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Cc Paul Harris, Network Rail

6 May 2025

Dear Jonathan,

Appeal under Regulation 32 of The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the "Regulations")

Response to representations from Network Rail Infrastructure Limited dated 10 April 2025

We are writing in response to the letter addressed to you from Network Rail (NR) dated 10 April 2025, which we received from you by email on 15 April 2025. We would like to thank Network Rail (NR) for their representations.

We respond below to the representations made by NR. For the avoidance of doubt, where we do not directly address a point raised in NR's letter dated 10 April 2025, we should not be taken to have agreed to that point unless it is explicitly accepted below.

Preliminary Matters

A. Right to make an appeal

1. It is NR's position that Virgin Management Limited ("**Virgin**") has no standing to bring an appeal under Regulation 32 of the Regulations. Virgin strongly disagrees.



2. Regulation 32 of the Regulations provides that an applicant has a right to appeal to the Office of Rail and Road ("**ORR**") 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, an allocation body, a charging body, a service provider or, as the case may be, a railway undertaking.
3. The ORR's guidance in respect of the Regulations states that anyone: "*who comes within the definition of an "applicant" has a right to appeal pursuant to regulation 32(1)*". The ORR's guidance also stresses the breadth of the general right to appeal under regulation 32 (1).
4. As NR notes in its representations, an applicant is defined in Regulation 3 and means:

"a railway undertaking or an international group of railway undertakings or other persons or legal entities, such as competent authorities under the Public Service Obligations in Transport Regulations 2023 and shippers, freight forwarders and combined transport operators, with a public-service or commercial interest in procuring infrastructure capacity"
5. Virgin clearly has standing to bring an appeal under Regulation 32 of the Regulations. It is a "legal entity" with a "commercial interest in procuring infrastructure capacity" and therefore satisfies the definition of "applicant" for the purpose of the Rail Regulations.
6. As NR notes, Virgin made an application to ORR on 17 May 2024 for a new Track Access Contract to operate services between London Euston and the Midlands, North-West and Scotland. It has therefore demonstrated its interest in procuring infrastructure capacity and falls squarely within the definition of "applicant" in the Regulations.
7. Virgin also notes that the Network Code (at paragraph 3.2.1) states that the timetabling process is open to anyone who proposes to enter into a Track Access Contract. When making its application for a Track Access Contract, Virgin also agreed to be bound by the timetabling process in the Network Code.
8. The application made by Virgin was made on the basis that First Trenitalia West Coast Rail Limited ("**FTWCRL**") had not used, nor was likely to use, paths to operate a second hourly Liverpool service. It would be unfair for Virgin to be deprived of an opportunity to appeal the allocation process for infrastructure capacity, when that



allocation process is of direct relevance to its application for a new Track Access Contract. Virgin notes that under Regulation 19, an infrastructure manager must allocate infrastructure capacity in an appropriate, transparent and non-discriminatory manner. Virgin had an expectation (as underlined by Regulation 19 and Regulation 32) that NR, as infrastructure manager, would apply the Network Code and Network Statement properly and has been treated unfairly by its failure to do so.

B. Basis of appeal

9. NR appears to represent that Virgin cannot, through an appeal under Regulation 32 of the Regulations, complain about NR's decisions regarding a third party Access Beneficiary. This is incorrect and appears to suggest that pointing out NR's failures to comply with its own Network Code and Network Statement is not permitted as part of the appeal process under Regulation 32 of the Regulations – that cannot be what is envisaged by the Regulations.
10. Regulation 13(4) requires NR as infrastructure manager to include in the Network Statement the nature of the railway infrastructure which is available to applicants and the conditions of access to it; and a description of the principles and criteria for the allocation of infrastructure capacity; the procedures and deadlines in the capacity allocation process and specific criteria employed in that process. This includes, in particular, the procedures according to which applicants may request infrastructure capacity from the infrastructure manager; the requirements governing applicants under Regulation 19(17); the schedule for the application and allocation processes; and the procedures to be followed to request information about that schedule. NR is required to include information about the access criteria and process in the Network Statement and to ensure that applicants' legitimate expectations are safeguarded.
11. Regulation 32 of the Regulations provides expressly that a basis for appeal includes where an applicant has been unfairly treated as a result of the allocation process for infrastructure and its result.
12. In this case, Virgin has been unfairly treated by NR's failure to properly follow and apply the process for the surrender of access rights. An applicant for the purpose of the Regulations has a right to expect NR to follow the process set out in the Network Code. NR failed to do so in this instance and Virgin has been treated unfairly as a result.
13. The end result/embodiment of NR applying their infrastructure access process correctly or incorrectly is likely to be a decision under a third party access agreement



