

# TTP2468

## Network Rail Defence Submission

### 1 DETAILS OF PARTIES

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

- (a) Freightliner Limited, (Company number 03118392) whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ

Freightliner Heavy Haul Limited (Company number 3831229), whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ

Collectively referred to as ("Freightliner") or ("the Claimant");

- (b) Network Rail Infrastructure Limited, whose Registered Office is at Waterloo General Offices, London, SE1 8SW ("Network Rail") or ("the Defendant").

1.2 Network Rail believe that Direct Rail Services Limited ("DRS") are likely to be affected by potential findings in this matter.

### 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 fail to be determined as part of the dispute;
- (a) The decisions of principle sought from the Chair in respect of
  - (i) legal entitlement, and
  - (ii) remedies;
- (b) Appendices and other supporting material.

### 3 SUBJECT MATTER OF DISPUTE

- 3.1 Network Rail broadly agrees with the Subject Matter of Dispute made by Freightliner but seeks to highlight the following inconsistencies with the information provided by Freightliner in their Sole Reference Document (SRD).
- 3.2 Network Rail had previously issued a Failure to Use (FTU) Notice against the same schedules on 19 March 2024. Network Rail agree that the FTU Notice was withdrawn, however this was in consideration of not only the evidence provided by Freightliner, but additional evidence from DRS and internal investigation of the evidence.
- 3.3 Network Rail accept that Freightliner were assessing the route with a view to start customer traffic in late 2022. Freightliner and Network Rail undertook gauging assessment work at this time. Network Rail are not aware of any current potential customers Freightliner have for this route and no evidence has been provided of such, since issuing the FTU Notice on 13 June 2024 or the earlier FTU Notice issued on 19 March 2024. Network Rail are aware that the customer Freightliner were looking to start traffic for in 2022, PD Ports, is the same customer DRS are pursuing these paths for.
- 3.4 Freightliner has indicated that the absence of W8 gauge clearance on the specified route has been a barrier to operating their services. Network Rail have proposed alternatives, including a diversionary route with W8 gauge clearance and put temporary dispensations in place following further gauge assessments for several alternative potential wagon and box combinations that would be possible given the current status of the network (Appendix 2). Freightliner advised Network Rail that these solutions did not present as economically viable and so were not pursued. This is supported by Freightliner's response to the Chair's Second Directions stating that W8 gauge is required to allow Freightliner to operate the flow efficiently.
- 3.5 Network Rail accepts that the MVL3 route, between 8m 230y and 15m 242y is not gauge cleared for W8 traffic due to six structures being foul. Four of these structures could be managed via speed restrictions, however two (Wright Mill Bridge in the up direction and Scott tunnel in the down direction) are still foul even with a 5mph speed restriction. Network Rail issued a Short-Term Network Change proposal STNC/G1/2022/NWC/889 (Appendix 3) on 04 January 2023. The intention is to gauge clear the route to W12. There is no firm date in place, however provisional estimates are for this work to take place in 2032. Since formally lodging a dispute against the issue of the FTU Notice, Freightliner have also instigated a formal dispute process against the Short-Term Network Change (Part G) that seeks to remove W8 gauge clearance from the route (ADA59).
- 3.6 Network Rail issued this FTU Notice following report by DRS that these Train Slots had been obtained by FL in the Working Timetable and were not underpinned by Quantum Access Rights. DRS were seeking the removal of these paths from Freightliner to create capacity needed for their customer traffic. Evidence has been provided by DRS, in the form of a customer's 'Letter of Intent' (Appendix 4). Additional evidence from internal colleagues regarding alternate routings and other potentially gauge cleared options for wagon and box combinations have led Network Rail to issue this FTU Notice.

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

### **4.1 Issues where the Defendant accepts the Claimant's Case.**

- 4.1.1 Network Rail accepts assertions made by Freightliner in 5.1 of their SRD; the Train Slots in question are not supported by Access Rights and have not run in the last 13 weeks.
- 4.1.2 Network Rail accepts Freightliner's statement contained within 5.4 of their SRD.

