



**Determination by the
Office of Rail and Road:**

**Appeal made by Network
Rail Infrastructure Limited
pursuant to Part M of the
Network Code against a
Determination of the
Timetabling Panel of the
Access Disputes Committee
dated 14 October 2019**

30 January 2020

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Introduction

1. This determination by the Office of Rail and Road (“ORR”) concerns the appeal made by Network Rail Infrastructure Limited (“Network Rail”) pursuant to Part M of the Network Code (“Part M”) against the determination of the Timetabling Panel of the Access Disputes Committee (“the TTP”) dated 14 October 2019 in respect of dispute reference TTP1520 (“the Determination”)¹.
2. The Determination allowed the appeal by Freightliner Limited (“Freightliner”) against Network Rail’s decision not to include eight Freightliner Train Slots in the December 2019 New Working Timetable. The Determination found that Network Rail was in breach of its track access contract with Freightliner as it had failed to apply the prioritisation procedure, in particular its Flexing Right in accordance with Condition D4.2 of the Network Code. This finding of the TTP is not in dispute.
3. As a matter of remedy the TTP firstly directed Network Rail to include the eight Freightliner Train Slots under dispute in the New Working Timetable to be implemented in December 2019. Network Rail was directed to include the slots as soon as reasonably practicable and in any event from no later than the first day of the week for each slot on or after 1 April 2020.
4. Secondly, the TTP directed Network Rail to pay Freightliner compensation without limitation, in respect of the actual and anticipated losses to Freightliner due to the breach of contract. The TTP further stated in the Determination that if the compensation amount could not be agreed between Network Rail and Freightliner, then the matter must be remitted back to the Hearing Chair for summary assessment.
5. The focus of the appeal is the remedies, as summarised above, in respect of which Network Rail alleges that the TTP did not apply the proper interpretation of the Network Code.

Relevant provisions of the Network Code

6. The Network Code² is a set of rules incorporated into, and forming part of, each access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail.
7. Part D sets out the rules for the revision of the timetable for the Network. Part M provides the process by which a party, dissatisfied with a decision of a TTP in relation to a dispute arising under Part D, can appeal the matter to ORR.
8. Part D imposes on Network Rail a general responsibility to establish a “*Working Timetable*”³ and sets out the process for revising the timetable and the respective roles of Network Rail and specified stakeholders (referred to as “*Timetable Participants*”). In particular, Network Rail is required to re-issue the

¹ Capitalised terms in this determination shall have the meaning given to them in the Network Code unless otherwise stated.

² <https://www.networkrail.co.uk/industry-commercial-partners/information-operating-companies/>

³ Condition D1.1.1.

Working Timetable in revised form twice in each year, following a consultation and specified revision process⁴.

9. The Network Code refers to the Working Timetable being developed prior to re-issue as the “*New Working Timetable*”. In compiling it, Condition D2.6.3 provides that “*Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2.*”
10. Condition D4 provides that:

“4. Decision by Network Rail

4.1 Decisions concerning the Rules

4.1.1 In conducting the processes set out in Condition D2.2...Network Rail shall make all decisions by application of the Decision Criteria in the manner set out in Condition D4.6.

4.2 Decisions arising in the preparation of a New Working Timetable

4.2.1 In compiling a New Working Timetable in accordance with Condition D2.6, Network Rail shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in the Condition D4.2.

4.2.2 Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:

- (a) a New Working Timetable shall conform with the Rules and the applicable International Freight Capacity Notice applicable to the corresponding Timetable Period;*
- (b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;*
- (c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right⁵;*
- (d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots⁶ in the New Working Timetable, the Train Slots shall be allocated in the following order of priority...⁷.*

and

⁴ Condition D2.1.2.

⁵ “Flexing Right” is defined as “a right, exercisable by Network Rail in allocating a Train Slot in the New Working Timetable, to vary a Train Slot: (a) sought in an Access Proposal; or (b) arising from a Rolled Over Access Proposal; or (c) sought in a Train Operator Variation Request, in any way within and consistent with the Exercised Firm Rights of the relevant Timetable Participant or, where the Train Slot which is being varied is a Strategic Slot, in any way without limitation.”

⁶ “Train Slot” is defined as “a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement”.

⁷ Condition D4.2.2(d) goes on to set out an order of priority for different rights, giving priority to specified “*Firm Rights*” and rights which Network Rail has for “*Network Services*”, with “*Contingent Rights*” and other rights being given lower priority.

