

Joint Reference Submission to a Timetabling Panel in accordance with the provisions of Chapter H of the ADR Rules effective from 1 August 2010 (and as subsequently amended)

1 DETAILS OF PARTIES

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

- (a) Freightliner Limited (Company number 3118392) whose Registered Office is at 6th Floor, The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ ("Freightliner") ("the Claimant");
- (b) Network Rail Infrastructure Limited (Company number 2904587) whose Registered Office is at 1 Eversholt Street, London NW1 2DN ("NRIL") ("the Defendant") and
- (c) GB Railfreight Limited (Company number 03707899) whose Registered Office is at 3rd Floor, 55 Old Broad Street, London, EC2M 1RX ("GBRf")
- (d) The Claimant's point of contact is Chris Matthews, Timetable Strategy & Rail Industry Manager, Freightliner Group [redacted]
- (e) The Defendant's point of contact is Simon Bennett, Customer Relationship Executive, Network Rail [redacted]
- (f) The GBRf contact is Jack Eagling, Head of Timetabling & Long Term Traincrew Planning, 3rd Floor, 55 Old Broad Street, London, EC2M 1RX [redacted].

1.2 Neither Freightliner nor Network Rail are aware of any other party that will be directly impacted by the outcome of this dispute.

2 THE CLAIMANT'S RIGHT TO BRING THIS REFERENCE

2.1 This matter is referred to a Timetabling Panel for determination in accordance with Condition D5 of the Network Code.

3 CONTENTS OF REFERENCE

The Parties have together produced this joint reference and it includes:-

- (a) The subject matter of the dispute in Section 4;
- (b) In Section 5, a detailed explanation of the issues in dispute prepared by the Claimant with a paragraph by paragraph response from the Defendant;
- (c) Any further issues raised by the Defendant in Section 6;
- (d) In Section 7, the decisions sought from the Panel in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (e) Appendices and other supporting material.

4 SUBJECT MATTER OF THE DISPUTE

- 4.1 The Parties agree that this is a dispute regarding a 'Failure to Use' notice issued by Network Rail under Network Code condition J8.5 against a Freightliner train slot 4M59 (MTWO) (ThO) and (FO) as issued on 15th October 2021 (copy located as accompanying Annex).
- 4.2 Freightliner voluntarily relinquished the (FO) path but responded that they believe that 4M59 (MTWO) and (ThO) had been used. (copy located as accompanying Annex).
- 4.3 The dispute arises over the interpretation of condition D8.5.1(C), that *Network Rail acting reasonably, considers that the Train Slots are not being used*; and the definition of the word 'use'.
- 4.4 The following documents are relevant to this dispute, and are included in Section 8:

Network Rail Failure to Use Notice

Freightliner Counter Notice

Network Rail Response to Freightliner

5 EXPLANATION OF EACH ISSUE IN DISPUTE WITH RESPONSE

5.1

(a) For clarity, Freightliner agree with Network Rail's statements within the original failure to use notice that:

(i) 4M59 (MTWO)(ThO) had not operated in whole between the origin point (Felixstowe North FLT) and the destination point (Birch Coppice Freightliner) in the 90 day period leading up to the service of the Failure to Use Notice by Network Rail on 15th October 2021.

(ii) 4M59 (MTWO)(ThO)(FO) is not underpinned by a Quantum Access Right. There is a Quantum Access Right historically associated with this train slot within the Schedule 5 Rights Table appended to Freightliner's Track Access Contract, however the train slot became disassociated with this Access Right at the May 2021 timetable change when Freightliner bid to amend the destination from Ditton O'Connor to Birch Coppice Freightliner.

(b) Network Rail Response

(i) Network Rail agree with the comments made by Freightliner in the above paragraphs (5.1(a)(i) and (ii)).

(c) GBRf Response

(i) GBRf notes that within its response dated 9th November 2021 Freightliner agreed to the discontinuation of the FO version of 4M59. It must be assumed that this particular schedule does not form part of the dispute and the NR should proceed with removal of this path from the working timetable.

