

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; and
- (b) Network Rail Infrastructure Limited ("NR") whose Registered Office is at
1 Eversholt Street, London, NW1 2DN.

1.2 Third parties to this dispute may include Freightliner Group Ltd, DB Cargo, DRS, Colas Rail, Devon & Cornwall

2 THE CLAIMANT'S RIGHT TO BRING THIS REFERENCE

2.1 This matter is referred to a Timetabling Panel ("the Panel") for determination in accordance with Conditions D3.5.3 and D3.4.5 of the Network Code. GBRf is dissatisfied with the decision made by NR to effectively take EAS Section 4 (Standard Possession Opportunities) as this will cause an unacceptable level of uncertainty in our ability to deliver a service business.

3 CONTENTS OF REFERENCE

This Sole Reference includes: -

- (a) The subject matter of the dispute in Section 4;
- (b) A detailed explanation of the issues in dispute in Section 5;
- (c) In Section 6, the decisions sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (d) Appendices and other supporting material.

4 SUBJECT MATTER OF DISPUTE

- 4.1 On 03rd June 2021 GBRf raised a dispute with NR in relation to its decision regarding week-on-week consecutive possessions from Week 10 for the remainder of the year, which between them constitute a weekly access periods, which were published at late notice on 27th May 2021 [Appendix 3.2]. The dispute was brought under Conditions D3.4.5 and D3.5.3 of the Network Code as applicable at the time and the Secretary registered it as TTP1880 [Appendices 1.1 and 1.2]. In notifying Network Rail of its response to the late notice possession request, GBRf referred to previous correspondence [Appendix 2.1] and discussions that the Section 4 request was unacceptable, as well as those in all other geographical areas where Network Rail is similarly pursuing additional Section 4s. These will affect GBRf's ability to meet its customer demands. GBRf is now of the view that this is unavoidable.
- 4.2 The subject matter is a mixture of additional Restrictions of Use notified both with less than and more than 12 weeks' notices, so that processes under Conditions D3.4 and D3.5 are applicable.
- 4.3 It is GBRf's belief that Network Rail has reached its decision without adequate consultation, as required by Condition D3.4.4. Network Rail has sought GBRf's views on the matter in question but carried on regardless in a rather hurried way. The consultation was, in effect, telling operators what Network Rail was going to do. It is clear from this that there really has been inadequate consideration for its freight customers.
- 4.4 The section of line in question is part of a key freight artery which links much of London and the south-east, East Anglia and routes to the north to and from the Great Western Main Line. As such this constitutes a vital link between the west of England and South Wales to those areas mentioned above in addition to providing access from those areas to terminals along the Great Western Main Line itself. There is no reasonable diversionary route. [Appendix 2.2].
- 4.5 GB Railfreight has not received a statement of how the Decision Criteria have been applied to demonstrate that Network Rail's decision is justified, as a requirement of Condition D3.4.4(b), let alone why the additional Section 4 possession opportunities are necessary on top of all the opportunities Network Rail already has at its disposal. Similarly there is no evidence of Network Rail exploring ways of utilising this access.

- 4.6 In the 2021 EAS version 4 (the last official publication), GW130 Section 4s meant that GBRf could run services on this route as there were “No possession opportunities available” other than a weekly opportunity on Saturday nights into Sunday mornings of 10½ hours’ duration, extendable for an additional 4 hours through Section 7 of the EAS. This means GBRf is able to bid WTT services at any time on this route, other than the window mentioned above. It is important to note that although this is a short section of line, it links between all the other radial routes around London, and the links to the cross-London routes too, all of which are densely used. Capacity is therefore scarce on all routes and planning of through services to satisfy customer demand is heavily constrained [Appendix 2.2]. It has also come to light that in addition to the late-notice additional time request that changes have been made to Section 4 of the 2022 Rules reflecting an hour on Tuesdays. This has not been consulted and first appeared in Version 1.0 of the 2022 Rules, but not highlighted as a change. This change was therefore not noticed by GBRf [Appendix 4.1].
- 4.7 On the 18th May 2021 Network Rail requested GBRf’s views on proposals for Section 4 for purposes of “patrolling”. GBRf duly responded on the 20th May 2021 with its views and suggestions to look at alternative options for undertaking this work [Appendix 2.1].
- 4.8 The possession was first requested by email on 18th May, requesting feedback by 31st May [Appendix 2.1]. GBRf responded on 20th May [Appendix 2.1], and on 21st May [Appendix 2.1]. GBRf did not agree with the proposal, generally as flexibility is a key requirement on this route, and also on a national scale there is a need for Network Rail to make better use of the Section 4 times already afforded to it, i.e. during “no-trains periods”, usually on Saturday afternoons and on Sundays (and in this particular instance as outlined above). GBRf illustrated the times in which Network Rail could utilise for patrolling requirements, (also set out in Appendices 2.1).
- 4.9 On 21st May a request was made (i.e. 10 days before the feedback request) to reduce the response time to effectively 3½ days. The request was made with an incorrect line of route code (GW103) and this is one of the reasons why GB Railfreight did not respond to the request made by Network Rail.

