

TTP 2318 AND TTP 2320 (SECOND HEARING)
GB RAILFREIGHT & FREIGHTLINER SOLE REFERENCE DOCUMENT
(SRD)

1 DETAILS OF PARTIES

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

- (a) GB Railfreight Limited (“GBRF”) whose Registered Office is at 3rd Floor, 55 Old Broad Street, London, EC2M 1RX (“the First Claimant”);
- (b) Freightliner Limited (“FL”) whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ (“the Second Claimant”);
- (c) Freightliner Heavy Haul Limited (“FLHH”) whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ (“additional dispute party/parties”);
- (d) First Greater Western Limited (“FGW”) whose Registered Office is at Milford House, 1 Milford Street, Swindon, Wiltshire, SN1 1HL (“additional dispute party/parties”);
- (e) XC Trains Limited (“XC”) whose Registered Office is at 1 Admiral Way, Doxford International Business Park, Sunderland, SR3 3XP (“additional dispute party/parties”); and
- (f) Network Rail Infrastructure Limited (“NR”) whose Registered Office is at Waterloo General Office, London, SE1 8SW (“the Defendant”).

1.2 Involved parties to this dispute include DB Cargo (UK), Northern Trains, Transpennine Trains, Arriva Rail London, Govia Thameslink Railways and First MTR South Western Trains.

1.3 For clarity, FL and FLHH are collectively referred to as ‘Freightliner’ throughout this SRD.

2 CONTENTS OF REFERENCE

2.1 This Sole Reference Document (SRD) includes: -

- a) GB Railfreight’s and Freightliner’s general comments
- b) GB Railfreight’s and Freightliner’s views on Network Rail’s responses to the seven questions listed in paragraphs 11 to 17 of the Seventh Directions
- c) The decisions sought from the Panel
- d) Appendices

3 GB RAILFREIGHT'S & FREIGHTLINER'S GENERAL COMMENTS

- 3.1 GB Railfreight and Freightliner note the Hearing Chair's 10th Directions and, in particular, that Network Rail has accurately summarised the powers of the TTP subject, of course, to any persuasive authorities from TTP493/494/495, TTP1331, TTP1376 and TTP2318 & TTP2320 and any other relevant determinations.
- 3.2 GB Railfreight and Freightliner's views on the TTP's powers do not differ from the Hearing Chair's preliminary conclusion stated in the 10th Directions and the several points made in the Supplement to the 10th Directions.
- 3.3 In order to assist with the arguments involved in this Timetable Dispute hearing, Appendix A has been provided which is a simple flow chart outlining what GB Railfreight and Freightliner believe Network Rail's legal entitlements to be in enabling it to flex both directly and indirectly affected operators as part of the "Informed Traveller" process. It is present to aid the discussion on how GB Railfreight and Freightliner believe Network Rail has flexing powers, which form a fundamental part of this hearing.
- 3.4 In operating within the terms of the Track Access Contracts between GB Railfreight and Network Rail, and Freightliner and Network Rail (each of which encompass the Network Code), GB Railfreight and Freightliner are both clear that there are expectations on all parties included in the Network Code that form part of a legally binding agreement.
- 3.5 As per Condition 1.1.8 of the Network Code, all Timetable Participants need to be sufficiently resourced to be able to process the general level of workload stipulated by current Part D of the Network Code. It cannot be the case, for example, that resourcing levels at either Network Rail or an operator can be used as a reason to degrade either parties legal entitlement, as is hinted at by Network Rail in paragraph 5.5 of it's SRD.

4 RESPONSES TO PARAGRAPHS 11 TO 17 OF THE 7TH DIRECTIONS

QUESTION 11:

Is NR correct in saying that if a freight service diverted in connection with a NR Variation under D3.4 cannot be accommodated on the diversionary route NR is under no duty to apply any Flexing Rights to other operators' services to accommodate the diverted freight services, nor is it required to apply the Decision Criteria in respect of such services?

