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Tuesday 19th May 2015

Dear Robert,

NOTICE OF APPEAL TO THE OFFICE OF RAIL AND ROAD PURSUANT TO CONDITION J11.1 AND PART M (APPEALS) OF THE NETWORK CODE BY GB RAILFREIGHT LTD.

ACCESS DISPUTE ADJUDICATION DETERMINATION IN RESPECT OF DISPUTE REFERENCE ADA21

GB Railfreight Ltd. ("GB Railfreight") is dissatisfied with certain aspects of the determination by the Access Dispute Adjudication in respect of dispute reference ADA21. Accordingly, GB Railfreight Ltd. wishes to refer these aspects of the determination to the Office of Rail and Road ("ORR") for determination pursuant to Condition J11.1 and Part M (Appeals) of the Network Code.

In accordance with Part M3.1 of the Network Code, GB Railfreight has attached to this letter a statement detailing the subject matter of the dispute and the reasons why GB Railfreight is making this reference. This letter and attachment has been copied to the other parties involved with ADA21 and to the Secretary of the Access Disputes Committee for information.

Yours sincerely,

Ian Kapur.
National Access Manager.

cc. Rachel Gilliland Network Rail
Lindsay Durham Freightliner Group Ltd.
Bill Hammill Office of Rail and Road
Tony Skilton Secretary, Access Disputes Committee



GB Railfreight Limited
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GBRf is a subsidiary of Groupe Eurotunnel

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STATEMENT OF DETAIL AND REASONS

1. Introduction

- 1.1. The dispute arises from the issuing of a Third Party Notice by GB Railfreight ("GBRf") to Freightliner Heavy Haul Ltd. ("FLHH"), dated 7th November 2014, pursuant to Condition 7.2 of the Network Code. The Third Party Notice made application for the transfer of a number of Firm Access Rights and associated Train Slots from FLHH to GBRf, which was brought about by the award of a contract by Aggregate Industries UK Ltd. for the conveyance of aggregates traffic commencing 1st January 2015.
- 1.2. In response FLHH issued a Third Party Counter Notice to Network Rail, dated 21st November 2014, pursuant to Condition 7.5 of the Network Code. Within the Third Party Counter Notice FLHH accepted the requested transfer of some Firm Access Rights and associated Train Slots but objected to the remainder.
- 1.3. On 28th November 2014 Network Rail issued a notice, pursuant to Conditions J7.6 and J7.7 of the Network Code, in which it stated that in some instances it agreed with GBRf that certain Firm Access Rights and associated Train Slots should be transferred and that in other instances it agreed with FLHH that certain Firm Access Rights and associated Train Slots should not be transferred, depending upon the individual merit of each. Network Rail also highlighted a number of instances where it agreed with neither party, instead stating that a number of Firm Access Rights should be relinquished and the associated Train Slots put forward to the Capacity Management Review Group for consideration as strategic capacity paths.
- 1.4. Through continued discussions with all three parties a resolution was found to the majority of the issues arising. However, in one particular case GBRf could not reach agreement with FLHH and Network Rail, whose views were aligned. Consequently GBRf issued a Notice of Dispute with Network Rail pursuant to Conditions J7.6 and J11.1.1 and the matter was referred to the Access Disputes Adjudication ("ADA") for determination.
- 1.5. A hearing took place on 18th March 2015 and the ADA's determination was issued on 13th May 2015.

2. Summary of Dispute

- 2.1. The disputed Firm Access Right upon which an agreement could not be reached, and which therefore became the subject of dispute reference ADA21, was contained within the FLHH Track Access Contract as follows:
 - Level 1 Right: 6L84 [SX] 08:44 Croft Quarry to Bow Depot FHH (arr. 12:30)
- 2.2. GBRf entered into a long-term contract with Aggregate Industries UK Ltd. for the conveyance of aggregates traffic commencing 1st January 2015 which, included within the contract, was a requirement for the provision of traffic from Croft Quarry to Bow

Depot. On this basis GBRf requested the transfer of the Firm Access Right detailed above in paragraph 2.1, along with the associated Train Slot detailed below:

- 6L84 [SX] 08:55 Croft Quarry to Bow Depot FLHH (arr. 12:31)

2.3. In their Third Party Counter Notice FLHH objected to the transfer of this Firm Access Right and its associated Train Slot, stating that the *"path has not run on behalf of Aggregate Industries since September 2011"*. At the time of the initial Third Party Notice submission by GBRf the Train Slot 6L84 shared part of its pathway with the following Train Slots, neither of which were underpinned with Firm Access Rights:

- 6L44 [MO] 04:50 Hope (Earles Sidings) to West Thurrock (arr. 12:56)
- 6L44 [TThFO] 04:52 Hope (Earles Sidings) to West Thurrock (arr. 12:56)

FLHH stated that it *"requires to continue to use 6L44 to convey traffic for the Primary Purpose Customer for whom over 50% (in fact 100%) of the gross tonnage transported has been moved in the 12 month period immediately preceding the date of service of the Third Party Notice"*.

2.4. In response to FLHH's Third Party Counter Notice Network Rail stated that the *"right should be relinquished and path put forward for consideration as strategic capacity"*.

2.5. GBRf contested the Network Rail view that the Firm Access Right could be relinquished and the path put forward for consideration as strategic capacity, given that there is no provision for such a process within Condition J4 of the Network Code. GBRf also challenged the FLHH view that the Firm Access Right and associated Train Slot for 6L84 should not transfer to GBRf because FLHH wished to retain a pathway (6L44) that was not underpinned by Access Rights. GBRf stated its view that the Firm Access Right for 6L84 could not have been used to convey traffic in the 12 month period immediately preceding the date of service of the Third Party Notice, given that, as stated by FLHH, the associated Train Slot had not been utilised since September 2011. FLHH had instead been conveying traffic from an alternative origin to an alternative destination using a separate Train Slot (6L44).

2.6. On 16th December 2014 Network Rail amended their position to align with that of FLHH, stating that they *"do not agree to the transfer"*. This was based upon the belief that *"the traffic carried for Hope Construction by FLHH on 6L44, does use the Right Subject to Surrender of 6L84 and 100% of the use of 6L84 in the last 12 months has been for Hope Construction, so FLHH's defence of Primary Purpose Customer in this instance is valid"*.

2.7. GBRf did not agree with this decision, leading to the matter being referred to the Access Disputes Adjudication for determination.

3. Subject Matter of the Appeal

3.1. Within the Statement of Claim submitted by GBRf and within the Statement of Defence submitted by Network Rail the ADA was requested to determine that the Firm Access Right and associated Train Slot for 6L84 should not transfer to GBRf. Alongside this the ADA was also requested by both parties to determine upon a number of issues brought to the fore by the debate surrounding the proposed transfer of 6L84.

3.2. The ADA determined that *"the Third Party Notice served by GBRf dated 7th November 2014 was not a valid notice and that GBRf is not entitled to the Train Slot 6L84(SX) as*

it seeks". This was based upon the principle that GBRf had not replaced FLHH in the provision of an existing transport service behalf of Aggregate Industries, thereby rendering Third Party Notice served by GBRf invalid.

- 3.3. GBRf contests the above determination that its Third Party Notice was invalid. GBRf is able to provide (and has done so previously) evidence that within its contract with Aggregate Industries, which commenced on 1st January 2015, is a requirement for the provision of a transport service from Croft Quarry and to Bow Depot. Throughout the duration of its preceding Aggregate Industries contract FLHH retained the Firm Access Right and associated Train Slot for 6L84 in order to convey traffic between the two if requested to do so by its customer. GBRf submits that as part of its contractual commitment with Aggregate Industries it requires the transfer of the Firm Access Right and associated Train Slot for 6L84 to facilitate the continued provision to convey aggregates traffic from Croft Quarry to Bow Depot when requested to do so.
- 3.4. GBRf considers that the ADA did not, as requested, satisfactorily determine upon all of the issues raised within GBRf's Statement of Claim and within Network Rail's Statement of Defence, in so much that a complete set of determinations was not offered within the Adjudication paper.
- 3.5. Therefore, this appeal concerns both the accuracy of the determination included in the ADA paper and also seeks a determination on the supplementary issues that GBRf considers to have been insufficiently addressed.