GBRf feels that overall this was an aggressive approach by Network Rail with the objective of pushing its requirements without any real consideration to GBRf’s business

or to utilising the opportunities Network Rail already has [Appendix 2.1]. The final comments made by Network Rail on 21st May [Appendix 2.1], viz. *“Where there is space on the graph, the Network Code allows NR to bid to utilise any space which exists”*, while not strictly accurate, does support GBRf’s argument that Network Rail is attempting a way of circumventing due process to close down the network to satisfy its own needs. The Network exists to be open for business and not closed for maintenance unless absolutely necessary. GBRf feels this approach is being taken nationally as this is far from the only example [Appendix 5.1], with Network Rail only seeking additional Section 4 time rather than actually utilising the time it has.

- 4.10 Network Rail then published a Decision Notice on 27th May [Appendix 3.2]. Contained in the notice is an explanation of the requirement for patrolling. GBRf is not objecting to the requirement for patrolling, but there is no adequate reason given why the patrolling can only be done at the times NR has imposed. By the very nature of how freight operates and its customers’ requirements there is often a need to respond quickly to changed or additional demand. It might seem to be “only an hour” but on a key freight artery such as this, it is nevertheless important particularly in the light of the high capacity utilisation on all of the connecting lines.

5 EXPLANATION OF EACH ISSUE IN DISPUTE AND THE CLAIMANT’S ARGUMENTS TO SUPPORT ITS CASE

- 5.1 Network Code Condition D3.4.4 requires NR to consult with affected Timetable Participants and that any decision that is reached is done so in accordance with the Decision Criteria within Condition D4.6. Whilst it cannot be disputed that NR did consult with GBRf in relation to the proposed late notice possession, GBRf feels strongly that its views put forward during this consultation have been largely discounted and the impact of the proposed possession on GBRf insufficiently considered, noting that the decision is not supported by a documented application of the Decision Criteria. NR might now belatedly seek to produce such an application to justify its stance, which will no doubt be weighted to support its position. While maintenance is undoubtedly essential the timing of it can be, and must be, adjusted to take into account the requirement for the Network to be open where there is demand. This is obviously very challenging for those who undertake maintenance and renewal, and this is fully

recognised, but it should not be at the expense of the very purpose of the network itself.

- 5.2 The railway only exists to be open for business: this is a fundamental principle. It exists to encourage rail user growth and allow rail operators move goods and passengers in a way that meets customer demand. Further restrictions like this proposal goes against the purpose of what the railway is there for.
- 5.3 GBRf recognises the need for maintenance but this essentially must work around demand. As GBRf has already illustrated in Section 4 of this paper there are alternative options available to Network Rail which do not impact on the availability of the Network. GBRf cannot accept that the only solution to a specific problem is more access time, particularly in the absence of any demonstration why that work cannot take place in existing opportunities.
- 5.4 Network Rail cannot possibly know what GBRf's operational and customer demands are in the short-, medium- or long-terms other than by generality. Currently there are various additional flows in the making, the details of which are not settled. For example, HS2 traffic (in particular the haulage of waste material) is still being negotiated and its potential traffic patterns are not finalised. Even when the requirements are settled they will always subject to change, such is the nature of the demands of our customers. Network Rail's decisions based on its perceived view of the world or specifically how freight and its customers operate will not necessarily reflect the reality on the ground.
- 5.5 Network Rail can only make decisions on the here and now, which isn't reflective of the wider picture and cannot be determinative in such matters. The access decision made by NR has impact on GBRf's ability to secure a plan to accommodate the requirements of our customers, and amend it should that prove necessary. At a time where freight is a key factor in keeping industry in retail, energy, infrastructure and the health service functioning, Network Rail's closure of a key part of the rail network is contrary to keeping a key part of the economy functioning. Freight operators can only achieve this if we are able to make changes at short notice as well as making long term changes.
- 5.6 NR appears to have made its decision based on existing traffic alone. This might appear to be reasonable in the context of the immediate future but is, of course, a one-

