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

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### **Determination in respect of reference TTP257**

*(following a hearing held at Central House, Euston on 20<sup>th</sup> January 2009)*

#### **The Panel**

**Andy Booth:** appointed representative of Network Rail  
**Nigel Oatway:** elected representative for Non-Passenger Class, Band 1  
**Graham Owen:** elected representative for Non-Franchised Passenger Class  
**John Quarmby:** elected representative for Franchised Passenger Class, Band 3.

Panel Chairman: **Bryan Driver**

#### **The Parties**

##### **For GB Railfreight Ltd ("First GBRf" or GBRf)**

**Steven Turner** Contract Manager  
**Ralph Goldney** Deputy Managing Director  
**Ian Kapur** Timetabling Manager

##### **For Network Rail Infrastructure Ltd ("Network Rail")**

**Fiona Dolman** Train Planning Manager (South)  
**Gordon Cox** Customer Relationship Executive (GBRf)  
**Martin Hunt** Acting Customer Relationship Executive (FL)  
**Jonathan James** Project Manager

**Interested Party, in attendance**

##### **For Freightliner Ltd ("FL")**

**Lindsay Durham** Head of Rail Strategy

#### **Brief Summary of the dispute**

1. The Panel was asked by GBRf to determine, in relation to a Spot Bid (*rolling Spot Bid PELP09PSB000001*) made by GBRf to Network Rail, that, because no formal response had been given by Network Rail to GBRf, then, in accordance with the provisions of Network Code Condition D4.5.2, GBRf's Spot Bid should be deemed to be accepted.
2. Felixstowe Dock and Railway Company ("FDRC") has been expanding its capacity to load and discharge Container trains steadily. As at Summer 2008 the involved Freight Train Operators were combining with FDRC to operate 26 intermodal services daily from the Port of Felixstowe.

- 2.1. On 4th August 2008, FRDC invited the Freight Train Operators to tender for a train loading slot on Felixstowe North Terminal that would enable the operation of a 27<sup>th</sup> daily Train.
- 2.2. The Panel was advised that 4 Freight Train Operators responded to the Invitation to Tender.
3. On 31<sup>st</sup> October 2008 FRDC advised GBRf that it had been successful in securing the right to utilise the loading slot for the 27<sup>th</sup> Train.
  - 3.1. On 10<sup>th</sup> November 2008 GBRf submitted Spot Bid PELP09PSB000001, to obtain the necessary (7) Train Slots to enable it to operate the 27<sup>th</sup> Train as a service between Felixstowe North Terminal and Hams Hall. The Train Slots sought were bid for as through SX services using GBRf diesel traction and did not require access to Ipswich Yard (some other services from Port of Felixstowe do require this for the purposes of a changeover of traction). The same bid also sought Train Slots for ancillary movements of empty stock/light engines at the beginning and end of the week.
  - 3.2. GBRf's Bid related to services that would not commence operation until after the commencement of the new Timetable ("the 2009 Timetable") on 14<sup>th</sup> December 2008, and were bid into what appeared to GBRf as "white space" in the versions of Trainplan and TRUST current at the time of preparation of the bid.
  - 3.3. On 29<sup>th</sup> December 2008 Network Rail made GBRf a partial offer for Train Slots requested in the rolling Spot Bid, but not including Train Slots that incorporated movement between Ipswich Yard and Felixstowe North (or *vice versa*).
  - 3.4. GBRf challenges Network Rail (in this case) on the grounds that Network Code Condition D4.5 requires Network Rail to issue a decision on any Spot Bid within 5 days of receipt, and that *"Network Rail shall, where it fails to notify the Bidder in accordance with Condition D4.5.1, be deemed to have accepted the Bidder's Spot Bid"* (Condition D4.5.2).
4. Network Rail contested GBRf's case, the main arguments upon which Network Rail rested its defence being that
  - 4.1. GBRf's bid conflicted between Felixstowe North and Ipswich Yard with Train Slots allocated to FL in response to a Spot Bid dated 14<sup>th</sup> August 2008. Network Rail had offered Train Slots 4R60 (11.46 SX Ipswich Yard to Felixstowe North) and 4R61 (16.43 SX Felixstowe North to Ipswich Yard) in response to this bid on 26<sup>th</sup> August 2008, and had incorporated them into the 2008 Timetable with effect from Monday 8<sup>th</sup> September 2008.
  - 4.2. It was understood by Network Rail that FL's bid was a "rolling Spot Bid" which would require in due course to be "rolled over", (i.e. validated and incorporated) into the 2009 Timetable.
  - 4.3. The workload associated with processing "rollovers" was not complete at the time that GBRf made its Spot Bid in respect of the "27<sup>th</sup> Train" (i.e. 10<sup>th</sup> November 2008). Network Rail decided that no offer could be made until the "rollovers" were incorporated into the 2009 Timetable Trainplan database, and therefore sought a "verbal agreement" with GBRf that no offer would be made within the timeframe (five Working Days) required by Condition D4.5.1.

- 4.4. Subsequent work had established that GBRf's Bid could not be reconciled with the Train Slots 4R60 and 4R61 already offered to FL; the partial offer made finally to GBRf on 29<sup>th</sup> December reflected this conflict (and also other conflicts in the London area that have subsequently been resolved).
- 4.5. GBRf had no basis on which to claim that its Spot Bid for Train Slots should be deemed to have been accepted in accordance with Condition D4.5.2.
5. GBRf, the Claimant, invited the Panel:
  - a) ***"to deem all 10 pathways within First GBRf's Rolling Spot Bid PELP09PSB000001 accepted in accordance with Network Code D 4.5.2"***
  - b) ***to direct NR to withdraw [from FL] 4R60 and 4R61 SX pathways as they do not have the required permission from the Facility Owner to occupy the '27<sup>th</sup> slot' at Felixstowe North***
  - c) ***to direct NR to upload the pathways contained within First GBRf's Rolling Spot Bid PELP09PSB000001 in accordance with Network Code D 4.6.3"***
6. Network Rail invited the Panel to determine
 

