

TTP1524 – Network Rail’s decisions regarding the New Working Timetable Publication for 2020

1 DETAILS OF PARTIES

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

- (a) FreightLiner Heavy Haul Limited whose Registered Office is at 3rd Floor, 90 Whitfield Street, Fitzrovia, London, W1T 4EZ ("FLHH") ("the Claimant"); and
- (b) Network Rail Infrastructure Limited whose Registered Office is at 1 Eversholt Street, London NW1 2DNJ ("NR") ("the Defendant").

1.2 The following could be considered as interested parties:

- (a) South Western Railway
- (b) Great Western Railway
- (c) Cross Country Trains
- (d) Govia Thameslink Railway
- (e) GB Railfreight
- (f) DB Cargo

2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant’s Sole Reference includes:-

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
- (b) A detailed explanation of the Defendant’s arguments in support of its position on those issues where it disagrees with the Claimant’s Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant’s Sole Reference.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fall to be determined as part of the dispute;

- (d) The decisions of principle sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (e) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

- 3.1 This is a dispute regarding the allocation of capacity during the bi-annual process specified in Conditions D2.6 and D4.2.
- 3.2 Specifically, NR's decisions to not include 5 trains into the New Working Timetable Publication for 2020.
- 3.3 The Train slots in question are:
 - (a) 7D23DQ FSX Acton TC – Merehead Quarry
 - (b) 7O12BA SX Merehead Quarry – Woking Down Reception
 - (c) 7O52PD MSX Merehead Quarry – Chichester Reception
 - (d) 6A83DB WFO Avonmouth Bennets Siding – West Drayton Arc
 - (e) 6L83DS TThO Avonmouth Bennets Siding – Acton TC
- 3.4 Network Rail confirm that the appendices provided with the claimants' sole submission to be relevant.
- 3.5 NR would like to make the Panel aware of the following background information, which has been supported by the inclusion of a timeline of events (Appendix A)

Prior to D40 for the December 2019 TT (08th March 2019) Capacity Planning (Network Rail) were notified of an upcoming change to the Mendip contract that would see its traffic being awarded to Freightliner Heavy Haul (FLHH) from the current provider DB Cargo; with effect from 01 November 2019. This would mean the "transfer" of many Train Slots in the timetable from DB Cargo to FLHH.

To protect the timetable plan, and ensure a smooth delivery of transfer, it was agreed by all parties to ensure that relevant documentation related to the transfer and related paths were

agreed as soon as possible, so that any related Train Slots could be reflected as FLHH at D26 (14 June 2019) when the December 2019 TT was Published. Although the contract did not change until 01 November 2019, due to the quantity of paths involved, Capacity Planning wanted to be supportive of a pro-active approach to allow the transfer of paths well in advance of 01 November 2019 in order to allow FLHH enough time to make any changes to those paths that suited their operations (such as crew changes or timings) and the end user.

For clarity, the documentation that was required for Train Slots underpinned by Access Rights are detailed in Part J 7 of the Network Code "Freight Transfer Mechanism" specifically 7.2 Third Party Notice and 7.4 Acceptance of surrender or 7.5 Third Party Counter Notice and is pertinent to 7O52PD MSX Merehead Quarry – Chichester Reception. This would allow Network Rail to convert the existing DB Cargo Train Slot to a FLHH Train Slot.

The documentation required for the other 4 Train Slots, that were not underpinned by Access Rights, are detailed in Part D 8.5 of the Network Code, specifically D.8.5.1 and D.8.5.2 whereby the current Freight Train Operator agrees to Network Rail's notification to remove Train Slots from the Timetable. This would allow Network Rail to remove DB Cargo Train Slots and use the capacity to accommodate the FLHH Train Slots in their Priority Date Access Proposal, subject to there not being any other reasons that capacity was required.

At the time of D40, none of the above documentation had been agreed. Therefore, the Access Proposal submitted by FLHH on 08th March 2019 (Appendix B to F) in the form of "Train Prints", contained Train Slots that were held by DB Cargo as "rolled over" Train Slots in the Prior Working Timetable.