4. Dispute Reference ADA21 Adjudication Paper and Determination

- 4.1. In the adjudication paper the ADA states in Paragraph 5.8 that a transport service was not provided by FLHH from Croft Quarry to Bow Depot and that, on this basis, GBRf could not be considered to be replacing the incumbent in providing this transport service. Therefore GBRf could not be considered an applicant within the meaning of Condition J7.1.2 (a) and thus not in a position to serve a valid Third Party Notice under Condition J7.2 of the Network Code.
- 4.2. Within paragraph 5.8 the ADA states that "*there was no expectation, contractual or otherwise*' that GBRf would provide a transport service utilising 6L84(SX) as of 1st January 2015 or in the immediate future". GBRf considers this statement to be incorrect given that it is contracted for the provision of traffic from Croft Quarry and to Bow Depot on behalf of Aggregate Industries.
- 4.3. GBRf counters the above statements in Paragraphs 4.1 and 4.2 with the view that, had the transport service not been required, then the Firm Access Right would have been removed from FLHH's Track Access Contract, as acknowledged in Paragraph 4.9 of the ADA Adjudication paper. FLHH retained the rights to 6L84 from September 2011 through until December 2014, maintaining the provision of a transport service from Croft Quarry to Bow Depot on behalf of Aggregate Industries. In requesting the transfer of the Firm Access Right for 6L84 GBRf is seeking to continue this provision for the incumbent customer and on this basis believes its original Third Party Notice to be valid under Condition J7.2 of the Network Code.
- 4.4. Furthermore, within paragraph 5.8 the ADA recognises that "*some new business might emerge from Aggregate Industries that might entail utilising part of the route covered by 6L84(SX)*" but that this "*cannot be considered as GBRf replacing FLHH in the provision of a transport service*". On this basis the ADA determined in Paragraph 6 that "*the Train Slot 6L84(SX) remains vested in FLHH*". GBRf considers this to be

inconsistent given its contractual requirement to provide a transport service on behalf of Aggregate Industries from Croft Quarry and Bow Depot using a Train Slot underpinned by Firm Access Rights, whilst FLHH have sought to retain an alternative Train Slot (6L44), which is not underpinned by Access Rights, as it *"was seeking to win new business to Bow"*, as stated in paragraph 4.6.

- 4.5. GBRf challenges FLHH, Network Rail and the ADA in its stance that Hope Construction is the Primary Purpose Customer for the Firm Access Right of 6L84. This is supported in Paragraph 5.13 of the ADA Adjudication Paper, which states *"did FLHH convey 50% or more of the gross tonnage transported using the subject right in the twelve months preceding the Third Part Notice for Hope Construction? We find that it did not."*
- 4.6. It is GBRf's view that Hope Construction cannot be the Primary Purpose Customer for the Firm Access Right to convey traffic from Croft Quarry to Bow Depot. This Firm Access Right was awarded to FLHH to serve the contract that it then held with Aggregate Industries. By its own admission, and as stated in Paragraph 4.6, FLHH *"wished to use part of the pathway for the Hope Aggregate business"*. GBRf submits that this is a misuse of the Firm Access Right for 6L84, which was sold for the conveyance of Aggregate Industries Traffic.
- 4.7. GBRf believes that the ADA view of 'Y' paths contains numerous inconsistencies and errors and that the emphasis placed upon this issue within the adjudication distorts the determination. Moreover, GBRf believes that the ADA paper presents a confused view of the differences between Firm Access Rights and Train Slots and that this has led to an incorrect determination being reached.
- 4.8. A 'Y' path is defined in Schedule 5.1.1 of each train operators' Track Access Contract as follows:

"in relation to a specified Service (which may be shown in one or more Service Group References and as identified by the letter "Y" in the column headed "Days per Week"), where the Train Operator has the Firm Right to that Service to:

