

TTP2320 Network Rail Sole Response

1 DETAILS OF PARTIES

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

- (a) Freightliner Limited (“Freightliner”) whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ (“the Claimant”); and
- (b) Network Rail Infrastructure Limited (“NR”) whose Registered Office is at Waterloo General Office, London, SE1 8SW (“the Defendant”).

1.2 Third parties to this dispute may include MTR Elizabeth Line, Great Western Railway, GB Railfreight, DB Cargo (UK) and Heathrow Express.

2 CONTENTS OF THIS DOCUMENT

2.1 This Response to the Claimant’s Sole Reference Document (“SRD”) includes:

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its SRD document, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in its respective documents, 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 SRD, including references to documents or contractual provisions not dealt with in the Claimant’s SRD document.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fail to be determined as part of the dispute;
- (d) The decisions of principle sought from the Chair in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (e) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

3.1 NR does not accept that Freightliner has the right to bring its reference under Condition D5.1 of the Network Code, for the reasons explained below.

3.2 This matter relates to an Access Proposal that Freightliner failed to make in response to NR’s relevant TW-22 statement report. This matter relates to 4O50 on Saturday 30th December. The TW-22 statement report is produced for Freightliner in accordance with Condition D3.4.10 entitled “Where Network Rail requires a revised Access Proposal”, which sits under Network Code Part D Section D3.4 (Network Rail Variations with at least 12 weeks notice).

- 3.3 Where Network Rail requires a revised Access Proposal, Condition D3.4.10 states:
- (a) *the requirement must be notified to the affected Timetable Participant no later than TW-22;*
 - (b) *Network Rail shall specify the aspects of the Access Proposal which need to be revised and its reasons for this;*
 - (c) *Network Rail shall specify a reasonable period in which the revised Access Proposal must be provided, and in any event the revised Access Proposal shall be submitted no later than TW-18.*
- 3.4 The relevant article in NR's TW-22 statement report for Week 40 (Appendix A) advised Freightliner that 4O50 (SO) was foul of possession P3766319 on Western Route, how it was foul and when it was foul. The responsibility was subsequently Freightliner's to consider the TW-22 statement report and act upon it by submitting an Access Proposal to amend 4O50 (SO) accordingly (i.e. trains to be bid to run over GW Main Lines).
- 3.5 In this matter, Condition D3.4.12 applies because "Where a revised Access Proposal has not been submitted by a Timetable Participant as required by Network Rail, Network Rail shall be 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."
- 3.6 In this matter, the Timetable Participant (Freightliner) did not submit a revised Access Proposal where one was required. As such, Freightliner has no right to appeal as made clear by Condition D3.4.12.
- 3.7 Notably, NR did seek to assist Freightliner in establishing a path for 4O50 (SO), though that is irrelevant to this matter given Freightliner failed to submit an Access Proposal when required.
- 3.8 NR notes the contention in Freightliner's SRD that "There was no notification in the CPPP that Network Rail required operators to submit access proposals for revised schedules." This statement is irrelevant – the requirements of Condition D3.4.10 apply.
- 3.9 The bidding of "two-track" diversions – the switch of services from one set of lines to another, GW Relief Lines to GW Main Lines in this case – has long been a source of tension between NR and Freight Operating Companies (FOCs), Freightliner especially. NR notes that with "two-track" diversion scenarios Train Operating Companies (TOCs) on the Western Route *do* bid their schedule alterations to switch their services from one set of lines to another. On multiple occasions, NR has reminded Freightliner of the requirements for them to bid their "two-track" alterations. Furthermore, with respect to their Mendip traffic flows on Western Route, Freightliner *do* currently bid their two-track alterations to NR (Appendix B illustrates a very recent Freight Informed Traveller bid for Week 46).
- 3.10 Appendix C of this submission is an extract from Freightliner's relevant Week 40 bid and confirms 4O50 (SO) as not being contained within Freightliner's bid submission. In the bid, 4O50 (SO) is marked "N" denoting that the service has not been bid in response to the possession.

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

4.1 Issues where the Defendant accepts the Claimant's Case.

- 4.1.1 NR accepts that Freightliner received a relevant capacity study on 4th August, leaving Freightliner with only limited time to consider and apply the capacity study before submitting (at TW-18 timescales) its Week 40 bid to NR. In the event, Freightliner submitted its Week 40 bid on 17th August. It must be noted here that Freightliner continue to bid at TW-18 timescales, despite NR only requiring bids by TW-12. Freightliner could have potentially made use of the capacity study in a later bid of Week 40 at TW-12 timescales. Whilst Freightliner wishes to discount

the capacity study from the dispute, NR wishes to inform the Hearing Chair that its Informed Traveller teams (both Freight and Passenger) did try to apply the capacity study in the planning of Week 40.

4.1.2 NR accepts the record of events and timeline reported by Freightliner in its SRD paragraphs 4.5 to 4.9.

4.2 Issues where the Defendant qualifies or refutes the Claimant's Case.

4.2.1 For the reasons stated in paragraphs 3.1 to 3.9, NR does not accept that Freightliner has the contractual basis to claim against NR in this matter.