“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”).”

11. The powers of a TTP when determining any appeal pursuant to Part D are set out in Condition D5.3, which states:

“5.3 Powers of dispute resolution bodies

5.3.1 In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail and Road (as the case may be) may exercise one or more of the following powers:

- (a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;*
- (b) it may direct that a challenged decision of Network Rail shall stand; or*
- (c) it may substitute an alternative decision in place of a challenged decision of Network Rail;*

provided that the power described in (c) above shall only be exercised in exceptional circumstances.”

12. In relation to remedies, the powers of the TTP are set out in Chapter H of Part R of the Network Code, which states at paragraph 50:

“50. Subject to any other provision of the Access Conditions and Underlying contract, the Hearing Chair may make such orders in his determination as he considers necessary to resolve the dispute including without limitation that:

- (a) one Dispute Party should take or not take specified action; or*
- (b) the meaning of an agreement or a Dispute Party’s obligations under that agreement are as stated in the determination.”*

13. Additionally, Chapter A also applies the general determination and remedy rules in relation to TTPs as follows:

“Determinations and Remedies

5. Each and every forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis. Each and every Forum shall act in accordance with the law; and all its decisions, including its determinations and decisions on procedure, shall be in accordance with the law.

6. Each and every forum shall:

- (a) Where the Access Conditions or Underlying Contract require that a specific remedy be granted, grant that remedy accordingly; or*
- (b) Where a specific remedy is provided for at law, grant that remedy accordingly; or*
- (c) Where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Forum, exercise*

that discretion in accordance with any requirements and criteria set out in the Access Conditions and Underlying Contract after due consideration of all remedies and orders that could properly be made.

Precedent

7. *In reaching its determination, each and every Forum shall:*
- (a) take note of relevant published ADA or TTP determinations (and those of any predecessor bodies) and of any other relevant tribunal excluding (to the extent referred to in (b) below) the ORR, as persuasive authority but need not be bound by them;*
 - (b) be bound by any relevant decision of the ORR on a Regulatory Issue and any relevant decisions of the courts.”*
14. Also relevant is Condition D5.7 with regard to appeals of Part D:
- “5.7 Liability of Network Rail**
- 5.7.1 Where a decision of Network Rail is overturned on appeal, Network Rail shall only be liable to any Timetable Participant in damages in respect of that decision where it was made in bad faith or was unreasonable.”*

Background

15. In relation to the New Working Timetable publication for December 2019, Network Rail rejected the inclusion of eight Freightliner trains to or from Felixstowe supported by Firm Rights to a 1600 tonne Timing Load.
16. Freightliner brought an appeal to the TTP in respect of this decision (TTP1520) contending that in respect of the rejected or modified Train Slots, Network Rail had neither prioritised Freightliner’s Access Proposals correctly in relation to its Firm Rights nor demonstrated how it had applied the Decision Criteria properly or at all.
17. Freightliner held Firm Rights to the characteristics included in a Train Slot for each train timed at 1600 tonnes trailing with a single Class 66 locomotive. Network Rail had rejected these trains and instead offered Train Slots with a Timing Load of 1235 tonnes for each of them.
18. Having held these Firm Rights for the duration of its Track Access Contract, Freightliner said it had made significant investments in assets to support a business requirement to increase the trailing weight of these eight services, with the intention of exercising the Firm Rights from December 2019 to take account of the arrival date of its new wagons.
19. Freightliner requested that the TTP instruct Network Rail to accommodate all the eight Train Slots at a 1600 tonne Timing Load in the December 2019 Working Timetable.
20. Network Rail contested this submission, stating that should the dispute be determined against it, the Train Slots could not be completed for the December 2019 Working Timetable without reviewing all existing paths which may have interacted with the affected Train Slots.

