

Sole Submission to Timetabling Panel by Network Rail Infrastructure Limited

TTP reference 1520

1 DETAILS OF PARTIES

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

- (a) Freightliner Limited ("Freightliner") whose Registered Office is at 3rd Floor, 90 Whitfield Street, London W1T 4EZ; 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 Timetable Participants operating on the GEML & WCML. However, none have not been referenced by Freightliner. The affected TOCs and FOCs include GBRf, Arriva Rail London, Greater Anglia and GTR train slots.

2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant's Sole Reference includes:-

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
- (b) A detailed explanation of the Defendant's arguments in support of its position on those issues where it disagrees with the Claimant's Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant's Sole Reference.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fall to be determined as part of the dispute;
- (d) The decisions of principle sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (e) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

The nature of the dispute in Section 3.0 of Freightliner's revised Sole Reference Document (SRD) is noted.

Freightliner's dispute is based around their request to increase the trailing weight of 8 train slots at 1200 tonnes in the current and previous Working Timetables to 1600 tonnes. This is in accordance with their Track Access Contract, which they are disputing for the December 2019 (Principal 2020) New Working Timetable. Network Rail was unable to accommodate the increase.

The 8 train slots refer to 4 specific trains operating on different days of the week.

The trains are:

Ref 1 - 4M86EA MSX (Felixstowe North FLT to Lawley Street FLT)

Ref 2 & 3 - 4M93FA MO & MSX (Felixstowe North FLT to Lawley Street FLT)

Ref 4,5 & 6 - 4S88LB MO, TWThO & FO (Felixstowe North FLT to Coatbridge FLT)

Ref 7 & 8 - 4L90HB TWThO & FO (Crewe Basford Hall to Felixstowe North FLT)

NR will respond to the Freightliner claim in three separate parts with respect to the four trains:

- i. Items raised in the SRD, rationale for rejections and general application of Part D
- ii. Priority for inclusion
- iii. Application of Decision Criteria

4 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE

4.1 Issues where the Defendant Accepts the Claimant's Case

i. Items raised in the SRD, rationale for rejections and general application of Part D

Network Rail accept Freightliner's assertion no reasons for rejection were provided with the formal letter. This practise has been established through previous iterations of the timetable where the reasons for rejection have been removed from the formal publication letter, following feedback from Timetable Participants. It was felt the letters were too detailed and a lot for operators to process during the appeals period (in this instance, 45 train slots were listed as rejected). Thus, Network Rail, in accordance with D2.4.6 (a) "*Where a Timetable Participant has submitted an Access Proposal which cannot be accommodated in the New Working Timetable,*" and D2.4.7 *Network Rail must notify the Timetable*

Participant of this fact, as soon as possible after it has become aware of it, so that the Timetable Participant has the opportunity to submit a further Access Proposal under D2.4.1(c)” now provide detailed “Intention to Reject” letters in advance, with the formal letter accompanying the publication of the New Working Timetable containing only a summary list of the rejected schedules.

Network Rail also acknowledge Freightliner’s use of the “Notification of intent to reject train slot” correspondence with their SRD (Appendix A).

There was no NR senior management presence at the meeting on 24th July 2019. This meeting was understood to be a practitioner led meeting to work together to identify planning solutions to accommodate Freightliner aspirations. It is not normal practise for a senior manager to be present at practitioner planning led activities. Furthermore, no senior management representation was specifically requested to be present at this meeting.

Network Rail acknowledge Freightliner has a business aspiration to operate the train slots at 1600 tonnes.

ii. Priority for inclusion by train

Network Rail accept Freightliner’s assertion that West Midlands Trains did not have Firm Rights in force at D-40 for the December 19 New Working Timetable.

However, with each “Intention to Reject” letter, a number of services are listed as conflicting train slots which possess an equal priority for inclusion with Freightliner. These are for trains operated by GTR, GBRf, Greater Anglia and Arriva Rail London.

