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Access Executive

24 November 2023

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Dear Sarah and Ian

Approval of the 21st supplemental agreement to the track access contract between Network Rail Infrastructure Limited and GB Railfreight Limited dated 11 December 2016

1. Today the Office of Rail and Road (ORR) approved the above supplemental agreement (SA) submitted to us formally on 10 November 2023 under section 22 of the Railways Act 1993 (the Act). This letter explains the reasons for our decision.

Summary

2. This letter directs the approval of contractual rights for GB Railfreight Limited (GBRf) to operate trains at the time slots requested moving sand for UK glassmaking. ORR's decision is based on our analysis of the network's capability, performance and operational aspects. We accept the case made by Network Rail and GBRf as to why these rights should be granted, despite concerns raised by CrossCountry Trains (XC Trains). The key reasons for our decision are:
 - XC Trains raised concerns about performance, but we consider that Network Rail has given these services sufficient scrutiny and analysis to conclude that they do not negatively impact other operators.
 - XC Trains' issue is with "[Network Rail] selling firm rights for freight services on the East Coast Main Line (ECML) that are not yet confirmed as part of the ESG work ongoing for implementation in the Dec 24 timetable". These services are already running and part of the ESG baseline. Therefore, ORR considers it is consistent with principles of fair and efficient use of capacity for Network Rail to sell these freight access rights on the East Coast Mainline, while wider timetable development work is ongoing. Furthermore, this is an improvement on existing rights and reflects current operational activity in the Working Timetable.



- Network Rail is confident that, and has attempted to assure XC Trains, it could accommodate both its current and known aspirant paths alongside GBRf's services.

Purpose

3. The purpose of this agreement is to provide GBRf with firm access rights to support its sand traffic from Middleton, Norfolk, which is used in the UK glassmaking industry. GBRf said in its application that Great Britain has an annual output of over 5 million tonnes of silica sand with the East of England being a major supplier, most of which is then moved to glassworks in Yorkshire.
4. GBRf is amending six of its long-standing firm rights, adding four new rights and deleting two firm access rights for local movements to/from March Yards, on the Peterborough to Doncaster ECML axis. The amended Rights Table now reflects GBRf's current operations and use of capacity.
5. Operations at March Yard have changed in that now the March Up Yard is the main stabling location instead of Doncaster and/or Peterborough. This has been reflected in the amended Rights Table and has been made possible through the reactivation of the March Up Yard and more lines being re-opened at March Down Yard. These changes aim to ease congestion in the Doncaster and Peterborough areas and release some network capacity on the ECML.
6. GBRf says that one-hour windows are vital for both the delivery of product and on-going network performance. GBRf argues that the requested 60 minutes of flex, for each of the arrival and departure windows, gives Network Rail two hours-worth of available flexing and is consistent with our [2016 letter](#), in which we agreed that one-hour windows would be the norm for freight access rights when backed up by commercial contracts with end users.

ORR's role

7. ORR is the independent safety and economic regulator for Britain's railways. For track access, we make sure that passenger train companies and freight train operators have fair access to the rail network and that best use is made of capacity. Our guidance module [The statutory and contractual framework \(July 2022\)](#) sets out how we do this. If a train operator wants to access the railway network, it must apply to Network Rail for access rights, which then requires approval by us the Act. Section 4 of the Act lists the duties which we must consider in exercising our functions under the access regime.

Industry consultation

8. Network Rail undertook an industry consultation from 15 June 2023 to 19 July 2023 and two issues were raised. DB Cargo raised an objection to one proposed access right, which was duly removed.



9. XC Trains said it could not support new firm rights on the ECML while a revised timetable is being developed by the ECML Event Steering Group (ESG). XC Trains questioned whether specific services (6L63/4 and 4L66) had been included in the ESG timetable.
10. Network Rail confirmed that the paths included in GBRf's 21st SA are not new to the Working Timetable (WTT) and are longstanding services. Network Rail's Capacity Planning team had considered and accepted these paths into the ECML ESG WTT and, therefore, is supporting the sale of firm access rights.
11. On 27 July 2023, following attempts made by Network Rail to resolve XC Trains' objection, XC Trains confirmed that its concerns remained, and it objected to any application for firm rights on the ECML. This objection would remain until it had seen sufficient modelling and received assurance that capacity will be available for its own aspirations. There were no other unresolved objections.

