

Gordon Herbert
Executive, Track Access
Telephone 020 7282 3964
E-mail: Gordon.Herbert@orr.gsi.gov.uk

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Rebecca Stonehouse
Customer Relationship Executive
Network Rail
1 Eversholt Street
London NW1 2DN

Lindsay Durham
Head of Rail Strategy
Freightliner Group Limited
3rd Floor, The Podium
1 Eversholt Street
London NW1 2FL

Dear Rebecca and Lindsay

Application by Freightliner Heavy Haul Limited (FHH) under section 22A of the Railways Act 1993: 27th Supplemental Agreement (non-coal)

1. The Office of Rail Regulation (ORR) has directed the 27th Supplemental Agreement (27th SA) to the track access agreement between Network Rail Infrastructure Limited (Network Rail) and Freightliner Heavy Haul (Ltd). This letter is to explain the extent and purpose of our direction and to set out the reasons for our decision.

Purpose of the agreement we have directed

2. The application was for a supplemental agreement to FHH's track access contract providing 48 additional non-coal access rights, until the Principal Change Date 2016 (PCD 2016) when the current track access contract expires.
3. ORR's directions are in respect of all those additional access rights. All the rights are to be attributed at Level One (L1), except for three services using the Midland Main Line which are to be at Level Two (L2). These are the rights with headcodes 6L44, 6L89 and 6M90. FHH had wanted the rights at L1, whereas Network Rail was only prepared for them to be at L2.
4. The principal reasons why we have directed for these services to be made at L2 rather than L1 are:
 - To allow Network Rail greater timetabling flexibility, thereby maximising capacity, on track it has declared as 'congested infrastructure'.
 - To ensure consistency between rail freight operating companies.
 - Network Rail can review its approach when the issues surrounding the declaration of congested infrastructure have been resolved.
5. FHH's coal traffic has been considered separately (the 25th and 28th SAs).

Background

ORR's role

6. ORR approval is needed under the Railways Act 1993 (the Act) for new track access contracts or amendments to them. Where parties have an existing track access contract but are unable to reach agreement on the terms of a proposed amendment to permit more extensive use, the beneficiary can apply to ORR to issue directions under section 22A of the Act.

7. As Network Rail and FHH have been unable to agree on the amendments to FHH's Rights Table in Schedule 5 of its track access contract, FHH has made an application to us under section 22A. ORR can issue directions to both parties on the terms of an amendment to the contract, if any. As we state in our track access guidance¹ the submission of a section 22A application need not mark the end of negotiations between Network Rail and the train operator. If they agree on terms, they may still make an application under section 22 of the Act.

Firm rights

8. Each freight train operator has a Rights Table, as part of their track access contract with Network Rail, which sets out their rights to access Network Rail's network. There are two types of 'firm rights', identified as level one rights (L1) and level two rights (L2). A L1 right is a firm right to a train slot with specific arrival and departure times on specified days of the week, with a specified permitted variation, or flex, value (usually +/- 30 minutes). A L2 right is a firm right to a specific number of train slots but only per day. There also level three rights (L3), called contingent rights.

More extensive use

9. The application concerned additional access rights where these were for more extensive use. Section 22A of the Act says that ORR may give directions requiring the parties to an access agreement to make amendments permitting more extensive use of the network, and to make consequential amendments. More extensive use means an increased use. So this only refers to new rights, or amended rights that make increased use of the network (such as more route miles).

10. ORR's directions apply to all the 48 additional rights applied for. This is because as additional services they all make more extensive use of Network Rail's network. ORR's directions do not apply to the services that FHH wants to relinquish and this must be done separately, under section 22 of the Act. The relinquished rights listed in FHH's application was however relevant background information.

¹ http://orr.gov.uk/_data/assets/pdf_file/0003/4818/ta_criteria_and_procedures.pdf paragraphs 3.107-3.109.

Congested infrastructure

11. The Railways Infrastructure (Access and Management) Regulations 2005 require Network Rail to declare areas of its network as congested where, after the co-ordination of requests for capacity and consultation with the persons requesting, it is not possible to satisfy requests adequately. Network Rail is also required to do that where, in the course of preparing the working timetable for the next timetable period, an element of infrastructure is likely to become congested during that next period.

12. Once any part of the network is declared as congested, Network Rail is required to give notice of this, undertake a capacity analysis and then produce a capacity enhancement plan. A capacity analysis is not required if a capacity enhancement plan is already being implemented. Network Rail will then develop options and actions to be taken².

13. On 24 September 2014 Network Rail declared part of the Midland Main Line as congested infrastructure: Leicester to Cricklewood via Market Harborough and Corby. Network Rail is 'minded to' declare the Hope Valley network as congested infrastructure, although it has not yet done so. This influenced its approach to the sale of access rights to FHH.

FHH's application

14. FHH's submitted an application under section 22A of the Act for 48 additional non-coal rights on 22 December 2014. The non-coal rights were part of a package of changes to update service groups 6204, 6223, 6228, 6229 and 6230, to reflect the December 2014 working timetable and inform its application for access right post-PCD 2016.

