

FREIGHTLINER HEAVY HAUL LIMITED: APPEAL TO THE OFFICE OF RAIL REGULATION

NETWORK RAIL'S RESPONSE

1. Introduction

- 1.1 This letter provides Network Rail's response to Freightliner Heavy Haul Ltd's ("Freightliner") letter of appeal dated 13 January 2010. It sets out what in Network Rail's submission is the relevant statutory and contractual framework, Network Rail's understanding of Freightliner's appeal, and submissions as to whether the appeal should proceed, and if it does as to its merits.

2. The Directive

- 2.1 Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification' ("the Directive") was implemented for current purposes by the Railways Infrastructure (Access and Management) Regulations 2005 ('the Regulations').

3. The Regulations

- 3.1 Under Regulation 11(1) the infrastructure manager is obliged following consultation to publish a network statement containing a description of the charging principles and methodology, exceptions to the charging principles and details of charges for the supply of those services listed in Schedule 2 which are provided by only one supplier. Schedule 2 sets out the basic the minimum access package rights of an applicant.
- 3.2 Regulation 12 states that the ORR must establish the charging framework and the specific charging rules governing the determination of the fees to be charged. Further the infrastructure manager must determine the fees to be charged for use of the infrastructure in accordance with the charging framework, the specific charging rules, and the principles set out by the ORR.
- 3.3 By Regulation 29,
- "(1) An applicant has a right of appeal to the Office of Rail Regulation if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager,
- (2) Those matters are: -

- (a) the network statement...
- (d) the charging scheme and charging system established in accordance with regulation 12;
- (e) the level of structure of infrastructure fees, the principles of which are prescribed in Part 4 and Schedule 3, which it is, or may be, required to pay..."

4. The Charging Regime and Claims under the Track Access Contract

4.1 The Track Access Agreement dated 20th June 2003

4.1.1 Clause 7 states that each party will comply with Schedule 7. Schedule 7 sets out the requirement to pay the variable charge.

4.1.2 Schedule 7 paragraph 2.2 sets out the means of calculating the Variable charge.

4.2 The Track Access Contract (Freight Services) dated 26th September 2007

4.2.1 Clause 7 of the TAC states that Schedule 7 will have effect. Schedule 7 paragraph 2.1 requires the Train Operator to pay inter alia the variable charge and to issue an invoice as soon as reasonably practicable or as otherwise agreed following the expiry of each Charging Period.

4.2.2 Schedule 7 paragraph 2.2 sets out the means of calculating the Variable charge.

4.2.3 Clause 16.2.1 requires that unless otherwise provided,

"within 14 days of receipt of an invoice...issued under any provision of this contract, the recipient shall notify the issuer of any aspects of the invoice or statement which it disputes, giving reasons for any dispute. Except to the extent that disputes are so notified, the recipient shall be deemed to have agreed the contents of the invoice or statement."

4.2.4 Under Clause 8.2 in relation to any breach of the TAC, the party in breach shall indemnify the Innocent Party against all Relevant Losses.

4.2.5 By clause 18.3.1 the TAC contains the entire agreement between the parties relating to its subject matter. Subject to irrelevant exceptions clause 18.3.2 states that,

"(a) neither party shall have any liability (including liability arising as a result of any negligence, breach of contract or statutory

obligation) to the other in connection with the subject matter of this contract; and

(b) the remedies provided for in this contract shall be the sole remedies available to the parties in respect of any matters for which such remedies are available."

- 4.2.6 Clause 13 of the TAC contains dispute resolution provisions requiring the referral of disputes to the ADPP but permitting simple court debt proceedings in relation to non payment of an invoice.

5 The 2001 Review of Freight Charging Policy

- 5.1 The ORR's Review concluded that it was appropriate to introduce an initial regime relating to suspension type and that they intended in the freight top down usage model to make a separate adjustment in relation to vehicle suspension type (paragraph 2.11).

6. CP3 and variable freight access charges

- 6.1 The reductions introduced were set by the ORR following consultation in a price list dated 29 October 2002 as part of its CP3 charging review as follows:

4 wheel wagon with pedestal type suspension	+9.8%
4 wheel wagon having leaf springs, friction damped	+5.8%
Bogie wagon with three piece bogie	+1.8%
Bogie wagon with enhanced three piece bogie, i.e. "swing motion", and parabolic 4-wheel wagon	-2.2%
Basic bogie wagon with primary springs e.g. Y25	-6.2%
Bogie with enhanced primary springs - low track force bogies, TF25, "axle motion" (like HV primary sprung bogies	-10.1%
Bogie Wagon with enhanced primary springs and steering	-14.2%

These percentages were applied by ORR to a calculation of the variable freight access charge which they conducted. The Price List was imposed as part of the amendments to the relevant TACs by means of a Review Notice issued by ORR on 12 December 2003 in accordance with paragraph 4 of Schedule 4A of the Railways Act 1993.

- 6.2 No objections were lodged to the notice by Freightliner and accordingly the price list became binding and was applied by Network Rail.

