Rail Freight Group

Response to ORR consultation on Model Freight Track Access Contract September 2003

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1. Introduction

Rail Freight Group supports the objectives of the Regulator in producing a model track access contract for freight. In particular we believe that model clauses will reduce transaction costs and promote fairer competition among operators. The process also has the potential to give freight operators greater clarity and assurance about the extent, capacity and capability of the network available for freight traffic and to ensure that where capacity is limited it is used efficiently. All of these will improve the climate for growth of freight on rail and achievement of Government and SRA targets.

Many of the matters discussed in the consultation document are of a detailed or technical nature and we believe that freight operators who work on a daily basis with access issues are best placed to provide feedback on the Regulator's ideas. We urge the Regulator to give appropriately heavy weight to the views of freight operators. We also believe that in finalising his model clauses for freight, greater weight should be given to what will work in practice than to ideal principles or perfect consistency – that is the Regulator should take a pragmatic approach. Most particularly the Regulator must bear in mind the needs of end customers, the nature of the commercial relationships between operators and their customers and the need to minimise the costs borne by freight operators since these can only be passed on to customers. Any increase in the cost of track access will result in business being lost to road transport.

The Rail Freight Group's key concerns are:

- securing capacity on the network for freight services,
- clarity and assurance about the extent, capacity and capability of the network available to freight
- fair competition among operators,
- a smooth mechanism for transfer of access rights exclusive to a customer when that customer changes operator
- keeping the cost of track access down

2. The Expression of Freight Access Rights

2.1 Classes of freight access rights

2.1.1 Level 1 and level 2 rights

RFG supports the principle of having rights of different kinds (such as level 1 and level 2) with different degrees of flex as this gives Network Rail a greater degree of flexibility in compiling timetables while at the same time safeguarding the timings of trains which require a greater degree of certainty. However, we do understand that in practice this may have resulted in an inefficient and perhaps unfair allocation of capacity and that something more is needed, in particular, in the coal–to–power-stations market to make better use of limited capacity and to ensure fairness.

2.1.2 Level 3 rights

We have discussed the need for Level 3 rights for coal traffic above and in paragraph 3.5 below.

However, the problem of long term rights for freight to access the network remains. If operators are to continue to invest in equipment with relatively long lead times ahead of firm contracts and if customers are going to re-engineer their supply chains in favour of rail, there must be a degree of assurance that capacity which may be available today will still be available tomorrow when services have been developed and the customer is ready to sign the contract.

It would seem appropriate that capacity is identified and reserved for freight growth through an independent mechanism rather than in individual bi-lateral track access contracts and the SRA's West Coast Strategy provides a useful model for this both in its outcome and in the way in which is was developed through an inclusive industry process.

The Regulator should take account of the SRA's Route Utilisation Strategies developed under this model but must take his own independent view of the appropriate allocation of capacity and to this end will need to consult the industry directly.

For specific new flows, within perhaps 6-12 months of launch there may be a case for a short term option for specific access rights to be secured to enable operators to carry the costs of start-up with less risk.

We look at the need for long term capacity reservation in the Appendix to this response. It is a matter which is of vital importance to the rail freight industry.

2.1 3 Spot bid rights and STAGA

There is a clear case for consistency in the ability of freight operators to make spot bids. RFG also supports provision of the same spot bidding rights to new operators. This would suggest that a new General Approval to replace STAGA would be the preferable option.

2.2 Specific elements of access rights

2.2.1 Permission to use the network on a route or network-wide basis

RFG has long advocated a much clearer and generally available statement of the extent, capacity and capability of the network in order to give operators, their customers and others investing in rail facilities the best possible information. We believe that operators should have permission to use the network on a network-wide basis subject to these freight operating constraints.

We believe that restricting access on a route by route basis would unnecessarily constrain freight operators' ability to respond flexibly to existing customers needs and to plan for the requirements of new traffics. We believe that the operating constraints should be bought together in a readily accessible format and must be up to date and comprehensive.

We note that sectional running times for class 66 locomotives are still not available and that this may lead to operators being refused access or offered inefficient paths when workable paths are in fact available.