- 4.11.1 GB Railfreight and Freightliner believe the Network Rail statement to be incorrect. GB Railfreight and Freightliner believe that if a Network Rail Variation, under Condition D3.4, cannot be accommodated on a diversionary route, Network Rail is under a duty to apply flexing to other operators' services to accommodate the diverted freight services, however the ability to use the required powers of flex must be enacted very early on in the process.
- 4.11.2 GB Railfreight and Freightliner believe that expectation and process follows on from the directions of the Access Impact Matrix, which is incorporated in the agreed National Timetable Planning Rules.
- 4.11.3 The Access Impact Matrix directly mandates Network Rail to produce specific outputs, for example (but not limited to) "Severity 3 Timetable Study": standard hourly patterns of service, timing exercise to understand the impact on journey time detriment, train-by-train timing to demonstrate impact on services, detailed structure of amended train plan stating additional time. These outputs are required to be ready and consulted for both Version 1 and Version 3 of the relevant Engineering Access Statement.
- 4.11.4 Freight Operating Companies' Track Access Contracts grant them access rights and access to the Network all subject to the Operating Constraints. The Operating Constraints are defined as; the Engineering Access Statement, the Timetable Planning Rules and the Working Timetable and all appendices to the Working Timetable including the Sectional Appendices as defined in the Working Timetable and all supplements to the Sectional Appendices.

- 4.11.5 The Operating Constraints include the Timetable Planning Rules document therefore the Access Impact Matrix and its contents, as shown in the agreed National Timetable Planning Rules document, are necessarily incorporated in the track access agreement(s) between Freight Operating Companies and Network Rail Infrastructure Limited.
- 4.11.6 With what Network Rail has stated in Paragraph 4.11.7 of its SRD, GB Railfreight and Freightliner are clear that, in a “Severity 4” Timetable Study scenario (for example), the current detail of the “Amended Train Plan Comments” do not provide sufficient, appropriate and necessary information for all operators to fully understand that Network Rail is actually exercising Condition D3.4.8 of the Network Code.
- 4.11.7 The outputs of a full timetable study (Severity 4) could then enact Condition 3.4.9 of the Network Code, when Network Rail may then require both directly and indirectly operators to submit revised Access Proposals.
- 4.11.8 For Severity 1-3 studies of the Access Impact Matrix, detailed timetabling work would not have been carried out prior to TW-26 and, for Network Rail to ensure it could exercise its Flexing Right, it would need to consult with directly and indirectly affected operators and ensure they understand that Network Rail might be required to flex their services when all revised Access Proposals bids are being validated. In GB Railfreight and Freightliner’s view, this consultation could be bolstered by enhanced Traffic Remarks stating, for example, that *“operators may be required to have their services flexed to accommodate diverted trains over this route”*.
- 4.11.9 GB Railfreight and Freightliner firmly believe this Condition D3.4.8 is fundamental in giving Network Rail its legal entitlement to flex any directly or indirectly affected Timetable Participants’ services, albeit with the prescribed notice as stated in the Network Code.
- 4.11.10 With respect to Paragraph 4.11.9 (c) of Network Rail’s SRD, GB Railfreight and Freightliner disagree with this statement. Network Rail’s entitlement to flex is not limited to only schedules bid (our emphasis) via a revised Access Proposal. Network Rail’s entitlement to flex any Timetable Participant is provided by Condition D3.4.8 and specifically Network Rail’s consultation (not provision of a bid) with any indirectly or directly affected Timetable Participants.

- 4.11.11 The critical piece of information that Network Rail has not provided in its SRD 4.11.9 (c) is that, for Network Rail's entitlement to flex any operator to apply, those operators should have been involved and consulted in the prescribed process between TW30 and TW26. The fact that directly and indirectly affected operators, for the Week 40 amended train plan, had not been consulted by TW-30 means that Network Rail has not abided by the Network Code and had lost its opportunity to be able to flex any operators' services.
- 4.11.12 GB Railfreight and Freightliner note with interest that in Paragraph 4.11.9 (e) of its SRD, Network Rail has correctly stated (as per Network Code Condition 3.4.12) that where a revised Access Proposal has not been submitted by a Timetable Participant after the required consultation, Network Rail is entitled to make a Network Rail Variation of any Train Slot, in respect of which the revised Access Proposal was required, and no appeal may be made in respect of Network Rail's decision.
- 4.11.13 Notwithstanding Paragraph 4.11.12, above, GB Railfreight and Freightliner believe that Network Rail is incorrect in its assertion in the same paragraph that Decision Criteria can only be used to decide between the inclusion of, or flex of trains, included in revised Access Proposals. Condition D4.4.1(c) makes it clear that the Decision Criteria shall be used only once Network Rail has applied and exhausted its Flexing Right and it is then not possible to create a timetable compliant with the Rules. In this scenario, there is no requirement for a revised Access Proposal to have been submitted.
- 4.11.14 This is exactly the point GB Railfreight had been making in the first SRD and does so again in this Second Hearing document - i.e. that these flexing powers for Network Rail do exist in the Network Code if exercised properly and at the right time.
- 4.11.15 With respect to Paragraph 4.11.9 (d) of Network Rail's SRD, GB Railfreight and Freightliner do not agree with the last sentence in this paragraph, which states that *'Network Rail can only make a change to the indirectly affected operator by consent.'* There is no mention of "consent" within Part D of the Network Code on this aspect. GB Railfreight and Freightliner would like Network Rail to justify this statement.
- 4.11.16 As articulated above, GB Railfreight and Freightliner believe that Network Rail is empowered by the Network Code to require a revised Access Proposal by an indirectly affected operator so long as consultation on this specific requirement has commenced