(i.e. giving access to one beneficiary/applicant not another). This cannot therefore be a bar to a Regulation 32 appeal as NR suggest.

14. We note that paragraph 1.3.3 of NR's Network Statement indicates that "*the Access, Management and Licensing Regulations also provide applicants with rights of appeal. These appeal rights apply if the applicant considers that it has been unfairly treated, discriminated against, or is in any other way aggrieved concerning the matters outlined in Regulation 32(2).*" There is therefore express reference to this appeal process in NR's Network Statement.

15. We believe that NR's failure to follow the correct process under Part J has led to Virgin being treated unfairly. In such circumstances, Regulation 32 of the Regulations provides an applicant (such as Virgin) with a right of appeal.

C. Remedy

16. In its appeal, Virgin requests that the ORR overturns NR's decision and instructs the correct application of Part J by NR. NR submits that there is no decision to overturn because NR was obliged to send a notice to ORR under Part J2.1.3 of the Network Code.

17. To be clear, Virgin's appeal relates to the decision by NR to modify the Track Access Contract of FTWCR. Virgin challenges NR's decision to accept the temporary surrender of rights that FTWCR purported to make under Part J2.1 and NR's decision to amend the Track Access Contract of FTWCR as a result.

18. As noted in our appeal, we do not believe that the use of Part J2.1.1 was correct, as it only applies to the surrender of Access Rights in circumstances where an Access Beneficiary has no current or foreseeable reasonable on-going commercial need.

19. That was clearly not the position in this case, as illustrated by the submissions made by FTWCRL dated 11 April 2025. In those submissions, there appears to be an acknowledgement that FTWCRL, at the time of the purported "relinquishment", had an intention to use the paths in the future.

20. In such circumstances, the process that should have been followed under Part J should have been Part J4 or even J2.3 requiring NR to carry out a consultation, including with Virgin who had made its application for paths in May 2024.



21. Virgin considers that ORR can and should overturn NR's decision and instruct it to re-run the process in a way that does not treat Virgin unfairly (i.e. that is in accordance with the requirements of the Network Code).

Substantive Application

22. In respect of the substance of its application, Virgin does not intend to repeat the points made in its application.
23. Virgin's position is that it has been treated unfairly because NR has not correctly followed the requirements of the Network Code. Virgin, and other aspiring Access Beneficiaries, are entitled to expect that NR correctly follows the Network Code and has a legitimate expectation that it will do so (e.g. under Regulation 13).

Failure to use

24. Virgin does not assert that NR was mandated to issue a Failure to Use notice, in circumstances where there had been a Failure to Use by FTWCRL. However, Virgin maintains that following 13 weeks of the paths being unused, and with no voluntary surrender having been made, NR should, in order to comply with its Better Use obligations under the Network Code and System Operator guidance letters have served a Failure to Use notice under J4.1 and J4.4. It appears from the documents provided by NR with its representations that it intended to issue a Failure to Use notice before its discussions with FTWCRL resulted in a different course of action being taken.

J2.1 Surrender

25. NR's attempt to justify the application of J2.1 to the temporary surrender of access rights that took place in this case ignores the plain and ordinary meaning of the words in J2.1.
26. J2.1.1 states:

"Without prejudice to the rest of this Part J, a Part J Access Beneficiary shall voluntarily and in good faith surrender those Access Rights or part or parts of such Access Rights in respect of which it has no current or foreseeable reasonable on-going commercial need..."