15. The application comprised:

- application form (Form F);
- the proposed Supplemental Agreement;
- annexes: commentary, timeline and a commercial justification paper; and
- an amended Rights Table³.

16. FHH explained that Network Rail:

- had agreed to additional L1 access rights where these do not traverse congested infrastructure (the Midland Main Line) or 'minded to' congested infrastructure (Hope Valley);

² See Network Rail's 2015 Network Statement for more <http://www.networkrail.co.uk/2015NetworkStatement.pdf>.

³ FHH had omitted an arrival time for headcode 6M88, it was subsequently corrected to be 10:43. The arrival time for 6F33 (TSX) was clarified to be 12:26.

- had agreed to sell these rights at L2 but FHH wants L1;
- had not specifically objected to any of the requested access rights apart from the level of specificity ;
- was not prepared to offset the number of relinquished rights against requested additional rights.

17. FHH contended that there is a commercial justification for L1 rights; that deleted rights should be offset against the request for additional rights; and it should be given similar treatment to DBS's request for L1 rights. FHH said that the +/- 30 minutes permitted variation (flex) with a L1 provides a reasonable balance between flexibility required by Network Rail and the certainty that FHH's business requires. It also said that L1 rights are easier to transfer when the need arises.

18. FHH's timeline demonstrates that the proposed supplemental agreement had been discussed at length throughout 2014. However, agreement on the level of specificity for some rights had still not been agreed when FHH made its application to ORR on 22 December 2014. Also, a process had been started by another freight train operator in respect of the transfer of certain rights under provisions in Part J of the Network Code. No industry consultation had been made on any of the rights at that stage.

19. FHH also stated that Network Rail had not consulted on its policy of not granting L1 rights on congested infrastructure and it had not been agreed with freight train operators.

Industry consultation

Process

20. On 30 December 2014 we started a wider industry consultation on this application.

Interested persons

21. Network Rail identified Transport for London (TfL) as an interested person, within the meaning of Schedule 4. We therefore wrote to TfL. On 19 January 2015 Crossrail responded objecting to the proposed rights on two grounds. It stated it would be inappropriate to issue L1 rights before the impact of diversions resulting from engineering works in the wider London area (Gospel Oak to Barking) has been concluded. Secondly, Crossrail registered an objection should certain rights extend to when Crossrail's timetable is fully operational (in 2019), as there could be conflicts with its track access option.

22. This application only concerns services up to PCD 2016. The rights FHH has applied for are already in the working timetable. The only disagreement between Network Rail and FHH is the level of specificity at which rights are granted. FHH's rights can be incorporated without affecting the services for which there are rights in the Crossrail track access option.

Responses

23. Passenger Focus responded on 31 December 2014 that it had no objections to the proposed 27th SA.

24. GB Railfreight (GBRf) responded to the consultation declaring that it did not support the application. It noted that some rights should be transferred to GBRf. We note that there are some applications ongoing under Part J of the Network Code. The right with headcode 6L44 might be concluded before the parties sign the 27th SA. 6L44 is a proposed new right. We make no comment on the case itself. But in order to cover all possible outcomes, our decision is that it is best to keep it within the application. We have no reason to leave it out as matters stand and if it is not in FHH's Rights Table it cannot be transferred anyway. Also as explained below, the right should be included at L2, which is less restrictive than L1 in terms of timing conflicts.

25. GBRf said that there are some errors in respect of the relinquished rights in FHH's submission (such as arrivals and departures). Again, however, while this is important background information, ORR's directions under section 22A can only relate to new or amended rights involving more extensive use of the network, and not less extensive use or deletions. FHH and Network Rail however will need to take into account GBRf's points when updating FHH's rights table.

Network Rail's position

26. Network Rail was content to grant L1 rights where these do not traverse the Midland Main Line or Hope Valley. Network Rail agreed to sell rights at L2 on these networks. Network Rail does not object to services using those routes. Network Rail also referred to ORR's West Main Line policy⁴ saying that overly specific rights can ossify the network.

27. Therefore the only area of disagreement between Network Rail and FHH was the degree of specificity at which firm rights should be sold on the Midland Main Line and Hope Valley.

28. On 21 January 2015 Network Rail wrote to us reinforcing the points it had already made to FHH. However, Network Rail said that it was now prepared to sell rights on the Hope Valley line at L1, as this has not yet been declared congested infrastructure. This would also be consistent with its decision for rights granted to DB Schenker (DBS). These rights are:

Headcode	Description
6E23	MSX additional service from Hope Earles Sidings to Dewsbury Larfarge
6M24	MSX additional service from Dewsbury Lafarge to Hope Earles Sidings

⁴ <http://orr.gov.uk/what-and-how-we-regulate/track-access/current-work/west-coast-main-line>

6E45	SX additional service from Hope Earles Sidings to Drax Power Station
6V82	SUN additional service from Tunstead BLI to Westbury Lafarge
6M58	MO additional service from Westbury Lafarge to Tunstead BLI
6E08	FSX additional service from Hope Earles Sidings to West Burton Power
6M08	SX additional service West Burton Power Station to Hope Earles Sidings

29. Network Rail said that only three services should therefore be sold at L2, that is those on the Midland Main Line. These are⁵:

Headcode	Description
6L44	TTFHO additional service from Hope Earles Siding to West Thurrock
6L89	SX additional service from Tunstead BLI to West Thurrock
6M90	SO additional service from West Thurrock to Tunstead BLI

30. Network Rail also pointed out that DBS's rights, where services are to use the congested infrastructure on the Midland Main Line, will now be sold at L2⁶.

