

Gordon Herbert
Senior Manager, freight track access

Email: track.access@orr.gov.uk

13 February 2020

Chris Matthews
Track Access Manager
Freightliner Heavy Haul Limited

Emma Day
Customer Relationship Executive
Network Rail

By email

Dear Chris and Emma

Railways Act 1993, section 22A: Directions in respect of the 8th supplemental agreement to the track access contract between Network Rail Infrastructure Limited and Freightliner Heavy Haul Limited

Part One: Background

Introduction

1. On 13 February the Office of Rail and Road (ORR) issued directions for Network Rail Infrastructure Limited (Network Rail) to amend its existing framework agreement¹ with Freightliner Heavy Haul Limited (FLHH) dated 11 December 2016 (the TAC), as formally requested by FLHH on 17 October 2019 but with modifications. This letter explains the background to these directions.

FLHH's application

2. FLHH applied to ORR under section 22A of the Railways Act 1993 (the Act) on 17 October 2019. Its application consisted of a completed Form F with supporting documents; and a proposed supplemental agreement with a Rights Table. FLHH requested 21 additional Firm Rights to support a commercial contract, for the duration of the TAC.
3. FLHH explained that matters that could not be agreed with Network Rail were:
 - the duration of access rights on the Great Western Main Line beyond the Principal Change Date (PCD) 2020,
 - certain arrival/departure windows, and
 - certain objections relating to the South East Engineering Access Statement.

ORR's approach

4. In assessing FLHH's application we followed ORR's track access guidance and the procedures set out in the Act. In making our decision we have had regard to the duties under section 4 of the Act.
5. It is for each party to make their case. We have given both parties opportunities to make representations, which we have considered carefully in making our decision.

¹ Also known as a track access contract.

Part Two: Representations

Views of third parties

6. Network Rail started an industry consultation on behalf of FLHH on 27 August 2019. Two responses were noted in FLHH's application.
7. It was stated in the Form F that Govia Thameslink Railway had requested further information about the nature of the services. It was confirmed that the traffic was established (that is already running and in the Working Timetable) and there was no further correspondence.
8. MTR Crossrail raised queries surrounding performance and timetabling modelling for the services concerned. FLHH noted that in its application that the concerns were unresolved. It believed the concerns related to platform capacity at Paddington beyond PCD 2020 and impact on MTR Crossrail services. Network Rail confirmed to us, in its letter of 13 November 2019, that work undertaken to test the FLHH rights alongside MTR's Crossrail's rights is sufficient to show that there is adequate capacity and that the Paddington platforming issues do not affect this.
9. Network Rail confirmed on 4 November 2019 that there were no "interested persons" affected by the application, within the meaning of the Act.

The parties' representations

10. FLHH's original application was made on 17 October 2019. Network Rail provided its written representations on 13 November and FLHH responded to those on 28 November. ORR asked Network Rail to comment again and its further representations were received on 20 January 2020, followed shortly after by an email from FLHH. The correspondence covered the issues discussed below.

Windows

11. Network Rail said that it could support 19 of the 21 access rights applied for. It could not support GV01(MON) and GO04 (SUN). FLHH then agreed to modify its requested windows for these services as follows:
 - Arrival time for GV01(MON) to be adjusted to 04:15-05:15.
 - Departure window for GO04 (SUN) to be adjusted to 21:40-22:40.

Duration

12. On resolution of the timings of the windows, the dispute centred on the duration of the rights. Network Rail did not support FLHH's application for the 21 rights to expire at PCD2026, it would only support them until 8<.

Engineering access

13. Network Rail said it had new Southeast access arrangements with proposed 6-weekly night possessions between Dartford & Hoo Junction and 12-weekly Longhedge Junction/Factory Junction that would need to be evaluated after "a sufficient" period of time (12 months minimum from December 2019), "to establish that they provide adequate possession access for core maintenance on these lines of route".
14. Network Rail also added that is embarking on a substantial programme of reviews for safe maintenance access in order to meet the requirements of ORR Improvement Notices served on Network Rail, which could result in an increase in night working. It

said committing to the extension of access rights until PCD2026 could result in insufficient access.

15. FLHH disputed Network Rail's representations. FLHH said that the 6-weekly cyclical maintenance strategy introduced on the South East route, for the PCD 2020 timetable, is published through Section 5 of the Engineering Access Statement (EAS). There are established procedures for making amendments to the maintenance strategy, as outlined in Part D of the Network Code, when required. It argued the granting of Firm Rights would not prevent this, rather services would have to be cancelled or retimed; and that payments under Schedule 4 of the TAC could be applicable.
16. FLHH stated that establishing possessions is a well-established industry process. Its TAC already includes many services that are regularly affected by disruptive engineering work. It argued that if Network Rail declined to sell access rights if they were to be impacted by Section 5 or 7 possessions this would lead to poor utilisation of the network, create problems for operators, and "not practically achievable". It argued that Network Rail's arguments should be dismissed.
17. FLHH thought there might be some misunderstanding within Network Rail over the status of access rights in relation to disruptive engineering access. Therefore, we allowed Network Rail further opportunity to comment (extended for the Christmas break). Network Rail noted that the mechanisms under Part D of the Network Code provide an opportunity for consultation with operators on future access requirements.

