

THE OFFICE OF RAIL REGULATION'S DECISION ON AN APPEAL BY FREIGHTLINER HEAVY HAUL LIMITED UNDER REGULATION 29 OF THE RAILWAYS INFRASTRUCTURE (ACCESS AND MANAGEMENT) REGULATIONS 2005 REGARDING CHARGING FOR CERTAIN TYPES OF ROLLING STOCK

DECISION: *The Office of Rail Regulation decides this appeal as set out in paragraph 105. An executive summary may be found immediately following the Introduction, at paragraph 5.*

Introduction

1. This is the decision of the Office of Rail Regulation (“ORR”) regarding an appeal made by Freightliner Heavy Haul Limited (“FHH”) on 13 January 2010¹ under Regulation 29 of the Railways Infrastructure (Access and Management) Regulations 2005 (the “Regulations”)².
2. In this decision, words and definitions have the same meaning as under the Regulations or under European Directive 2001/14 (the “Directive”), as the case may be, unless the context requires otherwise.
3. FHH has appealed to ORR because:
 - (a) it considers that, between 2001 and 2009, Network Rail charged it incorrectly for the use of wagon types TEAP, TEAK, FEAB, FEAE and FRAA. Further, it contends that such incorrect charging continues in relation to wagon types TEAP, TEAK and FRAA;
 - (b) it considers that those charges do not comply with paragraph 12(9), Part 4 of the Regulations because they do not “comply with the methodology, rules and where applicable, scales laid down in the network statement”³;

¹ Letter from FHH to ORR dated 13 January 2010, <http://www.rail-reg.gov.uk/server/show/nav.2471>

² Railways Infrastructure (Access and Management) Regulations 2005 <http://www.opsi.gov.uk/si/si2005/20053049.htm>

³ Ibid

- (c) it considers that the charges raised do not comply with paragraph 1(b) of Schedule 3 of the Regulations, in particular “in equivalent non-discriminatory charges for different railway undertakings that perform services of an equivalent nature in a similar part of the market”⁴;
 - (d) it considers that Network Rail has therefore also breached condition 9 of its Licence, which prohibits discrimination; and
 - (e) it considers that Network Rail has not acted in accordance with condition 8.2(a) of its Licence, which requires it to deal with stakeholders “with due efficiency and economy and in a timely manner”.⁵
4. FHH has therefore requested that ORR investigate these matters with a view to:
- (a) “directing Network Rail to amend the wagon charges which have been incorrectly calculated”; and
 - (b) “directing Network Rail to adjust retrospectively the incorrect charges billed to FHH during CP3 and CP4”.

Executive Summary

5. FHH appealed to ORR with respect to the variable usage charges of certain categories of wagon. In each case, it advocated a change in the input assumptions in Network Rail’s charging model that was used to determine charges for CP4, and the equivalent charging model that was used to determine charges for CP3.
6. First, FHH considered that the track access charges it pays for its TEAK wagons do not reflect the fact that these use ‘track-friendly’ bogies⁶. Instead, Network Rail has applied to it the same access charges as it charges a competing TEAK operator whose bogies are less “track-friendly”. Secondly, FHH considered that the access charges applied to its TEAP wagons are discriminatory, in that TEAPs are charged on a different average basis than TEAK wagons. Thirdly, FHH considered that during CP3 its waste wagons also attracted incorrectly calculated access charges from Network Rail.

⁴ Ibid

⁵ Network Licence granted to Network Rail Infrastructure Limited
<http://www.networkrail.co.uk/browse%20documents/regulatory%20documents/regulatory%20compliance%20and%20reporting/licence%20documents/network%20licence.pdf>

⁶ We have referred to “FHH’s TEAK wagons” throughout this decision letter. To be precise, FHH operates the TEAK wagons, which are leased by Conoco from VTG.

7. Network Rail challenged our jurisdiction to hear the appeal on the grounds that (1) the access charges against which FHH was appealing were in fact set by ORR rather than Network Rail, and therefore it is contrary to natural justice for us to hear an appeal against our own decisions; and (2) these particular claims can only be disputed in accordance with FHH's track access contract, rather than appealed under the Regulations.
8. Network Rail also responded to the substance of FHH's appeal. In relation to the first complaint, that charges levied on FHH's TEAK wagons take no account of 'track-friendly' bogies, Network Rail considered that FHH failed to follow the correct notification procedure. Network Rail argued that any discrimination caused as a result is therefore due to FHH's own failings. In relation to FHH's second complaint, that its TEAP wagons should be charged on a basis consistent with the comparable TEAK wagons, Network Rail's main argument was that ORR agreed with the approach taken. It also argued that FHH failed to raise these complaints when Network Rail and ORR consulted on setting prices at the start of each of CP3 and CP4. As regards the third complaint (discriminatory charges applied to waste wagons), Network Rail conceded it is lacking the necessary paperwork but considered the charges are consistent with the approach approved by ORR.
9. We have concluded that we have jurisdiction to hear all the claims brought by FHH.
10. We acknowledge Network Rail's contentions in relation to the role ORR played in setting these charges. We do not consider that any role we may have had would provide an objective justification for any discrimination to continue. The Regulations give us responsibility to ensure that any undue discrimination ceases, and we have determined this appeal on its facts in order to meet that responsibility.
11. In relation to FHH's claims, we have decided that:
 - the charges levied on FHH's TEAK wagons fail to reflect the fact that its bogies are 'track-friendly', and are the same as those levied on three-piece bogies which are less track-friendly. The practical effect of this overcharging is that the charges levied on FHH's TEAK wagons are discriminatory without any objective justification;
 - there is no objective justification to discriminate between the bases of the charges applied to FHH's TEAP wagons and its TEAK wagons; and

