the TTP Hearing Chair determine the best way to proceed, in accordance also with ADR Rules H8 and H9. Below is the Chair's initial direction to the Parties, both Parties' submissions and the Chair's determination to allow the matter to proceed via a TTP Hearing in accordance with Chapter H.

Chair's Direction to the Parties, sent on 13 November 2024, via email

Dear all,

Having reviewed Network Rail's objection to FL's Notice of Dispute, the Hearing Chair directs:

- i) By 16:00 on 18 November, NR formally set out the grounds for its objection in a written document;
- ii) By 16:00 on 25 November, FL to formally respond, addressing each ground of NR's objection, in a written document.

The Chair will then make a decision on the issue before the first SRD is due on 03 December.

If you have any questions, please do not hesitate to contact me. Please can a representative from each Party acknowledge receipt of this email?

Kind regards

Secretary
Access Disputes Committee

NR's response, sent on 18 November 2024, via email

1 DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows:-

(a) Freightliner Limited, whose registered Office is at 3rd Floor, 90 Whitfield Road, Fitzrovia, London, W1T 4EZ (Freightliner) ("the Claimant"); and

(b) Network Rail Infrastructure Limited, whose Registered Office is at Waterloo General Office, London SE1 8SW ("Network Rail") ("the Defendant").

2 Details of Network Rail's Objection

Network Rail submit the following information in relation to the Chair's directions issued on 13 November 2024:

Freightliner's Notice of Dispute (23 September 2024) specifies that a dispute is being raised under Part D of the Network Code. They claim that Network Rail, via publication of amended TPR values are not accurately representing the capability of the network...(artificially limiting capacity...), contend that Network Rail have failed to apply the Decision Criteria correctly and believe we do not have the right to publish TPRs without Network Change being agreed.

Freightliners substantive comments on Page 3 of their Notice all relate the fact that, in their opinion, new overlap restrictions have not been agreed (although they admit that the overlaps exist). Freightliner clearly set out that their argument is that a retrospective Network Change is required – essentially that TPR values cannot be amended without recourse to a formal Network Change process. Freightliner have not claimed or demonstrated a process deficiency within the decision criteria application based on these TPRs.

Network Rail's objection to this matter being lodged as a TTP is that Freightliner are conflating issues relating to Part D and Part G of the Network Code when there is clear binding precedent set by the ORR in the appeals to TTP807 and TTP808 that stipulate that there is no explicit contractual link between Parts D and G.

We have endeavoured over the past few weeks to resolve this matter with Freightliner with some progress, but parties are yet to agree any solution based on the binary nature of the argument presented – Network Rail either can, or cannot propose, consult and decision TPR values separately to any Network Change proposal.

[redacted]

For and on behalf of
Network Rail Infrastructure Limited
Timetable Production Manager (Wales & Western)

FL's response, sent on 25 November 2024, via email

Freightliner thank the hearing chair for the opportunity to respond to Network Rail's objection to the validity of this dispute.

Freightliner raised a Notice of Dispute on 10th October (the Notice issued on 23rd September referenced in Network Rail's letter was subsequently withdrawn and reissued with the Secretary) in response to Network Rail's Decision to proceed with publication of Train Planning Rules under Condition D2.2.7 (through the 'Western and Wales Version 4.1 document). As Network Rail identify, Freightliner had objected to the consultation on the basis the Rules subject to dispute failed to represent Network capability accurately – subsequently, Network Rail failed to show any evidence of having considered this objection, or having discharged it's responsibilities under Condition D4.6 in issuing a Decision. This led to this Dispute being raised.

The subject matter of dispute in TTP2525 is Network Rail's Decision to publish Train Planning Rules under Condition D2.2.7. As such, Freightliner believe a TTP to be the appropriate mechanism for arbitration on the matter (as with all other elements of Part D). Condition D2.2.15 (in the latest version of the Network Code published 19th November 2024) makes it explicitly clear that Decisions made pursuant to D2.2.7 are appealable in accordance with Condition D5.

While Freightliner recognise that one of the underlying factors that led to the Decision subject to this dispute is Network Rail's failure to maintain the Network to it's published capability, this is not the subject matter of dispute, which remains the application of Part D. Freightliner therefore maintain a TTP is the correct mechanism.

Signed

[redacted]

Head of Planning (Long Term)
Freightliner Group

Chair's ADR Rule H8 decision, sent on 27 November 2024, via email

Dear all,

Further to submissions by Network Rail and Freightliner, please find the Chair's ADR Rule H8 decision in italics below.

I revert with my decision on the objection which has been raised by Network Rail having now had the opportunity to consider it, and the response to it by Freightliner.

I note that Network Rail objects to the matter proceeding as a TTP under Part D on the basis that it contends that Freightliner are, in bringing the dispute as a TTP under Part D, conflating issues relating to Part D and Part G. I have been referred to the determinations in TTP807 and TTP808, as well as the ORR's determination of an appeal dated 15th October 2015. I have not been referred to any other precedent which might be helpful in resolving this preliminary issue. In accordance with Rule A7 of the ADRR, I must take note of any published ADA or TTP determination as persuasive but not binding authority, but I am bound by any relevant decision of the ORR on any Regulatory Issue, as well as by any decision of the courts. For the clear reasons which are set out at Paragraph 40 of the ORR determination to which I have been referred, I consider the relationship between Part D and Part G raised by NR's objection to be a Regulatory Issue. I therefore accept that there is binding precedent that there is no explicit contractual link between Part D and Part G. I make particular note of the comments made at Paragraphs 45 and 46 of that determination.

In Freightliner's Notice of Dispute, it refers to a decision published by Network Rail and contends that, in reaching that decision, Network Rail has failed to apply the Decision Criteria in Condition 4.6.2 of Part D in the correct way. It confirms in its response to the objection raised by Network Rail that the published decisions to which it objects are Timetable Planning Rules under Condition D2.2.7. Condition D2.2.7 makes clear that Network Rail must act reasonably when revising the Rules between D-44 and D-26. Condition D2.2.14(a) also makes clear that a Timetable Participant who is dissatisfied with any decision to revise the Rules pursuant to Condition D2.2.7 is entitled to appeal against any part of that decision. Furthermore, under Condition D4.1.1, all decisions (including under D2.2.7) are to be made in accordance with The Decision Criteria in D4.6.

I do not therefore consider that the subject-matter of this dispute is one which seeks to rely (wrongly, for the purposes of Part D) on any contractual link between Part D and Part G or that it conflates the two distinct Parts of the Network Code contrary to the binding precedent to which I have been referred. Rather, it is a challenge to Network Rail's decision-making process under D2.2.7 and I am satisfied therefore that it falls within Part D. Accordingly, I do not uphold the objection raised by Network Rail and direct that the matter proceed to the scheduled hearing as a timetabling dispute.

As always, if anyone has any questions please do not hesitate to contact me. The next deadline in this TTP process is Freightliner's SRD, due on **Tuesday 03 December by 16:00**.

Kind regards,

Secretary
Access Disputes Committee