sided opinion of the situation as it appears to NR. Such a decision cannot, of course, have taken into consideration business propositions of GBRf or any other operator as these would generally be unknown to NR as it is not (nor should be) the guardian or determinator of how freight operators may wish to maintain or develop their businesses. In context, road hauliers do not generally have such significant constraints to work around. For example, while road traffic might be subject to the occasion diversion or hold-up – and usually in response to specific projects rather than routine maintenance, they are rarely suffer a prohibition of movement at certain times on key routes that cannot be worked around.

- 5.7 Safety constraints imposed on Network Rail, like the open ban on patrolling on an open railway, will inevitably means Network Rail has to change the way it undertakes maintenance and very likely its cost base will increase. It is unreasonable for freight (in particular) to shoulder the burden if Network Rail chooses to minimise its costs at our expense. Where more stringent safety measures have been imposed it is quite unreasonable to attempt to use existing resources to carry out routine maintenance at the expense of the users of the railway without negative effect on those users, to the extent that existing business may become untenable or future business would be rendered uneconomic. Freight operators need stability of access to the Network in order to maintain existence.
- 5.8 Network Rail has provided no demonstration that it has made reasonable attempts to manage its workforce in the best way to balance all needs. Network Rail has an overwhelming amount of Section 4 opportunities (nationally) but choose not to use or work out how to use this time without minimal impact on the needs of the operators who need access to the Network.
- 5.9 In connection with 5.8, above GBRf would not expect Network Rail to show all its commercial detail to us (in order to demonstrate the point) but the Panel may wish to see such evidence.
- 5.10 Additionally, there is a potential performance impact by closing a key freight route, even just for one hour. Any out-of-course running (caused by any reason) can easily cause significant reactionary delay, particularly where services timed immediately before the additional maintenance period do not manage to "beat the block". Such a

scenario could mean trains held approaching either end of the possession, obstructing services behind heading for other routes, or indeed may be held back at recessing points some significant distance away. This can, and often does in other similar circumstances, result in significantly delayed destination arrivals, goods late to customers, delayed next workings, and exceedance of traincrew hours.

- 5.11 GBRf has carried out a weighting exercise of the Decision Criteria [Appendix 5.2]. As mentioned earlier in this paper one has not been received from Network Rail to support its decision.

6 DECISION SOUGHT FROM THE PANEL

- 6.1 The Claimant is requesting that the Panel determine that:

- (a) Under Condition D3.4.4 (b) NR is remiss in its failure to apply the Decision Criteria. In making its decision NR has nevertheless inaccurately evaluated the impact that its proposal would have on GBRf's business and likely that of others; the decision reached is flawed given the tangible alternatives that are available;
- (b) NR is remiss in implementing its decision contrary to Condition D3.4.6; and
- (c) NR's decision should be struck down, and all entries in all current versions of Section 4 of the EAS relating to line GW130 should be removed other than the long-standing entry for Saturday evenings into Sunday mornings.

7 APPENDICES

1 Dispute Notices

- 1.1 GBRf's Notice of Dispute to the Late Notice Decision regarding all the Section 4s. (2 Pages)
- 1.2 Reference letter from ADC. (1 Page)

2 Maps - Meeting Notes and Emails

- 2.1 Email exchanges regarding the proposal before the request. (4 Pages)
- 2.2 Map around London showing where the block is. Green route is the section affected, yellow routes are the other routes which the blocked line prevents our access. (1 Page)

3 Possession Documents

- 3.1 Request made by Network Rail on the 21st May 2021 (3 Pages)
- 3.2 Decision made by Network Rail on the 27th May 2021 (3 Pages)

4 Network Rail Publications

- 4.1 EAS Publications from version 4 2020 and 2021, Version 1 2022 (2 Pages)

5 GBRf Documents

- 5.1 EAS 2022 Version 2 responses to East Midlands, LNW (North) and LNW (South). To highlight the start of all the Section 4 entries. (6 Pages)
- 5.2 GBRf Decision Criteria (3 Pages)

8 SIGNATURE

For and on behalf of GB Railfreight Limited

A handwritten signature in black ink, appearing to read 'D Pell', written over a horizontal line.

Signed

Darren Pell
Engineering Access Manager