5.2 *Issue 1 (Use)*

(a)

- (i) Network Code Condition D8.5.1 states the conditions that must be met in order to permit Network Rail to serve a Failure to Use Notice. D8.5.1(C) states that “*Network Rail acting reasonably, considers that the Train Slots are not being used*”. The term ‘used’ carries no definition within the Network Code, and as such it is not defined what proportion of a Train Slot must be ‘used’ to qualify. Network Rail has agreed with Freightliner that the train slot that is the subject of this dispute had been partially used during the 90 days prior to the serving of the Notice.
 - (ii) As such, Freightliner do not believe the criteria contained within Network Code Condition D8.5.1, specifically criterion (C) had been met at the time the Failure to Use Notice was served, and therefore the Failure to Use Notice should be deemed invalid.
 - (iii) Freightliner contend that, while the train slot that is subject to this dispute has not been used between its origin and destination point, it has been used to an alternative destination (in line with commercial requirements) and as such condition D8.5.1 (C) has not been satisfied in that the train slot has been ‘used’ – Freightliner are aware of no contractual definition within the Network Code that expresses a requirement for a train slot to operate between origin, destination and all intermediate points in order to qualify as ‘use’.
- (b) *Network Rail response:*
- (i) As highlighted by Freightliner above, Network Code Condition D8.5.1(C) states that “*Network Rail acting **reasonably** (emphasis added by Network Rail), considers that the Train Slots are not being used*”. *On the basis that no further arguments have been advanced by Freightliner, the Parties are in agreement that as a minimum, Conditions D8.5.1(a) and (b) have been satisfied in respect of the Notice issued.*
 - (ii) Network Rail agrees that there is no contractual definition of ‘use’ but has sought to act in a reasonable fashion (in line with Condition

D8.5.1(C)) when considering whether 4M59 has been used or not by the Claimant.

- (iii) After consideration in which it was identified that a part of Train Slot 4M59 (Felixstowe to Birch Coppice) was being utilised to convey traffic to South Wales under headcode 4V36 (something that the Parties are in agreement on), Network Rail reasonably concluded that train slot 4M59 was not being used with the rationale explored below in Issue 2 and therefore contends that the Failure to Use Notice remains valid.
- (c) GBRf Response
- (i) GBRf agrees with Network Rail that Condition D8.5.1 (c) includes the requirement for it to act reasonably in reaching its decision and that this wording is included specifically to cater for situations such as these where the Network Code cannot pre-empt and cater for every possible scenario in detail.
 - (ii) GBRf asserts that it is reasonable, in the absence of a definition with Part D of the Network Code, for Network Rail to refer to Part J of the Network Code in relation to 'Use' to aid the decision making process. Condition J4.2.2 and J4.2.3 define a 'Use' as one within the use period and the use period to be "*thirteen consecutive weeks for which a Train Slot is included in the Working Timetable*".
 - (iii) A Train Slot is defined within Part D of the Network Code as "*a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement*". Freightliner has not used the Train Slot sought 4M59 to its end point and with its arrival time, it has operated to an alternative destination and with a different arrival time.
 - (iv) GBRf asserts that Freightliner's creation of a revised Train Slot for 4V36 as part of the Short Term Plan (as defined within D3.7.1 of the Network Code) cannot be related to the Train Slot held within the Working Timetable as part of the Long Term Plan and, thus, the Train

Slot 4M59 cannot be considered as having been used, irrespective of any possible similarities between 4M59 in the Long Term Plan and 4V36 in the Short Term Plan.

- (v) 4V36 has its own Train Slot established in the Working Timetable as part of the Long Term Plan, departing at 22:45, one hour later than 4M59.
- (vi) The fact that Freightliner has the luxury of utilising an alternative Train Slot as part of the Short Term Plan merely highlights the excess capacity that exists currently. Freightliner retains two Train Slots within the Long Term Plan to operate one train; every week either the 21:31 or the 22:45 departure from Felixstowe does not run.
- (vii) In achieving the Objective (as defined within Condition D4.6 of the Network Code) Network Rail is required to *“reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants”*. GBRf believes that, were the Panel to agree with Network Rail’s reasoning and decision, this would create the opportunity GBRf to improve the performance of an existing service and operate an additional long-term train, while Freightliner is not left at any significant disadvantage as alternatives exist for the services it runs. Should the opposite be concluded then GBRf is materially disadvantaged and Freightliner is left neutral.

5.3 Issue 2 (ADA50 Application)

- (a)
 - (i) Network Rail, in reaching the decision to remove the Train Slot, has drawn on the determination of ADA50, specifically around the association of train slots. ADA50 was held following a dispute between an operator and Network Rail over the association of train slots in the working timetable and Quantum Access Rights, following an application under Network Code Condition J7. Freightliner would

remind Network Rail that it is not bound by the determination made in relation to ADA50, which was under a different Condition of the Network Code. Having drawn on this determination, Network Rail determined the characteristics of the train slot and the partial use were not substantially similar, as the shared path mileage equated to 38% of the train slot subject to the Failure to Use notice.

