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28 October 2005

Dear Ms Durham

**FREIGHTLINER APPEAL UNDER PART M OF THE NETWORK CODE IN
RESPECT OF DETERMINATION ADP10 OF THE ACCESS DISPUTES
PANEL – DETERMINATION BY ORR UNDER CONDITION M4 OF THE
NETWORK CODE**

Summary

1. On 22 August 2005, Freightliner Limited ("Freightliner") served an appeal notice on ORR under Condition D5.2 of the Network Code in respect of Determination ADP10 of the Access Disputes Panel ("ADP")¹. ORR has been asked to determine whether Freightliner is entitled to compensation from Network Rail Infrastructure Limited ("Network Rail") due to the highly disruptive nature of Restrictions of Use ("RoU") that the facility owner intends to implement between December 2005 and December 2006 which will, in the appellant's opinion, cause it considerable financial loss.
2. This letter sets out ORR's conclusions, in respect of whether it should hear the appeal under Condition M4 of the Network Code.
3. Having considered the papers submitted under this appeal, ORR has concluded that it should not hear the appeal, and that the decision of the ADP should stand. The reasons for this decision are set out below.

¹ Access Disputes Panel's determination in respect of reference ADP10 issued 16 August 2005.

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Background

4. This appeal was made on behalf of both Freightliner and Freightliner Heavy Haul Limited ("FLHH"), who had previously made submissions to the Network and Vehicle Change sub-committee under Condition D2.2.4 of the Network Code in respect of Network Rail's proposed implementation of its West Coast Modernisation B Final Major Project Notice ("MPN") December 2005 to December 2006 issued on 28 January 2005. The basis of these original appeals was that the RoU proposed under the MPN would have a disruptive impact on a number of both freight operators' services for which, as they were categorised as renewals to the network, Network Rail considered that compensation would not be payable (Appendix C to the Joint Submission).

5. Following the introduction of new Access Dispute Resolution Rules in April 2005, the original appeals were heard by the Timetabling Panel which, in respect of the RoU only, ruled that Network Rail was entitled to implement the MPN for the routes which would affect Freightliner and FLHH². The Timetabling Panel did not, however, consider the issue of compensation, directing instead that if the appellant wished to pursue this matter, it would need to do so through a separate argument setting out its view of its legal entitlement to such payments through its relevant track access agreements. This matter was subsequently heard by the ADP, which in turn found that Freightliner had no explicit contractual entitlement to compensation for the additional costs that it expected to incur.

Appeal to ORR

6. Freightliner has subsequently appealed against this decision to ORR under Condition D5.2 of the Network Code. ORR notes that this appeal should technically have been made to it under Condition G6.2 of the Network Code, as Condition D2.2.5 provides that any matter referred to the Industry Committee for determination under Condition D2.2.4 shall be treated as a matter referred to that Committee under Condition G6.1. The right to make an appeal to ORR therefore arises under Condition G6.2. The preliminary procedural step to be taken by ORR is for it to consider whether it should hear the appeal.

7. Network Rail was invited to make representations to ORR on whether or not it should hear the appeal under Condition M4.1, and it expressed the view that it was unclear on what basis the appeal had been made. ORR also considered that the notice did not provide adequate information to enable it to make a determination under Condition M4.1. Freightliner was, therefore, invited by ORR to submit additional information to clarify and support its position. These further details were submitted on 30 September 2005. Freightliner also indicated at this time its intention not to proceed with the FLHH element of the appeal as it was no longer intended to operate the service in question.

8. In Freightliner's further submission, the grounds for the appeal to ORR were clarified as follows:

² Timetabling Panel Decision No 1 issued 19 May 2005.



- the ADP decision was unjust because Freightliner has a contractual entitlement to Level 1 Rights (under Schedule 5 paragraph 2.1 of its Track Access Contract) that Network Rail does not have a legal entitlement to curtail under either its track access contract or the Network Code;
- the ADP did not take sufficient account of this entitlement to firm contractual rights and the considerable financial implications of the RoU for the operator – Freightliner considers that the damage caused could be considered as a breach; and
- whilst Freightliner noted paragraph 16 of the ADP Determination (which set out the sequential nature of Part D of the Network Code in respect of changes to the Rules of the Route and Rules of the Plan, and the bidding process) it disagreed that this allowed Network Rail to deny it the right to exercise its firm contractual rights.

Under its appeal, Freightliner has specifically asked ORR to determine whether Network Rail should be directed to compensate it for any additional costs incurred due to the highly disruptive nature of the relevant RoU.

9. Condition M4 sets out a non-exclusive list of grounds on which ORR may refuse to hear the appeal. The specified grounds are:

- (a) the matter in question is not of sufficient importance to the industry;
- (b) the reference is frivolous or vexatious;
- (c) the conduct of the party making the reference ought properly to preclude its being proceeded with; or
- (d) it is appropriate or convenient for the matter instead to be disposed of by the High Court (in Scotland, by the Court of Session).

