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| **TTP 210 / GBRf****SUBMISSION BY GB RAILFREIGHT LTD.****TO THE TIMETABLING PANEL OF THE ACCESS DISPUTES COMMITTEE IN RESPECT OF NETWORK RAIL'S FINAL WEST COAST ROUTE MODERNISATION DECISION DOCUMENT REFERENCE NAUM\_13.** |
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**1 DETAILS OF PARTIES TO THE DISPUTE**

1.1 The names and addresses of the parties to the reference are as follows:-

(a) GB Railfreight Limited whose Registered Office is at 15 – 25 Artillery Lane, London, E1 7HA ("First GBRf"):

(b) Network Rail Infrastructure Limited whose Registered Office is at 40 Melton Street, London, NW1 2EE ("Network Rail"):

(c) First GBRf correspondence address:

 Ian Kapur.

 Timetabling Manager,

 First GB Railfreight,

 15 – 25 Artillery Lane,

 London,

 E1 7HA.

 Tel 0207 983 5174

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**2 THE PARTIES’ RIGHT TO BRING THIS REFERENCE**

2.1 This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Clause 2 of First GBRf's Track Access Contract, Condition D2.1.11 and D 5.1 of the Network Code and pursuant to Section 3.5.4.of the National Rules of the Plan.

**3** **CONTENTS OF REFERENCE**

3.1 In this instance, First GBRf is making an individual submission for reference TTP 210 / GBRf, as requested by the Committee Secretary.

3.2 The following information is included in support of the submission TTP 210 / GBRf:

 ( a ) The subject matter of the dispute in Section 4;

 ( b ) A summary of the issues in dispute in Section 5;

 ( c ) A detailed explanation of the issues in dispute prepared by the claimant in dispute, with a paragraph by paragraph response from the respondent(s) in Section 6;

 (d) Any further issues raised by the respondent in Section 7;

 (e) The decisions of principle sought from the Panel in respect of legal entitlement and remedies in Section 8;

 (f) Appendices and other supporting material.

**4 SUBJECT MATTER OF DISPUTE**

4.1 This dispute is centred on Network Rail's proposal, at short notice, to alter some standard possession opportunities (ROTR Section 4 items) and also to change and add new disruptive possessions (ROTR Section 7 items) to the already "agreed" 2008 Rules of the Route (Version 6.3).

 First GBRf's dispute is based on the lack of reasonable consultation on these possessions, followed quickly by advice that they are to go ahead. First GBRf believes this does not comply with the ORR's Provisional Order issued to Network Rail on 28th February 2008. First GBRf also believes that Network Rail is in breach of its Network Licence Conditions No.7 and No.9 in trying to plan and execute these late notice possessions.

4.2 This dispute relates to, and is associated with, Sections 3.1, 3.4 and 3.5 of the 2008 National Rules of the Plan (Version 4.2), Network Code Condition D 2.10.1, 2.1.11, D 5.1 and D 6, also Network Rail's Network Licence (version modified 12th April 2007).

4.3 There are copies of the following documents annexed to the reference:

 i) Appendix A: An e-mail, dated Wednesday 12th March 2008, from Network Rail to affected operators detailing its proposals to alter West Coast Main Line possessions from 18th May 2008 onwards.

 ii) Appendix B: An e-mail, dated Thursday 27th March 2008, from First GBRf to Network Rail responding, in turn, to each of its proposals.

 iii) Appendix C: An e-mail, dated Wednesday 2nd April 2008, from Network Rail to affected train operators stating its decision to deliver the infrastructure works as shown in this document (the "Decision Document").

 iv) Appendix D: An e-mail, dated Sunday 6th April 2008, from First GBRf to Network Rail stating that First GBRf cannot agree with the contents of the Decision Document and that this will be referred to the relevant Access Disputes Committee.

 v) Appendix E: An e-mail, dated Sunday 6th April 2008, from First GBRf to the Access Disputes Committee Secretary lodging a dispute to certain items in the Decision Document (Appendix C).

