TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP1520
(following a hearing held at 1 Eversholt Street, London, on 10 September 2019)

The Panel:

Peter Barber — Hearing Chair

Members appointed from the Timetabling Pool

Robert Holder	elected representative for Franchised Passenger Class, Band 2
Nigel Oatway	elected representative for Non-Passenger Class, Band 1
Toby Patrick-Bailey	appointed representative of Network Rail

The Dispute Parties:

For Freightliner Ltd ("Freightliner" or "FL")

Peter Graham	Rail Strategy Manager
Chris Matthews	Track Access Manager

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Muzaher Ul Haque	Timetable Production Manager (Anglia)
Rita Handley	Customer Relationship Executive

Interested parties:

GB Railfreight Ltd.

Ian Kapur	Head of Capacity Planning

XC Trains Ltd.

David Fletcher	Timetable Strategy Manager

West Midlands Trains Ltd. *(not represented due to illness)*

In attendance:

Tamzin Cloke — ADC Secretary ("Secretary")

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1 Introduction: Background, Jurisdiction and Interpretation

1. Dispute TTP1520 was raised by Freightliner by service of a Notice of Dispute on 21 June 2019 in respect of Network Rail's decisions in relation to the New Working Timetable publication for December 2019. The dispute was finally brought on the basis that Network Rail had rejected the inclusion of eight trains to or from Felixstowe supported by Firm Rights to a 1600 tonne Timing Load in the New Working Timetable, and had instead offered Train Slots for those trains at reduced Timing Loads which did not fulfil FL's business requirements. There were initially other elements in the dispute, but these were eventually resolved by the date of the Hearing. FL contended that in respect of the rejected or modified Train Slots Network Rail had neither prioritised FL's Access Proposals correctly in relation to its Firm Rights nor demonstrated how it had applied the Decision Criteria properly or at all.

2. I was appointed as Hearing Chair on 28 June 2019 and I satisfied myself that the matters in dispute included grounds of appeal which may be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.

3. In its consideration of the Parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in ADR Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

4. The abbreviations and other short form terms used in this Determination are set out in the list of Parties above, below in this paragraph 4 and as elsewhere specifically defined in this Determination. References in this Determination to a numbered "Condition" are to that Condition of Part D of the applicable version of the Network Code. Capitalised terms used in this Determination which are defined in the Network Code have the meanings there given.

   "ADC" means the Access Disputes Committee
   "ADR Rules" or "ADRR"mean the Access Dispute Resolution Rules
   "Decision Criteria" means the Objective and the Considerations defined and set out in Condition D4.6
   "Chapter H" means Chapter H of the ADR Rules
   "ORR" means the Office of Rail and Road (formerly the Office of Rail Regulation)
   "Part D" means Part D of the Network Code
   "Parties" means the Dispute Parties and the interested parties
   "Record" means the Record of evidence given and arguments presented during the Hearing as set out at Annex B to this Determination
   "Timetable" or "WTT" means the New Working Timetable publication for introduction in May or December of the relevant year as the context may require
   ''TTP'' means Timetabling Panel

2 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 Sole Reference Documents (each an "SRD") and a timetable was set for their production. The dispute and the proposed Panel Hearing were duly notified generally by means of the ADC's website to all potentially involved parties and by email to those identified by the Dispute Parties as potentially affected by the dispute.

6. On 2 August 2019 Freightliner served its SRD in accordance with the dispute timetable as issued by the Secretary. On 8 August 2019, following discussion with Network Rail, FL

resubmitted its SRD to amend the subject matter under dispute. FL's revised SRD is published on the ADC website.

7. On 12 August 2019 Network Rail served its SRD in accordance with the dispute timetable as issued by the Secretary. NR's SRD is published on the ADC website.

8. GB Railfreight, XC Trains Ltd. and West Midlands Trains Ltd. declared themselves to be interested parties. The two former were represented at the Hearing; the last was not represented due to last minute illness.

9. In accordance with ADR Rule H18(c), following receipt of the Dispute Parties' submissions I reviewed them to identify any relevant issues of law raised by the dispute. On 14 August 2019, I confirmed to the other members of the Panel that I did not consider there to be any general issues of law arising out of the submissions; I noted that there were some issues of contract interpretation relating to the application of the rules in Condition D4.2, concerning the principles governing decisions arising in preparation of a New Working Timetable, and Condition D4.6, concerning the appropriate method of application of the Decision Criteria to decisions required of Network Rail, but these were issues of mixed fact and law which constituted the substance of the dispute to be determined. This was copied to the Dispute Parties on 15 August 2019.

10. The Hearing was originally convened for 20 August 2019, but I became unable to chair it then due to illness. The Hearing was accordingly reconvened for 10 September 2019 and took place on that day. I made opening remarks summarising the history of the procedure leading to, and intended order of proceedings for, the Hearing. I noted that the Record of the Hearing would be published as part of this Determination. The Dispute Parties delivered oral opening statements (written versions of which were provided to the Panel and to each other) and the interested parties were invited to make opening comments. I then explained the structure and objectives that the Panel's Q&A would pursue, and the Parties were accordingly questioned by me and the other members of the Panel. Following and in the light of the Q&A session the Dispute Parties were invited to make closing statements and did so. The Dispute Parties' closing statements, as well as their opening statements (as given orally), are included in the Record. The interested parties were also invited to make closing statements but declined to do so.

11. At the end of the Hearing, having conferred with the other members of the Panel, I outlined to the Parties the substance of the Panel's intended determination of the dispute, as later to be confirmed in this written Determination. I also discussed with the Dispute Parties the practicality of various apparent options for remedies and received their submissions as to Costs.

12. I confirm that the Panel has read carefully all the material submitted by the Dispute Parties. 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 material are specifically referred to or summarised in the course of this Determination. In particular, I should note that some of the points and material mentioned in the submissions (including the outcomes sought) and even in the course of the Q&A during the Hearing eventually proved irrelevant, either because the underlying issue had been conceded or otherwise resolved between the Dispute Parties prior to or during the Hearing, or because such points merely stated the obvious or were intrinsically specious; by and large I have omitted such material from my summaries below of the Parties' submissions and the Q&A.

3 Relevant provisions of the Network Code and other documents

13. The versions of the Network Code Part D and the ADR Rules dated 12 July 2017 were applicable to these dispute proceedings.

14. The provisions of the Network Code in issue in this dispute are, principally, the following Conditions, which are appended at Annex A:
    D2.6 Timetable Preparation – D-40 to D-26
    D4.2 Decisions arising in the preparation of a New Working Timetable
    D4.6 The Decision Criteria

4 Submissions made, and Outcomes sought by the Dispute Parties

15. As previously noted, the full text of Freightliner's and Network Rail's submissions in their respective SRDs (including all Appendices) to the Hearing are published on the ADC website. A full note of each of FL's and NR's oral opening statements to the Hearing is set out in the Record and these were in substance summaries of their respective prior written submissions.

Freightliner

16. Freightliner's submissions in both its SRD and its opening statement to the Hearing, in summary, commenced with a statement that in respect of all the eight trains now under dispute (as listed in FL's revised SRD) FL held Firm Rights to the characteristics included in its Access Proposals for in the December 2019 WTT at the Priority Date, including in particular a Train Slot for each train timed at 1600 tonnes trailing with a single Class 66 locomotive. Network Rail had rejected these trains and had instead offered Train Slots with a Timing Load of 1235 tonnes for each of them.

17. Having held these Firm Rights for the duration of its Track Access Contract (which predated the Priority Date, i.e.D-40, for the December 2019 New WTT), FL said it had made significant investments in assets to support a business requirement to increase the trailing weight of these eight services (among others), with the intention of exercising the Firm Rights from December 2019 to take account of the arrival date of its new wagons. The expected delivery of the Southampton Train Lengthening Project and of an expected recast of the Great Eastern Mainline timetable had both been deferred again and FL maintained that it could wait no longer to satisfy its business requirements, with consequent reduced revenue.

Process

18. Freightliner explained that the reasons for NR's rejection of its Access Proposals for the eight services had been contained in a series of 'Intention to Reject' letters dated between 12 April and 3 May 2019 (each an "ITR Letter"), although all these ITR Letters had been batched and addressed to FL in a single email which was sent on 16 May 2019. NR had confirmed to FL that for various practical reasons the ITR letters (rather than the subsequent formal rejection notifications) could and should be treated as the full statements of NR's rationale for its decisions to reject the FL services in question and of its application of the Decision Criteria to such decisions.

19. FL accepted NR's designation of the ITR Letters as constituting its formal rationale for rejection of FL's Access Proposals for the eight trains in dispute and was content to use them as the basis of the dispute, notwithstanding that this was not strictly in accordance with the requirements of Part D. However, FL challenged the reasons given by NR in the ITR Letters

for rejecting the 1600 tonne Timing Loads included in its Access Proposals and contended that in doing so NR had breached FL's Track Access Contract by not acting in accordance with applicable provisions of the Network Code, in a number of material respects.

Prioritisation

20. First, Freightliner contended that NR had failed to comply with the requirements for prioritising conflicting Access Proposals set out in Condition D4.2.2 paragraphs (b) - New WTT to be consistent with Exercised Firm Rights - and (c) - entitlement to exercise Flexing Right. NR had neither, FL maintained, confirmed nor demonstrated that it was unable to include FL's 1600 tonne Train Slots because of conflict with equal priority but non-flexible Firm Rights of others, but had simply decided not to exercise its available Flexing Right to vary the Access Proposals of other Timetable Participants within their respective Firm Rights, so as to enable it to accommodate FL's Access Proposals in accordance with its Exercised Firm Rights. These decisions, FL submitted, were shown by the ITR Letters to have been made for a variety of inadmissible reasons, including "the number of retimings necessary, disruption to other timetable participants and the probability of additional clashes caused by retiming".

21. With regard to prioritising, FL also inferred from several of the ITR Letters that NR had improperly developed a specific non-contractual policy as part of the rationale justifying its failures to exercise its Flexing Right where necessary to accommodate FL's requested Access Proposals in accordance with its Exercised Firm Rights. This apparent policy, as repeated in several of the ITR Letters, was that "any benefit of a 1600 tonne path must be measured against the longstanding reduction in flexibility resulting from inclusion of a slower path". FL submitted that the several repeated expressions of this statement demonstrated timetabling decisions by NR based neither on correct prioritisation nor on any application of the Decision Criteria, correct or otherwise, but on NR's opinion of the 'validity' of the Firm Rights already sold to FL for this Timetable, and approved by ORR by D-40, and their impact on capacity allocation in future timetables. Such an overruling policy, FL said, undermined investments already made and was counter to broader industry policy.

22. FL submitted that NR had also made errors in its identification of the relative priority for inclusion of certain services of other Timetable Participants under Condition D4.2.2, by attributing Firm Rights to them where in fact there were none. FL said NR had accepted having made these errors in respect of all the West Midlands Trains Train Slots and a Freightliner Heavy Haul slot that did not have Firm Rights in force at D-40. FL believed, however, that NR had not reviewed any of its decisions in the light of these accepted errors, and that this also had materially affected NR's already flawed view of the likely difficulty (without this even having been specifically demonstrated) of resolving all remaining potential clashes by the use of contractually available Flex.

Decision Criteria

23. Secondly, to the extent that the reasons for its prioritisation decisions given by NR invoked application of the Decision Criteria, Freightliner submitted (in its opening statement) that a decision not to apply available Flex to resolve such conflicts between Access Proposals having otherwise equal Firm Rights was not in principle one to which the Decision Criteria could be appropriately applied. To do so would negate NR's obligation under Condition D4.2.2 to endeavour where possible to comply with all Access Proposals properly submitted to it, subject to (among other matters) the principles previously referred to, namely requiring consistency with Exercised Firm Rights and being entitled to exercise NR's Flexing Right.

24. FL also maintained that the Decision Criteria, whether or not applicable to a decision not to use available Flex, or to resolve post-Flex conflicts between Access Proposals for services all having equal Firm Rights, had not been applied properly or correctly by NR in any case. On the contrary, NR's asserted application had been fundamentally flawed by the general lack of a systematic approach, by the apparently random omission of a number of the relevant Decision Criteria Considerations, and by an undue weighting towards passenger services, coupled with a general lack of understanding of the priorities of the freight industry and the economics of rail freight. These flaws, FL believed, had resulted in NR failing to comply either with the general test of Condition D4.6.3 requiring application "so as to reach a decision which is fair and not unduly discriminatory" as between individual affected Timetable Participants or as between such individual participants and NR, or with the specifics of each Consideration selected by NR as relevant.

25. FL's SRD contained a detailed critique, by service, of the specific Decision Criteria Considerations referenced by NR in relation to each service in the ITR Letters and in Appendix A to NR's SRD. From the ITR Letters FL's SRD also picked up some more generalised remarks made by NR ostensibly in assessing application of the Decision Criteria to some of the rejected services, but similar to the policy on Flexing referred to in paragraph 21 above, such as "It is not clear to me that the amended path would improve the capability of the Network with sufficient benefit to outweigh the negatives"; and that NR "do not feel the benefit of increased tonnage outweighs the cost". FL believed such statements reinforced the inference that NR's approach to the Decision Criteria was flawed by an ignorance of the positives of operating heavier trains for the freight industry.

26. In its opening statement to the Hearing FL rejected the Appendices to NR's SRD supplied as showing how the Decision Criteria had been applied by NR after reassessment in the light of FL's SRD. FL noted that these indicated simply which Considerations were included or omitted by NR and/or disputed by FL, without conducting the necessary exercise of measuring the option of offering FL Train Slots in accordance with its Firm Rights (including a 1600 tonne Timing Load) against the option of Flexing other Train Slots within otherwise conflicting Exercised Firm Rights of other Timetable Participants.

27. Finally, FL suggested (also in its opening statement) that NR appeared to have adopted its own "overriding principle" outside the Decision Criteria in operating the timetable process. This had been alluded to in some of the ITR Letters and was confirmed in NR's SRD: "The overriding principle at the time of planning is not to fundamentally alter the structure of the timetable, without understanding the impact of consequences". Not only, FL said, was such a principle nowhere to be found in the Network Code, but it was specifically contrary both to the Condition D4.2.2 obligation to endeavour to comply with all Access Proposals and to the Objective informing the Decision Criteria, as spelt out at the beginning of Condition D4.6.1. FL suggested that this principle had been at the root of NR's decision not to accommodate the trains in dispute at the requested Timing Load, instead of following the process required by the Network Code.

Outcomes sought by Freightliner

28. In its SRD, and repeated in its opening statement to the Hearing, Freightliner asked the Hearing Chair to instruct Network Rail to accommodate all the eight paths listed as still in dispute at a 1600 tonne Timing Load in the December 2019 WTT, in accordance with FL's Firm Rights.

Network Rail

29. Network Rail's opening statement to the Hearing, in summary, commenced with an introductory statement that creating a Working Timetable was an incredibly challenging and complex piece of work. Unfortunately, it was not always possible to accommodate all Timetable Participants' aspirations all of the time. It was the role, NR said, of Operational Planners and Planning Specialists within the Capacity Planning department of NR to evaluate the options and opportunities available in the Timetable and make the decision to either "accept, modify or reject" the submissions in accordance with the criteria outlined in Network Code Part D.

30. Network Rail's SRD noted the nature of the dispute as stated in FL's SRD and confirmed that the dispute was based around FL's request to increase what NR referred to as the "trailing weight" of the eight trains listed from 1235 tonnes in the current and previous WTTs to 1600 tonnes in the New WTT for December 2019.

31. NR's SRD, in addressing the main issues in dispute, adopted the titled sections (from the ADC template) distinguishing between "Issues where the Defendant Accepts the Claimant's Case", "Issues where the Defendant qualifies or refutes the Claimant's Case", and "Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination". In substance, however, these three sections each contained various arguments on the issues in dispute generally calculated to refute FL's arguments and substantiate NR's compliance with the Network Code. They are summarised here, therefore by reference to the issues as raised by FL rather than the sections of NR's SRD.

Process

32. Network Rail's SRD confirmed that the reasons for its rejection of FL's Access Proposals were not contained in the formal letters of rejection notification but in the ITR Letters. This was due to a practice that had been developed by NR with the intention of giving Timetable Participants more time to consider appeals against rejections and if necessary submission of further Access Proposals to overcome them. NR accordingly accepted FL's use of the ITR Letters in its SRD.

33. NR acknowledged that FL had a "business aspiration" to operate the Train Slots in dispute at 1600 tonnes.

34. FL's SRD had referred to a meeting with NR's train planners at Milton Keynes on 24 July 2019 where no NR senior management had been present. NR said this was normal for such a meeting between train planning 'practitioners' and such management presence had not been requested, and that that meeting had been unsuccessful in identifying end to end journeys for the Exercised Firm Rights for 1600 tonnes. This was due, NR said, to "no compliant paths available" within the "framework" of the December 2019 New WTT.

Prioritisation

35. In its SRD NR confirmed its acceptance of FL's assertion that West Midlands Trains did not have Firm Rights in force at D-40 for the December 2019 New WTT. However, NR said, in each ITR Letter a number of other trains operated by GTR, GBRf, Greater Anglia and Arriva Rail London, had also been listed as conflicting Train Slots possessing equal priority for inclusion with FL.

36. Responding to FL's contention that NR 's failure to include the disputed Train Slots was due to decisions not to apply its Flexing Right to conflicting Train Slots despite being entitled to do so, NR noted that it had applied such Flex to accommodate eight of FL's requested Train Slots other than the eight remaining in dispute. It was not clear to the Panel quite how this was relevant to the issue of the Train Slots which were still disputed. NR also stated that the Decision Criteria were applied only "where conflicts of Train Slots [were] not resolvable by a Flex".

37. At this point, however, NR continued by describing how "the volume of Flexes required to accommodate an increase [in] the trailing weight of [the eight trains in dispute] resulted in a fundamentally different timetable". NR instanced various different Flexes to particular services or on particular routes that could be achieved by themselves but which would probably in aggregate produce a such different timetable, thereby in NR's contention failing to meet with the Objective of the Decision Criteria. On this basis NR made the assertion that "It is the role of the NR Operational Planner to make capacity allocation decisions to meet the Objective in line with the Network Code Part D. Thus inferring (sic), the planner has the right to determine if an access right can or cannot be accommodated."

38. Having determined that the aggregate volume of Flexes required to accommodate FL's trains at 1600 tonnes Timing Load would probably change the Timetable (even though such Flexes had not been actually worked through to conclusion for all affected individual operators or Train Slots), NR said it had rejected all FL's disputed services based upon the Decision Criteria being applied against all those and other Train Slots listed (including the Exercised Firm Rights of a number of other Timetable Participants) as set out in the ITR Letters to FL. As far as NR was concerned, the only relevant services to which prioritisation had been applicable before the Decision Criteria came into play, were those of West Midlands Trains (which NR had accepted as initially prioritised wrongly) - and there had been relevant conflicting Train Slots of other operators even when those of WMT were taken out of the equation.

