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10 September 2020

Dear Steve,

**APPLICATION FOR DIRECTIONS: PROPOSED 27<sup>TH</sup> & 28<sup>TH</sup> 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 letter dated 18 August 2020 inviting the comments of DB Cargo (UK) Limited ("**DB Cargo**") on the representations made by Network Rail Infrastructure Limited ("**Network Rail**") in its letters to Office of Rail and Road ("**ORR**") dated 17 August 2020 on the above matters ("**the letters**").

DB Cargo notes that Network Rail's latest position on many of the access rights contained in the proposed 27<sup>th</sup> and 28<sup>th</sup> Supplemental Agreements represents an improvement over its previous position of willing to offer only Contingent Rights across the two applications. Whilst this change of position is therefore a welcome step forward, unfortunately it still does not meet DB Cargo's requirement for Firm Rights with 'one-hour' arrival and departure windows which it believes, for the reasons set out in this letter, are necessary to allow it to continue to operate all of the intermodal services concerned with a reasonable degree of certainty and assurance.

***Justification for seeking 'one-hour' arrival and departure windows***

The importance of the intermodal market is continually increasing for DB Cargo and it is fully committed to being involved in the forecast growth and development of this traffic over the coming years so that it can offer a viable alternative to the more established players in this market, both in the road and rail transport sectors. Firm Rights with 'one-hour' arrival and departure windows rights are crucial to support intermodal services due to the nature and exacting demands placed on hauliers by customers who move their goods by intermodal container.

DB Cargo's intermodal services contained in both applications form part of vast 'end to end' supply chain serving the likes of supermarkets and online retailers who demand high reliability, performance and 'just in time' delivery. Rail provides a key part in that supply chain as it is able to provide the movement of a significant number of containers in each train and in doing so thereby reducing the number of separate lorry movements on the



UK's congested road network that would otherwise be necessary. Customers will only use rail, however, if it can continually meet the exacting standards that they require in terms of reliability, performance and 'just in time' delivery. If rail transport can reliably continue to offer services that meet those standards then it will be able to play a key role in the supply chain by ensuring timely movements of containers between the ports and destination terminals so that the goods can be delivered to retailers and consumers when they are expected.

By way of example, a supermarket customer who uses the Tees Port to Scotland intermodal service relies on trains departing regularly during the evening of Day A so that the goods can be delivered to its stores in the early hours of Day B. This enables stock levels to be effectively and efficiently managed and maintained during shop opening hours. Continuing to regularly deliver services in a daily cycle for such intermodal customers is crucial to ensure that shelves can remain filled for shoppers.

To ensure DB Cargo can successfully meet these requirements for its customers and consequently enable it to continue to play a key role in the larger supply chain, it requires Firm Rights that provide a reasonable degree of certainty and stability that are not subject to the possibility of unexpected material changes in timings over successive timetables. Therefore, DB Cargo considers that Firm Rights with 'one-hour' departure and arrival windows will enable DB Cargo to continue to meet the requirements of its customers. Such Firm Rights are also in line with ORR's expectation set out in paragraph 74 of its letter dated 29 February 2016 entitled "*Directions in respect of a track access contract between Network Rail Infrastructure Limited and DB Schenker Rail (UK) Limited*". In that paragraph, ORR expresses its expectation that the default position for the window size of freight Firm Rights that are backed by commercial contracts with end users, to effectively be 'one-hour' windows.

Of course, DB Cargo acknowledges that this does not preclude windows of other sizes being agreed. However, DB Cargo submits that given the intense modal competition in conveying intermodal containers, the exacting standards required and the fact that these services are backed by customer contracts, 'one-hour' windows will provide a reasonable degree of certainty for DB Cargo and its customer to ensure that the traffic remains on rail whilst at the same time giving Network Rail a reasonable degree of flexibility to manage capacity on its network. Furthermore, granting Firm Rights with 'one-hour' arrival and departure windows does not preclude any such windows being proposed for amendment in the future, if necessary, through the mechanism contained in paragraph 5 of Schedule 5 to the track access contract.

### **27<sup>th</sup> Supplemental**

- *London Gateway to Wakefield Europort*

In respect of the intermodal services contained within this traffic flow (4E08 & 4L08), DB Cargo notes that Network Rail is maintaining its position that it is only willing to offer Contingent Rights because of its current ECML Policy and because of "*uncertainty in the final timetable within Doncaster station limits*".

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As stated in its application, DB Cargo understands Network Rail's ECML Policy can be summarised as follows:

- The aim of the ECML Policy is to protect the future rights directed in the ORR letter dated 12 May 2016 relating to ECML and off-core route destinations.
- Broadly speaking the ECML Policy means that an Operator has Firm Rights for its ECML baseline as of the date of the ORR directions on 12 May 2016 and any new ECML rights above that baseline are contingent and time bound, following a case by case review that demonstrates the new rights affect the future rights directed on the ECML.
- The ECML Policy requires Network Rail to work with each Operator on a case by case basis to establish whether proposals for rights do affect the directed rights. On this basis any proposed rights that do not hinder the directed future rights as detailed in the ORR letter dated 12 May 2016 can be sold as Firm Rights.