Finally, in knowledge of Network Rail’s application of the Priority Criteria, following receipt of each of the “Intention to Reject” letters (Freightliner SRD Appendix A – letters dated 12th April 2019 to 7th May 2019), it is not clear why Freightliner did not choose to exercise their right in accordance with D2.4.7 *“the opportunity to submit a further access proposal”* prior to the publication of the December 2019 New Working Timetable.

iii. Application of Decision Criteria

Network Rail accept relevant Decision Criteria were selected, and applied in respect of the train slots in dispute. This is in accordance with D4.6.2 *“In achieving the ‘Objective’, Network Rail shall apply any or all of the considerations”* and D4.6.3 *“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 Participant..... 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.”

Each of the “Intention to Reject” emails contain specific references to the Decision Criteria applied and the reasons why it was found for or against Freightliner.

Application of Decision Criteria will be explored and assessed in full in 4.2.iii.

4.2 Issues where the Defendant qualifies or refutes the Claimant’s Case

i. Items raised in the SRD, rationale for rejections and general application of Part D

As part of the Freightliner SRD, the outstanding basis of dispute refers to “Some Train Slots have been flexed outside the timing windows of the Firm Rights held” (“1.0 Background” Element 3). NR has not been able to identify any reference to flexes being made outside of the timing windows, and nor has this been referenced at any further point in the Sole Reference Document. Network Rail does not accept it has timed trains outside the timing windows contained for the train slots contained within this dispute.

Furthermore, Network Rail has actively sought not to retime train slots outside Freightliner's contractual timing window. These are referenced in “Intention to Reject” letters for 4M93 MO, 4M93 MSX, 4S88 FSX and 4S88 FO.

The meeting held at Milton Keynes on 24th July between train planning practitioners was not successful in identifying end to end journeys for 1600 tonnes trailing weights. This is due to no compliant paths available within the framework of the December 2019 New Working Timetable.

As part of the SRD (5.2 Application of Part D) Freightliner assert NR *“has not confirmed that it can not accommodate the train slot, but rather that in many instances the failure to include the path is due to a decision not to apply its flexing right.”*

Freightliner submitted an application for 38 train slots with increased tonnages at D40. Network Rail were able to demonstrate use of its application of Flexing Right and accommodated 8 train slots. A significant number of flexes were undertaken to the timetable requirements of other Timetable Participants to accommodate these slots.

Where conflicts of train slots was not resolvable by a flex, only then the Decision Criteria was applied. This is consistently demonstrated in the number of train slots *"List of trains in dispute"* in each of the *"Intention to Reject"* letters (supplied by Freightliner SRD – Appendix A).

Network Rail, within the current framework of the timetable on the Great Eastern and West Coast Main Lines, the volume of flexes required to accommodate an increase the trailing weight of these four existing trains resulted in a fundamentally different timetable. The GEML timetable alone sees an additional 7 minutes in journey time for disputed schedules the between Stratford and Ipswich (Down direction) to accommodate the increase in trailing weight and 5 ½ minutes in the Up Direction.

In accordance with Network Code D4.6.2 *"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")*, NR has given consideration to the aspects of the Decision Criteria which were deemed relevant at the time of the *"Intention to Rejection"* was confirmed.

The NR deemed relevant Decision Criteria are documented in Appendix A.

With reference to Freightliner SRD 5.2 (point 3) – *"Freightliner is concerned that this implies a decision by the Planner to over-rule an access right that have been sold to Freightliner"*, 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, the planner has the right to determine if an access right can or cannot be accommodated.

ii. Priority for inclusion

Network Rail has rejected the train slots impacted based upon the Decision Criteria being applied against all train slots listed (with rights being exercised by a number of other Timetable Participants) within the *"Intention to Reject"* letters provided by Network Rail. Any dispute referencing the Priority for Inclusion involves only those train slots belonging to West Midlands Trains, therefore the application of the Decision Criteria stands for all other conflicts identified, and therefore Network Rail has not been able to include the increase in trailing weights, and the original 1200 tonne schedules remaining.

iii. Application of Decision Criteria

With respect to train slots Ref 1-8, Freightliner is *"concerned with the flaws in the application of the Decision Criteria"*.