We do not agree that Network Rail should be allowed to impose absolute tonnage limits on any route; we believe such a limit would not be workable in a fair manner. We note that where traffic is changing routes around the network, for example as a result of imported coal switching ports or substituting for indigenous resources, Network Rail will experience the effects of absolute tonnage reduction on some routes with an absolute increase on others.

While renewals might have to accelerated on the one they might be postponed on the other. Freight access charges already cover the additional maintenance requirement. Where increased use is a result of growth we believe that any genuinely additional costs should be dealt with as part of the periodic review settlement retrospectively or by making an allowance for anticipated growth and a subsequent adjustment against the benchmark in the light of what actually happens.

2.2.2 Definition of routes

Overall journey times and other route specific characteristics can be fundamentally important to the economics of rail freight movements and where operators require or desire it we believe that routes via specific intermediate points should be specified.

2.2.3 Flexing of level 1 rights

The question of acceptable flex is not as simple as it at first appears. It is not just 'obviously' time sensitive traffics the viability of which can be undermined by too much flex. Some traditional flows have equally tight delivery windows or their economics may depend crucially on fast turnaround of equipment, efficient driver utilisation, or sharing resources with another flow. While the Regulator may wish to move towards a 'standard' flex it will be important to allow variations from this depending on the nature of the traffic and the underlying economics and end-user requirements.

2.2.4 Specified and registered equipment

RFG believes that the equipment suitable or acceptable for any given route should be defined by the freight operating constraints and there should not be an additional 'hurdle' to clear before running specific equipment on a given route. It will still be necessary to demonstrate that any new equipment is compatible with the freight operating constraints on any given route but once this has been demonstrated any route with the same operating constraints will be available for that equipment. Special derogations could be sought and given for occasional use of non-compliant equipment.

2.3 Diverted varied and additional services and moving trains onto and of the network

2.3.1 Additional and varied services

RFG supports the Regulator's view that freight traffic justifies more detailed provisions for diversionary services than passenger traffic. Freight operators are generally extremely willing to work with the infrastructure operator to identify acceptable alternative routes to facilitate engineering works. The problem appears to have been a lack of forward planning to ensure diversions are available at the right time. The Regulator is right in saying that cancellation of service can result in loss of business to road and that financial compensation is inadequate in these circumstances.

RFG believes freight operators do need the ability to request additional or varied services in addition to spot bidding rights under a new general approval. This is because some new business is long term and requires investment which will not be made against the uncertainty associated with short term rights attainable through the spot bidding process.

2.3.2 Moving trains onto and of the network

RFG understands the importance of all parties having clarity about the process of moving trains onto and off the network and being incentivised to minimise any delays resulting from this procedure. We would support retention of this provision.

2.4 Cordon Caps and curfews

2.4.1 Cordon caps

The cordon cap idea was introduced as a way of limiting the infrastructure operator's exposure to demand in excess of supply for paths through certain pinch points. In the more mature and competitive rail freight market which now exists and in the light of more pressure on limited network capacity we believe the cordon cap mechanism is rather clumsy and needs to be dropped altogether at some locations and replaced with a more sophisticated mechanism at others where a genuine problem persists. Limited paths should be allocated by a neutral party in proportion to operators' actual needs.

2.4.2 Curfews

RFG does not support the continued or more general use of curfews, which we see as institutionalised discrimination and which are likely to contravene EU open access legislation.

3. The transfer of rights and extinguishing of unused rights

RFG is strongly in favour of mechanisms which allow the smooth transfer of rights from one operator to another in a case where these rights were held for the exclusive use of a particular customer and that customer chooses to change operator. We are also strongly in favour of a use-it-or-lose-it (UIOLI) mechanism which retains former freight access rights for use by other freight operators and promotes clarity about the exact availability of capacity on the network.

3.1 Possible implementation via the network code

RFG supports the suggestion of implementing change through the network code.

3.2 The need for change

RFG understands that the main area of concern for both the rocker mechanism and the UIOLI mechanism is in the movement of coal for electricity generation and we suggest that specific arrangements need to be made for this traffic which both requires considerable flexibility on a week by week basis and is now fiercely competitive.

