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Sunil Gupta, Esq.,
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Dear Sunil,

This is the response of Freightliner Ltd to your consultation document on model clauses for track access agreements issued this month.

We have no objection to the construction of model access clauses provided that this activity does not impede the speedy resolution of other issues facing the industry. We naturally welcome the opportunity offered in paragraph 1.11 to comment on freight-specific issues; it would be helpful to learn if there are particular freight issues you have in mind. However, we cannot accept that the clause improvement process should impart any delay into the urgent renewal of our access agreements.

Your description of the railway industry context is, in our opinion, deficient in one important regard; that is that the direct customers of the monopoly supplier (Railtrack) are operating in an overall transport market which is not regulated. Rail regulation must always, therefore, pay particular attention to the impact it has on the larger market position of its clients as well as the internal rail industry arrangements, which can become too dominant a focus. Thus, for instance, our pressing need to undertake significant capital investment is currently more adversely affected by regulatory uncertainty than it is by contractual deficiencies. We have had no difficulty in raising funds against the current contractual background; we cannot raise funds at all when the key elements in our commercial structure are subject to change and uncertainty.

Our starting position in relation to your detailed consultation points is one of an operator whose market, dominated by highly-competitive road costs, is unlikely to be able to fund significant investment in Railtrack's infrastructure; the infrastructure capabilities in terms of journey times are entirely suitable for our present and future needs, and changes in capacity and other capability factors are likely to be justified on non-user benefit grounds and to be available to all open access operators. We therefore expect the arrangements for such developments to be concluded outside the framework of our track access agreement, usually with other bodies as the principals.

In the light of this, our answer to your questions in paragraph 2.11 is that the commercial purposes of our access agreements will be plain from the content of the agreement and not have the complexity which might be expected from more ambitious documents. It would, however, be helpful to understand the benefits which have arisen from the insertion of such clauses.

We have no special issues with Railtrack on their day-to-day operation of the network, and have not so far felt a need for the types of clause you describe in paragraph 2.13. Is there evidence that this type of clause is effective in improving the performance of parties to such contracts?

In relation to your paragraph 2.18, we believe that absolute access rights could over time militate against the interests of other network users and, possibly, the network itself. It is, therefore, necessary to maintain the framework for adaptation represented by the Rules of the Route and the Rules of the Plan, but we agree that there may need to be greater safeguards for operators in the way these are compiled and implemented; it would be dangerous to make this dependent on unanimous operator agreement, but simplification and improvement of the appeals procedure requires examination. For a national operator, the present procedures are relatively difficult to operate effectively and in a timely fashion.

We are not able to comment on those of your questions in this section which seem to have specific passenger application; however, we support "use it or lose it" provisions for access rights which are seeking the allocation of future capacity. So far as journey times are concerned, we believe that maximum agreed journey times should not be capable of unilateral extension by Railtrack, but the agreed maximum times need to reflect the practicalities of running a railway.

Clause 6 of our agreement requires Railtrack to maintain and operate the network to a standard which permits the operation of our contractual services, ensuring that adequate and suitably qualified personnel are engaged in such maintenance and operation. This appears fit for our purposes. We have no provision for the 5 year statements you describe as being in the passenger agreements, and we are therefore wholly reliant on Railtrack's Licence Condition 7 and its enforcement by the Regulator; we would be pleased to learn why inclusion in our access contract would be a superior route, since as yet we have not been made aware of deficiencies in your processes. In the context of a commercial industry we would not wish to have Railtrack as an unwilling partner in network development, and we believe it is unlikely that we could define our future requirements in enforceable terms in our uncertain market

place at no net cost to ourselves. Our competitive market place does not allow us to pay a higher price now in the expectation of receiving future benefits for which there is no certainty of demand.

We are at present content with the application of Part G of the Track Access Conditions.

The practicalities of producing “local output statements” (paragraph 2.28) for national operators appear difficult. Equally, tying national operators into a multiplicity of route-based contracts will add yet more complexity to their task, potentially reducing their competitiveness in the external transport market. Despite its weaknesses, we need to be able to see the national position in the sort of format adopted in the *Network Management Statement*, and would not support any development which led to fragmentation. We cannot afford to maintain a very detailed scrutiny of the whole network, and our prime concern is with its outputs as they affect us. We expect input-related scrutiny to follow from output monitoring and for difficulties to be addressed, if not by the Regulator, by the Strategic Rail Authority. Railtrack’s Network Licence seems to offer the best approach to enforcement from this stance.

On paragraph 2.34, we support the view that Railtrack should provide express assurances in relation to the capacity it is selling. Compensation equivalent to lost operator revenue should be paid for train paths which are not provided.

In relation to liability for operational performance (paragraph 3.2), there is a clear link to the question of express assurances dealt with above. It is not usual for consequential loss to be provided for in most commercial contracts, since the risks are usually difficult to measure in advance and the potential burdens usually attract premium pricing. Our market competitors do not recover such losses in this way, and we would only be able to accept a substantially-enhanced performance regime if it came, effectively, free of charge.

Any consideration of liability - and any flow-through into pricing - must ensure that we have comparability so far as practicable with the conditions faced by our market competitors. If rail decides to be out of line in a way which increases our costs, it is likely to lose business. If improvements in Railtrack’s liabilities can be achieved without cost to us, we are of course wholly in favour, but reciprocity is likely to have a bearing on our transport market position.

We agree that in general specific performance (paragraph 3.8) has greater value to us than money compensation, and would welcome the provision of fast-track routes to this end. Our experience suggests, however, that recourse to judges or arbitrators usually arises when the wording is capable of several interpretations, and we would promote clarity of language as the best weapon, with the possibility of injunction in reserve.

I hope these comments are helpful; please do not hesitate to let me know if you would like any further information or to discuss the issues. I am conscious that we may not have fully

understood your thinking in these areas, and would be pleased if you could explain any apparent glaring misunderstandings on our part.

Yours sincerely,

Robert Goundry
Director of Strategy