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Dear David

**APPEAL UNDER REGULATION 29 OF THE
RAILWAYS INFRASTRUCTURE (ACCESS AND
MANAGEMENT) REGULATIONS 2005 - RESPONSE TO NETWORK RAIL'S REPRESENTATIONS**

This letter forms the response by Freightliner Heavy Haul Limited (FHH) to the Network Rail representations which were submitted to the Office of Rail Regulation (ORR) on 25th February 2010.

FHH notes that the Network Rail representation has had input that is clearly written by a lawyer. Unlike Network Rail FHH has no in-house lawyers and there is insufficient time in the 2 weeks allowed for response to appoint and educate an external lawyer, therefore this response is made without the benefit of legal advice.

Our response to the Network Rail's representations is made below and referenced on a paragraph by paragraph basis.

OVERVIEW

FHH responds in detail below to the procedural points made by Network Rail in respect of this dispute. However whatever the procedural flaws of either Network Rail or FHH the facts of the dispute are that FHH have been charged track access rates that either do not reflect the actual weight of the wagons that were moved or the correct bogie type of the wagons operated and are not consistent with the rates charged to other freight operators for similar wagons.

FHH DETAILED RESPONSE

Paragraph 6.1 - CP3 variable freight access charges

The last paragraph of this section states that the Price List was imposed by means of a Review Notice and that no objections were lodged by Freightliner to the notice. We believe this statement to be irrelevant to Network Rail's argument for CP3 as the wagons in question were not included in the Price List which was incorporated in the contract.

Paragraph 7 - CP4 variable freight access charges

The last paragraph of this section states that no objections were lodged by Freightliner in regard to the published price list for CP4.

FHH agrees that this was the case; the reason that no objections were lodged was that we believed that loaded wagons would be charged at the loaded rate and empty wagons would be charged at the empty rate. If this was not the case it was very misleading of Network Rail to publish both loaded and empty rates knowing that the loaded rates was to be applied to all movements.

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FHH notes that the published Price List itself did not include information about bogie types or assumed weights.

FHH also notes that this dispute was first raised with Network Rail on 23rd October 2008, some 8 weeks before the Price List was published by Network Rail. Also on 23rd December 2008, only 4 days after the publication of the Price List Paul Stanford of Network Rail wrote to FHH (letter previously copied to ORR) advising that Network Rail's billing system does differentiate between empty and loaded trains and the issue was one of how FHH had released their trains. This has subsequently proved not to be the case and we continued to be billed on the basis of the loaded rate for all services.

Paragraph 8.1.5- Freightliner Claim for CP3

The % adjustments laid out in our letter to ORR dated 13th January 2010 were only estimates based on the same percentage reduction as we calculated for the CP4 model. FHH is not in possession of a complete CP3 model so is unable to calculate the actual reductions that should apply.

Network Rail's Response

Paragraph 9

We are very confused by Network Rail's contradiction between paragraphs in their response and also previous correspondence regarding the use of average rates for wagons such as petroleum tankers or not. If Network Rail are not clear what their policy is and how it should be applied it is not surprising that FHH has also been confused in the past about the application of average weights or not.

We note that Network Rail's approach to the principles of the application of average weights or loaded and empty weights has not consulted with operators and therefore any Network Rail policy in this regard has not been agreed by operators.

In paragraph 9.1 the response states: "...Network Rail submits that the assumption that the average weight should be used in making the calculations is incorrect."

Paragraph 9.4 states: "Network Rail believes that the approach adopted by the ORR was that wagons such as TEAP wagons, which were classified as loaded because even when discharged they contained petroleum and petroleum vapours or waste wagons where the container was either full or empty but remained on the wagon which therefore remained loaded, was that the model had to be populated with the gross laden weight."

These statements are directly contradicted by paragraph 9.10 of Network Rail's response: "Freightliner made representations to Network Rail that the full laden weight of the vehicle should not be input to the model at the first stage calculation identified above but rather an average weight should be used. The ORR agreed that this was permissible in respect of this class of wagons, which resulted in the calculation being based on 62 tonnes which results in the model producing a lower rate per mile than would otherwise have been the case."

FHH does not understand why or on what basis different treatment has been applied to different wagons. We are aware of other commodities where average weights have been calculated, such as container carrying wagons, which are charged at the same rate whether they carry containers or not. We note that from the beginning of CP4 the average of the loaded and empty weight was used to calculate the loaded rate for waste wagons and the loaded rate was charged in both directions. We are also aware in the past a similar

approach has been used for automotive wagons.

We disagree that a wagon which is loaded one way and empty the other should be charged at the gross laden weight. In the example described by Network Rail in paragraph 9.3 they seem to be suggesting that charges should be raised for all movements based on a gross laden weight of 92 tonnes even though the actual weight of the wagon in the empty wagon is only 24 tonnes. This is not consistent with for example the charging of coal and aggregates wagons where a loaded and empty rate applies.

