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13 January 2010

Dear Paul

APPEAL UNDER REGULATION 29 OF THE RAILWAYS INFRASTRUCTURE (ACCESS AND MANAGEMENT) REGULATIONS 2005

This letter constitutes a letter of appeal by Freightliner Heavy Haul Limited (FHH) to the Office of Rail Regulation (ORR) pursuant to regulation 29 of the Railways Infrastructure (Access and Management) Regulations 2005 ('the Regulations').

FHH believes that the matter of this appeal is not one in relation to which directions can be sought from ORR under sections 17 or 22A of the Act as it relates to the circumstances specified in paragraph (4) of regulation 29.

FHH considers an appeal has become necessary as Network Rail have refused to engage with FHH over a matter of incorrect charges being billed to FHH.

BASIS FOR APPEAL

FHH contends that Network Rail has raised incorrect charges in respect of the following wagons for (variously – detailed below) the period 2002-2009: TEAP,TEAK,FEAE,FRAA.

FHH contends that the charges raised do not comply with paragraph 12. (9) of Part 4 of the Railways Infrastructure (Access and Management) Regulations 2005. FHH believes that the charges raised do not "comply with the methodology, rules and where applicable, scales laid down in the network statement".

FHH contends that the charges raised do not comply with paragraph 1(a) "complies with the rules set out in the network statement produced in accordance with regulation 11" or paragraph 1(b) "results in equivalent non-discriminatory charges for different railway undertakings that perform services of an equivalent nature in a similar part of the market" of Schedule 3 of the Railways Infrastructure (Access and Management) Regulations 2005.

FHH considers that Network Rail's charges in respect of this dispute constitute a breach of their Licence Condition section 9 – non-discrimination:

"9.1 Except in so far as ORR may otherwise consent, the licence holder shall not in its licensed activities, or in carrying out any other function contemplated by this licence, unduly discriminate between particular persons or between any classes or descriptions of person."

In addition FHH does not believe that Network Rail have acted in accordance with their Licence condition 8.2 (a):

"8.2 The licence holder shall achieve the purpose in condition 8.1. In particular, the licence holder shall, to the greatest extent reasonably practicable, deal with stakeholders:

(a) with due efficiency and economy and in a timely manner "

BACKGROUND

FHH commenced its operations in 1999, operating under the Freightliner Limited licence until 2003 when it obtained its own licence and subsequently separate track access agreement. FHH operates services in the rail freight sector commonly understood as "bulk" products, moving train loads of commodities in predominantly specialised wagons. This is a competitive market and FHH directly competes with several other rail freight companies for business in the "bulk" market. Margins in this market are very small with typical margins being 5% or lower. Customers typically choose rail freight operator following a tender process and price is normally the dominant factor in choice of rail freight operator. It is therefore very important to a rail freight operator that track access charges are correctly charged taking into account the characteristics of each wagon.

In October 2001 the Office of Rail Regulation (ORR) published its "Review of freight charging policy - Final conclusions". This concluded that variable charges for wagons should be varied to take into account their suspension type "In the context of a more deterministic regime, the Regulator believes that an explicit discount should be introduced, based on the current level of knowledge, in order to provide incentives to use more track-friendly suspensions."

FHH and some of its customers have decided to invest in track friendly suspensions in order to benefit from lower track access charges. The decision to purchase wagons with more track friendly suspensions is only taken on the basis of a business case that assumes a lower track access charges in line with ORR's conclusions. ✂

FHH has been charged the incorrect charge by Network Rail for certain wagons detailed below. In some cases the incorrect rate based on the bogie type has been charged and in other cases the incorrect rate was based on the incorrect assumed weight.

FHH considers that in charging the incorrect rates for wagons Network Rail has not complied with paragraph 12. (9) of Part 4 of the Railways Infrastructure (Access and Management) Regulations 2005. The Network Statement (see extract from 2008 Network Statement attached) states that charges will vary depending on the bogie type of the wagon.

FHH also considers that by not charging wagons at the correct rates Network Rail have acted in a discriminatory fashion between rail freight operators. Other operators who have older wagons with less track friendly suspension or who have chosen to invest in cheaper bogies, which should attract higher track access charges have been able to gain commercial advantage over FHH.

✂

DETAIL

The appeal is spread over two control periods, Control Period 3 (CP3) and Control Period 4 (CP4). The detail of the incorrect charges is described below for each of the Control Periods.

We attach to this appeal a copy of the correspondence with Network Rail in regard to this matter.