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

- 4.2.1 Network Rail note that these Train Slots have not been used since they entered the timetable on 01 July 2019 (4M75) and 07 February 2020 (4E70).
  - 4.2.2 Network Rail does not accept the Claimant's case that Network Rail did not act reasonably.
  - 4.2.3 Network Rail does not accept that there is a contractual link between Network Code Condition D8.5 and Condition J4. Network Rail does not accept the Claimant's case that Network Rail should refer to the conditions of J4 in order to determine whether the Train Slots are not being used. There is no reference to Part J of the Network Code in Condition D8.5 (or Part D at all). Additionally, in the Appeals against TTP 371, 513, 514, 570 and 571 (Para 43) the ORR determined that there is no contractual link between Part D of the Network Code and Part G. Network Rail submits that, in applying the same logic, that there is no link between Part D of the Network Code and Part J (Appendix 5). It is noted that within paragraph 5.5 of their SRD, Freightliner concede that there is no contractual link between Network Code Part D and Part J.
  - 4.2.4 Noting in paragraph 11 of the Chair's First Directions that an operational link could exist even when there is no contractual link, we accept that, in the absence of a defined Use Quota or Use Period in Network Code Condition D8.5, we have typically used 13 weeks as a 'reasonable' starting point for considering whether a path has been used or is being used. This has historically been utilised either in the absence of or in support of any additional evidence. There may be scenarios where it would be reasonable to consider other periods of time. An example being if there were to be a transfer of Freight traffic between operators (where the Train Slots are not underpinned by Access Rights), there is no mechanism in Part D for this and it may be reasonable to consider that these are no longer being used by the operator.
  - 4.2.5 Network Rail does not accept the Claimant's case that had these Train Slots been supported by Access Rights, any third-party application would have been disregarded by Network Rail as the non-use would have been attributable to non-economic reasons beyond Freightliner's control. Network Rail has offered a diversionary route with W8 gauge clearance to enable the traffic to run. Additionally, Network Rail has put RT3973 forms in place following further gauge assessments for several alternative potential wagon and box combinations that would be possible to run with the current gauge restriction (Appendix 2). Network Rail were advised that these solutions did not present as economically viable for Freightliner and therefore were not pursued. Additionally, Network Rail are aware that DRS are able to utilise the Train Slots with the current status of the Network remaining unchanged. This additionally supports our decision that the non-use of these Train Slots is due to economic reasons. Network Rail submit that even if we were to look at Network Code Condition J4.3, that Freightliners choice to not utilise the Train Slot in line with the above would amount to an economic reason.
  - 4.2.6 Network Rail submit that Network Code Part J contains a set of tests that equate to a higher threshold for Network Rail to reach a decision to issue a Failure to Use Notice because the Train Slots in question are underpinned by Quantum Access Rights contained within the Track Access Contracts. As such, it is right that a higher burden is placed on us in this instance. This position is contrasted with the simpler process detailed in Network Code Condition D8.5 where the operator in question has obtained no Access Rights in their contracts.
- 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 highlights that the Train Slots in question have been in the working timetable for over four years. In order for the Freight Market to be able to respond quickly to requests from customers, the model freight contract gives operator's contingent rights to run Train Operator Variation Services for up to twelve months without specific rights in Schedule 5. The Track Access Contract between Network

Rail and Freightliner states, in paragraph 2.3.2, that *'The Duration of any Train Operator Variation Service shall not exceed 12 months.'* There are no Access Rights associated with these Train Slots, additionally no Access Rights have been sought, and as such Freightliner do not have the right to run services in these Train Slots.

