

***Defendant's Response to a Sole Reference to a Timetabling Panel in
accordance with the provisions of Chapter H of the ADR Rules effective
from 1 August 2010 (and as subsequently amended)***

Dispute Reference: TTP1708

1 DETAILS OF PARTIES

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

- (a) Freightliner Limited whose Registered Office is at 3rd Floor, 90 Whitfield Street, Fitzrovia, London, W1T 4EZ ("Freightliner") ("the Claimant"); and
- (b) Network Rail Infrastructure Limited whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("Network Rail") ("the Defendant").

1.2 Third parties that may be affected by the ruling are:

DB Cargo Rail (UK) Ltd, Abellio East Anglia Limited, Abellio East Midlands Limited, Govia Thameslink Railway (GTR) Limited, XC Trains Limited

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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

- 3.1 In response to Freightliner Sole Reference Document (SRD), Section 4.1, Network Rail agrees that this is a dispute regarding package of Restrictions of Use (RoU) between Ely North Junction and Peterborough in weeks 23-27 of 2020.
- 3.2 The dispute has arisen over Network Rail's actions with regard to the Network Code Condition D4.6.2 in respect of how the decision has been reached to take the proposed disruptive access.

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

4.1 Issues where the Defendant Accepts the Claimant's Case

- 4.1 Network Rail accepts that the dispute is in relation to a disruptive possession for the area of network known as 'Manea Bridges' scheduled to take place from Saturday 5th September to Monday 5th October 2020.

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

- 4.2.1. In response to Freightliner SRD, Section 4.2, Network Rail qualifies that it did not agree that all operator services could be accommodated. Network Rail disagrees that the possession strategy would be devised once the Capacity Study was completed. Network Rail have applied D3.1.2 and D3.5 throughout this process. The preferred delivery option (DEFCON4) was highlighted at the initial meeting on 21st May 2020 (refer to Appendix B1: Manea Campaign for operators v1.2) and the need to understand Single Line Working (SLW) was identified. This is a Restriction of Use and as such Network Rail did not, prior or subsequent to the Decision, agree to all services being accommodated. Network Rail submits that to do so would potentially render any given Restriction of Use susceptible to a circular process of offer and response with each affected operator and that this is not a requirement of the application of Network Code section D3.4 and D3.5.
- 4.2.2 In response to Freightliner SRD, Section 4.3, Network Rail confirms this was the case, but qualifies that the output was shared on 15th June 2020 with operators.
- 4.2.3 In response to Freightliner SRD, Section 4.4, Network Rail confirms this statement, but qualifies that it was outlined in the e-mail on 11th June 2020 that capacity was limited (refer to Freightliner Appendix 2) and did not indicate all services could be accommodated through the SLW or diversions. Network Rail also qualifies that they would not be able to provide a service level at this point based on the high-level summary.
- 4.2.4 In response to Freightliner SRD, Section 4.5, Network Rail confirms the time line stated is correct, however qualifies that work was ongoing on paths available beyond the limits of the RoU and Network Rail was working toward fulfilling commitments to work with the parties to accommodate aspirations outside the scope of the Capacity Study, though not required to do so under the Network Code.