The Determination

21. The TTP found Network Rail in breach of its track access contract in that it failed to apply the prioritisation procedure, in particular its Flexing Right, properly or correctly to decisions in accordance with Condition D4.2 of the Network Code. This part of the Determination is not in dispute, rather the appeal relates to the TTP's determination in relation to remedy:

- “107. As a matter of remedy, subject to compliance with any contractual or regulatory requirement binding on it from time to time including, without limitation, its Network Licence, Network Rail is directed to include the eight Freightliner Train Slots under dispute at a Timing Load of 1600 tonnes (“the 1600t Train Slots”) in the New Working Timetable which will be implemented in December 2019. The 1600t Train Slots shall be included in that Timetable as soon as reasonably practicable by Network Rail and, in any event, so that they are timetabled to operate in the Working Timetable (but not necessarily the Applicable Timetable) from no later than the first relevant day of the week for each particular Train Slot on or after 1st April 2020, and Network Rail shall observe all such procedures and take all such actions as are required of or permitted to it under the Network Code and any Track Access Contract in order to reasonably enable or facilitate such inclusion.*
- 108. As a matter of remedy: Network Rail is directed to pay to Freightliner compensation in respect of its breaches of contract referred to in paragraphs 105 and 106 above. Such compensation shall be calculated on the basis of the principles of English law governing damages for breach of contract and may include (without limitation) compensation for the actual and anticipated losses to Freightliner of the opportunity to operate freight services for any of its customers at a 1600 tonne Timing Load during the period from the December 2019 Timetable Change Date to the first day on which the 1600t Train Slots shall have effect in the Timetable.*
- 109. The amount of compensation payable under paragraph 108 is to be assessed if not agreed between Network Rail and Freightliner. Freightliner shall submit to Network Rail within 21 days from the date of publication of this Determination either its itemised claim for compensation or its written final confirmation that it makes no claim for such compensation. Network Rail may request Freightliner to provide within a reasonable time but not less than 13 days, and Freightliner shall so provide, any reasonable further information or substantiation of its claim; and in any event within 14 days from the date of such initial submission or further provision Network Rail shall confirm to the Secretary of the ADC that the amount of the claim is either agreed or required to be summarily assessed. If agreed, the full amount of the claim shall be paid by Network Rail within 14 days of such confirmation; if required to be assessed, it shall be remitted to me for summary assessment including any necessary further direction as to the process and timing for assessment and payment.”*

22. Whilst not part of Network Rail's appeal, ORR considers the following paragraph of the Determination to be relevant:

- “111. The Parties will note that in the determination at paragraph 107 above I have postponed the deadline for inclusion of the 1600t Train Slots into the Working Timetable from 1st March, as indicated in the summary of my decision outlined to the Parties at the end of the Hearing, to 1st April 2020. This is to permit Network Rail*

to give sufficient notice to affected Timetable Participants to enable them to meet “Informed Traveller” guidelines prior to commencing any services necessarily changed due to such inclusion.”

ORR’s handling of the appeal

23. On 22 October 2019, Network Rail gave notice via letter that in accordance with Conditions M3.1.1, it wished to challenge paragraphs 107, 108 and 109 of the Determination.
24. On 23 October 2019, Freightliner wrote to ORR acknowledging receipt of the notice of appeal and made representations in accordance with Condition M6.1.1 that the appeal should be dealt with on an expedited basis. Freightliner submitted that it would be reasonable for the appeal to be considered by the end of November at the latest, which would enable the remedies to be confirmed prior to the start of the December 2019 Working Timetable and enable it to plan its business with more confidence and certainty.
25. On 25 October 2019, Freightliner served notice on ORR and Network Rail that it opposed the appeal and set out its reasons.
26. On 5 November 2019, ORR wrote to Network Rail and Freightliner to advise them that ORR was minded to hear the appeal on the basis that it raised a matter of importance to the industry. ORR further stated that it did not consider it to be in the interests of justice to expedite the appeal as a full review of the issues was required and expedition would therefore have been inappropriate and impractical.
27. On 13 November 2019, ORR further wrote to Network Rail and Freightliner to state that it did not intend to hold a re-hearing and would therefore proceed on the basis of a review of the TTP decision. ORR set out the process for the review and invited any further representations by either party to be made by 22 November 2019.
28. On 22 November 2019, both Network Rail and Freightliner served further submissions in response to ORR’s letter.

Network Rail’s grounds of appeal

29. Network Rail’s Notice of Appeal dated 22 October 2019 stated that it wished to appeal paragraphs 107, 108 and 109 of the Determination (as set out above). The Notice of Appeal set out the grounds of appeal, namely:
 - (a) The direction to include the eight Train Slots constituted the substitution of an “alternative decision”, a power of the TTP which pursuant to Condition D5.3.1 can only be applied in “exceptional circumstances”. Network Rail contended that no such exceptional circumstances applied in this case and further the TTP did not put forward why it considered the case to be exceptional; and
 - (b) When overturning a decision of Network Rail on appeal, the TTP is only entitled under Condition D5.7.1 to find Network Rail liable in damages if its decision was made in bad faith or was unreasonable. The TTP made no such finding and so the basis on which compensation was ordered is unclear.