4.2.2 NR refutes the position made by Freightliner in its paragraph 4.3 that the relevant possession Traffic Remarks dictated that they did not need to bid schedule alterations in response to the possession. The Traffic Remarks made no declaration to the effect that Freightliner, or any other operator, did not need to bid in response to the possession. Possession Traffic Remarks assist operators to understand what action they must take in response to a possession – they are not an order for NR to unilaterally amend the timetable without the direction of the operator. For a variety of reasons, NR is quite sure Freightliner would object to NR unilaterally amending their schedules in response to Traffic Remarks.

4.2.3 In rejecting 4O50 (SO), NR refutes Freightliner's claim in paragraph 5.1 of its SRD that "no evidence has been provided to explain its considerations, as required by Condition D3.4.11." See paragraphs 4.2.4 and 4.2.5 for evidence to the contrary.

4.2.4 In rejecting 4O50 (SO) in our Week 40 offer to Freightliner, NR reported to Freightliner:

WK40 PC REJECTED

TW-14-LC AT GW103

Service currently unable to run in current path due to being foul of possession 3766319. Due to services having to cross to ML at Twyford west and speed of services on ML between Twyford West and Reading there is not enough capacity for the services to run. W&W + Freight planners have looked at the service and concluded that for the service to run between 3 and 5 passenger services would need to be rejected after attempting to move service around possession. No time in schedule to run earlier onto GW103, and only Freight path through Twyford West - Southcoat (sic) JN being used by 6V06DM between 1356 - 1406. As train is W10 must run on GW103 the service has been rejected as both FOP (foul of possession) and no viable path

4.2.5 In confirming the rejection of 4O50 (SO) in our Week 40 offer response to Freightliner, NR reported to Freightliner:

as previously mentioned in the train note, there is no compliant path at all for this train to run. Even working with the passenger teams to find a path, I am unable to find one, as I am unable to flex the passenger services

4.2.6 Paragraphs 4.2.4 and 4.2.5 combine to evidence that NR Informed Traveller teams (Freight and Passenger) were seeking to find solutions and flexing other services was a clear consideration. Freightliner contends in paragraph 5.2 of its SRD that "Network Rail must utilise it's flexing right in order to make best use of Network Capacity when this is reduced due to a Restriction of Use." NR disagrees with this statement.

4.2.7 NR confirms that, when deciding upon Network Rail Variations, Condition D4.4.1 entitles NR to exercise its Flexing Right when responding to an Access Proposal submitted under Condition D3.4.10. In the course of processing the Access Proposal, and as outlined in Condition D3.4.11, Network Rail subsequently "may modify, accept or reject a revised Access Proposal", giving written reasons for any modifications or rejections in the process. In this matter, NR gave written reasons for its decision.

- 4.2.8 NR wishes to emphasise that Condition D4.4.1 “entitles” NR to flex services when processing Access Proposals related to Network Rail Variations, but the clause does not demand that NR *must* flex services. Furthermore, Condition D4.3.1 is clear that in being entitled to exercise its Flexing Right, NR shall not accept a Train Operator Variation Request if to do so would give rise to any conflict with any Train Slot already scheduled in the New Working Timetable. In this matter, the accommodation of 4O50 (SO) gave rise to conflicts with Train Slots in the New Working Timetable (see Appendix D for greater detail on those conflicts arising). In summary:
- For 4O50 path to run with minimal changes from WTT, 1W25DF, 1C15DF and 1A19DF (WTT) would need to be rejected. Moving to platform 10 would lead to 1A68DF being rejected.
 - For 4O50 path to run earlier, 9R42RE (WTT) would need to be rejected with consequential timings made to other services to make it work.
 - For 4O50 path to run later, 2J37DF (WTT) and 1O14CA would need to be amended. Service would need to be held at Hanwell, meaning either 6L78HB and 6B91DA/DB would need to be rejected.
- 4.2.9 Whilst Condition D4.4.1 entitles NR to exercise its Flexing Right when responding to an Access Proposal submitted under Condition D3.4.10, Freightliner failed in this matter to submit an Access Proposal under Condition D3.4.10 and, as previous paragraph 3.6 states, NR does not accept that Freightliner has a right to appeal in this case.
- 4.2.10 NR refutes the Freightliner view that the NR Freight Informed Traveller team did not apply the Decision Criteria pursuant to D4.6.2 in its handling of 4O50 (SO). NR accepts that in delivering its outcome for 4O50 (SO) it did not share information pertaining to the Network Code Decision Criteria. Given the very high turnover of schedules that the NR Freight Informed Traveller team has to process and the perceived abrasiveness by FOCs of applying Decision Criteria to each schedule transaction, it has not been the convention of the NR Freight Informed Traveller team to supply Decision Criteria information with each schedule transaction. NR wishes to make clear that this admission does not equate to a lack of consideration or application of the Decision Criteria in its handling of 4O50 (SO).
- 4.2.11 As the commentary in paragraph 4.2.4 demonstrates, the NR Informed Traveller teams (Freight and Passenger) sought to find a retiming solution to 4O50 (SO) but ultimately decided it was not possible unless 3-5 passenger services were rejected. The solution of terminating passenger services short (at Maidenhead vice Reading) was explored but ultimately discounted owing to two factors:
- some services extended across to the South West and Wales, thus their removal would be a loss of journey / less-frequent travel option; and
 - terminating was deemed to lose multiple passenger services their connections with other passenger services towards Guildford, Basingstoke etc.

