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16 December 2020

Dear Mike and Nigel

Direction of the 27th Supplemental Agreement (SA) to the Track Access Contract dated 11 December 2016 (the TAC) between Network Rail Infrastructure Limited (Network Rail) and DB Cargo (UK) Limited (DBC) (the Parties)

1. The Office of Rail and Road (ORR) on 16 December 2020 under section 22A of the Railways Act 1993¹ (the Act) directed the parties to enter into the DBC 27th SA of the TAC. This letter explains our reasons for the decision to direct a SA which provides **firm rights with 24-hour windows for 4L08 and 4L45 (MSX), firm rights with 1-hour window for 4E45 and contingent rights to expire on Subsidiary Change Date 2022 (SCD 22) for 4E08, 4D10 and 4L45 (MO)**.
2. DBC's application explained it could not reach agreement with Network Rail, primarily because the latter was only willing to offer 24-hour contingent rights on all of the application. Additional representations between the parties to ORR were needed to demonstrate evidence of their concerns. In particular, we asked Network Rail to provide evidence of its concerns on capacity. We have considered DBC's and Network Rail's representations in our final directions. ORR's review of the evidence and conclusions are summarised from page 6.

Background

3. DBC applied for:
 - a. four new firm rights for traffic between London Gateway Port and Wakefield Europort;
 - b. one new firm right between Doncaster Belmont Yard and Wakefield Europort; and

¹ The Railways Act 1993 sets out the procedures and approach for ORR to follow for access applications under Schedule 4. It also provides ORR its duties in section 4.

c. four amendments to services between Port of Felixstowe and Wakefield Europort.

All of the services proposed are already operating and have validated train slots in the May 2020 Working Timetable. The rights applied for are summarised as²:

Service Group Reference	Flow No	Train Reporting Number	Minimum Turn Around Time at Origin	Days per Week	Departure Window From	Departure Window To	Origin	Origin Stanox	Destination	Arrival Window From	Arrival Window To
Extracts from Service Group 4075: Flows 31 and 32											
4075 52407545	31	NOT USED 4E08		TTHO	03:11	04:11	LONDON GATEWAY DB CARGO	51126	WAKEFIELD EUROPORT	09:26	10:26
4075 52407545		4E08		WFO	03:04	04:04	LONDON GATEWAY DB CARGO	51126	WAKEFIELD EUROPORT	09:26	10:26
4075 52407545		4E08		SO	03:04	04:04	LONDON GATEWAY DB CARGO	51126	WAKEFIELD EUROPORT	09:20	10:20
4075 52407545		4L08		SX	14:55	15:55	WAKEFIELD EUROPORT	17197	LONDON GATEWAY DB CARGO	23:09	00:09
Extracts from Service Group 2324: Flow 12											
4075 52407529 52407540	32	4E45		FSX	21:48	22:48	FELIXSTOWE SOUTH EWS DBC	49132	WAKEFIELD EUROPORT	06:09 04:30	06:09 05:30
4075 52407529 52407540		4E45		FO	21:48	22:48	FELIXSTOWE SOUTH EWS DBC	49132	WAKEFIELD EUROPORT	04:37	05:37
Extracts from Service Group 2324: Flow 13											
4075 52407540		4D10		MO	05:49	06:49	BELMONT DOWN YARD	23432	WAKEFIELD EUROPORT	06:45	07:45
Extracts from Service Group 2324: Flows 12 and 13											
2324 4075 64232420 52407540	12	4L45		MO	00:00 09:34	24:00 10:34	DONCASTER-BELMONT WAKEFIELD EUROPORT	23432 17197	FELIXSTOWE SOUTH EWS DBC	00:00 16:03	24:00 17:03
Transferred from Service Group 4075: Flow 32											
2324 4075 64232420 52407540	13	NOT USED		MSX	00:00 09:34	24:00 10:34	WAKEFIELD EUROPORT	17197	FELIXSTOWE SOUTH EWS DBC	00:00 16:03	24:00 17:03
Transferred to Service Group 4075: Flow 32											
2324 64232420	12	NOT USED		MO	00:00	24:00	DONCASTER-BELMONT	23432	FELIXSTOWE SOUTH EWS	00:00	24:00
Transferred to Service Group 4075: Flow 32											
2324 64232420	13	NOT USED		MSX	00:00	24:00	WAKEFIELD EUROPORT	17197	FELIXSTOWE SOUTH EWS	00:00	24:00
Transferred to Service Group 4075: Flow 32											