30. Network Rail made the following additional submissions:
- (a) that the only way it could have complied with the Determination was by consent in accordance with Condition D3.6.1 as the introduction of the December 2019 Working Timetable was less than 12 weeks away, which it would be unlikely to obtain, and therefore it is in the position that it will be in breach of the Determination⁸;
 - (b) the appeal is of importance to the industry as whole because it raised issues that, if allowed to stand, create a precedent which will have a significant detrimental impact on the operation of Part D⁹.
31. Network Rail requested that the direction to include the Train Slots be quashed and instead it be directed to reconsider its decision. Network Rail also requested that paragraphs 108 and 109 be removed from the Determination and an alternative remedy be sought by Freightliner in relation to damages in accordance with its Track Access contract¹⁰.

Freightliner's response to the appeal

32. Freightliner Group Limited (on behalf of Freightliner) opposed the appeal in its letter dated 25 October 2019¹¹. In particular, Freightliner made the following submissions:
- (a) the Determination was consistent with Part D5.3.1(a) of the Network Code, that the panel "*may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved.*"¹² Freightliner contended there were a range of options available to Network Rail to accommodate the disputed Train Slots and acknowledged the means of accommodating the Train Slots had only come to light since the Determination, but Network Rail had a large window of time to accommodate them as per the Determination;
 - (b) compensation would only be sought in the absence of accommodating the disputed Train Slots from the beginning of the December 2019 Working Timetable, and therefore objected to Network Rail's point that it had failed to seek compensation as a remedy through the provisions of the Track Access Contract. Further, it is reasonable for Network Rail be directed to pay compensation for financial loss due to its breach of contract by wrongly failing to include its Train Slots; and
 - (c) the issue of compensation is consistent with appeal TTP1521, which Network Rail did not appeal, where it was directed to compensate the operator for breach of a Track Access Contract. Freightliner contended Network Rail's view that allowing the Determination to stand would set a

⁸ Notice of Appeal, paragraphs 3.2 and 4.1.9.

⁹ Notice of Appeal, paragraph 5.1.

¹⁰ Notice of Appeal, paragraphs 4.2.7, 5.3 and 5.4.

¹¹ Freightliner Limited is a subsidiary of Freightliner Group Limited.

¹² Freightliner's Response, paragraph 2.1.

dangerous precedent should not be a concern in light of similar, unchallenged TTP directions¹³.

33. Freightliner opposed Network Rail's submissions to quash the direction and considers that Network Rail being allowed to reconsider its decision would be futile and would allow Network Rail to put back the solution until the May 2020 Working Timetable, as opposed to the December 2019 Working Timetable. Freightliner stated it was a matter of principle for the industry that a TTP has the authority to direct Network Rail to resolve a timetabling matter where it has been determined that it has failed to correctly apply Part D of the Network Code¹⁴.
34. Freightliner highlighted that it sought to expedite the appeal process and should Network Rail's appeal against the remedies be successful, it would set a negative precedent for the industry that Network Rail could wait until a late stage in the timetabling process and avoid having to abide by future instructions of the TTP.

Network Rail's further submissions

35. On 22 November 2019, Network Rail submitted its further representations to ORR:
 - (a) reiterating that its appeal relates to the remedies imposed in the Determination; and
 - (b) explaining that following the TTP's decision, Network Rail made requests for consent to accommodate the Train Slots in order to comply with the direction to accommodate the Train Slots. The majority of the requests were refused and as a result none of the Train Slots could be accommodated into the December 2019 Timetable.
36. Network Rail contended that had Freightliner sought compensation as a remedy when making its reference to the TTP then it would have been open to Network Rail at that stage under paragraph 7(b) of Chapter H of the Access Dispute Resolution Rules to argue that "*some aspects of the dispute or issues raised by the dispute are not matters of timetabling, timetable change and/or capacity allocation and are not properly resolved by a Timetabling Panel and consequently should be reserved for determination by another dispute resolution process.*"¹⁵
37. Network Rail expressed concern that the Determination reflected a "significant expansion" of the TTP's role into areas it was not designed for¹⁶.
38. Network Rail contended it had acted in good faith throughout the dispute and confirmed Freightliner would be compensated for the fact the tonnage could not be increased from December 2019 if it were to be successful in a claim under the Track Access Contract.

