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Dear Rob and Ian

Direction of the 11th Supplemental Agreement (SA) to the Track Access Contract dated 11 December 2016 (the TAC) between Network Rail Infrastructure Limited (Network Rail) and GB Railfreight Limited (GBRf) (the Parties)

1. The Office of Rail and Road (ORR) on 16 December 2020 under section 22A of the Railways Act 1993 (the Act) directed the parties to enter into the GBRf 11th SA of the TAC. This letter explains the reasons for the decision to direct a supplemental agreement which provides **firm rights with 24-hour windows for 4D06 and 4D15, and contingent rights to expire on the Subsidiary Change Date 2022 (SCD 22) for 4N06, 4D08 (SX), 4D08 (SO), 4N08 (SX), and 4D12 (SO).**
2. GBRf's application for seven new 1-hour firm rights did not match Network Rail's offer of contingent rights expiring in December 2021. 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 GBRf's and Network Rail's representations in our final directions. ORR's review of the evidence and conclusions are summarised from page 7.

Background

GBRf's application

3. GBRf sought seven new firm rights for new-to-rail Intermodal flows between Teesport and Doncaster i-Port terminal. These rights support new W10-gauge intermodal

services, with one set of wagons managing two full rotations over a 24-hour period.

- GBRf explained the need for 1-hour windows on the basis that the rights run off the mainline and on to private infrastructure, where capacity is limited and arrivals and departures need to be co-ordinated with other users. The rights applied for are summarised as:

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
4601	294	4D06	134	SX	21:56	22:56	Tees Dock GBRf	15622	Doncaster i-Port GBRf	01:35	02:35
Non-contractual comments:											
4601	295	4N06	154	EWD	04:00	05:00	Doncaster i-Port GBRf	23405	Tees Dock GBRf	06:31	07:31
Non-contractual comments:											
4601	296	4D08	157	SX	09:08	10:08	Tees Dock GBRf	15622	Doncaster i-Port GBRf	12:30	13:30
Non-contractual comments:											
4601	297	4D08	132	SO	08:43	09:43	Tees Dock GBRf	15622	Doncaster i-Port GBRf	12:30	13:30
Non-contractual comments:											
4601	298	4N08	214	SX	16:04	17:04	Doncaster i-Port GBRf	23405	Tees Dock GBRf	19:42	20:42
Non-contractual comments:											
4601	300	4N13	155	SO	15:05	16:05	Doncaster i-Port GBRf	23405	Tees Dock GBRf	18:05	19:05
Non-contractual comments:											
4601	299	4D15	-	EWD	01:55	02:55	Doncaster i-Port GBRf	23405	Doncaster i-Port GBRf	03:16	04:16
Non-contractual comments:											

- Network Rail stated that it did not support firm rights with 1-hour windows. It was though willing to consider supporting an application for contingent rights to expire on the Principal Change Date December 2021 (PCD 21).
- GBRf formally submitted its application to ORR on 18 August 2020 after it was unable to agree terms with Network Rail. It was clear to GBRf that any new firm rights applied for over the East Coast Main Line, when not accompanied by surrendered firm rights, would not be agreed to by Network Rail. As the applicant sought additional rights the application was made to ORR to consider the application under section 22A of the Act.
- In this case, Network Rail has not been able to readily produce the evidence (requested by ORR) to demonstrate the reasons for its decisions for each individual right. This has, at least in part, been due to Network Rail's ongoing work to resolve long term capacity issues on the East Coast Mainline, and compounded by the ESG process now entering its final stages.
- ORR's consideration of this application coincided with our consideration of a separate application, for the DB Cargo 27th SA (the DBC 27th), which also relates to services that are routed via Doncaster Station. Ensuring that Network Rail has applied its decision making criteria consistently to both applications is an important consideration for us.

The East Coast Mainline

- The services in this SA are routed via the East Coast Mainline (ECML) which is facing a long term issue of demand from operators exceeding available capacity.

10. An ECML Event Steering Group¹ (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.
11. 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

12. An industry consultation was carried out by Network Rail between 19 August and 16 September 2019. Responses were received from Northern Railway (Northern) and Crosscountry Trains Ltd (Crosscountry).
13. Northern noted that it had been unable to obtain firm rights for its own new ECML services, which were subsequently placed in to contingent rights. Northern considered that all new rights for the ECML should be sold as contingent in order for Network Rail to demonstrate that it was treating all operators equally.
14. Crosscountry stated that it could not support the application for the following reasons:
 - a. 4D06 – would require movements to be very precise in order not to affect performance of other rights in the Doncaster area at the timings proposed;
 - b. 4D08 – would require movements to be very precise in order not to affect performance of other rights in the Doncaster area at the timings proposed; and,
 - c. Crosscountry expects new rights on the ECML to be granted as contingent.
15. Due to the delay between this consultation and submission of the application, ORR asked GBRf to write to consultees in May 2020 and offer them an opportunity to provide any new representations. GBRf has confirmed that no further responses were received.