- The proposed rights, with 1-hour windows at origin and destination, are described as being required in order to support on-going time-critical intermodal services. 1-hour windows are the default position for freight services, see ORR's 2016 decision letters for FOC track access contract applications under section 17³.
- The application would allow DBC to run one return intermodal service five days per week from London Gateway to Wakefield Europort, one return intermodal service five days per week from Felixstowe to Wakefield Europort, plus one service per week (MO) from Doncaster to Wakefield Europort. It describes a requirement for clearly defined arrival and departure times to tie into port and inland terminal slots at each end of the route.
- Network Rail stated that it could not support firm rights with 1-hour windows. However, it was prepared to grant contingent rights with 24-hour windows. DBC

² The changes/new rights are highlighted in yellow.

³ <https://www.orr.gov.uk/sites/default/files/om/s17-db-schenker-rail-uk-limited-decision-letter.pdf>

was unable to agree terms with Network Rail, so this section 22A application was formally submitted to ORR on 17 June 2020.

7. ORR's consideration of this application coincided with a separate application for the GBRf 11th SA. As with the DBC 27th SA, that also related to services that are routed via Doncaster Station. An important part of our consideration of these applications was ensuring that Network Rail has applied its decision making criteria consistently to both applications.

The East Coast Mainline

8. The services in the DBC and GBRf applications are routed via the East Coast Mainline (ECML) which is facing a long term issue of demand from operators exceeding available capacity. An ECML Event Steering Group⁴ (ESG) was set up to evaluate service specifications, aspirations and journey times on the route. It is developing a proposed working timetable for May 2022 onwards and has completed its initial stages. The aim of Phase 3 of the ESG is to deliver a draft timetable by April 2021 in line with D-55 Notification of Significant Change milestone in the May 2022 timetable production timeline.
9. To avoid overselling capacity and protect performance for existing contractual rights, Network Rail has a specific ECML access policy in place, which it most recently updated on 7 December 2020. The policy now states that for access rights that have already been sold until May 2020 on a contingent basis, and subsequently sold until December 2021, Network Rail would expect to agree to the perpetuation of these access rights on a contingent basis until May 2022 subject to taking account of the access rights directed in ORR's letter dated 12 May 2016. It is silent on the sale of new rights. ORR expects that applications for new rights will be assessed on a case by case basis.

Industry consultation

10. An industry consultation was conducted by Network Rail between 22 April and 22 May 2020. Responses were received from Transport Focus, C2C Rail, West Yorkshire Combined Authority, GBRf and Cross Country Trains.
11. GBRf stated that there were enough contractual checks and Part J mechanisms in place to permit business to continue as normal and ECML rights to be approved. No concerns were raised and there were no outstanding unresolved issues.

Parties' representations

12. In this case, the evidence provided in Network Rail's initial representations did not demonstrate its capacity concerns. Consequently, ORR sought clarification and additional evidence from Network Rail at that initial stage and on several further occasions throughout the process in order to understand the evidence base.
13. We consider that there have been two main effects of Network Rail's position which have directly impacted on the application process. Firstly, given the lack of clarity relating to what capacity will be available, it is clear that Network Rail found it difficult to justify its general policy to DBC prior to its formal applications being

⁴ This is in line with Part D of the Network Code.

made. Secondly, as evidence to support Network Rail's decision had not been available during discussions between the parties, it was similarly not provided to ORR when requested. This resulted in significant delay to the section 22A process, whilst Network Rail was provided with additional time to provide evidence to support its position. Significantly, when pressed, Network Rail recalculated the capacity available for some of the DBC rights.