¹³ Freightliner's Response, paragraph 2.2.

¹⁴ Freightliner's Response, paragraph 3.0.

¹⁵ Network Rail's further submissions, paragraph 3.1.

¹⁶ Network Rail's further submissions, paragraph 4.2.

Freightliner's further submissions

39. On 22 November 2019, Freightliner submitted the following further submissions:
- (a) Network Rail's suggestion that the only resolution would be to incorporate the disputed Train Slots into the May 2020 Working Timetable was wholly unsatisfactory and would create a poor incentive, allowing parties to believe they can fail to meet their contractual obligations by waiting until a sufficiently late stage in the timetabling process¹⁷;
 - (b) it was concerning that Network Rail wished to limit the scope of the TTP, because instructing Network Rail to reconsider its decision would significantly undermine the value in raising a timetabling dispute¹⁸;
 - (c) Network Rail's breach of its track access contract was wholly unreasonable and therefore the award of compensation by the TTP was appropriate¹⁹; and
 - (d) requiring Freightliner to seek compensation through a separate dispute in relation to the same contractual matter would not be a good use of the industry's time²⁰.

ORR's consideration of the appeal

40. ORR has carefully considered the Determination, the issues involved in the appeal and the entirety of the submissions made by Network Rail and Freightliner as summarised above. ORR's reasoning in respect of each appeal ground is set out below.

TTP's Determination under D5.3.1

41. Network Rail alleges that the TTP's direction to include the eight disputed Train Slots constituted an "alternative decision" for the purposes of D5.3.1, in the absence of exceptional circumstances. In order to determine whether in fact the direction was an "alternative decision", ORR firstly considered the "decision" which was the subject of the appeal to the TTP and secondly, what effect the direction had on this decision.
42. As part of the timetable process, Network Rail must adhere to condition D4, in particular conditions D4.1.1 (decisions concerning the rules), D4.2 (decisions arising in the preparation of a New Working Timetable) and D4.6 (the Decision Criteria).
43. ORR considers that Condition D4 clearly confers on Network Rail the requirement to make a "decision" about the relevant Access Proposals in relation to each New Working Timetable. In the relevant instance, Network Rail decided to reject Freightliner's Access Proposals for each of the eight Train Slots at a Timing load of 1600 tonnes²¹.

¹⁷ Freightliner's further submissions, paragraph 3.0.

¹⁸ Freightliner's further submissions, paragraph 6.0.

¹⁹ Freightliner's further submissions, paragraph 8.0.

²⁰ Freightliner's further submissions, paragraph 9.0.

²¹ Determination TTP1520, paragraph 105.

44. ORR considers that the TTP effectively reversed this decision by stating²²:

“Network Rail is directed to include the eight Freightliner Train Slots under dispute at a Timing Load of 1600 tonnes... in the New Working Timetable which will be implemented in December 2019. The 1600t Train Slots shall be included in that Timetable as soon as reasonably practicable...”

The TTP could have directed Network Rail to reconsider its decision in respect of the eight Train Slots, consistent with the Exercised Firm Rights of each Timetable Participant and exercising its Flexing Right to the fullest extent of its entitlement. Such a direction would have fallen within D5.3.1(a). The TTP did not do this. Instead it made a direction requiring the inclusion of the eight Train Slots by a set deadline.

45. Freightliner has submitted, in its submission dated 25 October 2019, that the direction does not specify how the Train Slots are to be accommodated and therefore the direction should not be regarded as an “alternative decision”, but as falling within D5.3.1(a).
46. ORR has considered the position carefully and is of the view that the specification of the number of Train Slots and the deadline provided is consistent with the TTP substituting its own decision in accordance with Condition D5.3.1(c).
47. ORR’s conclusion is consistent with a previous appeal determined by ORR²³, where the following TTP direction was considered:

“... my determination is that Network Rail shall withdraw its offer to MTR in respect of capacity for a standby train at Liverpool Street Platform 18 and instead offer the capacity to AGA for its Class 321 standby train.”²⁴