¹ This is in line with Part D of the Network Code: <https://www.networkrail.co.uk/industry-and-commercial/information-for-operators/network-code/>

Parties' representations

16. In this case, the evidence provided in Network Rail's initial representations of 15 July 2020 did not demonstrate its capacity concerns. Consequently ORR sought clarification and additional evidence from Network Rail at the outset and continued to do so throughout the process in order to try and understand the evidence basis for its position (set out below). Supplementary additional representations were received from Network Rail on: 14 August, 23 October, and, 30 October 2020.

Network Rail position

17. Network Rail confirmed that the services associated with the 11th SA are established in the current Working Timetable, but that the ECML timetable structure is going to significantly change with the planned May 2022 timetable recast. This could result in schedules beyond the core ECML geography being retimed from origin/to destination.
18. Although it was noted that the ESG is keen to keep re-timings beyond the core ECML geography to a minimum, Network Rail cannot, at this point confirm that sufficient capacity exists at the times that the associated Train Slots are required to operate and so cannot support the sale of firm rights.
19. Network Rail was willing to consider supporting an application for contingent rights to expire on the Principal Change Date in December 2021 (PCD 21).
20. Network Rail explained the sale of access rights on the ECML was conducted in-line with its ECML access policy of 19 June 2020. Within that policy there is provision for all access rights requests to be considered on a case by case basis, thus individual rights affected by the policy could be sold as firm rights if evidence was available to demonstrate that capacity existed and that no clashes would be created.
21. Network Rail confirmed that Phase 2 of the ESG developed three concept timetables for London to Doncaster that offered different solutions to address trade-offs between capacity, capability, connectivity, and journey times. The chosen timetable option ("PRA Option 2") was described as requiring further review and development including consideration of flighting of trains on dual-track sections of the ECML such as Doncaster to York. ORR is particularly mindful of Network Rail's statement that "*The Doncaster station area, between the start of the morning peak through to the post evening peak, is the biggest risk for overselling capacity in the ECML ESG May 2022 timetable*"². Network Rail considers that until this work has concluded, these rights should be sold as contingent and time limited.
22. Network Rail emphasised the key ESG timetable dates were:
 - a. 18 December 2020: Draft ECML May 2022 timetable to be issued for Industry consultation.

² Letter of 30 October 2020 from Paul Rutter, Route Director East Coast to Gordon Herbert, ORR.

- 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

- 23. In its letter of 14 August 2020, Network Rail confirmed an amendment to its initial position, that, although uncertainty remained surrounding the final timetable within Doncaster station limits, the Eastern Region could now support firm rights with 24-hour windows for the following trains because the presentation at Doncaster is at a time of day when the passenger service is much less intense. This applies to the following rights:
 - 4D06 [SX] Tees Dock – Doncaster iPort
 - 4D15 [EWD] Doncaster iPort – Doncaster iPort
- 24. Network Rail also noted a conflict with 4N06 and Section 5 Engineering Access, which (irrespective of the wider issues) it considered necessitated the application remaining supported as contingent for the timings proposed.
- 25. No specific evidence was provided to show the difficulties posed within Doncaster station limits. This remained the case after ORR requested train graphs, along with performance and timetable analysis, in order to allow Network Rail to evidence the reasons for its decisions. We were advised that no documents existed at that time which met these descriptions.
- 26. Network Rail confirmed its understanding that ORR would like 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 now, may be different conflicts when the draft timetable is issued on 18 December 2020. Network Rail considers its approach will provide it with the flexibility it may require to retime these services and make the best use of capacity.

GBRf's response to Network Rail's statutory consultation response

- 27. As is normal procedure for a section 22A application, Network Rail's representations and ORR's request for additional clarification were provided to GBRf for its comments, on 19 August 2020. GBRf responded on 28 August and made the following observations, all within the context of freight operators requiring firm rights for traffic already running:
 - a) *"Network Rail's position on firm rights with regard to the ECML has altered so many times over the last eight years that it is not credible nor does it appear to be based on fact"*;