- (a) Depart from one or more origins to the same destination; and/or*
- (b) Arrive at one or more destinations from the same origin,*

as set out in the Rights Table provided that the Train Operator shall not be entitled to more than one Y Path Option within any within any one Y path on any particular day"

In its Statement of Claim GBRf drew attention to this definition, as recognised in paragraph 5.18 of the ADA adjudication paper. However, as stated in paragraph 5.19 the ADA discarded it from the determination as it was deemed to be contradictory with the Network Code under Condition J1.2.1, which defines a 'Y-Path' as follows:

"a Train Slot incorporated in the Working Timetable that is identified as such by the incorporation of the letter 'Y' in the operating characteristics part of the Train Slot's heading".

GBRf disagrees with the ADA view that these two definitions of a 'Y' path are contradictory and, conversely, considers them to be complimentary to each other.

- 4.9. On this basis GBRf believes that the ADA was incorrect to discard the definition as set out in the Track Access Contract and believes that it should have been considered within the Adjudication document. In the case of the Train Slots that are the subject of dispute reference ADA21, GBRf believes that the Train Slot 6L44, with a origin of Hope (Earles Sidings) and a destination of West Thurrock, cannot be considered to be a 'Y' path with the Firm Access Right for 6L84 and its associated Train Slot, given that its shares neither a common origin (Croft Quarry) or destination (Bow Depot) with 6L84.
- 4.10. Furthermore, perusal of the FLHH Track Access Rights Table, as of 7th November 2014, shows 6L84 [SX] 08:44 Croft Quarry to Bow Depot FHH (arr. 12:30) as an independent Firm Access Right, without any 'Y' character in the "Days per Week" column (which is the defined method of identifying a 'Y' path, as set out by each operators' Track Access Contract). Therefore, purely based upon the ADA accepted definition of a 'Y' path, there can be only one Train Slot associated with this Firm Access Right; namely 6L84 [SX] 08:55 Croft Quarry to Bow Depot FLHH (arr. 12:31). FLHH's use of the Train Slot 6L44, running from an alternative origin to an alternative destination for a different customer, does not represent a use of the Access Right for 6L84. This is supported in paragraph 5.13 of the adjudication paper, which states "*we reject the notion that 6L44 was used in conjunction with 6L84; there is no need or reason to combine the two. The fact that they may share a common pathway for part of the route is immaterial.*"
- 4.11. Paragraph 5.13 continues to state "*it seems to us that all of the Hope Construction business was carried using the rights associated with 6L44 alone*". GBRf considers this statement to be incorrect, given that the Train Slot 6L44 is not underpinned by Access Rights. It is the view of GBRf that FLHH is attempting to operate the **Train Slot 6L44** under the **Firm Access Rights** for 6L84. As highlighted in Paragraph 5.15, the ADA view is that "*6L84 and 6L44 are two separate and distinct paths which although they share common track are capable of being subject to quite different legal rights.*" GBRf, therefore, considers the ADA determination to be in conflict with its own findings.
- 4.12. GBRf considers the ADA view of the Train Slots involved within the dispute and whether or not they run 'Y' with each other to be inconsistent and confusing. Paragraph 5.15 states that the paths of 6L84 and 6L44 "*appear separately in the Working Timetable*". This appears to be in direct contradiction with paragraph 4.11, which states that "*all three paths have in common a substantial run down the Midland Mainline. Obviously not all three pathways could be used at the same time*". In the same paragraph ADA notes that Network Rail had stated that "*if the rights were vested in different parties and there was a conflict, Network Rail said that priority would be given to 6L84 since it has a Firm Access Right*". However, in their response to the Third Party Counter Notice from FLHH, Network Rail adopted the opposite stance, giving preference to the Train Slot 6L44 over 6L84. GBRf is of the view that had priority correctly been given to 6L84 in Network Rail's response, the matter would not have required ADA adjudication. GBRf submits that ADA is incorrect in endorsing Network Rail's position of prioritising 6L44, a train slot that is not underpinned by Access Rights, over 6L84, which is underpinned by a Firm Access Right.