- 4.2.5 In response to Freightliner SRD, Section 4.6, Network Rail confirms the events presented, but qualifies that provision of a Capacity Study is not a requirement under the Network Code.
- 4.2.6 In response to Freightliner SRD, Section 4.7, Network Rail agrees to the date stated, but clarifies that changes are permitted under Network Code par D3.5. Furthermore, the amendments to Weekends 23, 24, 26 and 27 were an easement to the starting time of the All Line Block (ALB) from 1600 Saturday (refer to Freightliner Appendix 4), thus extending the SLW opportunities.
- 4.2.7 In response to Freightliner SRD Section 4.8, Network Rail agrees with the statement but qualifies that a Capacity Study is not a requirement under the Network Code in relation to taking a decision on a disruptive possession and as such does not direct Network Rail to accommodate all paths through the RoU.
- 4.2.8 Regarding Freightliner's Section 5.1, Network Rail refutes that it only took action to address the deterioration of the wheel timbers at Manea once the defects have become a 'safety critical matter'. Work was undertaken in 2017 and 2018 to replace timbers and a return planned by 2019 when it was anticipated to require intervention. However, Network Rail came under pressure not to undertake any works at this location in 2019 and after much consultation succumbed to no intervention in 2019, instead planning for 2020 and 2021. Upon further inspection, the timbers have deteriorated faster than expected and now a larger number require immediate remedial work to be undertaken.
- 4.2.9 Regarding Freightliner's Section 5.2, Network Rail identified access through the Engineering Access Statement (EAS) for 2020, which was suitable to undertake wheel timbers replacement at Manea, and this has informed the delivery strategy in the RoU and that of 2021. With reference to Appendix C: Infrastructure Assessment, it is a new inspection probe and regime, which has identified the accelerated deterioration of the timbers leading to Network Rail operating under D3.5.
- 4.2.10 Regarding Freightliner's Section 5.3 Network Rail submits that this RoU was issued in line with D3.5, however it refutes that it didn't plan to address the condition of the timbers in the correct timescales and that the accelerated deterioration of the timbers has led to this.
- 4.2.11 Regarding Freightliner's Section 5.4 Network Rail accepts that it requested information on operator services on 11th June 2020 (refer to Freightliner Appendix 2), and that it has continued to engage regularly with operators to address capacity issues, though not required to do so under the Network Code (refer to Appendix A: Timeline of Events). Network Rail submits that it has provided printouts from the Train Planning System (TPS) to operators for the capacity within the SLW possession. Network Rail also submits that Freightliner appear to be raising a Timetable Dispute matter, not an Access Dispute matter and that this Hearing is an Access Dispute.

- 4.2.11 Freightliners SRD Section 5.5 argues that Network Rail have failed to correctly assess the impact of this RoU in line with Network Code Condition D4.6.2 and have focussed solely on Network Rail's priorities. Network Rail refute this argument and submit that they have provided consideration to all of the Considerations and applied those that are relevant to the issue at hand.
- 4.2.12 Network Rail made their decision regarding this possession on 15th July and communicated this to Freightliner on the same day which included supplying a copy of the Decision Considerations table used to detail the same (Appendix D: Decision Criteria).
- 4.2.14 Network Rail submit the following in relation to the specific Decision Considerations that are disputed by Freightliner.

(a) Maintaining, developing and improving the capability of the network: It is acknowledged by Freightliner that this matter is a longstanding one. Reference to Appendix C will show that Network Rail have been aware of this issue since 2016 and in fact were looking to plan remedial work as recently as 2019 so as to avoid the situation the industry now find ourselves in. It is submitted that when a disruptive possession has been suggested historically in relation to this section of the network, that Operators have objected to this resulting in work being pushed back to later dates. Network Rail have shown that the operable state of the timbers in question has deteriorated at a faster than anticipated rate resulting in this work becoming safety critical in the immediate future. The status of the timber does not remain in stasis and the deterioration has made this a safety critical issue. This is demonstrated to have been communicated with Operators by reference to Appendix B1. A resolution has been sought in previous years and Operators have disagreed with access being permitted as is happening again here.

(b) The spread of services reflects demand: The weighting applied by Network Rail to this Consideration was categorised as 'low' not because of the impact of the possession, but because the possession will not deliver benefit in this regard. Rectification of the issue simply returns the network back to "where we were". However, if the bridge is shut for six months because Network Rail cannot access it to do the work the, the impact of that might then be deemed to be "high" on the basis that the section of track may have to be completely closed, no work can be undertaken and no trains will be running at all. Freightliner submit that this is 'the most important criteria given commercial decisions' for them. Network Rail submit that this is incorrect in that all Decision Considerations are of equal weighting and are to apply these in a manner that is 'fair and not unduly discriminatory' as per D4.6.3. Network Rail must account for the Objective (D4.6.1) 'to share capacity on the Network for the safe carriage of passengers and goods'. In doing so, Network Rail must consider the whole of the network and all rail users, not just the commercials of a single Operator.

(e) *Maintaining and improving an integrated system of transport for passengers and goods:* Network Rail submit that committing to Single Line Working is in itself evidence of maintaining an integrated system. Passenger traffic has in fact been removed in favour of Freight traffic and Network Rail have utilised diversionary routes which it is submitted supports this Consideration. In the alternative, if the line is closed, no traffic will be able to run at all which is a scenario that Network Rail are seeking to avoid. It is reiterated that planning for Single Line Working through the possession is evidence of maintaining integration.