7 CP4 and variable freight access charges

- 7.1 Section 6.3 of the Network Statement 2011 sets out the different components of the applicable access charges and explains how they are calculated. In so far as relevant to the current appeal relating to freight wagons it is stated that adjustments are made to variable costs of freight wagons to reflect their relative track friendliness depending on the suspension characteristics of the wagons grouped into seven bands (page 52).
- 7.2 These bands are the same 7 bands as were in use during CP3 and as explained above provided impacts on the variable charging rates of between + 9.8% and -14.2%.
- 7.3 These percentages were again applied to a charging rate calculated by Network Rail as Part of the CP4 charging review but within parameters set by the ORR including as to the use of laden weight in calculating the charge for freight wagons. Network Rail published the Price List on 18 December 2008 as the 'Track Usage Price List 2009/10'. It set out the various prices per mile in relation to the relevant classes of wagon. The Price List was imposed as part of the amendments to the relevant TACs by means of a Review Notice issued by ORR in accordance with paragraph 4 of Schedule 4A of the Railways Act 1993.
- 6.3 No objections were lodged to the notice by Freightliner and accordingly the price list became binding and was applied by Network Rail.

8. Freightliner's Claim

- 8.1 Freightliner's claim is in summary:
- 8.1.1 For CP4:
- 8.1.2 TEAP wagons were charged based on an average loaded and discharged weight of 97 tonnes instead of the average weight of 62 tonnes leading to a correct rate of £1.20 per kgm rather than the £1.81 actually charged. They were not told that the only way to obtain the correct average weight was to correct the weight in the model and therefore did not identify that to Network Rail.
- 8.1.3 TEAK wagons were charged based on the correct 62 tonnes average load but the model wrongly assumed the bogie was a 3 piece bogie rather than a TF 25 leading to the correct rate being £1.28 per kgm rather than the £1.96 actually charged. They did not realise this was the situation because the rates being charged for the TEAP and TEAK wagons were similar.

8.1.4 For CP3:

- 8.1.5 TEAP and TEAK charges were wrong for CP3 for the same reasons and Freightliner are therefore entitled to a 34% decrease in charges paid for TEAP wagons and a 39% reduction in respect of TEAK wagons.
- 8.1.6 Network Rail failed to comply with Schedule 7 in relation to the introduction of TEAP wagons after the commencement of CP3.
- 8.1.7 The TEAK wagons had been allocated an incorrect fourth character code by the Rolling Stock Library as having a Gloucester 3 piece bogie when in fact they had TF25 bogies.
- 8.1.8 FEAB, FEAE, and FRAA waste wagons were added after the commencement of CP3 and were not subject to the correct Schedule 7 procedure. The CP3 model failed to use average laden weight and therefore produced higher laden weight figures than the CP4 model and was wrong leading to an overcharge.

9. Network Rail's Response

- 9.1 In respect of paragraph 8.1.2 above Network Rail submits that the assumption that the average weight should be used in making the calculation is incorrect.
- 9.2 The model, for these purposes whether for CP4 or CP3 in simplified form works in two stages.
- 9.3 Firstly a calculation is carried out which allocates to particular classes of wagon a proportion of the total cost of damage to the network caused by the operation of railway vehicles. That calculation is based on the laden weight of individual vehicles of a particular class. Thus the TEAP wagons were input into the calculation with a gross laden weight of 92 tonnes and the KGTM calculated on the basis of that weight and other factors such as suspension etc. This work is done as part of the Periodic Review process commencing approximately 18 months before the ORR issues its final determination.
- 9.4 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. In connection with CP3 Matthew Cherry, and in connection with CP4 Iain Morgan, of ORR considered that this approach should be adopted. ORR considered that any reduction in the weights actually identified by the process set out above would result in an

under recovery of income. The approach also recognised the part played by KGTM in the re-allocating activity and charging process.

- 9.5 The second stage of the process is that in relation to any vehicle movement a charge is made based on its actual weight as identified by the TOPS system, multiplied by the rate identified as above and included in the price list, multiplied by the mileage travelled.
- 9.6 Network Rail consulted with industry about the vehicle characteristics used in the variable usage charges model on the following occasions:

Strategic Business Plan, November 2007

Technical consultation, 19 December 2007

Strategic Business Plan update April 2008

Each time the assumptions were published Network Rail asked if operators wanted to change them.

- 9.7 The ORR then also consulted in its Draft Determinations: <http://www.rail-reg.gov.uk/upload/pdf/368.pdf> in June 2008. At paragraph 19.35 it stated,

“Vehicle rates

19.35 We have set out in a separate document available on our website the proposed vehicle charges (incorporating our view on efficiency). If train operators, manufacturers or others have any remaining concerns related to the vehicle characteristics included as the basis for charges for CP4 (both the existing vertical characteristics or the new characteristics relating to lateral and longitudinal forces), it will be important to highlight them in responses to our draft determinations, with full reasons for the concerns.”