ORR's review process

12. On 10 August 2023 we asked Network Rail to set out its position on GBRf's application in relation to the ECML ESG timetable work and its views on XC Trains' objections. We also asked Network Rail to clarify the position of XC Trains' services in the ECML ESG timetable and to provide evidence that the rights would not significantly affect other operators.
13. On 15 September 2023 we placed the key submission documents, including the consultation correspondence, on our website for transparency. Network Rail committed to continue working with XC Trains concurrently to resolve its outstanding objections.
14. On 5 October 2023 Network Rail notified us that XC Trains' objections remained unresolved. Network Rail said that XC Trains has been involved in the ECML ESG and has contributed to timetable workshops. Network Rail confirmed it continued to support the application and that XC Trains' objection was "not relevant to this application". On 9 October 2023 we asked XC Trains some questions. On 19 October, we invited Network Rail to add any final comments in response to XC Trains' answers.
15. The Rights Table in the SA submitted to us on 8 November 2023 was updated on 10 November 2023, with a minor correction to a non-contractual comment.
16. We have considered the application in detail and whether it would equate to fair and efficient use of capacity. ORR's operations advisers have been engaged in reviewing the application. We also factored in what impact the access rights have on the performance of existing services, especially on a busy network.



XC Trains' representations

17. Part of the reason for XC Trains' objection is that the rights which now make up its recent section 22A application were not supported by Network Rail. XC Trains would not support any application for firm rights on the ECML as it had recently been denied an extension to its own rights on the ECML by Network Rail.
18. In its representations, XC Trains argued that it "has not been provided with any evidence from Network Rail that the rights for these services have been reviewed in detail against the future aspirations of the ECML ESG TT [timetable]". XC Trains confirmed that it is unable to support any freight access rights on the ECML prior to the conclusion of the ESG work.
19. XC Trains also claims that there is an inconsistency in the way that rights are processed. It questioned why it has had to demonstrate to Network Rail that it should be given firm access rights when the rights it sought were also part of the ESG timetable. XC Trains referenced specific services included in GBRf's 21st that it asserted cause issues with its own 26th, 29th and 30th SA applications. For example, it highlighted risk of a potential interaction between two GBRf services and one of its own at Doncaster Platform 8 "should there be any subsequent retiming or re-platforming as part of the ESG work". XC Trains specified three services, which potentially conflict with GBRf's rights, that either are running today with firm rights (1E64) or form part of the base quantum of services within the ECML ESG timetable (1E60 and 1L42).

Network Rail's position

20. Network Rail has been consistent in its support of GBRf's 21st SA. It has been signed off by Network Rail's Capacity Planning team, Eastern Route and SoAR Panel. Network Rail states that the services reflected in the SA have been in the working timetable for many timetables and are therefore in the ESG base timetable whereas XC Train's services are aspirational.
21. Network Rail has considered GBRf's application and satisfied itself that "it can accommodate both current and known aspirant paths for XC Trains, alongside the GBRf applied paths". It has also confirmed that the full XC Trains 'Hydra' aspirations were included in the base ECML ESG timetable. Network Rail has reassured XC Trains that there is no clash with its aspirant paths and GBRf's application in fact reduces the quantum rights by two schedules. XC Trains has not engaged further with Network Rail to pursue further details on, or to resolve any, potential clashes.

ORR analysis

Performance modelling

22. XC Trains argues that it has not been provided with evidence from Network Rail that the rights for GBR's services have been reviewed in detail against the future aspirations of the ECML ESG TT. It objects to any other application from freight operators that are seeking firm rights on the ECML prior to the conclusion of the ECML ESG TT. XC Trains argue that performance modelling of the ECML ESG TT is not yet at an advanced enough stage for Network Rail to sell long term firm access rights when it cannot yet guarantee industry that all services can be included and that the performance of that TT, once implemented, will be satisfactory.
23. Network Rail has confirmed that it has followed its internal clearances with Eastern Route and the Sale of Access Rights (SoAR) Panel duly approving the services. These services have been running for years and we are not aware of any significant performance issues. Performance modelling of the ECML ESG TT is a separate workstream and, although related, this application is not dependent on its outcome.

XC Trains and unused access rights

24. On 25 September 2023, XC Trains submitted a section 22A application to ORR proposing the extension of a number of unused access rights currently in its TAC, which were previously included in its 26th SA. XC Trains states that it plans to use the rights again from SCD 2025, while conceding that they will remain inactive for the next three timetable periods. Network Rail does not agree to the application, citing its policy on unused access rights and pointing out that XC Trains' current TAC expires on PCD 2024, a full timetable period before these rights will be required again.
25. XC Trains has explained that it did not consider it appropriate to relinquish its access rights, even on a temporary basis, in light of its recently issued National Rail Contract (NRC) and the commercial requirement for those rights. XC Trains pointed out that no Part J4 process was instigated by Network Rail even though it appeared to be aware of the unused access rights (and XC Trains' aspirations to retain them) through the business planning process.
26. Our decision on the section 22A application ([issued 17 November 2023](#)) acknowledged that although Network Rail had failed to act decisively on XC Trains' access rights. However, this did not negate the principle of the unused access rights policy, nor the fact that XC Trains' application is in direct opposition to it. We noted that Network Rail not following its own processes in failing to instigate a Part J4 Failure to Use notice when it first became aware of the unused rights, led to a section 22A application rather than using the process set out in the Network Code to address the issue.



