

Caroline Webber  
Executive  
Access and Licensing  
Office of Rail and Road  
One Kemble Street  
London  
WC2B 4AN

**By email only**

22<sup>nd</sup> November 2019

Dear Caroline,

**Appeal under Part M of the Network Code by Network Rail Infrastructure Limited (Network Rail) in respect of Determination ADP TTP1520 of the Timetabling Panel (the Determination)**

In paragraph 3 of your letter of 13 November 2019 you invited further representations in connection with the above appeal. Network Rail considers that it may assist the ORR in determining the appeal to understand Network Rail's position on the key points made in Freightliner's Respondent's Notice dated 25 October 2019 (the **Respondent's Notice**). Network Rail's position is therefore set out below.

Unless otherwise defined the terms used in these representations adopt the definitions provided under the Network Code (the Code) and Network Rail's Notice of Appeal dated 22 October 2019.

**1 Paragraphs 1.0 and 2.0 of the Respondent's Notice**

1.1 Freightliner is correct that Network Rail's appeal relates to the remedies imposed in the Determination. Network Rail's position is indeed that the Timetabling Panel has overstepped its powers in relation to: 1) the substitution of an alternative decision without exceptional circumstances as required by paragraph 5.3.1 of Part D of the Network Code; and 2) awarding compensation without making a finding of bad faith or unreasonableness as required by paragraph 5.7.1 of Part D of the Network Code.

**2 Paragraph 2.1 of the Respondent's Notice**

2.1 Network Rail reiterates its position set out in section 4.1 of its Notice of Appeal; the direction in paragraph 107 of the Determination in effect constitutes the substitution of an alternative decision of the Timetabling Panel in place of Network Rail's challenged decision. The Network Rail decision that Freightliner challenged in the Timetabling Panel was the decision not to include the Train Slots in the December 2019 Working Timetable and it is that decision which the Timetabling Panel has reversed.

2.2 The Respondent's Notice does not fully take account of paragraph 3.2 of Network Rail's Notice of Appeal and seems to treat that paragraph as confirmation that the Train Slots can be accommodated in the December 2019 Timetable. This is not correct; paragraph 3.2(b) makes

clear that one of the train slots under discussion cannot be accommodated without recasting the entire north-west timetable. Further, as set out in paragraph 3.2.2, the only basis on which Network Rail can now vary the December 2019 Timetable is by consent under Condition D3.6.1; such consent has not been provided as set out further below.

- 2.3 Following the Timetabling Panel's decision, Network Rail made the necessary requests for consent to accommodate the Train Slots as set out in paragraph 3.2 and Annex 2 of the Notice of Appeal. The detail regarding this, including specific timetable participant responses/notes is set out in Annex 1 to these representations. In summary:
- (a) In respect of Train Headcode 4M86 for MSX: 46 Train Slots were impacted. Network Rail received consent to amend only 13 of them, with 27 amendments being rejected and the relevant operator asking for further information in respect of 6 of them;
  - (b) In respect of Train Headcode 4M93 for MO: 18 Train Slots were impacted. Network Rail received consent to amend only 7 of them, with 9 amendments being rejected and the relevant operator asking for further information in respect of 2 of them;
  - (c) In respect of Train Headcode 4M93 for MSX: 14 Train Slots were impacted. Network Rail received consent to amend 11 of them, with 2 amendments being rejected and the relevant operator asking for further information in respect of 1 of them;
  - (d) In respect of Train Headcode 4S88 for MO, TwThO and FO: 12 Train Slots were impacted. Network Rail received consent to amend 4 of them, with the remaining 8 being rejected; and
  - (e) In respect of Train Headcode 4L90 for TWTHO & FO: 13 Train Slots were impacted. Network Rail received consent to amend 6 of them, with the remaining 7 being rejected.
- 2.4 The result of the correspondence outlined in paragraph 2.3 above is that none of the Train Slots can be accommodated in the December 2019 Timetable.
- 2.5 If, despite the issues identified above, Network Rail is forced as a result of the Determination to include these train slots in the December 2019 Working Timetable then Network Rail will have to start the timetabling process again with Train Slots in the Timetable and make everything fit around them. This would give the Train Slots a status above all other slots currently in the timetable, contrary to the decisions that Network Rail has made to date and also cause significant disruption this close to the introduction of the Timetable.
- 2.6 Network Rail also asked the relevant Timetable Participants for consent to amend the December 2019 Timetable from 1<sup>st</sup> April 2020 to accommodate the Train Slots. This consent has not been forthcoming (further details in Annex 1).
- 2.7 However, Network Rail has exercised its right to Flex other operators as part of the May 2020 timetable development process. Network Rail have accommodated the Train Slots in the May 2020 Timetable.