- (ii) Freightliner do not agree with Network Rail's decision that the threshold to deem 'use' is 50%, and therefore D8.5.1(C) has been met. To reach this decision, Network Rail have drawn on precedent from ADA50, which by their own admission relates to the alignment of access rights and train slots in relation to the 'Freight Transfer Mechanism' contained in Network Code condition J7. Freightliner do not believe this should be used as it pertains to a different section of the Network Code.
- (iii) Network Code Condition J7 relates to the 'Freight Transfer Mechanism' – this is a binary process for the transfer of Access Rights between freight operators and is used in situations where customer haulage contracts migrate between operators. As such, there has to be a point at which an Access Right can be seen as aligning with a Train Slot, hence the determination setting this at 50%. Freightliner contend that the Failure to Use process contained within Network Code condition D8.5 is non binary, and as such application of the determination of ADA50 is not relevant in this situation.
- (iv) Train path utilisation cannot, and is not, measured in percentage terms, instead being governed by physical infrastructure available for use. The position Network Rail have taken appears to imply that, had Freightliner used 51% of this train slot, Network Rail would deem this as 'use', however any figure below this is seen as failure to use. Freightliner do not see how this can be a practical policy to apply as it will provide inconsistent results in its application due to the infrastructure available at the point at which an amended train slot diverges from another.

- (v) To follow through on the logic of Network Rail's position. Was Train Slot 4M59 routed to Daventry and not Birch Coppice Freightliner would be able to retain the Train Slot even if it not been used to Daventry. Following the logic that would be because Daventry is further south than Birch Coppice and therefore the total mileage would be lower and therefore the percentage used would be higher. It clearly does not matter whether the Train Slot is routed to Birch Coppice or Daventry but instead used to Cardiff – the outcome is exactly the same, i.e. that the Train Slot is being used to an alternative destination other than what is in the Working Timetable. The application of an arbitrary percentage that will lead to inconsistent decisions being made (e.g. in the hypothetical example above why would it be ok to retain a path that is routed to Daventry but not to Birch Coppice when the principles surrounding it are the same?).
- (vi) Freightliner believe that, given the lack of contractual definition given to the term 'use', it must be taken to mean use of a Train Slot in any form, be that between origin and destination, or between a series of intermediate points. There is a requirement for rail freight operators to move swiftly and flexibly to respond to commercial demand, in order to stay relevant in a very competitive sector, and to do this operators must be able to amend service patterns without the risk that arbitrary percentage figures are being applied to make decisions over use, where the reality is that this is absolutely the case.
- (b) Network Rail response:**
- (i) Network Rail accepts that in the absence of any contractual definition of 'use' that the definition provided in ADA50 for 'substantial' has been used to support Network Rail in discharging its obligations under D8.5.1 (C) to act "*reasonably*" when considering whether 'use' of a Train Slot has occurred and that in the instance of 4M59 as can be seen in Appendix 8.4 and Appendix 8.5 there are clear differences between the Train Slot 4M59 and 4V36 which Network Rail submit demonstrates a Failure to Use.

- (ii) Train Slot 4M59 is routed to London from Felixstowe before joining the West Coast Mainline to be routed to the North West. 4V36 is routed to London from Felixstowe before travelling via the Great Western Mainline to the South West. Whilst the initial portion of the pathing matches, Network Rail did not consider this substantial in line with ADA50 which stated *“The word “substantially” is being used in its ordinary sense meaning to a significant extent or more than 50%”*.
- (iii) Network Rail recognises Freightliner’s argument that this aspect of the ADA50 determination is not binding in the context of ‘use’ rather than ‘association’; however, in the absence of other persuasive precedent Network Rail has considered this as a potential yardstick in reaching a reasonable and justifiable decision. The Parties have agreed that neither 4M59 nor 4V36 are underpinned by Rights and as such Network Rail are unable to make any comparisons against contractual characteristics (as per ADA50) and submit that it was therefore reasonable in this instance to assess ‘use’ against the route mileage and run frequency of 4M59.
- (iv) Freightliner state that ‘use’ should be considered to have occurred irrespective of how much or how little of a Train Slot is actually used. Network Rail contend that this is not a reasonable or a practical position that allows best use of capacity of the Network. Following this logic, Freightliner would consider 4M59 to be used merely by the fact it had left Felixstowe within the Train Slots allocated time, irrespective of routing and destination thereafter. Equally, the logic proposed by Freightliner would consider ‘use’ of a Slot to have occurred if at any point along the whole slot a service ran in its routing, irrespective of where and for how long. This position locks up substantial and significant capacity on the Network that both Parties agree isn’t being used. Network Rail does not consider this to be a practical or reasonable position which renders significant amounts of capacity unusable (to the detriment of all timetable participants) and has therefore sought to use the available precedent to reasonably establish if use has occurred.