CP 4

TEAP wagons - The loaded rate for TEAP wagons has not been based on an average of loaded and discharged rates in the model (as should be the case to allow for the fact that TOPS requires a laden description for this commodity type regardless of whether it actually contains a product for the journey in question) The weight used in the model is 97 tonnes – this is clearly a fully loaded weight and we contend that the average rate should be 62 tonnes [(97+26)/2]. This would be consistent with the approach used for other oil wagons such as the TCBH and TEAK in the model. The rate charged is £1.81 per thousand gross tonne miles (kgtm) and using the model we believe that the rate should be £1.20 per kgtm.

TEAK wagons – For these wagons the correct loaded rate of 62 tonnes, based on an average of loaded and discharged rate, has been used in the model. For this wagon type however we can see that the charging model incorrectly assumes that these wagons have a 3-piece bogie (band 3) with an unsprung mass of 1,780, whereas in fact they use a TF25 bogie (band 6) with an unsprung mass of 1,325. This error seems to have occurred as a result of another fleet of TEAK wagons, operated by DBS, which do have 3 piece bogies. The rate charged is £1.96 per kgtm and using the model we believe that the rate should be £1.20 per kgtm.

FHH first wrote formally to Network Rail on 23rd October 2008 regarding the discrepancy in charging for these wagons, this was before the consultation for CP4 variable charges was undertaken. At that stage we believed that the dispute was simply a case of empty wagons being incorrectly charged at the loaded rate, this was also Network Rail's assumption in its letter of 23rd December 2008, when it wrote to advise that the issue with mis-charging of oil wagons had been resolved. At that time we did not know that the only way to get a correct charge was for the variable rate to be based on the average of empty and loaded wagons rather than being charged the loaded rate for loaded wagons and the empty rate for empty wagons, and therefore we did not advise Network Rail or ORR that the weight in the model for CP4 needed correcting. Because the actual rates charged for TEAP and TEAKs for CP4 were very similar the issue over weights also masked the fact that the TEAP wagons were being charged with the incorrect assumption regarding bogie type.

CP 3

Oil wagons

The incorrect assumptions for TEAP and TEAK wagons in the CP4 charging model were also incorrect in the CP3 model. We are unable to calculate accurately what the charges for these wagons should have been in CP3 as the CP3 model, which we have obtained from the ORR, is apparently incomplete. Therefore, we can only make an assumption based on rough quantification on what the actual charges should have been. We have assumed that the inputs in question (i.e. bogie type and average laden weight) had the same weighting in previous costing models as they do in the CP4 model. On that basis, we have assumed that the 34% reduction in track access charge that we have calculated for TEAP wagons as a result of correcting the CP4 model and the 39% decrease in TEAK track access charge from doing the same, are in the same proportions as the reduction that would have been seen in the CP3 model had the same adjustments been made.

On this basis, we calculate that the charge for TEAP wagons in CP3 should have been approximately £1.84 instead of the charged rate of £3.00 and the charge for TEAK wagons in CP3 should have been approximately £1.64 instead of the charged rate of £2.69.

The TEAP wagon was first introduced into service during the year 2006/7, and therefore was not included in the original CP3 price lists. The process listed in Schedule 7 paragraph 2.2.2 of the FHH Track Access Agreement dated 20th June 2003 whereby Network Rail calculates charges for new wagons, and these are approved by the ORR was not to our

knowledge followed.

The TEAK wagon was allocated an incorrect 4th wagon character by Rolling Stock Library, who is a contractor of Network Rail. There is another fleet of TEAK wagons, which came into service in the early 1980s, which have Gloucester 3 piece bogies and an unsprung mass of 1780, these fall into wagon suspension band 3. Clearly a wagon with a TF25 bogie, which should be charged as suspension band 6 should not have been allocated the same vehicle type as a wagon with a band 3 bogie.

Waste wagons

During CP3 FHH were also incorrectly charged for waste wagons. In essence we were charged for wagons modelled at loaded weights for both the empty and loaded movements. Because TOPS requires waste wagons to be recorded as laden, even when discharged of their contents, an average "laden – unladen" weight should have been used for input to the charging model, whereas the actual weight assumptions used for the wagons used by FHH are shown in the table below:

Wagon Type	Laden Weight used in CP3 Model (t)	Correct Laden Weight used in CP4 Model (t)
FEAB	70	42.8
FEAE	70	42.8
FRAA	69	69.0

As the table shows a fully laden weight (c.70t) was used for all journeys in CP3; this error was largely corrected for CP4 (although the rate for the FRAA wagons is still incorrect, this is relatively minor financially).