27. J2.1.1 places an obligation on an Access Beneficiary to surrender its Access Rights or part of such Access Rights in the circumstances in question. The relevant circumstances are where it has no current or foreseeable reasonable on-going commercial need.
28. NR appears to argue that the wording of J2.1.1 permits three courses of action (a temporary surrender, a managed withdrawal or an immediate and complete surrender of all rights) despite there being no express wording in J2.1.1 making reference to any such option. Its interpretation, including suggesting that there is to be a managed withdrawal when there is a current need but no foreseeable need is respectfully nonsensical.
29. The natural and ordinary meaning of J2.1.1 is clear. If an Access Beneficiary has no current or foreseeable reasonable on-going commercial need to its Access Rights then it must surrender them voluntarily. If, on the other hand, it does have a current need or a foreseeable reasonable on-going commercial need (such as in the case of FTWCRL, as shown in the FTWCRL submission) then it cannot surrender them voluntarily and J2.1.1 will not apply.
30. There is no right under J2.1.1 to a temporary surrender of Access Rights. In its submission, NR refers to a letter from Jake Kelly, Group Director, System Operator of 24 April 2023 and a reference in that letter to temporary surrender. NR appears to refer to that letter to justify the action that was taken, purportedly under J2.2.1 to accept a temporary surrender of FTWCRL Access Rights, without a consultation, in circumstances where FTWCRL did have a current or foreseeable reasonable on-going commercial need. However, there is no suggestion in the letter of 24 April 2023 that J2.2.1 should be the mechanism used for any temporary surrender. Virgin does not deny that temporary surrender of Access Rights could take place but it is J2.3.1 that refers expressly to temporary surrender and this is a different process which, critically, involves a consultation with parties that would include parties such as, in this case, Virgin.

Relevant Enquiry

31. The documentation shared by NR together with their representations show clearly that FTWCRL did not make a unilateral decision to issue a notice of surrender of Access Rights pursuant to J2.1.1.
32. It is evident from the meeting notes shared by NR that the temporary surrender of Access Rights was suggested by NR to FTWCRL and that FTWCRL sought comfort that



it would get its Access Rights back if it temporarily relinquished them. The documents shared by NR also make it clear that FTWCRL considered that it did have a reasonable on-going commercial need for the Access Rights - the use of J2.1.1. was clearly not therefore appropriate.

33. It appears that what took place was a negotiation between NR and FTWCRL regarding a temporary surrender of Access Rights (as an alternative to a notice of Failure to Use). Virgin maintains that these discussions, and FTWCRL's enquiries regarding the consequences of relinquishing Access Rights, must have formed the basis of a Relevant Enquiry (under J2.3). That then required a consultation to have taken place.
34. The use of the process in J2.1.1 following the negotiation that took place between NR and FTWCRL was not appropriate. J2.1.1 is intended for the unilateral surrender of Access Rights by an Access Beneficiary. The type of discussions that took place between NR and FTWCRL regarding the temporary nature of the relinquishment of Access Rights (not currently used), and whether those Access Rights could be returned, clearly required the consultation process in J2.6 to be followed.
35. We would also note that much of the chronology presented by NR relates to a period before the Access Rights in question were granted from December 2023. If NR are relying on conversations from 2023 to support J2.1.1 being the correct process to have followed, then they have seemingly knowingly granted rights in December 2023 that it knew would not be used until much later. That would seem inappropriate given the capacity constraints of the network.
36. It also appears that the discussions between NR and FTWCRL were continuing when Virgin made its May 2024 application for rights. That should have further highlighted the appropriateness of a consultation process.

In conclusion, Virgin has standing to make the appeal and has valid grounds to do so. For the reasons set out in our application, and above, we maintain that Virgin has been treated unfairly through NR's failure to follow correctly the process set out in the Network Code.

With respect, it is irrelevant that NR say that there is no point in Virgin appealing because of its view that overturning the NR decision does not mean that Virgin will secure the access rights. The paths should be open for other operators to bid for too. Virgin does not suggest that it should automatically be provided with the paths – just that it should be provided with the ability to bid for them.

Yours sincerely,



Phil Whittingham

Rail Consultant

Virgin Group