48. In this case, ORR accepted that this determination fell under Paragraph D5.3.1(c) and went on to consider whether “exceptional circumstances” applied. In ORR’s view, the direction given to Network Rail by the TTP in this case to include the eight Freightliner slots at 1600 tonnes is similar in its level of specification to that given to Network Rail in this previous case.
49. As ORR considers that the direction of the TTP falls under Paragraph D5.3.1(c), ORR has gone on to consider whether the TTP was right to substitute an alternative decision, as this may only be done in exceptional circumstances. Network Rail has submitted that there were no exceptional circumstances and referred to the TTP’s failure to reference or identify the existence of exceptional circumstances as evidence. This is a similar submission to one put forward in a previous appeal to ORR²⁵. In that appeal, Network Rail submitted that the TTP was “unjust due to a serious procedural irregularity because the Hearing Chair failed to record his decisions and conclusions reached with regarding to Condition 5.3.1(c).” ORR determined that whilst such clear language would be useful, it was satisfied that the determination in that particular case provided a clear record of the exceptional circumstances relied upon.

²² Determination TTP1520, paragraph 107.

²³ ORR’s Determination TTP985, paragraph 14.

²⁴ Paragraph 7.1 of Determination TTP985.

²⁵ ORR Determination TTP985, paragraph 41.

50. In line with that appeal determination, ORR does not consider that it was a requirement for the TTP to explicitly state the exceptional circumstances in the present case. However, the Determination must provide enough clarity to enable the parties to understand whether there were exceptional circumstances and what those exceptional circumstances were, in each case.
51. The term “exceptional circumstances” is not defined in the Network Code. As such, what may constitute exceptional circumstances will turn on the particular facts of the case. For example, in the appeal referenced above, ORR determined there were exceptional circumstances because the TTP understood from the Statement of Claim that should the matter be found against them, Network Rail had explicitly requested the TTP impose an alternative decision rather than ask Network Rail to reconsider its decision.
52. The circumstances are materially different in this case. Network Rail opposed Freightliner Limited’s appeal and asked the TTP to determine that²⁶:
- “... should the dispute be determined against Network Rail, Freightliner’s request for accommodation of the 8 train slots at 1600 tonnes cannot be completed for the December 2019 New WTT, without reviewing all existing paths which may interact with the affected train slots.”*
- This is consistent with a request from Network Rail that it be directed to reconsider its decision in accordance with condition D5.3.1(a).
53. As neither party have given presented substantive argument to inform ORRs consideration of exceptional circumstances in this case, ORR has therefore considered the evidence in the case more generally.
54. The TTP found Network Rail in breach of its track access contract in that it failed to apply the prioritisation procedure properly or correctly. In particular, the TTP explored the Freightliner Access Proposal and questioned Network Rail in relation to its application of its Flexing Right. Network Rail conceded “that in regard to the December 2019 Timetable no contractual conflicts had actually been identified that could not be accommodated within contractually entitled Flex.”²⁷ This formed the basis of the Determination that Network Rail had failed to apply the prioritisation procedure properly in accordance with Condition D4.2 of the Network Code because it had not exercised the Flexing Right correctly.
55. On its own, ORR does not consider that this finding and the result that Network Rail is in breach of its track access contract is sufficient for the circumstances to be exceptional. There are other circumstances in which Network Rail has been found to not have correctly applied either the prioritisation procedure or other elements of the timetable process and in those circumstances the situation has not been regarded as exceptional.

²⁶ Determination TTP1520, paragraph 45.

²⁷ Determination TTP1520, paragraph 60.