- there is no objective justification to discriminate between the bases of the charges applied to FHH's FRAA wagons and its FEA- waste wagons.
12. Our prime focus under the regulations is to ensure that undue discrimination ceases; it does not follow automatically that any finding of discrimination will result in a retrospective amendment to the appellant's track access charges, to any extent, and this is rather a matter for our discretion. We are not bound to provide a remedy to the extent which FHH appears to expect. We have set out the extent to which we consider it is appropriate to backdate amendments to those charges. In no case have we directed the amendments of CP3 charges as FHH sought. In reaching this view, we have had regard to relevant matters such as: when FHH first raised the issues; what action FHH took to check the charges levied by Network Rail; and whether, and the extent to which, our decision will incentivise Network Rail materially to prevent such problems from occurring again.
 13. We should make it clear that this decision applies to all operators who are similarly affected by this discrimination – that is, any other operators of TEAK wagons with TF25 bogies, TEAP wagons, or of the FRAA and FEA- waste wagons⁷. We expect Network Rail to identify other affected operators and apply charging corrections in line with this determination (which in most cases is likely to be with effect from the beginning of CP4).

Conduct of the appeal

14. We have published guidance on the approach we intend to adopt when considering appeals made under the Regulations⁸ ("Guidance"). Paragraph 4.5 of our Guidance states that all appeals under the Regulations will be dealt with using the same process as set out for applications made under Sections 17 or 22A of the Railways Act 1993 (the "Act"). Therefore, the process used and the deadlines imposed in the consideration of this appeal have been in accordance with Schedule 4 of the Act.
15. After requesting and receiving the representations from the parties summarised below, we sought further information from both parties in order to clarify some outstanding issues. In particular, we were

⁷ We understand that the relevant wagons include design code TE041B, TE041F and TE045A (FHH operates some, but not all, of the last two), and TE04D, TE04F, TE04G, and TE042B (none of which are operated by FHH). We do not know what design codes are included in the FRAA and FEA- classes.

⁸ Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005, March 2006 <http://www.rail-reg.gov.uk/upload/pdf/275.pdf>

interested in receiving a response from Network Rail to FHH's evidence concerning what information the Rolling Stock Library (the "Library") held in respect of FHH's TEAK wagons, and in establishing which operator in fact first requested that TEAK wagons be charged on an average of loaded and discharged weights. Subsequently, we decided that we had received all relevant information to enable us to make a decision on this appeal on 13 May 2010. Therefore, the two-month deadline under Regulation 29(7) of the Regulations for us to make a decision in this appeal commenced on that date.

16. We would also note here that neither the team at ORR responsible for advising the decision-maker in this appeal, nor the decision-maker responsible was involved in the correspondence with Network Rail and FHH in December 2008 or with the setting of the particular charges for CP4 in relation to which FHH has raised its appeal.

FHH's claim that Network Rail has breached its licence

17. We have decided that we are not going to consider FHH's argument that Network Rail's actions have amounted to a breach of its licence.
18. FHH argued that Network Rail's actions constituted a breach of two licence conditions, namely conditions 8 (in that FHH says that Network Rail's actions in dealing with its complaints prior to making this appeal were not dealt with efficiently or in a timely manner) and 9 (which puts a duty on Network Rail not to unduly discriminate between persons). Network Rail denies any breach of its licence.
19. In our policy "Economic enforcement policy and penalties statement – April 2009", we state that "ORR will not generally, as a matter of policy and good practice, seek to use different enforcement mechanisms simultaneously"⁹. We adopt the same approach in this appeal. We consider that FHH's complaints about discriminatory charging are adequately addressed under the appeal rights in the Regulations. In any event, a finding of licence breach would not serve to reimburse FHH.

Jurisdiction of ORR to hear this appeal

Network Rail's submissions

20. We sought representations from Network Rail on the points that FHH had made in its appeal letter. Network Rail submitted its

⁹ Chapter 3 "ORR's enforcement policy", section entitled "Choices between licence enforcement, competition law, and other remedies", paragraph 9 onwards.

representations to us on 25 February 2010¹⁰. These were a mix of representations on the specific factual complaints made by FHH, and a challenge to our jurisdiction to hear FHH's appeal. Those arguments on jurisdiction are summarised as follows.

21. Network Rail challenged our jurisdiction to hear this appeal on two grounds. The first ground was that the access charges against which FHH was appealing were in fact set by ORR rather than Network Rail (in respect of CP3) or were set by Network Rail using "parameters" set and/or approved by ORR (CP4). Network Rail therefore submitted that the appeal should not proceed since it would be contrary to natural justice for ORR to hear an appeal that is effectively against itself.
22. Network Rail's second objection to our jurisdiction was that to the extent the disputes about access charges relate to whether or not Network Rail followed Schedule 7 of the track access contract, such disputes are governed by the track access contract only. Network Rail did not explain what it considered that "extent" to be – for example, whether it argued that the question of what bogies FHH uses on its TEAK wagons was purely a contractual issue, so that we have no jurisdiction. Network Rail noted that under the track access contract, disputes over charges in Schedule 7 must be raised within 14 days of the receipt of an invoice, and that liability and remedies in respect of the subject area of the contract are limited to those set out in the contract itself.

FHH's response

23. On the question of whether or not it is not proper for ORR to hear an appeal which involves a decision about the parameters which we set for CP3 or CP4 price lists, FHH contended that it is Network Rail's application of the parameters which is the basis of the dispute rather than the setting of them (and further noted that Network Rail, not ORR, set the CP4 parameters).
24. FHH made the point that these matters have been in dispute between itself and Network Rail for a considerable time, and that Network Rail set out its consideration that FHH should register an appeal to us (after we had declined to be involved in an informal capacity).
25. In response to Network Rail's contention that FHH's complaints represent contractual invoicing matters, which must be resolved under the track access contract only, FHH accepted that it raised no questions about the prices shown in the invoices before October 2008. Notwithstanding its complaints from October 2008 onwards, FHH

¹⁰ Network Rail representations, 25 February 2010 <http://www.rail-reg.gov.uk/server/show/nav.2471>

stated that it has now paid all outstanding invoices, in line with its contractual requirement to pay all disputed amounts.