Due to the knowledge that the DB Cargo Train Slots would be either removed or transferred, NR believed the sensible and collaborative approach was to hold the Access Proposal by FLHH until such documentation were all confirmed and sent to all parties, including the ORR, and not attempt to accommodate both FLHH and DB Cargo slots for inclusion, nor use the Decision Criteria not to include one or the other. This was managed by a single point of contact in Capacity Planning due to the complexity of the situation.

On 11th March 2019, Network Rail received DB Cargo's Priority Date (Access Proposal) which therefore made all their Train Slots Priority 4 under Part 4.2.2 (d) (iv) (A) of the Network Code.

Due to the timescales of the Timetable Preparation period, Capacity Planning had to continue to prepare the timetable whilst documentation were concluded; this meant that many decisions related to the paths could (and were) made to paths whilst they belonged to DB Cargo in "Train Planning System" and planners not knowing which paths were agreed for transfer or removal. The Rights Tables listed on the ORR website are a common source of information for planners to use to make decisions.

NR would like it acknowledged that any gaps in communications related to decisions not to include Train Slots in the timetable was significantly impacted by the timescales by which these agreements were in the end delayed. Due to ongoing disagreements between both parties on transfer dates and specifics of paths, the agreements were not in place until late in May 2019, a few weeks before D26.

To highlight this further, on 21 March 2019 Freightliner issued a letter (Appendix G) to Network Rail wishing to activate the Voluntary Relinquishment of paths without rights under Part D 8.5.2 of the Network Code, however the details of those paths were not agreed by DB Cargo until 21 May 2019 (See Appendix H). This gave Capacity Planning only 2 weeks of Timetable activity to transfer all paths involved and cross reference any communication that would have been sent to DB Cargo and ensure was visible to FLHH. In the cases of the paths with rights under Part J 7. Freight Transfer Mechanism, the letter to the ORR was not issued until 29 May 2019 Appendix J. (All lined out in timeline of events has been included in Appendix A)

4 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE

4.1 Issues where the Defendant qualifies or refutes the Claimant's Case

7D23DQ FSX Acton TC – Merehead Quarry

NR recognises that a Rejection Letter was not issued regarding 7D23DQ. NR acknowledges that reasons for why this train was rejected was not included in the letter received by FLHH. NR dispute the incorrect decision was made not to include 7D23DQ.

7012BA SX Merehead Quarry – Woking Down Reception

NR recognises that a Rejection Letter was not issued regarding 7012BA. NR acknowledges that the path is TPR compliant and has subsequently been offered to FLHH.

7052PD MSX Merehead Quarry – Chichester Reception

NR refutes FLHH's claim that they hold Firm Access rights for this train. NR acknowledges that more detail could have been provided regarding the rejection of this train. NR dispute the incorrect decision was made not to include 7D23DQ.

6A83DB WFO Avonmouth Bennets Siding – West Drayton Arc

NR strongly refutes the Claimant's case regarding 6A83DB and 6L83DS. NR refutes FLHH's claim that NR were not clear on reason for rejection.

6L83DS TThO Avonmouth Bennets Siding – Acton TC

NR's response to 6L83DS is the same as above for 6A83DB.

4.2 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant

7D23DQ FSX Acton TC – Merehead Quarry

7D23DQ was a Train Slot held by DB Cargo that was not underpinned with Access Rights and was shown in the Prior Working Timetable as a DB Cargo path. FLHH included 7D23DQ in their Priority Date Notification Statement (Access Proposal) for inclusion in the December 2019 TT. As stated in Section 3.5 of this document, FLHH 7D23DQ was not to be progressed until the relevant documentation was in place, which for the avoidance of doubt, was a response from DB Cargo under D.8.5.2 stating their acceptance of the removal of the Train Slot 7D23DQ.

During the Timetable Preparation Period, NR made the decision not to include DB Cargo's 7D23DQ in December 2019, due to conflicts with:

2N73DB – SX 22:42 London Paddington - Didcot Parkway [Priority 3 for inclusion]

1C38DA – FSX 23:32 London Paddington – Cardiff Central [Priority 3 for inclusion]

1C38DQ - FSX 23:32 London Paddington – Cardiff Central [Priority 3 for inclusion]

Network Rail was unable to find solutions to accommodate all train slots, and aware that 7D23DQ was a Q path for 7C23DC Acton to Merehead Quarry (which was included in December 2019) which means that it would only be required to run when the line at Newbury was blocked. Therefore using the Decision Criteria 4.6.2 (a) (b) and (e) the decision was made to include both 2N73DB and 1C38s that would run regular throughout the timetable and provide the core path for 7C23DC that could be amended via the Informed Traveller Process Newbury was blocked.