FHH suggests that lessons are learnt for future control periods and that clear guidelines are published by Network Rail with regard to which wagons are to be charged on an average rate and which wagons are to be charged separately on empty and loaded rates. In the cases where average rates are applied this should be clearly marked in the Price List and no corresponding empty rate should be published. We also believe that the onus should be put on Network Rail to weed out unnecessary lines and consult on a clear basis.

Paragraph 9.6-9.8

We note that Network Rail did consult the proposed vehicle charges and the vehicle characteristics during 2008. We did not object to the inputs for wagons such as the TEAP, FEAB, FEAE OR FRAA wagons because we did not understand that the empty movements would be charged at the loaded rate. Why did Network Rail include in their Price List an empty rate for these wagons if it was never to be charged? We believe the inclusion of the empty rates in the consultation on the Price List was misleading.

We accept that we should have picked up in the consultation that the bogie type for the TEAK wagons, however in mitigation of this oversight we would like to point out the following:

The rates for the TEAP and TEAK were very similar (because a TEAK wagon had correctly been calculated using an average rate) and therefore we did not realise that there was an underlying and fundamental problem with the calculation of the rates. If the rates had been substantially different we would have investigated further at the time. We have had no assistance from Network Rail in understanding what has been the underlying problems with their inputs to the Price List, indeed they have during this dispute sent us confusing and contradictory information; we have had to investigate information and search out facts independently of them.

The table of wagons that was published by Network Rail was so overwhelmingly confusing, with many hundreds of unnecessary lines including wagons that no longer exist and for every wagon type assumptions about commodity types that could not possibly exist (coal in oil wagons and vice versa) that with the resource available we had no choice but to prioritise management assessment of the information where there appeared to be glaring errors; which prima facie there was not in the case of the TEAK wagon.

Paragraph 9.8

It would appear that the audit undertaken by Halcrow was not fit for purpose if the only check that was undertaken was against previously existing CP3 data, rather than a check (even if random) against actual data.

Paragraph 9.10

We have already pointed out above that this paragraph contradicts paragraphs 9.1 and 9.4.

Paragraph 9.11

We believe the Rolling Stock Library was informed that the TEAK wagons in question have a different bogie type to the earlier early eighties TEAK wagons with 3 -piece bogies operated by DBS. Please see attached Rolling Stock Library records for a 1981 TEAK VTG 082748 and a 2001 TEAK VTG 088027. It can be noted that the bogie and running gear for these two different types of wagons have different codes which represent the different types of bogie.

Paragraph 9.14

This sentence does not clarify what loaded weight was input into the model by Network Rail, which is the critical factor.

Paragraph 9.15

The bogie type is one of the sections of the standard Rolling Stock Library form for registering wagons. Bogie and running gear is included in Section B: Submission of design data of the forms. The TEAK wagons would have been registered by CAIB (now part of VTG) who is the owning company of these wagons.

Paragraph 9.17.2

Network Rail wrote to us on 24th December 2009 (letter previously copied to ORR) and stated "Network Rail considers that Freightliner Heavy Haul should now formally register a dispute pursuant to the Access and Management Regulations as we understand has been suggested to you by the ORR". Network Rail appears to have changed their mind on this point.

We note that with regard to CP4 Network Rail were responsible for the details of setting the Price List, not ORR. We do not believe the setting of relevant parameters is in question here, just the application of them.

Paragraphs 9.17.4 -6

FHH notes Network Rail's point that many of the invoices in question were not objected to within 14 days of receipt, we accept that this was not the case before October 2008.

However Network Rail's summary does not take into account 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 and that by not charging wagons at the correct rates Network Rail have acted in a discriminatory fashion between rail freight operators.

Paragraph 9.17.7

It should be noted that FHH has after considerable pressure and threats from Network Rail paid all outstanding invoices relating to these wagons to Network Rail.

Paragraph 10 - Breach of Licence

FHH in the absence of any legal advice will leave this matter for the consideration of the ORR.

We do believe that Network Rail's actions and lack of consistency in the treatment of different wagons types included in their Price List, whilst not constituting a deliberate act of discrimination has resulted in inconsistent rates being charged which are discriminatory

between different operators.

FHH also believes that Network Rail has not dealt with this matter in a timely or efficient manner. There has been unacceptable delay in Network Rail's response to this dispute and contradictory information provided, particularly with regard to the use of average weights for particular wagon types.

CONCLUSION

FHH believes that there has been a lack of clarity throughout the process. We have responded to the detailed points raised by Network Rail in their letter but believe the detail of the process should not distract from the ultimate result, which is that FHH has been incorrectly charged.

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

Yours sincerely

Lindsay Durham
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Freightliner Group Limited