 vi) Appendix F: An e-mail dated Wednesday 9th April 2008, from the Access Disputes Committee Secretary to First GBRf acknowledging receipt of this dispute item and setting a date of Thursday 8th May 2008 for the dispute hearing.

 vii) Appendix G: Section 3 of the 2008 National Rules of the Plan.

 viii) Appendix H: Licence Conditions 7 and 9 of the Department of Transport's Network Licence granted to Network Rail Infrastructure Limited (version modified on 12th April 2007).

 ix) Appendix J: A letter from the Office of Rail Regulation to Network Rail, dated 28th February 2008, detailing its Provisional Order to Network Rail requiring it to produce an adequate plan for the remaining West Coast Route Modernisation programme in consultation with its customers and funders.

**5                    SUMMARY OF DISPUTE**

5.1 This dispute is in relation to late notice proposals for new and altered West Coast Main Line possessions taking place in the 2008 and 2009 timetable years. Network Rail formally made its preferred proposals by e-mail to all affected train operating companies on 12th March 2008 (Appendix A), extremely late in the normal 2008 Rules of the Route process. As an example of how late in the process these new proposals fall, in one case, the time span from a period block being proposed to its date of proposed implementation is just over nine weeks. The final date for train operating companies' responses is 17:00 on Friday 28th March 2008.

5.2 After having consulted our direct customers who'd be affected by these blockages, First GBRf responded to the proposal document on 27th March 2008. There were several proposals that had First GBRf's agreement but also seventeen items that were declined, with details as to why they were unacceptable to First GBRf and its customers (Appendix B). As part of several declinations, particularly for time sensitive Royal Mail services, First GBRf requested sight of validated paths showing how its trains' journeys might be affected if diverted away from their booked routes. These would give our customers some visibility of service from which they might draw up revised plans, possibly using alternative modes of transport.

5.3 As part of an investigation into recent overrunning engineering work possessions, on 28th February 2008, the Office of Rail Regulation ("ORR") issued a Draft Final Order to Network Rail in relation to its weaknesses on its possession planning, also a Provisional Order relating to the remaining works in the West Coast Route Modernisation programme. This stated that Network Rail must *"by 31st March 2008, produce an adequate plan in consultation with your customers and funders".* The ORR order was notable in that there was neither a stipulation on timescale for when these works were required to be completed nor a time for when an enhanced timetable would be required to commence.

5.4 First GBRf firmly believes that there was insufficient time between the required response date to the Proposal Document (Appendix A), 17:00 on Friday 28th March 2008, and the date that Network Rail was required to deliver a consulted and robust plan for these works to the ORR (31st March 2008), for any meaningful consultation to have taken place. Indeed, there was no consultation between Network Rail and First GBRf over these three days before Network Rail's submission for its "robust" delivery of WCML works to the ORR. It is also notable that there was no consultation by Network Rail on any alternative options for delivering the WCML works (in Appendix A) prior to 12th March 2008. It appears that only Network Rail's preferred option was put forward.

5.5 With only Saturday 29th, Sunday 30th and possibly a small part of Monday 31st March 2008 technically available for consultation between Network Rail and First GBRf, and given that there was no contact by Network Rail during this time, Network Rail has not complied with the Draft Final Order from the ORR, issued on 28th February 2008, and is in breach of its Licence Condition No.9.

5.6 It has taken until Tuesday 15th April 2008, when both parties were present at an ORR meeting, for Network Rail to set up its first consultation meeting with First GBRf. This is to be on Tuesday 29th April 2008.