Our decision on jurisdiction

26. Network Rail challenged our jurisdiction to hear this appeal as a whole. Network Rail did not require this to be decided as a preliminary issue before other issues in the appeal could be decided; rather, it has formed a first line of defence. For that reason, we have considered all facts and arguments raised in the appeal submissions (and which are set out in more detail in the remainder of this letter) in coming to our conclusions on jurisdiction.
27. Regulation 29 grants a right of appeal to any relevant party which considers “it has been unfairly treated, discriminated against or is in any other way aggrieved” (regulation 29(1)).
28. In relation to the allegation of discrimination arising from charges applied to FHH’s TEAK wagons failing to reflect the fact that FHH uses TF25 bogies, FHH identified that we have previously published guidance setting out that we expect investment in “track-friendly” bogies to result in lower track access charges vis-à-vis older bogies which cause more damage. We note that a similar expectation is to be found in Network Rail’s own network statement. We do not consider that an allegation about a failure to follow our guidance and its own network statement can be classified as solely an invoicing dispute.
29. We do not agree with Network Rail’s contention that we are deciding an appeal against our own decisions. This is an issue of discrimination in the application by Network Rail of charging parameters, rather than an appeal against the parameters themselves. As such, we consider that Network Rail’s challenge to jurisdiction on this ground should fail.
30. Further, Network Rail suggested to FHH that it should refer its complaint to us (Network Rail’s letter of 14 August 2009). Subsequently in correspondence to FHH we declined to become involved in a dispute on an informal basis, and Network Rail then expressly agreed that FHH should refer this dispute to us under the Regulations (Network Rail’s letter to FHH of 24 December 2009). The opportunity arose at that point for Network Rail to stay silent or indeed to inform FHH that it would contest jurisdiction. It did neither, but instead encouraged FHH to make this appeal under the Regulations.
31. We should note here an issue raised by FHH in its letter dated 21 July 2010, when commenting on the draft version of this decision letter. FHH has indicated that it expected our resolution of its appeal to resolve all differences in charging which it had identified and backdate any amendments for the entirety of the period it demanded (including back into CP3). Such an expectation however is at odds with what we

consider this appeal process is about. This appeal process is not a substitute for a contractual dispute process, which FHH has not pursued, and it does not automatically follow that our directions in such an appeal will be the same as that which FHH might have expected in a contractual dispute. As we explain below we consider that the decision as to how far the consequences of a finding of discrimination are to be applied retrospectively is a matter for our discretion, and we must have regard to our section 4 duties in coming to that finding.

32. **Conclusion:** this appeal falls within the scope of Regulation 29 of the Regulations, and we have jurisdiction to hear all the claims made by FHH.

The substance of FHH's appeal submission

33. FHH's appeal makes three different complaints as set out in the executive summary above. As part of its appeal submission, FHH provided us with the correspondence it has exchanged with Network Rail on these issues since October 2008¹¹.
34. Network Rail responded to FHH's claim in its letter of 25 February 2010. In addition to its jurisdiction arguments, it made the point that FHH lodged no objections to the review notices pertaining to the access charge price lists that were introduced on 12 December 2002 for CP3 and on 18 December 2008 for CP4. The specific arguments Network Rail raised in relation to each of FHH's three complaints are set out in detail below the relevant heading.
35. FHH provided a reply to Network Rail's representations on 12 March 2010 (though the letter is dated 3 March 2010).

Explanation of subject matter referred to in the appeal

36. Before setting out the detail of the appeal, it will be useful to any wider audience to include an explanation of how the Total Operations Processing System ("TOPS") works and an explanation of the charges which form the basis of FHH's claims.
37. TOPS is a means of tracking the location (whether at a terminal or yard or in a train) of all freight vehicles and most locomotives. It records the condition of the vehicle, including its laden or empty status, what if any restrictions are applied to it, and the nature of the goods being conveyed. This includes whether the goods are regarded as "dangerous", using the UN categorisation system for this purpose. It is also capable of recording that an unloaded vehicle is still potentially

¹¹ This correspondence can be found on the ORR website at <http://www.rail-reg.gov.uk/server/show/nav.2471>

"dangerous" when it is empty but conveying residues - e.g., petroleum vapours. For this purpose, a further status of "discharged" is available.

38. By accessing the Library, TOPS is able to confirm that the vehicle has been registered for use on the Network Rail network, and to obtain the weight of the vehicle. It is for the freight train operating company to input gross laden weight to TOPS before the vehicle is despatched in a train; otherwise, TOPS will assume the Library gross laden weight for loaded vehicles. TOPS feeds Network Rail's billing systems for freight trains running on the network.
39. Variable track access charges paid by rail freight operators are calculated using Network Rail's variable track access charge model. It is designed to recover Network Rail's marginal operating, maintenance and renewal (OMR) costs that arise from the amount of rail freight traffic operating on the network and the characteristics of the vehicles in which it is conveyed. The model takes a 'top down' approach, using Network Rail's infrastructure cost model to determine the marginal OMR cost attributable to rail freight. This cost is then allocated between each freight vehicle type operating on the network based on the vehicle's own design and operating characteristics (e.g. tare weight, number of axles, unsprung mass, etc) that impact on the extent of wear and tear it causes to the infrastructure and its annual gross tonne mileage. In this way, so far as is reasonably practicable, the charge for each vehicle type is set at a level that reflects the level of wear and damage it causes.
40. FHH argued that the charging model should use the following assumptions:
 - a) *for the "laden" charge for TEAP wagons carrying petroleum*, an average weight of 62 tonnes, not the 97 tonnes that was assumed for CP4. This is because, as a peculiarity of Network Rail's billing system, the "laden" charge is levied on both loaded and discharged petroleum wagons, and the average weight across both these wagon states is around 62 tonnes (whereas the average loaded weight is around 97 tonnes). Such a move would make the derivation of this charge consistent with the equivalent CP4 charge for TEAK, a comparable wagon used by FHH and another operator;
 - b) *for the "laden" charge for various categories of wagon carrying waste*, an average weight equal to the average of the wagons' loaded and empty weights. This is because, as a peculiarity of Network Rail's billing system, the laden charge is levied on both loaded and empty waste wagons. In many cases, for CP4, Network Rail has adopted this approach in its charging model in any case; and

