

APPLICATION TO THE OFFICE OF RAIL AND ROAD FOR A FREIGHT TRACK ACCESS CONTRACT, OR AN AMENDMENT, UNDER SECTIONS 17-22A OF THE RAILWAYS ACT 1993

1. Introduction

Please use this form to apply to the Office of Rail and Road (ORR) for:

- Directions under section 17 of *The Railways Act 1993* (the Act) for a new track access contract. This is for companies who want to use Network Rail's network where the parties are not able (for whatever reason) to reach agreement.
- Approval for a new track access contract under section 18 of the Act. This is for use where terms have been agreed by the parties.
- Approval of a proposed amendment to an existing track access contract, agreed by both parties, under section 22 of the Act.
- Directions under section 22A of the Act for an amendment to an existing track access contract. This is for someone seeking an amendment to an existing track access contract to permit more extensive use of the railway facility if the parties are not able, for whatever reason, to reach agreement.

Network Rail should normally take responsibility for the pre-application consultation, where the terms are agreed. Before a consultation is made, complete this form up to the end of section 7. You should fill in the rest of the form after the consultation and before applying to ORR.

If, in the case of section 17 and 22A applications, the beneficiary and Network Rail have been unable to agree terms, the beneficiary should:

- (a) ask Network Rail to conduct a pre-application consultation in line with the code of practice; or
- (b) conduct a pre-application consultation itself, in line with the code of practice; or
- (c) submit the application to ORR and ask ORR to conduct the consultation, in which case, please complete this form in full before submitting it to us.

The form sets out ORR's standard information requirements for considering applications. Our [track access guidance](#) explains the process, timings and the issues we will consider. You should use our current [model freight track access contract](#) as your starting point. Please read the guidance before completing the contract and this form.

We are happy to talk to you informally before you apply. Please contact us [here](#). You can download a copy of this form, and of our model track access contract, from our [website](#).

You may also use and adapt this form to apply to use railway facilities other than those of Network Rail. Do not use this form for HS1, for which a separate form is available on our [website](#).

2. The application

2.1 Title of contract or supplemental agreement (please also include the section of the Act under which you are applying):

Twenty Eighth Supplemental Agreement (Section 22A Application)

2.2 Contact details (Company and named individual for queries):

<u>Facility Owner</u>	<u>Beneficiary</u>
Company: Network Rail Infrastructure Limited ("Network Rail")	Company: DB Cargo (UK) Ltd ("DB Cargo")
Contact individual: Mike Pybus	Contact individual: Nigel Oatway
Job title: Customer Manager	Job title: Access Manager
Telephone number:	Telephone number:
E-mail address	E-mail address:
Address: Floor 4B, George Stephenson House York, YO1 6JT	Address: Ground Floor, McBeath House, 310 Goswell Road, London, EC1V 7LW

2.3 Licence and railway safety certificate: please state whether you intend to operate the services yourself or have them operated on your behalf.

DB Cargo intends to operate the services itself.

Does the proposed operator of the services (a) hold a valid train operating licence under section 8 of the Act or an exemption under section 7, or a European licence with a GB Statement of National Regulatory Provisions issued under the *The Railway (Licensing of Railway Undertakings) Regulations 2005* **and** (b) hold a valid safety certificate under the Railways and Other Guided Transport Systems (Safety) Regulations 2006?

If the answer to either (a) or (b) is no, please state the point reached in obtaining a licence, exemption and/or safety certificate (as relevant).

DB Cargo holds valid operating licences under Section 8 of the Railways Act 1993 and regulation 6 of the Railway (Licensing of Railway Undertakings) Regulations 2005 (as amended) ('the Licensing Regulations') as well as a Statement of National Regulatory Provisions granted under Regulation 10 of the Licensing Regulations. DB Cargo also has a Safety Certificate under regulation 7 of the Railways and Other Guided Transport Systems (Safety) Regulations 2006.