**6                    EXPLANATION OF EACH ISSUE IN DISPUTE WITH RESPONSE**

6.1.1 Network Rail's Network Licence Condition 7 (Appendix H) states that, the purpose of the stewardship of the network is *"to secure the operation and maintenance of the network, the renewal and replacement of the network, and the improvement, enhancement and* *development of the network, in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders in respect of the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network".*

First GBRf's position is that the renewal and enhancement of the network, with possessions as described in the Decision Document (Appendix C), does not satisfy First GBRf's reasonable requirement to run freight services, as stated above. If the unconsulted possessions go ahead, as suggested, there will be occasions when First GBRf will not be able to run its W10 gauge Intermodal traffic, for periods between 1 and 15 days, along the only W10 gauge cleared route between Wembley and Hams Hall, via Rugby and Nuneaton. W10 gauge traffic is based on a 9' 6'' container being carried on a standard flat wagon. The affected services are 4M21 03:26 (SO) Felixstowe North – Hams Hall; 4M21 03:05 (MSX) Felixstowe North - Hams Hall; 4M23 09:48 (MO) Felixstowe South – Hams Hall; 4M23 10:59 (MSX) Felixstowe North – Hams Hall; 4L22 14:15 (SX) Hams Hall – Felixstowe North; 4L23 21:51 (FSX) Hams Hall – Felixstowe North; 4L23 21:51 (FO) Hams Hall – Felixstowe South. Ancillary movements 0L22 08:57 (MO) Wembley InterCity Depot – Hams Hall; 0M21 11:10 (SO) Hams Hall – Wembley InterCity Depot. All these services have Level 1 rights, with an arrival time at each end of its journey of +/- 30 minutes. There is no diversionary route for this gauge-dependent traffic and it is unreasonable to expect First GBRf to convey this traffic by road. Not withstanding the ability to secure enough lorries to convey our traffic when many other services would also need to transfer to road, the containers would not arrive at their terminal at the required time, nor would the return container traffic be on time back at the port. Specifically with the 15 day blockade proposed for Weeks 22-24 in 2008, the disruption caused to our customers in not carrying W10 gauge traffic by rail would be unacceptable and would likely lead to the loss of contract based on poor performance.

6.2.1 First GBRf's response (Appendix B) to the proposal document requested sight of validated paths showing how specific Royal Mail services might be affected if diverted away from their booked routes along the Trent Valley via Nuneaton. These trains are 1S96 16:26 (SX) Willesden PRDC - Shieldmuir Royal Mail Terminal; 1A97 19:30 (SX) Warrington Royal Mail Terminal – Willesden PRDC. The trains have Level 1 rights, with an arrival time at each end of its journey of +/- 15 minutes due to the time sensitive nature of the Royal Mail traffic. These "diverted paths" were required to give our customers visibility of service from which they might draw up revised plans, possibly also using alternative modes of transport. I had no response from Network Rail offering sight of alternative paths for these trains, so both First GBRf and Royal Mail still don't know whether or not these trains can run. With this issue in mind, and taking into account the details in paragraph 5.3, 5.4 and 5.5, Network Rail has, therefore, not produced an adequate plan *in consultation with its* *customers* and has not complied with the ORR's Provisional Order.

6.3.1 Network Rail Licence Condition 9 (Appendix H) states that:

 *9.2: the licence holder shall:*

*a) plan its renewal, maintenance and enhancement of the network in a timely and efficient manner to enable it to specify its requirements for temporary changes to the national timetable (except in respect of changes arising from emergencies or severe weather conditions) so that the procedures to revise the national timetable in respect of such changes can be completed not less than 12 weeks prior to the date of any such change; and*

*(b) provide access to information in accordance with Condition 9.1 in relation to all such changes to the national timetable not less than 12 weeks prior to the date such changes are to have effect. Also,*

*9.3 The licence holder shall:*

*(a) consult with train operators in carrying out such planning;*

*(b) notify ORR if the licence holder considers that any non-compliance by a train operator with its contractual or licence obligations in relation to the procedures referred to in Condition 9.2 is wilful or persistent and is likely to prevent it complying with Condition 9.2(b); and*