***"whether NR has interpreted the Network Code D4.5 correctly in coming to its conclusions, specifically:***

  - a) ***whether NR is able to enter the slots which GBRf have requested into the Working Timetable, given that this would raise a conflict with Freightliner's 4R60/61.***
  - b) ***whether NR is empowered to remove 4R60/61 from Freightliner.***
  - c) ***if NR is unable to take further action in respect of 4R60/61, whether the Panel is empowered to do so.***

### **The jurisdiction of the Panel**

7. The Panel was satisfied that the matter is one that should properly be heard by a Timetabling Panel, meeting under the terms of Network Code Part D, as all the matters in question arise because a *"Bidder is dissatisfied with ...decision[s] of Network Rail made under this Part D"*. However, the Panel also recognised that one possible outcome of its determination of the matter would be to require Network Rail to review and amend Train Slots already offered and accepted by other Train Operators.
8. The Panel reminded itself that,
  - 8.1. as stipulated in the Access Dispute Resolution Rules, it must *"reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis"* (Rule A1.18).
  - 8.2. the entitlements of the parties in this instance derive from
    - 8.2.1. the Track Access Contract of GBRf (and those of other affected parties);
    - 8.2.2. compliance with the processes and obligations set out in Network Code Part D, in particular as they relate to the making of Spot Bids;

- 8.2.3. compliance with the processes and obligations set out in the Rules of the Plan, in particular the procedural guidance given in the "National Rules of the Plan" relating to the making of Spot Bids;
- 8.2.4. any relevant amplification of the meaning of these documents, and the obligations that they impose on the parties, as may be contained in a determination of either a "*relevant ADRR Panel*" (persuasive authority) or the Office of Rail Regulation (binding authority);
- 8.3. in respect of any question of remedy;
  - 8.3.1. Rule A1.19 prescribes that "*The Panel shall (a) where the Access Conditions or Access Agreement require that a specific remedy be granted, grant that remedy accordingly; or (b) where the choice of remedy is not a matter of entitlement but is a question properly falling within the discretion of the Panel, exercise that discretion in accordance with any requirements and criteria set out in the Access Conditions and Access Agreement after due consideration of all remedies and orders that could properly be made.*"
  - 8.3.2. Condition D5.3 states that "*any dispute panel shall, in determining the matter in question, have the power:*
    - 5.3.1 *in determining the matter in question:*
      - (a) *to direct Network Rail to comply with directions which specify the result to be achieved but not the means by which it shall be achieved ("general directions");*
      - (b) *to direct the parties to accept any submissions made by Network Rail as to any Train Slots; and/or*
      - (c) *to specify the Train Slots and other matters which Network Rail should have determined in its decision made pursuant to this Part D,*  
  
*provided that a dispute panel shall only take any action under paragraph (c) above in exceptional circumstances;"*
9. Where, as in this instance, there is a question that the Claimant's rights may not have been afforded the appropriate relative priority, as compared with other Train Operators, the Panel must be satisfied that it is supplied with appropriate facts relating to the standing of the rights of all Train Operators, and that all Train Operators potentially affected by the determination sought from the Panel should have the opportunity to be considered interested parties to the dispute.
10. In a letter to the parties dated 15<sup>th</sup> January 2009, the Panel Chairman had directed the Parties to clarify "*the following matters of fact:-*"
  - *In relation to the submitting of Spot Bids for the operation of trains between Ipswich and Felixstowe, what is the normal practice in relation to compliance with Condition D4.2, (and Condition D3.3) in particular in respect of any bid being associated with rights conferred by Felixstowe Dock and Railway Company ("FDRC") allowing access to the Port facilities? As it appears that GBRf and another Train Operator (Freightliner Ltd "FL") have bid separately for the same Train Slots, was there qualitatively any difference between the form in which these two Train Operators entered the respective Spot Bids that may be of assistance to the Panel in considering this case? In particular, given the obligations upon the Train Operators imposed by Clause 6.4.1 of their Track Access Contracts, and addressed in paragraph 5.29 of the joint*

*submission, what undertakings does Network Rail seek by way of confirmation that Spot Bids correspond with "suitable access rights" to a terminal?*

- *Will Network Rail please confirm, in respect of the services operated by FL, whether these have changed in number, or timing, such that the disputed Train Slots currently attributed to services 4R60 and 4R61 are essential to the continued operation of services which previously did not require the use of these Train Slots?*
- *Will Network Rail please confirm whether, in relation to the consultation by the Office of Rail Regulation in respect of the request from FL that it be granted Level 1 Rights corresponding to 4R60 and 4R61,*
  - *Network Rail is in favour of such rights being granted to FL, and if so why, OR*
  - *Network Rail is opposed to the granting of such rights to FL, and if so why?*
- *Will Network Rail please confirm whether or not it is technically possible, but for the alleged contractual impediments, to construct a Timetable that would confer upon GBRf Train Slots that would enable it to operate the "27<sup>th</sup> Train" as per the terms of its bid of 10<sup>th</sup> November 2008, and of its agreement with FDRC (to the extent that it, Network Rail, is aware of the terms of that agreement), and at the same time allow FL to continue to operate all such services as it has rights for with FDRC?*
  - *Would construction of such a timetable require Network Rail to modify (which might imply "flex" or "rescind") the Train Slots corresponding to 4R60 and 4R61?*
  - *If modified, what would be the extent of such modification, and would any Train Operator be thus prevented from running a service for which it has either external contracts, or Track Access Rights?*
  - *In other words, were a Panel, in accordance with its powers in Condition D5.3, to direct Network Rail, to make such changes to the Timetable as would be necessary to allow GBRf to operate the 27<sup>th</sup> Train, would compliance with that direction pose an insuperable problem in respect of the operation of trains 1 to 26?*
- *Is there any documentary evidence to substantiate whether the parties came to any agreement or understanding that Network Rail was to be allowed to defer giving a decision on GBRf's bids in relation to the 27<sup>th</sup> Train, and if so, what alternative date was set against which Network Rail's compliance with Condition D4.5 (b)(ii) was to be, or should be, judged?*
- *There is an internal contradiction as between the date of the bid for 4R60/61 as given in paragraph 6.2.3 of the joint submission, and that given in paragraph 5.31. Which is correct, and can the parties confirm that all other cited dates are in fact accurate.*
- *The attention of the Parties is drawn to the powers that Network Rail may acquire in accordance with the provisions of Condition D 3.4.2(a). Will Network Rail please confirm that, in the event that the Panel were to determine in such a way that would require Network Rail to exercise such flexing in respect of the Train Slots of other Train Operators, it would be in a position so to act.*