by TW-30, as clearly stated in Condition 3.4.8 of the Network Code, but this is not the only route to amend the timetable to accommodate a Network Rail Variation.

4.11.17 GB Railfreight and Freightliner believe that the Decision Criteria should have been used, where necessary, in dealing with any conflicts between directly and indirectly affected operators once Flexing Rights have been exhausted, in accordance with D4.4.

4.11.18 In reaching a Decision with regards to a Network Rail Variation, pursuant to D3.4, Network Rail is expected to comply with the requirements of Condition D4.4. D4.4.1 (a) explicitly states that, in reaching a Decision regarding a Network Rail Variation, Network Rail must *“exercise its flexing Right when responding to an Access Proposal submitted under Condition D3.4.10”*

4.11.19 Where D4.4.1(a) has been exhausted to the extent that Network Rail has exercised its Flexing Right and has concluded it is not possible to create a timetable consistent with the Rules [D4.4.1(b)], and only where those over-riding principles have been exhausted, Network Rail is expected to apply D4.4.1 (c) prescribing that the Decision Criteria must be used to reach a Decision on capacity allocation.

4.11.20 Network Rail’s application of this is evidenced by the significant number of schedules Freightliner see flexed by Network Rail on a weekly basis to facilitate other operators diverted schedules, where Freightliner have not submitted a revised Access Proposal. Appendix D provides a typical example of the flexes applied to Freightliner services in one week to facilitate diverted or retimed passenger services amended as a result of RoUs not directly impacting Freightliner. In terms of application of the Decision Criteria, Freightliner argue that there should only be a requirement to apply the Decision Criteria once all options regarding application of Flexing Right have been exhausted and the only option available to Network Rail is the rejection of an revised Access Proposal, at which point written reasons for this rejection should be provided pursuant to D3.4.11 and D4.4.1(c).

QUESTION 12:

If NR is correct in this opinion, then does this interpretation of Part D only apply to freight services, or does it apply to any diverted train?

- 4.12.1 Having described in our answer to Question 11 why both GB Railfreight and Freightliner believe Network Rail's answer is not correct, GB Railfreight and Freightliner believe that flexing at "Informed Traveller" timescales applies to any and all services, be they passenger or freight, also articulated above.
- 4.12.2 However, given the long list of examples in Appendix B and D, and Network Rail's list of 4 examples, where passenger schedules have been *sought* to be amended for diverted freights, we ask the Panel to come to its own conclusions.

QUESTION 13:

If, however, NR is not correct in its interpretation of Part D on this point, is this in fact an NR policy?

- 4.13.1 With regard to any Network Rail policy, GB Railfreight and Freightliner believe this question has got to be for Network Rail to answer. However, with regards to the Week 40 amended train plan, GB Railfreight believes that capacity decisions on the amended plan started out with a real reluctance to flex passenger services.
- 4.13.2 GB Railfreight also believes that, in general, Network Rail starts out any capacity decision requirements on the basis that moving a passenger service is a last resort, not passenger and freight capacity decisions starting on a level basis, followed by flexing then Decision Criteria application (Also see Appendix B and Appendix D).
- 4.13.3 As asserted in its Opening Statement for the first hearing, Freightliner believes there is a reluctance within Network Rail to amend passenger services to accommodate diverted freight schedules and that this is a behavioural issue within Network Rail.