*(c) use reasonable endeavours to resolve promptly any disputes arising under such procedures so as to prevent or minimise the risk of delay in providing access to the information in accordance with Condition 9.2.*

 It is the view of First GBRf that Network Rail is in breach of Licence Condition 9.2(a), 9.2(b) and 9.3(a) as listed above, for the following reasons:

i) Condition 9.2(a): In publishing its Decision Document (Appendix C), Network Rail's proposals for altered Section 4 possession opportunities in Period D (from 18/5/2008 to 7/9/2008) 101.10 Hillmorton Junction to Rugby Trent Valley Junction; 101.11 Rugby Trent Valley Junction to Nuneaton South Junction & 101.12 Nuneaton South Junction to Nuneaton North Junction) and also its first Section 7 disruptive possession (Week 9 – Sat. 24th May to Thurs. 29th May 08 from Atherstone to Armitage) have been planned so that the procedures to revise the national timetable cannot be completed not less than 12 weeks prior to the date these changes would take effect.

ii) Condition 9.2(b): In publishing its Decision Document (Appendix C), Network Rail's proposals for altered Section 4 possession opportunities in Period D (from 18/5/2008 to 7/9/2008) 101.10 Hillmorton Junction to Rugby Trent Valley Junction; 101.11 Rugby Trent Valley Junction to Nuneaton South Junction & 101.12 Nuneaton South Junction to Nuneaton North Junction) and also its first Section 7 disruptive possession (Week 9 Atherstone to Armitage) cannot provide access to information in relation to all such changes to the national timetable not less than 12 weeks prior to the date these changes would take effect.

iii) Condition 9.3(a): As in Paragraph 5.5, there were only two and a half days between when a response to the Network Rail Proposal Document (Appendix A) was issued, on 28th March 2008, and the date when Network Rail was required to deliver a consulted and robust plan for WCRM works on 31st March 2008. Given this was over a weekend, no consultation on the planning of an amended timetable took place nor was any revised timetable agreed. There has been no formal consultation or agreement on any amended timetable after Network Rail issued the Decision Document (Appendix C) on 2nd April 2008 and not even between that date and the date on submission of this dispute paper.

**7                    ANY FURTHER ISSUES RAISED**

7.1 First GBRf emphasised in its response to Network Rail, and wants it to be emphasised once again that, as per Condition 2.1.10 of the Network Code, Network Rail must not implement any change to amend the Rules of the Route until any appeal against such change has actually been determined.

* + 1. First GBRf is adamant that, for West Coast Route Modernisation works as set out in Appendices A and C, normal industry processes apply. This is as dictated by First GBRf's Track Access Contract, the National Rules of the Plan, the Rules of the Route process, the Network Code, referral to the relevant Access Disputes Committee and final referral to the ORR. It is First GBRf's position that any suggestion by Network Rail that the above processes are not the industry mechanism for these works, due to its wish to have them completed by December 2008, has no legal standing.

**8                    DECISION SOUGHT FROM THE PANEL**

8.1.1        The Panel is asked to determine whether or not:

(a) Network Rail has complied with the Office of Rail Regulation's Provisional Order, issued on 28th February 2008, relating to the West Coast Route Modernisation programme and its consultation thereof.

(b) Network Rail is in breach of its Licence Condition No.7.

(c) Network Rail is in breach of its Licence Condition No.9.

8.1.2 If Network Rail is found to have been in breach of either Licence Condition No.7 or No.9 or both, the Panel is asked to direct Network Rail to withdraw the current possessions as described in Appendix C, and to properly consult with train operating companies to reach agreement in laid down industry timescales and in accordance with its Licence Condition No.7 and 9.

**9                    SIGNATURES**

For and on behalf of l For and on behalf of GB RAILFREIGHT.

Signed Signed IAN KAPUR.

Print name Print name IAN KAPUR.

Position: Position: TIMETABLING MANAGER.

Date: Date: 23rd April 2008.