56. ORR notes that the TTP raised a “precedent” argument in its conclusions (which Freightliner strongly concurred with in its Respondent’s Notice)²⁸:
- “I am also mindful of the potential danger of creating a precedent incentivising Network Rail or any other Timetable Participant to believe it can safely fail to perform its contractual obligations simply by waiting until a sufficiently late stage in the Timetabling process.”*
57. While this is a relevant consideration, ORR does not consider that it is enough to provide for “exceptional circumstances” as required in D5.3.1(c). There are additional safeguards to prevent Network Rail from deliberately delaying. In particular Condition 7.12 of Network Rail’s network licence requires it to run an efficient and effective process, reflecting best practice, for establishing a timetable to enable persons to plan their businesses with a reasonable degree of assurance. If it became evident that Network Rail was circumventing the Network Code process, in contravention of its network licence, then ORR could intervene using powers under the Railways Act 1993. Further, the correct application of Part D of the Network Code should prevent such practices.
58. It is also relevant that Network Rail has now confirmed that it has accommodated all of the disputed Train Slots into the May 2020 Timetable²⁹.
59. ORR also note that Network Rail asserted in its appeal notice that the effect of the Determination is that it will be in breach of the Determination if the Train Slots are not included in the December 2019 Working Timetable. This was followed up in its appeal representations of 22 November where Network Rail explained that the majority of Timetable Participants had refused its requests for consent, meaning that “not one of the Train Slots can be accommodated in the December 2019 Timetable.”³⁰
60. ORR agrees with Network Rail’s assertion in its appeal notice that the exceptional circumstances stipulation in D5.3.1(c) should avoid “Network Rail being needlessly in breach of determinations...”³¹
61. Further, paragraph 16(d) of Chapter H of Part R of the Network Code stipulates that one of the overriding objectives of the TTP is to administer disputes in a way which is proportionate to “the need to ensure that the production processes for the railway operational timetable are not disrupted to the potential detriment of third parties.”
62. ORR therefore considers that the TTP erred in its application of D5.3.1. Either it mistakenly believed that the direction it gave fell within D5.3.1(a), when in fact it fell within D5.3.1(c) or, it believed its decision fell within D5.3.1(c) when there were no exceptional circumstances to justify such a decision. ORR has balanced the points considered by the TTP in the Determination as being possible exceptional circumstances but have not identified anything “exceptional”. The TTP therefore should have directed Network Rail to reconsider its decision in accordance with D5.3.1(a).

²⁸ Determination TTP1520, paragraph 110.

²⁹ Network Rail’s further representations, paragraph 2.7.

³⁰ Network Rail’s further representations, paragraph 2.4.

³¹ Notice of Appeal, paragraph 4.1.10.

Award of compensation

63. In order to determine if the TTP was correct to award compensation, ORR firstly assessed whether the provision limiting Network Rail's liability in condition D5.7 applied. ORR then went on to consider whether the actual award for compensation was correct.
64. ORR considers the following sections of the track access contract between Network Rail and Freightliner to be relevant:

"1.1...Relevant Losses" means, in relation to:

- (a) a breach of this contract; or
- (b) in the case of Clause 10, any of the matters specified in Clause 10.1(a), (b) or (c) or Clause 10.2(a), (b) or (c) (each a "breach" for the purpose of this definition),

all costs, losses (including loss of profit and loss of revenue), expenses, payments, damages, liabilities, interest and the amounts by which rights or entitlements to amounts have been reduced, in each case incurred or occasioned as a result of or by such breach;

8. LIABILITY

8.2 Compensation in relation to breach

In relation to any breach of this contract, the party in breach shall indemnify the Innocent Party against all Relevant Losses.

11. RESTRICTIONS ON CLAIMS

11.3 Restrictions on claims by Train Operator

Any claim by the Train Operator against Network Rail for indemnity for Relevant Losses:

- (a) *shall exclude any Relevant Losses to the extent that they result from delays to or cancellations of trains (other than delays or cancellations in circumstances in which there has been a failure to achieve a Class A Local Output); and*
- (b) *shall:*
 - (i) *include Relevant Losses only to the extent that these constitute amounts which the Train Operator would not have incurred as train operator but for the relevant breach; and*
 - (ii) *give credit for any savings to the Train Operator which result or are likely to result from the incurring of such amounts.*

11.4 Restriction on claims by both parties

Any claim for indemnity for Relevant Losses shall exclude Relevant Losses which:

- (a) *do not arise naturally from the breach; and*
 - (b) *were not, or may not reasonably be supposed to have been, within the contemplation of the parties:*
 - (i) *at the time of the making of this contract; or*
 - (ii) *where the breach relates to a modification or amendment to this contract, at the time of the making of such modification or amendment,*
- as the probable result of the breach.*

11.5 Limitation on liability

Schedule 9 shall have effect so as to limit the liability of the parties to one another under the indemnities in Clauses 8.2 and 10, but:

- (a) does not limit any liability arising under Schedule 4, Schedule 7 or Schedule 8 or under the Traction Electricity Rules;
- (b) in relation to a failure to perform an obligation under the Network Code, only to the extent (including as to time and conditions) that the Network Code so provides; and
- (c) subject to Clause 18.3.3.

13.1 ADRR

A Relevant Dispute shall be referred for resolution in accordance with the Access Dispute Resolution Rules in force at the time of the reference (the "ADRR"), as modified by this Clause 13, unless:

- (a) any Part of the Network Code or the Traction Electricity Rules provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply;
- (b) any Part of Schedule 7 or Schedule 8 provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply; or
- (c) Clause 13.2 applies.

