

1 DETAILS OF PARTIES

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

- (a) GB Railfreight Limited ("GBRf") whose Registered Office is at 55 Old Broad Street, London, EC2M 1RX; and
- (b) Network Rail Infrastructure Limited ("NR") whose Registered Office is at 1 Eversholt Street, London, NW1 2DN.

1.2 Third parties to this dispute may include all other FOCs and Abellio Greater Anglia.

2 THE CLAIMANT'S' RIGHT TO BRING THIS REFERENCE

2.1 This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Condition D3.3.9 of the Network Code. GBRf is dissatisfied with the decision made by NR in respect of Train Operator Variation Request reference PELE17SSB000062.

3 CONTENTS OF REFERENCE

This Sole Reference includes:-

- (a) The subject matter of the dispute in Section 4;
- (b) A detailed explanation of the issues in dispute in Section 5;
- (c) In Section 6, the decisions sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (d) Appendices and other supporting material.

4 SUBJECT MATTER OF DISPUTE

4.1 This is a dispute regarding Network Rail's decision in respect of Train Operator Variation Request reference PELE17SSB000062 ("the Bid") for the May 2017 timetable. In this instance, GBRf believes that NR has not acted in accordance with the processes specified in Part D of the Network Code.

- 4.2 NR has rejected the Bid and GBRf believes the reason for rejection to be invalid for a variety of reasons.

5 EXPLANATION OF EACH ISSUE IN DISPUTE AND THE CLAIMANT'S ARGUMENTS TO SUPPORT ITS CASE

- 5.1 The Bid was submitted to NR on 16 August 2017 [Full email correspondence within Appendix A] and contained an application for one additional Train Slot (21:23 SX Parkeston S.S. to Felixstowe North Terminal), to be applicable from 28 August 2017, along with amendments to three other GBRf schedules to accommodate the Bid. Within the submission, GBRf requested that the Bid also be rolled into any future timetable iterations. The detailed timings of the proposed Train Slots are contained within [Appendix B].
- 5.2 Prior to its formal response NR contacted GBRf to query whether the schedule was required in the May17 timetable, as the schedule bid appeared to conflict with a number of existing Train Slots. GBRf conceded the the Train Slots had been bid into May17 in error but were required in the December 2017 timetable.
- 5.3 NR formally responded to the Bid on 12 September 2017. The four schedules (one additional; three amendments) were all rejected in the May 2017 Timetable. In the December 2017 timetable two of the amended schedules (0E06 ThO 19:54 Harwich Up Tip Sidings to Peterborough Maintenance Shed and 6H33 SX 21:14 Parkeston S.S. to Whitemoor Yard) were offered as bid. The other (4L18 SX Trafford Park Euro Terminal – Felixstowe North Terminal) and the additional schedule (4R18 SX 21:23 Parkeston S.S. to Felixstowe North Terminal) were rejected. Network Rail cited three reasons for its rejection of the two schedules; performance risks identified by TCRAg, a lack of information being supplied to Anglia Planning and a rejection of an additional service by the 'port'.
- 5.4 GBRf responded on 18 September 2017 with its disappointment that NR had notified it of the rejection of two schedules in the December 2017 timetable (as required by Condition D3.3.11) but that insufficient reasoning had been supplied to support its decision. Further details of these reasons were requested.

- 5.5 NR replied on 19 September 2017, stating that the "main issue" surrounded confirmation of acceptance into the 'port' and the potential 'issues' that could be caused on the network without an operational slot having been confirmed. NR requested feedback from a meeting between GBRf and Hutchison Ports, which was presumed to resolve all issues relating to Third Party Access to/from Port of Felixstowe.
- 5.6 GBRf registered a notice of dispute on 19 September 2017 [Appendix C], which was registered as "TTP1172"
- 5.7 GBRf contacted NR on 3 October 2017, informing them that they had been advised of no change to the Hutchison Ports Capacity Allocation Process [Appendix D]. Any operator pursuing additional slots at the Port of Felixstowe is required to identify a suitable operational window at the rail terminal and support any application with a robust business case. GBRf considers the establishment of Train Slots on the national network to meet any proposed operational window at Port of Felixstowe, to form a fundamental part of any robust business case. In its past applications for additional capacity at Port of Felixstowe GBRf has been required to evidence its access to the national network prior to being awarded an operational slot. The letter required to secure the 33rd slot, which commenced in July 2016, is contained within Appendix E.
- 5.8 NR acknowledged on 4 October 2017 that securing the sought capacity on the national network would strengthen any business case but reaffirmed its position that it was unwilling to offer the Train Slots. Instead, NR attached provisional timings for the proposed additional schedule (4R18 SX 21:23 Parkeston S.S. to Felixstowe North Terminal); matching those that GBRf had bid for. NR suggested that GBRf use the timings to support its business case for an additional operational slot at the Port of Felixstowe and stated that they would "be happy to formally offer the Train Slot on the basis that the Port are themselves accepting of GBRf's proposed 34th path".
- 5.9 In its response, dated 10 October 2017, GBRf rejected Network Rail's proposed approach for a number of reasons. GBRf stated that it considered (and continues to consider) its Access Proposal compliant pursuant to Condition D2.5.1 of the Network Code, which makes no reference to the Hutchison Ports Capacity Allocation Process and, as such, this should not preclude Network Rail from offering the proposed Train