27. Although ORR agrees that Network Rail has not properly followed its own processes with regards to unused access rights, this should not become a factor during an industry consultation for another operator gaining access rights. These are not under-utilised paths. GBRf is seeking to amend its rights table to reflect its current operations of long-standing services in and out of March Yard.

XC Trains' service aspirations

28. XC Trains argue that the ECML ESG timetable is still a work in progress with significant issues still to resolve and that Network Rail should not be agreeing to the sale of access rights on the ECML via Doncaster with the timetable not being fully validated. XC Trains says it had to demonstrate to Network Rail as part of its 26th and 30th SA applications that the rights should be included in its TAC. This is despite the rights being sought to extend already being part of the ESG timetable. It believes that Network Rail has applied two different logics to the same situation for GBRf and XC Trains which has achieved two opposite outcomes.

29. We support Network Rail's progress in the development of the ECML ESG timetable and, although related, does not prevent it from selling freight access rights on the ECML for services which are already running, and where operational performance is known. This application represents an improvement on existing rights and reflects operational activity in the Working Timetable. In its recent S22A application, XC Trains stated that it plans to use certain access rights in its TAC from SCD 2025 but concedes that they will remain inactive for the next three timetable periods. Network Rail cited its policy on unused access rights and pointed out that XC Trains' current TAC expires on PCD 2024, a full timetable period before it believes these rights will be required again. Therefore, ORR does not share the view that Network Rail has applied a different logic to GBRf that it did for XC Trains as they are two different scenarios.

Conflicting rights

XC Trains claims that there are potential issues with services included within GBRf's 21st SA and services it has applied for through its 26th, 29th and 30th SA application, which XC Trains argues are all either running today (and have firm rights) or form part of the base quantum of services within the ECML ESG TT. XC Trains argues that this would prevent it from delivering its part of the ESG TT scope and its Train Service Requirements as part of its recently signed National Rail Contract with the Department for Transport.

30. We consider XC Trains' argument as not sufficiently substantiated in that it is objecting to GBRf's access rights on the grounds that the ECML ESG has not yet been completed, yet parts of its S22A application describe its access rights that are bound up in the uncompleted ESGs on East West Railway and ECML. XC Trains' objections appear to be dealing in possible interactions with services in future timetables. Although strong evidence to suggest that GBRf paths would clash with soon-to-run XC



Trains services could be grounds for objecting to this application, in this case XC Trains' argument is not convincing and is dependent on other factors.

ORR conclusions

31. All of GBRf's rights have associated train slots in the May 2023 timetable. Network Rail has confirmed that it could accommodate both current and known aspirant paths for XC Trains alongside these GBRf services. The application has received sign-off from the necessary parts of Network Rail. The fact that XC Trains had not been supported by Network Rail when attempting to extend its own rights is not sufficient reasoning for objecting to, and significantly delaying, another operator's track access application. It is right that Network Rail has leeway within its sale of access policies to consider changes on a case-by-case basis.
32. In the event where there are unresolved issues arising from Network Rail's consultation regarding the likely operational performance impact, we require supporting performance information as part of an application. Our view is that there has been sufficient scrutiny and performance modelling on these services. They have been running for several timetables and therefore a significant bank of historic running data can be analysed to assess performance. We agree with Network Rail in that although a full performance modelling exercise is sometimes warranted, in context, it does not invalidate what Network Rail has done for this application.
33. This application has been made more complex and a lengthier process due to the outstanding objections raised during the industry consultation. XC Trains' objection partly follows-on from Network Rail not supporting its unused access rights, which lead to a S22a application. Network Rail has acknowledged that it did not progress a Failure to Use notice under Part J4 of the Network Code as it should have done when XC Trains failed to surrender the rights in question. [We expect Network Rail and operators to consistently follow the Part J Network Code processes.](#)

Our duties under section 4 of the Act and our decision

34. We have concluded that approval of this SA strikes the appropriate balance in discharging our statutory duties under section 4 of the Act; in particular, those relating to protecting the interests of users of railway services (section 4(1)(a)), promoting the use of the railway network in Great Britain for the carriage of passengers and goods (section 4(1)(b)), contribute to the development of an integrated system of transport of passengers and goods (section 4(1)(ba)), and enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance (section 4(1)(g)).



Conformed copy of the track access agreement

35. Under clause 18.2.4 of the track access contract, Network Rail is required to produce a conformed copy, within 28 days of any amendment being made, and send copies to ORR and the GBRf. Please send the conformed copy to me at ORR.

Public register and administration

36. Electronic copies of this letter, the approval notice and the agreement will be sent to the and Network Rail's Policy and Access Team. Copies of the approval notice and the agreement will be placed on ORR's public register (website) and copies of this letter and the agreement will be placed on the ORR website.

Yours sincerely

Ryan Holt

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