## **Some preliminary issues of definition; the relevant contractual provisions**

11. The procedures to be followed in the formulation and offering of Spot Bids are covered variously in Condition D4, and the National Rules of the Plan. Part D of the Network Code was re-issued on 1<sup>st</sup> September 2008. The National Rules of the Plan was also re-issued on the same date, and all quotations relevant to this case are from these versions of these two documents (unless otherwise noted).

### **Network Code : Condition D**

#### **DEFINITIONS**

- "First Working Timetable"* means the version of the Working Timetable in respect of which Network Rail gives notice pursuant to Condition D3.2.7, as that version may be amended in accordance with Condition D3.2.9;
- "Flexing Right"* means a right, exercisable by Network Rail, either
- (a) pursuant to Condition D3.4.1 or D4.4.1, to vary a Bid or to define in detail the content of a Train Slot or series of Train Slots in any way within and consistent with the Firm Rights (if any) of the Bidder; or
  - (b) pursuant to Condition D3.4.2 or D4.4.2, to vary a Train Slot previously scheduled in the relevant Working Timetable or a Bid as the case may be;
- "Spot Bid"* means any Bid (other than a Revised Bid) made during the Timetable Period to which that Bid relates or during the Supplemental Period immediately prior to that Timetable Period;

### **"CONDITION D4 - SPOT BIDDING, VARIATION of SCHEDULED TRAIN SLOTS and the SUPPLEMENTAL TIMETABLE REVISION PROCESS**

#### **4.1 Making of Spot Bids**

- 4.1.1 Every Bidder shall have the right to make a Spot Bid to change, delete or add to the Train Slots shown in the Working Timetable.
- 4.1.2 A Spot Bid may be made at any time during the Timetable Period to which that Bid relates or during the Supplemental Period immediately prior to that period, and (in either case) shall relate to that Timetable Period.
- 4.1.3 Network Rail shall use its reasonable endeavours to answer any enquiries made by any Bidder in relation to a Spot Bid by that Bidder.

#### **4.2 Contents of a Spot Bid**

A Bidder shall, in making a Spot Bid, indicate in respect of the Train Slots for which the Spot Bid is being made the extent of its requirements (if any) as to the matters listed in Condition D3.3.

### **4.3 Priorities in considering Spot Bids**

*Without prejudice to the exercise by Network Rail of a Flexing Right, Network Rail shall, in relation to any Spot Bid which falls to be considered under Condition D4.8, deal with such Spot Bid as provided for in that Condition, and in all other cases shall accord priority to Spot Bids in the order in which they are received by Network Rail.*

### **4.4 Flexing rights – Spot Bids**

#### **4.4.1 Time of exercise**

*Network Rail may, in relation to any Spot Bid, exercise a Flexing Right at any time prior to the acceptance of that Spot Bid, provided that:*

- (a) Network Rail shall have first consulted with each person materially affected by the exercise of such Flexing Right;*
- (b) Network Rail shall, in exercising that Flexing Right, have had due regard to the Decision Criteria; and*
- (c) Network Rail shall notify the Bidder of the exercise of its Flexing Right as soon as practicable thereafter.*

#### **4.4.2 Requirement to exercise**

*Network Rail shall exercise a Flexing Right at any time:*

- (a) in the circumstances referred to in Condition D4.5.3 or Condition D4.8.6; or*
- (b) in order to give effect to a decision of the relevant ADRR panel or the Office of Rail Regulation as provided for in Condition D5; or*
- (c) if it is necessary to do so in order to comply with any directions issued or approval given by the Office of Rail Regulation in the exercise of its powers under section 17, 18, 22 or 22A of the Act.*

### **4.5 Timing of acceptance, modification or rejection of Spot Bids**

**4.5.1** *Without prejudice to Conditions D2.1 and D4.4, Network Rail shall in relation to any Spot Bid give notice (subject to Conditions D4.5.3, D4.5.4 and D4.8) to the Bidder of its acceptance, modification or rejection of it:*

- (a) in relation to a Spot Bid received by Network Rail no later than five weeks prior to the applicable Revision Finalisation Date, no later than five Working Days after receipt of that Spot Bid;*
- (b) in relation to a Spot Bid not falling within paragraph (a), by the later of:*
  - (i) five Working Days after the Revision Finalisation Date in respect of the Timetable Week during which that Spot Bid would, if accepted, be planned to operate; and*
  - (ii) five Working Days after receipt of that Spot Bid; or*

- (c) *by 10.00 hours on day A in respect of that part of any Spot Bid received by 10.00 hours on the day preceding day A which, if accepted, would be planned to operate on day C; or*
- (d) *by 15.00 hours on day A in respect of that part of any Spot Bid received by 10.00 hours on day A which, if accepted, would be planned to operate on day C,*

*whichever of paragraphs (b), (c) or (d) is the earliest to occur, where day A, day B and day C are three consecutive days (excluding, in the case of day A, Saturdays and Sundays and, in the case of day B, Sundays), and*

- (e) *in respect of a Short Notice Spot Bid, as soon as practicable after receipt by Network Rail of the Spot Bid,*

*provided that, in determining whether to accept, modify or reject a Spot Bid, Network Rail shall:*

