

**FIRST GB RAILFREIGHT'S TIMETABLE
DISPUTE SUBMISSION FOR REFERENCE**

TTP 312

1 DETAILS OF PARTIES

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

(a) **First GB Railfreight Limited**, whose Registered Office is at
15-25 Artillery Lane, London, E1 7HA. ("**GBRf**") ("the Claimant"); and

(b) **Network Rail Infrastructure Limited**, whose Registered Office is at
King's Place, 90 York Way, London, N1 9AG. ("**NR**") ("the Respondent").

Contact Details:

GBRf Ian Kapur.
First GB Railfreight,
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London,
E1 7HA.
Telephone: 02048 461222
e-mail: i.kapur@first-ge.com

NR Matthew Allen.
Network Rail,
City Exchange,
11 Albion Street,
Leeds,
LS1 5ES.
Telephone: 0113 2661111
e-mail: mat.allen@networkrail.co.uk

2 THE PARTIES' RIGHT TO BRING THIS REFERENCE

2.1 This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Condition D 2.2.4 of the Network Code.

3 CONTENTS OF REFERENCE

GBRf has produced this reference and it includes:-

- (a) The subject matter of the dispute in Section 4;
- (b) A summary of the issues in dispute in Section 5;
- (c) A detailed explanation of the issues in dispute prepared by the claimant in Section 6;
- (d) The decisions of principle sought from the Panel in respect of legal entitlement and remedies in Section 8; and
- (f) Appendices and other supporting material.

4 SUBJECT MATTER OF DISPUTE

4.1 The dispute arises as GBRf believes that proper consultation on Network Rail's "Water Orton Possession Strategy Notice ("PSN") 2011 & 2012" has not taken place between Network Rail and itself. GBRf also contends that no evidence has been given to it that the published intended method of implementation for proposed works has either had due regard to the Decision Criteria or taken into account any comments submitted by GBRf and therefore the PSN is not valid.

4.2 Condition D 2.2.2 of the Network Code makes it clear that Network Rail shall consult with Bidders concerning the method of implementation for the proposed works. Conditions D 2.2.3 (a) & (b) of the Network Code state that in deciding such intended method of implementation, Network Rail shall have had due regard to the Decision Criteria and shall have taken into account any comments submitted to it pursuant to Condition D 2.2.2 and given its reasons for discounting any it has discounted.

It is the content of the consultation process between the two companies and transparency of the decisions made that is the matter in dispute as there are several GBRf Intermodal services that would be affected by these possessions.

4.3 A copy of the relevant extracts from the Network Code, referred to above, are attached at Appendix H.

4.4 Copies of NR's Water Orton Preliminary PSN 2011 & 2012 and GBRf's response, NR's Water Orton Decision PSN 2011 & 2012 and GBRf's response, also further e-mails on the subject, are found in Appendices attached to this reference.

5 SUMMARY OF DISPUTE

5.1 Firstly, a chronology of events is useful in showing a clear time line associated with the consultation process for the Water Orton PSN 2011 & 2012. Relevant comments associated with each step of the process have been included.

10 July '09: Water Orton Preliminary PSN 2011 & 2012 issued by NR to GBRf (Appendix A). A response was due by 10 August '09.

2 Aug. '09: GBRf sent a response to the Preliminary PSN 2011 & 2012 pointing out items for correction, requesting information on traffic capacity and available routes within the affected area, suggesting improvements for capacity in the affected area, and giving information on GBRf services that would be affected or unable to run at all, were the proposed access strategies to go ahead as shown (Appendix B).

There was no reply from NR to any of the items raised in the initial GBRf response.

15 Sept. '09: Water Orton Decision PSN 2011 & 2012 issued by NR to GBRf (Appendix C). A response was due by 15 October '09.

6 Oct. '09: GBRf sent a response to the Decision PSN 2011 & 2012 pointing out that, as there had been no reply to GBRf's Preliminary PSN response (dated 2 August '09) there were similar points and questions raised in GBRf's Decision response. It was also stated that, as there had been

no sight of Network Rail's review of operators' formal responses, GBRf hoped to receive answers to questions this time. Notice was given to NR that the Decision PSN was to be a Dispute Item. (Appendix D).

15 Oct. '09: GBRf lodges a Timetable Dispute Item under Condition D 2.2.4 of the Network Code.

25 Nov. '09: An E-mail was received from Joe Warr (Network Access Unit, Network Rail) stating he was *"trying to resolve as many issues as I can before we get to a dispute hearing"* (my italics) (Appendix E).

1 Dec. '09: Formal notification from the Secretary, Access Disputes Committee that a date has been set for the hearing of this dispute along with six other TOCs / FOCs.

E-mail from GBRf to Joe Warr (NR) stating GBRf was *"unhappy that Network Rail hasn't responded to GBRf's response to the Water Orton Decision PSN 2011 & 2012"* (my italics), which was dated 6th October '09. (Appendix F).

2 Dec. '09: GBRf received an e-mail from Joe Warr (NR) stating *"please see attached a spreadsheet which contains Network Rail's formal reply to GBRf's Water Orton PSN response"* (my italics) (Appendix G). This was the first formal response received on the subject. There was further clarification of various possession issues during the day.

5.2 The sequence of events, above, shows that, throughout the Water Orton PSN 2011 & 2012 consultation period, there wasn't actually any proper consultation between Network Rail and GBRf and that a series of deadlines were merely reached and passed without any real discussion having been had. This contravenes Conditions D 2.2.2 and D 2.2.3 (b) of the Network Code.