DB Cargo submits, therefore, that the ECML Policy does not prevent Network Rail granting Firm Rights for its intermodal services in the application, provided that it can be demonstrated that there is no conflict with the future rights directed in ORR's 12 May 2016 letter.

Other than the mere fact that DB Cargo's proposed intermodal services 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, the latest information provided by Network Rail still does not appear to demonstrate that there are any actual identifiable material conflicts between the two sets of requirements. If that is the case, then there should be no reason why DB Cargo's proposals should not be granted alongside those rights directed in ORR's 12 May 2016 letter, particularly as DB Cargo's proposed intermodal services are already established, having been validated both in the December 2019 and May 2020 WTT's. In addition, since the application was submitted, these services have also now been validated in the December 2020 WTT.

Therefore, DB Cargo considers that the reasons given by Network Rail for not offering Firm Rights remain at a general level despite the fact that Network Rail states that it now has improved confidence in being able to accommodate a path between Finsbury Park and Doncaster and between Doncaster and Wakefield. Any material conflicts between the Firm Rights DB Cargo has applied for and those already directed in ORR's 12 May 2016 letter do not appear to have been demonstrated and DB Cargo considers that it should not have to wait any further for an Event Steering Group 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. DB Cargo also disagrees with Network Rail's assertion that *"the proposal for [Contingent?] 24 hour 'window' Rights is sensible because the associated paths have not yet been assessed beyond the core ECML geography, for example*

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*between London Gateway and Finsbury Park*". As already mentioned above, these intermodal services are already operating and have been validated in successive WTTs.

In summary, given that these intermodal services are already established, are supported by customer contracts and convey 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 summarised earlier in this letter.

- *Felixstowe to Wakefield Europort*

**4L45 MO** - DB Cargo again notes that the reasons given for Network Rail's refusal to 'sell' Firm Rights for this intermodal service remain at a general level citing its ECML Policy and uncertainty in the final timetable within Doncaster station limits. Therefore, any material conflicts between the Firm Rights DB Cargo has applied for in respect of 4L45 MO and those already directed in ORR's 12 May 2016 letter do not appear to have been demonstrated. DB Cargo is also unclear why there is "*uncertainty in the final timetable within Doncaster station limits*" on a Monday when it appears such uncertainty does not exist Tuesday to Friday which is evidenced in Network Rail's distinctly different position between 4L05 MO and 4L05 MSX (i.e. Contingent Rights for the former and Firm Rights for the latter). In any event, DB Cargo considers that it should not have to wait for an Event Steering Group to have concluded its Phase 3 work in respect of a future timetable so that the "*timetable becomes more mature around the Doncaster area*" before Firm Rights for 4L45 MO can even be considered. This would just prolong the current uncertainty unnecessarily and undermine customer confidence in rail as a viable alternative for their transportation needs.

**4L45 MSX** - Network Rail states in its letter that it can now 'sell' Firm Rights for intermodal service 4L45 MSX. However, DB Cargo already has Firm Rights in its Rights Table for this intermodal service. The main reason this intermodal service is included in the application is so that the arrival and departure windows can be amended from '24-hour' to 'one-hour' windows in keeping with the other proposed Firm Rights in the application. Therefore, although Network Rail indicates in its letter that it can now 'sell' Firm Rights for 4L45 MSX, it would be helpful to understand what size arrival and departure windows such Firm Rights would be provided with.

**4E45 FSX & FO** - Network Rail states in its letter that it can now 'sell' Firm Rights for intermodal services 4E45 FSX & FO. However, DB Cargo already has Firm Rights in its Rights Table for these intermodal services with 'one-hour' arrival and departure windows. The reason these intermodal services are included in the application is so that relevant Service Characteristics and non-contractual information can be updated. It is not clear to DB Cargo, therefore, as to what Firm Rights Network Rail is now considering 'selling' in respect of 4E45 FSX & FO.

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**4D10 MO** - DB Cargo notes that Network Rail is now willing to 'sell' Firm Rights for this intermodal 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. 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 expansive windows offers Network Rail the opportunity to retime this intermodal service earlier in order to provide the optimum fit with the start of the morning peak, especially on the Doncaster to Leeds route. DB Cargo submits that Network Rail does not need such a large window in order to be able to have an opportunity to retime a service earlier into a period that avoids the morning peak as presumably such a period would not be greater than around 5-hours in any case (e.g. from 00:00 to 05:00).

In summary, given that all of these intermodal services are already established, are supported by customer contracts and convey 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 which it considers will provide the certainty required to continue to meet its customer's requirements which are summarised earlier in this letter.

### ***28<sup>th</sup> Supplemental***

- *Tees Dock to Mossend/Grangemouth*

DB Cargo notes that Network Rail is now willing to 'sell' Firm Rights for the intermodal services contained within this traffic flow. 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 intermodal 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.

In summary, given that these intermodal services are currently operating, are supported by customer contracts and convey 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 which it considers will provide the certainty required to continue to meet its customer's requirements which are summarised earlier in this letter.



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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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