Decision Criteria

39. Having again quoted the Objective of the Decision Criteria, Network Rail's SRD explained its general approach to the application of the Decision Criteria Considerations to the rejection of FL's eight services in dispute. NR said its 'selection' of Decision Criteria (presumed to mean selection on the basis of general relevance) was "based on Considerations that are quantifiable at the time of the decision". NR acknowledged that no further information was sought from Timetable Participants having rights for potentially affected services with respect to identifying suitability of other Considerations for application.

40. Appendix A to NR's SRD showed the Decision Criteria (assumed to mean the Considerations set out in Condition D4.6.2) "deemed relevant" by NR, colour coded to distinguish those apparently disputed and not disputed by FL, and those disputed because they had not been included by NR.

41. NR's SRD confirmed that at the time of the decision it had given an equal weighting (presumed to mean importance or significance) to each of the Decision Criteria Considerations applied by it. NR then stated (as highlighted by FL in its opening statement, noted in para. 26 above) that "The overriding principle at the time of planning is not to fundamentally alter the structure of the timetable, without understanding the impact of consequences".

42. NR's SRD then gave an itemised explanation of how each relevant Consideration had been specifically applied in respect of each of the Train Slots in dispute, as previously summarised in each of the ITR Letters. Objections to the Considerations identified in the ITR Letters were addressed in detail by Train Slot in FL's SRD, and the interchange between NR's explanations and FL's objections was interrogated comprehensively in the Q&A (as reproduced in the Record), which is where I shall deal with it in this Determination.

43. The principal argument in NR's SRD concluded with the assertion that it had demonstrated it was not able to accommodate the FL 'aspiration' for a Timing Load of 1600 tonnes for the Train Slots as included in its Access Proposals. This was "due to the number of conflicts with other Train Slots as identified by" [the ITR Letters]. NR had "chosen not to remove conflicting Train Slots from the timetable, and applied the Decision Criteria in favour of the listed trains." This resulted in the 'existing' 1235 tonne Timing Load FL Train Slots being retained, with only the increase in Timing Load not being accommodated. NR believed the principles within the Network Code had been adhered to "in a fair and consistent manner" during the Timetable Preparation Period D40-D26 in reaching "the Objective".

44. NR's opening statement listed twelve 'Key Points for consideration'. All can be read in the Record but in my opinion all but one fall into one or more categories of irrelevance referred to in para. 12 above. The one remaining relevant point made is number 9, the assertion that Freightliner has not been able to demonstrate how its services can or should have been accommodated without impacting other Timetable Participants. This issue was addressed in the Q&A.

Outcomes sought by Network Rail

45. Network Rail in its SRD and its opening statement asked the Panel to determine (here excluding matters no longer in dispute or otherwise irrelevant) that:
    - a planner working on behalf of Capacity Planning, Network Rail, as part of the development of a New WTT is able to make a decision to accept, modify or reject a train slot request from any Timetable Participant in cognisance (sic) of their access rights;
    - [in the case of] a Timetable Participant possessing access rights which are subsequently exercised, [such rights] are not guaranteed inclusion in the New WTT. Access rights do not supersede Part D and nor do they undermine Network Rail's processes in delivering "the Objective";
    - Network Rail has applied the Decision Criteria in [the] fairest manner, as outlined in [paragraph] 4.2 iii [of NR's SRD] in accordance with reaching "the Objective";
    - 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.

GBRf (interested party)

46. After the Dispute Parties' opening statements GBRf (at my invitation) indicated a wish to make a comment. GBRf referred to the ORR's Criteria and Procedures for the approval of Track Access Agreements 2011, which it said was the document that Passenger and Freight Operators were pointed to when applying for Firm Rights. Paragraph 4.16 of that document stated that if capacity had been oversold then "the facility owner faces liability for breach of contract if it fails to deliver the access it has contracted to provide". GBRf considered this relevant to the issues in this Hearing.

5 Oral exchanges at the Hearing: evidence and arguments submitted

47. After considering the written submissions of the Dispute Parties as listed in section 2 above and having heard their further oral submissions in their opening statements as summarised in section 4 above, I and the other members of the Panel questioned the Dispute Parties' representatives to clarify a number of points arising. In line with the practice adopted at previous Timetabling Panel Hearings, because there is no procedure for individuals' answers to questions to be taken as sworn evidence (in common with the Dispute Parties' written submissions), I consider that the Panel ought and is entitled to accept answers and submissions regarding matters of fact as true and accurate statements unless it finds any indication to the contrary. I have taken them into account accordingly in reaching this Determination.

48. The Record at Annex B includes a full account of the Q&A during the Hearing, including incidental observations by the Panel and the Parties, and as such constitutes an integral part of this Determination. The following, therefore, is a digest of the main evidential conclusions established and arguments advanced in the discussion during the Q&A sessions.

49. The discussion followed a sequence which I outlined at the outset. I explained the Panel's intended method for questioning the Dispute Parties, following the issues as raised by the submissions. I described the main four background issues in the case as follows:

    - first, as a matter of process, clarifying the scope of the respective Firm Rights of FL and other potentially affected Timetable Participants, by seeking clear information as to the actual expression of such Firm Rights in their Track Access Contracts ("TAC") in order to be able to gauge the available margin for Flex by NR, which the Network Code defines as modification "within and consistent with the Exercised Firm Rights" of an operator;
    - second, understanding the prioritisation rules of the Network Code applicable to the compilation of the New WTT and how they had been applied in this case by NR;
    - third, the actual process adopted by NR in its application of the Decision Criteria to the decisions in dispute, whether that had been effected procedurally in the way and at the time required by the Network Code; and
    - fourth, if and to the extent that it was right to apply the Decision Criteria, were they properly and correctly applied as described in NR's documents, namely the ITR Letters and the Appendices to NR's SRD. On this issue, application of the Decision Criteria, I proposed that we would take it by reference to FL's SRD as this made a series of repeated objections to each specific Decision Consideration evaluated as chosen or discarded by NR in the ITR Letters, and by working through these Considerations and FL's objections once we could avoid the need to examine them repeatedly for each individual train in dispute.

Process

50. Before getting on to the Firm Rights information the Panel needed first to dispose of one other procedural issue of principle. Notwithstanding NR's consistent use in its submissions of the phrase "accept, modify or reject" to describe the options open to it in responding to a Timetable Participant's Access Proposal in the course of compiling the New WTT, the Panel established that this expression was actually derived from the language in Condition D3.3.3 dealing with Train Operator Variations.

51. NR seemed to feel that the expression "accept, modify or reject" was somehow analogous to the process it actually went through in dealing with Access Proposals for a New WTT between

D-40 and D-26. NR thought that this terminology had become generally used for the timetabling process in "custom and practice" but accepted that, as the Panel pointed out, contractually it was very different, presumably intentionally, from the specific Part D provisions for that particular process. These were, in the first place, Condition D2.6.3 Timetable Preparation - D-40 to D-26, which pointed to Condition D4.2, Decisions arising in the preparation of a New WTT, which in turn engaged Condition D4.6, The Decision Criteria. (The full text of these provisions is set out at Annex A.)

52. NR confirmed that its submissions, therefore, should not be taken as asserting any general power to "accept, modify or reject" Access Proposals according to some sort of general dictionary definition of those words. I confirmed that we would proceed on the basis of Conditions D4.2 and D4.6 as governing the operation of the timetabling process under dispute.

53. Moving to the clarification sought of the definition and extent of FL's Firm Rights regarding the 1600 tonne Timing Loads in dispute, FL explained that these rights were expressed within the Schedule 5 Rights Table in its TAC, which followed largely the model form of Freight TAC as approved by ORR. This Rights Table included the equipment characteristics, Timing Load and other physical characteristics of each train. A copy was requested by and provided to the Panel.

54. The Panel then explored the nature of the definition of the 1600 tonne and other Timing Loads in the Rights Table. I wanted clearly to understand in principle how this worked in terms of NR's right to Flex and FL's right to make Access Proposals. I asked if FL was saying it was a maximum weight in terms of FL's entitlement to submit an Access Proposal for a Train Slot and a minimum weight in terms of NR's obligation to grant a Train Slot requested. FL confirmed this was so. After further discussion the Panel established that, indeed, on FL's side it was a maximum they could go up to but on NR's side it was a minimum below which, if a Freight Operator requested that, NR could not Flex because to do so would <u>not</u> be "within and consistent with" the contractual Exercised Firm Rights.

55. Members of the Panel then advised that the precise wording which expressed this concept in Schedule 5 of the model Freight TAC, was contained in paragraph 4.2.1 and read: "Subject to paragraph 4.2.3, the Train Operator has, in relation to a Service, a Firm Right to use any equipment registered with Network Rail's rolling stock library which has performance characteristics <u>identical to or better than</u> (my emphasis) the Timing Load specified in the Rights Table for such Service."

56. NR accepted then that this was the correct and applicable interpretation of the Timing Load definition appearing in Schedule 5, i.e. maximum entitlement on one hand and minimum obligation on the other, and that it was precisely on the basis of this that one could determine what the extent of the Flexing Right should be in relation to an Exercised Firm Right to a particular Timing Load.

57. The next process issue concerned the possible need to identify the precise expression of the relevant Firm Rights of other affected operators, in order to be able to gauge the scope for Flex of those Rights open to Network Rail, had it chosen to avail itself of the maximum possible such Flex in order to accommodate the 1600 tonne Timing Loads requested by FL for the eight trains in dispute. I expressed the hope that the Panel could avoid the need for a wholesale examination of every single potentially engaged Firm Right of every single potentially affected operator, by concentrating on the merits of the overarching proposition raised by both Dispute Parties' submissions, that in theory <u>all</u> necessary changes could

eventually be made by NR to other affected Train Slots within the scope of NR's Flexing Right available in relation to each such Train Slot, so that such scope was not actually in issue.

58. Accordingly I put it to Network Rail that, despite multiple references in its submissions to the difficulty, scope and sheer size of the task of working through all possible conflicts, the 'knock on' effects and general ramifications of changing other affected operators' services by the proper use of Flex, it had not at any point actually completed such a task nor, on the other hand, stated categorically that it was impossible to complete – NR had just emphasised that to complete it would be very difficult and time-consuming.

59. NR made various references to the possible connected effects of impacts on multiple services, "rippling" into other Train Slots, and the "spider's web" of consecutive results of changing existing services even by a few minutes. There followed an extended discussion on the likely reach and relevance of such speculative effects, with NR consistently repeating the assertion made in its submissions that with all the changes that it believed would have to be made using all available Flex, the underlying structure of the Timetable would be fundamentally altered or otherwise negatively affected. In the end, however, NR acknowledged that in starting to conduct (or considering whether to conduct) the task it had not actually identified any specific impact (of a potential use of available Flex) that would amount to a breach of an operator's contract. It had only reached the point of saying that there were so many points of conflict that there might be a 'knock on', wider impact.

60. I concluded therefore that on this issue the Panel could sensibly avoid calling for details and examining the definitions of every potentially affected operator's relevant Firm Rights, on the basis that NR had acknowledged that none of the apparently potential but as yet undefined conflicting Firm Rights of other operators definitely conflicted, because they were Firm Rights in respect of which the conflicts might possibly be resolved by Flexing within their contractual terms in the manner identified in the ITR Letters; or to put it another way, that in regard to the December 2019 Timetable no contractual conflicts had actually been identified that could not be accommodated within contractually entitled Flex.

Prioritisation

61. By now the Panel had already dealt with several aspects of prioritisation in relation to the previous process issue about the need to engage with details of other operators' Firm Rights in order to assess the scope of available Flex. The Panel therefore now continued to examine some of the same points but in the context of their effect on NR's conduct, as required under Condition D4.2.2, of prioritising competing Firm Rights subject to various principles including its 'entitlement' to exercise its Flexing Right, concentrating on the conditions under which Flex could and should be exercised.

62. GBRf noted first that, to meet ORR's latest guidelines, a process had recently been undergone between NR and Train Operators of expanding NR's Flexing Right - most passenger services to a 24-hour window and freight services to 60-minute windows - to accommodate more services and give NR better availability to 'mix and match'. With ORR having put in much time and effort to afford NR such additional Flex, GBRf believed NR would have taken the opportunity to use it where needed to accommodate all contractual rights, but it appeared not to have done so. NR agreed that this was the case and that this substantiated what it had already accepted, namely that of the various conflicts and other potential problems with other operators' services referred to by NR in trying to accommodate FL's Firm Rights, none had been identified that would actually breach a TAC.

63. There followed a discussion along similar lines to that in respect of the previous process issue regarding the scope of conflicting Firm Rights of FL and other operators. The Panel started by correcting an apparent misunderstanding on Network Rail's part that it had failed to give the right priority to seven of FL's eight Train Slots in dispute for inclusion in the New WTT only because of a perceived conflict with services bid for by West Midlands Trains which had subsequently proved not to have Firm Rights in place at the Priority Date. It was established, and NR accepted, that the status of the WMT services had been irrelevant and the rejection of FL's Access Proposals had really been due to NR's perceived possibilities of conflicts with other operators who held Firm Rights subject to Flex. Discussion accordingly focused again on the issues of scope for and obligation to exhaust available Flex, which brought the Panel back to examining Condition D4.2.

64. I explained again the contractual basis on which these issues arose, namely that under Condition D4.2.1, when considering Access Proposals in compiling a New WTT, NR was obliged to "apply the Decision Criteria in accordance with Condition D4.6 and (my emphasis) conduct itself as set out in this Condition D4.2". In my view this sentence required NR to perform two distinct sets of obligations. The operative part of Condition D4.2 was Condition D4.2.2, which I had characterised as the 'prioritisation' exercise, and which, as drafted in Condition D4.2.1, constituted a separate obligation from applying the Decision Criteria. I believed it to be generally accepted in respect of these sorts of timetabling decisions (subject always to the possibility of ORR in future opining to the contrary), that the Decision Criteria came into play only after NR had completed the prioritisation exercise. The Decision Criteria were therefore the assessment yardstick by which to resolve conflicts remaining between Access Proposals which had already been correctly accorded wholly equal priority under Condition D4.2.2 and in respect of which NR either had no Flexing Right (because of the way in which the Firm Right was expressed in the relevant TAC) or its entitlement to exercise any available Flexing Right had already been exercised to the fullest possible extent, i.e. within and consistent with the relevant operator's Exercised Firm Rights.

65. I put it to NR that my understanding of FL's argument in this dispute (which FL confirmed) was that NR had not operated the prioritisation procedure under Condition D4.2.2 correctly, in that it had, in effect, wrongly prioritised a number of other operators' Access Proposals over FL's Access Proposals by not Flexing them to the extent it could have done under their respective TACs. I suggested that NR's SRD did not appear to have refuted that contention, nor did its opening statement, nor any answers or other remarks made on behalf of NR to the Hearing. After some additional clarification NR accepted this, and also that it could give no clear evidential example of another operator's conflicting Firm Right having no available Flex, which would put NR in breach of contract if varied in order to resolve the conflict with FL. NR acknowledged that what it had actually done in this case was to decide not to Flex various Train Slots because of the volume of contractual Flexes that would have been required, rather than because it was unable to do so contractually.

66. In the light of these acknowledgements I wanted to clarify whether NR was nevertheless saying that it could or should apply the Decision Criteria to a decision to prioritise one Access Proposal over another by refraining from Flexing an operator's Firm Right to the full extent of NR's Flexing Right. NR confirmed that it made no such assertion; and NR did not believe it had applied the Decision Criteria to any decision not to exercise its available Flexing Right.

67. NR accordingly was still acknowledging that it had not demonstrated that it had attempted to use the full extent of its Flexing Rights. NR then said, however, that each ITR Letter had demonstrated the different permutations it had attempted (to resolve the conflicts with FL's Access Proposals) within what was available to NR, and that NR had then applied the

Decision Criteria when it felt unable to resolve the conflicts. As this was somewhat confusing in the light of what NR appeared to have accepted previously, I asked NR again to confirm that it had not exercised its Flexing Rights to the extent it could have done, that the reason for this was because of the anticipated volume of 'knock-on' impacts, and that NR's position was not that it could not do it, but that it was too much to do. NR confirmed again that this was so; it said it could only work within the resources it had.

68. I suggested that NR already knew some of the Flex it had available; that it had worked out what that Flex was theoretically but had not put this into practice and made decisions on that basis. It had identified the Flex available but then, citing the Decision Criteria as somehow relevant, had decided not to go forward, on the real basis of too much disruption and affecting the structure of the timetable too much. NR again agreed that it had not identified and could not identify any actual breaches of contract, i.e. variation not within and consistent with any Exercised Firm Rights, that would have been occasioned had it pursued the exercise.

69. Following this exchange it was not entirely clear to what decision NR thought it had applied the Decision Criteria. I said I was minded to conclude in any event that NR had not complied with the prioritisation procedure of the Network Code, thus agreeing with FL's allegation. However, in case a higher authority disagreed with me on prioritisation or the primacy of Flex, there was still the issue of the actual application of the Decision Criteria to consider.

Decision Criteria

70. I noted that there were usually two separate issues to consider with regard to the Decision Criteria, which I had described in the course of introducing the Q&A session. The first issue was to evaluate the process adopted by NR in its application of the Decision Criteria to the decisions in dispute, to confirm whether that had actually been done in the way and at the time required by the Network Code. This was something with which NR seemed to have had difficulty in many previous disputes assessed by TTPs; typically it would become evident that at the time of a particular decision in dispute NR had not had the Decision Criteria in mind and that since the dispute was raised someone had concocted something for its purposes. In this case I was pleased to note that this had not happened, and that as far as I could see NR had in good faith and with good intent undertaken the exercise of considering the Decision Criteria in the course of making whatever decisions were made, and to an extent documenting this process in the ITR Letters, rather than afterwards. Therefore, the issue of failing to apply or applying them only retrospectively did not arise here.

71. The second, main, issue with the Decision Criteria was the actual substance - the sufficiency and reasonableness - of their application by NR in the instant case. Before addressing this in the Q&A I wanted to give it some perspective by explaining how I thought the relevant parts of the Network Code had been drafted and should be understood. I noted that since the change to Condition D4.6 some years ago when the "Considerations" in Condition D4.6.2 had been split out from the "Objective" in Condition D4.6.1, much reference had been made to "weighting" the various Considerations. I believed there were in fact two distinct kinds of weighting process required by Condition D4.6, but confusingly only one of them actually described itself as "weighting".