- (i) *not accept such Bid if to do so would give rise to any conflict with any Train Slot already scheduled in the Working Timetable or with the applicable Rules of the Route or applicable Rules of the Plan; and*
- (ii) *otherwise have due regard to the Decision Criteria and, subject thereto and to the extent that the Spot Bid does not fall to be considered under Condition D4.8, give priority to that Spot Bid which is received first in time;*

*and any notice of rejection of a Spot Bid shall include a concise explanation therefore.*

**4.5.2** *Network Rail shall, where it fails to notify the Bidder in accordance with Condition D4.5.1, be deemed to have accepted the Bidder's Spot Bid.*

**4.5.3** *...."*

#### **4.6 "Decisions in relation to Spot Bids**

**4.6.1** *A Bidder shall, in respect of any Spot Bid, following notice given by Network Rail of the rejection of that Spot Bid, or the exercise of a Flexing Right by Network Rail, notify Network Rail if it disputes that decision of Network Rail:*

- (a) *no later than five Working Days after receipt by the Bidder of such notice; or....."*

#### **4.7 Variation of scheduled Train Slot**

**4.7.1** *Once a Bidder is deemed to have accepted a decision of Network Rail under Condition D3.2.8 or D4.6.2 or Network Rail has accepted a Bidder's Bid in accordance with Condition D3.2.7 or D4.5, both the Bidder and Network Rail shall, subject to Conditions D3.4.2, D4.4.2 and D4.7.2, be bound by that decision.*

**4.7.2** *A Train Slot scheduled in the Working Timetable may be varied by Network Rail:*



- (a) *in accordance with the procedures provided for in Condition D2.1.10, D4.5.3 or D4.8; or*
- (b) *by agreement between Network Rail and the Bidder (provided that every other affected party has also agreed in writing); or*
- (c) *in order to give effect to a decision of the relevant ADRR panel or the Office of Rail Regulation as provided for in Condition D5.*

## **National Rules of the Plan**

### **2.6 Spot Bidding**

*"2.6.2. Spot Bids must be compliant with the Rules of the Route/Plan (including any agreed amendments) and the relevant Track Access Agreement. Spot Bids must be internally conflict free and should not conflict with any other Train Operators' agreed paths in the Permanent Timetable or with agreed short term paths which have been advised to Train Operators by Network Rail.*

*2.6.3 Spot Bids must include sufficient detail to demonstrate compliance with Rules of the Route/Plan and Track Access Agreements and to make the Train Operators intentions clear to Network Rail. Unless otherwise specified in Rules of the Plan, Spot Bids should contain the same level of detail as Bids for paths in the Permanent Timetable. ..."*

.....

*"2.6.7 Train Planning Managers will validate each Spot Bid against Appendix E [of the National Rules of the Plan] along with the Rules of the Route/Plan and the Track Access Agreement...*

*2.6.8. Network Rail will resolve conflict between Spot Bids by according priority by date of receipt by Network Rail. It will be permissible for Network Rail to flex Spot Bids, taking into account the Decision Criteria set out in Network Code Condition D, to maximise use of Network capacity. This includes flexing of Spot Bids to maximise remaining "white space"*

.....

*"2.6.10 Except as provided for...., all Offers in respect of Spot Bids received more than 7 working days before the day on which the train is to run will be made by 17:00 hours on the fifth working day following receipt of the Spot Bid. If Network Rail is unable to make a firm offer within that timescale, it will make a provisional offer indicating the areas of work still to be addressed and the likelihood of the Spot Bid being accepted. In some cases Network Rail will make an Offer as soon as practicable rather than waiting until the above deadline."*

.....

*"2.6.16 If Network Rail fails to make an offer by the due time, the Spot Bid is deemed to be accepted by Network Rail.*

*2.6.17 Each path offered by Network Rail must be accepted, declined or disputed unconditionally by the Train Operator within 7 days... No response is regarded as acceptance of the Offer. ...*

*2.6.18 Train Operators may appeal against Network Rail exercising its flexing rights and rejection of Spot Bids. Any appeals must be notified to the Access Disputes Secretary within 7 days. Train Operators should note that in some cases the TTPn determination is likely to be given after the date on which the disputed train would run and will be used to establish "case law". A Train Operator wishing to appeal in respect of a Spot Bid should discuss the circumstances with the Access Disputes Secretary to determine the best way to proceed.*

*2.6.19 Accepted paths will be loaded to Train Service Database (TSDB) by Network Rail.*

*2.6.20 Agreed Spot Bids may be published in Weekly Amended Timetable Notices, equivalent publications for engineering trains or in daily advices."*

## **Model Freight Track Access Contract**

### ***"Clause 6.4 Movement of Trains onto or off the Network***

#### ***6.4.1 Suitable access***

*In order that railway vehicles under the control of the Train Operator be promptly*

*(a) accepted off the Network; and/or*

*(b) presented onto the Network*

*the Train Operator shall ensure that in respect of each Nominated Location suitable access has been granted to it in relation to such location by the facility owner in respect of the relevant facility connected to the Network at the Nominated Location."*

***"Nominated Location"*** *means in relation to a Service, any of the Origin, Destination, Intermediate Point and such other location where railway vehicles operating that service under the control of the Train Operator will move onto and off the Network".*

### **Schedule 5**

#### **Definition:**

***"Spot Bid Services"*** *means Services in relation to which Spot Bids are made by the Train Operator pursuant to paragraph 2.4*

