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CC: Muzaher-ul Haque - Timetable Production  
Manager, Network Rail

By email

25<sup>th</sup> October 2019

Dear Catherine,

### Respondent's Notice

Following receipt of Network Rail's notice of appeal in the matter of timetabling panel determination TTP150, under Condition 5.1.1 (a) of Part M of the Network Code, Freightliner hereby serves notice on the Appellant that it opposes the appeal. Freightliner has already made a representation to the Office of Rail and Road ("ORR"), under Condition 6.1.1 of Part M of the Network Code, that the appeal should be dealt with on an expedited basis. This notice to the appellant has been sent promptly to assist the ORR in agreeing an expedited timeframe to deal with the appeal.

#### 1.0 TTP1520 Determination

It was determined that *"Network Rail is in breach of contract in that, in rejecting Freightliner's Access Proposals for each of the eight Train Slots the subject of this dispute at a Timing Load of 1600 tonnes, it has failed to carry out the task required of it under Condition D4.2.2, in compiling the New WTT for December 2019"*.

It was determined, amongst other matters, that Network Rail:

- Did not exercise its Flexing Right to accommodate the Freightliner Train Slots
- Did not apply with the correct prioritisation for dealing with conflicting Access Proposals. Trains without access rights were wrongly considered to have firm rights, and
- To the extent, if any, that it was applicable that *"Network Rail is in breach of contract in having failed to apply the Decision Criteria properly or correctly to such decisions in accordance with Condition D4.6."*

Freightliner is not aware that Network Rail is appealing against any of these matters, but rather the appeal concerns the remedies that were instructed by the Timetabling Panel, namely that:

1. Network Rail is directed to include the Train Slots under dispute at a Timing Load of 1600 tonnes in the New Working Timetable which will be implemented in December 2019, from no later than the first relevant day of the week for each particular Train Slot on or after 1st April 2020.
2. Network Rail is directed to pay to Freightliner compensation for the actual and anticipated losses to Freightliner of the opportunity to operate freight services, from the beginning of the December 2019 timetable, until the paths have been accommodated at 1600 tonnes.

## 2.0 Network Rail grounds of appeal

Network Rail appears to be arguing that the Timetabling Panel overstepped its powers in relation to two matters - namely with regard to Part D5.3.1, by directing the substitution of an alternative decision in place of a challenged decision without the existence of exceptional circumstances, and secondly in the award of compensation for the breach of contract.

### 2.1 Adherence to Condition D3.5.1 of the Network Code

Freightliner strongly disagrees with Network Rail's analysis and contends that the Timetabling Panel's direction is consistent with Network Code Part D5.3.1(a) - namely that the panel "*may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved*". There are a range of options available to Network Rail to accommodate these train slots - noting the right Network Rail has to flex Freightliner's trains within the one-hour windows at origin and destination and the pathing time that exists in the train schedules. The matter of how Network Rail is to accommodate these train slots is not specified in the direction, and it remains at Network Rail's jurisdiction as to the means of adhering to the direction. Indeed, the means of accommodating the Train Slots have only come to light since the panel - as detailed in the 'further work' described in paragraph 3.2 and Annex 2 of Network Rail's appeal.

Furthermore, Network Rail has a large window of time for these trains to be put in the December 2019 timetable. Whilst Freightliner's preference remains that these train slots are accommodated from the start of the December 2019 timetable, Network Rail has until the start of April to find a solution. This again points at the Timetabling Panel issuing a general direction, which focusses on outcome, rather than being, as Network Rail suggests, the direct substitution of an alternative decision.

Without even entering the debate over whether the combination of failings in the application of Part D of the Network Code in this matter could be construed as being exceptional, Freightliner maintains that the directions applied were entirely consistent with Condition D5.3.1(a) of the Network Code.

### 2.2 Award of compensation

Network Rail is appealing against the award of compensation for a number of reasons, including (see paragraph 4.2.5 of its appeal notice) because "*Freightliner did not seek such a remedy*". Freightliner's preference remains that the train slots are accommodated, in line with access rights, from the beginning of the December 2019 Working Timetable. It is only in the absence of doing so does Freightliner suffer financial loss, which gives rise to the remedy of compensation. It remains entirely under Network Rail's control over whether the remedy of compensation is applicable, as it

is only in the absence of including the 1600 tonne train slots from the beginning of the December 2019 timetable does the matter of compensation arise.

Notwithstanding the above, Freightliner considers it entirely reasonable for Network Rail to be directed to pay to Freightliner compensation for the financial loss caused by wrongly failing to include the 1600 tonne train slots in the December 2019 Working Timetable. It has been determined that Network Rail is in breach of contract (see Paragraph 105 of the Determination) and this breach restricts Freightliner's ability to operate trains at 1600 tonnes. The breach gives rise to a financial loss and, in line with the instructions in the Determination, Freightliner is in the process of working with Network Rail to calculate this loss.