Network Rail position

14. Relating to the rights contained in the 27th SA, Network Rail confirmed that it did not support a sale of new firm rights for the duration of DBC's contract (to 2026). It would be willing to consider supporting an application for contingent rights to expire on PCD2021 in line with its ECML letter of 19 June 2020 and would reconsider the application, along with any other rights on the ECML, once the ESG concludes.
15. Network Rail also noted that the final freight paths that it could offer would be subject to final detailed development, especially flighting of trains on dual-track sections of the ECML such as Doncaster to York. Overselling capacity through Doncaster was noted as the biggest single risk to the ESG. Network Rail considered that until this work was concluded these rights should be sold as contingent and time limited. In a similar vein, any additional 1-hour window rights would be sold as contingent rights in line with its ECML access rights policy until completion of the ECML timetable re-write to retain as much flexibility as possible.
16. Network Rail emphasised the key ESG timetable dates were:
 - a. 18 December 2020: Draft ECML May 2022 timetable to be issued for Industry consultation.
 - b. April 2021: Final May 2022 timetable available.
 - c. 23 April 2021: ESG completes its function and the sale of Access Rights on the ECML is expected to revert to a 'business as usual' state.

Specific constraints for the rights sought

17. Doncaster Station was highlighted by Network Rail as a challenging location for timetable validation. Therefore, until the ESG work has concluded these rights should be sold as contingent rights with any additional 1-hour, or 24-hour window rights to be sold as contingent rights in line with the ECML access rights policy until completion of the ECML timetable re-write to retain flexibility.
18. ORR responded to Network Rail on 29 July requesting further details of ESG Phase 2, clarity over its analysis of the sections of the rights requested that can be accommodated and those that cannot and details of Doncaster area performance issues to support Network Rail's statement regarding "*challenging location for timetable validation at Doncaster*".
19. A response was received from Network Rail on 17 August 2020 stating that improved confidence in accommodating paths between Felixstowe and Wakefield meant that **firm rights with 24-hour windows could be offered**, except for the Monday only service. Between London Gateway and Wakefield, its position was still contingent only but said "*when the ECML timetable becomes more mature around the Doncaster area, Eastern Region will grant firm Rights to DB Cargo.*"

ORR pointed out that this response appeared to be inconsistent with its reply on the GBRf case and Network Rail later changed this to “*will review the position regarding the sale of firm Rights.*”

20. DBC responded to Network Rail’s representations on 10 September 2020. It noted that Network Rail’s latest position on many of the access rights represented an improvement over its previous position of willing to offer contingent rights only across the two applications. However, it still did not meet DBC’s requirement for firm rights with ‘one-hour’ arrival and departure windows which it believed necessary to allow it to continue to operate all of the intermodal services concerned with a reasonable degree of certainty and assurance and prevent loss of business to the road haulage sector.
21. DBC considered Network Rail’s representations “*remained at a general level despite the increased confidence in accommodating freight paths between Finsbury Park and Doncaster and did not demonstrate any identifiable material conflicts preventing sale of 1-hour windows*”. It said it was unacceptable to await the conclusion of the ESG which would prolong the current uncertainty and undermine customer confidence in rail as a viable alternative to road. It requested clarity on specific services to and from Felixstowe, window sizes being offered and explanations why such large 24-hour windows were required. For example, in respect of service 4D10, DBC said that Network Rail did not need such a large window in order to be able to have an opportunity to retime a service earlier into a period that avoids the morning peak as presumably such a period would not be greater than around five hours in any case (e.g. from 00:00 to 05:00).
22. On 1 October 2020 Network Rail responded to DBC’s letter on the points raised. It said it “*could not support 1-hour rights because it cannot be demonstrated that there are no conflicts with the future passenger operator access rights as directed by ORR in May 2016*”. For headcode 4E45 (FSX) & (FO) only a 24-hour window could be given despite DBC already holding 1-hour firm rights for this existing service.
23. On 8 October 2020 ORR queried with Network Rail:
 - a) why 1-hour or 4-hour windows would not provide the requisite flexibility for the services;
 - b) that conflicts with other rights be identified; and,
 - c) with regards specific reference to 4E45 (FSX) & (FO), we noted that the change sought was to move the time slot of an existing 1-hour window by 40 minutes. We queried why Network Rail consider that a 24-hour window was required in order to accommodate this change, and whether Network Rail’s decision here was consistent with its policy to allow changes to services that do not use up additional capacity but which are potentially more efficient⁵.
24. Network Rail’s response on 19 October 2020 did not supply any evidence for the difficulties posed within Doncaster Station limits. We requested train graphs, along with performance and timetable analysis, in order to allow Network Rail to