72. I referred to Condition D4.6.3 which stated the method by which the Considerations were to be applied in achieving the Objective. There were three stages to be applied: first, considering which of the Considerations are "relevant" to the particular circumstances; second, applying the Considerations identified by NR as relevant "so as to reach a decision that is fair and not unduly discriminatory as between any individual affected Timetable Participants or as

between any individual affected Timetable Participant and Network Rail" (my emphases). Then third, where in light of the circumstances NR considers that "application of two or more of the relevant Considerations" would lead to conflicting results, NR has to decide which is most important and then apply the appropriate weight to each such Consideration. So, after deciding relevancy, the first sort of weighting would be in taking each single relevant Consideration in turn and evaluating - weighting - its actual impact across the range of different affected Timetable Participants. Only once that was done and it was known who was most impacted by each Consideration on its own, did one then - where these relative impacts conflicted - weight the most significant impacts of each relevant Consideration against those of the others to see which was the most important. These processes appeared sometimes to be conflated. So, the first weighting would not be for or against the importance of individual Considerations relative to one another, but evaluating the relative impact of each relevant Consideration by itself on one Timetable Participant against another or against NR.

73. This issue, of NR's actual specific application of the Decision Criteria, had been covered substantively in FL's comments on the ITR letters against each of its rejected services in its 'Detailed analysis of rejections' in its SRD, and had been addressed in NR's responses in its SRD, both as to its general approach and by individual Consideration. I proposed to deal with it in Q&A, therefore, by going through FL's comments on each individual Decision Criteria Consideration successively as applied (or discarded) by NR, as set out in FL's revised submission. I noted that the object of this exercise was largely to give NR the chance now to respond to FL's comments where it had not done so fully or directly in its submission. The ensuing quite lengthy debate in respect of each relevant Consideration identified is fully reproduced in the Record so I just summarise here the general thrust and conclusions reached with regard to each one, taking them in the order dealt with in the Q&A which was that in which they first arose in FL's SRD in addressing each rejected service in turn.

74. *Consideration (i), mitigating the effect on the environment*: FL advanced the environmental benefits of rail freight; NR had ignored this Consideration in its application of the Decision Criteria. NR now acknowledged the benefit of reducing road freight traffic but argued that extending passenger journeys or removing passenger Train Slots "may also result in passengers driving rather than utilise the largely electric trains in operation on relevant routes" and it therefore submitted the Consideration could not be 'weighted' for or against FL without obtaining further information. NR then accepted FL's assertion that NR had not actually identified any Train Slot that would need to be removed to bring about additional car journeys. The Panel concluded that Consideration (i) was relevant and should have been applied, and that its relative impacts favoured FL.

75. *Consideration (c), maintaining and improving train service performance*: NR's ITR Letters had weighted the impact of this against FL. FL said it expected all offered Train Slots to be TPR compliant and therefore there to be no detrimental impact on performance. NR now accepted this. After a further debate on the relative effects of increased train weight versus length, it was accepted that heavier trains, particularly with the small increases in weight subject to this dispute, did not necessarily lead to poorer performance and NR withdrew its previous comments on this aspect. The Panel concluded that Consideration (c) was relevant but its relative impacts favoured neither FL nor any other operator nor NR, so were neutral.

76. *Consideration (e), maintaining and improving an integrated system of transport for passengers and goods*: NR said it had weighted this against FL based on the requirement (in order to resolve conflicts) to use its Flex at key Network locations – what it had called "the ripple effect". NR accepted the suggestion that this was another example of NR's unsubstantiated concern at the possibility of too much aggregate change somehow disrupting

the timetable generally. FL's SRD had pointed out that there was no suggestion that any passenger Train Slot would have to be removed and no details provided of any current connections that would no longer be possible. Conversely, FL maintained, this Consideration would support making the freight path more productive, thereby helping to reduce freight's overall footprint on the Network, which should be deemed a positive of uplifting the tonnage.

77. In a further discussion it became apparent that NR's focus was on 'integration' of passenger services as a whole in the sense of preserving theoretical connectivity, with no regard for integrating the needs of freight services, individual or otherwise, nor any information as to what actual connectivity might be compromised; simply, "the outcome should be in favour of keeping the whole passenger network integrated and not changing it for the sake of eight slots comprising four trains". The Panel concluded that Consideration (e) was relevant but had been misapplied so as to exclude freight from evaluation; in fact its relative impacts probably favoured freight but at worst should have been regarded as neutral.

78. *Consideration (a), maintaining, developing and improving the capability of the Network*: NR had applied the impact of this against FL on the basis, again, of too much anticipated change to the timetable, as well as the possible impact on other services and extended journeys; NR considered it relevant to "maintaining" capability of the Network, in that a slower train occupying track for a longer time would reduce the number of Train Slots available. NR accepted that it had not compared this with the impact on "developing and improving" capability through having more freight paths.

79. After discussion the Panel considered that this Consideration was intended for and normally applied in the context of conflicts between possessions and trains, i.e. physically maintaining the Network, rather than accommodating more trains on the Network by making several small adjustments to train timings. Moreover, this construction supported the breadth of the Objective under Condition D4.6.1, which was paramount, 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". NR acknowledged that increased tonnage could be an improvement for FL, but conversely the possible detriment of that had not been considered. I pointed out that the exercise on which the Hearing was now engaged was precisely what should have been done at the time of NR's decision, namely evaluating the negative impact on one party and the positive impact on another, in this case the freight operator. NR so far had only considered and articulated the possible negative impact on passenger services, being some general disruption in a number of minor respects, with only the aggregate passenger service impact being cited as the potential problem. The Panel concluded that Consideration (a) was relevant and, properly construed, its relative impacts favoured FL.

80. *Consideration (j), enabling operators of trans to utilise their assets efficiently*: FL said the ability to use assets efficiently was one of the key drivers for freight operators' aspirations to run longer and heavier trains, and the impact of this Consideration should have weighed heavily in favour of accepting FL's Access Proposals; NR had ignored this Consideration in rejecting those Access Proposals. NR now acknowledged that the potential impact might be reconsidered in light of a fundamentally different timetable structure, which it accepted equated a repetition of its previous underlying general objection to altering the timetable as it stood, mentioning again the "spider's web" analogy where one decision might lead to a number of conflicts further down. NR again accepted that it had neither obtained nor offered any evidence of the likelihood, let alone the fact, of possibly irresolvable conflicts occurring. NR said it had not had sufficient information to explain the possible conflicts at the time of making the decisions but might now be able to obtain something if given time to go away and

do so. The Panel considered that NR had already had ample time and opportunity to produce anything it might be able to.

81. FL then explained how its inability to run the services at 1600 tonnes Timing Load substantially affected the utilisation of its assets and the economics of running more freight, leading to the likely conclusion that the impact of Consideration (j) favoured FL. The Panel concluded that Consideration (j) was highly relevant and should have been applied, with necessary information having been sought by NR, at the time of its decisions; and, with or without any further information, its relative impacts favoured FL.

82. *Consideration (f), the commercial interests of NR… or any Timetable Participant*: FL's SRD stated there were efficiency gains and therefore commercial benefits to the freight operators of running heavier trains; NR had ignored this Consideration in rejecting the Access Proposals. NR's response in its SRD was that this had not been considered and, if it had been, would have been assessed as neutral. NR now explained that this was because any NR gains (presumably from accepting FL's Access Proposals) would be marginal and offset by maintenance, so it would be neutral to NR. FL pointed out that it would obviously not be neutral to FL as a Timetable Participant; it was in FL's commercial interests to run longer and heavier trains and was a prime driver of its business. FL confirmed that there would be no increase to its TAC fixed charges if it ran 1600 tonnes. The Panel concluded that Consideration (f) was relevant and should have been applied, and that its relative impacts favoured FL.

83. *Consideration (g), seeking consistency with any relevant Route Utilisation Strategy [or its current equivalent]*: FL said that the Freight Network Study (of April 2017) talked about how the Network could be configured; running longer and heavier freight trains was absolutely key and had underpinned the investments made by the industry through the Strategic Freight Network Fund. NR accepted that this freight study was effectively the equivalent of a RUS, but with caveats that there were other future growth aspirations for the GE Mainline and other studies, and NR would have to look at the wider context.

84. Following some discussion as to what additional documents and evidence might be or should have been before the Panel, I concluded that the Panel should proceed on the basis of what it already had. FL had submitted that the Freight Network Study was relevant; NR in its SRD had said that Consideration (g) had not been applied. NR had acknowledged that this Consideration could be applied in favour of FL but it had "weighted other Considerations higher, in the knowledge of the impact of including the proposal from Freightliner would have a negative impact on the timetable structure we already have" (sic). NR did not offer any further details of such higher weightings; although there was a CP6 document for freight and passengers, NR said it had not referenced it here because it had not considered it, nor anything else. The Panel concluded that Consideration (g) was relevant and should have been applied, and that by virtue of the Freight Network Study its relative impacts favoured FL.

85. *Consideration (b), that the spread of services reflects demand;* and *Consideration (d), that journey times are as short as reasonably possible:* NR had said in the ITR Letters and in its SRD that both of these had "weighed heavily" or been applied against FL on the ground that necessary changes to other operators' Access Proposals might impact passenger service connectivity and journey times, and NR believed these applications were not disputed by FL. FL said they had been disputed in its SRD, collectively with other Considerations, on the ground that the longest necessary passenger service retiming forecast by NR was only 3 minutes. FL contended that 3 minutes in a passenger service journey time did not stop it meeting demand and could still make it as short as reasonably possible. I noted that as

passenger journeys would still be as short as was reasonable, a pathing time increase of three minutes would not greatly detract from the principle that the journey should be as short as reasonably possible. The Panel had no information on which to see it any other way; NR accepted this. The Panel concluded that Considerations (b) and (d) were both relevant and should have been applied; that the relative impacts of (b) favoured FL; and that the relative impacts of (d) were neutral.

86. That concluded the Panel's examination of Network Rail's specific application of the relevant Decision Criteria Considerations. I had noted a number of other objections in FL's SRD not specifically addressed to the application of the Considerations but to some more general remarks by NR in the ITR Letters concerning its rejection of FL's services or at least the 1600 tonne Timing Loads, as mentioned at paragraph 25 above. To some extent these remarks and FL's objections had already been considered in the course of the Panel's examination of the previous issues, particularly prioritisation of Access Proposals. Nearly all the flaws identified by FL were in the application of the Decision Criteria Considerations, and all comments by NR in response were in relation to its application of the Considerations, except one reference by NR to the Objective in the context of why it prioritised not Flexing all the other relevant services. I believed the Panel had therefore exhausted all the material that justified any further discussion.

87. The Panel had thus completed the exercise of examining Network Rail's approach, and FL's objections to that approach, to the first two stages of the Condition D4.6.3 process (as I had described it at paragraph 72 above), namely first identifying the relevant Considerations and then applying each of them so as to reach a decision that was "fair and not unduly discriminatory", in terms of assessing the relative impacts of each relevant Consideration on one individual participant against another, i.e. FL versus other operators or FL versus NR. This had led the Panel to conclude that the relative impacts of all the relevant Considerations either favoured FL or were neutral. That being the case, the Panel no longer needed to consider the third stage consisting of the other (self-described) "weighting" process as I had distinguished it earlier, derived from the second sentence of Condition D4.6.3, which would be required only where the application of two or more relevant Considerations would lead to a conflicting result.

88. Network Rail said it disagreed with this last conclusion but could not articulate anything better. I invited NR to make any further representations it wished, to supplement the information and arguments already provided, but it declined. The Panel accordingly considered that there had been sufficient opportunity, including a postponement of Hearing date, and that it had to judge on the basis of the information presented by the Parties, albeit the Panel would have wished NR to be conclusive as to whether it would breach another operator's TAC if directed to include the 1600 tonne Train Slots, but the Panel did not think NR could answer the question with the information it had brought to the dispute nor, in any event, without completing the exercise it should have completed before rejecting FL's Access Proposals for the 1600 tonne Train Slots.

Remedies

89. The Panel continued the oral exchanges by considering the practicalities of various possible outcomes including remedies available. That discussion is included in the Record. I wanted to explore what the genuine practical consequences would be of a determination that Network Rail should, as requested by Freightliner, direct NR to accommodate these eight Train Slots at 1600 tonnes in the December 2019 timetable; or accommodate the Train Slots in the May 2020 timetable; or accommodate them by a sensible date in between. The Panel was

informed that accommodating the Train Slots in the December 2019 timetable would have a significant impact for Network Rail in terms of human resources and in what it described (again) as the 'ripple effect', being the potential 'knock on' effects on individual services being altered by three or four minutes, and possible impacts on connections or turnarounds. NR was still unable, however, to give any quantitative estimate of any of these impacts. FL said it would be able to quantify the financial impact to it of not having the 1600 tonne paths from December 2019 and NR confirmed that it should be able to agree a methodology for calculating compensation to FL for the rejected Train Slots should this become necessary.

Conclusion

90. The Dispute Parties made brief closing statements which are included in the Record. The interested parties declined to make any further comments. The oral exchanges ended with some further questioning of FL by NR regarding its decision not to submit revised Access Proposals following the rejection of its original Access Proposals, rather than challenging the rejection in accordance with the TAC. This had no bearing on the outcome of the dispute.

91. I outlined to the parties a summary of my decision which would be issued in due course. I then asked Freightliner if it wished to make an application under ADR Rule H60 for its costs of pursuing the dispute, having regard to the tests for such an order set by that Rule. FL confirmed it did not wish to make such an application.

6 Analysis and consideration of issues and submissions

92. I now consider the issues raised by this dispute. I confirm this analysis takes into account, as previously noted, the Dispute Parties' submissions prior to and at the Hearing, including the oral exchanges on particular points of information raised during the Hearing. It is these matters that inform the conclusions of this Determination.

93. In essence, I conclude, on the basis of the submissions, evidence and arguments presented at the Hearing (as appear from the Record) and my own interpretation of the relevant Conditions of Part D of the Network Code, that Freightliner has made out its case as expressed in the Notice of Dispute, its SRD and subsequent submissions.

94. The analysis of the issues in this dispute mainly follows the structure and content of the propositions discussed and established in the course and at the end of the oral exchanges sequentially during the Hearing. To some extent therefore it repeats what was explained by me in the course of those exchanges.

Applicable Contract Processes and Information

95. As previously noted, therefore, regarding the first issue as to identifying the contractual provisions and processes applicable to the dispute I conclude that the relevant provisions of the Network Code are those listed in paragraph 14 above and set out in full at Annex A, namely Conditions D2.6, D4.2 and D4.6. Consequently, Network Rail's various references in its submissions to a right to "accept, modify or reject" Access Proposals are mistaken.

96. With regard to the nature of the Firm Right of a Timetable Participant to any particular Timing Load as evidenced in Schedule 5 to FL's TAC, the Panel established that on the Freight Operator's side this was a maximum it could request up to but on NR's side it was a minimum below which, if requested by a Freight Operator, NR could not Flex it because to do so would not be "within and consistent with" the Exercised Firm Rights of that operator.

97. With regard to NR's exercise of its Flexing Right to accommodate Access Proposals exercising Firm Rights of equal priority under Condition D4.2.2 including those of FL for the 1600 tonne Train Slots in dispute, I find that NR has not identified any specific impact of a potential use of available Flex that would amount to a breach of another Timetable Participant's Firm Rights. NR has acknowledged that none of the apparently potential but as yet undefined conflicting Firm Rights of other Timetable Participants unavoidably conflict with those of FL, because they are Firm Rights in respect of which the conflicts may be resolved by Flexing within their contractual terms in the manner identified in the ITR Letters. For the New WTT for December 2019, therefore, no contractual conflicts with FL's Access Proposals for the rejected 1600 tonne Train Slots have been identified by NR that cannot be accommodated within NR's contractually entitled Flex. It has therefore proved unnecessary to seek further information as to the scope of the Firm Rights of other Timetable Participants potentially conflicting with those of FL.

Prioritisation of Bids

98. The second issue of the dispute concerns the process of Network Rail's prioritisation of Access Proposals and Firm Rights of Timetable Participants under Condition D4.2.2. My analysis and conclusions here are substantially as appears from the Q&A account at paragraphs 64 to 69 above and from the related part of the Record. In summary, I find that:
    - NR did not operate the prioritisation procedure under Condition D4.2.2 correctly in that it wrongly prioritised a number of other operators' Access Proposals by not Flexing them to the extent it could have done under their respective TACs. NR accepted this and also that in this case it had decided not to Flex various Train Slots because of the volume of contractual Flexes that would have been required, rather than because it was unable to do it contractually.
    - NR did not have, nor assert, an entitlement or obligation to apply the Decision Criteria in making the decision of preferring one service over another and therefore in making the decision of not necessarily Flexing an operator's Access Proposal to the extent it could have done; and NR did not believe it had applied the Decision Criteria to any decision not to exercise its available Flexing Right.
    - each ITR Letter demonstrated the different permutations NR had attempted within what was available to it to resolve the conflicts with FL's Access Proposals, and then NR had had resort to the Decision Criteria when it felt unable to resolve the conflicts. NR confirmed again that it had not exercised its Flexing Right to the extent available, in anticipation of the volume of 'knock-on' impacts, not because it could not do it, but because it thought it was too much to do; it said it could only work within the resources it had.
    - NR had identified the Flex available but then, citing the Decision Criteria as somehow generally applicable, had decided not to go forward with applying that Flex, on the real basis of too much disruption and affecting the structure of the timetable too much. NR agreed that it could not identify any actual breaches of contract, i.e. variations not within and consistent with the Exercised Firm Rights of operators, that would have been occasioned had it pursued that approach.

Decision Criteria Application

99. On the third issue of the dispute, Network Rail in good faith and with good intent appears to have undertaken the exercise of considering the Decision Criteria in the course of making whatever decisions were made, and to an extent documenting this process in the ITR Letters,

rather than afterwards. Therefore, the issue of NR failing to apply or applying them only retrospectively does not arise here.

100. Regarding the sufficiency of Network Rail's specific application of the Decision Criteria to its perceived possible non-Flexible conflicts of FL's 1600 tonne Access Proposals with those of other Timetable Participants, the detail of the Panel's analysis and specific conclusions in respect of each relevant Consideration again appears from the Q&A account above, at paragraphs 74 to 85, and from the Record. In summary, Network Rail cites but largely ignores the Objective; it disregards several obviously relevant Considerations; it does not evaluate the effect of any individual Consideration on several relevant but conflicting interests; it seeks no information as to the specific interests of and impacts on individual affected operators including FL, particularly as between passenger and freight operators; there is no apparent rationale for its weighting of the relative impacts of the Considerations; there is a perceptible concentration on passenger journey times at the expense of freight commercial expectations; and there is a heavy influence from two principles which are outside the Considerations and actually contrary to the Objective – not making too many changes in aggregate to existing services and not altering the 'fundamental structure' of the Timetable. I maintain the conclusions reached by the Panel in the course of the Hearing, that a proper application of each relevant Consideration, where it was not merely neutral, largely favoured the relative impact on FL.

7 Guidance and Observations

101. Rule H51(j)(iii) contemplates a dispute determination including guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy. I offer some such observations here.