18.3.2 Exclusive remedies

Subject to Clause 18.3.3 and except as expressly provided in this contract:

- (a) neither party shall have any liability (including liability arising as a result of any negligence, breach of contract or breach of statutory obligation) to the other in connection with the subject matter of this contract; and
- (b) the remedies provided for in this contract shall be the sole remedies available to the parties in respect of any matters for which such remedies are available."

65. ORR has considered Network Rail's assertion that compensation should not have been awarded in accordance with D5.7.1 as the TTP did not find Network Rail to have acted in bad faith or unreasonably. ORR does not consider that the TTP was required to address condition D5.7.1 specifically as the grounds for their decision are clearly set out in its conclusions at paragraphs 105 to 106.
66. Network Rail submitted that Freightliner did not seek compensation and therefore the TTP was not entitled to award it. In Network Rail's submission, any such compensation award should have been pursued in separate proceedings. ORR does not agree. There is nothing in the Network Code to suggest that compensation may only be granted if sought by one of the parties, indeed at paragraph 6 of Chapter A³² it is stated "where the Access Conditions or Underlying Contract require that a specific remedy be granted, grant that remedy accordingly." In addition, Chapter H specifically envisages at H51(j) that the Hearing Chair will reach a determination distinguishing between 'legal entitlement' and 'remedy'. Directing payment of

³² Part R of the Network Code.

compensation is a remedy and given that there is an entitlement to compensation under the track access contract, the exercise of the Hearing Chair's discretion in this instance does not conflict as a matter of principle with the underlying provisions of the contract.

67. ORR then considered if condition D5.7.1 prevents an award of compensation in this case. In ORR's view the findings of breach on the facts of this case indicate that Network Rail made its decision unreasonably (although not in bad faith). The TTP found that it did not properly exercise its Flexing Right with no acceptable justification for the failure. Therefore, in ORR's view, the TTP was entitled to direct payment of compensation.
68. With regard to the size of the award, any remedy awarded by a TTP must be limited to the legal rights of each party, which are contained within the relevant track access contract. So, whilst the TTP was entitled to award compensation on the basis that an award for breach of contract is contemplated by the track access contract and is in accordance with the law³³, the TTP went too far in its determination by stating that the award was "without limitation," which is contrary to the cap clearly set out in Clause 11.5.
69. Further, ORR observes that the TTP further stated:

"109. The amount of the compensation payable under paragraph 108 is to be assessed if not agreed between Network Rail and Freightliner...if required to be assessed, it shall be remitted to me for summary assessment including any necessary further direction as to the process and timing for assessment and payment."
70. While neither party has specifically raised issue with the above paragraph, it is ORR's view that the TTP is not entitled to assess compensation. Any disagreement as to the size of award should be referred to ADRR in accordance with the provisions of the track access contract.
71. In referring the assessment of compensation back to itself, ORR considers that the TTP essentially circumvented the ADRR process set out in the track access contract, a process which ultimately concludes in Court if necessary. Summary assessment by the TTP could potentially result in an appeal to ORR and this would not be the appropriate forum to decide an award of compensation.
72. ORR therefore considers that whilst the TTP was entitled to direct payment of compensation, the TTP erred in remitting the assessment of compensation back to itself and that any dispute in relation to the compensation amount should be dealt with in accordance with ADRR provisions in the relevant track access contract.

ORR conclusions and determination

73. In light of the considerations above, ORR determines in relation to the first ground of Network Rail's appeal, namely that the TTP wrongly made a decision under Condition D5.3.1(c) of the Network Code in the absence of exceptional circumstances, that this appeal ground succeeds.

³³ Paragraph 6, Chapter A, Part R of the Network Code.

74. ORR therefore determines that paragraph 107 of the Determination is wrong and should be struck out.
75. Network Rail is directed to reconsider its decision in respect of each of the eight Freightliner 1600t Train slots.
76. ORR determines in relation to the second ground of Network Rail's appeal, namely that the TTP was not entitled to find Network Rail liable for damages, that the TTP was entitled to award damages and so this appeal ground fails, subject to the following:
 - (a) in paragraph 108 of the Determination the words "(without limitation)" are wrong and shall be struck out; and
 - (b) that paragraph 109 is wrong and shall be struck out.

Catherine Williams

Catherine Williams
Deputy Director, Railway Markets and Economics
Duly Authorised by the Office of Rail and Road
30 January 2020