On 21 May 2019 (See Appendix H) NR were notified of DB Cargo agreeing to the removal of 7D23DQ, at which point a decision had already been made not to include it in December 2019.

FLHH were made aware of the decision to not include this path in the letter stated in Appendix A of FLHH's SRD. On 19 July 2019, NR explained 7D23DQ conflicted with 2N73DB, 1C38DA & 1C38DQ (also highlighted in Appendix B of FLHH's SRD).

FLHH submitted a revised path for 7D23DQ in a TOVR for December 2019 which was found to be non-compliant with another FLHH path at Reading Station and rejected the TOVR in accordance with Network Code Pt 4.3.1 [b][i]

7O12BA SX Merehead Quarry – Woking Down Reception

NR recognises that a Rejection Letter was not issued regarding 7O12BA. NR acknowledges that the path is TPR compliant. As such, NR consider this matter resolved as a formal offer was made to FLHH on 20 September 2019 (Appendix K)

7O52PD MSX Merehead Quarry – Chichester Reception

7O52PD was a Train Slot held by DB Cargo that was underpinned with Access Rights and was not shown in the Prior Working Timetable as a DB Cargo path. 7O52 was not in the PWT as DB Cargo had requested NR to remove from the December 2018 Timetable and subsequent timetables on 2 January 2019. (Appendix L).

FLHH included 7O52PD in their Priority Date Notification Statement (Access Proposal) for inclusion in the December 2019 TT. As stated in Section 3.5 of this Document, FLHH 7O52PD was not to be progressed until the relevant documentation was in place, which for the avoidance of doubt was Acceptance of Surrender as per Part J 7 from DB Cargo. However, due to DB Cargo submitting a late Priority Date Notification Statement, including notifying Network Rail of its wish to exercise any Firm Rights (as laid out in Part 2.4.1 of the Network Code), their Train Slots (including 7O52, that was not in the PWT) were treated as Priority 4 as per 4.2.2 (d) (iv) (A) *“fourth to any rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date...”*

NR would like to note that FLHH does not currently hold Firm Access rights for this or any of the Mendip paths. Firm Access Rights do not come into effect until 03 November 2019 and this is reflected in the admission of this slot in FLHH's Access Rights table. 7O52PD was processed as

Priority 3 for inclusion based on FLHH requesting the train slot, but 7O52 lost Priority 1 Status due to the DB Cargo's (the owner of the rights at the time of D40) failure to submit their Priority Date Access Proposal by D40.

On 11 June 2019, NR sent a Rejection Letter to FLHH regarding 7O52PD (Appendix C of FLHH's SRD). NR acknowledges that the letter did not provide enough detail into what the clashes were. However, we can confirm that this conflicts with 4 other services between Southampton and Havant:

1B14CA SX 05:00 Poole - London Waterloo [SWR Priority 1 for inclusion]

5E90CD SX 05:47 Northam to Havant [SWR Priority 1 for inclusion]

1J94BP SX 06:08 Southampton Central to Horsham [GTR Priority 1 for inclusion]

1G18CA SX Portsmouth Harbour – London Waterloo [SWR Priority 1 for inclusion]

NR stands by the decision of rejecting 7O52PD as to include it would require at least 2 of the 4 mentioned services above to be drastically retimed or rejected themselves for a service that was Priority 3 for inclusion, that had been requested to be removed from previous timetables by the current owner of rights, DB Cargo.

NR understand that FLHH are awaiting correspondence from SWR regarding a request to flex one of their Train Slots. Upon agreement from SWR, FLHH will submit a TOVR for the December 2019 TT to NR for the inclusion of a revised path for 7O52 .NR would also like to acknowledge FLHH's point regarding the wording of the Rejection Letter to include 'Network Rail wish to exercise their flexing right by rejecting train slot for 7O52PD' – NR agree this was incorrect wording and this will be addressed internally.