102. I have mentioned above that whilst purportedly applying the Decision Criteria to its compilation of the New WTT for December 2019, Network Rail appears to have developed reliance on two new complementary principles which are outside the Considerations and, if anything, contrary to the Objective. These are, first, to avoid making too many changes collectively, via Flex or otherwise, to existing services or new Firm Rights of Timetable Participants; and second, not to alter or disrupt the 'fundamental', or 'underlying', structure of the Timetable. Having discovered these principles NR has found itself in the position of having to shoehorn them into being complementary to a proper application of the Decision Criteria, which of course they are not. The purpose of these principles is, it seems, to address a situation which may arise as use of the railway network grows - the possible overselling of capacity. NR may have found itself in the position contemplated by the ORR's 'Criteria and procedures for the approval of track access contracts' (C&Ps) 2011 (currently being overhauled by new modules) as pointed out by GBRf in a comment in this case - that having 'oversold' rights it is likely to be in breach of contract to at least one of its purchasers. So it seems that, whilst it is not appropriate to use the Decision Criteria to resolve whose Firm Rights to Flex within their contracts, NR may have to use the Decision Criteria to decide whose contract to breach in a situation where it must breach one or other party's contract.

103. Obviously, it is not ideal for NR to find itself in this position, and ORR is there as a regulatory safety net to prevent it arising by reviewing the grant of Firm Rights in TACs. Behind this structure, however, it is clear that considerations of capacity and structuring the timetable are matters to be taken into account at the stage of the grant of Firm Rights – which is the stage policed in advance by ORR – rather than the implementation of Firm Rights – contractual – already granted. For NR to interpret the existing Network Code conditions as giving it a right, or obligation, to use the Decision Criteria (let alone more nebulous principles) to address

capacity etc. issues with already granted Firm Rights, would be to give it a second 'bite at the cherry' – in effect to introduce by the 'back door' another kind of defeasance, i.e. nullification, of already granted contractual Firm Rights, but on undefined policy rather than legal grounds.

8 Determination

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

105. As a matter of legal entitlement (or principle): Network Rail is in breach of contract in that, in rejecting Freightliner's Access Proposals for each of the eight Train Slots the subject of this dispute at a Timing Load of 1600 tonnes, it has failed to carry out the task required of it under Condition D4.2.2, in compiling the New WTT for December 2019, of endeavouring wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 subject to the principles, among others, that the New WTT shall be consistent with the Exercised Firm Rights of each Timetable Participant and that NR is entitled to exercise its Flexing Right. Network Rail's failure in this respect is constituted, on its own admission in the course of its submissions to and in the course of this Hearing, by its having chosen not to exercise its Flexing Right to the fullest extent of its entitlement in order to resolve anticipated but unproved conflicts between the rejected 1600 tonne Timing Load Train Slots of Freightliner and Train Slots requested by other Train Operators for the December 2019 New WTT.

106. As a matter of legal entitlement (or principle): to the extent, if any, that the Decision Criteria were applicable under Condition D4.2.1 to Network Rail's decisions rejecting Freightliner's Access Proposals for each of the eight Train Slots the subject of this dispute at a Timing Load of 1600 tonnes, Network Rail is in breach of contract in having failed to apply the Decision Criteria properly or correctly to such decisions in accordance with Condition D4.6.

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 reasonably to 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 FL. FL 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 FL to provide within a reasonable time but not less than 14 days, and FL 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.

110. As noted above, FL in its SRD asked for a determination that the 1600t Train Slots be included in the December 2019 New WTT immediately. Notwithstanding my determinations as to NR's breaches of contract in paragraphs 105 and 106, I have concluded that such a remedy if implemented at this relatively late stage of the current Timetable development process could be inappropriate and impractical, having regard to the considerations of significant impact for the industry which were discussed. In reaching this conclusion I am mindful of ADR Rule H16 which requires as an "overriding objective" that disputes referred to a Timetabling Panel be administered in a way which is proportionate to, among other matters, "the need to ensure that production processes for the railway operational timetable are not disrupted to the potential detriment of third parties". 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.

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.

112. No application was made for costs.

113. 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.

Peter Barber
Hearing Chair
14 October 2019

Annex A Principal Network Code Conditions applicable
Conditions D2.6, D4.2, D4.6

2.6 Timetable Preparation – D-40 to D-26

2.6.1 During the Timetable Preparation Period (D-40 to D-26) ("Timetable Preparation Period"), Network Rail shall compile the proposed New Working Timetable.

2.6.2 Between D-40 and D-26:

(a) all Timetable Participants shall have access to the evolving draft of the New Working Timetable either:

(i) by way of "read-only" remote computer access or such other electronic means reasonably requested by a Timetable Participant ; or

(ii) to the extent that a Timetable Participant does not have the required systems to facilitate remote computer access, by read-only computer access upon attendance at such of Network Rail's offices specified by Network Rail;

(b) Network Rail shall consult further with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable, and shall continue to answer enquiries and facilitate and co-ordinate dialogue as stated in Condition D2.3.4.

2.6.3 In compiling the New Working Timetable, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2.

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 this 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 Right;

(d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority:

(i) first to:

(A) the Firm Rights of any Timetable Participant that will subsist during the whole of the Timetable Period and which have been Exercised; and

(B) any rights Network Rail has for Network Services included in the Rules;

(ii) second to Firm Rights of any Timetable Participant, that were in force at the Priority Date but will expire prior to or during the Timetable Period and which have been Exercised, provided that Network Rail considers (acting reasonably) that new Firm Rights, substantially the same as the expiring rights, will be in force during the Timetable Period;

(iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided Network Rail considers (acting reasonably) they will beFirm or Contingent Rights in force during the Timetable Period;

(iv) fourth to any:

(A) rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date but before D-26 in accordance with D2.4 and D2.5. Where more than one set of rights or expectation of rights are so notified, capacity is to be allocated in the order in which Access Proposals containing details of the rights (or expectations thereof) are submitted to Network Rail; and

(B) Strategic Paths contained in the Strategic Capacity Statement.

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)-(k) 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) seeking consistency with any relevant Route Utilisation Strategy;

(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 Path 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 Record of Hearing

Record of evidence at Timetabling Panel Hearing of TTP1520 held on 10 September 2019

Note: This Record is not designed to be a verbatim account of the proceedings but is intended to be a note of the evidence given and arguments presented to the Hearing. It has been compiled from notes taken by the Access Disputes Committee Secretary at the hearing and has been approved by the Hearing Chair and Panel Members as being substantially accurate to the best of their recollection.

The Chair stated that this Timetabling Panel was appointed by the Access Disputes Committee under Chapter H of the Access Dispute Resolution Rules to hear dispute TTP1520 brought by Freightliner Limited (FL) against Network Rail (NR). All potentially Involved Parties had been notified, none had joined as additional Dispute Parties and three had declared themselves interested parties. Only two were represented, XC Trains and GBRf.

Introductions were made. The only possible conflict of interest declared was that panel member Nigel Oatway was an employee of DB Cargo, an on-rail competitor of FL.

The Chair noted that the record would be published with the determination unless there were a particular reason not to. He then summarised events to date, namely that on 3rd May 2019 NR issued intent to reject letters in respect of a number of Train Slots bid by FL for the Dec 2019 timetable. These Train Slots were supported by Firm Rights which included a characteristic of 1600 tonne timing load that had not previously been exercised. NR followed the intent letters with formal rejection, offering paths for the requested Train Slots at a reduced timing load similar to those in the existing May 2019 timetable. Notice of Dispute was received from FL on 21st June 2019 and a hearing was originally set for 20th August 2019 then postponed to today. During this time discussions had continued and only eight Train Slots remained in dispute, with FL having amended its submission to reflect the reduced number of trains in dispute. It could be assumed that the Panel had read carefully all materials submitted.

The Chair outlined the intended order of proceedings, namely: the Panel would hear opening statements on behalf of each of the Dispute Parties; then take any statements or opening comments from any of the interested parties who wished to do so; Q and A from the Panel; then closing statements and comments from interested parties to the extent they wished; finally the Chair would try to give an indication in principle of the substance of the decision so that the parties could understand and act accordingly. If the Panel could not reach a decision today, they would advise what further information was required to make a decision. He noted adjournments would take places for breaks and discussions. Any party wishing to ask for an adjournment was free to do so.

Freightliner gave an opening statement, as follows:

> Freightliner thanks the committee for agreeing to hold a hearing in respect of the dispute reference TTP1520 that Freightliner Limited has lodged regarding Network Rail's decision surrounding the inclusion in the December 2019 timetable of 8 paths timed with a 1600 tonne trailing weight.
>
> Freightliner holds Firm Rights for the 8 services referenced within its Sole Reference Document to or from Felixstowe with a timing load of 1600t. We do not believe that this fact is disputed.

Freightliner has made significant investments in assets to support its business requirement to uplift the trailing weight of these services from 1235t to 1600t from the December 2019 timetable. Freightliner has not exercised its rights to these services and raised a dispute in previous timetables because we understood through our attendance at the Great Eastern Event Steering Group that the uplift would be available from December 2019, principally driven by a major recast of the Great Eastern Mainline timetable. However, this recast has now been postponed, with no date set for implementation, and as such, Freightliner is not prepared to suffer the financial loss and reduced revenue that will be incurred as a result of not increasing the trailing weight of our services.

Freightliner bid for the 8 services, that are the subject of this dispute, at the Priority Date in accordance with its access rights. We do not believe that this fact is disputed.

On 14th June (the D-26 offer date of the December 19 timetable) Network Rail did not offer Train Slots with a 1600t timing load but instead offered paths with a timing load of 1235t. Freightliner Limited subsequently registered a dispute on 21st June 2019.

Freightliner did not receive formal rejection letters at the time of the D-26 offer. After the offer date we had discussions with Network Rail regarding finding solutions for these paths. A meeting was subsequently arranged with Network Rail on 24th July. At that meeting Network Rail clarified that nothing had changed between the intention to reject letters being issued and the formal offer being made. Therefore, we were advised that the intention to reject letters should be treated as the formal rejection letters. Note that while the letters are dated between 12 April and 3 May they were batched and sent to Freightliner by email on the 16th May.

Freightliner is challenging the reasons provided by Network Rail for rejecting the 1600t timing loads and contends that Network Rail has not acted in accordance with the Network Code.

Network Rail has made a number of decisions in these letters that do not comply with the principles laid out in Part D paragraph 4.2.2. (b), (c) and (d) of the Network Code.

Network Rail has made subsequent decisions based on a selective use of the Decision Criteria, which is not in line with the fair and not unduly discriminatory test laid out in Part D paragraph 4.6.3. We deal with these points in turn:

<u>With regards to Part D paragraph 4.2.2:</u>

(b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant; - this is not the case in respect of the 8 paths that form this dispute.

(c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Rights; – Network Rail has not confirmed that it is unable to include the Train Slots – In most cases the required flex has been identified and listed, but Network Rail has made a decision not to apply its flexing rights, despite its obligation in D4.2.2 (d) to apply (b) and (c) above.

In most cases part of Network Rail's reasoning is that the "benefit of a 1600-ton path must be measured against the longstanding reduction in flexibility resulting from inclusion of a slower path". This stated reasoning appears to overlook the fact that the 1600t paths have Firm Access Rights that have been approved by the Office of Rail and Road. The wording used appears to offer an opinion about the validity of the rights sold and how they impact future timetables beyond December 2019. The implication is a decision by Network Rail, not just about whether the Train Slots can be accommodated in the December 2019 timetable based on the Decision Criteria, but not to include these paths because of concerns about capacity allocation in future timetables. It is not the role of a Network Rail

planner to overrule decisions already made in respect of Firm Rights or to fail to adhere to the obligations laid out in the Network Code in the preparation of a New Working Timetable - namely it should be consistent with the Exercised Firm Rights (Part D 4.2.2 (b)).

(d)…the Train Slots shall be allocated in the following order of priority:

(i) first to

(A) the Firm Rights of any Timetable Participant

Network Rail accepts that it made an error in its application of Part D 4.2.2 (d) regarding all of the West Midlands Trains slots and the Freightliner Heavy Haul slot that did not have Firm Rights in force at D-40. Freightliner believes that this is material and that the foundation of Network Rail's analysis of clashes and flexing is flawed. The number of clashes, and therefore the flexes required is vastly reduced had the correct base position been used. We are not aware that Network Rail has reviewed any of its decisions in light of the material error being identified.

With regards to Decision Criteria

Network Rail has stated that "where conflicts of Train Slots was not resolvable by a flex, only then the Decision Criteria was applied" (page 6 of Network Rail's SRD). As stated, Freightliner does not agree that the conflicts were unresolvable by flex, indeed the flexes required are listed in the intent to reject letters in detail. However, for the purposes of this opening statement, we turn to the application of the Decision Criteria by Network Rail in the case of these disputes.

In its submission (page 7) Network Rail states that "each of the relevant Considerations applied by Network Rail have been given an equal weighting at the time of the decision". This statement is simply incorrect and directly conflicts with Network Rail's admission (page 8) that it did not consider Consideration (f) "the commercial interests of Network Rail or any Timetable Participant..", nor Consideration (g) "seeking consistency with any relevant Route utilisation Strategy", nor Consideration (i) "mitigating the effect on the environment" nor Consideration (j) "enabling operators of trains to utilise their assets efficiently". Network Rail also acknowledges that Consideration (c) "maintaining and improving train service performance" was weighted against Freightliner in all instances but now agrees that "the application of this Decision Criteria does not apply in this instance". Such relevant and material omission of certain Decision Criteria from the considerations is not in line with the fair and not unduly discriminatory test laid out in Part D4.6.3.

Network Rail has stated that Appendix A compiles the reassessed Decision Criteria. Appendix A is a simple table that shows which criteria were previously considered or not (note column J should be [coloured] Red as Network Rail states on page 8 of its submission that it was not considered). Appendix A is not an assessment of how the Decision Criteria applies to each decision to not offer the Freightliner Train Slots, in accordance with their Firm Rights, and measured against a decision to flex each of the listed clashing services.

Freightliner therefore contends that the statement made by Network Rail in its submission (page 10) that the Decision Criteria has been reassessed is inaccurate and misleading.

Overriding Principle

Network Rail appears to have adopted its own overriding principle regarding the timetable process. We point to the 4th paragraph on page 7 of Network Rail's submission where they state: "The overriding principle at the time of planning is not to fundamentally alter the structure of the timetable, without understanding the impact of consequences".

Such a statement, nor any text with a similar sentiment is included in the Network Code. The stated "Objective" in Part D4.6.1 is in fact "*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*". Network Rail also has an obligation to conduct itself as set out in Condition 4.2 which states that "Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it…".

Freightliner observes that the bi-annual timetable process is the only opportunity to fundamentally alter the structure of the timetable and it is Network Rail's responsibility to understand the impact of the changes. Freightliner suggests it is this "overriding principle" adopted by Network Rail that has resulted in Network Rail's decision not to accommodate the trains instead of following the process laid out in the Network Code - and it is this that is at the heart of the dispute.

Request of the Hearing Chair

Freightliner requests that the Hearing Chair instructs Network Rail to accommodate the 8 paths listed at a 1600 tonne timing load in the December 19 timetable in accordance with Freightliner's Firm Rights.

Scope of dispute

By way of an update, Freightliner no longer has a dispute with Network Rail pertaining to trains flexed outside access right timing windows.

The Chair clarified with FL that under the heading "Overriding Principle" in the second paragraph of the, "Such a statement" should have been "no such statement".

Network Rail gave an opening statement, as follows:

Creating a working timetable is an incredibly challenging and complex piece of work. Unfortunately, it isn't always possible to accommodate all Timetable Participants' aspirations, all of the time.
It is the role of the Operational Planners and Operational Planning Specialists within the Capacity Planning department of Network Rail to evaluate the options and opportunities available in the timetable and making the decision to either "accept, modify or reject" the submissions in accordance with the criteria outlined in Network Code Part D.

Key Points for consideration

1. The Dec 19 Working Timetable drafting process over the course of 14 weeks resulted in 34069 schedules being bid at the Priority Date (D40) stage by Timetable Participants.
2. Each of these changes was validated by a Network Rail in good faith, with no prejudice and in accordance with the Network Code
3. Planning decisions were made by Operational Planner and Operational Planning Specialists based on the information available at the time.
4. Time to complete the changes is constrained within the 14 week timescale (D40 to D26) and Network Rail must make a decision to accept, modify or reject an Access Proposal.
5. In this instance, FL bid 38 Train Slot changes of which 8 have been accommodated.
6. The 8 accommodated Train Slots required Network Rail to exercise it's right to flex Train Slots of other Timetable Participants.

7. Each of these decisions made not to accommodate Freightliner aspirations was carefully considered, with detailed reasons why the request was not able to be accommodated, explained in accordance with the Network Code Part D4.2.
8. The 8 rejected Train Slots already have Working Timetable paths with a 1200 tonne trailing weight. Network Rail's decision was to reject only the increase in trailing weight to 1600 tonnes trailing weight.
9. Freightliner have not been able to demonstrate how their services can or should have been accommodated without impacting other timetable participants.
10. One Train Slot (4M86EA MSX) in dispute refers exclusively to the application of the Decision Criteria.
11. Seven Train Slots (4M93FA MO & MSX, 4S88LB MO, TWThO & FO and 4L90HB TWThO & FO) in dispute, Freightliner challenge both the application of the Priority for Inclusion and Decision Criteria.
12. There is no dispute to be answered with regarding Network Rail flexing any Train Slots outside of Freightliner's timing window.

The decision sought from the panel:
(a) there have been no Train Slots flexed outside the timing windows of the Firm Rights held and this element of the dispute is dismissed.

(b) a planner, working on behalf of Capacity Planning, Network Rail, as part of the development of a New Working Timetable is able to make a decision to accept, modify or reject a Train Slot request from any timetable participant, in cognisance of their access rights.

(c) a timetable participant possessing access rights which are subsequently exercised, are not guaranteed inclusion in the New Working Timetable. Access rights do not supersede Part D and nor do they undermine Network Rail's processes in delivering "the objective".

(d) NR has applied the Decision Criteria in a fairest manner, as outlined in 4.2.iii in accordance with reaching "the Objective."

(e) following the matter of principle, Freightliner accepted Network Rail's decision and "Intent to Reject" letters and reference to Network Code D2.4.1(c), confirming Freightliner's entitlement to submit a further Access Proposal to be considered for inclusion was not pursued further until a dispute was lodged.

We are presently at D13 for the December 2019 New Working Timetable, with readiness plans underway to ensure the timetable change is delivered smoothly.

(f) should the matter of dispute be found against the defendant, Network Rail is seeking an acknowledgement of Freightliner's request for accommodation of the 8 Train Slots at 1600 tonnes cannot be completed for the December 2019 New Working Timetable, without reviewing all existing paths which may interact with the affected Train Slots. These paths have been published for other TOCs and FOCs, who have not been considered "interested parties" for this dispute by Freightliner, and have not been afforded the opportunity to prepare a response. Nor is it practicable, if required, to remove conflicting Train Slots from the published timetable without all parties being involved.