QUESTION 14:

To assist in answering these questions, does NR or any operator have any record of NR flexing WTT services to accommodate past diversions, whether of passenger or freight services?

- 4.14.1 GB Railfreight has attached, in Appendix B, 64 examples of where GB Railfreight has had some of its WTT services flexed to accommodate other operators' amended train plans, without an amended bid being made. These show train headcodes, the detailed nature of alterations made and, in many cases, materially earlier departures from origin and/or later arrivals at destination, these being highlighted in red.
- 4.14.2 Freightliner, similarly, sees numerous flexes applied to its WTT services, not directly impacted by Restrictions of Use, in order to accommodate diverted passenger services. Appendix D provides examples of Freightliner's schedules amended, as such, as a typical example of a single week of amendments not subject to any Revised Access Proposals by Freightliner.
- 4.14.3 While Network Rail has provided examples of occasions where flex has been requested from passenger operators, Freightliner provides the following observations:
- That Network Rail have had to provide an example from April 2022 (Paragraph 4.14.5 of Network Rail's SRD) in order to share 5 examples of passenger trains being flexed, perhaps gives an idea of how often this happens given the thousands of changes taking place on a weekly basis.
 - That Network Rail requests written confirmation from passenger operators of the flex being agreeable to them, whereas it just amends freight schedules as it sees fit.

QUESTION 15:

Is an amendment to a schedule required as a direct or indirect result of a Restriction of Use a Part D3.3 Train Operator Variation, as NR suggested during the first hearing, or a Network Rail Variation under Part D3.4?

4.15.1 GB Railfreight and Freightliner believe what is being described are Network Rail Variations under Network Code Condition D3.4.

4.15.2 Again, GB Railfreight notes with interest that in paragraph 4.15.1 of its SRD, Network Rail has correctly stated (as Network Code Condition 3.4.9 clearly details) that 'To facilitate the planning of any Network Rail Variation, Network Rail may require that *any* (GB Railfreight and Freightliner *emphasis*) Timetable Participant shall submit a revised Access Proposal in respect of any Train Slot'.

QUESTION 16:

Part D entitles NR to exercise Flexing Rights; is there an implied duty on NR to do so if otherwise Access Proposals cannot be accommodated?

4.16.1 GB Railfreight contends that Network Rail is correct in Paragraph 4.16.3 of its SRD, to state that "Network Rail (a) is entitled to exercise its Flexing Right when responding to an Access Proposal submitted under Condition D3.4.10", however Network Rail should not be highlighting only D3.4.10 as this flows on directly from Conditions D3.4.8 and D3.4.9.

4.16.2 The implication of D3.4.10 is that directly or indirectly affected operators have been consulted and the requirement for any revised Access Proposals discussed as is mandated in Network Code Conditions D3.4.8 and D3.4.9.

4.16.3 Network Code Condition D4.6.1 states "Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe

carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services” (“the Objective”).’

- 4.16.4 There is, therefore, a general duty for Network Rail to meet the Objective in any matter of Part D of the Network Code, be it for the New Working Timetable, Network Rail Variation Request or Train Operator Variation Request. This leads to an implied duty to use all legal instruments at its disposal in order to meet the Objective. This point is set out at the beginning of Part D of the Network Code, in Condition D1.1.5, which states that ‘In conducting the processes set out in this Part, decisions must be made by Network Rail in accordance with the principles set out in Condition D4.’
- 4.16.5 It is reasonable, therefore, that the same explanation and clarity of what Network Rail must do applies to Network Code Condition D4.4.1 (a) *‘is entitled to exercise its Flexing Right when responding to an Access Proposal submitted under Condition D3.4.10’* and D4.2.2 *‘in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right’*, which contain the same wording.
- 4.16.6 GB Railfreight and Freightliner believe that persuasive authority exists to support this assertion in the form of TTP1520, Paragraph 105 (Page.23):

“As a matter of legal entitlement (or principle): Network Rail is in breach of contract in that, in rejecting Freightliner’s Access Proposals for each of the eight Train Slots the subject of this dispute at a Timing Load of 1600 tonnes, it has failed to carry out the task required of it under Condition D4.2.2, in compiling the New WTT for December 2019, of endeavouring wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 subject to the principles, among others, that the New WTT shall be consistent with the Exercised Firm Rights of each Timetable Participant and that Network Rail is entitled to exercise its Flexing Right. Network Rail’s failure in this respect is constituted, on its own admission in the course of its submissions to and in the course of this Hearing, by its having chosen not to exercise its Flexing Right to the fullest extent of its entitlement in order to resolve anticipated but unproved conflicts between the rejected 1600nne Timing Load Train Slots of Freightliner and Train Slots requested by other Train Operators for the December 2019 New WTT”.