Freightliner notes that the issue of compensation is consistent with the directions made in TTP1521, where the Timetabling Panel directed Network Rail to compensate the operator for breaching a customer's Track Access Agreement. Freightliner understands that Network Rail did not appeal the direction in this instance and therefore the concern it raises around TTP1520 creating "*a precedent which will have a significant detrimental impact on the operation of Part D*" should not be a concern in light of similar, and unchallenged, previous Timetabling Panel directions. Freightliner also notes that the direction to compensate the operators in both these Timetabling Panels was in respect of breach of contract rather than operation of Part D. Therefore, the award of compensation should not be considered to set a precedent impacting on the operation of Part D.

### 3.0 Appropriate remedies

Freightliner notes that Network Rail's appeal effectively seeks to quash both remedies directed by the Timetabling Panel. Network Rail does not propose any other remedies that will address the failings identified by the Timetabling Panel. Network Rail instead want to change the direction to a light-touch direction that it should merely "reconsider its decision". Freightliner would regard such a direction to be futile, particularly in light of the lengths Network Rail has already gone to argue against the inclusion of these paths. Such a direction would likely not resolve the issue in the December 2019 Working Timetable, but instead would result in Network Rail suggesting that the solution is to wait until the May 2020 Working Timetable. This is hinted at in paragraph 3.2.3 of Network Rail's notice of appeal.

Freightliner strongly contends that the remedy needs to apply to the December 2019 Working Timetable, given that it is that timetable that is in dispute. It is a matter of principle for the industry that a Timetabling Panel has the authority to direct Network Rail to resolve a timetabling matter where it has been determined that Network Rail has failed to correctly apply Part D of the Network Code.

In making the direction the hearing chair was mindful of creating a precedent "*incentivising Network Rail or any other Timetable Participant to believe it can safely fail to perform its contractual obligations simply by waiting until a sufficiently late stage in the Timetabling process*" (see paragraph 110 of the Determination). Freightliner strongly agrees with this.

At all stages Freightliner has sought to expedite the dispute process, and therefore it would undermine the dispute process for Network Rail to claim that at this stage of timetable production it cannot adhere to the Timetable Panel's directions. Aligned with the concerns raised by the hearing chair, should Network Rail's appeal against the remedies be successful, it would set a precedent that Network Rail could wait until a late stage in the timetabling process, to avoid

having to abide by future instructions of the timetabling panel. Such a situation would undermine the dispute process and set a negative precedent for the industry.

#### 4.0 Accommodating the Train Slots

Section 3 of Network Rail's notice of appeal outlines the further work that it has done since the Timetable Panel hearing. It notes that all the disputed schedules can be accommodated in the timetable (with the exception of 4M93 on a Monday Only, where more work is required to identify a solution). Network Rail suggests that the constraints of Part D prevent it from making the necessary adjustments to accommodate the Freightliner Train Slots at 1600 tonnes. Paragraph 3.2.2 of the notice of appeal states that "*the only basis under Part D of the Code on which NRIL can now vary that Timetable is therefore by consent under Condition D3.6.1*".

Condition 4.7.1 of Part D of the Network Code suggests that a decision shall be binding on Network Rail and Timetable Participants "*save to the extent that it is changed by an appeal authorised by this Part D*".

Furthermore Condition 5.6.1 of Part D of the Network Code stipulates that "*Network Rail shall be bound and empowered to take such steps as may be necessary to implement all rulings made by a Timetabling Panel or the Office of Rail Regulation pursuant to this Condition D5. All such steps shall be taken promptly.*" This condition could assist Network Rail in accommodating the 1600 tonne paths in line with the methodology outlined in 3.2 (a), (c), (d) and (e) of Network Rail's appeal notice.

#### 5.0 Conclusion

Freightliner wishes to reiterate the business need to uplift tonnages for these services and therefore the importance of securing 1600 tonne Train Slots for these schedules at the earliest opportunity. Freightliner urges Network Rail to take all steps to accommodate these in the December 2019 Working Timetable at the first available opportunity - noting that the issue of compensation only arises should these not be accommodated from the start of the December 2019 Working Timetable.

Freightliner reiterates its view that the Timetabling Panel gave general directions to Network Rail, which specified the result to be achieved (i.e. paths to be accommodated) but it did not specify the means to achieve this outcome. Indeed the means have only come to light since the panel. Paragraph 3.2 of Network Rail's notice of appeal highlights the further work that has been conducted since the Timetabling Panel and Annex 2 identifies specifically how the Freightliner Train Slots can be accommodated.

Freightliner continues to oppose the appeal and highlights the importance of ensuring that Network Rail abides by the Conditions of Part D of the Network Code and Track Access Agreements. To maintain an effective dispute process, delays should not be a means of any party avoiding having to fulfil their contractual obligations.

Yours sincerely,



Peter Graham,  
Rail Strategy Manager, Freightliner Group Limited