Any changes to the December 2019 New Working Timetable at this stage is likely to import risk to the plans of both Network Rail and timetable participants.

The next available opportunity for Network Rail to make amendments to a published Working Timetable, in cognisance of the holistic nature of planning a network of services and the

interdependencies between timetable participants is May 2020. In the event of any conflicts being identified, decisions will be made in accordance to Network Code Part D.

An adjournment took place for the Panel to consider the opening statements.

Upon reconvening, GBRf made a short statement, as follows:

> I refer to the ORR's Criteria and Procedures, 2011, which is the document that TOCs and FOCs are pointed to when they are applying for rights. Paragraph 4.16 of that document states in the middle, if capacity has been oversold then "the facility owner faces liability for breach of contract if it fails to deliver the access it has contracted to provide". And I just think that's relevant in today's hearing. That was all I wanted to raise at this stage.

Chair: Thank you very much. I may as well say in response to that, that is precisely the conclusion we had come to as a matter of principle, subject to hearing anything else, even without the benefit of the ORR having said that, which I recognise.
I said I would try and outline how we want to try and structure the Q and A. I want to take this against a background of the logical issues which arise here, some of which are information type issues and some of which are interpretation of the contract type issues. The first is information, and that is getting information on the respective Firm Rights of FL and any other timetable participants who are either here as interested parties or who NR say are potentially affected parties. By information on Firm Rights I mean how they are actually expressed in their relevant Track Access Contract ("TAC") because it's only against expression of the Firm Rights that one can gauge the scope for flex, since flex is defined as modification "within and consistent with the Exercised Firm Rights" of an operator. Therefore, you can only understand if a flex is appropriate if it's consistent with the right. An example is a journey time being able to be flexed between contractual parameters, or if it's for a specific time then flex can't be applied, albeit that means it probably won't be granted as a right in the first place.

Once we've done this, we will consider the prioritisation process and how that was applied, then there is the issue of the application process of the decision criteria, whether and when that was done in the right procedural way. Then there is the biggest issue, which is - where and when it was right to apply the decision criteria - were they properly applied as outlined in NR's various documents, such as the intention to reject letters and the appendices to NR's SRD. I think if we go through those points, we will cover pretty much everything. When we get to the last point, application of the decision criteria, we will do it by reference to FL's SRD as it has a number of objections that are repeated, and by the time we've gone through all those we will not need to go through every single train. At the end we will come back to anything we haven't picked up.

Q1 (to NR) Before all that, however, there is one matter of principle and determination from NR's opening statement that we want to deal with first, as it colours the whole way we approach this matter and, we think, the way NR has approached the matter. That is NR's use of the language that it's the role of NR to make the "decision to either accept, modify or reject" timetable submissions (Access Proposals). You said that in the introduction to the opening statement and you repeat it in the decision sought.
I have to put it to you that that language is not applicable to the process of compiling a New Working Timetable and it looks as if you have derived it from the language in Part D dealing with operator variations in D3.3.3. It appears elsewhere, but firstly in D3.3.3 then D3.3.7 for Train Operator Variations after D-26. There are separate provisions for NR variations after D-26 with more than 12 weeks to go. Whereas, in relation to NR's role regarding Access Proposals in the course of compiling the New Working Timetable, it seems to us that the operative part is D-40 to D-26, dealt with under Condition D2.6. And the language there is,

we assume, intentionally different from D3.3.3 "accept, modify and reject", and the duty and power of NR in response to Access Proposals pre D-26 is as stated under Condition D2.6.3 which refers to Condition D4.2. This does not state that NR will “accept, modify or reject a proposal” but that it is to act in accordance with Condition D4.2, which is both to apply the decision criteria and to comply with the procedures, including prioritisation, in Condition D4.2.2.

I've put that as a statement but it's really a question. Where are you coming from in using this language?

A1 (NR) I can't say how it's come about but over time it has become a custom and, I suggest, accepted practice in terms of schedules we have accepted, modified or rejected. And when we refer to modify we mean flexed a Train Slot. The principle is the same, the language different.

Q2 (to NR) So would it be fair to say you've let the language creep from one Condition to the other?

A2 (NR) Correct yes.

Q3 (to NR) And that's a matter of “custom and practice”?

A3 (NR) Yes, some of the terminology is a little different between the two Conditions, e.g., “offer” becomes “publish”, whereas “reject” stays the same.

Q4 (to NR) So would it be fair to conclude then when you talk about “accept” you are actually talking about accepting within the procedures of the applicable Condition D-whatever, when “rejecting” you're talking about doing so within those procedures, and when talking about “modifying” you're talking about Flex as defined, very closely defined, in Part D?

A4 (NR) Correct.

Q5 (to NR) So can I take it then that you do not assert, as you do in your statement, some sort of general power to “accept modify or reject” according to the general dictionary definition of those words, and that you wouldn't go to the stake on that statement?

A5 (NR) Correct and no I wouldn't.

Q6 (to FL) Thank you. We will proceed on the basis of Conditions D4.2 and D4.6 being applicable. The first area to ask you for information on is, how are the relevant rights, Firm Rights, actually expressed in the Track Access Contract. First of all, FL?

A6 (FL) The rights are expressed within the TAC Schedule 5 Rights Table. Namely, the equipment characteristics, timing load, the weight and characteristics of that train.

Q7 (to FL) Can we have a copy?

A7 (FL) Yes.

A copy was shared for the panel to examine.

Q8 (to FL) Do you know when those rights came into force?

A8 (FL) December 2016. The latest rights table is the 2nd Supplemental Agreement, which is eight months old. Can [NR] confirm that?

(NR) Yes, but those rights were there in December 2016.

Q9 (to FL) With 1600t weight?

A9 (FL) Yes.

Q10 (to both) It seemed to me from the statements that there was some expected linkage that the jump to 1600t would have applied at the point of the intended GE Mainline timetable recast, which has now disappeared into the distance somewhere, and FL wants to realise that investment and can't wait any longer. A question to both parties, were the rights to the timing load expressed to be contingent on the recast?

A10 (both) No.

(FL) We had bid sporadically for 1600t over recent timetables and we had some rejected but we never brought it to dispute because we expected that the recast would resolve all the problems.

Q11 (to FL) So there's nothing in the contract that prevents you bidding for 1600t in any timetable?

A11 (FL) Correct, we could have lodged this dispute last year but didn't because we understood the recast was happening in Dec 2019.

Q12 (to FL) So, are the timing loads as expressed in the relevant column in effect maximum timing loads relative to the particular intermediate points, allowing for loco changes and so on?

A12 (FL) Correct yes. It determines whether it's electrically or diesel hauled, for example beyond Ipswich the type of locomotive changes so we will see two different timing loads. It's planned to be at that weight maximum. If it went over that and incurred delay, we would be responsible as we have run a train that is too heavy for the contractual timing load.

Q13 (to FL) Okay, but in terms of the right as an entitlement would it be more correct to view it as a minimum right?

A13 (FL) The timing load expressed in the Rights Table is the timing load that should be incorporated into the timetable.

Q14 (to NR) Does NR consider that the access rights as set out here allow them to flex a timing load, or is the flexing right solely about arrival and departure time?

A14 (NR) As we understand it there is no flexing right to a timing load as expressed in the contract.

Q15 (to NR) There is nothing in FL's access rights that permitted the flexing of the timing load.

A15 (NR) Not as far as I'm aware.

Q16 (to FL) So flex only applies where there are a range of parameters set, for example, departure and arrival windows, whereas the other characteristics are absolute?

A16 (FL) Correct.

Q17 (to FL) If you were to bid less than the timing load set would you consider that to be within your firm right?

A17 (FL) So long as it was a reduction on the timing load set, then yes we would, for example if we bid a train at 1200t when we had rights for 1600t we would say we were covered by the access rights and were choosing not to exercise them to the fullest extent.

Q18 (to FL) I'm trying to understand in principle how this works in terms of NR's right to flex and your right to bid. I think you are saying it's a maximum weight in terms of your entitlement to bid for a Train Slot and a minimum weight in terms of NRs ability to grant a slot as bid for?

A18 (FL) Potentially yes.

Q19 (to FL) Is there anything in the contract that states this?

A19 (FL) No.

Q20 (to FL) Passenger TACs state there is a firm right to the timing load, plus anything that meets those characteristics?

A20 (FL) We'd have to check the precise wording.

Q21 (to FL) But it's fair to say that from Dec 2016 until the timetable recast you expected to have the right to 1200t , with a variation of consent to operate at this reduced capacity regardless of the contract detail?

A21 (FL) Yes, noting that we were working together to recast the timetable. I refer to my previous answer noting we didn't bring the matter to dispute when we could have done.

Q22 (to FL) You were having non-contractual discussions?

A22 (FL) Yes but we could still have taken NR to dispute.

Q23 (to FL) The previous changes, where you bid for 1600t and were offered 1200t, were with your consent?

A23 (FL) If consent is not lodging a dispute then yes.

Q24 (to FL) Well yes, you are choosing not to exercise your right. By Dec 2019 you have informed NR you had rights and wanted to exercise them in respect of 1600t?

A24 (FL) Correct.

Q25 (to FL) Is there anything else in Schedule 5 which puts flesh on the bones of that agreement, which is quite difficult to express in language, i.e. on your side it's a maximum you can bid up to but on NR's side it's a minimum below which, if you bid that, it cannot flex. I've expressed this imperfectly, but it's difficult to get over in legal language.

A25 (FL) I would have to go back and have a look at the specific wording in our contract, I don't have it to hand at the moment, and could report back.

Members of the Panel then advised that the precise wording in Schedule 5 of the model freight TAC , was contained in paragraph 4.2.1 and read: *Subject to paragraph 4.2.3, the Train Operator has, in relation to a Service, a Firm Right to use any equipment registered with Network Rail's rolling stock library which has performance characteristics identical to or better than the Timing Load specified in the Rights Table for such Service.*

Q26 (to FL) "Identical to, or better than", so a lighter train is covered?

A26 (FL) Yes.

Q27 (to FL) Subject to verifying that your contract is a model freight contract, would NR accept then that that is the correct and applicable interpretation of the timing load definition appearing in Schedule 5, i.e. maximum on one hand and minimum on the other? My reason for asking is that it's precisely on the basis of this that one can determine what the Flexing right should be.

A27 (NR) Yes.

Q28 (to NR) The next issue was on the expression of the relevant Firm Rights of all the other impacted train operators. We may be able to short-circuit the need to get detailed information on all sets of rights if NR are able to say, as is the implication of what has been said so far, that you don't dispute that changes to other operators' trains, including in various multiple knock-on scenarios, could be made within the Flexing rights that you have for all affected operators as opposed to breaching any Firm Rights?

A28 (NR) I cannot say that with confidence. There may be nuances within the flexing available including connections at key locations… I cannot be comfortable asserting that we could accommodate all Firm Rights.

Q29 (to NR) Even within available Flex.

A29 (NR) Correct.

Q30 [not used]

A30 [not used]

Q31 (to NR) Because you haven't actually said that in your submissions and it's a key question, because FL's clear assertion is that there is not an actual legal conflict between their Firm Rights and the exercised Firm Rights of anyone who might be affected in every scenario, because all the changes you have said would be necessary to accommodate FL's 1600t services would be within your Flexing Rights, and you haven't actually, as I understand it, said that's not the case?

A31 (NR) So there are references we have mentioned in terms of impact and application of the decision criteria, in terms of rippling into other Train Slots. On page eight of our submission, second paragraph, where we say the underlying structure of the timetable would be impacted. But that doesn't specify any links to the TAC, if that's the original question.

Q32 (to NR) So you haven't identified any specific impact that would amount to a breach of an operator's contract?

A32 (NR) In this instance, no. We have had opportunities where we have not rejected any other services impacted, but we have not rejected services in favour, although we have had specific points of conflict.

Q33 (to NR) You've just said there are so many points of conflict that there may be a knock on, wider impact?

A33 (NR) Yes which in itself may be an easier point to defend.

Q34 (to NR) I'm not sure it is actually, particularly in light of the comment you repeat in your opening statement, that whether or not you did reject more services, the underlying structure of the timetable would be impacted and therefore the Decision Criteria are deemed to have been applied correctly. As we're on that I might as well ask, where in the Decision Criteria - that's to say in the Objective or the Considerations - do you find a Consideration that states NR should not impact the underlying structure of the timetable?

A34 (NR) It is not listed anywhere; however, I'd like to point out in this case that the current status quo was that FL would bid for a 1600t service and accept a 1200t trailing weight. That decision has not been previously challenged and for us to accommodate 1600t in Dec 2019 we would need to change the timetable on two key routes.

Q35 (to NR) I understand but where do you find "not fundamentally changing the underlying structure of the timetable" in the Objective or Considerations of the Decision Criteria?

A35 (NR) It is not explicitly stated, however Decision Criteria refer to journey time, spread of services reflecting demand... but to give a simple answer, it does not state that.

Q36 (to NR) So if your argument is relevant, it's because the services affect journey times and so on, but not merely as a result of changing the underlying structure. Is it fair to say that is not a relevant Consideration?

A36 (NR) I think it would be unfair as it underpins the choices that we make.

Q37 (to NR) Let me rephrase that. Where do you get from the contract that the "underlying structure of the timetable" underpins the right and obligation to apply Decision Criteria or prioritise services in the way described in Part D?

A37 (NR) In the way your question has been framed it does not.

Q38 (to NR) I am fixating on this because this is at the crux of this case, and many others, but it's the first time I've heard it be put in this way. Namely, that maintaining the underlying structure of the timetable in itself is a Consideration alongside the Objective, whereas my understanding has always been that in the sale of rights a specific commercial, and indeed regulatory, consideration was not to fossilise or hardwire the timetable. On the contrary, in pursuing the Decision Criteria and the Objective and Considerations - because they are a way of expressing the intent of the underlying Railways Act - the object is to develop the timetable and the whole operation of the Network in a way in which is consistent with current commercial and social needs?

A38 (NR) Sorry to interrupt, that much is understood, in line with our assertions that we're trying to take that into account for the GE Mainline timetable recast.

Q39 (to NR) So I haven't previously focused on the impact of the recast and it's accepted that that's not contractual, but to an extent it's relevant. Let me ask, is it still in NRs corporate mind to go ahead with that recast, although it hasn't been practicable to do it at the intended time, and at that time to accommodate these rights that were bid for and accepted in contemplation of the recast?

A39 (NR) There is a separate and distinct workstream being undertaken with the PMO and DfT and timetable participants that acknowledges there isn't sufficient capacity on the GE Mainline once Crossrail goes live and to accommodate all requirements including the GE franchise aspirations. NR has considered and whittled down the various options from 15 to five and is currently finalising the structure of the timetable under those various options. Each option has a level of compromise for a party including FOCs. There is no timetable which accommodates all operators' aspirations. We are analysing economic viability, impact on customers, and acknowledging the Decision Criteria. What we are trying to achieve is an optimal timetable, where we can remove contractual concerns prior to D40, so that if a party loses out, that can be dealt with prior to D40 so it doesn't become a timetable concern, and the contract can be dealt with.

Q40 (to NR) How do you mean dealt with?

A40 (NR) A change in specification from DfT, or as [GBRf] alluded to, commercial agreements... anything that can smooth out the process.

Q41 (to NR) To amend contracts before bidding?

A41 (NR) Correct.

Q42 (to NR) So as to avoid what looks like would be the consequence that you end up where you can't accommodate all rights where NR has oversold and is in breach of contract?

A42 (NR) Potentially.

Q43 (to NR) Are the operators aware of this workstream?

A43 (FL) I am aware. The contractual side hasn't been discussed with me and I'm not aware it's been discussed with others within FL. We have been clear the result of the recast should be an uplift, not a detriment, to what we have today. We have been clear that freight paths need to be more efficient. It's a key part of the Strategic Freight Network and the industry would not accept running an increased number of lighter trains around the Network rather than fewer heavier trains as this is completely counterproductive in light of our competition with road freight.

(NR) I'm aware [that a FL employee who] is part of the PMO is aware of the options, albeit doesn't support those that reduce capacity for freight services.

Q44 (to NR) It sounds like extra contractual discussions which may be enshrined in the contract later as it's getting to a point where all rights that have been granted cannot be accommodated?

A44 (FL) Can I clarify that Crossrail in Dec 2019 is not the full quantum of service (that causes the problem)?

(NR) Correct.

(FL) Can we keep this solely focused on the Dec 2019 dispute. The GE recast is a future point.

Q45 (to FL) So are you saying there is potential for this problem to get worse?

A45 (FL) I'm saying the problem NR is stating isn't actually relevant for this timetable and a long-term issue with access rights isn't relevant in Dec 2019 and shouldn't stand in the way of 1600t being offered in Dec 2019.

Q46 (to NR) Notwithstanding the point about the GE recast, most of the rejections are down to the WCML?

A46 (NR) Some are WCML and some on GEML. They vary by Train Slot.

Q47 (to NR) Which of the two is the fundamental rejection point?

A47 (NR) It varies by Train Slot.

(FL) In the meeting we had with NR in July we identified various crunch points. For services from the ports it was the WCML, towards the ports it was the GEML on Brentwood Bank. The flexibility to accommodate solutions at Northampton is constrained.

Q48 (to NR) Can I test, the list of conflicts detailed is a list of conflicts only, not a set of services that couldn't be accommodated?

A48 (NR) Yes.

Q49 (to NR) So in a different way of expressing the opening question, we can avoid getting details of every right if NR acknowledges that none of the apparently conflicting rights are actually conflicting because they are absolute Firm Rights in respect of which the conflicts could be resolved by flexing within contractual terms in the manner identified in the rejection letters. You have said you don't know how far the web will spread, but as at Dec 2019 there are no contractual conflicts of rights identified that can't be accommodated by contractually entitled Flex?

A49 (NR) That have been identified, yes.

Q50 (to NR) On that basis I think we don't need to look at the definition of every single affected right?

A50 (NR) On the basis that we have not rejected any slots based on one-on-one conflict.

Q51 (to NR) I now move on to West Midlands Trains ("WMT"), who introduced a number of additional services. Were those trains with existing rights, or new rights?

A51 (NR) What has come to light is that the WMT TAC was not in force at D40 for all trains.

Q52 (to NR) Was there a previous TAC in force?

A52 (NR) I do not believe that process was followed, which I think is one of FL's points.

Q53 (to NR) FL has said it applied to exercise its rights at D-40, does NR accept this? That FL clearly exercised the right to a 1600t slot?

A53 (NR) Correct.

Q54 (to NR) In previous discussion, NR has implied it thought FL would accept 1235t path because they had previously.

A54 (NR) Without putting words in anyone's mouth, yes, it had become practice to bid 1600t and offer 1235t. The reason I say this with confidence is that in 30 of 38 instances for Dec 2019 FL accepted what we could accommodate.

Q55 (to NR) Have FL previously bid 1600t and accepted a lower tonnage?

