



Steve Jones
Access & Licensing
Office of Rail and Road
25 Cabot Square
London E14 4QZ

DB Cargo (UK) Limited
Ground Floor McBeath House
310 Goswell Road
London EC1V 7LW

Nigel Oatway
Access Manager

Telephone: +44 (0)1302 577010

17 November 2020

Dear Steve,

APPLICATION FOR DIRECTIONS: PROPOSED 27TH & 28TH SUPPLEMENTAL AGREEMENTS TO THE TRACK ACCESS CONTRACT BETWEEN NETWORK RAIL INFRASTRUCTURE LIMITED AND DB CARGO (UK) LIMITED DATED 11 DECEMBER 2016

Thank you for your e-mail dated 2 November 2020 inviting the comments of DB Cargo (UK) Limited ("**DB Cargo**") on the latest of many representations made by Network Rail Infrastructure Limited ("**Network Rail**") on the above matters, these being contained in its letter to Office of Rail and Road ("**ORR**") dated 30 October 2020.

DB Cargo set out in its letter to ORR dated 10 September 2020 its response to Network Rail's earlier representations to ORR which had been received up to and including 17 August 2020. DB Cargo's representations in this response should be read in conjunction with those set out in that earlier letter.

Introduction

DB Cargo is disappointed that Network Rail's latest position on many of the access rights contained in the proposed 27th Supplemental Agreement represents a detriment over its previous position set out in its earlier letter to ORR (dated 17 August), particularly when that earlier position represented an improvement over Network Rail's original position of it willing to offer only Contingent Rights across the two applications. Furthermore, DB Cargo is also dissatisfied that Network Rail is seeking to extend uncertainty over capacity on the East Coast Main Line ("**ECML**") by proposing to extend its ECML Policy until May 2022.

The key reasons given by Network Rail behind its latest change of position appear to be (1) errors made in its earlier representations; (2) ensuring it is not discriminating between different freight operator applications for capacity on the ECML; and (3) uncertainty over the future. Consequently, as a result of these reasons, Network Rail has decided to revert to its original position of offering only Contingent Rights for some of the services contained in the proposed 27th Supplemental Agreement. Furthermore, in respect of the London Gateway to Wakefield services, this backward step appears to have been driven by the fact that Network Rail has not offered another freight operator Firm Rights for different services on the ECML. This does not suggest to DB Cargo that its application



was considered on a 'case by case' basis as it is clear the outcome was subject to a further consistency adjustment based on Network Rail's previous decisions on other applications. It also does not seem to DB Cargo to accord with Network Rail's statement at the end of its letter that it has "*reviewed GBRf and DB Cargo's Supplemental Agreement applications independently and the decisions that have been made are on their own merits.*"

In addition, it appears that DB Cargo is expected to continue to operate its business for these particular flows with a great deal of uncertainty not because Network Rail has demonstrated an actual conflict with the future passenger rights detailed in ORR's 12 May 2016 letter, but because it remains uncertain over the content and makeup of a future timetable. This is unacceptable. Network Rail should be able to take a view on whether or not rights can be granted and at what level based on actual knowledge and the facts available at the time rather than avoiding making such decisions because of future uncertainty.

This overly cautious approach places current traffic in jeopardy at the expense of possible future traffic that may not even materialise. Rail freight customers are not likely to remain on rail if the mode is not able to give them any degree of certainty which, in effect, is exactly what Contingent Rights offer. This is particularly relevant where there is intense modal competition which is certainly the case with the services that are subject to these applications. DB Cargo set out its detailed justification for requesting Firm Rights with 'one-hour' arrival and departure windows in its 10 September letter. This justification remains valid.

In summary, this constant changing of position by Network Rail is deeply unsatisfactory and reduces significantly any prospect of DB Cargo operating on behalf of its customers these services with any degree of certainty and assurance. It is also surely not what should be expected from skilled and experienced network facility owner and operator who is required to deal with Stakeholders with due efficiency and economy, in a timely manner and with a degree of skill, diligence, prudence and foresight.