The NR Informed Traveller teams (Freight and Passenger) spent in the region of five hours exploring options for 4O50 (SO).

- 4.2.12 In the 4O50 (SO) decision, NR was in compliance with Condition D4.6.1 as its timetable decision demonstrated fulfilment of “the Objective” in accordance with the following clauses of Condition D4.6.2 (The Decision Criteria):

(d) that journey times are as short as reasonably possible

passengers seeking connections at Reading to Guildford or Basingstoke, or those travelling to the South West and Wales, would have experienced longer and more complex journeys as a consequence of the removal of the 3-5 passenger services

(e) maintaining and improving an integrated system of transport for passengers and goods

passengers seeking connections at Reading to Guildford or Basingstoke would have experienced a degradation in their onward connections as a consequence of the removal of the 3-5 passengers services

(j) enabling operators of trains to utilise their assets efficiently

in any location on the network, capacity is always required/used to terminate passenger services short and this has a consequential impact on the running of other proximate services – in this matter, possession P3766319 on Western Route had already reduced infrastructure availability and service provision in the area

It should not be forgotten that the weekend in question (in the Christmas / New Year period) is a busy time for passenger train usage.

4.3 Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination

4.3.1 NR has no additional points of argument in this matter.

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

4.4.1 Freightliner's main arguments in this matter centre on: NR's application of its Flexing Right; and NR's consideration and application of the Decision Criteria.

4.4.2 Paragraphs 4.2.3 to 4.2.9 of this Sole Response evidence that NR *did* attempt to exercise, as it is entitled to do, its Flexing Right.

4.4.3 NR wishes to emphasise that Condition D4.4.1 "entitles" NR to flex services when processing Access Proposals related to Network Rail Variations, but the clause does not demand that NR *must* flex services.

4.4.4 Paragraphs 4.2.10 to 4.2.12 of this Sole Response evidence the Decision Criteria *did* underpin NR's communications to Freightliner on 4O50 (SO) and explanation is given as to why the Decision Criteria information was not explicitly shared at the time of rejection.

4.4.5 Paragraph 4.2.8 explains that the accommodation of 4O50 (SO) gave rise to conflicts with Train Slots in the New Working Timetable. Condition D4.3.1 is clear that in being entitled to exercise its Flexing Right, NR shall not accept a Train Operator Variation Request if to do so would give rise to any conflict with any Train Slot already scheduled in the New Working Timetable. As such, NR was contractually entitled to reject 4O50 (SO) because of the conflicts brought about and documented in Appendix D.

4.4.6 However, above all other factors in this case, NR believes very firmly that Freightliner does not have a route to appeal in this matter as made clear by Condition D3.4.12. Freightliner did not submit a revised Access Proposal for 4O50 (SO) where one was required under Condition D3.4.10.

5 DECISION SOUGHT FROM THE CHAIR

5.1 NR seeks from the Panel the determination that, owing to Condition D3.4.12, Freightliner has no contractual basis on which to bring this dispute concerning 4O50 (SO) which was advised to Freightliner under Condition D3.4.10. As such, NR's decision (rejection) of 4O50 on Saturday 30th December stands.

- 5.2 In the event the Panel believes Freightliner do have contractual grounds to refer this matter, NR seeks from the Panel the determination that its Informed Traveller teams (Freight and Passenger) have correctly met all of their contractual obligations under Part D, including the application of its Flexing Right.
- 5.3 NR seeks from the Panel the determination that, owing to Condition D3.4.10, Freightliner was non-compliant in its action not to bid its “two-track” diversions on Western Route for possession P3766319 following NR’s TW-22 statement report advising of the closure of the GW Relief Lines.
- 5.4 NR seeks from the Panel the determination that possession Traffic Remarks do not in any way remove the obligation of operators to bid Access Proposals in response to Network Rail Variations.
- 5.5 NR does not seek costs in this matter.
- 5.6 NR does not consider any exceptional circumstances exist in this matter.

6 APPENDICES

- 6.1 NR confirms that it has complied with Access Dispute Resolution Rule H21.

- APPENDIX A Relevant article in NR TW-22 statement report relating to 4O50
- APPENDIX B Relevant article in Freightliner Week 46 Informed Traveller bid confirming the bidding of two-track alterations on Mendip traffic flows
- APPENDIX C Relevant article in Freightliner bid confirming 4O50 not bid
- APPENDIX D Evidence of conflicts arising with Train Slots in the New Working Timetable

7 SIGNATURE

For and on behalf of Network Rail Infrastructure Limited



Nick Coles
Timetable Production Manager – Freight