A55 (NR) NR Five previous times.

Q56 (to FL) And this time your attitude has changed?

A56 (FL) Yes, partly because we have made investments and because we have engaged thoroughly with ESG on GEML to accommodate all trains at 1600t

Q57 (to FL) Why did you previously bid 1600t if you knew you wouldn't want them until later? To remind everyone the Firm Rights were there?

A57 (FL) They vary in weight day by day. There are occasions today that we are running above 1200t. There is a constant battle between our commercial and operational teams to run higher weights.

Q58 (to FL) There is a commercial need already, which you were prepared to compromise in light of the GEML recast?

A58 (FL) Yes, and in light of investments that will be realised during the Dec 2019 timetable.

Q59 (to FL) I had thought there were meetings between NR and FL to discuss uplift in tonnage before D-40?

A59 (FL) No - we took part in the ESG and also had bilateral phone calls for Southampton services, but we don't have access rights for those trains and they are not subject to this dispute.

Q60 (to NR) I don't understand why NR rejected the 1600t when FL had made their intent clear?

A60 (NR) Yes, there was awareness in the wider planning community via attendance at the GEML ESG. However, FL's bid was not expressed any differently to previous timetable submissions, nor was there anything to differentiate this timetable from others.

Q61 (to NR) Would these discussions have involved the specific planner who wrote the intent to reject letters?

A61 (NR) NR works on a case-by-case basis. We would wish them to be involved if we had identified them via the resource plan. If they aren't identified at that point then someone with some kind of authority within the train planning organisation would have attended.

Q62 (to NR) Then the answer is no, not necessarily involved.

A62 (NR) Yes.

Q63 (to NR) The intent to reject letters are written in a personal way, “I feel so and so”, which carries the impression that this planner made that decision, and therefore whether the particular planner was aware of the background might be relevant.

A63 (NR) I can’t say for the individual concerned. They were a relatively new planner, supported by a specialist throughout the process.

Q64 (to NR) Not just made decisions by themselves?

A64 (NR) Exactly, and each decision is vetted by a manager in my team who would make sure that the decision and content was sound based on the information available at the time.

Q65 (to FL) I’m having trouble counting, can you help me? The NR submission says 38 trains were bid with increased tonnages. Eight were accommodated and eight rejected, leaving 22 unaccounted for?

A65 (FL) They don't have Firm Rights.

Q66 (to FL) So some have rights and some were aspirational?

A66 (FL) Yes, and they were treated as having expectation of rights.

(NR) Can I clarify, some were stated by FL to have Firm Rights at D-40, hence why the original fifteen trains referred for dispute have been reduced to eight. There is some doubt as to what contract was in place at the time.

Q67 (to NR) Are you suggesting there was a lack of clarity in NR about the level of rights it was dealing with at the time, or was it well understood that these trains had Firm Rights at the point of the decision being made?

A67 (NR) At the time, yes, plus a further seven trains in which letters were provided in the same fashion however the information transpired later that those seven didn’t have rights.

(FL) They don't form part of this dispute and those seven are being discussed with our account team outside this dispute.

Q68 (to FL) Did any of the discussion or uncertainty colour, in any way, the thinking or discussion of the eight trains that do have Firm Rights?

A68 (FL) I don't believe so, reading the intent to reject letters, there was an assumption that the eight trains had Firm Rights at D-40, which is correct. There is no issue with the contractual position between D-40 and today

(NR) The broader point is whether that would have clouded the judgement...

(FL) Each decision should be reached on a train-by-train basis and there's no indication that any of these eight, no contractual questions about the eight that are part of the dispute.

Q69 (to NR) Nor the eight that have been accepted by FL?

A69 (NR) No. Those did not have access rights

Q70 (to NR) This is a question I was coming to. NR accepted eight slots with lots of flex... what was different between the first eight and the second eight?

A70 (NR) This is where my choice of language has been challenged… there were changes we could make that did not alter the fundamental structure of the timetable.

Q71 (to NR) So these flexes were probably smaller flexes?

A71 (NR) Yes, the ripples or spider web, was probably within an acceptable level, especially within the fourteen-week window. With regard to those rejected at 1600t - the challenge of rewriting a timetable from scratch within the fourteen-week window will lead to more disputes and a poor-quality timetable.

Q72 (to NR) So the statement in your submission that, if NR had done all the flexing required to accept the eight trains at 1600t it would have ended up with seven minutes flex in one direction and 5 ½ in the other, and in your view that destroys the underlying structure of the timetable?

A72 (NR) Yes and that's a snapshot I've chosen to illustrate the example.

Q73 (to both) So FL are in a position where there are Firm Rights for trains that have been rejected and trains with no Rights have been accepted?

A73 (Both) Correct.

Q74 (to NR) This leads you to wonder what the point of having Rights is, which I'm wrestling with at the moment. I think Firm Rights should mean something, and if NR has sold you something you have an expectation it should be met.

Before we leave this topic, is there any such confusion caused by the claims previously made and now dropped about flexing slots out of timing windows or is that now outside the scope of this dispute; did any of that cloud NR's thinking?

A74 (NR) That is referenced in a number of the intention to reject letters, where it does state we have looked at, for example with 4M93 on the 28th April letter, looked at a path within the allowed departure window, and tried to accommodate the bid within the departure window.

Q75 (to NR) So you accommodated things, but is there any suggestion that this element of the dispute in any way affected your ability to make judgements on the proper criteria in respect of those in dispute?

A75 (NR) No I don't believe it would have done.

Q76 (to NR) So we can disregard it.

A76 (NR) Yes, each rejected train will have been accompanied with an individual letter.

The Chair advised this concluded questioning about definitions of Rights and potentially conflicting Rights; the next issue was prioritisation of Rights. GBRf then asked to make a comment on Flex:

> There has been talk on Flex and the structure of timetables. As we all know NR and operators went through a painful process of expanding the contractual Flex of rights, most passengers to a 24-hour window, and freight to 60-minute windows, to accommodate more services and giving NR better availability to mix and match. It was quite a process to go through, yet we seem to be talking about why we shouldn't Flex. Was that time and work wasted? We went through lots of work to get 24-hour windows, and mainly 60-minute windows for freight, so I think that is very relevant.
>
> I'm generalising but I'm suggesting we went through a lot of pain to give NR that flex and I would have thought NR would have been able to use this flex to accommodate all contractual rights.

Q77 (to GBRf) Does this affect the commercial or contractual position?

A77 (GBRf) It affects the contractual position, for example there will be different levels of Flex for each TOC. You should then be able to accommodate them all. We went through that process and the industry shouldn't be scared of using it to meet the Part D Objective.

Q78 (to NR) If anything, that seems to substantiate what NR have accepted, which is that of the various conflicts and other problems, none have been identified that would actually breach a TAC?

A78 (NR) Not in the way we've expressed it in the intention to reject letters, yes.

The Hearing adjourned for lunch

Q79 (to NR) Welcome back. We had finished off looking at the scope of the Rights in question and the resultant Flexing Right. The next issue I want to look at is the operation of the prioritisation provisions, which I mentioned before. In principle the FL contention is that NR has not operated those provisions properly and, as I read it from NR's submission and its statement this morning, you don't reject that allegation by FL. You raise a lot of 'round-the-houses' points in favour of NR but am I right in thinking you don't directly dispute FL's contention?

A79 (NR) For seven of the eight Train Slots we accept that the priority given for their inclusion might not have been correct.

Q80 (to FL) And the sole exception? FL service reference 4M86 MSX, is that right?

A80 (FL) Yes FL's understanding is that the priority rules were applied correctly with regard to 4M86 MSX.

Q81 (to NR) Okay, for the seven services where it is accepted prioritisation was incorrect, is that because NR did not apply the Flex it could have done to otherwise conflicting rights, am I right in thinking this?

A81 (NR) The reason why it was not applied correctly was that there was a misunderstanding that the WMT TAC was in place, however it has transpired since then that that wasn't in place at the time for WMT at D-40.

Q82 (to NR) Let me clarify, it's my understanding that the reason it is correct to say NR did not prioritise correctly is because in respect of certain other conflicting services, not WMT, where rights were not there, but in respect of certain other conflicting services where the knock-on impact had been identified, there were Firm Rights of equal priority that could have been Flexed but were not, and the decision was taken not to Flex them, and that is not applying the right priority because you took the decision not to Flex them when you should.

A82 (NR) I understood FL's dispute is solely about WMT?

Q83 (to FL) Is that correct?

A83 (FL) There are two principles. WMT were given the same status as FL under D4.2.2, therefore shouldn't have gone in at level 1a, they should have been at level 3, therefore when it comes to looking at our trains and those others, they were deemed to have equivalent status, which they didn't.

Q84 (to FL) Understood, but I thought there was a separate argument outside of WMT and for other TOCs, where they had been given equal and eventually greater priority but not been Flexed within the degree available?

A84 (FL) Yes that's the second point in our wider discussions. The Flex had been identified and there's been a decision not to apply that Flex.

Q85 (to NR) Yes and in my world, the legal world, that's a failure to apply the prioritisation obligation, not a failure to apply the Decision Criteria obligation which is the next level down the chain. So, I'm asking: have I got it right that in respect of these services, your contention is still that you did prioritise them, that somehow you were within your rights and not in breach of your obligations by not exercising the degree of flex that you could?

A85 (NR) Can you please rephrase so I completely understand?

Q86 (to NR) There are two sets of obligations NR has to go through in considering when to accept bids under Condition D4.2.1: "shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in this Condition D4.2." Now the guts of D4.2 is D4.2.2, which is what I group together as the 'prioritisation' exercise, and that is a separate exercise from applying the Decision Criteria to potentially conflicting bids. I think it's generally accepted, subject to ORR deciding to say to the contrary, in respect of these sort of decisions that the Decision Criteria come into play after you have been through the prioritisation exercise. My understanding of FL's argument is that NR did not operate a prioritisation procedure under D4.2.2 correctly in that it, in effect, wrongly prioritised a number of other operators by not Flexing to the extent it could have done under the contract i.e. within those operators' Firm Rights. As I understand it, I have not seen a direct refutation of that contention in NR's submission or statement today. Do you contend that this understanding is wrong, and if so, how?

A86 (NR) I will start with acknowledging the WMT scenario.

Q87 (to NR) This is a separate point from WMT.

A87 (NR) Yes, considering the overarching principle of applying priorities for inclusion. We have applied Flex and considered the priority of the eight Train Slots that were accepted.

Q88 (to NR) Can I stop you there and say we are talking now about the eight in dispute?

A88 (NR) On these slots you will see on the letters that planners had tried at the time to Flex, they refer to different timing windows in which clashes were there, at which point the Decision Criteria were applied.

Q89 (to NR) At what point were the Decision Criteria applied?

A89 (NR) At the point it was deemed that the challenge faced was too great to accommodate.

Q90 (to NR) What's the nature of the 'challenge'?

A90 (NR) Without breaking other contractual obligations.

Q91 (to NR) Yes, but you identified Flex that could be used, you identified but didn't implement it.

A91 (NR) Yes, if we refer to the meeting that took place a few weeks ago, we could identify Flex for some services but there was no definitive one end-to-end answer for each Train Slot

(FL) There was a series of Flexes that would be needed, but no discussion of the contractual ramifications.

Q92 (to NR) If it is Flex with a capital F, then by definition it would not be a breach of contract because Flex is something that can only happen within a contract, so I come back to not having seen NR give any example of something that would need to be done to accommodate a particular train at 1600t without actually breaking someone else's contract, as distinct from Flexing someone else's bid within their contract and Flexing a whole lot of other people's bids within their contracts. So, I again ask you, have I missed something, or are you unable to give any evidential example of something which conflicts, in a way which would put you in breach of contract?

A92 (NR) Okay, I cannot refute that.

Q93 (to NR) If that is the case, the conclusion sort of follows that FL have made good their contention, and it's what I deduce anyway, that what NR did in this case was to decide not to Flex a load of conflicting Train Slots, which would have involved a lot of work, because of the volume of contractual Flexes that would have been required, rather than because it couldn't do it contractually?

A93 (NR) It's something we haven't been able to demonstrate, yes.

Q94 (to NR) The other point I want to clarify is this: I want to be clear that NR is not asserting that it was entitled at the prioritisation stage to decide not to Flex conflicting services within their respective contracts by applying the Decision Criteria at that stage. Let me repeat, am I right in thinking that you're not saying you were entitled to apply the Decision Criteria in preferring one service over another and therefore in not Flexing to the extent you could have done?

A94 (NR) Based on the description of what we've gone through, yes.

Q95 (to NR) "Yes" - so you didn't apply the Decision Criteria to that decision?

A95 (NR) There's only one Train Slot to which the Decision Criteria apply.

Q96 (to NR) Can I test that? I understand the WMT point, but I can find no example where only WMT Train Slots are affected, however every Train Slot conflicts with a slot that has equal rights. All eight are affected by, as far as I can tell, something that is of equal priority. All eight are affected by a train of equal priority and the WMT is an additional conflict with something that doesn't have equal priority. If we are right in saying NR made a decision not to use Flexing rights, that was not a decision to which it was appropriate to apply the Decision Criteria, we are saying this happens at a stage before the Decision Criteria come into play.

A96 (FL) The Decision Criteria come in when Flexing rights can't achieve the Objective.

(NR) Isn't priority for inclusion about level of rights and once you have gone past that point it's about the Decision Criteria, therefore setting WMT aside, if they all have equal rights then we move to the Decision Criteria.

(Chair) That's right, but because the way the prioritisation provision is set out, the obligation to prioritise having regard to a load of things including exercising its Flexing right, is stated in parallel to the obligation to apply the Decision Criteria, under Condition D4.2.1. If one just applied the Decision Criteria it would negate the obligation for NR to conduct itself as set out in D4.2.2, which is to "endeavour wherever possible to comply with all Access Proposals submitted to it". This must also include complying with the Planning Rules, the Exercised Firm Rights of Timetable Participants and exercising NR's Flexing Right. And only where D4.2.2(a), (b) and (c) - (c) being the Flexing right - have been applied, but NR is still unable to include everything requested of it, then there is a lower order of priority.

(Panel member #1) I have an interpretation that says you can't apply the contractual flex without looking at the Decision Criteria, because the level of Flex that could be applied leads to huge permutational variability. I think the manner in which the Flexing right is applied is subject to the Decision Criteria before prioritisation for inclusion.

(Panel member #2) You take all trains that have been bid, look at their priority, look at if you can Flex them within their rights, take out the lowest priority to make it fit, and when you have a group of services you can accommodate then you use the Decision Criteria to find the best iteration of that.

(FL) That's our understanding as well, that you shouldn't be looking at priority order unless confident that D4.2(b) and D4.2(c) have already happened.

(Panel member #1) We are looking at a general point of interpretation.

(Chair) It affects this dispute because we're pinpointing the extent to which NR has to exhaust its Flexing right before the Decision Criteria come into play, for this particular decision.

(Panel member #1) I'm struggling with the idea of applying a Flex and then figuring out what doesn't fit, as there are a number of permutations and each permutation is a challengeable decision, and each challengeable decision needs to be made with reference to the Decision Criteria.

(Chair) I come back to saying that the degree of Flex permissible is part of the Firm Right, which is why it's important to understand the definition of that Firm Right to understand the available Flex, because until you've gone to the lengths of Flexing to the maximum possible, you cannot say you've gone to the extent of the Firm Right. In effect, in not using Flexing right you have gone against the Objective of sharing capacity, therefore using the Decision Criteria not to meet the Objective rather than to meet it.

(Panel member #1) Agreed, but where there is 'a, or b, or c' outcome I'm struggling to see how, when it gives 'f or g, or h' consequence, you can do that without referring to Decision Criteria.

(Chair) Without resorting to using all available Flex, it's not that you're not complying with sharing capacity, it's that you're not complying with the obligation to comply with Access Proposals submitted to NR, including using the ability to Flex where contractually entitled. Flex isn't defined with reference to the Decision Criteria, it's an absolute right; you should be able to just do it. And if you could just go straight to applying the Decision Criteria to whether or not to accept a bid, then D4.2.2 would be redundant.

(NR) So in this example, it suggests that we have not applied our Flex at this stage of proceedings and we've gone straight to the Decision Criteria.

Q97 (to NR) Well that's what I'm hearing from you, and that appears to be what you did.

A97 (NR) We haven't demonstrated that we attempted to Flex, but each intention to reject letter demonstrates the different permutations we attempted within what we had available to us, and then we applied Decision Criteria when we weren't able to resolve the conflict.

Q98 (to NR) I'll come back to the beginning question, am I right in understanding that you accept that you have not flexed to the extent you could have done - you say you have attempted to flex but you haven't actually flexed, and as I understand it, the reason you haven't flexed is because of the volume of knock-on impacts. You haven't said you can't do that; you've said it's too much to do, Am I misrepresenting the position?

A98 (NR) No, whether it's the right case we've made or not is a different matter, but within what we've submitted, if we have a million monkeys and a million typewriters, we would write Shakespeare; but we can only work within the resources we have.

Q99 (to NR) There isn't an unlimited amount of Flex. You already know some of the flex you have, you've worked out what the flex is theoretically, but not put this into practice and offered things on that basis. You've identified the Flex available but then on the basis of the Decision Criteria decided not to go forward, on the basis of too much disruption and affecting the structure of the timetable too much.

A99 (NR) The description submitted to the Panel might state three minutes, but it's also the spider web of the rest of the timetable and it might have been other points where the flex outside the contract might have happened but we haven't necessarily demonstrated it and that's what we are trying to intimate but haven't identified clearly enough in the rejection letters.

Q100 (to NR) We touched on this earlier, that you haven't identified it but aren't confident that there might not be clashes further down the line. Within the exercise you took at the time, you didn't identify any breaches?

A100 (NR) Yes.

(Chair) I am minded to conclude - and the reason I'm asking this is that I was trying to identify if at any point you had clearly stated that at some stage you would have broken someone's contract. You haven't done that - therefore I am minded to conclude that you haven't complied with the prioritisation, thus agreeing with FL's allegation. However, if a higher authority disagrees with me there is still a second issue to consider, which is the application of the Decision Criteria, so we turn to that now.

There are always two issues with the Decision Criteria: first, applying them procedurally at the right time and in the right way, something which historically NR has fallen down on quite a bit, i.e. it has been typically fairly evident in past disputes that at the time of making its decisions, NR didn't have the Decision Criteria in mind and that since the dispute was raised someone has come up with something. In this case I am pleased to see - and will mention in the determination - that this hasn't happened here, and that as far as I can see someone did in good faith and with good intent have a stab at considering the Decision Criteria when making the decisions rather than afterwards. Therefore, the issue of using the wrong procedure for their application does not arise here.

So here we are down to the second issue with the Decision Criteria, which is the actual substance of their application. That is dealt with substantively in FL's responses. Therefore, the best way of dealing with it is to look at FL's objections to the Decision Criteria applied by NR as set out in FL's revised submission. We can just go through those.