## 2.4 "Spot Bid Services"

### 2.4.1 *The duration of any Spot Bid Services shall not exceed six months.*"

## The Contentions of the Parties

### 12. GBRf argued that

- 12.1. Train Slots corresponding with the Spot Bid in contention were critical to delivering the train service to exploit the 27<sup>th</sup> loading slot at the Port of Felixstowe. The traffic was already passing, but, as GBRf had not secured the necessary Train Slots, it was currently being conveyed on road transport that GBRf had commissioned, pending resolution of this dispute. However, until the traffic actually commenced passing by rail, there was a shortfall of income to GBRf.
- 12.2. GBRf was the straightforward winner of the Tender from FDRC for the use of the 27<sup>th</sup> loading slot in the Port, for a duration of 5 years, but now finds that it has difficulties in delivering the service sought by FDRC (which is concerned to put the maximum possible share of traffic on Rail for both economic and environmental reasons), because of the conflict with Train Slots 4R60 and 4R61 already bid by, and offered to FL.
- 12.3. GBRf's tender to FDRC, and its subsequent Spot Bid had been informed by scrutiny of Trainplan and TRUST, which, at the time of such scrutiny, did not contain details of 4R60 and 4R61, for the 2009 Timetable. In consequence, First GBRf's Spot Bid was, at the time it was made, compliant with the stipulations of Condition D4, paragraph 2.6.2 of the National Rules of the Plan, and Clause 6.4.1 of its Track Access Agreement. GBRf acknowledged that, when Network Rail had indicated that there was a potential problem in processing the Spot Bid, and that an Offer would be delayed, whilst there was agreement to extend Network Rail's response time, that agreement had not been documented, and no new deadline date agreed.
- 12.4. Given the pressures on capacity at Felixstowe North Terminal, and on the single line approaches, any Train Operator bidding for Train Slots to the Port of Felixstowe needs to be assured that there is a corresponding loading slot at the Port that allows the service to be stripped and loaded in a reasonable time. GBRf contended that the obligations on the Train Operator contained in clause 6.4.1 of the Freight Track Access Contract (*"the Train Operator shall ensure that in respect of each Nominated Location suitable access has been granted to it in relation to such location by the facility owner in respect of the relevant facility connected to the Network at the Nominated Location."*) imply that another Train Operator is not entitled to bid for a Train Slot when, not only does it not have access rights to the corresponding loading slot, but the resultant Offer means that the Train Operator with rights to use the loading slot is prevented from getting the relevant track access.
- 12.5. It was GBRf's view that there was a causal connection between the date on which FDRC invited tenders for the 27<sup>th</sup> loading slot (4<sup>th</sup> August 2008) and the date of FL's Spot Bid that resulted in Train Slots 4R60/61. Whilst 4R60/61 would have been of material assistance to FL, had it been the successful tenderer for the "27<sup>th</sup> loading slot", once that loading slot had been allocated to another Train Operator, that other Train Operator (i.e.

in this case GBRf) should have been able to Bid for, and be Offered, the Train Slots it required, in replacement of those that had been offered to FL.

- 12.6. GBRf considered that it had not been an appropriate course of action for Network Rail to Offer such critical Train Slots to only one of the four Train Operators invited to tender, on terms that seemingly precluded Network Rail from transferring them in the event that the successful tenderer was one of the other three Train Operators.
  - 12.7. GBRf, given Network Rail's apparent inability to effect change, had sought to negotiate with FL directly, to obtain the use of Train Slots 4R60/61. GBRf had established that FL was making only occasional use of these Train Slots, principally on a Friday, and then only to provide alternative paths for existing services, not in connection with any new traffic. GBRf was prepared, in the short term, to consider using the Train Slots 4R60/61 on a Monday to Thursday only basis. This proposal had been rejected by FL, in case it prejudiced FL's position pending the decision of this Timetabling Panel. GBRf reported that it had not been able to persuade FL to meet, or to engage in any meaningful talks.
13. Network Rail argued that
- 13.1. *"...at this stage [i.e. of FL's Spot Bid resulting in the Offer of 4R60/61] Network Rail was not aware of the tendering process that was taking place for the 27<sup>th</sup> slot at the Port of Felixstowe..."* At the time of the FL Spot Bid, *"Network Rail assumed this bid was compliant with clause 6.4 (Movements of trains onto and off the Network) of the Track Access Contract with FL"*. [Quotations from paragraphs 6 and 5 of "Network Rail opening statement"]
  - 13.2. *"The extension to the spot bid offer period was initially agreed because Network Rail was unable to process the bid immediately due to the unusually high volume of "rollovers" for the December 2008 Timetable"*. [Quotation from paragraph 4 of "Network Rail opening statement"]
  - 13.3. No Offer could ultimately be made to GBRf in relation to the Train Slots required between Ipswich Yard and Felixstowe North that complied with the timing of the 27<sup>th</sup> loading slot because of the Offers that had been made to FL in respect of 4R60/61.
  - 13.4. Although FL has no rights to the use of the 27<sup>th</sup> Loading Slot, it has made use of the Train Slots 4R60/61, but only for the movement of trains forming one of the pre-existing 26 services, and then generally only on Fridays.
  - 13.5. Network Rail considered that, other than as a sequel to a direction from a Timetabling Panel, it did not have the right to flex or withdraw the Offer made to FL for Train Slots 4R60/61 in September 2008. Nor, as FL had made some use of the Train Slots, was there scope to apply any of the provisions of Network Code Part J in order to effect a transfer of rights/Train Slots from FL to GBRf.
  - 13.6. Network Rail had encouraged GBRf to seek to negotiate with FL to obtain the use of Train Slots 4R60/61.
  - 13.7. FL had sought to include in a recent S22 application to the Office of Rail Regulation for a 5<sup>th</sup> Supplemental Track Access Agreement Level 1 Rights for 4R60/61. Network Rail, in carrying out pre-application consultation, had received objections from both GBRf and Hutchison Ports (UK) ("HPUK"), the owners of FDRC. HPUK, in a letter dated 18<sup>th</sup>

December 2008 stated *"Please be advised that Freightliner do not have corresponding Terminal Access at our terminal in order to accommodate trains arriving on these paths. In the case of 4R60 and 4R61 the corresponding terminal access has been allocated to GBRf (headcodes 4L02 and 4M02) following a competitive tender process carried out by the Port of Felixstowe".* [Letter signed by Stephen Brodie, Project Manager - Port Development HPUK]