ORR published a price list for wagons on 29th October 2002 following the publication of its Review of Freight Charging Policy: Final Conclusions in October 2001. This price list does not include the FRA, FEAB or FEAE wagons and we therefore conclude that these wagons were added to the model after CP3 had commenced. The process listed in Schedule 7 paragraph 2.2.2 of the FHH Track Access Agreement dated 20th June 2003 whereby Network Rail calculates charges for new wagons, and these are approved by the ORR was not to our knowledge followed, for any of these wagons. Though we note that it is possible that another freight operator prior to FHH operated some of these wagons.

The incomplete nature of the CP3 charging model which we have access to, requires some broad assumptions in order to quantify the extent of the overcharge resulting from these input errors. Assuming again that the relative weighting of inputs to the CP3 model is the same as that in the CP4 model, we can calculate, using the CP4 model, the approximate proportional decrease in rates caused by correcting the laden weight input in the CP3 model. On this basis, we calculate that the charge for FEAE wagons in CP3 should have been approximately £2.60 instead of the charged rate of £3.31 and the charge for FRAA wagons in CP3 should have been approximately £2.60 instead of the charged rate of £3.19.

CONCLUSIONS

FHH has been trying to resolve this dispute over wagon charging with Network Rail for over a year through correspondence and requests for meetings at senior level. Network Rail has refused to engage with the detail of our dispute and considers that the ORR should deal with FHH's complaint, not Network Rail.

FHH believes that Network Rail's incorrect charges have resulted in non-compliance of the Railways Infrastructure (Access and Management) Regulations 2005. FHH also believes that Network Rail has not acted in accordance with its Licence obligations in respect of discrimination or dealing with its stakeholders in a timely manner.

FHH appeals to the ORR to investigate the above matter with a view to:

- Directing Network Rail to amend the wagon charges which have been incorrectly calculated
- Directing Network Rail to retrospectively adjust the incorrect charges billed to FHH during CP3 and CP4 as laid out in this letter

Please contact us if you would like any further information to be provided.

Yours sincerely

Lindsay Durham
Head of Rail Strategy
Freightliner Heavy Haul Limited

Extract from Network Rail The 2008 Network Statement

6.3 Tariffs

Section 6.1 sets out the different components of the charges applicable for access to the main rail network. The tariff arrangements for each of these are set out below.

Variable Usage Charges

The existing variable usage charges are based on a top-down analysis of Network Rail's incremental costs, to establish a pool of variable costs, which are then distributed to individual vehicles in proportion to their relative propensity to cause damage to the network. This propensity is established by a bottom-up analysis of causes of wear and tear to the network, and the relative characteristics of different rolling stock types. The usage charges are specified in pence per vehicle mile for each type of vehicle and are applied to the actual volume of vehicle miles of each type that are operated. The billing system records actual vehicle movements and an invoice is issued at the end of each four week period. The charge rates for each vehicle type apply nationally as there are currently no variations by area or region. The cost of track maintenance and renewal varies with axle loads, speed and unsprung mass. The higher the axle load, or the higher the speed of the vehicle or the greater the unsprung mass, the higher the consequent infrastructure maintenance and renewal costs. So the charge will reflect these characteristics. For prospective operators, Network Rail can provide an estimate of the charge for a new vehicle type where provided with the following items of information:

- whether the vehicle is powered (Yes or No);
- whether the power source is diesel or electrical;
- tare weight;
- number of axles;
- unsprung mass;
- maximum speed of the vehicle; and
- seating capacity.

Whilst the basis of the calculation of usage charges for freight is similar as to that for passenger vehicles, there are some key differences. First, for freight wagons, adjustments are made to variable costs of freight wagons to reflect their relative track friendliness. Prospective freight operators will therefore need to describe the suspension characteristics of their vehicles, which are grouped into seven bands, as follows: Secondly, the axleload and operating speeds are determined by reference to the commodity type and/or Network Rail's service group codes. The commodity types are as follows.

- Automotive & Intermodal;
- Bulk & Neo-Bulk;
- Coal ESI & Iron Ore;
- General Conventional; and
- Mail & Premium Logistics

Thirdly, a factor for coal dust spillage is applied to coal traffic.

A list of variable charges per vehicle type is provided, for passenger and for freight vehicles, in Annex A (Usage Price List) to this Network Statement.

Tariffs, subject to adjustment as mentioned above, are set out in Annex B (Traction Electricity Tariffs) to this Network Statement.

1 4 wheel wagon with pedestal type suspension
2 4 wheel wagon having leaf springs, friction damped
3 Bogie wagon with three piece bogie
4 Bogie wagon with enhanced three piece bogie, e.g. 'swing motion', and Parabolic 4 wheel wagon
5 Basic bogie wagon with primary springs, e.g. Y25
6 Bogie wagon with enhanced primary springs – Low Track Force bogies, TF25, 'axle motion' (like HV primary sprung bogies)
7 Bogie wagon with enhanced primary springs and steering