Just before we do can I give another indication of how I think the relevant parts of the Network Code are drafted and should be understood. A lot of reference has been given to "weighting" the various Decision Criteria, since the change when the Considerations were split out from the Objective. There are in fact two weighting processes required by Part D, only one of which calls itself "weighting". Condition D4.6.3 states the method by which the Decision Criteria are to be applied. There are three limbs that must be applied: first, considering which of the Considerations are "relevant" to the particular circumstances; second, applying the Considerations identified by NR as relevant "so as to reach a decision that is fair and not unduly discriminatory" as between more than one individual affected Timetable Participants or as between one individual affected Timetable Participant and NR. Then third, where in light of the circumstances NR considers that "application of two or more of the relevant Considerations" will lead to conflicting results NR must decide which is most important and then apply the appropriate weight. So, after deciding relevancy, the first sort of weighting is in taking each single relevant Consideration in turn and considering its actual impact on different affected Timetable Participants. Only once that is done and you know who is most impacted by each Consideration on its own, do you then - where these impacts conflict - weight each relevant Consideration against the others to see which is the most important. These processes appear sometimes to be conflated. So, the first weighting is not for or against the importance of individual Considerations relative to one another, but placing a greater weight on the impact of each relevant Consideration on one Timetable Participant against another.

Now let's go through the Decision Criteria Considerations as dealt with in the documents. Really a large part of the object of this exercise is to give NR the chance to respond where NR hasn't responded in its submission to FL's comments.

Q101 (to FL) Starting on p4 of FL's revised submission of 8th August 2019 under 'detailed analysis of rejections', the first bullet point, not having regard to consideration (i) mitigating effect on the environment, then goes into the environmental benefits of rail freight. NR has responded, on p8 of its submission; in the first instance it says mitigating effects on the

environment has not been considered, however extending passenger journeys or removing passenger slots "may also result in passengers driving rather than utilise the largely electric trains in operation on conflicting routes" and it therefore concludes the consideration cannot be weighted for or against Freightliner. I suppose I'm inviting you to debate this; do you want to come back on that FL?

A101 (FL) Nowhere has NR identified a Train Slot that would need to be removed.

A102 (to NR) Is that accepted?

A102 (NR) Yes.

(FL) Extending passenger journey times in the way identified for this dispute wouldn't have the impact of taking passengers off those trains, especially trains into London, I think people wouldn't rather drive into central London than take the train because it's been extended by three minutes - that argument doesn't carry huge credibility. There may be journeys in the local outer areas where that may have validity but the majority of journeys will be into central London and we don't think that would carry validity. Small changes at the edges of conurbations might trigger changes, but most of the services we're dealing with are into and out of London journeys on WCML and GEML. The benefits of 15 HGVs off the road, are very quantifiable benefits, well understood by government, with quantifiable congestion benefits.

Q103 (to both) I was going to come to this in general, to try and see if there is a way of assessing quantitatively, arithmetically, the impact of journey time increases as a proportion of the overall journey time versus. timing load increases as a proportion of the overall timing load, and where I got to was thinking that an increase of 400t on a 1200t timing load is 33% and I was wondering what a similar increase would be for passenger journey times. Six minutes is the largest potential increase mentioned. What is that as a proportion of the average passenger journey time?

A103 (FL) There may be differences depending on the time of day, peak and off-peak services into London. Do NR keep figures of what passengers shift modes as a result?

Q104 (to NR) I'm thinking this applies elsewhere as well?

A104 (NR) In terms of application of the Decision Criteria, we can see not all Considerations were considered. Based on information available at the time of a decision we needed to make at the time, because from a planning practitioner point of view that's not something we would be able to articulate without further information and they didn't request that at the time. What level do we go to and where do we make the judgement call?

Q105 (to NR) I appreciate that's difficult when you have to make several thousand calls?

A105 (FL) But there's a basic principle of the shift from road to rail by increasing tonnage.

(NR) That is understood, however without being able to fully articulate the adverse effect it may have on other Timetable Participants and their impact on the environment, it wasn't something we could consider at the time that we made the decision.

Q106 (to NR) I appreciate you may not have been able to consider it at the point you made the decision. Would it be fair to say that NR at management level, or even down to planner

level, would be aware of the general environmental issues in terms of road vs. rail freight and the impact of moving from 1200t to 1600t, at least to the extent of being able to consider them as relevant or being able to ask for more information rather than ignoring the criterion?

A106 (NR) Yes is the simple answer, we invite participants in, to talk about their business, their opportunities and what benefits it brings. It's part of our interactions with our Timetable Participants. It's something we encourage but, in this case, we didn't have enough information to consider it.

Q107 (to NR) Would it be fair otherwise to say in the context of the pattern of bidding that had taken place previously, that the individual planner might have thought that FL had bid for these services before, therefore hadn't been serious now, and therefore NR didn't need to consider it?

A107 (NR) That's probably an unfair suggestion, the reason being that different criteria were applied in different ways, demonstrating trains were treated on a case by case basis.

Q108 (to NR) Okay, although I was suggesting that in favour of NR?

A108 (FL) That goes back to the conversation we had before about the ESG process. It was understood by many at NR that we were bidding at 1600t in Dec 2019. I don't think it was a surprise.

(NR) Ultimately if NR is assessing a bid it shouldn't be on the basis of whether the FOC is taking us to dispute, it should be on its merits.

Q109 (to FL) What happens to the traffic at the moment?

A109 (FL) It is lost to road. We are running the maximum we can out of Felixstowe, constrained by the tonnage of our services.

Q110 (to FL) Thank you. Moving then to what I have labelled as FL's Objection 2 [in its submission]: Consideration (c), "maintaining and improving train service performance"-?

A110 (FL) We would expect all offered paths to be TPR compliant and therefore there to be no detrimental impact on performance,

Q111 (to FL) NR accepts it doesn't apply, on the assumption that it's able to identify TPR-compliant, conflict-free train paths, which begs the question of Flexing. Additionally, although a timetable should be TPR compliant, is it more difficult to recover performance with a longer, heavier train if disruption occurs?

A111 (FL) This dispute only covers weight not length - weight doesn't have a bearing on, for example, being able to enter a loop.

Q112 (to FL) That doesn't remove the Consideration. For example, right time presentation, which is more than TPR compliance, is fundamentally relevant to understanding timetable structure in terms of how you choose to structure a timetable pattern for good performance and a structure that includes multiple interactions is complex. It's about how you make decisions that maintain and improve performance. But I don't think NR, based on their submission, have chosen to weight in favour of pattern because they haven't asked for information about

right time presentation at Felixstowe, nor enquired about current performance on the North London Line?

A112 (FL) We are talking about a timetable dispute and we have to make assumptions around performance. Timetable structure should enable a timetable that performs. It's not about having something that is capable of running when everything is out of its slot in perturbation. We can plan something easily recoverable, but that shouldn't be an overriding consideration.

Q113 (to FL) I agree it should not be overriding, nor can I see it's been properly considered but I don't think either submission addresses what this criterion is meant to discuss, namely, robust and stable structure of the timetable, enabling NR and operators to make decisions that support a robust timetable. In this case, the only change is 1235t to 1600t and whether it's harder to recover 1600t than 1235t. In either case if the train breaks down, you'd need another locomotive to rescue it, and any freight loco can pull either loading. In this case, and because FL have confirmed that the length isn't changing so loops are irrelevant, in this particular case there is no performance issue in my view.

(Panel member #1) I thought the issue in this is that heavier trains are slower?

(Panel member #2) Not as slow as trains that stop at every station?

A113 (FL) The top speed is the same regardless of weight, the only changes are acceleration and braking.

Q114 (to FL) This indicates to me that you can't take any one as overriding and it must be considered within context and how it relates to the other considerations. A pedantic question, if speed is the same, how does it equate to lorries off the road - your 1200t service is currently running with empty wagons?

A114 (FL) Yes, it might run at reduced SLUs. From a theoretical planning perspective, the train is the same length.

Q115 (to FL) Does the rights table have SLUs on it as well and this hasn't changed?

A115 (FL) Yes, and no.

Q116 (to both) Where I'm coming out on this is that Consideration (c) does not weigh particularly heavily against FL?

A116 (FL) It should be neutral.

(NR) There are some comments which were made based on information we had at the time, but having reconsidered, we cannot substantiate our comments

Q117 (to NR) It sounds like someone in ignorance saying that heavier trains will lead to poor performance?

A117 (NR) Yes and that's why our Sole Reference Document addresses it.

Q118 (to NR) Performance should have been considered during the sale of rights process?

A118 (NR) Yes but you can't performance assess rights against a specific timetable path.

Q119 (to NR) But surely that would have been taken into account generally?

A119 (NR) Typically that would have been covered off as freight services start operating before access rights have been sold.

Q120 (to both) The interaction between performance and the sale of rights process is probably irrelevant, as different timetable permutations result in different performance outcomes, yes, but in this case with no increase in length and negligible increase in tonnage then I think probably neutral and no benefit or disbenefit for all parties?

A120 (FL) We have trains that run today at 1600t and they don't cause any more delay than any other service

Q121 (to FL) If NR has supplied the correct information then this train has already run at 1600t?

A121 (FL) Yes.

Q122 (to FL) How?

A122 (FL) It would have run over the permitted weight and FL would have paid the associated Schedule 8 penalty from any resultant delay.

Here there was some brief discussion about how the 1600t weight had ended up in FL's TAC if NR couldn't accommodate it. GBRf recollected that it had occurred in 2016 when the TAC was updated - an out of date timing load had been exchanged for what FL felt to be the closest equivalent; 1600t. At the time this was accepted by NR.

Q123 (to NR) Okay. Let's examine the 3rd bullet point on page 4 of FL's submission, (so counted as FL's Objection 3), Consideration (e). NR weighted this against FL based on the requirement to use Flex at key Network locations - the ripple effect. NR, do you want to speak to this? My reaction is that this isn't a correct application of the Decision Criteria, but another example of what you have said candidly elsewhere is, in your opinion, too much aggregate change disrupting the timetable?

A123 (NR) Simply, yes. Our position is that the current structure affords connections at the moment. The system is integrated and works, for example someone can change from a local train at Stratford to a fast service to Norwich. By adding three or four minutes we lose connectivity in terms of an integrated system.

Q124 (to NR) Right. But what about "passengers and goods"? It's not about one, but a balance between both?

A124 (NR) That's fair, but the outcome should be in favour of keeping the whole passenger network integrated and not changing it for the sake of eight slots comprising four trains.

(FL) Which connections are actually lost?

(NR) We need to demonstrate this and articulate it better. In this example I can only talk in round terms.

Q125 (to NR) I'm provisionally concluding on examples of applying an overall consideration, which is what you say at the end, as distinct from considering the impact on individual parties, which is in the order of a few minutes. Do you want to respond?

A125 (NR) I understand that without specifics I can't elaborate further, but I could go back to the office and get examples to demonstrate if I can?

Q126 (to NR) I don't want to prolong this if it can be avoided. You speak of connections possibly being broken; are these contractual connections or non-contractual connections? If the latter then they are only a 'nice to have'.

A126 (NR) That is interesting, what about contractual connections and priority for inclusion? I believe that would bring it back to priority for inclusion.

Q127 (to NR) But at the moment you only 'believe' that and don't actually know?

A127 (NR) Yes.

Q128 (to NR) Doesn't the connection issue come up elsewhere in relation to something else in FL's submission? We will come to it. I come back to saying, in my mind, when considering the "integrated system", that the integration referred to is between passenger and goods, not between different passenger services. The effect on passenger services is dealt with elsewhere. To say that the weighting against FL is because there would be an adverse effect on passenger services doesn't apply this Consideration properly.

A128 (NR)The way we would have applied it is as an integrated system of transport and if we break that integrated system, we have a less integrated system by allowing a 1600t freight train and Flexing other services in the timetable.

(FL) There is a point more generally that we are now transporting more tonnage by rail and running fewer trains. Running heavier trains allows us to run less trains, which allows more passenger trains, which can only be a good thing for network-wide integration when looking at a mixed-use railway, where heavier trains should be a good thing. The point the Chair is referring to is at page 14 of our Sole Reference Document. There's a general case in point worth stating that at locations like Stratford (London) and Clapham Jn there is a large amount of connectivity. When you have a service every six to 10 minutes, what weighting would you apply? Passengers will simply catch the next or previous service and the journey time increase would be quite minimal.

Q129 (to FL) So yours is a separate point, that in the circumstances and having regard to the detail of the places affected, it doesn't necessarily disintegrate the passenger service because these are places where there are alternative connections, however you could only make this assessment on a schedule by schedule, case by case basis and we don't have that information in front of us, nor is it the basis on which NR has made its decision?

A129 (FL) Agreed.

(The Chair) On Consideration (e) then), I am forming the conclusion that the way it was applied so as to favour integration of passenger services, to the extent that they needed integrating, was not achieving what it's supposed to do, which is to integrate passenger and goods services. It disfavoured goods by not considering it at all. At best it should have been neutral.

Q130 (to NR) The next one is Consideration (a) (which I have counted as Objection 4 in FL's SRD), maintaining, developing and improving the capability of the Network. What do NR say to the point about the general strategic freight objectives, which this consideration would seem to favour - "consistent references to the holistic nature of the rail network" - it looks like this has been applied against FL on the basis, again, of too much change to the timetable?

A130 (NR) And the impact on other services as well, extended journeys etc.

Q131 (to NR) So you would say it goes against maintaining capability, not against improving it?

A131 (NR) It goes against maintaining capability, in that a slower train path occupying track for a longer time would reduce the number of train paths available.

Q132 (to both) Okay, if you have slower trains there will be a detriment somewhere but that doesn't deal with the consideration of improving the Network, and there seems to be an accepted general policy objective all over the place to increase the general amount of freight paths on the Network, whether by the Strategic Freight Network or elsewhere?

A132 (FL) Yes, absolutely right. The Strategic Freight Network is to support operators to improve by enabling operators to make investments to support lengthier or heavier trains. Running heavier trains also touches on the RUS consideration, very consistent.

(NR) FL are referring to the freight network, but NR must consider the overall whole Network

Q133 (to NR) Does increased tonnage affect engineering access?

A133 (NR) It's considered as part of the TCRAG process, as train paths are allocated.

Q134 (to NR) What did TCRAG say?

A134 (NR) As the paths were not offered, TCRAG did not consider it.

(FL) But these are still relatively lightweight and therefore of relatively marginal impact.

(NR) That's still a cumulative effect once you multiply it up.

(FL) And we pay direct costs for wear and tear through our track access charges, such as variable charges, and therefore should be cost neutral. If you were to calculate our service uplift as a percentage of the tonnage already existing on the WCML and the GEML it wouldn't be significant.

(NR) That's a different question for a different audience.

(FL) Yes, but it's a very small percentage.

Q135 (to NR) Okay, given that 'maintaining' is not fiddling around with the existing timetable I am coming to the conclusion that the consideration favours FL as 'developing and improving capability' is also partly to deal with increasing freight capability, which has been recognised as a proper purpose. This is confirmed by D4.6.4 which says you still have to consider the Objective when looking at the considerations, which is "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". Does NR want to say anything else?

A135 (NR) In my very simple view, I acknowledge that there is an improvement, but the detriment of that isn't considered and we haven't countered that in this example. Finding in favour of FL, the converse of that is that there may be a negative impact of having increased tonnages.

Q136 (to NR) Yes, but the exercise we are trying to do is one that should have been done at the time, namely evaluating the negative impact on one party and the positive impact on another, in this case the goods operator. So far, you've only articulated the negative impact on passengers being the general disruption in a minor number of respects, with the aggregate impact being the issue.

A136 (NR) And that's where the integration point comes in, rather than the micro we are dealing with here. It's an example of the passenger network being quite well integrated, where there's only a number of small changes as a consequence, rather than big changes like an extra 30 minutes journey time or removal of Train Slot. Before we started this discussion and maybe now, I have seen this as neutral as it's about the Network, not trains on the Network and the Decision Criteria are also used for decisions about engineering work. This Consideration is usually, in my view, used specifically for conflicts between possessions and trains. I have always thought this one is neutral about the infrastructure being able to do what it should do, or investing in it going forward, albeit it seems to imply being made available to heavier freight.

Q137 (to NR) Next one, Consideration (j) (counted as FL's Objection 5), Utilisation of assets, seems relevant in this case. NR response was that it hasn't been considered but that the potential "impact could be considered in light of a fundamentally different timetable structure". Are we here back to an objection to altering the timetable as it stands? NR doesn't seem to have identified any journeys that would be extended longer than six or seven minutes, or are you talking about longer journeys elsewhere?

A137 (NR) Yes, the wider impact of a decision, and the spiders web analogy; a decision here can lead to a number of conflicts further down.

Q138 (to NR) Yes, that is a theoretical possibility, but in applying this Consideration at the time, or with hindsight, you have come up with no hard or even approaching hard evidence of impacts on rosters, use of passenger rolling stock etc. I'm loath to prolong the exercise by saying if you can come up with something meaningful let's suspend it and you can go and see if you can find some hard evidence from whichever operator.

A138 (NR) At this moment it would be our preferred approach as it would give us the time to explain the conflicts, as in each case there are several conflicts.

Q139 (to NR) You've had the opportunity to do that and what you've come up with is the two tables in the Appendices to your submission. Also, it would affect passenger operators now as they have made their rosters. In May 2019 it wasn't an issue, but they've been done now?

A139 (FL) Can I make a general point? We are surprised that this had not been considered by NR. This is all about one loco and one driver moving more freight. It's key to the economics of running more freight.

Q140 (to FL) Has the decision to include some services at 1600t, and not others, led to misalignment in FLs resources?

A140 (FL) Yes, the length isn't the issue it's the weight.

Q141 (to FL) It's more than just a schedule running, it's also the assets at both ends of the journey?

A141 (FL) Yes, it's inefficient, as we end up waiting for the next path south that matches the characteristics of the first train.

Q142 (to NR) I conclude from that that Consideration (j), when properly considered, seems to favour FL. Do you agree NR?

A142 (NR) At this moment in time, although I may disagree, I cannot demonstrate otherwise, so yes.

Q143 (to NR) I'll give you one more chance as I don't want to be unfair. I, as a relative layman, am aware of the general considerations in favour of increased freight transport by rail and it's something therefore I imagine most network planners in Network Rail would have some consideration of even if they didn't have the Decision Criteria at their elbow. Is that fair?

A143 (NR) Not unfair but doesn't take into account ...

Q144 (to NR) It has to be on the basis of the individual clash and that's not how the information has been identified today, for example Network Rail's case would have been supported had you been able to identify a consequence where FL could resource an alternative and a passenger operator could not as a result of including a 1600t path.

A144 (NR) Hence I acknowledge where we are. But the decision might have been different at the time if we'd had the facts and conveyed them.