4.16.7 Also, persuasive authority can be found in the form of TTP493, Paragraph 5.59 (Page 34):

“As also recorded in the Transcript, having previously concluded that Network Rail had not only a right but also an obligation (by virtue of the overriding principle at the beginning of Condition D4.2.2) to exercise Flex, we considered the extent of that obligation and concluded that it must be to exhaust all reasonable possibilities of Flex. Network Rail accepted this but considered that the obligation was nevertheless still limited by whatever should be included in the Timetable, in the sense of having greater priority as a matter of contract”.

4.16.8 GB Railfreight has made reference to, and sought to expand on this particularly important item in this GB Railfreight & Freightliner Sole Reference Document in Paragraphs 3.3, 4.11.1, 4.11.8, 4.11.14, 4.11.18, 4.11.19, 4.12.1 and throughout the whole of the response to this Question 16.

QUESTION 17:

Should Condition D2.5.1(k) apply only to passenger trains? Given that GBRf's biomass services leave the Network at Liverpool and at Drax, should the reference to services leaving the Network be removed?

4.17.1 Regarding the amended train plan for Week 40, and GBRf's Liverpool – Drax Biomass services, GB Railfreight's firm Access Rights clearly state the contractually required 'minimum turnaround Time' at Origin and Destination. It is not unreasonable for these to apply for any associated Network Rail Variation as this is a variation to the Working Timetable which, amongst other things, is governed by Schedule 5 of a Freight Operating Company's track access contract, as Network Rail makes reference to in its SRD paragraph 5.8.

4.17.2 Freightliner has, through recent timetable development, worked proactively with Network Rail in order to provide details of previous/next workings for trains where they terminate on, or start from, Network Rail infrastructure. Examples of this would be for Mendip

schedules splitting and changing headcodes at Hanwell Bridge Loops, where links exist between workings ensuring clarity on line occupancy.

- 4.17.3 However, in locations where railway vehicles leave the Network, Freightliner believe this would be impossible to plan or govern, both for passenger and freight vehicles.
- 4.17.4 Given buoyant commercial demand, particularly in the aggregates sector, it is impossible to know more than a day or two in advance what a set of wagons will be used for as its next working – loading slots, quarry production or other services running (amongst many other factors) could all influence the next working of a set of wagons, and this will likely not align with the next working of a locomotive, which will often be stepped up to another working so that it is not sat out of use in a quarry for hours while wagons are loaded.

5 DECISIONS SOUGHT FROM THE PANEL

The Claimant is requesting that the Panel determines that:

- 5.1 When consulting any Restriction of Use, Network Rail must consult all operators, including indirectly impacted operators on any diversionary route, on its potential use of its Flexing Right when processing revised Access Proposals, noting that with regards to long-distance services, the scope and geographical spread of this consultation is significant.
- 5.2 When validating revised Access Proposals for Severity 1-3 Restrictions of Use, where a full timetable study has not, and will not, be created, Network Rail must, in the first instance, apply its Flexing Right pursuant to D4.4.1 (a) to enable revised Access Proposals to be accommodated on diversionary routes.
- 5.3 When validating revised Access Proposals for Severity 1-3 Restrictions of Use, Network Rail must, where a revised Access Proposal cannot be accommodated in compliance with the relevant Rules, apply the Decision Criteria against all services, whether directly or indirectly affected by the Restriction of Use.
- 5.4 When constructing an Amended timetable for Severity 4, Network Rail should follow the process described in Network Code parts D3.4.8 - D3.4.12

SIGNATURE

For and on behalf of GB Railfreight Limited



Signed

Tom Mainprize
Head of Timetabling

6th February 2024

For and on behalf of Freightliner Limited and Freightliner Heavy Haul Limited

Signed



Print Name

Chris Matthews

Position

Timetable Strategy and Rail Industry Manager

6th February 2024