ORR has considered whether the appeal should not proceed to it under each of the specific grounds. ORR has concluded that none of the specific grounds are applicable to this appeal.

10. As noted above, the list of specified grounds on which ORR may decline to hear a reference is expressly non-exclusive. The word “including” which precedes the specific grounds is to be construed without limitation (see Condition A1.1(f)), so that ORR may reach a decision on other grounds.

11. In particular, ORR has considered whether it should not hear an appeal where it considers that the appeal would have no real prospect of success. This is a criterion for deciding whether to hear an appeal which other appellate bodies (such as the Court of Appeal) apply. ORR has concluded that it should not hear an appeal with the impact that this has on both the appellant and the respondent, as well as ORR, in terms of time and resources where it considers that the appeal does not have a real prospect of success.



For the reasons set out below, ORR considers that this appeal does not have a real prospect of success and has therefore concluded that it should not hear the appeal.

12. In considering this issue, ORR has considered each of the grounds set out in paragraph 8 above. In summary, ORR considers that the principal ground for Freightliner's appeal is that it considers that Network Rail does not have a contractual right to vary its Firm Rights.

13. Under both the Freightliner track access contract and the Network Code, Firm Rights are made subject to the Rules of the Route and Rules of the Plan. Clause 5.2 of Freightliner's access contract states that the permission for Freightliner to use the network³ **is subject** (emphasis added), in each case and in all respects, to the Network Code and the Operating Constraints⁴. A train operator cannot therefore claim breach of its Firm Rights where a Restriction of Use is taken pursuant to the Rules of the Route.

14. Condition D2.2 of the Network Code sets out the procedure by which the Rules of the Route may be changed to provide for possessions or other restrictions for Major Projects. Part D provides the train operator with a contractual right to dispute these changes. Freightliner has not made a specific claim in respect of the procedure followed by Network Rail under Part D. Freightliner stated in its letter of 30 September 2005 that it is not objecting to the decision of the Timetabling Committee which determined that Network Rail was entitled to implement the MPN for the routes which would affect Freightliner and FLHH (i.e. incorporate the Restrictions on Use in the Rules of the Route). For the reasons stated in paragraph 13 above a train operator does not have a right to claim breach of contract where a Firm Right is not delivered as a consequence of a Restriction of Use being incorporated in the Rules of the Route.

15. ORR has therefore concluded that Freightliner's appeal to ORR on the basis that Network Rail does not have a contractual right to vary its Firm Rights does not have a real prospect of success.

16. Turning to the compensation issue, paragraph 6 of Schedule 4 to Freightliner's access contract provides that:

"If Network Rail nominates that any part of the Network will not be available for a Service to run at the Planned time by reason of a Restriction of Use to be taken pursuant to the Rules of the Route which has been notified to the Train Operator in all material respects prior to the Possession Notice Date, Network Rail shall have

³ Permission to Use is granted by Network Rail under Clause 5 of the track access contract and includes permission to use the track for the provision of services set out in the Schedule 5 Rights Table.

⁴ The 'Operating Constraints' are defined as "the Rules of the Route, the Rules of the Plan and the Working Timetable and all appendices to the Working Timetable, including the Sectional Appendix as defined in the Working Timetable and all supplements to the Sectional Appendix" and detail the capability of the network.



no liability to the Train Operator under this Schedule 4 or Schedule 8 in respect of the effect of that Restriction of Use on such Service.”

17. Freightliner does not therefore have a contractual entitlement to claim compensation under its access contract where Restrictions of Use are included in the Rules of the Route pursuant to Part D. In the absence of a contractual entitlement to compensation, Freightliner has no basis to claim compensation from Network Rail. ORR has therefore concluded that there is not a real prospect of it determining that Network Rail should be required to compensate Freightliner, as there would be no legal basis for ORR making such a direction.

18. The only mechanism that ORR believes could be used for such a claim would be if the works in question were considered to constitute a Network Change under Part G of the Network Code. In this respect ORR notes that Network Rail’s MPN categorised the RoU to which the appeal refers as non-enhancement works (or renewals), and that these works would not be compensatable through Part G. The appeal papers make no reference to Freightliner having contested this, and therefore ORR has not considered this issue. In ORR’s opinion there are therefore no mechanisms under which Freightliner would be legally entitled to compensation for the disruption to its services.

19. Finally, ORR notes Freightliner’s concerns about the manner in which the original appeal was heard by two separate industry disputes bodies. Freightliner considers this to be relevant to the appeal but states that this is not the reason for the appeal. ORR remains unclear whether Freightliner is suggesting that it was treated unfairly by the Timetabling Committee. However, because of ORR’s conclusion that Freightliner’s grounds of appeal do not otherwise have a real prospect of success on legal grounds, it has concluded that this point does not alter its decision not to hear the appeal.

Conclusion

20. For the reasons stated above ORR has concluded that the appeal should not proceed to it under Condition M4 of the Network Code and determination ADP10 should stand.

A handwritten signature in black ink, which appears to read 'Bill Emery', is positioned above the printed name.

Bill Emery