- 9.8 Following the finalisation of the price list an audit was carried out by Halcrow (http://www.rail-reg.gov.uk/upload/pdf/rep-cp4_halcrow.pdf). The purpose of the audit was to check that Network Rail’s final prices (published December 2008) were consistent with the ORR Final Determinations. Halcrow specifically stated that Network Rail’s vehicle characteristics were acceptable. They stated,

“Vehicle characteristics

3.1.7 We checked the freight vehicle characteristics used in the spreadsheets against the wagon characteristics in the current (CP3) freight model. We found that generally the characteristics either matched the current model or had been updated with reference to

source of the new data. However, we did find that 4 wagons (OCAN, SCAZ, SKAK, SKAZ) had changed suspension bands without an explanation of the data source. Network Rail is reviewing the reason for this change in suspension band and will advise if an adjustment is required.

Freight adjustments

3.1.8 The suspension band discount is applied within the calculation of the prices. We checked the application of these discounts and found them to be correct. The rates being used were as per the final determination.

3.1.9 The adjustments for coal spillage, coal spillage investment fund and freight-only-line mark-ups are made in the final pricelist spreadsheet. The £/kGTM values used agree with the values given in the final determination. The ORR have confirmed that these values are in 2006/07 prices."

- 9.9 Further please see paragraph 9.16 below.
- 9.10 In respect of paragraph 8.1.3 above an exception to the method of operating the model was permitted by the ORR. 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. Freightliner made no other representations in connection with other classes of wagon.
- 9.11 To the best of Network Rail's knowledge TEAK vehicles with 3-piece bogies are operated by DB Schenker. They were present on the railway before those of Freightliner. Unless Freightliner informed Network Rail or the Rolling Stock Library that their TEAK wagons had different bogies and were therefore required to be treated as new wagons both for vehicle acceptance purposes and for establishing the correct charge under Schedule 7 of the TACs, the charge would simply have been calculated on the basis that they were the same as the DBS TEAK wagons. Network Rail has no recollection of Freightliner at any time asking it to input these wagons into the model. Had they done so and identified the different bogie type the anomaly would have been identified.
- 9.12 Further please see paragraph 9.16 below.
- 9.13 In respect of paragraph 8.1.5 above as already explained the model used to allocate costs in the first stage of the process used the loaded KGTM from TOPS for all vehicle movements and calculated the overall track damage

and cost elements based on that. The KGTM was calculated using the actual vehicle weights on the trains as input by the FOCs themselves. Once the track damage was calculated the total cash value of that was allocated out pro-rata to the amount of KGTM each vehicle was shown as operating. Network Rail does not accept that there was any overcharge. Further please see paragraph 9.15 below.

- 9.14 In respect of paragraph 8.1.6 above the process was followed correctly. EWS wrote to NR on 30/6/2006 seeking new rates for TEAP wagons. These were calculated and added to the model using a Tare weight of 26.2t, USM of 1325kg and suspension band 6 for the Commodity Petroleum. Freightliner would not necessarily have seen these rates as they were not added to any published pricelist as this was not the process for CP3. It was clarified and changed for CP4.
- 9.15 In respect of paragraph 8.1.7 it is probable that EWS who operated these with the 3-piece bogie at the time requested the code, then when Freightliner asked for new vehicles of a similar type to be registered with the Rolling Stock Library, they would have had to make it clear that they were using a different bogie.
- 9.16 In respect of paragraph 8.1.8 above Network Rail has papers showing that the FEAE charges were correctly calculated, however they are incomplete and Network Rail cannot identify the freight operator which made the request. Network Rail has been unable (so far) to find any papers relating directly to the rates for the FRAA or FEAB wagons.
- 9.17 Further in respect of paragraphs 8.1.2 and 8.1.3:
 - 9.17.1 Freightliner did not make any objection to the relevant Review Notices and should therefore be taken to have accepted the same.
 - 9.17.2 Freightliner's challenge is not to any decision made by Network Rail but by decisions made by the ORR in calculating and setting the CP3 price list and in connection with both CP3 and CP4 setting the relevant parameters by which the prices were calculated. Regulation 29 cannot have been intended to allow an appeal to the ORR against a decision made by the ORR as the same would be contrary to the principles of natural justice. The right of appeal in effect must be against a decision made by Network Rail and Network Rail did not make any relevant decision and Freightliner's appeal on this point should not be permitted to proceed.
 - 9.17.4 In so far as its claim relates to matters covered by the 2003 TAA and the 2007 TAC Freightliner is moreover subject to their terms which remain contractually binding between the parties.

- 9.17.5 Network Rail submits that the charges levied under the 2003 TAA were in accordance with its contractual terms and that Network Rail was not in breach of contract and that Freightliner has no right to reclaim the same.
- 9.17.6 Under the 2007 TAC clause 16.2.1 deems acceptance of the correctness of invoices unless objection is made within 14 days. To the extent that no such objections were made Freightliner has no right to challenge Network Rail's right to payment, whether by means of the remedies provided under the TAC or the Regulations.
- 9.17.7 Further the TAC contains an entire agreement clause and states that neither party will have any liability to the other including any breach of statutory obligation other than under the TAC itself. It is not therefore open to Freightliner to avoid its obligations under the TAC, including to pay charges already incurred in accordance with the Price List and Schedule 7 thereof, by making an appeal under the Regulations.

10. Conclusions

- 10.1 Network Rail denies that it has acted in breach of the requirements of the Regulations or its Licence. ✕

25th February 2010