

TTP2540

Network Rail Defence Submission

1 DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows: -

- (a) GB Railfreight Limited whose Registered Office is at 5th Floor, 62-64 Cornhill, London, EC3V 3NH. ("GBRf") or ("the Claimant").
- (b) Network Rail Infrastructure Limited, whose Registered Office is at Waterloo General Offices, London, SE1 8SW ("Network Rail") or ("the Defendant").

1.2 Network Rail believe that Freightliner Limited (Freightliner) are likely to be affected by potential findings in this matter.

2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant's Sole Reference includes: -

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
- (b) A detailed explanation of the Defendant's arguments in support of its position on those issues where it disagrees with the Claimant's Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant's Sole Reference.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fail to be determined as part of the dispute.
- (d) The decisions of principle sought from the Chair in respect of
 - (i) Legal entitlement, and
 - (ii) remedies
- (e) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

3.1 Network Rail agree that this dispute relates to the issuance of a Failure to Use Notice (Notice) under Network Code Condition D8.5 in relation to the following Train Slots held by GBRf in the current December 2024 Working Timetable.

4L24 [SX] 05:36 East Midlands Gateway GBRf – London Gateway GBRf (arr. 12:01)

4L24 [SO] 04:55 East Midlands Gateway GBRf – London Gateway GBRf (arr. 12:23)

4M24 [SX] 16:32 London Gateway GBRf – East Midlands Gateway GBRf (arr. 23:33)

4 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE

4.1 Issues where the Defendant accepts the Claimant's Case.

- 4.1.1 It is agreed that Network Rail issued a Failure to Use Notice in relation to the above noted Train Slots on the dates contained within the GBRf Sole Reference Document (SRD). Network Rail have provided a Chronology of Events as Appendix 1.
- 4.1.2 It is agreed that the reason for issuing the Notice was non-utilisation of the identified Train Slots.
- 4.1.3 It is agreed that there was a clerical error in the initial Notice in which Network Rail incorrectly referenced DB Cargo as the third party that had requested, we investigate a potential failure to use. When this was queried, Network Rail re-issued the Notice with corrected details to reflect the fact that it was Freightliner who submitted this request.
- 4.1.4 It is agreed that GBRf disagreed with the decision, notified us of the same and referred the matter for dispute in line with the provisions in Part D. The contents and rationale within the Dispute Notice are self-evident.

4.2 Issues where the Defendant qualifies or refutes the Claimant's Case.

- 4.2.1 It is submitted that the clerical error contained within the initial Notice (referencing DB Cargo vice Freightliner) in no way impacts the validity of the Notice issued under Condition D8.5.
- 4.2.2 GBRf's rationale within their response to the Notice was "GBRf do not feel it is reasonable for Network Rail to relinquish the paths as an active and live tender process is still to be decided by Maritime, for this traffic." No other counter argument was provided at this stage for Network Rail to consider. Network Rail disagree with this position.
- 4.2.3 Whilst it is understood that GBRf were (at the time of the decision) undergoing an active tender – that tender (by their own admission) was yet "to be decided". In reaching the decision to issue the Notice, Network Rail have relied on Condition D8.5.
- 4.2.4 There has been no objection from GBRf that the first two limbs of Condition D8.5 are not satisfied. The Train Slots in question are contained within the Working Timetable and (at the time of the decision) are not underpinned by a Quantum Access Right. It is submitted that the dispute must rest solely on the third limb of the test – whether "Network Rail acting reasonably, considers that the Train Slots are not being used". In issuing the Notice, Network Rail have indicated that we consider the Train Slots are not being used. We disagree with GBRf and submit that the Train Slots are not being used and that thus decision is a reasonable one.