3. The proposed contract or amendment

3.1 Executive summary: please provide an executive summary of the proposed contract or amendment. This should cover the services, the commercial terms, and the reasons for making the application in the terms proposed. This information should be laid out clearly and concisely; and, in the case of an amendment, fully highlight the changes from the previous version of the contract.

Please also explain any important safety risks that have been identified arising from the proposal and how these will be controlled (by reference to the facility owner's safety authorisation and the train operator's safety certificate).

Please also state the commencement and expiry dates for the proposal, and, for new contracts or extensions to existing contracts, provide justification for the proposed duration of the contract where the total exceeds five years.

Date of commencement: The date of ORR's approval of this proposed agreement.

Expiry date: PCD December 2026

The Rights Table in Schedule 5 of the Track Access Contract (Freight Services) dated 11 December 2016 between the Parties ("the Contract") shall be amended by adding Flows 9, 10 & 11 to Service Groups 4075. Firm Rights for these additional services are required to enable DB Cargo to meet its customer's requirement for one return intermodal service from Tees Dock to Mossend and one return intermodal service from Grangemouth to Tees Dock. Further detail can be found in the attached Commentary and Annex 1 of the Supplemental Agreement.

3.2 Terms not agreed with the facility owner (for applications under sections 17 or 22A only): please set out here any areas of the application which have not been agreed, the reasons for the failure to agree and the reasons for seeking these provisions. Please state the efforts you are making to resolve any disputes.

All of the services contemplated by this proposed 28th Supplemental Agreement are already operating and have validated Train Slots in both the December 2019 and May 2020 Working Timetables. These services convey intermodal containers, which is a rail freight market segment that is under intense competition from road transport. Consequently, to give DB Cargo and its customer a reasonable degree of certainty in future timetables, Firm Rights with one-hour flexing windows are being sought. Unfortunately, Network Rail is only prepared to grant Contingent Rights with 24-hour flexing windows, which offer very little, if any, certainty and therefore is unacceptable to DB Cargo. Despite the fact that the services are operating currently, DB Cargo understands that the main reason for Network Rail's reluctance to grant (i) any Firm Rights at all and (ii) Firm Rights with one-hour flexing windows is because the services operate for part of their journeys over the East Coast Main Line citing its East Coast Main Line (ECML) Access Rights Policy ("the Policy") which, in summary, provides the following:

- The aim of the ECML access rights 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.
- Network Rail policy is 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 firm.

DB Cargo notes that the Policy does not prevent Network Rail granting Firm Rights 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 services operate over the same sections of the ECML that a number of the rights directed in ORR's 12 May 2016 letter also operate over, it has not been demonstrated by Network Rail to DB Cargo's satisfaction that there are any material conflicts between the two sets of requirements. If this is the case, then DB Cargo submits that there should be no reason why its proposals should not be granted alongside those rights directed in ORR's 12 May 2016 letter, particularly as DB Cargo's proposed services have been validated against relevant train services in the December 2019 and May 2020 WTT's.

DB Cargo is continuing its discussions and correspondence with Network Rail over this application.

3.3 Departures from ORR's current model freight track access contract: please set out and explain here any:

- Areas where the drafting is different to ORR's published template freight track access contract. Please explain why these departures have been made.
- Instances where the proposal departs from the charging and/or performance regimes established by ORR's latest periodic review (or subsequent interim reviews) as reflected in ORR's model freight track access contract, including the financial implications (e.g. establishment of an access charge supplement or rebate).
- New processes (e.g. self-modification provisions) which have been added. Please demonstrate how these new processes are robust and complete.

Not applicable

4. The expression of access rights and the use of capacity

4.1 Benefits: Please provide full descriptions of any new rights required, as compared to the previous contract (in the case of an amendment). Why do you need these new rights (if any)? Please describe any significant changes in the pattern of services and any impact on other operators, including other freight operators. Please provide a fully

marked-up version or document comparison of any tables in Schedule 5 which are being modified as a result of this application.

The additions to the Rights Table will facilitate the conveyance of customer's traffic in accordance with their evolving requirements and ensure that the intermodal traffic is conveyed by rail rather than road transport.