27th Supplemental

- *London Gateway to Wakefield Europort (4E08 TTHO, WFO & SO)*

DB Cargo notes that Network Rail has withdrawn its previous offer of '24-hour' window Firm Rights for these services and has instead reverted to its previous position of offering only Contingent Rights. DB Cargo notes that this about turn is because Network Rail has carried out yet another analysis of these services in the Doncaster station area and has concluded that there is still some uncertainty in what the final validated train graphs will look like and it cannot yet be demonstrated that there are no conflicts with the future Passenger Operator Access Rights, which were directed in ORR's 12 May 2016 letter. Furthermore, Network Rail cites that as the ECML Event Steering Group has not yet produced a detailed timetable for Doncaster because different timetable structures need to be tested first in order to highlight trade-offs between the ECML train service specification and the capacity available.

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Therefore, despite the level of additional detail provided to ORR by Network Rail in support of its latest representations (which seems oddly to relate solely to the proposed 28th Supplemental Agreement and therefore seems of little relevance), there appears to have been little if any progress as Network Rail remains unable to demonstrate whether or not there are any material conflicts with the future Passenger Operator Access Rights, which were directed in ORR's 12th May 2016 letter.

Furthermore, Network Rail's about turn seems to have also been driven by the fact that it had only offered Contingent Rights to another freight operator over the sections concerned and wished to ensure consistency in its decision making. DB Cargo submits that under Network Rail's own ECML Policy, applications should be considered on a 'case by case' basis and not be subject to a final adjustment based on a comparison of Network Rail's previous decisions in respect of separate applications concerning different services.

- *Wakefield Europort to London Gateway (4L08 SX)*

DB Cargo notes that Network Rail remains prepared to support Firm Rights for this service. However, unfortunately this offer comes with '24-hour' arrival and departure windows rather than the 'one-hour' arrival and departure windows requested in DB Cargo's application. This is because Network Rail considers that there remains some uncertainty in what the final validated train graphs will look like in the Doncaster area and it cannot yet be demonstrated that there are no conflicts with the future Passenger Operator Access Rights which were directed in ORR's 12th May 2016 letter.

Therefore, DB Cargo considers that the reasons given by Network Rail for not offering 'one-hour' window Firm Rights remain at a general level despite the additional detailed information supplied in support of its representations. In fact, DB Cargo questions the relevance of Network Rail's additional information supplied in Annex 1 (and Annex 2) to its representations in respect of this particular service given that this information relates to services contained in the proposed 28th Supplemental Agreement which do not even operate over the same sections of the ECML.

- *Wakefield Europort to Felixstowe (4L45 MO)*

It is noted that Network Rail remains of the view that it can only support a Contingent Right for this service, if DB Cargo requires to amend the origin from Doncaster Belmont to Wakefield. This is because the base May 2022 ECML timetable is still in the developmental stage and will not be completed and issued for industry consultation until 18 December 2020. Consequently, as Network Rail is currently in this developmental stage and the flexing of trains to make the best use of capacity is still permitted, this service still needs to be reconciled with other services holding anticipated Firm Rights in the ECML May 2022 Working Timetable (WTT).

DB Cargo is also unclear over the issue of the different pattern of service on a Monday which has led to Network Rail's distinctly different position between 4L45 MO and 4L45 MSX (i.e. Contingent Rights for the former and Firm Rights for the latter). Network

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Rail's assertion in this respect that *"the service pattern or volume of services on a Monday is somewhat different to that on a [MSX] basis (on weekdays apart from Mondays) in the Doncaster area"* does not appear to have been demonstrated. Furthermore, DB Cargo notes Network Rail's assertion that *"a Contingent Right provides Network Rail with the flexibility to retime this service, making the best use of capacity"*. DB Cargo submits that any Firm Right also provides Network Rail with varying degrees of flexibility. However, the difference between the two, which is not remarked upon by Network Rail, is that unlike a Firm Right, a Contingent Right also gives Network Rail the ability not to accommodate the service at all.

- *Wakefield Europort to Felixstowe (4L45 MSX)*

DB Cargo notes that Network Rail is prepared to support Firm Rights for this service provided DB Cargo retains its current '24-hour' arrival and departure windows rather than the 'one-hour' arrival and departure windows requested. Again, this position is cited on the basis that the base May 2022 ECML timetable is still in the developmental stage and will not be completed and issued for industry consultation until 18 December 2020. Consequently, as Network Rail is currently in this developmental stage and the flexing of trains to make the best use of capacity is still permitted, this service still needs to be reconciled with other services holding anticipated Firm Rights in the ECML May 2022 Working Timetable (WTT).