In accordance with Network Code D4.6.2 *“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”)*, NR has given consideration to the aspects of the Decision Criteria which were deemed relevant at the time of the “Intention to Rejection” was confirmed in writing to Freightliner and not *“cherrypicked”* as claimed by Freightliner.

The Network Rail selection of Decision Criteria has is based on Considerations that are quantifiable at the time of the decision. Network Rail acknowledge no further information was sought from affected Timetable Participants with respect to identifying suitability of other Considerations for application.

The NR deemed relevant Decision Criteria are documented in Appendix A. Decision Criteria in “Green” are not disputed by Freightliner, “Red” are disputed due not being considered by NR, and “Amber” items dispute NRs application of the Decision Criteria.

Each of the relevant Considerations applied by Network Rail have been given an equal weighting at the time of the decision. The overriding principle at the time of planning is not to fundamentally alter the structure of the timetable, without understanding the impact of consequences.

These are explored in more detail below:

Decision Criteria (a) *“maintaining, developing and improving the capability of the Network”* has been applied correctly against Freightliner and explained in each of the “Intention to Reject” letters, with consistent references to the holistic nature of the rail network, as well the number of Timetable Participants impacted by way of specific flexes, retimings and extended journeys required to accommodate Freightliner’s request.

Decision Criteria (b) *“that the spread of services reflects demand”* is applied against Freightliner, and its application by Network Rail is not disputed by the claimant.

Decision Criteria (c) *“maintaining and improving train service performance”* has been applied by Network Rail for each train slot, against Freightliner. Network Rail acknowledge, without performance modelling being undertaken, if offered, the expectation is the paths to be planned without conflict to the relevant timetable planning rules. Thereby Network Rail acknowledge the application of this Decision Criteria does not apply in this instance, only on the assumption Network Rail is able to identify Timetable Planning Rule conflict free train paths on the Great Eastern and West Coast Main Lines for the heavier timing loads.

Decision Criteria (d) *“that journey times are as short as reasonably possible”* is applied against Freightliner, and its application by Network Rail is not disputed by the claimant.

Decision Criteria (e) *“maintaining and improving an integrated system of transport for passenger and goods”* has been applied and is disputed by Freightliner. The weighting against Freightliner, is based on the number of flexes required, impacting times at key network locations to train slots of other Timetable Participants. These locations include, and are referenced in the list of affected schedules in each *“Intention to reject”* letter, Clapham Junction, Stratford and Liverpool Street. The inference being, retimings which may ripple into impacting more train slots, damaging passenger connections and thus no longer being an *“integrated system of transport”*. The underlying structure of the timetable would be impacted and thus, this Decision Criteria is deemed to have been applied correctly by Network Rail for each of the train slots listed.

Decision Criteria (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”* has not been considered by Network Rail at the time of timetable preparation. If considered, it would be considered neutral.

Decision Criteria (g) *“seeking consistency with any relevant Route Utilisation Strategy”* has not been considered. Network Rail acknowledge this Decision Criteria could be acknowledged in favour of Freightliner, in cognisance of the anticipated growth in Anglia for freight traffic. However, we have 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.

Decision Criteria (i) *“mitigating the effect on the environment”* has not been considered by Network Rail. Freightliner’s argument in this instance in reducing road traffic is acknowledged. However, extending passenger journey lengths, or the removal of passenger train slots, in favour freight may also result in passengers choosing to drive rather than utilise the largely electric trains in operation on conflicting routes. Thereby, this Decision Criteria can not be weighed neither in favour, nor against Freightliner or Network Rail, without requesting further specific information from each of the Timetable Participants.

No further information was sought at the time in respect of this Decision Criteria Consideration.

Decision Criteria (j) *“enabling operators of trains to utilise their assets efficiently”* has not been considered by Network Rail. No further information was sought at the time in respect of this Decision Criteria. Potential impact of this could be considered in light of a fundamentally different timetable structure with longer passenger train journeys and associated train crew rostering and unit diagramming concerns. This

can be balanced against Freightliner's improvement in use of their asset. No further information was requested by Network Rail in respect of this Consideration.

Decision Criteria (h), (k) and (l) not applied by Network Rail, nor disputed by Freightliner.