A fully marked up version of the Rights Table to be modified in Schedule 5, together with a commentary detailing the changes to be made to the Contract, will be submitted with this application.

4.2 Adequacy: please set out how you have satisfied yourself that there is enough network capacity for the proposed and/or amended services (or will be at the time of service operation). Please also set out whether there are any implications for overall network performance and the facility owner's maintenance and renewal activities. Please confirm whether the proposed Rights will involve operation over an area subject to a Declaration of Congested Infrastructure, or whether the capacity requirement will result in a Declaration of Congested Infrastructure by Network Rail (under the Network Code).

The trains in this proposal have been validated against all relevant train services in the December 2019 and May 2020 WTT's.

4.3 Firm Rights: Do these Firm Rights in the proposal contract relate to service freight haulage contracts which you hold or will hold? If so, how? How does the duration of these haulage contracts compare with the duration of the proposed track access contract?

DB Cargo will operate these services on behalf of its customers and expects to continue to do so until the expiry of the Track Access Contract. Firm Rights with one-hour windows are required to support on-going time-critical intermodal services.

4.4 Contingent Rights: please set out the extent to which you expect to use the Contingent Rights in the application. In particular, please state whether the proposed rights are seasonal (eg 3 months each year) or occasional (eg MO, SX, etc).

Not applicable

4.5 Window size: Please set out the reasons for the origin and destination window sizes used in the Rights Table in Schedule 5.

As stated in paragraph 74 of ORR's letter dated 29 February 2016 "*Directions in respect of a track access contract between Network Rail Infrastructure Limited and DB Schenker Rail (UK) Limited*", ORR expects the default position for window size of freight Firm Rights, backed by commercial contracts with end users, to effectively be one-hour windows. Whilst DB Cargo acknowledges that this does not preclude windows of other sizes being agreed, given the intense modal competition in conveying intermodal containers, one-hour windows will provide a reasonable degree of certainty for DB Cargo and its customer to ensure that the traffic is not lost to road transport.

4.6 Long term planning process: please state which Route Studies are relevant and whether the proposed rights are consistent with them. If they are not consistent please give the reasons. See Network Rail's [website](#). What consideration has been given to

any issues emerging from relevant Events Steering Group concerning capacity on the routes covered by the application (if Network Rail network).

The proposed rights are consistent with all relevant Route Studies established to date, particularly the Northern, Scotland and Freight.

5. Incentives

5.1 Train operator performance: please describe any planned projects or initiatives associated with the operation of the proposed services aimed at improving your performance (including faster or longer trains).

There are no planned projects associated with the particular flows in the Twenty Eighth Supplemental.

5.2 Facility owner performance: please describe any planned projects associated with the operation of the proposed services aimed at improving the facility owner's performance.

There are no planned projects associated with the particular flows in the Twenty Eighth Supplemental.

5.3 Restrictions of Use: set out and explain the reasons for any changes from the Restrictions of Use regime in the model freight track access contract (Schedule 4).

Not applicable.

6. Enhancement

6.1 Enhancement details: where the proposal provides for the delivery of any network enhancements, or the services in the proposal are subject to any planned network enhancements, please give full details of the relevant enhancement schemes, including a summary of outputs from the scheme, timescales and the extent to which the network change procedure in the Network Code (Part G) has been completed (where appropriate, by reference to submissions made under ORR's enhancement reporting framework).

There are no network enhancements associated with this Twenty Eighth Supplemental.

6.2 Enhancement charges: please confirm that the arrangements for the funding of any network enhancements are consistent with ORR's [Policy Framework for Investments](#), and summarise the level and duration of payments, and the assumed rate of return (see chapter 3 of the Conclusions document).

Not applicable

7. Other

7.1 Associated applications to ORR: please state whether this proposal is being made in parallel with, or relates to, any other current or forthcoming application to ORR (e.g. in respect of track, station or light maintenance depot access contracts).