- 5.3 In issuing the Decision document on 15 September 2009, NR had given no evidence that, in deciding the intended method of implementation, it had had due regard to the Decision Criteria. Taking into account paragraph 5.2, above, along with this Item, it is clear there is no evidence that any part of Condition D 2.2.3 was adhered to. Without demonstrating that it had adhered to all of Condition D 2.2.3, the notice of intended method of implementation (PSN) should not have been published.

6 EXPLANATION OF EACH ISSUE IN DISPUTE WITH RESPONSE

- 6.1.1 The lack of information from Network Rail on the Water Orton PSN 2011 & 2012 documents is clear. Leaving the Preliminary PSN to one side, there was no reply from Network Rail to GBRf's response to the Decision PSN from when it was sent, on 6/10/09, right up to 2/12/09 when, by its own admission, the first formal response from Network Rail was received. Indeed, GBRf believes there was also no response to DB Schenker, Freightliner Intermodal and Freightliner Heavy Haul on its queries and requested information on the PSN. This, therefore, was not "consultation" in any way and is not in line with Network Code conditions D 2.2.2 and D 2.2.3 (b).

- 6.1.2 As notified in GBRf's response to the Decision PSN (sent 6/10/09), there are some proposed possessions that would stop GBRf running its Intermodal services between Felixstowe and Hams Hall as said proposals would block off both the main route and the two alternative routes into Hams Hall terminal. Network Rail has not given any evidence that the Decision Criteria have been taken into account before publishing the proposed possessions.

The Intermodal trains and light locomotive that GBRf requires to run through the proposed blocks are as follows:

1) 2011 Weekend 35 - Phase 1 commissioning - 23:50 Fri. - 06:00 Mon.:

4M02 16:43 (FO) Felixstowe North – Hams Hall (arr. 00:25).

4L02 04:40 (SO) Hams Hall – Felixstowe North (arr. 11:42).

4M21 03:26 (SO) Felixstowe North – Hams Hall (arr. 08:57).

0M21 09:37 Hams Hall – Wembley InterCity Depot (arr. 12:30).

6.1.3 During the Phase 1 commissioning, above, there are other GBRf services that would normally run through the affected area during Saturdays but, in giving suggested revised possession times to NR in its response to the Decision PSN, GBRf had already planned not to run these services. The above trains are those deemed absolutely necessary for GBRf to comply with its contract for its customer, as mentioned in Decision Criteria D6 (c).

6.1.4 It is worth noting that, by taking the proposed possession, Network Rail would be blocking the main W10 gauge route from the Port of Felixstowe via Nuneaton to Hams Hall, the main diversionary W10 gauge route via Sutton Park into Hams Hall, then also the lower gauge, W8 route, via Nottingham and Tamworth into Hams Hall, from 23:50 Friday to 06:00 Monday. This deprives GBRf from running any container traffic, be it the larger W10 gauge services or even a reduced W8 gauge train, which is unacceptable to its customers.

GBRf does not expect Network Rail to not abide by the Network Code but to conduct its consultation and decision for a Possession Strategy Notice in the proper manner.

8 DECISION SOUGHT FROM THE PANEL

8.1 GB Railfreight requests the Panel to determine:

(a) That Network Rail did not consult with GBRf on either the content of the Water Orton Decision PSN or the method of implementation for the proposed works, thus contravening Network Code Condition D 2.2.2.

(b) That Network Rail had shown no evidence that, in deciding the intended method of implementation of the Water Orton Decision PSN 2011 & 2012, it had had due regard to the Decision Criteria, contravening Network Code Condition D 2.2.3 (a).

8.2 GB Railfreight also requests that if the Panel finds in favour of either (a) or (b) or both, that it directs Network Rail to withdraw the Water Orton Decision PSN 2011 & 2012, dated 15th September 2009, or find a suitable method of operation that allows GBRf to run its services listed in paragraph 6.1.2.

9 APPENDICES AND ANNEXES

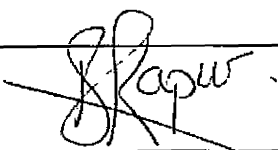
GB Railfreight confirms that it has complied with Rule A1.34 of the Access Dispute Resolution Rules, with the relevant Network Code extracts containing the provisions under which the referral to the Panel arises, the relevant Network Code extracts containing provisions associated with the substance of the dispute and various other documents referred to in the reference. These appendices are as follows:

- i) Appendix A: Water Orton Preliminary PSN 2011 & 2012 issued by Network Rail.
- ii) Appendix B: GB Railfreight's response to the Preliminary PSN 2011 & 2012.
- iii) Appendix C: Water Orton Decision PSN 2011 & 2012 issued by Network Rail.
- iv) Appendix D: GB Railfreight's response to the Decision PSN 2011 & 2012.
- v) Appendix E: E-mail correspondence from Network Rail to GB Railfreight regarding trying to resolve issues raised by GB Railfreight.
- vi) Appendix F: E-mail correspondence from GB Railfreight to Network Rail responding to E-mail in Appendix E.
- vii) Appendix G: Network Rail's formal response to GB Railfreight's Water Orton PSN response.
- viii) Appendix H: Network Code Part D extracts on Possession Strategy Notices and the Decision Criteria.

10 SIGNATURES

For and on behalf of First GB Railfreight Ltd

For and on behalf of Network Rail
Infrastructure Limited

Signed 

Signed _____

Print name: IAN KAPUR.

Print name: _____

Position: GBRf TIMETABLING MANAGER.

Position: _____

Date: 22nd DECEMBER 2009

Date: _____

LIST OF APPENDICES, ANNEXES AND SUPPLEMENTARY MATERIAL