- c) *the TEAK wagons used by FHH have TF25 “track friendly” bogies;* this contrasts to the TEAK wagons used by another operator that have three-piece bogies. For CP4, charges were derived on the assumption that all TEAK wagons have three-piece bogies.
41. Although FHH used the terminology of “laden / unladen rates”, we consider that this can be confusing and ambiguous; “loaded, discharged and empty weights” is clearer, and for the remainder of this decision letter we have used these terms purposely for that reason.

The use of “track-friendly” bogies on FHH’s TEAK wagons

FHH’s claim

42. FHH submitted that Network Rail calculated the access charge for FHH’s TEAK wagons on the basis that they are mounted upon a three-piece bogie, rather than the TF25 bogies which they in fact use. The TF25 bogie has far less unsprung mass and so causes less damage to track than the older three-piece bogie.
43. FHH stated that its TF25 bogies represent a more expensive investment than would have been the case had it purchased three-piece bogies for its TEAK wagons. FHH noted that in appendix C of our 2001 “Review of freight charging policy – Final Conclusions”, we established the principle that variable charges for wagons should be structured in such a way as “to provide incentives to use more track-friendly suspensions”¹².
44. FHH also stated that Network Rail’s network statement provided that adjustments are made to variable costs to reflect relative track friendliness. FHH considered that failure to comply with this provision was a breach of Regulation 12¹³.
45. FHH stated that on this basis it invested in such rolling stock and expected to benefit from lower track access charges. In addition, FHH noted that it operates in a highly competitive market for the movement of commodities in bulk, and so the marginal effect of its operating costs in this respect is substantial.
46. FHH considered that, contrary to its expectations, Network Rail calculated its access charges on the basis that FHH uses the same

¹² Review of freight charging policy – Final Conclusions, 18 October 2001 <http://www.rail-reg.gov.uk/upload/pdf/136-fchargfincon.pdf>

¹³ In particular Regulation 12(9): “the infrastructure manager must be able to justify that the charges invoiced to each railway undertaking for access to the infrastructure comply with the methodology, rules and, where applicable, scales laid down in the network statement...”.

three-piece bogies for its TEAK wagons which its competitor, DB Schenker, uses. The effect of this over-charging for CP4 is that FHH's TEAK wagons were charged at £1.96 per thousand gross tonne miles ("kgtm") rather than what FHH contends is the correct charge of £1.20 per kgtm.

47. FHH submitted that this alleged over-charging started when it introduced its TEAK wagons during CP3. During that period, FHH claimed, it was charged £2.69 per kgtm rather than an approximate £1.64 per kgtm which FHH has calculated would have been the correct charge. In its claim letter, FHH attributed this over-charging to the fact that the Library allocated an incorrect fourth wagon character to the FHH TEAK wagon, with the result that the Library did not reflect that the FHH and DB Schenker TEAK wagons used different bogies. Contrary to FHH's note that the Library is owned by Network Rail, and run by a contractor, Network Rail has informed us that the Library is owned by ATOS ORIGIN; nonetheless, Network Rail uses the Library to inform its charging calculations, and cannot avoid its responsibility in this regard by assigning it to the Library. We do not consider therefore that this point about ownership affects our conclusions.

Network Rail's response

48. In respect of FHH's claim that its TEAK wagons had been charged on the basis of incorrect suspension characteristics, Network Rail did not dispute that FHH is operating TF25 bogies. Rather it disputed that FHH had formally notified Network Rail and the Library that its TEAK wagons actually differed in that respect from DB Schenker's TEAK wagons. In the absence of that notification, Network Rail calculated the access charge on the basis that both operators' TEAK wagons had the same bogies.
49. Network Rail appeared to accept that had FHH in fact made such a formal notification, Network Rail would have been obliged to correct what it calls "the anomaly".

FHH's reply

50. In its reply, FHH produced records to show that the Library recorded that its TEAK wagons had TF25 bogies, and that accordingly these were different from the TEAK wagons used by DB Schenker.

Subsequent further information

51. In response to specific questions we asked, Network Rail provided further detail about the procedures it has in place for operators to inform it when they introduce vehicles with characteristics which necessitate a change to the existing variable track access charges. In the present case, Network Rail stated that its TEAK access charge was

based on the version already registered in the system (that is, with a three-piece bogie), and that FHH did not make any request to amend the charge to better reflect the bogies its own wagons used. We consider that the request to Network Rail to amend the charge ought in fact to have come from the previous operator who introduced these wagons into service and registered them for charging purposes. We note that FHH rather inherited the situation, when it took over operation of the wagons.