- 13.8. Network Rail has advised FL that it will no longer be supporting a joint (S22) application to the ORR that includes Rights to the Train Slots for 4R60/61.
- 13.9. Network Rail considers that it has carried out the Spot Bid process correctly.
- 13.10. In response to the question posed by the Chairman (see 10 above: *"were a Panel, in accordance with its powers in Condition D5.3, to direct Network Rail to make such changes to the Timetable as would be necessary to allow GBRf to operate the 27<sup>th</sup> Train, would compliance with that direction pose an insuperable problem in respect of the operation of trains 1 to 26?"*) the reply given was as follows
  - *"NR [Network Rail] does believe that a timetable can be constructed to allow First GBRf to operate the '27<sup>th</sup> slot', whilst allowing FL to continue to operate all such services it has rights for with FDRC.*
  - *However,... to construct such a timetable NR would need to "rescind" the Train Slots corresponding to 4R60 and 4R61.*
  - *Should NR be directed to undertake such changes it can confirm that it would not cause any timetable issues in respect of the operation of trains 1 to 26 at Felixstowe Docks."* (Section 4 "First GB and Network Rail Joint reference to TTP257 in the matter of a reference to the Timetabling Panel entitled TTP257, Matters for Clarification")
14. FL submitted a paper for consideration by the Panel ("Statement by Freightliner Limited (as Interested Party)") wherein it argued that
  - 14.1. it had not declined to surrender the Train Slots for 4R60/61, but was seeking clarification of *"issues related to the relationship between the port and the rail network"*. It has however suggested that the submission of the 5<sup>th</sup> Supplemental should proceed without the inclusion of 4R60/61;
  - 14.2. FL has not been advised the date at which GBRf wishes to commence operation of the *"27<sup>th</sup> train"*;
  - 14.3. the terms of the FDRC tender included *"applying parties were required to demonstrate that they had the necessary paths on the rail network. Clearly First GB did not apply to Network Rail for such paths until after the offer for the loading slot at the port had been awarded"*. [5<sup>th</sup> paragraph FL Statement];
  - 14.4. *"FL bid for the paths, it was necessary for us to have paths in place to ensure that we were fully compliant with the requirements of Hutchinson [sic] Port's tender. FL also believed that in the event of not being awarded the "27<sup>th</sup> loading slot" these paths could be utilised for improving performance and for providing the ability to move more traffic for*

*Maersk to the North West of England*" [FL comment on Paragraph 5.11 of the Joint Submission]

- 14.5. FL consider that the capacity of the Branch has not been exhausted, and makes alternative suggestions as to possible paths: specifically an arrival at Felixstowe North at 1405, and a departure at 1810. [The loading window stipulated by FDRC for the 27<sup>th</sup> Loading Slot is between 1200 and 1700].
- 14.6. *"FL is currently using [the 4R60 and 4R61 Train Slots on a Friday] because they permit a more even throughput of services at Ipswich Yard."* In particular, 4S88, which is scheduled to leave Felixstowe North at 16:07, and then to depart Ipswich at 1744, is being worked up 36 minutes later as 4R61, still able to depart Ipswich at 1744.

### **The Panel's findings of entitlement in respect of the Dispute**

15. The Panel found that Network Rail was correct in its view that the provisions of Network Code Conditions D4.1 to 4.6 meant that
  - 15.1. it could not, of its own authority, take action which would have the effect that FL would lose the Train Slots 4R60/61, and GBRf's Spot Bid could be fulfilled, unless all parties were in agreement; but that
  - 15.2. it could take such action, were a Panel to consider it appropriate, taking account of all its findings in relation to both facts and entitlements, to make a determination that would direct Network Rail to achieve this result, in accordance with Condition D5.3.
16. The Panel consider that both FL and GBRf carried out correctly the detailed procedures in respect of the making of Spot Bids, as laid down in Condition D4. In making this assessment the Panel notes that FL and GBRf chose to act differently, in relation to the steps necessary to support their respective tenders for the 27<sup>th</sup> loading slot, in relation to the timing of any necessary bids for Train Slots. (The Panel was not given any evidence as to the behaviour of any other potential tenderers in this respect). Both GBRf and FL formulated Spot Bids that they reasonably considered to be valid at the time of making. In the case of GBRf its Bid was subsequently revealed to be non-compliant, but only when relevant information (the "rollovers") that had previously not been available for access, had been belatedly added to the Trainplan database.
17. The Panel took cognisance of the fact that FL was currently operating Train Slots 4R60/61 as Spot Bid Services. Network Rail grants the right to operate such Spot Bid Services by virtue of the Offer that it makes in response to a Spot Bid (in conformity with Condition D4.5). However, under the terms of paragraph 2.5 of Schedule 5 to FL's Track Access Contract the right to operate Spot Bid Services is time constrained (*"The duration of any Spot Bid Services shall not exceed six months"*). This limit applies even if the Spot Bid in question has been described as a "rolling Spot Bid"; this is a "custom and usage" term that has no defined contractual status.
18. However, the Panel noted that if a Train Operator required the Train Slots concerned to continue beyond the six months limit, it would need to obtain Firm Rights approved by the Office of Rail Regulation. In the specific case of 4R60/61, as Network Rail had confirmed that

it would not support the inclusion of these Train Slots in the final submission for FL's 5<sup>th</sup> Supplemental Track Access Agreement, the practical effect would be that

18.1. once the six months period had been exceeded (i.e. on 8 March 2009) , the Train Slots would no longer be underpinned by any access rights at all and that, therefore,

18.2. Network Rail would be entitled to remove such Train Slots from the 2009 Timetable, on the authority given in Condition D1.6.2.