5. Issues Requiring Determination

- 5.1. In its Statement of Claim GBRf requested that ADA determine upon a number of issues brought to the fore by the debate surrounding the proposed transfer of 6L84. Network Rail, in their Statement of Defence, also requested that a number of

supplementary issues be determined upon as part of dispute reference ADA21. GBRf considers a number of these issues to be in need of more conclusive determination, as set out below:

- 5.1.1. That the Primary Purpose condition cannot be used to determine a decision involving any Train Slot that is not underpinned by an Access Right. Within the Network Code, under Condition J1.2.1, Primary Purpose "*means conveying 50% or more of the gross tonnage transported **using the Rights Subject to Surrender**, over the 12 month period immediately preceding the date of service of the Third Party Notice, for a Primary Purpose Customer*" (emphasis added). In the case of the Train Slots that are the subject of dispute reference ADA21, GBRf believes that the Train Slot 6L84 should take priority over 6L44 as it is underpinned with a Firm Access Right, whereas 6L44 is not.
- 5.1.2. That the Primary Purpose condition cannot be used to determine a decision where two separate Train Slots share a common pathway for part of a journey but run from different origins and destinations for different customers. The Primary Purpose condition applies where two or more customers' traffic is conveyed using the **same** Train Slot, with the **same** origin and destination but carrying various customers' traffic.
- 5.1.3. That, on the basis of the statements set out in Paragraphs 5.1.1 and 5.1.2 above, the ADA is incorrect in its determination that GBRf could not be considered an applicant within the meaning of Condition J7.1.2 (a) and thus not in a position to serve a valid Third Party Notice under Condition J7.2 of the Network Code.
- 5.1.4. Consequently, the ADA is erroneous in its determination that Hope Construction is the Primary Purpose Customer for the Firm Access Right for 6L84 to convey aggregates traffic from Croft Quarry to Bow Depot. Consequently, the determination that this Firm Access Right remains vested in FLHH is flawed and the Firm Access Right, along with its associated Train Slot, should transfer to GBRf.
- 5.1.5. GBRf considers that Network Rail's view, as set out in paragraph 3.2.7.2, that "*a service that is regularly running should take priority over an unused Right which has not run over a significant period*" is not based upon legal entitlement. GBRf believes that where an Access Right is no longer required it should be surrendered, with updated Access Rights sought to underpin those Train Slots which are intended for regular use. Therefore, GBRf seeks a determination that Network rail's view is not of legal standing.
- 5.1.6. In its Statement of Claim GBRf drew attention to the fact that 'Y' path is defined in more detail in Schedule 5 of a Train Operator's Track Access Contract and this was recognised in paragraph 5.18 of the ADA adjudication paper. However, this definition was discarded by the ADA as it considered the two definitions to be conflicting. GBRf disagrees with this view and considers the two statements to be complementary to each other rather than contradictory. GBRf therefore believes that this definition should have been considered by ADA when making their determination.

6. Conclusions

- 6.1. GBRf is dissatisfied with the ADA determination with regard to 6L84, as detailed within paragraph 6 of the Adjudication paper. GBRf considers the reasons behind the decision to declare the Third Party Notice served by GBRf invalid to be based upon a flawed application of Primary Purpose condition, which has been applied in error. GBRf believes that the application of the Primary Purpose condition should be reconsidered in this instance, with the Train Slot that is underpinned by Firm Access Rights prevailing over the Train Slot that is not.
- 6.2. GBRf considers that the ADA did not determine upon a number issues raised within GBRf's Statement of Claim or those raised within Network Rail's Statement of Defence, in so much that no complete determination was offered within the Adjudication paper. The outstanding issues that GBRf considers to be unanswered and unresolved have been outlined in Section 5 of this statement. GBRf is seeking a determination on these issues by the Office of Rail and Road having been dissatisfied by those provided by the ADA.

7. Attachments

- 7.1. ADA Determination in respect of dispute reference ADA21.