- 4.2.5 In relation to the issue of 'reasonableness' it is noted within Section 5 of the SRD, that GBRf "believes that the principles of reasonableness require actions to be fair and moderate under the set of circumstances in question." Network Rail would qualify this with reference to previous TTP hearings which have examined the question of reasonableness through the lens of commercial case law -specifically *Braganza v BP Shipping Company*¹. As detailed in previous TTP's, Network Rail should make decisions with "honesty, good faith, and genuineness" and avoid "arbitrariness, capriciousness, perversity and irrationality". GBRf do not appear to be arguing dishonesty, bad faith or that Network Rail have been disingenuous. It is for GBRf to evidence that Network Rail have reached a decision that is arbitrary, capricious, perverse or irrational. We submit that there is no evidence that these thresholds have been reached or breached.
- 4.2.6 In relation to the second element of Condition D8.5(c), Network Rail undertook 'run checks' on these Train Slots prior to making its decision. These checks confirmed that these services have not and are not running. GBRf are arguing that they *may* run in the future. GBRf remain silent within their SRD as to whether the trains have ever run or are currently running.
- 4.2.7 In reaching its decision to issue the Notice, Network Rail took care to examine the exact wording contained within Condition D8.5(c). Having looked at the construction of this Condition, it is submitted that the phrase "are not being used" refers to present state, meaning something is not currently in use. It doesn't inherently include future use unless additional context specified that it does – Network Rail's position is that there is no such additional context. If 'future use' was intended to be considered under D8.5, the construction would have been "are not *and will not be used*." On this basis, Network Rail submit that it has reached a decision that is both contractually compliant and reasonable.
- 4.2.6 Network Rail note the argument within Section 5 of the SRD regarding a previous decision (2021). Network Rail submit that it is not bound to follow its own previous decisions. Each decision taken is assessed on its own individual facts and merits before a decision is reached. It is also submitted that the issue at hand relates to the disputed Notice only and not what Network Rail did or did not do back in 2021. As noted by GBRf, that decision was not taken to a TTP. The scenario faced here differs from the 2021 decision because in that case, the train slot had only been in the timetable 16 days when the Failure to Use was issued. That coupled with the explanation provided by GBRf at the time, prompted NR to reflect and withdraw the Notice on the basis it was unreasonable to continue.
- 4.2.7 GBRf argue that D4.6 is applicable but that there is no evidence of its application. In our experience, application of the Decision Criteria has never been requested for a D8.5 Notice because most (if not all) of it is not applicable. This is the first time that GBRf have raised this as an issue. Whilst NR don't think that application of the Decision Criteria is particularly helpful in Failure to Use cases, we have provided a version of the Decision Criteria that demonstrate our thinking regarding application of the same (Appendix 4). It is submitted that this supports the decision taken to issue the Notice.
- 4.3 Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination.**
- 4.3.1 The Train Slots were added into the working timetable in May 2022. It has been established that the last time that these Train Slots have not been utilised since at least 3rd November 2022 (Appendix 3).

¹ *Braganza v BP Shipping Ltd & Anor* [2015] UKSC 17

- 4.3.2 We note the request from GBRf in relation to the decisions sought from the Chair. Network Rail would query whether a 'withdrawal' of the Notice is tantamount to a substitute decision in this case given the binary nature of the issue. If it is deemed a substitution (and we submit it would be), then exceptional circumstances would need to be present – something that GBRf have not presented a case for and that Network Rail submit are not present.

4.4 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant

- 4.4.1 Within their SRD, GBRf have argued that it is inappropriate for Network Rail to have applied Condition D8.5 to this scenario. This appears predicated on the basis that there was a live/ ongoing tender for traffic. At no point do GBRF present any argument that the Train Slots in question have been or are in use.
- 4.4.2 Network Rail submit that the correct interpretation, and application of Condition D8.5.1 is to assess past and present use. If GBRf disagree with our assessment, we would invite them to supply evidence that the Train Slots have been used or were being used at the time that Network Rail issued its decision.