Q145 (to NR) What I'm getting at is that people could have regarded themselves as on notice, when they were making these decisions, to get more information and not just to disregard the Considerations.

A145 (NR) I acknowledge it should have been considered.

Q146 (to NR) So the next one is Consideration (f) commercial interests (counted by me as FL's Objection 6). The NR response is that this was not considered and if it had been considered would have been neutral - do you want to say anything?

A146 (NR) NR gains would be marginal and offset by maintenance, so neutral to NR.

(FL) Yes neutral to NR but not neutral to us as a Timetable Participant; it's in our commercial interests to run longer and heavier trains, it's not neutral, it's a prime driver.

Q147 (to FL) It's about net revenue to industry, revenue freight gain vs passenger revenue. Is there an increase to your fixed TAC charges if you run 1600t?

A147 (FL) No.

Q148 (to both) Next, Consideration (g), consistency with any RUS (counted as FL's Objection 7). Which don't exist anymore. I wasn't clear whether this had a RUS, or now an alternative kind of RUS.

A148 (FL) RUSs haven't existed for a number of years and have been replaced with the Long Term Planning Process ("LTPP"). The freight network study from 2017 talked about how the Network could be configured; running longer and heavier trains was absolutely key and has underpinned the investments made through the strategic freight fund.

Q149 (to NR) Would NR accept this? That this freight study etc. is effectively the equivalent of a RUS?

A149 (NR) Yes, and again with caveats that there are also future growth aspirations for Abellio with additional services and additional trains to Norwich and Southend. We would have to look at the wider context.

Q150 (to both) Is there any connection with the Anglia Route Study and longer trains from Felixstowe and the GEML ESG? The commencement of 1600t and the timetable recast, is it strategically aligned or practically aligned? Because unless they are a committed part of the plan we shouldn't use this consideration here? For the RUS we would need to look at the latest LTPP documents as they would include the plans, which are not here.

At this point there was some discussion on the point of what documents and evidence was or should be in front of the Panel. The Chair concluded:

We could go on forever asking for more information, but there's a level above which one says look, this is what you've brought to the table, having had several opportunities to look at it again. On this one, I think we're saying RUS or equivalent, and that we have considered something that has been brought up by one party, evidence about the subject that even I've heard of and we've got nothing brought up by the other party -?

A150 (NR) We've acknowledged there is an aspiration for growth on Anglia, albeit not in terms of 1600t paths.

Q151 (to NR) On this Consideration you note freight traffic but don't mention passengers, but then just say 'we have weighted other things higher', but this should show the weighting of where you come down?

A151 (NR) In terms of the decision made, in the here and now, there was something considered more relevant at the time.

Q152 (to NR) I'm giving you the opportunity to say if there's something else we should consider in favour of passengers?

A152 (NR) There is a CP6 document for freight and passengers. We have not referenced it here.

Q153 (to NR) Which means you thought it didn't override the Strategic Freight Network?

A153 (NR) We didn't consider it at the time.

Q154 (to NR) But your argument isn't about passenger growth, it's just about accommodating heavier trains. I could argue it must be consistent with the RUS, but that is silent on the

point of flexing passenger services and the question is about flex in the Dec 2019 timetable. If two lots of competing growth came in then you would make decisions based on competing growth in a plan?

A154 (NR) At the time it was not considered, I can't say any more than that.

Q155 (to NR) Do you have points to make on any other specific Considerations?

A155 (NR) There are two where FL didn't dispute, (b) and (d) and NR's application of those.

Q156 (to both) Yes, that's something else I want to pick up, because I thought FL did dispute these collectively. On FL page 6, bullet point 1 specifically disagrees with NR's weighting of Considerations (a),(b),(c) and (d). We've dealt with (a) and (c) in more detail already, so that leaves (b) and (d). I don't think NR has addressed this. Consideration (b) is that spread of services reflects demand, both passenger and goods, Consideration (d) is that journey times should be as short as reasonably possible. FL has said there is demand FL cannot meet at the moment?

A156 (FL) Absolutely, and we would say that three minutes in a passenger service journey time doesn't stop it meeting demand and can still make it as short as reasonably possible if, for example, there is a demand for a twelve coach train, if that train runs as a twelve coach three minutes later it will still meet that demand.

Q157 (to both) I think that gets us through the Decision Criteria Considerations. I have noted a number of other objections by FL that aren't specifically part of the Decision Criteria but are about NR remarks generally. Not sure we need to go through them, to some extent we have already considered them. All the flaws identified by FL are in the application of the Decision Criteria, and all comments by NR in response are in relation to consideration of the Decision Criteria, except perhaps one reference by NR to the Objective in the context of why it prioritised not Flexing all the other services. Actually, I don't think either NR or FL has specifically debated the Objective. No, NR refers to it at top of page 7 of their submission, but I don't need to ask any questions as it's quite clear what both parties are saying.

Where we've got to on what I think are the relevant Considerations, on the basis of the exercise just gone through, is that for all the important Considerations, in terms of assessing their impact in terms of one operator against another, FL versus passenger operators, which is the bit in Part D about applying it in a way that is "fair and not unduly discriminatory", we seem to have come out with them all either neutral or favouring FL.

A157 (NR) With the exception of (d)?

Q158 (to NR) I came out with (d) as neutral. As passenger journeys will be as short as is reasonable, the point was made that you could say a pathing time increase of three minutes does not hugely detract from the principle that it should be as short as reasonably possible. On the basis of the information we have I would struggle to see it any other way. If you were able to demonstrate something else specifically, we might have a different discussion

A158 (NR) Okay.

Q159 (to NR) That being the case we don't even get to the other weighting process I distinguished earlier, which is the second sentence of Condition D4.6.3, which is where application of two or more considerations would lead to a conflicting result then you weight one consideration

against another, e.g. environment against journey time. It seems to me we don't get to that exercise. Do you want to say anything on that?

A159 (NR) I disagree but can't articulate anything better right now.

Q160 (to NR) I'm inviting you to give me persuasive reasons for disagreeing.

A160 (NR) The way we have approached this dispute has led us to a certain result. I still believe that in the overarching principles in how we came to the decision we did, we didn't discriminate.

(Chair) "Discriminate" is a loaded word, more than intended by the word "discriminatory" in the first sentence of Condition D4.6.3. Do any of my colleagues think it would be right to prolong the exercise by inviting NR to come back at a later stage with any information it can on any of these points, e.g. on journey times, or is it honestly the case that if you went away and looked at it you wouldn't come back with any additional information? Isn't the point that the decision was taken on the basis of information available at the time, and there have been opportunities since to address it further?

The Panel agreed there had been sufficient opportunity, including a change in Hearing date, and that it had to judge on the basis of the information given by the Parties, albeit they would have wished NR to be conclusive in whether it would breach another operator's TAC if directed to include the 1600t paths, but they didn't think NR could answer the question with the information it had brought to the dispute.

(Chair) I think we've covered all relevant points. The only other thing I want to ask about is consequences, and the practicalities and options for determining this matter.

There was a short adjournment for the Panel to consider the evidence so far provided.

(Chair) I just want to ask about matters connected with the decisions we could make in terms of remedy. I want to explore a bit more what you've already said about practicality or impracticality if we were to require NR to put these trains in at 1600t for the Dec 2019 timetable. NR, you've said a certain amount in your submissions about that, and a lot of your submissions in principle seem to have been based just on a general feeling that it would be a lot of work, a difficult task and you're not sure what the eventual outcome might be.

Q161 (to NR) Getting down to concrete practicalities therefore, are you saying that just in terms of NR's capability it would be completely impractical to do that task within 13 weeks, or that it would just be difficult?

A161 (NR) It would be difficult, if it was easy, we wouldn't be sitting here. We're at D-33 or D-34 for May 2020 timetable preparation and our focus is on making the right decisions for that timetable. It's difficult in terms of the task, and making a robust and compliant timetable. Secondly, it's impractical in terms of how we're resourced and delivering an outcome.

Q162 (to NR) Meaning you haven't got the staff resource to do it if we were to say go ahead and rework it, because you have to be doing the May 2020 timetable at the same time.

A162 (NR) Correct, it's broader than that; also in terms of industry resourcing, diagramming and timetable planning. The first piece of work is to draft what a timetable plan would be and then for others to work out what it means for them.

Q163 (to NR) I'm trying to get a feel for the extent, not just in terms of resources but the extent of the impact of introducing these eight paths, in terms of geography and number of TOCs affected. The intent to reject letters and our discussions today have described this to a certain extent, but does this amount to something that is over the balance of reasonable practicality in terms of its effect on NR, the industry in general and users?

A163 (NR) The New Working Timetable is published and in the public domain. Any change to that would impact users depending on the outcome; at 13 weeks out, if a timetable was to be rewritten on two key routes in this country, the ripple effect... well, we haven't been able to demonstrate that, but it exists.

Q164 (to NR) Is the ripple effect at each successive ripple, which may not be the most important metric, any more than individual services being altered by three or four minutes?

A164 (NR) I couldn't tell you right now, it could be connections or turnaround that might be impacted.

Q165 (to NR) Could those 2nd, 3rd, 16th level changes ultimately result in more than a single figure minute increase in journey time?

A165 (NR) Potentially yes.

Q166 (to FL) FL do you have anything to add?

A166 (to FL) Our priority remains to get these trains into the Dec 2019 timetable. We have a business requirement to run these trains in a1600t weight from Dec 2019. There is a broader revenue impact from doing that, and if we were to run them, we would incur a delay attribution risk that we would pay for.

Q167 (to FL) Is that financial impact quantifiable?

A167 (to FL) Yes, our commercial team are acutely aware. We can quantify that; we quantify that with NR all the time when we claim against them.

Q168 (to FL) Would you quantify it on the basis of the services lost?

A168 (NR) There is a distinction in quantifying costs between cancelling actual services and quantifying loss from future services.

(FL) Yes but there is a clear, obvious demand there.

(NR) Yes.

Q169 (to NR) The next question is to NR. If we're talking in terms of compensation, is there a basis on which you could accept that some compensation is reasonably calculable, including not just as to the amount but whether it would represent a genuine loss of what would have been achieved rather than failure to meet a bare aspiration?

A169 (NR) Yes, we'd have to reach agreement on methodology, because even if all those paths are included in Dec 2019, they might not necessarily be 100% full from the start.

(FL) Yes, we would seek to fill them, but there are nuances around customer revenue.

Q170 (to FL) Could you have that debate with NR?

A170 (FL) Yes, we could.

Q171 (to both) If there were a determination to include these slots in the May 2020 timetable would that work at a practical level? Let me explain. We have made such determinations in the past, but my experience is that, although in order to be contractually compliant we can override contracts to a certain extent. it's not practical for loads of reasons to do so wholesale, therefore one normally says [include slots] "subject to complying with all the principles and procedures", which could cancel each other out and we end up back where we are today?

A171 (FL) The risk there is that we are back here again after the May 2020 offer with an argument about priority or decision criteria, but we are now in a different timetable situation.

(NR) And Abellio don't have rights.

(FL) Yes, and it's a different base position.

Q172 (to FL) Therefore we couldn't simply say "put these slots in come what may and flex everyone else's slots if you need to". FL, you have presumably included these services in your May 2020 bid?

A172 (FL) Yes, we bid for everything.

Q173 (to NR) Is it practical to determine introducing the services at a stage between timetable change dates, such that the T-12 process still works?

A173 (NR) There is potential to, but we go back to the ripple effect.

Q174 (to FL) When are the wagons ready?

A174 (FL) Between December and May, coming on gradually in that time. We'd still be seeking to run them at these tonnages regardless, given existing demand.

(Chair) The other potential compensation would be for delay minutes, but could we determine something that negatively impacts performance? I'd also note it might not just affect performance, but also the ability to resource the knock-on impact.

The Parties were then invited to make closing statements. FL made the first statement:

> Access rights are crucial for the industry. They provide certainty for operators and customers. There is no suggestion they override Part D, however for us this represents a breach of our track access contract. NR has not applied the principles of Part D correctly. Despite significant available Flex, it has failed to identify how any of the required Flexes would represent a breach of contract for other operators and, irrespective of the above, the Decision Criteria haven't been applied in a fair and balanced manner.
>
> There is no disputing that the trains have 1600t rights. This was clear throughout the timetable development process. We repeat our request that the Hearing Chair directs NR to

accommodate these slots in the December 2019 timetable. To not do so would directly impact Freightliner and result in a loss of revenue. Thank you.

NR then gave a closing statement.

In terms of the challenge presented to our planners on a day to day basis, 24000 amendments, we are talking about eight Train Slots here and there was an acknowledgement from the Chair regarding the communication and the letters being presented to FL in a timely manner, and that recognition is genuinely appreciated and recognised. However, the challenge of articulating the reasons for rejection is something we can do better with and that is something acknowledged at this stage already. The principles are still there, we just haven't articulated them in a way that has been beneficial in this dispute. It is a key learning we can take from here. In terms of going back to the challenge for our train planners, the four slots here had been requested on several previous occasions and we didn't recognise that it should have been treated differently, and this may have clouded and impacted the decisions we made.

Going back to the beginning, our planners' decisions are still made in good faith, albeit there is a discriminatory impact as it discriminated against one party; that is acknowledged. We would still like the panel to determine that NR can publish, Flex and not include an operator's services even if they have access rights, as that's why Part D exists and gives priority for inclusion. Again, going back to Part (c) of our opening statement [Decision sought from the Panel], TAC rights don't supersede Part D. There were opportunities for FL to submit other Access Proposals, four weeks prior to the publication of the timetable. At no point did FL submit any other Access Proposals or suggest any other solutions that we weren't aware of.

In terms of ultimate determination, we do not believe it is practicable to deliver a new timetable for Dec 2019 without fully understanding the impact of it, which may be more than we anticipate now.

Q175 (to FL) Thank you. Can I ask FL if they would like to respond to the point about not having taken the opportunity to put in another Access Proposal within the available timescales?

A175 (FL) We received the intent to reject letters on 13th May 2019, and they are dated earlier than that. It would have been more helpful to send them after they were written. Our understanding of submitting another Access Proposal, was firstly that we still needed 1600t weight therefore it was difficult to work out what a revised proposal would look like and secondly, we would have lost our priority and taken ourselves down the pecking order to put a bid in for the same thing. We had a conversation with NR at the same time around the difficulty of this.

(NR) One of the very simple errors was about assuming a TAC was in place with WMT, if that is one of the bases of dispute at the time then FL submitting a new bid would have presented the opportunity to consider this.

(FL) We pointed that out to your colleague on 16th May. He acknowledged WMT didn't have a TAC and said there were more trains that clashed. When he issued the final letter, nothing had changed in the letter. We have the emails, but we did make that point as it was quite significant for us at that stage and the D26 offer didn't reflect our comments.

(NR) Is that an acknowledgement that you didn't submit a revised Access Proposal?

(FL) An intent to reject is not a rejection. In our minds if intent to reject is issued on 3rd April, how can the train be rejected if there are another six weeks of timetable development where anything could have happened to the clashes identified. We wouldn't necessarily see intent to reject as a final notice of rejection. It shouldn't be the final word. In the case of WMT, we asked NR to look at a specific clash and we just got reissued the same document with the same statement

(NR) In response to the time order, we work through the timetable in a coordinated fashion across the timetable, in good faith, letting Timetable Participants understand our thinking at the time.

Q176 (to NR) Where the TOC does put in a revised proposal where it is minded to challenge the response to its first proposal, would the new proposal keep its original priority - is it like putting on an alternative bet, or would the original proposal lapse if a revision was put in?

A176 (NR) In terms of custom and practice, any changes to the Working Timetable are dealt with as bespoke and validated on their own criteria, on a case by case basis. They would be dealt with in tandem.

Q177 (to NR) The rejected proposal would remain theoretically valid and they would have the ability to challenge?

A177 (NR) Yes but the new proposal would have a lower priority for inclusion.

Q178 (to NR) Yes, would the latter one stop them being able to challenge the first one?

A178 (NR) It wouldn't exclude it, but if it points out incorrect assumptions, it would perhaps help NR revisit the first one.

Q179 (to NR) Any revised bid would have been dealt with after the offer?

A179 (NR) Or prior to the publication of the New Working Timetable.

Q180 (to NR) I'm struggling to see this as a revised proposal; this should be a continuation of dialogue about an existing Access Proposal. Where we are talking about the expression of a Firm Right and, in any case, even if there was an opportunity to put in a further Access Proposal, there is no obligation on the TOC to do that and they are well within their right to refuse, particularly in the light of the priority issue and it's perfectly proper for them to carry on fighting their corner on the original proposals.

A180 (NR) It's an opportunity to right a wrong.

Q181 (to NR) But aren't there other opportunities to right that wrong, e.g. by picking up the phone and pointing something out, which to a certain extent they did?

A181 (FL) There was an assumption that NR was still working on it as it was only an intent to reject letter and there were several weeks to go.

Q182 (to FL) Was there discussion?

A182 (FL) Yes, which is what I alluded to before. It was difficult to respond to as they arrived in a batch, but our conversations didn't drive any change.

Q183 (to both) I remember seeing something about too much information to assimilate all in one go?

A183 (NR) Yes, the feedback we previously received led us to send the letters earlier and that has become practice.

Q184 (to FL) This is covered in D2.4.6 and D2.4.7, NR "must notify the Timetable Participant of this fact, as soon as possible after it has become aware", which implies you should have said they were outright rejected so FL were under no Illusions as to what you were, and were not, going to do. I understood you to be saying intent to reject letters were well understood.

A184 (FL) Everything for this dispute arrived on the 16th May 2019.

Q185 (to FL) Is this the first time you've had intent to reject letters?

A185 (FL) No, but we always assume that means NR is working on it.

(NR) Does this mean FL just leaves it there?

(FL) No, it's train by train dependent.

Q186 (to both) Or relationship by relationship?

A186 (both) Yes

Q187 (to NR) I'm not sure this discussion is getting us anywhere with relevance to the central issue. Given the discussion that has arisen, is there scope for the 1600t paths to go outside FL's contractual window and Flex?

A187 (NR) That has been discussed, yes. A heavier train may need to arrive later and depart earlier.

(FL) The Rights are written around Train Slots on that timing load. The principle is that the Rights windows are sufficient for that timing load.

Q188 (to FL) What about a double headed service achieving a 1200t schedule for a 1600t loaded service in December, to allow NR to make single running in May 2020?

A188 (FL) In terms of our fleet, we don't have the locomotives available and there would be a huge cost, so purely looking at loco availability we are struggling.

(NR) I'd echo that in terms of strategic conversations we are having with FL.

The interested parties were asked if they wished to make any closing statement or comments. All declined.

Following a further adjournment, the Chair outlined to the parties a summary of his decision which would be issued in due course. He then asked FL if they wished to make an application under

ADRR Rule H60 for their costs of pursuing the dispute, having regard to the tests for such an order set by that Rule.
Freightliner confirmed it did not want to make such an application.