Slot. GBRf acknowledged that NR is entitled to request additional information from an operator in relation to the Bid, pursuant to Condition D2.5.2, but noted that it had not done so prior to the formal rejection of the Access Proposal.

- 5.10 GBRf stated its view that the decision to accept, reject or modify any Train Operator Variation Request must have the Decision Criteria applied to it, pursuant to Condition D4.6.2. GBRf noted within its response that, as of 10 October 2017, NR had not evidenced the Decision Criteria it had applied in reaching the decision to reject its Access Proposal and requested that this information be supplied.
- 5.11 In its response, dated 18 October 2017, NR stated that "regardless of any remaining questions around the Port's views on this path", it considered itself to be justified in rejecting the Access Proposal as it had judged Condition D4.3.4 to apply. NR cited an Access Proposal made within GBRf's Priority Date Notification Statement for inclusion within the December 2017 timetable, stating that it considered the Train Slot bid within PELE17SSB000062 to be substantially similar.
- 5.12 GBRf challenged this position within its correspondence dated 19 October 2017. The PDNS submission referenced by NR was not rejected; it was amended and offered. Condition D4.3.4 specifically relates to Access Proposals that have been rejected. As the PDNS item was never rejected, Condition D4.3.4 cannot be cited as justification for the rejection of PELE17SSB000062. GBRf also stated its view that the two Access Proposals were sufficiently different to constitute a material change in circumstances, thereby rendering Condition D4.3.4 invalid. GBRf re-iterated its request to NR to evidence the Decision Criteria it had applied in reaching the decision to reject its Access Proposal.
- 5.13 NR clarified on 25 October 2017 that it considered its offer of a Train Slot with amended timings to constitute a rejection. GBRf challenged this in its 2 November 2017 response, highlighting that no-where within the PDNS correspondence had NR indicated that it had rejected the Access Proposal. This is supported by the fact that no evidence was supplied as to the Decision Criteria that had been applied in reaching the decision to reject the PDNS Access Proposal. Had GBRf been informed that the proposed schedule was rejected, and been supplied with relevant Decision Criteria

behind this decision, then it would have been lodged an appeal against Network Rail's decision within its response to the PDNS offer.

- 5.14 In the same correspondence GBRf sought clarity from NR as to the criteria it applies in adjudicating whether or not a material change has been made when it considers the application of Condition D4.3.4. At the time of writing (9 November 2017), GBRf has not had a response.
- 5.15 NR clarified in its mail dated 2 November 2017 that two of the three issues cited as a reason for rejection in the original, formal response were no longer considered to be relevant. Namely, these were the concerns raised by the TCRAG group and a lack of information being provided to Anglia Planning. Consequently, GBRf believes NR's sole concern with the Bid (with the exception of Condition D4.3.4) to be in relation to Access agreements to/from the national network and a potential impact upon network performance.
- 5.16 NR finally shared evidence of the Decision Criteria it had applied in reaching the decision to reject its Access Proposal on 2 November 2017. GBRf notes that these should have been included within the original formal response, dated 12 September 2017.
- 5.17 Within the Decision Criteria supplied there appears to be an overriding pattern in the way in which they have been applied, with the majority being linked back to apparent performance concerns. This follows a similar pattern to the ways in which the Decision Criteria were belated applied within Network Rail's Sole Reference Document for TTP1127. GBRf would highlight that "maintaining and improving train service performance" constitutes only one of the twelve criteria. GBRf is of the view that Network Rail has afforded too much weight to Condition D4.6.2 (c) and too little weight to a number of the others in reaching the decision to reject 4R18 within the December 2017 timetable. There is no explanation within the supplied evidence of how these weightings have been compared and concluded upon in order to reach a final decision to reject the Access Proposal. GBRf requested further detail from NR on 02 November in relation to this but, at the time of writing (9 November 2017), has not had a response.
- 5.18 Taking each of the Decision Criteria in turn and applying appropriate weighting, the result in GBRf's view is somewhat different. GBRf notes that it has raised these queries

and concerns within its mail dated 02 November but, at the time of writing (9 November 2017), has not had a response.