Appendix B compiles the reassessed Decision Criteria, in cognisance of the information presented by Freightliner. The outcome still remains the same, and Network Rail have made the correct decision not to accommodate the increase in tonnages for the Freightliner trains in dispute. The existing 1200 tonne train slots remain "offered" within the December 2019 New Working Timetable, as they have done for a number of timetable iterations.

4.3 Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination

The Freightliner Notice of Dispute on 21st June 2019, Freightliner state *"we are not aware of any other party which might be concerned with this matter"*.

However, in their SRD their Network Rail decision for Priority for inclusion is challenged.

This, by implication, suggests a choice or planning decision has been made between the inclusion of Freightliner or other TOC/FOC access proposal. Thereby, there are other affected parties including, by name in the Freightliner SRD, West Midlands Trains.

The affected parties are also inferred by Freightliner in their SRD (2.0 Update on discussions) under "Those solutions all require varying degrees of flex to be applied to other services.

Furthermore, the Network Rail "Intention to Reject" letters clearly state a number of trains operated by other operators. Again, there are several other TOCs/FOCs who should be considered as interested parties.

It should also be noted Freightliner have amended the SRD, withdrawing 7 train slots from the dispute. This matter arose from Freightliner arriving at the conclusion with NR they do not have the track access agreements claimed in place at D40. There were a further 8 train slots which were accommodated with the increased tonnages to 1600 tonnes. NR will undertake an exercise to review the complete Freightliner track access agreement to understand if there have been previous timetable iterations where requests for increased trailing weights have been requested, with the reason for the request being the exercising of existing rights.

Notwithstanding the application of the Priority Criteria, Network Rail has demonstrated it is not able to accommodate the Freightliner aspiration for 1600 tonnes for the train slots as bid. This is due to the number of conflicts with other train slots as identified by the "Intention to Reject" emails. Network Rail has chosen not to remove conflicting train slots from the timetable, and applied the Decision Criteria in favour of the listed trains. The result being the existing 1200 tonne Freightliner train slot remaining, and only the increase in trailing weight not being accommodated.

Finally, the Determination sought by Freightliner from the Hearing Chair is, *"Instruct Network Rail to accommodate all the above paths at 1600 tons in the 2020 Principle (from December 2019), in line with Freightliner's Firm Access Rights."* However, no consideration has been made to how this instruction is achievable. Any amendment to the timetable at this stage, for one which a number of Timetable Participants do possess Firm Contractual Rights, may not be considered practicable, given Freightliner's view represented in their SRD 6.0 Ref 1 Point (c) *"Freightliner would expect all offered paths to be compliant with the Timetable Planning Rules,"* without the amendment and/or removal of offered train slots to other impacted Timetable Participants, including those that should be considered as affected parties.

4.4 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant

Network Rail believes the principles within the Network Code have been adhered to in a fair and consistent manner during the Timetable Preparation Period D40-D26 in reaching "the objective."

Application of the Decision Criteria has also been reassessed in light of the argument raised by Freightliner and still finds in favour of Network Rail, for each of the disputed train slots concerned.

The acknowledged error in the Priority for Inclusion is only one decision incorrectly applied, amongst several other decisions when constructing the new working timetable. Decisions, by way of "Intention to Reject" letters, were notified by NR at the earliest opportunity (see dates on letters, supplied Freightliner as part of their SRD Appendix A).

5 DECISION SOUGHT FROM THE PANEL

Network Rail is seeking the panel to determine:

(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 accordance with Network Code Part D, cognisance of access rights belonging to Timetable Participants.

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

(d) NR has applied the Decision Criteria in a fair 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.

(f) should the matter of dispute be found against the defendant, Network Rail is seeking a determination Freightliner's request for accommodation of the 8 train slots at 1600 tonnes can not 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.

SIGNATURE

For and on behalf of
[usually Network Rail Infrastructure Limited]

Signed



Print Name

M. HAQUE

Position

TIMETABLE PRODUCTION MANAGER

The Appendices

Appendix A – Summary of Decision Criteria applied by Network Rail and challenged by Freightliner

Appendix B – Summary of Revised Decision Criteria in response to Freightliner's SRD