5 DECISION SOUGHT FROM THE CHAIR

- 5.1 Network Rail seek a determination from the Chair to uphold the Network Code Condition D8.5 Failure to Use Notice issued by Network Rail to GBRf.
- 5.2 Network Rail seek clarity on whether it is reasonable to consider Future Use, as Part D8.5 is currently drafted, in determining whether a Failure to Use has occurred.

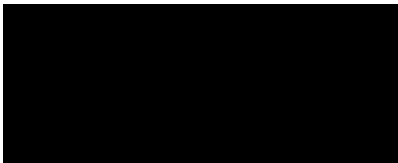
6 APPENDICES

1. Network Rail Chronology
2. Failure to Use Notice issued by Network Rail
3. Evidence of non-running service
4. Decision Considerations

7 SIGNATURE

For and on behalf of Network Rail Infrastructure Ltd

Signed



Print Name



Position

Customer Relationships Executive

Appendix 1 – Chronology

- **11 November 2024, 2:31 PM**
 - Request received from Freightliner for Network Rail to investigate potential failure to use of three Train Slots held by GBRf. Investigations undertaken confirm that these paths:
 - are in the WTT,
 - Are not underpinned by Quantum Access Rights, and
 - have not run.
- **11 November 2024, 3:30 PM**
 - Network Rail informs GBRf of the Freightliner request and issues a Notice that under D8.5 (DB Cargo was incorrectly addressed in notice, GBRf were informed later verbally, and notice was revised with no change to the date).
- **19 November 2024, 4:14 PM**
 - GBRf disagrees with Network Rail's decision to pursue D8.5 for relinquishing the paths.
- **19 November 2024, 5:20 PM**
 - GBRf attaches a notification of dispute for the failure to use notice served by Network Rail on GB Railfreight for paths 4L24 SX/SO and 4M24 SX. The attachments include the notification of dispute. NR's original serving of failure to use, and GBRf's correspondence to NR substantiating their justification and ongoing commercial requirement.
- **26 November 2024, 1:19 PM**
 - Network Rail requests a check from Capability and Planning Manager to determine if GBRf has run services on specific paths (4L24 [SX], 4L24 [SO], 4M24 [SX]) since acquiring them, noting that these paths have been in the working timetable with slight variations for the past two years.
- **26 November 2024, 1:45 PM**
 - Capability and Planning Manager responds that there have been no runs for all three headcodes since at least November 3, 2022.
- **4 December 2024**
 - Network Rail internal meeting to discuss present position and options.
- **5 December 2024**
 - Network Rail internal meeting to discuss present position and options.
 - Note: Freightliner have indicated likely dispute if Network Rail decide not to uphold its original decision to issue the failure to use notice.
- **6 December 2024, 7:29 PM**
 - GBRf provide confirmation from Maritime of the award for the London Gateway – East Midlands flow using paths 4M24/4L24 and the slot confirmation at Maritime's East Midland Gateway terminal.
- **9 December 2024, 10:26 AM**
 - Network Rail requests evidence confirming the start date for the business.
- **9 December 2024, 3:15 PM**
 - GBRf informs that the service movement is part of a ship transfer by Maersk and Hapag, with the first vessel due to land at Gateway on March 18th, and the service will commence around that date.
- **9 December 2024**