6A83DB WFO Avonmouth Bennets Siding – West Drayton Arc

6A83DB was a Train Slot held by DB Cargo that was not underpinned with Access Rights and was shown in the Prior Working Timetable as a DB Cargo path. FLHH included 6A83DB in their Priority Date Notification Statement (Access Proposal) for inclusion in the December 2019 TT. As stated in Section 3.5 of this Document, FLHH 6A83DB was not to be progressed until the relevant documentation was in place, which for the avoidance of doubt, was a response from DB Cargo under D.8.5.2 stating their acceptance of the removal of the Train Slot 6A83DB.

On 21 May 2019 (See Appendix H) NR were notified of DB Cargo agreeing to the removal of 6A83DB, at which point a decision had been made not to include it in December 2019 and an Intent to Reject letter had been issued to DB Cargo; this was later provided to FLHH as stated in Appendix D of their SRD.

NR's decision to not include these paths were made against multiple paths, all but 1 that were Priority 1 for inclusion:

1H23DA SX 12:45 London Paddington to Weston Super Mare [GWR Priority 3 for inclusion]

1V53DC SX 11:05 Manchester Piccadilly to Bristol Temple Meads [Cross Country Priority 1 for inclusion]

1M49FX SX 11:50 Plymouth to Manchester Piccadilly [Cross Country Priority 1 for inclusion]

5Y20DA SX 13:59 Filton to Abbey Wood Filton Abbey Wood

2V64DA SX 11:14 Weymouth to Gloucester [GWR Priority 1 for inclusion]

2O78DA SX 12:41 Great Malvern to Weymouth [GWR Priority 1 for inclusion]

6A83 path was rejected to DB Cargo as quoted Priority 4, as DB Cargo's Access Proposal for December 2019 was received after D40 – as outlined in the timeline (Appendix A) and explained in the case of 7O52. The rejection notes were then provided to FLHH as existed for DB Cargo. NR would like to note that although FLHH believe they should be Priority 3, this would still not have changed the outcome of the decision. NR refutes FLHH's point stating they are not clear as to what prevented Network Rail from exercising its Flexing Right – there is clear and detailed reasoning stated in Appendix D of their SRD and what attempts were made to accommodate 6A83DB.

NR are aware that FLHH submitted a further TOVR to NR with a revised path for 6A83 that was Rejected under Network Code Part D 4.3.1 (b) (ii) due to being non TPR compliant.

6L83DS TThO Avonmouth Bennets Siding – Acton TC

NR's response to 6L83DS is the same as above for 6A83DB. Although they run on different days, the same decision was made against SX paths quoted in the case of 6A83DB.

DECISION SOUGHT FROM THE PANEL

4.3 NR considers this dispute to be a dispute based on matters of principle and would like the Panel to provide agreement that the correct decisions were made in relation to the Train Slots in dispute.

NR would also seek for determination of guidance as to how NR should manage both the Part J 7 Freight Transfer Mechanism and voluntarily relinquished under Part D 8.5.2 of the Network Code in a Timetable Development period when the transfer of contract is agreed in advance of that timetable. Specifically, should the activity to process such changes happen at the point of agreement or at the point of when the contract changes.

5 APPENDICES

Appendix A – Timeline of Events

Appendix B - FLHH DEC19 PDNS Mendip Transfer Pt 1

Appendix C - FLHH DEC19 PDNS Mendip Transfer Pt 2

Appendix D - FLHH DEC19 PDNS Mendip Transfer Pt 3

Appendix E- FLHH DEC19 PDNS Mendip Transfer Pt 4

Appendix F- FLHH DEC19 PDNS Mendip Transfer Pt 5

Appendix G - FLHH Letter to NR - Voluntary Relinquishment

Appendix H - DB Cargo Letter to FLHH Voluntary Relinquishment

Appendix J - NR Letter to ORR - Part J7 Freight Transfer Mechanism - Mendip Rail

Appendix K - Offered Train Print for 7012BA

Appendix L - TOVR for removal of 7052PD

6 SIGNATURE

For and on behalf of
[usually Network Rail Infrastructure Limited]

Signed



Print Name

GARETH BROOKS

Position

ATTENDED SCHEDULE PLANNING MANAGER