

Gordon Herbert
Senior Manager, Access and Licensing
E-mail track.access@orr.gov.uk



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Rob Williamson
Customer Relationship Executive
Network Rail
1 Eversholt Street
London NW1 2DN

Carl Kent
Head of Strategy & Innovation
GB Railfreight Ltd
3rd Floor, 55 Old Broad Street,
London EC2M 1RX

Dear Carl and Rob

IFAD vehicles conveying Construction Domestic and European Intermodal and Automotive traffic - proposal to supplement Track Usage Price List

This letter sets out the Office of Rail and Road's position in response to the submission made by the parties on 31 March 2019 to supplement the Track Usage Price List, for the purpose of GB Railfreight's track access contract, to include IFAD vehicles.

The application

Network Rail emailed the Office of Rail and Road (ORR) on 31 March 2019 requesting a supplement to the CP5 track price usage list to include IFAD vehicles. That was a Sunday, the very last day of CP5, and the email was opened at ORR on Monday 1 April (after CP6 had commenced). We responded that the application appeared incomplete, as it was not endorsed by GBRf. However GBRf subsequently confirmed that Network Rail had been acting on its behalf and it did not normally separately endorse these applications. In light of this ORR is willing to consider the application as duly submitted within CP5.

It is Network Rail's standard practice to make price list supplemental applications jointly with the train operator, or at least provide a separate endorsement. ORR needs to know that both parties support the submission, and is not misled into consenting to a change which one party does not agree to (for whatever reason). Please may I ask that going forward any track usage price list supplement requests are jointly made by both parties, as a matter of routine, before ORR considers them.

Validity

The application was made in CP5 and it was clearly the intention of both parties for the supplement to apply to the CP5 Track Usage Price List retrospectively from the date the equipment was used or the start of CP5, whichever was later, in accordance with the contractual regime set out in paragraph 2.2 of Schedule 7.



Having established that the application was indeed made with the agreement of GBRf, ORR explained to the parties that we would have to consider whether and how this application should be processed, given that we are now in CP6.

Paragraph 2.2.12 of Schedule 7, of the contract in force on 31 March 2019 (i.e. during CP5) when the parties made their application, states that in the case of a supplement to the Track Usage Price List (that is the price list published or about 20 December 2013), the supplement shall have retrospective effect from the first day of the Default Period (that is 1 April 2014 or when the wagons were first used, whichever is the later).

Rob Williamson of Network Rail emailed ORR on 5 April indicating that he had initially thought the process concluded with submission to ORR. In fact an ORR consent notice is needed and so the process was not completed in CP5. Mr Williamson indicated that, in Network Rail's opinion, under the contract, the relevant default period would now run from the start of CP6 not CP5; the consequence of this would be that the application which both parties consented to could not take effect as a supplement to the CP5 price list as intended.

We have considered that submission. We note that neither the CP5 nor CP6 versions of the contract expressly constrain ORR's ability to issue a consent notice for VUC rates in the track access price list in respect of an application properly applied for in CP5 despite a new control period having commenced.

ORR decision

It is clear that the applicants intended the contract provisions in force on 31 March 2019 to be considered by ORR (rather than those which only came into effect from 1 April, after the parties' application had been made), and for the supplement to have retrospective effect from the first day of the CP5 Default Period then in force.

Given that, and the logic of the supplement consent process envisaged by paragraph 2.2 of Schedule 7, ORR is content to issue a consent notice on the terms applied for (that is, supplementing the CP5 price list); we will issue such a consent notice separately.

One of the consequences of the parties making a late submission is that the new price list for CP6 has already been published and took effect on 1 April 2019; the current price list is now defined in the contract as the Track Usage Price List published on or about 20 December 2018. Our consent under this application is only to a supplement to the CP5 price list, not the CP6 price list. For completeness sake, the parties should now also make an application under paragraph 2.2 of Schedule 7 to supplemental the CP6 price list as well, and we will consider it.

I trust this adequately explains ORR's position.

Yours sincerely

Gordon Herbert

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