Analysis

31. Network Rail has now agreed to sell rights at L1 for the Hope Valley line. However there was still disagreement about the level of specificity for three rights on the Midland Main Line. That is where we have focused our attention. There is a balance to be struck between the FHH's requests and Network Rail's need for flexibility to make the best use of its network where it has been declared as congested infrastructure.

32. We understand why it is important for FHH to have L1 rights so it can plan its services and organise terminal timings. Also FHH will be surrendering several rights from its Rights Table and this will release capacity in aggregate. FHH made reference to our West Coast Main Line policy⁷, where the implications extend to other major routes. We said that where a highly prescriptive right is given up this should be considered if a specific request for a new right with similar characteristics is made at the same time.

33. However, there are many other considerations that Network Rail must take into account. It is important here that the Midland Main Line is facing a number of competing demands for services and Network Rail has declared it as congested infrastructure. L2 rights mean that services can be scheduled (flexed) out of busy periods if necessary, enabling more services to run overall than otherwise might have been the case. L2 is more appropriate than L1. This is even where other capacity is being released, or otherwise it could be more difficult for Network Rail to undertake its capacity study. This does not

⁵ Network Rail's letter had included a fourth route, 6E08, but this had been cited in error and was actually to be sold at L1 as part of the Hope Valley line services.

⁶ DBS's 116th SA

⁷ <http://orr.gov.uk/what-and-how-we-regulate/track-access/current-work/west-coast-main-line>

however preclude new L1 rights when the congested infrastructure issues have been resolved.

34. Our view is that it is not necessarily easier or more efficient to transfer rights at L1 than at L2. It depends on the circumstances and what is needed by the transferee. This aspect however was not a determinative factor in this case.

Conclusion

35. We have to be mindful of the impact of granting L1 rights for what are additional services. Timetabling will become complex for Network Rail on congested infrastructure. Our duty as a regulator is to make sure that the use of capacity is optimised. Our view is that an optimal outcome would not be achieved by FHH's additional services being at L1. FHH's rights at L2 is also consistent with DBS's new rights being at L2 on the same network. L2 rights, in this case, would better enable Network Rail to maximise use of its capacity on very busy network. For this reason our directions are for the new rights on this part of the network to be at L2.

36. ORR has only had to make a decision in respect of just three out of the proposed 48 additional services, and where none of the paths was in dispute, only the level of specificity. ORR accepts that our WCML policy was not definitive in respect of its application to congested infrastructure, where exceptional circumstances will apply. This letter clarifies our position up to PCD 2016, when the WCML policy will be withdrawn.

ORR's statutory duties

37. In considering the application and in reaching our decision, we are required to weigh and strike the appropriate balance in discharging our statutory duties under section 4 of the Act. We believe that approval of this supplemental agreement is consistent with these duties, in particular our duties to:

- (a) protect the interests of users of rail services;
- (b) promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of the railway network, to the greatest extent that ORR considers economically practicable;
- (c) contribute to the development of an integrated system of transport of passengers and goods;
- (d) promote competition in the provision of railway services; and
- (e) 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

38. Under clause 18.2.4 of the Track Access Contract, Network Rail is required to produce a confirmed copy, within 28 days of any amendment being made, and send copies to ORR and the train operator. I look forward to receiving the conformed copy.

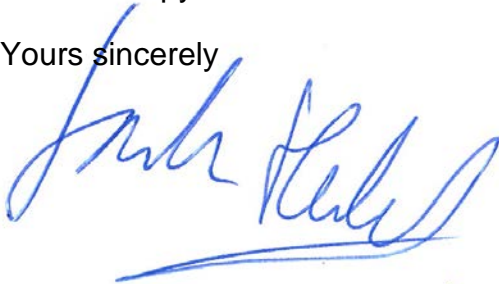
Public register

39. In accordance with section 72 of the Act, we will place a copy of the 25th SA on our public register. The customer name will not be included in the revised the Schedule 5 Rights Table placed on the public register.

40. We will also a place a copy of this letter, ORR's directions and the industry representations on our website⁸.

41. A copy of this letter will be sent via email to Madeline Matthews at Network Rail.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Gordon Herbert', is written over a horizontal line.

Gordon Herbert

⁸ <http://orr.gov.uk/consultations/access-consultations/track-access-decisions/disputed-amendment-to-contracts-section-22a>