a) *"maintaining, developing and improving the capability of the Network"*: GBRf challenges NR's view this is not applicable. Offering the proposed schedule would facilitate the opportunity to create an additional operational slot at the Port of Felixstowe. In doing so, this would develop and improve the capability of the network to convey increased Intermodal freight tonnages across a highly sought-after corridor with suppressed demand. GBRf is of the view that this criteria should be positively weighted in its favour.

b) *"that the spread of services reflects demand"*: GBRf challenges NR's view that a 'medium' weighting is applicable. In CP6 NR is committed to spending £60.4m to upgrade the network capacity to facilitate increased Intermodal tonnages from the Port of Felixstowe. A 'high' weighting would seem much more appropriate given the investment NR is making to facilitate the growth in traffic that GBRf is attempting to realise with the Bid. GBRf notes that NR has linked its response to Condition D4.6.2(b) to network performance, which is considered within Condition D4.6.2(c).

c) *"maintaining and improving train service performance"*: NR appears to present contradictory views in relation to this Condition. The two statements within the supplied evidence state that "if the service is not accepted by the Port, it will be held on the Network, causing delay to other services on an intensively used part of the network and therefore causing a worsenment to train performance". However, the same document states "running the service does not maintain or improve train service performance, but neither does it result in a performance worsenment". These would appear to counter each other. GBRf has sought clarification on this point but has not received a response. Given that NR has cited network performance concerns throughout its correspondence, and linked its responses to a number of the other Decision Criteria to network performance, GBRf is surprised that NR has only applied 'medium' weighting to this consideration. The Train Slot within the bid is compliant with NR's own Timetable Planning Rules and that NR has heavily over-estimated this criteria in reaching its decision.

d) *"that journey times are as short as possible"*: GBRf considers NR to be remiss in dismissing the impact that rejecting the Bid could have in reducing journey times.

Given that the Bid has the potential to give rise to a new Intermodal service on a highly sought-after corridor, GBRf believes NR has missed the possibly of reducing journey times for its indirect customers by offering a rail alternative to traffic currently conveyed by road. GBRf believes this should have been considered within NR's decision.

e) "maintaining and improving an integrated system of transport for passengers and goods": GBRf notes that NR acknowledges that the operation of additional services by rail, which the Access Proposal facilitates, improves an integrated system of transport. The objection cited within NR's response to this Condition relates to network performance, which is adjudicated within Condition D4.6.2(c). GBRf considers this criterion to be of high weighting and, given that NR's objection is irrelevant in this criteria, believes that it should have found in favour GBRf when applying this Condition.

f) "the commercial interests of NR (apart from the terms of any maintenance contract entered into or proposed by NR) or any Timetable Participant of which NR is aware": GBRf notes that NR acknowledges the Commercial requirement for the proposed Train Slot. The objection cited within NR's response to this Condition relates to network performance, which is adjudicated within Condition D4.6.2(c). GBRf considers this criterion to be of high weighting and, given that NR's objection is irrelevant in this criteria, believes that it should have found in favour GBRf when applying this Condition.

g) "seeking consistency with any relevant Route Utilisation Strategy": GBRf challenges the 'low' weighting applied to this criteria. NR appears to attribute little value to its own documentation, published as recently as 2016, considering adhering to it to be of 'low' importance. Given the financial commitment that NR has made in CP6 to meet the directions of the Anglia Route Utilisation Strategy, GBRf would consider this to be of 'high' weighting and in its favour.

h) "that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed": GBRf concurs with NR's view that this Condition is not applicable.

i) "mitigating the effect on the environment": The benefits of haulage by rail in place of road have been proven in various forums to reduce the environmental footprint of freight haulage. GBRf believes NR to be remiss in ignoring the positive impact that an additional daily Intermodal service from the Port of Felixstowe could have on the local environment. GBRf believes that the positive environmental impact that any additional

Felixstowe Intermodal services would bring would vastly outweigh the negatives and, consequently, this criteria should be found in favour of GBRf. GBRf notes that NR's assertion relating to terminal acceptance again relates to network performance, which is not relevant to Condition D4.6.2(i).

j) *"enabling operators of trains to utilise their assets efficiently"*: GBRf considers this Condition to fall in its favour, given NR's own admission that "operating this service represents an opportunity for GBRf to utilise their assets efficiently". NR's assertion that GBRf or other Operator's assets could be negatively impacted by the addition of the proposed Train Slot is based upon an assumed performance issue, which should be adjudicated within Condition D4.6.2(c).