*"Movements of trains operated by a Train Operator which are not made in the exercise of access rights shall not be entered in the Working Timetable. In this Condition D1.6.2, 'access rights' means permission, under an Access Agreement, to use track for the purpose of or in connection with the operation of railway assets by a Train Operator".*

19. The Panel considered whether an argument that FL may not have met its obligations under Clause 6.4.1 of its track access contract by not securing suitable access for Train Slots 4R60/61 from FDRC at the Port of Felixstowe, meant that Network Rail had erred in offering FL Train Slots 4R60/61. The Panel considered that, as a matter of fact, FL had not been prevented from running trains in the Train Slots 4R60/61, for reasons of lack of terminal access, but probably only because it had only used those Train Slots for services that already had rights of terminal access. Had Network Rail refused to make FL an offer, citing concerns about FL's compliance with Clause 6.4.1 of the Track Access Agreement, this might have been the subject of a separate reference to a Timetabling Panel by FL, but is, in any case, not a matter that this Panel is required to determine.

20. As an interim finding the Panel concludes that

20.1. none of Network Rail, GBRf or FL has acted in a way that breaches the letter of any of the prescribed procedures in Condition D, or the National Rules of the Plan; except that

20.2. Network Rail has not ensured that the process for "rolling over" so called "rolling Spot Bids" into the 2009 Timetable has been completed adequately expeditiously.

21. That said, the Panel is being asked by both GBRf and Network Rail

21.1. to accept that a situation has been created whereby a Train Operator (GBRf) that has secured, through an agreement with a third party (FDRC), traffic new to rail, cannot operate that traffic until the two Train Slots concerned can be flexed or removed from the WTT to make room for two others , and

21.2. to intervene and issue directions that such a change can be effected.

22. In effect, therefore, in making this reference to the Panel, both GBRf and Network Rail are seeking a determination on the basis that

22.1. Network Rail acknowledges that, in making the Offer to FL for the Train Slots 4R60/61, it has acted in a way that it might not have acted, had, at the time of making that Offer, it been in fuller possession of the facts presented to the Panel;

22.2. the contractual checks and balances within Part D of the Network Code prevent Network Rail revoking or modifying any Offers, unless all parties affected are in agreement, or

unless an external authorised body (in this case this Panel) issues the necessary determination.

23. In arriving therefore at a decision that it should intervene, and make a determination in this instance, the Panel takes into account the following considerations.

23.1. Subject to the overall approval of the Office of Rail Regulation, Network Rail is the body accountable for maximising the use made of the Network, for the benefit of all Train Operators, and for its own revenues.

23.2. Where it can be demonstrated that Network Rail has made an injudicious decision in relation to the allocation of capacity which it wishes to reverse, and the contractual framework prevents it from making that reverse without the intervention of a Panel, then the Panel must consider the relative impact of leaving the first action unchanged, as compared with restoring the "*status quo ante*".

24. In this case, the Panel finds that

24.1. Network Rail is expected, even in its treatment of Spot Bids *to maximise use of Network capacity. This includes flexing of Spot Bids to maximise remaining "white space"* (National Rules of the Plan 2.6.8);

24.2. line capacity on the Felixstowe Branch, and Loading Capacity in the Port of Felixstowe are both known to be constraints on the number of Train Services that can be operated, requiring carefully considered judgements as to how increases are achieved;

24.3. the procedure followed by FDRC in inviting Train Operators to tender for the use of the 27<sup>th</sup> loading slot is not unprecedented. In the situation where a number of Freight Train Operators may be responding to the same traffic invitation to tender, Network Rail may reasonably engage in appropriate, and even-handed, dialogue to establish the feasibility of alternative proposals, and, where practicable, to protect itself from allocating resources in ways that may potentially frustrate a third party contracting with the Train Operator of its preference. The Panel noted that, in this case, it was the loading slot being tendered by FDRC, rather than any specific traffic, but considered that this did not materially affect the degree of caution that might need to have been exercised by Network Rail;

24.4. Network Rail states that "*at this stage [i.e. at the time of FL's Spot Bid resulting in the Offer of 4R60/61] Network Rail was not aware of the tendering process that was taking place for the 27<sup>th</sup> slot at the Port of Felixstowe...*".

24.5. there are no services operated by FL that would be in any practical degree materially impaired as compared with the situation existing prior to the implementation of Train Slots 4R60/61, were 4R60/61 to be withdrawn; and

24.6. GBRf and FDRC would be enabled to implement the operation of a service corresponding to the 27<sup>th</sup> loading slot (i.e. net new traffic to rail).

25. The Panel therefore concludes both that it is entitled in principle to make a determination in the circumstances of this case, and that the totality of the merits of the arguments advanced by the dispute parties justify it finding as set out below.

26. Finally, the Panel, notes, and reminds Network Rail that



- 26.1. it is, for the purposes of the operation of Track Access Contracts, and the related Network Code and Rules of the Plan provisions, a single, indivisible legal entity;
- 26.2. it employs Customer Relations Executives with specific responsibilities for the relationship (essentially the Access relationship) between Train Operators and Network Rail;
- 26.3. it has encouraged GBRf and FL to enter into dialogue, but does not appear to have been prepared to be an active participant in such dialogue;
- 26.4. Under the provisions of paragraph 2.6.10 of the National Rules of the Plan, in respect of Spot Bids received more than 7 days before the day on which the train is to run, Network Rail is entitled to advise the Bidder if it is unable to make a firm offer within the normal timescales. In such circumstances, the Panel considers that it is the responsibility of both parties to agree the new timeframe within which a firm offer would be made by Network Rail. In this case, when Network Rail and GBRf agreed that "the clock should be stopped" in respect of the five days stipulated in Condition D4.5.1, no record was made of this agreement, nor was any limit set on the duration of the "stoppage".