- o Network Rail internal meeting to discuss present position.
- **10 December 2024, 9:56 AM**
 - o Freightliner proposes using path 4L24 as per existing WTT timings between East Midlands Gateway and London Gateway or starting from another terminal. Path 4M24 will be used to Wembley, with a new path bid northbound. There is confirmed demand for traffic between London Gateway and a terminal in the Midlands, with the exact terminal to be decided based on path availability and commercial demand. Freightliner believes Network Rail should consider whether the path is not being used, not future use by the incumbent, and reserves the right to utilise capacity created by the removal of these slots.
- **10 December 2024, 10:40 AM**
 - o Network Rail have confirmation that it is the same slot out of LG but questions if there's a definite end customer, as it sounds speculative. Requests further inquiry on this point and mentions seeking confirmation from CP on the risks to removal and rebid, with LX risks on Anglia.
- **16 December 2024, 5:00 PM**
 - o Network Rail re-confirms their intention to remove the Train Slot as outlined on November 11, 2024, despite the review. Notes that the matter has been referred to the Access Disputes Committee.
- **18 December 2024, 12:30 PM**
 - o GB Railfreight sends a formal response to Network Rail, requesting a plan of tangible action and steps to address the letter's contents by April 1, 2025.
- **18 December 2024 13:57 PM**
 - o Network Rail acknowledges GBRfs response.
- **19 December 2024**
 - o GBRf register dispute with ADC in line with Part D – no further details provided.
- **07 January 2025**
 - o Hearing arrangements issued by ADC.
- **21 January 2025**
 - o Maritime contact Network Rail with further information
- **21 January 2025**
 - o GBRf SRD submission date.
- **28 January 2025**
 - o NR and FL Submission dates
- **03 February 2025**
 - o Hearing Date

Appendix 2 – Failure to Use Notice

11 November 2024

Dear,

Network Code Condition D8.5 – Failure to Use Notice – 4L24 SX/SO – 4M24 SX

Network Rail is in receipt of a Third Party Application from DB Cargo (UK) Limited (“DB Cargo”) under Part D8.5 of the Network Code in respect of the below unused Train Slots held by GB Railfreight (“GBRf”) The Train Slots (listed below) have been validated by Network Rail and included in the Current Working Timetable. Network Rail believes that the below Train Slots are not underpinned by Access Rights, have not been utilised in the thirteen weeks preceding DB Cargo (UK) Limited (“DB Cargo”) letter to us on 11 November 2024, and that this non-use is continuing.

June 2024 Train Slot

4L24 [SX] 05:36 East Mids Gateway Tml GBRf – London Gateway GBRf (arr. 12:01)
4L24 [SO] 04:55 East Mids Gateway Tml GBRf – London Gateway GBRf (arr. 12:23)
4M24 [SX] 16:32 London Gateway GBRf - East Mids Gateway Tml GBRf (arr. 23:33)

December 2024 Train Slot

4L24 [SX] 05:36 East Mids Gateway Tml GBRf – London Gateway GBRf (arr. 12:01)
4L24 [SO] 04:55 East Mids Gateway Tml GBRf – London Gateway GBRf (arr. 12:23)
4M24 [SX] 16:32 London Gateway GBRf - East Mids Gateway Tml GBRf (arr. 23:33)

As such, Network Rail would be grateful for your confirmation that the Train Slot will be relinquished by GB Railfreight at the earliest opportunity.

Network Rail will make arrangements for the removal of this Train Slot from the current and future Working Timetables from 09 December 2024. Should you wish to appeal this Failure to Use Notice, please could I ask that Network Rail receive your objection not later than 25 November 2024.

Yours sincerely,

Appendix 3 – Historical Run Checks

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Hi,

Fairly simple answer – no runs for all three headcodes since at least the 3rd of November 2022.

4L24 [SX] is on the list for upcoming round of CMRG (likely not for the first time).

Regards,

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Hi,

Hope you're well, and congratulations on your award last Wednesday.

I have one last query regarding CMRG. We are currently discussing several paths that GBRf have available. We understand that they have had these paths, with slight variations, for the past two years.

If possible may you please conduct a quick search to check if GBRf has actually run a service on these paths since acquiring them? If you have the capacity to check, the paths in question are:

4L24 [SX] 05:36 East Mids Gateway Tml GBRf – London Gateway GBRf (arr. 12:01)

4L24 [SO] 04:55 East Mids Gateway Tml GBRf – London Gateway GBRf (arr. 12:23)

4M24 [SX] 16:32 London Gateway GBRf - East Mids Gateway Tml GBRf (arr. 23:33)

Kind regards,

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Appendix 4 Network Rail Decision Criteria

Decision Criteria Table

| | |
|---|--|
| Record of the application of Network Code Part D4.6 Decision Criteria in relation to: | |
| i) | A Network Rail decision under D8,5 to issue a notice of intention to GBRf to remove various train slots which we have deemed 'are not being used'. |
| | |

In making this decision, Network Rail has carefully considered its obligations under Part D of the Network Code, including the application of the Decision Criteria at Condition D4.6.2 of Part D of the Network Code. The following table sets out Network Rail's application of the Decision Criteria.