The relevance of the Rolling Stock Library to this appeal

52. There was a dispute between the parties as to whether FHH had properly informed Network Rail that it was using these TF25 bogies, in the absence of which Network Rail assumed it was using the same type of bogies as DB Schenker. We consider that this issue is relevant to our findings as to the extent to which the required charging amendment should be backdated.
53. We find that it is clear that the Library held the relevant information that FHH's TEAK wagons use TF25 bogies by the time FHH commenced operation of the same. A different bogie type does not automatically oblige the Library to allocate a different fourth wagon character to differentiate FHH's wagons from DB Schenker's. We do not agree with FHH's view that the "prime cause of the incorrect charging was the incorrect registering of the wagon by the Library".
54. While the information held by the Library is not the sole source of data available to Network Rail in calculating the charges for wagons, we consider that it is an essential component of that calculation process. Other sources include details being carried over from previous control periods and information provided directly to Network Rail by operators themselves, but it is critical that the information held by the Library is correct and should be drawn on to determine charges.
55. Network Rail claimed that while the Library may have registered that FHH's TEAK wagons use TF25 bogies, FHH did not follow Network Rail's standard requirement that operators should formally register wagons for charging purposes when those vehicles have different characteristics to those already on the system which would justify a different charge. As stated above, we consider that criticism of this nature would have been valid had it been directed at the previous operator when it had responsibility for registering the wagons.

Our findings

56. The parties are in agreement that Network Rail has calculated the variable access charge for FHH's TEAK wagons on the basis that they use the same three-piece bogies used by DB Schenker. In fact, FHH uses TF25 bogies which are more 'track-friendly'. In line with our policy

which has been in place since 2001 and CP3 (“Review of freight charging policy – Final Conclusions”), and Network Rail’s network statement, we expect an investment in such bogies to result in lower variable track access charges, so that operators are incentivised to make such an investment. We consider that failure to reflect this in charging means that operators who have not made the investment in rolling stock that FHH has made, and who therefore should be paying higher access charges vis-à-vis FHH, have effectively gained a commercial advantage over FHH as a result of Network Rail not reflecting FHH’s use of TF25 bogies in its variable access charge. Subject to what we say below about responsibility for making sure that charges reflect the actual bogies used, the practical effect of Network Rail overcharging FHH is therefore that Network Rail has been acting in a discriminatory fashion with no objective justification.

57. We agree that the primary responsibility for identifying if new or different vehicles require an amendment to extant charges should rest with the affected operator. However, we are not satisfied that a competent infrastructure manager should use such an excuse to avoid amending its charges to remove discrimination once such discrimination has been expressly brought to its attention. As the infrastructure manager and author of these processes, Network Rail is clearly most acquainted with the requirements it has in place for amending prices and registering new, different vehicle types.
58. Once FHH complained about the discrimination directly to Network Rail, Network Rail as a competent infrastructure manager should have taken steps to rectify the discrepancy. Network Rail could either have made the relevant amendments or directed FHH to the appropriate procedure. Instead, notwithstanding that Network Rail’s submission in this appeal categorised this issue as an “anomaly” which could have been simply resolved if FHH had identified the different bogie type, it still sought to defend this aspect of the appeal (and even appeared to include the issue within its jurisdiction challenge). It did this rather than take steps to correct the “anomaly” whether by making a change to the charges itself or by supporting FHH in raising the issue with ORR (if Network Rail considered it needed our involvement).
59. We find that FHH made the position clear when it complained of this discrepancy and resultant discrimination in its letter of 4 June 2009. Network Rail therefore had an opportunity to take steps to resolve the discrimination in its charges at that point. We find Network Rail’s actions in this respect to be unsatisfactory.
60. FHH considers that any amendment to rectify discrimination should be backdated to 2002, when it started operating these TEAK wagons. We do not agree.

61. We consider that FHH is to some extent at fault for failing to check that the amounts it was being invoiced accurately reflected the charges it expected in relation to its use of TF25 bogies. It is imperative that the discrimination cease with immediate effect, but our decision on how far to back-date any amendment takes into account how long a time FHH has been operating these wagons without verifying how it is being charged for the same. We consider that this is a relevant fact to take into account because our determination has been made, at least in part, by reference to our section 4 duties, especially section 4(g) (as set out in more detail below) .
62. Our starting point in considering appeals where we identify discrimination is that we will look to make sure that such discrimination cease.
63. We may also consider whether it is appropriate for our determination to have some retrospective effect, so that some form of reimbursement for historical discrimination is provided. This will always depend on the circumstances of the appeal. In some cases it may be appropriate for our determination to have retrospective effect to the date the appeal was made, or to the date the appellant first identified the existence of the alleged discrimination to the other party. In other cases, the facts of the appeal may lend themselves to identifying an alternative, even earlier retrospective date. However, in all cases, we consider our prime focus under the Regulations is on ensuring that discrimination ceases going forward, and that we are not obliged under the Regulations to seek to reimburse parties for historical discrimination; that remains a matter for our discretion.
64. In the present case, in relation to FHH's use of TEAK wagons, FHH has requested that we apply our finding of discrimination retrospectively back to 2002, so re-opening its CP3 charges. In its comments on our draft decision, FHH stated that it expected all these relevant track access charges would be adjusted or amended to the full extent it sought (that is, including re-opening CP3 charges). In this, FHH considered that this appeal mechanism would yield an equivalent finding to what it seems to consider it would have been entitled to under a contractual dispute process to rectify invoicing or charging errors, but that is not our appeal role under the Regulations.
65. We do not consider it appropriate that we start re-opening prices to the extent requested by FHH; instead we have concluded that the discrimination should cease with immediate effect and that Network Rail should amend the TEAK variable track access charges retrospectively to take effect from the start of CP4.
66. Our reasons for this retrospective amendment are as follows:

- As we have identified above, FHH had provided Network Rail with sufficient information to identify and correct this discrimination in its letter of 4 June 2009. Had Network Rail taken action at that time, this appeal would have been avoided. We are therefore satisfied that, as a minimum, it is appropriate to backdate the resultant charges amendment to the date of that letter.
- However, we also note that we gave Network Rail responsibility for establishing the detailed charges set in PR08. In the course of doing so, it should have identified and rectified any mistakes arising from CP3. We consider it essential that Network Rail should discharge such responsibility fully by conducting a thorough and accurate review of the charges to be established in a periodic review. If it had done so, we consider that the discrepancies identified in this appeal would have been corrected from the beginning of CP4. We therefore require Network Rail to backdate any corrections to that date. We also require Network Rail to apply the relevant TEAK charge amendment to any other operator affected by this discrimination with effect from the beginning of CP4 (and it is for Network Rail to identify the same).

