

Hearing of Timetabling Dispute TTP2388 - Directions Letter GB Railfreight Response

9. Did you, GBRf, request NR not to copy you into so many emails, and ask NR to use its judgement when consulting changes to engineering access under D3.4 and D3.5?

GBRf has never done that and we would never accept Network Rail's "judgement". GB Railfreight (Tom Mainprize and Ian Kapur) met with Maria Lee and George Long in Wessex Route, on 6th December 2023, to discuss a number of items including the extremely high number of late notice possession changes.

Having talked about the possibility of not being sent some areas of Wessex documents for late notice change (e.g. Waterloo Station), the conclusion was reached that we just could not implement the removal of any possessions communications as we often run short-notice charter/inspection saloons/test movements. We had to receive everything, as per Network Code. There are no meeting minutes but George Long (NR) took notes.

GB Railfreight has been advocating, for some years now, that all blocks are to be sent out every time, particularly to freight operators, as our customers can request changes to services at the very last minute or we might attain new business for which visibility of these possessions is required, so we can correctly advise our customers. Please refer to "e-mail 1" in the attached documents, this contains X3 requests to ensure GB Railfreight are copied into all possessions.

10. It is noted that:

(a) NR say in their email from Bryan Davey (29/2/24 @18:10) "the engineering access team have confirmed that "no traffic has been bid and offered" on 12 Feb 2024".

At the time of bidding our services, on 08/02/24, there was no possession published. Between our bidding and Network Rail Short Term Planning working on the bid, the possessions appeared and, as a result, GBRf was not offered the paths. Working through this process, there would have been no obvious visibility of GBRf's bid services however the services were bid before the possession notice was issued.

Even if no bid had been made by 12/2/24, GB Railfreight still has a perfectly legal entitlement to be able to bid a service by the STP process (bid Day A for Day C running) if no access decisions had been agreed and published. It doesn't matter what is in the TOPS/TRUST system as that has no reflection on legalities. In the absence of a confirmed possession in the Confirmed Period Possession Plan (CPPP), and no formal late notice agreed decisions being added afterwards to this possession plan, GBRf's track access contract permits it to bid for a path just a few minutes before departure time.

(b) You (GBRf) say in your case summary: "8th February: GB Railfreight bid 14 test paths to Network Rail Capacity Planning using the Short Term Planning process."

GB Railfreight can confirm we bid 14 services on the 08th February 2024

(c) Can you, GBRf, confirm that there was a bid from GBRf on 8/2/24? If so produce any documents relied upon.

Please refer to "e-mail 2" in the attached documents which contains GBRf's STP bid for its services – Note we have only included the schedules concerning London Waterloo. Please also refer to the possession document attached showing the creation of the possession after we bid our services.

11. How often has GBRf run trains (whether "test" trains or otherwise) on the Sheepcote Up/Down lines in the last two years?

Owing to the complex nature in which information is available for week-on-week requirements, there is not a straightforward answer to this question.

GB Railfreight can say that the use of the Sheepcote Lane Curve infrastructure will have been on a number of occasions throughout a year, with some charter services and infrastructure monitoring trains as examples of our commercial work. As per the aforementioned, in Point 9, we will bid charter/inspection saloons/test movements at short-term timescales to provide a service to customers.

There is, though, still an overarching point of principle and culture which remains at Network Rail in that it is often still adopting a stance of not consulting all operators when it is wanting to take possession of the infrastructure. GB Railfreight, like all freight operators, is a national operator and we have a right to bid services at short notice at the request of our customers, whether it is for access to London Waterloo or any other station for that matter.

Resolution of the dispute

12. Mitigation of loss 5 and co-operation 6 between the parties to resolve the issue: To enable the panel to determine if the parties have co-operated and attempted to mitigate their losses (should I decide there were losses incurred), please state:

(a) Are you (GBRf) prepared to work with NR to ensure that “test train(s)” can be run into Waterloo via Sheepcote Curves before any HS2 blockades? If so, have you contacted NR to discuss the issue?

GBRf is prepared to work with Network Rail, as far as it is able, to reach a solution that is satisfactory to our customer however that may just not be possible in this case. It has not been possible to operate test trains into London Waterloo prior to the blockades due to our customer waiting for gauging certification to be authorised and issued. This has in itself contributed to the urgency our customer needs to complete the testing program on time.

(b) If you have so contacted NR when and with what outcome?

GBRf has suggested that Network Rail works around GBRf’s bid paths however, due to the nature of work that Network Rail wishes to carry out, this is not possible in Network Rail’s view.