### **3 Paragraph 2.2 of the Respondent's Notice**

- 3.1 In Network Rail's view it is relevant that Freightliner did not seek compensation as a remedy (which is not contested in the Respondent's Notice). If Freightliner had sought such a remedy when making its reference to the Timetabling Panel then it would have been open to Network Rail at that stage under paragraph 7(b) of Chapter H of the Access Dispute Resolution Rules to argue that "*some aspects of the dispute or issues raised by the dispute are not matters of timetabling,*

*timetable change and/or capacity allocation and are not properly resolved by a Timetabling Panel and consequently should be reserved for determination by another dispute resolution process".*

- 3.2 In Network Rail's view issues regarding compensation as a result of breach of contract are not "*matters of timetabling, timetable change and/or capacity allocation*" and thus should not be determined by the Timetabling Panel unless the very specific set of circumstances set out in Condition D5.7.1 of the Network Code apply. They do not in this case.
- 3.3 As set out in paragraph 4.27 of the Notice of Appeal, this does not leave Freightliner without a remedy for any breach of contract it suffers. The appropriate remedy for Freightliner in connection with any breach is to pursue a claim in accordance with the dispute resolution provisions in its Track Access Contract.
- 3.4 With regard to TTP 1521, to the extent that the ORR determines that it is a relevant consideration in determining this appeal that the Timetabling Panel has acted in a similar way in an unrelated decision, Network Rail notes that paragraph 7(a) of Chapter A of the Access Dispute Resolution Rules means the ORR is not bound by the Timetabling Panel's decision.

#### **4 Paragraph 3.0 of the Respondent's Notice**

- 4.1 In pursuing this appeal, Network Rail is not seeking to deprive Freightliner of remedies, rather it is seeking to enforce the contractual scheme agreed by the industry in relation to resolution of disputes.
- 4.2 The industry's contractual scheme for the resolution of disputes includes a variety of routes for disputes which are tailored to the nature of the issue concerned. The Timetabling Panel's role in this scheme as an expert panel is clearly limited to resolution of disputes relating to the matters referred to in paragraph 3.1 above. It was also recognised in setting up the Timetabling Panel that it should only be able to substitute its decisions for Network Rail's decisions in exceptional circumstances. Network Rail is concerned to prevent what it sees as a significant expansion in the role of the Timetabling Panel in these two areas.
- 4.3 It is not correct that the Notice of Appeal does not propose remedies that will address the failings identified by the Timetabling Panel. As set out in paragraphs 4.1.8 and 4.2.7 of the Notice of Appeal, Network Rail's position is that the Timetabling Panel should have directed Network Rail to reconsider its decision regarding the Train Slots and that it is open to Freightliner to pursue a claim for breach of contract under its Track Access Contract in respect of any breach of contract.
- 4.4 Network Rail notes Freightliner's contention that "*the remedy needs to apply to the December 2019 Working Timetable*". A successful breach of contract claim under the Track Access Contract would allow Freightliner to secure a remedy in relation to the December 2019 Working Timetable.

#### **5 Paragraph 4.0 of the Respondent's Notice**

- 5.1 Freightliner's characterisation of the position regarding the accommodation of the Train Slots is incorrect. As set out in paragraphs 2.3 and 2.4 above, the Train Slots cannot be accommodated in the December 2019 Timetable. The Train Slots can however be accommodated in the May 2020 Timetable.
- 5.2 Network Rail does not agree with Freightliner's contention that Condition 5.6.1 of the Network Code could assist Network Rail in accommodating the contested train slots. In Network Rail's view Condition 5.6.1 cannot be interpreted to mean that Network Rail must implement a decision of the Timetabling Panel without regard to any of the other constraints that ordinarily apply to Network Rail's conduct.

## **6 Paragraph 5.0 of the Respondent's Notice**

- 6.1 Network Rail has acted in good faith throughout this dispute. Until it received the Timetabling Panel's determination, Network Rail believed that it had made the correct planning decision and therefore proceeded with the timetable process on this basis. It is unfortunate that, because the dispute process took as long as it did, it is now not possible for Network Rail to accommodate the Train Slots in the December 2019 Timetable.
- 6.2 Network Rail recognises Freightliner's need to increase the tonnage for its services; this will be possible from May 2020. In addition Freightliner will be compensated for the fact that the tonnage cannot be increased from December 2019 if it is successful in a claim under its Track Access Contract.

Yours Sincerely



**Muzaher-ul Haque**  
Timetable Production Manager  
Network Rail

cc. Network Rail  
Freightliner  
ADC Secretary