67. Our reasons for not backdating the amendment to the extent sought by FHH (to 2002) are as follows:

- FHH's requested date of 2002 pre-dates when the Directive was required to be brought into force (March 2003), although this does not absolve Network Rail of its responsibility to charge correctly.
- We consider that it would require an exceptional case to justify re-opening charges in a now-closed Control Period, or charges stretching back 8 years (in fact). We do not consider that this appeal is such an exceptional case, for the reason given below.
- As noted above, we have identified that FHH itself should accept some responsibility for ensuring that its wagons were correctly registered, and for not identifying earlier that it was being charged an incorrect amount. For an operator to miss, disregard or ignore discrimination resulting from charging errors of the type identified in this appeal (i.e. classification errors rather than more deliberate discrimination on the part of Network Rail), and then demand that we retrospectively amend charges over such a lengthy period, is not a circumstance we wish to encourage. An operator needs to accept some responsibility in such a circumstance.

- We do not consider that it would materially strengthen the message to, and incentive on, Network Rail to ensure correct charging decisions in future.
 - Accordingly, we do not consider directing Network Rail to amend CP3 charges for FHH (and all such TEAK operators) would be consistent with our section 4 duties and in particular our section 4(g) duty to enable a person providing railway services, in this case Network Rail, to plan the future of its business with a reasonable degree of assurance.
68. Network Rail did not put forward any figures of its own as alternatives to FHH's contention that the appropriate CP4 charge should be £1.20 per kgm rather than £1.96 per kgm. In the absence of comment or disagreement from Network Rail, we consider that a revised rate should be determined once Network Rail has updated its track usage charge model accordingly and recalculated the rate.
69. **Conclusion:** We find that Network Rail's variable track access charges in respect of FHH's TEAK wagons are discriminatory with no objective justification. We direct that Network Rail should amend the charges as noted in paragraph 68, above, and that this should be backdated to take effect from the start of CP4. We direct that Network Rail should repay any resulting overcharge, or arrange for it to be credited against a future invoice, by the end of March 2011.

The variable track access charge applied to FHH's TEAP wagons

FLHH's claim

70. It was FHH's submission that the variable track access charges it is charged for its TEAP wagons should be calculated on an average of loaded and discharged weights. In contrast, since FHH introduced them into service during CP3 (2006/2007) its TEAP wagons had been charged at an average fully loaded weight. This approach was inconsistent with the approach used for other oil wagons in the model. FHH calculates that if the average loaded and discharge weight of 62 tonnes is used, its TEAP wagons, that are currently charged at £1.81 per kgm (2009/10 prices), should be charged at £1.20 per kgm. FHH estimates that the equivalent change in price for CP3 is £3 per kgm falling to £1.84 per kgm.
71. FHH stated that when it first wrote formally to Network Rail regarding this matter on 23 October 2008, it had thought that the reason its TEAP wagons were incorrectly charged derived from unloaded wagons being mistakenly designated as loaded.
72. FHH stated that it was for that reason that it did not advise Network Rail in October 2008 that its CP4 model needed changing in this

regard. By this, we understand FHH to mean that it considered the CP4 model would reflect the approach taken for charging TEAK wagons in CP4 (which are charged when classified as laden at an average loaded / empty rate).

Network Rail's response

73. Network Rail stated that the assumptions it had applied in allocating average weights to these wagons had been agreed with ORR. In addition, Network Rail considered that both Network Rail and ORR had consulted the industry on the classification of freight rolling stock for charging purposes, and FHH did not raise any objections to relevant review notices for CP4 "and should therefore be taken to have accepted the same". In fact, we have identified that Network Rail and FHH did exchange correspondence prior to the finalisation of CP4 price lists which show that FHH did not accept the charging basis for TEAP wagons; this is set out below at paragraphs 80 and following.
74. There has been some confusion as to who was responsible for changing the TEAK loaded weight, against which FHH now compares its TEAP wagons. Network Rail claimed that FHH had made express representations that its TEAK wagons should have charges calculated in accordance with the average approach which it now seeks to apply to its TEAP wagons, and that Network Rail changed the calculation for the TEAK wagons accordingly. Network Rail then sought to draw out the point that FHH failed to make any similar representations in relation to its TEAP or waste wagons. In fact, as we have identified to the parties, it was EWS (now DB Schenker), not FHH, which made such representations in relation to the TEAK wagons. In its letter of 12 May 2010, Network Rail accepted that it was DB Schenker which was responsible for changing the TEAK loaded weight to 63 tonnes in June 2008. We return to this point in our conclusions.

FLHH's reply

75. As an overall point, FHH submitted that, contractual and procedural issues notwithstanding, the fact remained that it has been overcharged for the use of certain wagons, and in a way that is inconsistent with how other operators have been charged.
76. FHH disputed the Network Rail criticism that it raised no objections when the CP3 review was carried out, on the grounds that at that time TEAP wagons were not included within the CP3 price list.
77. In respect of Network Rail's claim that FHH also failed to object to the review notice for CP4, FHH argued that the process was misleading, and that this explained any failure to register concerns at that stage. FHH stated that the review did not make it clear that discharged TEAP

wagons were to be charged at the loaded rate; FHH questioned why an empty rate was included in the price list if it was not going to be used.