Following a recent call with our customer dated 04/03/24, GBRf can confirm that there is still a requirement for it to operate all day Monday and Tuesday, up to Tuesday 15:45, to accommodate GBRf’s bid test trains. On the 5th March 2024, GBRf has requested that Network Rail revisits the proposed blockade with these suggested alterations factored in.

Please refer to “e-mail 3” in the attached documents which contains our earlier correspondence regarding the possession and the requirement to have the ability to run services Monday and Tuesday only. At the time of completing this Directions letter response, this alteration is still being assessed by Network Rail.

(c) Will GBRf please confirm what consideration, if any, has been given to cancelling, or postponing the proposed test runs (on 18/3/24, 1/3/24 and 20/3/24) (*Are these dates right? Please correct them if not*). and what penalties would be incurred if they were to be cancelled or postponed.

GB Railfreight can advise the requirement to assess both Waterloo and Euston is part of a DfT-funded (and Network Rail supported) project which loses funding at the end of March 2024. GB Railfreight has no visibility of the value of this agreement or what, if any consequences (financial or otherwise), would result as a result of not delivering this testing on time.

Network Rail has been pushing for direct running into London Waterloo to be assessed, over the customer’s preference of London Euston station. As such, it is included in the DfT specification and GWR cannot go against the DfT instruction unless this is duly withdrawn, which will only come at the clear direction of the Department for Transport to GWR and, therefore, Network Rail. From a GBRf perspective, the revenue will be in the region of £20-25k per week that we stand to lose if we are not able to operate the service.

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5 The common law of England and Wales imposes **a duty on parties to a contractual dispute to mitigate** (that is avoid or minimize) **any loss** which may result from a breach of contract. Failure to mitigate loss by taking reasonable steps to avoid or minimize loss will result in the loss potentially being irrecoverable.

6 The Access Dispute Resolution Rules at Chapter A “Duties of Dispute parties” **requires the parties to co-operate with each other and conduct themselves in good faith with the objective of resolving the dispute: R9 (a)**

7 Referred to in the email of Gareth Rawlings on 19/2/24

13. Set out those matters which you (GBRf) consider renders the decision by NR unjustified and disproportionate in relation to the matter, and produce any documents you rely on.

GB Railfreight believes the decision made by Network Rail is unjustified as the work content of this last-minute possession is not remedial or emergency work, which is the principal use of the Late Notice Possessions process.

There is a clear possession planning process for all parties to follow laid out in the Network Rail and it is this that allows all parties to have a reasonable degree of certainty in carrying out its business. GB Railfreight is clear that the decision is wholly unjustified as Network Rail has admitted, quite clearly, that it had not consulted GBRf on this proposed possession, has not abided by the Network Code and is therefore likely to be in breach of its contract.

It is right and proper that GB Railfreight expects to operate its business according to its joint GBRf/Network Rail Track Access Contract, which itself incorporates the Network Code. It is on this basis that GBRf believes Network Rail is not justified in deviating from the conditions of this contract and that GBRf can reasonably expect all parties to abide by said track access contract. Network Rail appears to have made its own judgement as to whom to consult and who not.

Our customer is committed to carrying out a testing programme to a deadline of the end of March 2024. It has suffered some set-backs in this tightly-timed project which has brought it to the imminent timeframe whereby it must deliver, complete and give detailed reports on the testing. This deadline is set by Network Rail and the Department for Transport and GBRf has an agreed commercial agreement to deliver these services.

GB Railfreight believes that this work could and should have been carried out sooner if it was that critical to deliver. GBRf refers to the e-mail received from Network Rail, dated 21/02/23, where it is clear that Network Rail has had 2 years to deliver this piece of work and it has had choices in that 2 years period to deliver this track renewal work.

Taking all the above into account, GB Railfreight believes that Network Rail’s decision to implement this non-consulted and non-agreed late notice possession, in contradiction to GBRf services already bid, is a breach of contract and, therefore, unjustified and not permissible.

14. Produce any documents you wish to rely upon at the hearing by 14:00 on Wednesday 6 March so that the panel and NR have sufficient time to deal with the same.

Please refer to emails and documents attached with our response.

15. Will GBRf outline what outcome it seeks from the hearing?

Ultimately, GB Railfreight wishes to be able to run its specified services that have been bid, as per Network Code and clear of any properly formally consulted possessions, for the whole of the Monday and Tuesday in question. The running of these services would be complete by 15:45 on the Tuesday after the passage of 5Q86. GB Railfreight also wishes the Hearing Chair to determine that, by not abiding by the Network Code for its possession planning, Network Rail is in Breach of Contract. Were this to be determined, GB Railfreight seeks an award of damages against any loss of revenue.