(f) *The commercial interests if Network Rail...or any Timetable Participant:* Freightliner submit that this Consideration should have been awarded a higher status by Network Rail. This Consideration was awarded 'low' status on the basis that Network Rail's interests and those of the Operators tend to be diametrically opposing. On the basis that these essentially cancel each other out, a 'low' status was decided upon in this case. In reaching this conclusion, Network Rail have not provided this weighting towards taking the access but rather have neutralised this based on the information available to us at the time the decision was made. Freightliner's argument also appears to contradict an earlier submission - they claim that "Network Rail have, to date, been unable to provide details of paths available for all required services..." (Section 5.4 SRD). In relation to Condition (f) they submit that Network Rail are "unable to accommodate all services (through the Capacity Study)". The Network Code does not require that Network Rail have to provide paths for all services and it is submitted that Network Rail have correctly followed and applied both D3.5 and D4.4 in this respect.

(i) *Mitigating the effect on the environment:* As evidenced above and within our Appendices, Network Rail refute the assertion that the suggested works have been poorly planned. Network Rail have in fact been aware of the issue since 2016 and have made several attempts to rectify the matter via a possession which have all been rejected by Operators in favour of undertaking the work at a later date because it was too disruptive. It is also submitted that Network Rail have clearly communicated the reasons for the remedial work and the detailed the restrictions that are in place. Natural England have restrictions on this section of the line which prohibit access for all but 4 months of the year. Access is permissible between July to October (refer to Appendix B2: Natural England 2020 consent). Outside of these dates, the area is subject to flooding (which covers the working platform level) and is residence to various migratory nesting birds which are legally not allowed to be disturbed. In abiding by these laws, Network Rail submit that they have accounted for mitigating effects on the environment. In respect of the impact on Freightliner it is submitted that a possible 3 month closure of the line (until we can access the area again) will result in their use of a lot more road haulage compared with the suggested four weeks of Single Line Working with a lesser volume of road haulage required.

(j) *Enabling Operators to utilise their assets efficiently:* It is submitted that the outcome of the Capacity Study referenced by Freightliner is not a matter for this dispute which is focused solely on the issue of Access, not Timetabling and whether certain trains can or cannot be accommodated on the network. Freightliner submit

that they will be unable to utilise their assets during this time, but there would be nothing to stop them using these assets elsewhere on the network rather than sitting idle. It is submitted that a RoU by its very nature limits the number of paths that are available for use and is an outcome that to a greater or lesser extent may in fact be inevitable.

- 4.2.15 Freightliner's Section 5.6 alleges that Network Rail have not applied the Decision Criteria in allocating available train slots. It is submitted that the issue raised by Freightliner here is in fact a relevant one for a Timetable dispute, but not an Access Dispute Hearing. In reaching a decision on whether or not a possession is needed, Network Rail are not required under the Network Code to provide decisions on the allocation of available paths to Operators. The purpose of the Capacity Study is to support the operators revised Access Proposals. It is submitted that this is a dispute about a possession access, not the train paths themselves.

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

- 4.3.1 Network Rail notes that the decision sought in Freightliner's SRD for the withdrawal of the RoU and re-planning of the RoU in EAS timescales in line with D2.2.3 would not be feasible due to the safety critical nature of the work. Referring to Appendix C: and Appendix B1, the timbers are deteriorating, and an intervention is required before the Natural England window of consent closes in October 2020.
- 4.3.2 Network Rail considers it important to note the environmental constraints in this area. Natural England has designated the Ouse Washes a Site of Special Scientific Interest (SSSI), and the Ramsar Wetlands are specified as both a Special Protection Area (SPA) and a Special Area of Conservation (SAC). Due to this and as the area flooding during Winter months, there is a specific annual time window in which Network Rail can undertake work in this area. Should the decision sought in Freightliner's SRD for the withdrawal of the RoU be upheld, then the next window is June 2021, which is a year after the designated red and orange timbers highlighted for renewal in 2020 need to be replaced.
- 4.3.3 Network Rail also considers that the reluctance by operators for Network Rail to do this work in previous years should be taken into account (refer to Appendix C) Following intervention in 2018, there was pressure from both operators and Natural England on Network Rail not to undertake any works at this location in 2019, which it reluctantly agreed to do. A year without an access intervention, together with the enhanced inspection regime and training introduced has led to a larger number of timbers now requiring an urgent access intervention.
- 4.3.4 Within their Directions, Panel have sought clarification from Network Rail as the factors that have led to them being unable to comply with timings within Network Code Part D. It is submitted that due to the above detailed factors, Network Rail have instigated this proposal under D3.5 Network Rail have evidenced that it has