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"*: GBRf concurs with NR's view that this Condition not applicable.

5.19 GBRf continues to maintain its position that it has submitted a compliant Access Proposal to NR pursuant to Condition D4.6.2 of the Network Code. The Decision Criteria are those that NR should apply in reaching its decision to accept, amend or reject any Access Proposal in order to achieve the Objective. Confirmation from the Port of Felixstowe of an operational slot to accept the train is not one of these criteria. Within its Track Access Contract GBRf is required to satisfy itself that it has agreed suitable access on to and off of the national network to ensure that it can deliver a robust train plan. GBRf has initiated discussion with Hutchison Ports in this regard and has assured NR that it has no intention of operating the proposed Train Slot without such agreement being in place.

5.20 GBRf is very clear that evidence of acceptance to/from the national network, from a Third Party Infrastructure owner, is not required as part of a Train Operator Variation Request.

5.21 GBRf believes NR to be incorrect in stating that "the Port had confirmed to Anglia Production colleagues that they would not be supportive of a 34th path" and has challenged NR to provide evidence of this with no response. GBRf is aware of correspondence on 11 September 2017 whereby Hutchison Ports stated to NR that it would require full details of the proposed terminal slot and further conversations to

make a final decision. So far as GBRf has seen, at no point has Hutchison Ports stated that a final decision had been made to not support a 34th daily service.

- 5.22 GBRf concurs with NR's timeline of events, shared on 25 October 2017. GBRf notes that processing of the bid did not commence until 3rd September 2017, some twelve working days after the Train Operator Variation Request was submitted on 16th August 2017. GBRf believes that, in the case of PELE17SSB000062, Condition D3.3.6(g) applies and NR was obliged to notify GBRf of its acceptance, rejection or modification of the Train Operator Variation Request within five working days of its submission. Clearly these timescales were not adhered to in this instance. Condition D3.3.8 states that should NR fail to respond within the prescribed timescales then it is deemed to have accepted the Access Proposal provided that Conditions D3.3.8 (a), (b) or (c) have not been met. GBRf does not believe that any of these criteria have been met in this instance. GBRf has requested clarity on the issue from NR but has not had a response.
- 5.23 GBRf is clear that the Access Proposal has already been accepted, pursuant to Condition D3.3.8, and that the Train Slot should be included within the Working Timetable without further delay.

6 DECISION SOUGHT FROM THE PANEL

The Claimant is requesting that the Panel determines:

- (a) That Condition D4.3.4(b) is not applicable in the case the Bid
- (b) That evidence of acceptance to/from the network, from Third Party Infrastructure, is not required as part of a Train Operator Variation Request.
- (c) That NR has not correctly applied the Decision Criteria in relation to the Bid.
- (d) That NR has not provided adequate evidence and reason for rejection of the Bid.
- (e) That NR has not met its contracted timescales in relation to the bid;
- (f) That, consequently, NR must accept the Bid as it is compliant with the Timetable Planning Rules and does not give rise to any conflict within any timetable period.

7 APPENDICES

Appendix A: Email correspondence between GBRf and NR, from submission of the bid through to GBRf's latest response.

Appendix B: Detailed timings of the Train Slots sought.

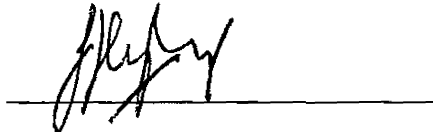
Appendix C: GBRf's registration of its appeal against NR's decision in relation to the Bid.

Appendix D: Hutchison Port's Felixstowe Capacity allocation Process.

Appendix E: NR's letter to GBRf confirming the Train Paths to facilitate the start-up of the 33rd Felixstowe Slot.

8 SIGNATURE

For and on behalf of GBRf Limited

A handwritten signature in black ink, appearing to read 'Jack Eagling', is written over a horizontal line.

Signed

-----Jack Eagling-----

Print Name

____Senior Planning Manager____

Position

9 November 2017