### **The Panel's Determination**

27. The Panel therefore determined, that, in respect of each of the issues raised by the parties, as follows

- ***whether NR is empowered to remove 4R60/61 from Freightliner.***

Network Rail is not entitled, or empowered, of its own authority, to remove FL's right to use Train Slots 4R60/61 during the remaining term of the first 6 months for which Network Rail made an Offer on 26<sup>th</sup> August 2008. FL's rights to access these Train Slots must, in the absence of the conclusion of an appropriate Supplemental Track Access Agreement, lapse when the rights conferred by the Spot Bidding process lapse. The Panel interprets the date of that lapsing to be 6 months after the date at which the Train Slots were first incorporated into the Working Timetable, (i.e. 6 months after Monday 8<sup>th</sup> September 2008).

- ***if NR is unable to take further action in respect of 4R60/61, whether the Panel is empowered to do so.***

The Powers conferred on the Panel by the provisions of Condition D5.3 have the effect that the Panel may, in turn, confer on Network Rail rights to flex Train Slots that are otherwise inviolate, given that they have been the subject of a compliant Spot Bid, an Offer from Network Rail made in accordance with due procedures, and timely acceptance by the Train Operator. Thus, in this instance, were the Panel to conclude that it had just cause, it could make a determination, the effect of which would be to give Network Rail scope to "exercise a Flexing Right at any time" in order to "comply with directions which specify the result to be achieved". The Panel construes that its authority in such a case is limited to those circumstances that can be justified by reference to the contractual entitlements of Network Rail and the affected Train Operators, including the applicability of the Decision Criteria (Condition D6).

- ***whether NR is able to enter the slots which GBRf have requested into the Working Timetable, given that this would raise a conflict with Freightliner's 4R60/61.***

The Panel is satisfied that once, as envisaged above, FL no longer has the benefit of the Train Slots acquired as a result of the Offer made on 26<sup>th</sup> August 2008 in response to its Spot Bid, there will be no requirement for Network Rail to retain those Train Slots (4R60/61) in the Working Timetable against any entitlement in the name of FL. At such time (from 8<sup>th</sup> March 2009), these Train Slots could be removed from the 2009 Timetable and the resulting capacity released could be bid for by another Train Operator pursuant to the provisions of Part D.

- ***“to deem all 10 pathways within First GBRf’s Rolling Spot Bid PELP09PSB000001 accepted in accordance with Network Code D 4.6.2***

The Panel considers that it would be inequitable to determine that GBRf should have the benefit that its Spot Bid be deemed accepted because no offer has been received within 5 working days of the date of the Bid. In particular, GBRf has not protected its own best interest because it has failed to agree, in respect of any understanding with Network Rail that a process “clock” be stopped, what the limit of that time extension should be. That said, the Panel notes with concern that, at the time that GBRf made its Spot Bid, there are grounds for believing that the data displayed in TRUST and Trainplan was inadequately current, in particular because the 2009 Timetable did not incorporate details of rolled over Spot Bids (in particular the Train Slots 4R60/61), and that this contributed to GBRf making a Bid that subsequently was found to conflict with the Spot Bid for Train Slots 4R60/61 that had already been made by FL. The Panel considers that it is incumbent on Network Rail to ensure that it is adequately resourced to meet the workload presented by Spot Bids requiring to be entered into the next Working Timetable so that offers can be made within the laid down timescales without the need to agree unlimited extensions with any Bidders concerned. That said, the Panel cannot find for GBRf on either this point, or ***“direct NR to upload the pathways contained within First GBRf’s Rolling Spot Bid PELP09PSB000001 in accordance with Network Code D 4.6.3”*** for the period before 8 March 2009, as there can be no gainsaying that FL currently has rights to 4R60/61, as a consequence of Network Rail’s Offer of 26<sup>th</sup> August 2008.

- ***to direct NR to withdraw [from FL] 4R60 and 4R61 SX pathways as they do not have the required permission from the Facility Owner to occupy the ‘27th slot’ at Felixstowe North***

The Panel notes that Network Rail, GBRf and FL are all in agreement that expansion of the number of trains serving Felixstowe Port is desirable, and that the identification of a 27<sup>th</sup> loading slot in the Port is a development to be supported. The Panel further notes that all three parties have declared a willingness to engage in constructive dialogue to seek ways in which 27 train services can be timed and operated effectively. For the reasons given above the Panel considers that there are no insuperable Contractual provisions that prevent GBRf from being granted the use of Train Slots commensurate with their Spot Bid ***PELP09PSB000001*** with effect from 8 March 2009 (subject to GBRf executing the necessary Supplemental TAC to obtain the necessary long term rights). Such Train Slots would enable GBRf to exploit the 27<sup>th</sup> loading slot to the full, and would not impair the ability of FL to meet its obligations in respect of that part of the other 26 services that it was operating prior to 8 September 2008.

In the short term, the Panel notes that any practical proposals to achieve an earlier introduction of the 27<sup>th</sup> Train, will probably depend upon the flexing of a number of existing

Train Slots, in ways that can only be achieved as a consequence of a direction by this Panel consistent with the powers in Condition D5.3(a).

28. The Panel therefore directs that

28.1. All parties should engage in such necessary dialogue as should result in the commencement of operations of 27 services in and out of Felixstowe, (and with GBRf as the operator of the train serving the 27<sup>th</sup> loading slot) by no later than 9th February 2009;

28.2. if, in order to achieve that objective, the Parties are able to agree mutually acceptable arrangements for the timing and allocation of Train Slots, that agreement shall be sufficient to empower NR to make any necessary flexing of Train Slots on the Felixstowe Branch in compliance with Conditions D3.4 or D4.4;

28.3. if such agreement is not forthcoming, NR shall be empowered by this determination to use such powers of flexing as are conferred by D3.4.2(a) or D4.4.2(b) to make such reasonable changes to Train Slots on the Felixstowe Branch having due regard to the Decision Criteria, and always providing it has properly consulted the Train Operators concerned and given adequate opportunity for representations to be made..

29. Should any Train Operator be dissatisfied with any flexing decision by Network Rail made in accordance with this determination, the Train Operator concerned may refer that decision to a Timetabling Panel for determination pursuant to Condition D5.1.

30. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.



Bryan Driver  
Panel Chairman

30 January 2009