To: Freightliner Heavy Haul Ltd (‘FLHH’)

 Network Rail Infrastructure Ltd (‘NR’)

Dear Sirs,

**Directions relating to Timetabling Dispute TTP1197**

I am grateful to FLHH for its revised Sole Reference Document (‘SRD’) and to NR for its response. Nonetheless, there are a number of areas which remain unclear. To make the hearing effective it is obviously important to ensure as far as possible that the Panel understand the case of each Party before the hearing commences, and that each Party understands the other’s case.

**Question 1**

The first question relates to the rights to which FLHH is actually entitled. Paragraphs 4.2 & 4.3 of FLHH's SRD suggest that the trains in question are: 6J34 [EWD], 6M08 [EWD], 6M91 [EWD] & 6M91 [SO] and 6M92 [EWD]. However, in respect of 6M08 the Rights are recorded as [SX] which means that either FLHH does not have rights for 6M08 [SO], or the extract from the Rights Table has not been provided. 6M91 [EWD] & 6M91 [SO] appear to conflict as [EWD] means [SX] & [SO]. It is assumed that it is an error as the Rights Table shows these services separately as [SX] & [SO]. NR's paragraph 4.1 states that although it recognises FLHH has rights for these services, they were not exercised in its PDNS. FLHH's SRD does not address this issue. However, as a preliminary view, if these services were already included in the Prior Working Timetable, then it is likely that they would not be specifically included in the PDNS, as the purpose of that document seems to be primarily for stating what changes and/or additions are required to the Train Operator’s services in the Previous Working Timetable (see Conditions D2.1.6 and D2.4.1 for example).

**FLHH and NR are to co-operate to establish between themselves an agreed position on the rights to which FLHH is entitled in relation to these five services and submit a jointly agreed response. If agreement cannot be reached then each Party is to serve a separate response by 1200 on Wednesday, 7th March, explaining that Party’s position and why it differs from the other Party.**

**Question 2**

NR appears to be suggesting that FLHH did not meet NR’s bidding requirements in respect of a number of the rejected bids, see paragraph 4.2 of NR’s SRD as an example. Is NR saying that the lack of a submission on NR’s template means that there was no valid bid? If so, does NR consider that this is consistent with Condition D2.4.1?

**NR is to confirm as soon as possible, and in any event by no later than 1200 on Wednesday, 7th March, whether it is asserting that a failure to use NR’s template meant that NR treated a bid submitted in any other way as invalid.**

**If this is NR’s case then it will be a matter of law to determine whether NR is entitled to adopt such a policy.**

**Question 3**

It appears to be NR’s case that in respect of 6J34 NR has offered a path within the one-hour Arrival and Departure Windows (see paragraph 4.6 of NR’s SRD), but NR refers to Appendix E, part of which is illegible on the version supplied to the Panel. It also appears to refer to 6M91 in the message header. It is assumed that NR’s case is that it has offered a compliant path for this service and therefore FLHH should have no grounds to reject it.

**NR is to confirm as soon as possible, and in any event by no later than 1200 on Wednesday, 7th March, whether this is its case.**

**FLHH is then to confirm, by no later than 1200 on Thursday, 8th March, whether it accepts that it has been offered a compliant path and is therefore no longer seeking a determination in relation to 6J34.**

**Question 4**

In paragraph 4.9 of NR’s SRD it is assumed that NR is trying to say that because of other changes the previous path for 6M08 (presumably in the Prior Working Timetable of the December 2017 Working Timetable) is no longer available. But the phrase ‘Full Timetable’ is not understood by the Panel, nor why it had to be amended twice to make it TPR compliant.

NR quotes Condition D2.4.6(b) in respect of 6M08, 6M91 and 6M92 as if that were a full explanation, but without going on the explain whether it then complied with Condition D2.4.7, and, if so, whether FLHH then submitted further Access Proposals. In general, NR’s statement in reply to FLHH’s case includes no mention of how the Decision Criteria were applied in each of NR’s decisions.

In paragraphs 4.13 and 4.16 NR states that it has not offered paths for 6M91 (both SX and SO) because of Engineering Possessions. It is not clear whether these possessions were disputed by FLHH and, if so, the outcome of such disputes, or whether FLHH omitted to register a dispute. (NR’s reference to easements is not considered to provide a full answer on this point).

**The Panel will be greatly assisted if a chronology for each of the disputed services can be provided, starting from how they were bid for and when, what happened next (i.e. how were they considered by NR in the Timetable Development Process and ultimately rejected), what alternatives (if any) were offered by NR (including how NR used its flexing rights to try to accommodate the services), whether those offers were compliant with FLHH's Firm Rights, and why any offers made were not acceptable to FLHH. This chronology should refer to the relevant Conditions of Part D, including how Network Rail applied the Decision Criteria in respect of its decisions at each stage of the process.**

**If FLHH confirms that it has been offered a compliant path for 6J34 and that this service is no longer in dispute then a chronology in respect of 6J34 will not be required.**

**It would be preferable if this chronology could be jointly agreed, although there may not be sufficient time to achieve this. NR and FLHH are to liaise as quickly as possible to decide whether a joint chronology is achievable. If so, the joint chronology is to be served by 1200 on Wednesday, 7th March. If a joint chronology is not achievable, NR is to serve its chronology by 1200 on Wednesday, 7th March. FLHH may submit any reply to this that it wishes the Panel to consider by 1200 on Thursday, 8th March.**

**Question 5**

In paragraph 4.24 NR appears to pick up on the criticism of FLHH’s Appendices made by the Panel, but it is not clear whether NR is suggesting that these were the documents used by FLHH in the bidding process and were in any way defective. Regardless of this or other criticisms made by NR it is not clear to the Panel how NR seeks to justify its failure to respond to all bids made by FLHH.

**NR is to provide a further and fuller explanation by 1200 on Wednesday, 7th March as to why it has still not made Offers or rejected all outstanding bids by FLHH. This can be included in the chronology for each service in answer to Question 4 above.**

Yours faithfully,

Clive Fletcher-Wood

Hearing Chair

5th March 2018