78. FHH claimed that the similar CP4 charges for TEAP (with the charge derived using a fully loaded weight) and TEAK (with the charge derived using an average empty / loaded weight but with incorrect bogie type) wagons masked the underlying discrepancy in the calculation of the rates when FHH reviewed the same during the CP4 consultation process. We understand this to mean that FHH was assuming that TEAP and TEAK wagons were being charged on the same basis. As set out in our correspondence of 6 May 2010, we note that FHH did not identify in its submissions that it made representations to Network Rail in December 2008 as part of a 'short-form' consultation; those representations show FHH proceeding on the basis that its assumption was correct (as set out below).
79. In relation to Network Rail's claim that FHH expressly made representations in respect of its TEAK but not its TEAP wagons, FHH stated that this contradicted Network Rail's policy that petroleum wagons had to be charged as laden, rather than as an average laden / unladen. (As noted above, both parties subsequently acknowledged our own finding that it was in fact DB Schenker which made representations on TEAK wagons.)

Subsequent information regarding CP4 consultation

80. We identified to the parties on 6 May 2010 that there had been correspondence exchanged between Freightliner and Network Rail in December 2008 which neither of them had referred to in their initial submissions. In response, Network Rail set out an explanation for the December 2008 correspondence which in essence argued that Freightliner had misunderstood what opportunity it had to comment on proposed charging rates, and that while Freightliner did identify that its TEAP wagons should have a loaded weight of 63 tonnes, this came too late to be included in the price list. Network Rail identified that ORR was responsible for making a decision that the rates should not be changed for this reason.
81. In summary, the correspondence exchanged by the parties in December 2008 is as follows.
82. On 28 November 2008, Network Rail sent a revised price list spreadsheet to Freightliner containing the latest version of freight variable track access charges. Network Rail asked Freightliner to "double-check that we have accurately updated the vehicle characteristics to reflect the comments you have made".
83. That "double-checking" took time, and by 3 December 2008, Freightliner had only managed to check Freightliner's domestic inter-

modal values, and not its Heavy Haul wagon types. Freightliner identified that Network Rail had misinterpreted its original comments which were intended to be at “broad wagon type level” rather than only identifying specific wagons. By email response, Network Rail accepted that it now understood what Freightliner intended, but noted that Freightliner had not made this clear (and Freightliner appears to have accepted the same).

84. Freightliner did not send its “double-checking” of heavy-haul wagons to Network Rail until 5 December 2008.
85. As part of this appeal, Network Rail accepted that the material sent on 5 December 2008 did indeed show TEAP at a loaded weight of 63 tonnes, and that this was not subsequently amended in the pricing model.

Our findings

86. We have noted Network Rail’s acknowledgement that the variable access charge for FHH’s TEAK wagons is calculated on an average loaded / discharged basis, whereas it calculates the charge for TEAP on a loaded basis.
87. We consider that the only difference relevant to this dispute between TEAP and TEAK petroleum wagons is one of gross laden weight. We find no objective justification for the different treatment of the charging bases.
88. Network Rail sought to make the case for FHH being responsible, since Network Rail contended that FHH had originated the change to charging for TEAK wagons – presumably intending that if that caused discrepancies with FHH’s other wagons, then FHH should have identified the same. In the event we have identified that Network Rail was wrong to attribute the TEAK change to FHH. In fact, we have identified (and Network Rail has now confirmed) that it was DB Schenker which asked Network Rail to alter the basis on which TEAK wagons were charged in June 2008.
89. We consider that a competent infrastructure manager should have had regard to its regulatory responsibilities, especially under the Regulations. Network Rail should have been proactive in ascertaining whether amending the charges levied on a wagon type within a particular class (in this instance a TEAK wagon within the TEA-petroleum wagon class) resulted in inconsistent and/or discriminatory charging for other wagon types of the same class (whether for the same or other operators is immaterial).
90. We find that FHH raised its concerns in relation to this inconsistency in its 5 December 2008 email to Network Rail responding to the proposed

CP4 price list. Network Rail therefore had further notice before the CP4 list was finalised that its existing charges levied on FHH's TEAP wagons were discriminatory and needed to be amended. Network Rail did not incorporate such amendments into the CP4 charges.

91. We do not propose to comment on the detail of who is responsible for deciding not to take Freightliner's information of 5 December 2008 into account in the CP4 price list, whether it is a result of Freightliner's own delays, Network Rail or, as Network Rail contends, ORR. The fact that a periodic review by necessity must be conducted in accordance with identified time-scales does not provide an objective reason for unjustified discriminatory charges, once identified, simply to remain in place until the next formal review.
92. We have concerned ourselves with the facts of the matter and addressed the primary question: are the charges discriminatory? The answer to that is clearly 'yes'. The appropriate response is to direct that the discrimination must cease; there is no intent to penalise Network Rail, and any financial consequences which may be identified for Network Rail will be addressed separately, outside of this appeal decision.
93. We find that the appropriate resolution to this aspect of the appeal is that the access charges levied by Network Rail on FHH's TEAP wagons are to be amended to remove the discrimination between TEAP and TEAK wagon charges, and that this amendment should take effect from the start of CP4, which is what FHH had been seeking to achieve in its original correspondence with Network Rail. Given the work Network Rail was doing to set a new price list, CP4 was the suitable opportunity to make the change, but as we note above, for whatever reason this opportunity was missed. We do not consider re-opening CP3 to be appropriate in this circumstance, in part for that very reason – namely, FHH had identified the charging discrimination towards the end of CP3, but rather than seek to appeal against it, FHH sought to ensure (quite properly) that the charges were corrected for CP4. Our other, more general reasons for not entertaining a retrospective amendment of CP3 prices in this particular appeal are as set out in paragraph 67 above.
94. FHH has submitted that in its view the correct charge for CP4 is £1.20 per kgtm (rather than the current £1.81 per kgtm). Network Rail has not disputed this figure. We have been able to correct the error in Network Rail's track usage charge model and confirm that the correct rate is £1.2068 per kgtm.
95. **Conclusion:** We find that Network Rail's charges levied on TEAP wagons are calculated on an inconsistent basis to those levied on TEAK wagons. Given the similarity of these wagons, we find no objective justification for this difference in treatment. We find that

