

TTP2540 - Freightliner Limited Defence Document

1 DETAILS OF PARTIES

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

GB Railfreight Ltd, whose Registered Office is at 62-64 Cornhill, London, EC3V 3NH ('GBRf')

Freightliner Limited, whose Registered Office is at The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ ('Freightliner')

and;

Network Rail Infrastructure Limited, whose Registered Office is at Waterloo General Office, London, SE1 8SW ("Network Rail").

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;
- (a) The decisions of principle sought from the Chair in respect of
 - (i) legal entitlement, and
 - (ii) remedies;
- (b) Appendices and other supporting material.

3 SUBJECT MATTER OF DISPUTE

4.1 This is a dispute relating to Network Rail's removal of 3 train slots held by GBRf (4M24 SX, 4L24 SX and 4L24 SO) from the Working Timetable pursuant to Condition D8.5.1 of the Network Code.

4.2 This action was triggered following the submission of a 'Failure to use Notification', pursuant to Condition D8.5.5, to Network Rail by Freightliner on 8th November 2024.

4.3 GBRf do not believe these Train Slots should be removed from the timetable, as they have a desire to operate them in the future.

4.4 Freightliner do not agree with the position taken by GBRf in its Reference Document, and consider Network Rail acted reasonably in issuing the Notice under D8.5 to remove these Train Slots from the timetable.

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 Freightliner note that GBRf have not claimed that these Train Slots have been used for a period leading up to the issuing of the Notice, as such Freightliner are working on the assumption it is agreed among dispute parties that the Train Slots had not been used for a reasonable period prior to the issuing of the Notice.

4.1.2 Freightliner also agree with GBRf that, in order to act reasonably, Network Rail needed to act fairly and moderately under the circumstances in question.

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

4.2.1 GBRf claim that Network Rail should have been influenced by a previous Failure to Use Notification, citing an example from 2021. Freightliner contest that there was no binding precedent set by this, and that Network Rail had to act on the evidence available to it in relation to the specific Notice subject to this Dispute.

- 4.2.2 In paragraph 5.1(j) of its document, GBRf state that in removing these Train Slots, Network Rail is *undermining its ability to meet its contractual obligations..... and causing potentially profoundly serious reputational damage...* From the timeline in the appendices shared, GBRf entered into these contracts after the Notice had been received from Network Rail. GBRf was therefore fully aware of the fact these paths could be removed when it entered the contracts.
- 4.2.3 Freightliner believe that, in order to act reasonably, Network Rail was required to assess the information available to it around use of the Train Slot. As per paragraph 4.1.1, the Train Slots had not been used in the period leading up to the Notice being issued (a period greater than 13 weeks). Therefore, it is a reasonable conclusion that Network Rail was acting reasonably when it considered that the train slots are not being used.
- 4.2.4 Any consideration needs to be given to reasonable future use. GBRf indicate the need to consider future use as part of the consideration under D8.5. GBRf cite a contractual commitment, although suggest that this would not start until April 1st 2025, as per paragraph 5.1(h) of GBRf's document.
- 4.2.5 At the point Network Rail issued its confirmation the Train Slots were to be removed, on 16th December 2024, the 1st April 2025 date GBRf cite for commencement of this traffic was over 3 months distant. Hypothetically, if the Train Slots were supported by Access Rights, this time period would have been greater than the 'Non-Use' period mandated under Condition J4.
- 4.2.6 It is therefore reasonable to conclude that, given the Train Slots had not been used in a significant period of time prior to the Notice being issued by Network Rail, and that there was no intended use for them for a significant period of time after the Notice was issued, a time period even greater than the Use Period for Train Slots with access rights stipulated under Part J4.2.3, the only reasonable conclusion is to regard the Train Slots as not being used.
- 4.2.7 While Freightliner acknowledges that there is no direct contractual link between Part D and Part J, this does not preclude the criteria of one part from being considered in the application of the other, particularly when they address similar issues. This is evident in the case of Part D8.5 and Part J4, both of which seek to address unused capacity.

While Network Rail appears to have greater discretion under Part D (guided by a test of reasonableness), Part J4 is more prescriptive, restricting the Use Period to the previous thirteen weeks, making it inherently backward-looking. Allowing Part D to consider future use while confining Part J to a retrospective 13-week window would be both inconsistent and unreasonable.

4.2.8 If Network Rail were to fail to remove these Train Slots, they would effectively be reserving capacity on the Network for a significant period of time, for GBRf's future use. In doing this, Network Rail would fail to meet 'The Objective' as they would not be sharing capacity on the Network for the safe carriage of passengers and goods.

4.2.9 Freightliner does not agree with GBRf's position in relation to Condition D4.6. Although Condition D4.6.2 instructs Network Rail to use the Decision Criteria to achieve the Objective, and Condition D4.6.1 instructs that it shall be used to decide any matter within Part D, the points at which it is appropriate to apply D4.6 are identified throughout Part D, for example in Condition D4.1.1, or 4.3.1(b).

4.2.10 Freightliner believe the Decision Criteria is intended to allow Network Rail to consider the weighting of various considerations when making trade-offs. In the case of Condition D8.5, the output is binary – a simple yes/no – and there are no further considerations beyond whether the Train Slot is reasonably being used or not. Furthermore D8.5 concerns the removal of train slots not being used, rather than the consideration of two competing applications for the same capacity, and therefore Freightliner's aspirations to utilise the capacity is not immediately relevant to whether the Train Slot is being used.

4.2.11 Further, it is reasonable for Network Rail to consider that a Failure to Use Notification received from another operator under D8.5.5, has been sent to it on the basis that the operator submitting the Notification wishes to make use of that capacity. As such any application of the Decision Criteria would be neutral as the same considerations would apply to both the incumbent operator and the operator submitting the Notification. Given that Freightliner intends to operate similar, new to rail, deep-sea container services to and from London Gateway, had any application of the Decision Criteria been performed it would with high likelihood have been neutral.

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 GBRf cite that the removal of these Train Slots will prevent it from developing new to rail traffic which will damage the rail industry. Freightliner have similar plans to develop new to rail traffic utilising the capacity from London Gateway relinquished by this removal, and have shared and evidenced this directly with Network Rail. The capacity held by these Train Slots, would, therefore, continue to be used for the transport of deep-sea intermodal volumes from London Gateway, albeit to a different inland terminal.

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

4.4.1 Network Rail must seek to allocate capacity in a way which shares the Network for all users. This includes the removal of Train Slots not being used, in order to allow other users access to that capacity.

4.4.2 Freightliner considers that, given the Train Slots had not been used for a significant period prior to issue of the Notice, and would not be used for a significant period after issue of the Notice, the only reasonable conclusion by Network Rail is that the Train Slots are not being used and therefore should be removed from the timetable under Part D8.5.

4 DECISION SOUGHT FROM THE CHAIR

6.1 Freightliner request the Chair determine that, in removing the 3 Train Slots included in the Notice subject to this dispute, Network Rail has acted reasonably and correctly, and that this is upheld.

5 APPENDICES

There are no appendices linked to this paper.

6 SIGNATURE

For and on behalf of Freightliner Limited

Signed

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Print Name

A black rectangular box redacting the printed name.

Position

Head of Planning (Long Term)