In applying the Decision Criteria Network Rail has weighted the considerations using the below weighting:

N/A - Not applicable in this case

Low: is relevant and of very low importance in this case

Medium: is relevant and of medium importance in this case

High: is of high relevance and high importance in this case

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Decision Criteria

Objective (4.6.1)

To share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of the railway services.

| Decision Criteria Considerations (4.6.2) | | Relevance (Yes or N/A) | Weighting | Evidence | Network Rail Opinion |
|--|---|------------------------|-----------|----------|---|
| a | Maintaining, developing, and improving the capability of the Network; | N/A | | | This decision is not related to maintaining, developing, or maintaining capability. |
| b | That the spread of services reflects demand; | N/A | | | At the time of the decision to remove the Train Slots, the Slots in question had been in the WTT since May 2022. The last use of the Train Slot was in November 2022. |
| c | Maintaining and improving train service performance; | N/A | | | No Trains have run since November 2022 – removal of the Train Slots cannot impact performance of trains that have not and are not running. |
| d | That journey times are as short as reasonably possible; | N/A | | | No Trains have run since November 2022 – removal of the Train Slots cannot impact journey times of trains that have not and are not running. |
| e | Maintaining and improving an integrated system of transport for passengers and goods; | Medium | | | No Trains have run since November 2022. Retaining Train Slots which are not being utilised |

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|---|---|-----|--|--|---|
| | | | | | and for which there are no Rights within a TAC is tantamount to reservation of capacity at the expense of other prospective users. |
| f | The commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware; | Low | | | GBRf have demonstrated that there are ongoing negotiations with a customer that may require the use of these Slots. At the time of the decision, there is no finalised contract for the customer, and having a contracted customer does not guarantee that traffic will run. It is in Network Rail's commercial interest that some traffic runs (Track Access Charges) – however, we remain neutral as to which service (if any) run. The decision at hand is whether the Train Slots are being used. Run checks undertaken show that they are not. To create white space on the graph is to allow any operator who may have traffic that they wish to run to submit requests to Network Rail as appropriate. |
| g | Seeking consistency with any Long-Term Plan and any relevant Development Timetable produced by an ESG. | N/A | | | There are no relevant Long-Term Plans or ESGs. |

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|--|--|-----|--|--|--|
| h | That, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed; | N/A | | | These Train Slots do not impact any International Paths. |
| i | Mitigating the effect on the environment; | N/A | | | No Trains have run since November 2022 – removal of the Train Slots has no impact. |
| j | Enabling operators of trains to utilise their assets efficiently; | N/A | | | Removal of the Train Slots cannot impact efficiency of services (or diagramming) for trains that have not and are not running. |
| k | Avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates; and | N/A | | | No Strategic Train Slot is impacted. |
| l | No International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed. | N/A | | | No International Train Slot within the IFCN (Section A) is impacted. |
| Decision Taken: To remove the identified Train Slots utilising Network Code Condition D8.5.1 on the basis that, the Train Slots are contained within the Working Timetable, are not underpinned by Quantum Access Rights and that Network Rail reasonably considers that these Train Slots are not being used. | | | | | |

Having considered all of the above and as detailed in Condition D4.6.2, Network Rail submits that the decision to remove the Train Slots under D8.5 is justified by reference to the Network Code and supports the Objective as detailed within Condition D4.6.1 to assist in achieving the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of the railway service.