previously attempted to gain this access with advanced planning and notification (as per D3.4) but were strongly rebuffed by Operators.

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

- 4.4.1 Network Rail submits that it has correctly applied all relevant Considerations of the Decision Criteria to the RoUs in Weeks 23 to 27, and that progressing with the RoU is more beneficial than withdrawing it as requested in Freightliner's Sole Reference with regard to the immediate safety risks to the operational railway that would be imported by doing so, especially given the environmental constraints in this area. This is evidenced in Appendix D and in Section 4.2.14.
- 4.4.2 Network Rail submits that this RoU is planned in accordance with D3.5 and is the result of accelerated deterioration of the asset and not lack of planning.
- 4.4.3 Network Rail submits that that it has continued to engage regularly with operators to address capacity issues, though not required to do so under the Network Code, and that that this is an Access Dispute and not a Timetable Dispute, which addresses issues such as train path allocation/ accommodation.

5 DECISION SOUGHT FROM THE PANEL

- 5.1 Network Rail ask the Panel to acknowledge that where possible, it is preferable to plan Restrictions of Use via the Engineering Access Statement but that in certain circumstances, this may not be viable and is recognised as such within the Network Code under Condition D3.5.
- 5.2 Network Rail ask that the Panel confirm that it has applied the Decision Criteria under Conditions D4.6.1 and D4.6.2 in a compliant manner. Network Rail submit that it has considered all of the Considerations and applied any that are relevant in reaching its decision. Freightliner have not alleged that there are any issues of non-compliance with the Network Code, simply that they disagree with the decision that has been reached.
- 5.3 Network Rail note Freightliners request under Section 6.3 (SRD) and submit that the effect of this is to request that train plans take precedence over the access itself. This shows no consideration for the 'Objective' under D4.6.1 to share capacity for the *safe* carriage of passengers and goods. The Objective does not state that all trains must be accommodated, but it does prioritise *safe* operation and requires the sharing of capacity. Network Rail ask the Panel to confirm that issues of accommodation follow subsequent to access.
- 5.4 Network Rail ask that the Panel decline the direction requested by Freightliner (SRD Section 6.4) on the basis that withdrawing the planned access will result in significant line closures and far more disruption to all parties due to the safety critical nature of the issues at hand and the access restrictions imposed by Natural England.
- 5.5 Pending the outcome of TTP1706, Network Rail ask the Panel to confirm the possession as planned.

6 APPENDICES

The Defendant confirms that it has complied with Access Dispute Resolution Rule H21

Extracts of Access Conditions/ the Network Code are included where the dispute relates to previous (i.e. no longer current) versions of these documents.

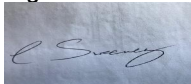
All appendices and annexes are bound into the submission and consecutively page numbered. To assist the Panel, quotations or references that are cited in the formal submission are highlighted (or side-lined) so that the context of the quotation or reference is apparent.

Any information only made available after the main submission has been submitted to the Panel will be consecutively numbered, so as to follow on at the conclusion of the previous submission.

7 SIGNATURE

For and on behalf of
Network Rail Infrastructure Limited

Signed



Print Name
COLIN SWEENEY

Position
Head of Planning, Anglia Route

The Appendices

Appendix A – Timeline of Events

Appendix B - Referenced correspondence (from Timeline) and extracts

- Appendix B1: Manea Campaign for operators v1.2 (presentation 21st May 2020)
- Appendix B2: Natural England 2020 Consent

Appendix C – Network Rail Infrastructure Assessment

Appendix C1: Manea Timings (reference spreadsheet)

Appendix D - Network Rail Application of the Decision Criteria

Appendix E – Registered Addresses of Interested Third Parties