Not applicable

7.2 Unregulated access: please comment on whether any contracts are being negotiated for access to a facility adjoining Network Rail's network (e.g. to a freight light maintenance depot), including where ORR's approval is not required. For more information, see [The Railways \(Class and Miscellaneous Exemptions\) Order 1994](#). (This is relevant in the context of clause 6.4 of the model contract.)

Not applicable

7.3 Supporting information, side letters and collateral agreements: please:

- state here any relevant information in support of the proposal, including a list and explanation of any other material being submitted (and supply copies with the application).
- confirm here that the whole of the proposal between the parties has been submitted with this application and that there are no side letters or other documents which affect it.

A spreadsheet and commentary relating to changes in the relevant sections of the Rights Table is attached with any amendments being highlighted accordingly (see Annex 1).

The whole of the proposal has been submitted, and there have been no side letters or other documents between the parties that relate to this application.

7.4 Confidentiality exclusions: please list any parts of your application which you have excluded on the grounds of confidentiality, from the version of the application sent to consultees for any pre- application consultation process, and provide reasons. If there has been no pre-application consultation, you should state any parts of the application you want us to exclude from publication.

Customer details are excluded from the Rights Table

8. Pre-application consultation

Note: Where a pre-application consultation is to be undertaken in line with the Code of practice for industry consultations, the remainder of this application should not be completed until after that consultation has been completed.

8.1 The consultation: has a pre-application consultation been carried out in line with the [Industry code of practice for consultations](#)? If yes, please:

- state who conducted the consultation;
- list all train operators and any other parties that were consulted, stating which parties responded and attach their responses and any associated documentation to this form; and
- state the period allowed for the consultation. If this was less than one calendar month, please explain the reasons for this.

If a pre-application consultation has not been carried out, please explain the reasons and whether any informal discussions have been held with any third parties who might be affected by this application and the nature of any concerns which they raised.

DB Cargo's 28th Supplemental was presented at Network Rail Sale of Access Rights Panel (SoAR) on Monday 11th November 2019, prior to Industry consultation which was undertaken by Network Rail on DB Cargo's behalf. The consultation was issued to all relevant Train Operators and Stakeholders by Network Rail on 22 April 2020 with a deadline for responses of 22 May 2020.

8.2 Resolved issues: please set out any issues raised by consultees which have been satisfactorily resolved. You may wish to refer to responses attached to this form. Please explain any changes as a result of the consultation.

All issues raised by consultees have been resolved. Full consultation documentation (including all responses from consultees and subsequent resulting correspondence) is attached to this application.

8.3 Unresolved issues: please set out any issues raised by consultees which have **not** been resolved to the consultee's satisfaction, including any correspondence with that consultee. You may wish to refer to responses attached to this form. Please explain why you think these issues should not stop ORR approving the application.

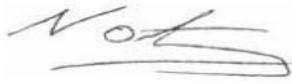
Not applicable

9. Certification

Warning: Under section 146 of the Railways Act 1993, any person who, in giving any information or making any application under or for the purposes of any provision of the Railways Act 1993, makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, is guilty of an offence and so liable to criminal prosecution

In the case of agreed applications under section 18 or 22, the facility owner should fill in the information in the box below. For disputed applications under section 17 or 22A, the applicant should fill in the required information.

I certify that the information provided in this form is true and complete to the best of my knowledge



Signed: _____ Date: 17 June 2020
Name (in caps) NIGEL OATWAY Job title ACCESS MANAGER
For (company) DB CARGO (UK) LIMITED

For section 18/22 applications, please provide a letter of support from the beneficiary or ask them to sign here:

Signed Date.....
Name (in caps) Job title
For (company)

10. Submission

10.1 What to send: please supply, in hard copy or electronic format, the signed application form, one copy of the proposed contract or amendment, with copies of any documents incorporated by reference (other than established standard industry codes or other documents) and any other attachments, supporting documents or information.

10.2 Where to send it:

Freight Track Access Manager
Access and Licensing Team
Directorate of Railway Markets and Economics
Office of Rail and Road
One Kemble Street
London
WC2B 4AN

Email: track.access@orr.gov.uk