- 4.3.2 Network Rail details that Part D of the Network Code does not have a Freight transfer Mechanism akin to Condition J7 of the Network Code. Additionally, there is no mechanism for temporary relinquishment of a Train Slot, as there is for a temporary Specified Relevant Surrender of an Access Right detailed in J2.3.1.
- 4.3.3 Network Rail is aware that DRS have made a S22A application to the ORR for Access Rights for Train Slots that would require utilisation of the capacity of the Train Slots that are subject to this dispute. Should these be granted, this would give DRS priority over Freightliner for these Train Slots.
- 4.3.4 Network Rail note that there is an additional associated Y-path that was not referenced in the initial Failure to Use Notice (4M75 Immingham A2 and B4 FLHH 17:49 – Trafford Park FLT 00:58) . It is our view that this Train Slot is associated with the Train Slot's contained within the original Failure to Use Notice. This Train Slot has been in the working timetable since 30th October 2020 and also has not been used in the 13 weeks prior to the original Failure to Use Notice.
- 4.3.5 In determining whether or not Network Rail has acted reasonably, we would rely on the past precedent of TTP2207 which discussed as part of the determination, the case of *Braganza v BP Shipping Ltd* [2015] UKSC17 when looking at the issue of rationality. It is submitted that in reaching the decision to issue the FTU Notice Network Rail have:
  - Asked the right questions, taking into account circumstances and the terms of the contract;
  - Taken account of relevant matters;
  - Ignored irrelevant matters; and
  - Avoided reaching a result so outrageous that no reasonable decision maker could have reached it.

#### **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 Condition D8.5 of the Network Code in relation to this matter in reaching this decision.
- 4.4.2 Network Rail has considered all information provided in determining that these Train Slots are not being used. Part D of the Network Code makes no reference to the criteria in Condition J4 and there is no precedent that obliges Network Rail to refer to the conditions of J4 when determining, reasonably, if a Train Slot is being used in relation to Condition D8.5. These Train Slots do not have Access Rights, and therefore Part J is not applicable. Network Rail submit it has acted reasonably in reaching the decision to issue the FTU Notice.
- 4.4.3 Network Rail have asked questions of Freightliner, DRS, Network Change Sponsors, and other internal colleagues in order to take into consideration all relevant matters, whilst ignoring irrelevant matters, and believes it has reached a decision that other reasonable decision makers could also have reached.
- 4.4.4 The Train Slots relating to this dispute have no Access Rights supporting them and therefore no right to run. It is important to emphasise, in relation to the Chair's Second Directions (Point 13) that Network Rail do not consider the status of this section of the network as relevant under the Track Access Agreement with Freightliner. Timetable Panel Hearings are based on the legal entitlements of the parties involved, and as the relevant Train Slot is not underpinned by Access Rights and has been in the Timetable in excess of the exemption provided by Clause 2.3 of the Track Access Contract, therefore Freightliner have no legal entitlement to run this service.

- 4.4.5 It is submitted that issuing a FTU Notice to an operator whose Train Slot has no legal right to run must be considered reasonable.
- 4.4.6 In the event that the service is able to run, Network Rail have also taken addition steps to investigate the matter such as:
- Undertaking a 13-week run check;
  - Investigating customer demand (for the incumbent and potential applicants);
  - Undertaken gauge assessments of the routes;
  - Instigated RT3973 Forms for a combination of boxes and wagons of various sizes that are gauge cleared along the route and so are able to physically run; and
  - Offered diversionary routes which Freightliner declined on economic grounds.
- It is submitted that these constitute reasonable steps that in fact go over and above the minimum contractual position set out in Condition D8.5 of the Network Code.
- 4.4.7 In the event that Freightliner disagree with our position regarding the legal right to run this service, we would expect them to produce relevant evidence in support of any such assertion.

## **5 DECISION SOUGHT FROM THE CHAIR**

- 5.1 Network Rail seek the chair to uphold the Network Code Condition D8.5 Failure to Use Notice issued by Network Rail to Freightliner.
- 5.2 Network Rail seek confirmation that it has acted reasonably in deciding that the Train Slots are not being used and therefore progressing with the removal of the Train Slots from the Working Timetable.

## **6 APPENDICES**

1. Network Rail Chronology
2. RT3973
3. STNC/G1/2022/NWC/889
4. DRS Customer Letter of Intent
5. TTP371 TTP513 TTP514 TTP570 TTP571 ORR Appeal Determination

## **7 SIGNATURE**

For and on behalf of

Network Rail Infrastructure Ltd

Signed



Print Name

Rhiannon Saegert

Position

Customer Support Manager