Therefore, despite the level of additional detail provided to ORR by Network Rail in support of its latest representations (which seems oddly to relate solely to the proposed 28th Supplemental), there appears to have been little if any progress as Network Rail remains unable to demonstrate whether or not there are any material conflicts with the future Passenger Operator Access Rights, which were directed in ORR's 12 May 2016 letter.

- *Felixstowe to Wakefield Europort (4E45 FSX & FO)*

DB Cargo acknowledges Network Rail's misunderstanding of the changes proposed to these services (i.e. non-material updates to relevant Service Characteristics and non-contractual information).

- *Doncaster Belmont to Wakefield Europort (4D10 MO)*

DB Cargo notes that Network Rail has withdrawn its previous offer of '24-hour' window Firm Right and has instead reverted to its previous position of offering only a Contingent Right for this service. DB Cargo notes that this about turn is because Network Rail has carried out yet another analysis of this service in the Doncaster station area and has concluded that there is still some uncertainty in what the final validated train graphs will look like and it cannot yet be demonstrated that there are no conflicts with the future Passenger Operator Access Rights, which were directed in ORR's 12 May 2016 letter. Furthermore, Network Rail cites that as the ECML Event Steering Group has not yet produced a detailed timetable for Doncaster because different timetable structures need

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to be tested first in order to highlight trade-offs between the ECML train service specification and the capacity available.

Therefore, DB Cargo considers that the reasons given by Network Rail for not offering 'one-hour' window Firm Rights remain at a general level despite the additional detailed information supplied in support of its representations. In fact, as mentioned previously, DB Cargo questions the reliance of Network Rail on the additional information supplied in Annex 1 to its representations in respect of this particular service given that this information relates to flows contained in DB Cargo's proposed 28th Supplemental Agreement which do not even operate over the same sections of the ECML.

28th Supplemental

- *Tees Dock to Mossend/Grangemouth*

DB Cargo notes that Network Rail remains willing to 'sell' Firm Rights for these services. However, unfortunately this offer comes with '24-hour' arrival and departure windows rather than the 'one-hour' arrival and departure windows requested in DB Cargo's application. DB Cargo further notes that Network Rail's offer of '24-hour' rather than 'one-hour' arrival and departure windows, is made on the basis that such an expansive window offers Network Rail the opportunity to retime these intermodal services earlier to provide an 'optimum fit'. DB Cargo is uncertain as to why Network Rail has concluded that these services may all need to be retimed earlier to provide an 'optimum fit' as this is not fully explained in the letter. In any case, any size arrival and departure window (including those sized at 'one hour') will provide a degree of flexibility for Network Rail to retime services earlier, and also indeed, later.

Summary

Other than the mere fact that DB Cargo's services contained in its proposed 27th & 28th Supplemental Agreements operate over a number of the same sections of the ECML that the rights directed in ORR's 12 May 2016 letter also operate over, yet again Network Rail has failed to identify and demonstrate any material conflicts between the two sets of requirements and its reasons for not offering Firm Rights, therefore, remain at a general level. This is despite the additional detailed information which seems to relate solely to the proposed 28th Supplemental Agreement but strangely has also been quoted by Network Rail to support its various decisions in respect of the services in the proposed 27th Supplemental Agreement.

DB Cargo considers that it should not have to wait any further for an ESG to have concluded its deliberations in respect of a future timetable before Firm Rights for its current services can even be considered. Such undue delay would just prolong the current uncertainty unnecessarily and undermine customer confidence in rail as a viable alternative for their transportation needs.

Therefore, given that these intermodal services are already established having been validated in successive WTTs, are supported by customer contracts and convey

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intermodal containers, which is a rail freight market segment that is under intense competition from road transport, DB Cargo wishes to maintain its application for Firm Rights for these intermodal services with 'one-hour' arrival and departure windows. DB Cargo considers that such arrival and departure windows will provide the certainty required to continue to meet its customer's requirements which were summarised in its 10 September 2020 letter to ORR.

DB Cargo hopes that these representations are helpful. If ORR requires any further information, please let me know.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nigel Oatway', with a horizontal line underneath.

Nigel Oatway
Access Manager

cc Gordon Herbert ORR

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