⁵ <https://www.orr.gov.uk/sites/default/files/om/gb-railfreight-8th-sa-decision-letter.pdf>

evidence the reasons for its decisions. We were advised that no documents existed at that time which met these descriptions.

25. Network Rail confirmed its understanding that ORR would expect to see evidence of the potential conflicts which prevented it from supporting firm rights, including specific headcodes. However, because the draft timetable has yet to be completed, Network Rail did not consider it was feasible to provide such a level of evidence and noted that any examples of potential conflicts identified then, could be different once the draft timetable is issued on 18 December 2020. Network Rail considered this position to provide it with the flexibility it required to retime these services and make the best use of capacity.
26. We noted that Network Rail had offered contingent rights for the GBRf 11th SA services and asked them to explain the reasons for this different approach.
27. Network Rail was offered an additional week to provide further representations, and specifically asked to justify why DBC had been offered firm 24-hour rights whereas GBRf's 11th SA was only offered contingent rights for their respective services which passed through the Doncaster pinch point. Again, we raised the issue of 24-hour windows for 4D10 and 4E45 and in the case of the latter, why the "one in, one out" policy was not being applied.
28. Network Rail responded on 23 October 2020 with train planning diagrams and an example of ECML conflicts between York and Edinburgh to highlight the difficulties. It conceded that 4E45 [FSX] & [FO] could be sold as 1-hour window firm rights. This was because it acknowledged that the nature of the changes being requested were immaterial with no significant impact on the timetabling work currently being undertaken.
29. ORR asked Network Rail to explain the different approaches for GBRf and DBC. On 30 October 2020 Network Rail advised that having examined the paths through Doncaster it realised there would be insufficient capacity. For consistency it would have to withdraw its offer of 17 August 2020 to DBC of 24-hour window firm rights. On 7 December 2020 Network Rail confirmed that it had rescinded its offer of firm rights to be replaced by contingent rights. Network Rail said that offering firm rights to DBC for the services in question had been an "oversight". It said "*whilst we are still undertaking the ECML ESG analysis around Doncaster, not all of the required information is available to make firm Right decisions at this time.*"

ORR review

30. Although later described by Network Rail as an "oversight", ORR considers that the second set of representations submitted by Network Rail contained a significant error. This should have been identified in Network Rail's analysis and internal validation processes and not offered as an option. ORR expects that all representations made to it as part of the section 22A process will be fully detailed and considered.
31. ORR recognises that Network Rail is reaching the final stages of the ECML ESG. This is a complex project which aims to resolve the long term issue of demand exceeding network capacity on the ECML. Our review should be seen within that general picture and requires us to balance our statutory duties to ensure our decision leads to the best outcome for multiple operators.