Justification

18. Network Rail contended that FLHH's commercial contract with the freight customer ends before PCD2026. The disagreement over the extension to PCD2026 had caused the section 22A application to ORR. Network Rail argued that by selling rights beyond duration of the commercial contract, there was a risk of ossifying capacity. Network Rail cited paragraph 17 of ORR's track access guidance module *Duration of Framework Agreements, October 2019*. The guidance indicates that commercial contracts with customers is evidence needed to support framework agreements in excess of five years. The guidance also refers to the expectation train operators will have about continuing existing services when framework agreements are renewed or replaced.
19. Network Rail concluded that aligning the duration of the access rights with the commercial contracts would provide sufficient confidence to the end customers over the ability to run trains.
20. FLHH submitted that granting rights until 2026 would align its rights with all its other access rights in its TAC. FLHH noted that typically freight train commercial contracts do not necessarily align with the duration of the associated rights in track access contracts. FLHH stated that this gives freight customers' confidence that the associated paths will not terminate with the end of a particular FOC's contract. Rather, if a contract is re-tendered and awarded to another train operator, the rights can be transferred through the Freight Transfer Mechanism in Part J of the Network Code. FLHH argued that granting rights through to PCD2026 would provide certainty to the end customers in respect of their long term investments in rail terminals and wagons. FLHH queried the impact on rail freight if this were adopted by Network Rail as a national policy.
21. FLHH, in its Form F and representations, provided useful context for this application. FLHH's points included:

- FLHH has a multi-year contract to transport aviation fuel to Heathrow Airport.
- The customer has made significant investment to support the traffic including the procurement of new wagons and specialist terminal facilities.
- This investment of “30 year+ assets” was made with the expectation that the flow will continue well into the future.
- The traffic is critical for airport operations, supplying a significant amount of aviation fuel to Heathrow Airport given the limits of the existing infrastructure.

Part Three: ORR’s review

Introduction

22. This proposed supplemental agreement has been on a longer road than FLHH would have wished. We have reviewed the issues raised by this application and the representations made by the parties.

Performance

23. FLHH is already running services under its commercial contract with the customer, using Train Operator Variation Requests. One advantage of this is it allows the impact on other operators’ current services to be considered. FLHH’s application stated that “The performance of this traffic has been very strong and has been recognised by all parties to be so.” It stated a performance figure of “Arrival to Fifteen minutes” of 87.1%, above the Moving Annual Average Arrival to Fifteen minutes of 86.2% across all FOCs. It said “Exact on-time departure” was 82.4%, compared to the all freight operator average of 79.9%. Measures are being undertaken to improve performance.

24. We note that MTR Crossrail raised concerns at the consultation stage. However, we note that Network Rail is satisfied about the available capacity.

25. Network Rail did not raise any substantive concerns about the impact on other services. We do not see the impact on other operators being a significant aspect of the dispute.

Windows

26. ORR notes that the parties have now reached agreement on the windows for GV01 and GO04. Therefore, we have not considered that further, except to note that these changes need to be reflected in any ORR directions consequent to this application.

Duration

27. The outstanding area of dispute between Network Rail and FLHH is the duration of the rights. The following paragraphs discuss ORR’s review of the representations made.

Possessions strategy

28. First, Network Rail has cited the need for night time possessions for parts of the network. FLHH in turn has argued that it, and other train operators, have access rights that use network that could be subject to engineering work. The amount of detail provided by Network Rail in this instance and the impact on the consequences for maintaining its network was limited. FLHH made convincing points about the applicability of industry processes and provisions in the TAC for securing possessions.

29. ORR is persuaded that the sale of access rights does not preclude Network Rail taking possessions when these are needed. If rights are not sold in order to reserve space for

possessions (whether they go ahead or not), established procedures for accommodating maintenance would be circumnavigated and the network risks becoming underutilised and inefficient.

30. Network Rail cited ORR's Improvement Notices on track worker safety. ORR issued two Improvement Notices to Network Rail on 8 July 2019². In summary, the notices were served because Network Rail was not ensuring the safety of its employees and contractors working on or near track so far as is reasonably practicable, and was not implementing preventive and protective measures necessary for the protection of workers on or near the line.
31. The aim of the notices is for Network Rail to maximise the potential to remove workers from the track while trains are running. ORR understands that as the network becomes increasingly busy during the day, running more night time freight could reduce the potential for opportunities to access the network for maintenance at night. However, it is for Network Rail to determine whether night time working is a solution for maintenance needs and to negotiate with train operators to secure access as required.
32. Overall, Network Rail has not persuaded us that rights should not be sold in this instance. There are existing industry processes for planning engineering possessions, which are routinely used across the network. We are not convinced that this application should be treated differently to other traffic on the network on that basis.