(v) Network Rail wish to highlight that operators have the ability to bid variations into the WTT to reflect changes in traffic either via PDNS for upcoming timetable changes or via the Rolling Spot Bid (RSB) team for current timetable periods. Freightliner have demonstrated an understanding of this process within this submission with 4M59 seeing Freightliner bid in a May21 change in destination from Ditton O'Connor to Birch Coppice. Network Rail accepts that commercial changes to traffic may require changes to Train Slots to meet commercial requirements but would have thought this would have been reflected through one of the above mechanisms. Taking steps to update WTT slots to reflect commercial changes ensures an efficient use of network capacity as opposed to the partial use of slots approach taken in this instance.

(c) GBRf Response

(i) As outlined above, GBRf believes the fundamental debate to be whether or not Network Rail has acted reasonably in reaching its decision that Freightliner has not made use of the Train Slot in question. All parties agree that there is no formal definition of 'Use' within Part D of the Network Code, therefore it is beholden on Network Rail to reach a reasonable decision on what constitutes a use in this instance.

(ii) GBRf has also stated that it would appear reasonable to refer to other sections of the Network Code for guidance where Part D does not provide full clarity. The references to ADA50 and the attempt to use this to thoroughly explain the reasoning behind the decision made is not unreasonable in the view of GBRf. It is clear to GBRf that Network Rail has not made its decision arbitrarily, as suggested by Freightliner, but that much consideration has been given to the matter.

(iii) Irrespective, GBRf asserts that the Train Slot 4M59 cannot be considered as having been used for the aforementioned reasons.

6 ANY FURTHER ISSUES RAISED

- 6.1 (a) The Parties are in agreement that there are no additional issues to be raised.

7 DECISION SOUGHT FROM THE PANEL

- 7.1 The Parties request the panel make decisions regarding the following issues:
- 7.1.1 Whether or not Network Rail can be said to have acted 'reasonably' in reaching the decision it has made regarding the Failure to Use Notice.
 - 7.1.2 Whether or not (in the absence of defined terms and/or other precedents) that Network Rail's interpretation of the term 'substantial' within ADA50 in respect of 'use' under D8.5 is a reasonable application of the principle in this instance.
 - 7.1.3 Whether or not the term 'use' can apply to the operation of a Train Slot both wholly, between origin and destination and partially where a series of intermediate points are shared.
 - 7.1.4 Whether or not the Failure to Use Notice issued by Network Rail on 15th October 2021 to remove the WTT Train Slot as detailed in Appendix 8.1 that has led to this dispute is valid.
 - 7.1.5 If the Chair is not in agreement with the principles that have been applied by Network Rail in reaching its initial decision, guidance is requested as to what would or could constitute 'use' in respect of a WTT Slot.

8 APPENDICES

- 8.1 Network Rail Failure to Use Notice:



Network Code Part
D8.5 - Failure to Use I

- 8.2 Freightliner Counter Notice:



Part D8.5 Response -
4M59.docx

8.3 Network Rail Response to Freightliner:



Network Code Part
D8.5 - NR response to

8.4 Map of 4M59 and 4V36 routings



Microsoft Word
Document

8.5 TIPLOC and Mileage of 4M59 and 4V36





Microsoft Excel
97-2003 Worksheet



Network Code Part
D8.5 - NR response to

9 SIGNATURES

<p>The Claimant</p> 	<p>The Defendant</p> 	
<p>For and on behalf of Freightliner Ltd</p> <hr/> <p>Signed</p> <p>CHRIS MATTHEWS----- Print Name</p> <p>TIMETABLE STRATEGY & RAIL INDUSTRY MANAGER_____ Position</p> <hr/>	<p>For and on behalf of <i>Network Rail Infrastructure Ltd</i></p> <hr/> <p>Signed</p> <p>Simon Bennett ----- Print Name</p> <p>Customer Relationship Executive _____ Position</p> <hr/>	<p>For and on behalf of <i>GBRf</i></p> <hr/> <p>Signed</p> <p>----- Print Name</p> <hr/> <p>Position</p> <hr/>