- b) *“GB Railfreight notes that Network Rail has now been able to support firm access rights for 4D06 [SX] and 4D15 [EWD], a sudden change to its previous stance. Given this change, and the full lack of reasoning and detail for each of these firm rights, GB Railfreight believes that a similar outcome might actually apply to the other firm rights in question.”*
- c) *“Care needs to be taken when relying on ESG information. An ESG concept Train Plan consists of “aspired to” service levels. ESGs, therefore, look at options that may come to fruition (or may not) and for which there is no guarantee to their being the actual workings in a given future timetable. Sufficient funding support or a lack of available units or drivers are just some examples of why ESG options do not come to pass.”*
- d) *“Crucial to GBRf’s business success is the ability to secure reliable access to the Network, with firm rights, so that it can plan the future of its business with a reasonable degree of certainty and assurance. The approval of firm rights also helps secure the efficiencies of this new container service as one set of wagons works two round trips between Teesport and Doncaster i-Port each day. It is that real efficiency that GBRf wishes to protect as it is unusual for this level of productivity to be attained for an Intermodal service.”*
- e) *“GB Railfreight cannot understand why Network Rail requires GBRf to provide evidence that theoretical capacity exists on the ECML for these services. It should be for Network Rail to categorically demonstrate that there is insufficient capacity for these services from 2022 onwards. There is, obviously, capacity in the timetable to satisfy these firm rights and all the paths are offered in the current May 2020 timetable and the December 2020 timetable.”*
- f) *GBRf noted that option PRA-02 has been stated as requiring further development. It was concerned that the process appeared as “ever moving” and preventing contractual certainty “for operators whose survival depends on it gaining firm rights in a timely manner. This is not least as there is no real evidence that the requested firm rights, with 60 minute arrival and departure windows in each case, cannot be accommodated.”*
- g) *“With regard to the Network Rail’s note on a conflict of the 4N06 right with some Section 5 cyclic possession opportunities, this has no bearing on our firm access rights application. Firm rights are sold on the condition that they do not interfere with booked Standard Possession Opportunities and hold no sway in whether or not the desired possessions are entered into the Engineering Access Statement. In any case, conversations are progressing in finding a bespoke solution.”*
- h) *“In summary, GB Railfreight believes that Network Rail has not offered any credible reasoning for not supporting GBRf’s firm access rights application.”*

ORR review

28. ORR recognises that Network Rail is reaching the final stages of the ECML ESG. This is a complex undertaking which aims to resolve the long term issue of demand exceeding capacity on the ECML. Our review should be seen within that general picture and requiring us to balance our statutory duties to ensure our decision leads to the best outcome for multiple operators.
29. 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. However, on balance we think the lack of evidence produced by Network Rail contributed to the frustration of FOCs, who cannot always put their applications on hold indefinitely. Both FOCs indicated to ORR they felt compelled to use section 22A for resolution.
30. ORR considers that the evidence initially provided by Network Rail was not sufficient to show it had considered the specific impact that the rights applied 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 GBRf prior to its formal application being made. Secondly, as evidence to support Network Rail's decision had not been available during discussions between the parties, it was similarly not available to provide to ORR when requested. This resulted in significant delay to the section 22A process whilst Network Rail was provided with additional time to prepare its evidence.
31. 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. 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.
32. Although definitive evidence was not forthcoming to support Network Rail's statement that the Doncaster 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.
33. 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 that are set out below. This position has been reached as a result of the exchanges that have occurred during our consideration of this particular case, 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.
34. More broadly, we note that Network Rail has stated that the rights sought in this application are included in the 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 the 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.

Other matters

35. We note that one right within this application was specified with the same origin and destination (Doncaster I-port). Running these services under a single headcode should not be considered good practice. Automatic Route Setting (ARS) can struggle when services use the same headcode and pass through an area multiple times in a short period and there is potential to cause signaller confusion where there is no ARS facility. As a result, our direction separates this into two individual rights.
36. Although it has not proved to be material to this case, we note Network Rail's argument that a conflict exists between 4N06 and Section 5 Engineering Access. Network Rail considered that such a conflict necessitated the application remaining supported as contingent for the timings proposed. ORR has previously issued a Direction in a section 22A case which directly involved this matter³. Our decision letter for that case sets out that the sale of access rights does not preclude Network Rail from taking possessions when these are needed. We noted that there are established means for accommodating engineering access within the framework of firm rights. Those mechanisms should be relied upon in place of reserving capacity and potentially underutilising the network.

Conclusion

- 37. We therefore direct Network Rail to enter into an agreement for the following new access rights:**
- a. **Firm rights with 24-hour windows: 4D06 and 4D15**
 - b. **Contingent Rights to expire on SCD 22: 4N06 (EWD), 4D08 (SX), 4D08 (SO), 4N08 (SX), and 4N13 (SO)**
38. As a result of this case and Network Rail's consequent re-assessment of the application, Network Rail is now prepared to sell two firm rights on terms it was initially unwilling to offer.
39. In considering this application, ORR has been mindful of its simultaneous consideration of the DBC 27th, which also sought firm rights on the EMCL, via Doncaster. Without our focus it is not clear whether Network Rail would have applied the same criteria to both operators' applications.

³ <https://www.orr.gov.uk/sites/default/files/om/s22a-fhh-8th-sa-decision-letter.pdf>

40. The existence of an ESG and the development of a provisional timetable does not mean that Network Rail can ignore other requests for capacity, which should be considered on their own merits. Further, ORR will consider applications under section 22A of the Act 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.
41. 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

42. 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 Train Operator. Please send the conformed copy to me at ORR.
43. 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 the Department for Transport.

Yours sincerely



John Trippier