Justification

33. In its letter of 20 January 2020 Network Rail cited ORR's guidance module "*Duration of framework agreements, October 2019*". Network Rail refers to the need for framework agreements longer than five years to be justified. This reflects the requirements of *The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016*. It would be the case that an access right granted today to expire at PCD2026 would be longer than five years in duration. The ORR guidance refers specifically to "framework agreements" not individual access rights. FLHH's framework agreement for these purposes is the TAC. ORR approved the duration of the TAC, until PCD2026, in 2016³.
34. We note, as FLHH says, that it will already be the case that many access rights in framework agreements last longer than the commercial contract under which the services are operated. Limiting the sale of freight access rights to the duration of the underlying commercial contract is not usual practice; normally access rights last for the duration of the track access contract. When considering new or additional rights we do not interrogate the duration of the commercial contracts. However, we note here the argument that the traffic flows concerned will continue on a long term basis.
35. Overall, we are not persuaded that the duration of the new access rights applied for should be limited to the length of the commercial contract. ORR has already approved the duration of FLHH's TAC until 2026; it was expected that the rights in the Schedule 5 Rights Table would be regularly adjusted during the time of that contract.

² IN/TW/2019/07/08/2 and IN/TW/2019/07/08/1 see <https://orr.gov.uk/rail/publications/enforcement-publications/improvement-notices/improvement-notices-2019>.

³ https://orr.gov.uk/_data/assets/pdf_file/0012/21513/fhh-dec-letter.pdf.

Other solutions

36. We have considered whether other solutions might meet both parties' concerns, such as the granting of rights on a contingent basis or further deferment of a decision. In the circumstances and with the information presented, we did not consider these to be obviously better outcomes than that FLHH applied for. However, they might have increased the amount of uncertainty for Network Rail and FLHH, as well as the customer involved. It might also present extra strain on both parties' resources.
37. We note cases can often be resolved by the adjustment of window timings or sizes. In this case the parties were able to reach agreement on the windows, after the section 22A application was made to us. That, however, did not affect the fundamental issue of how long the access rights should last.

Part Four: ORR decision and conclusions

ORR's decision

38. In considering the application 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 Act⁴. These include:
- ...otherwise to protect the interests of users of railway services;
 - promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the
 - contribute to the achievement of sustainable development;
 - promote efficiency and economy on the part of persons providing railway services;
 - promote competition in the provision of railway services for the benefit of users of railway services;
 - promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;
 - impose on the operators of railway services the minimum restrictions which are consistent with the performance of ORR's functions.....;
 - enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance;..
39. We note that aside from the issue of duration of the access rights (and associated implications for maintenance and obtaining possessions) , which we consider in detail above, Network Rail has not highlighted any other operational reason as to why the access rights should not be granted.

ORR directions

40. ORR may give directions to Network Rail and FLHH, under section 22A of the Act, requiring them to make amendments to their TAC permitting "more extensive use" (MEU) of the network. MEU is defined in the Act. Examples of MEU set out in ORR's

⁴ https://orr.gov.uk/_data/assets/pdf_file/0007/24847/our-rail-and-road-duties.pdf

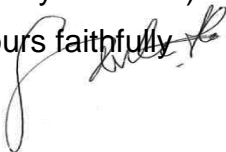
guidance⁵ include additional services. There has been no dispute in consideration of this application that the additional Firm Rights constitute MEU for these purposes.

41. ORR has directed Network Rail to enter into the supplemental agreement proposed by FLHH as applied for under section 22A of the Act.
42. After FLHH's application was submitted, the parties agreed to changes to two windows in the proposed Rights Table. ORR's directions reflect this change by including an updated Rights Table, as supplied by FLHH on 30 January 2020. Also, in the supplemental agreement, we have corrected the FLHH registered address, with FLHH's consent.

Administration

43. Copies of this letter, the directions and the agreement will be sent to Peter Craig at Network Rail and his regulatory reform team. Redacted copies of this letter and the agreement will also be placed on the ORR website and sent to Keith Merritt and the Department for Transport in due course.
44. Once the supplement agreement is signed, in accordance with section 72(5) of the Act, please send us copy within 14 days. In accordance with section 72(2)(b)(iii), a copy will be placed on our public register and website.
45. In entering any provision on the register or publishing it on our website, we are required to have regard to the need to exclude, as far as is practicable, the matters specified in section 71(2)(a) and (b) of the Act. These sections refer to:
 - any matter which relates to the affairs of an individual, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that individual; and
 - any matter which relates to the affairs of a particular body of persons, whether corporate or incorporate, where publication of that matter would or might, in the opinion of ORR, seriously and prejudicially affect the interests of that body.
46. When submitting the copy of the signed agreement please therefore identify any matters which you would like us to consider redacting before publication. I will contact you separately about any redactions required in respect of this decision letter.
47. Please also send us a conformed copy (consolidated version) of the TAC, as required by clause 18.2.4 of that contract, within 28 days of making the amendment (marked for my attention).

Yours faithfully



Gordon Herbert

⁵ https://orr.gov.uk/_data/assets/pdf_file/0005/17591/making-a-track-access-application.pdf