32. Although Network Rail consistently provided a narrative explanation for its decisions, the lack of granular detail delayed ORR's decision. Network Rail contends that it is difficult to provide that detail when new timetables, with competing demands, are being developed. We recognise timetable development provides a degree of uncertainty. Both FOCs indicated to ORR they felt compelled to use section 22A for resolution.
33. ORR considers that the evidence initially provided by Network Rail did not initially offer sufficient evidence to show it had considered the specific impact that the rights applied for might have. This created significant difficulties. Firstly, given the lack of clarity relating to what capacity will be available, it is clear that Network Rail found it difficult to justify its general policy to DBC prior to its formal application being made. Secondly, as evidence to support Network Rail's decision had not been made available during discussions between the parties, it was similarly not available to provide to ORR when requested. This led to significant delay to the section 22A process whilst Network Rail was provided with additional time to prepare its evidence.
34. However, ORR recognises that the ECML is facing demand from operators that, in the round, exceeds capacity. The dates for the work of the ESG to conclude are within six months and Network Rail has stated that it will have a full understanding of available capacity in April 2021. These two points are central to our conclusions in this case.
35. Although definitive evidence was not forthcoming to support Network Rail's statement that the Doncaster Station area is the biggest risk for overselling capacity in the ESG, ORR has not seen sufficient evidence to enable us to conclude that sufficient capacity exists to allow a direction for the sale of all the firm rights sought in this application.
36. In this case, despite the difficulties of obtaining clarity on the available capacity, ORR is satisfied that, under the current circumstances, it is appropriate to direct the rights set out below. This position has been reached as a result of the exchanges that have occurred during our consideration of this particular case and not simply due to the existence of the ESG. FOCs should continue to use the section 22A process where they cannot reach agreement with Network Rail.
37. More broadly, we note that Network Rail has stated that the rights sought in this application are included in ESG's Indicative Train Service Specification (ITSS). As such it remains an objective of the ESG to accommodate the rights in the long term. We encourage both parties to continue to work together in that process and note that clarity on its conclusions will increase from December 2020 and the final position known in April 2021.

Conclusion

- 38. We therefore direct Network Rail to enter into an agreement for the following new rights:**
- a. Firm rights with 24-hour windows: 4L08 and 4L45 (MSX)**
 - b. Firm rights with 1-hour window: 4E45**
 - c. Contingent rights to expire on SCD2022 4E08, 4D10 and 4L45 (MO).**

39. As a result of ORR's consideration of this application, two firm rights are being directed compared to those rights which Network Rail was initially willing to offer.
40. While we note DBC's disappointment that the rights Network Rail offered as firm in its letter of 17 August, appear to have been offered in error, and were subsequently withdrawn on 30 October, we are satisfied that, under the current circumstances, it is appropriate to direct the rights set out above.
41. The existence of an ESG and the development of a provisional timetable does not mean Network Rail can ignore new requests for capacity, which should be considered on their own merits. Further, ORR will consider applications under section 22A on their own merits. However, it is likely that a Network Rail policy statement and other known constraints will at least indicate issues with capacity. Where Network Rail has a special access policy in place, we expect it to be able to articulate and demonstrate to applicants what the issues are and the evidence as to why new services cannot be accommodated on a firm rights basis, where that is the case.
42. In considering the agreement and in reaching our decision, we have had to weigh and strike the appropriate balance in discharging our statutory duties under section 4 of the Act. In making this decision, we have taken into account the following duties in particular:
- to protect the interests of users of railway assets;
 - to promote the use of railway network in Great Britain for the carriage of passengers and goods and the development of that railway network, to the greatest extent ...economically practicable;
 - to promote efficiency and economy on the part of the persons providing railway services; and
 - to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

Conformed copy of the track access contract

43. Under clause 18.2.4 of the TAC, Network Rail is required to produce a conformed copy, within 28 days of any amendment being made, and send copies to ORR and the Train Operator. Please send the conformed copy to me at ORR.
44. Copies of the approval notice and the agreement will be placed on ORR's public register and copies of this letter and the agreement will be placed on the ORR website. I am also copying this letter without enclosures to the Regulatory Reform Team at Network Rail and to the Department for Transport.

Yours sincerely

S Jones

Steve Jones