Network Rail had an opportunity to identify this discrimination as part of its work when amending the TEAK charges sought by DB Schenker in June 2008. The fact that FHH did not identify the discrepancy until it double-checked Network Rail's proposed charges late in the pricing process does not provide an objective justification for FHH to be obliged to continue to pay the discriminatory charges until the next price review. We therefore direct that Network Rail should amend the charges levied on FHH's TEAP wagons to £1.2068 per kgm in order to remove this discrimination, and that this amendment should be backdated to take effect from the start of CP4. We direct that Network Rail should repay any resulting overcharge, or arrange for it to be credited against a future invoice, by the end of March 2011.

Access charges applied to FHH's FEAB, FEAE and FRAA wagons

FLHH's claim

96. In respect of its waste wagons, FHH considered that it was over-charged during CP3, in that it was charged at the rate for laden wagons in the case of both loaded and unloaded movements. FHH identified that the reason for this is because TOPS requires waste wagons to be classified as laden even when discharged of their contents.
97. FHH argued that such waste wagons should have been charged at an average empty and loaded weight. On the basis of the approximate calculations it has made, FHH claimed that in CP3 it should have been charged £2.60 per kgm rather than £3.31 for FEAE wagons, and £2.60 per kgm rather than £3.19 for FRAA wagons. We note that FHH did not make representations about CP3 pricing for its FEAB wagons. In light of our conclusions set out below we do not concern ourselves with this omission.
98. FHH claimed that Network Rail did not follow the charging process listed in paragraph 2.2.2 Schedule 7 of its track access agreement, although it conceded that other operators may have operated these types of wagons prior to FHH.
99. FHH accepted that CP4 corrected this charging model for FEAB and FEAE wagons, so that these are now charged at an average loaded / empty weight. The claim in respect of these two wagon types is therefore entirely retrospective. As regards its FRAA wagons, FHH considered that the over-charging in CP3 has continued into CP4, but that such over-charging is of minor financial impact, and it did not put forward any proposed new charge.

Network Rail's response

100. Network Rail stated that the paperwork it holds shows that FEAE charges were correctly calculated, but acknowledges that its paperwork

is incomplete. Network Rail was not able to locate records relating to charging for FEAB and FRAA wagons.

FLHH's reply

101. In light of Network Rail's limited response on this issue, FHH's reply added nothing further.

Our findings

102. We have set out above that we do not consider it appropriate to re-open CP3 charging except in exceptional circumstances. In the circumstances of this appeal, any discrimination that existed in relation to FHH's FEA- wagons was corrected for CP4. Further, in the absence of evidence of discrimination, or of any failures in relation to the charging process, during CP3 for these particular FRAA and FEA- wagons, there are no grounds to justify re-opening charges levied in CP3.
103. We find that there is no objective justification for discriminating between FRAA and FEA wagons on variable track access charges. Given that the basis of charging FEA wagons was changed for CP4, we therefore consider that FRAA wagons should be brought into line for CP4 charging purposes.
104. **Conclusion:** We find that FRAA wagons should be charged at an average loaded / empty weight. Given that FHH does not identify any financial effect of discrimination in relation to this type of wagon, there seems no requirement to back-date this amendment to the start of CP4, but we shall discuss how other operators may be affected with Network Rail. We leave it to the parties to calculate the new charge and to ensure the appropriate arrangements are put in place with effect from the date of this decision letter.

ORR's decision

105. Therefore, in accordance with Regulation 29(11) of the Regulations:
- (a) ORR concludes that it has jurisdiction to hear this appeal brought by FHH;
 - (b) ORR concludes that the variable track access charges levied on FHH's TEAK wagons which use TF25 bogies are discriminatory without any objective justification for such difference in treatment, in that those charges fail to take account of the 'track-friendly' nature of the TF25 bogies and are instead charged as if using three-piece bogies. ORR directs that Network Rail amends the variable track access charge for TEAK wagons which use TF25 bogies (to be calculated by the parties) to remove this discrimination. This

amendment shall apply to all operators of TEAK wagons using TF25 bogies and is to be backdated to take effect from the start of CP4. ORR directs that Network Rail should repay any resulting overcharge, or arrange for it to be credited against a future invoice, by the end of March 2011.

- (c) ORR concludes that there is no objective justification for discriminating between the bases of the variable track access charges levied on FHH's TEAP wagons and the charges levied on TEAK wagons. ORR directs that Network Rail is to amend those variable track access charges to £1.2068 per kgm in order to remove the discrimination. This amendment shall apply to all operators of TEAP wagons and is to be backdated to take effect from the start of CP4. ORR directs that Network Rail should repay any resulting overcharge, or arrange for it to be credited against a future invoice, by the end of March 2011; and
- (d) ORR concludes that the FRAA wagons as operated by FHH should be charged on the same average loaded / empty weight basis as its FEAB and FEAE wagons, and that this difference constitutes discrimination without any objective justification. ORR directs that Network Rail is to amend the FRAA variable track access charges (to be calculated by the parties) to remove the discrimination. This amendment shall apply to all operators of FRAA wagons and is to take effect from the date of this letter.



Brian Kogan

**Deputy Director, Railway Markets and Economics
Duly Authorised by the Office of Rail Regulation**

18 January 2011