3.3 The rocker mechanism

Where rights are held exclusively for the use of a single customer and that customer chooses to change operator (provided there is no breach of contract), the rights should transfer promptly, certainly in significantly less than the current 60 day notice period. This could perhaps be achieved by identifying such rights as a distinct subset of level 1 rights at the time the rights are sought. There may still be an ongoing requirement for a rocker mechanism in cases where there is some dispute or it is not clear whether or not a service runs for the exclusive (or substantial) use of a specific customer.

Operators should not be required to relinquish rights for genuine multi user services or network services except through the UIOLI mechanism. We are very concerned that the economics of traffics which share the same trains or the same regular timetable slots should not be undermined by artificially allocating a proportion of the rights used in proportion to the ‘share’ of the shared resource (train or timetable slots) used. One fifth of a train five days a week is very different in economic terms from a single train once a week.

3.4 UIOLI

RFG believes that the rocker mechanism should be used for transfer of rights where business transfers between operators. The UIOLI mechanism should be used when an operator is seeking new rights for new business which cannot be accommodated at the times and on the routes requested without another operator relinquishing unused rights. In general operators should not hold rights they are not using because this gives a false impression that capacity is not available on the network for new business. However, we consider that operators will not be incentivised to release rights they are not using unless clear provision is made to protect capacity on the network for freight.

Provision needs to be made for automatic release of rights where they are not being used perhaps on a voluntary basis backed up by a compulsory annual review and for release of unused or underused rights more quickly if another user has a commercial need for them.

We believe that the process for release of rights on request should be streamlined and needs to be much faster.

The standards period of non-use leading to a right being withdrawn should be much shorter than a year but there must be provision for appeal in cases where there are specific reasons for this, for example the reduced level of service which EWS could run via the Channel Tunnel as a result of the illegal immigrant crisis. The demonstration of ongoing commercial need is the right criterion against which judgement should be made on whether or not rights should be relinquished under the UIOLI mechanism.

Under use as opposed to non-use is much more problematic. There may be good social, environmental and commercial reasons why a particular timetable path should be used by a daily rather than a weekly or less frequent service. However, this would appear to be in the territory of negotiated compensation to the displaced operator. It may be that rights which use timetable paths inefficiently should be granted on a shorter timescale than rights for traffics which use capacity more efficiently.

3.5 An independent rights holder

We understand that there is a variety of view among freight operators about the need for a 'RightsCo'. The need for such an independent or procedure may be different for coal as for preserving long term capacity for freight – discussed in more detail in the Appendix.

There are a number of different mechanism and structures, ranging from an independent Rightsco to Network Rail undertaking the work under supervision of the Regulator.

It may be that such a model adds little to the combination of Rocker mechanism and UIOLI. However, we believe that there is a case for something like this both in the ESI coal market and potentially more generally as an alternative or in addition to identification of freight capacity through the SRA's Route Utilisation Strategies.

Where rights have to be rationed among operators or where the needs for rights change on a very frequent basis, as in the ESI coal market the procedures used by RightsCo would be different from circumstances where sufficient capacity is available for all where the UIOLI and Rocker mechanisms would be applied.

3.6 Short term rights for paths on congested parts of the network

The problem with trying to solve the ESI coal problem by allowing only short term access rights is that the *traffic itself* is in fact very long term, even though the specific rights required by an operator this week may be different from those required next week. Long term rights are required to give adequate security and assurance to the customers and suppliers of power station coal, to those investing in equipment and facilities and to protect their interests in industry processes. Passenger operators on congested parts of the network would not be content with short tem rights so there could be an inconsistency in the level of protection for passenger and freight services on these routes. Without the protection of a RightsCo owning the long term rights for freight this idea is not attractive.

3.7 Path cancellation fee or reservation charge

Theoretical economics would suggest putting a price on rights whether used or not would properly incentivise operators to use capacity efficiently. However, RFG believes that the

idea could be administratively onerous, would not obviate the need for the rocker and UIOLI mechanisms and would be likely to add to overall costs. We believe the other mechanisms proposed should be tried first before any decision is taken to introduce further complexity into the charging mechanism.

4. Performance and restriction of use regimes

The key issue under this heading is the affordability of performance and restrictions of use regimes.

4.1 Performance regimes

4.1.1 Basis of delay assessment

Some freight trains run late as a result of trying to accommodate customers; requirements and cause no delay to other trains on the network. We therefore do not support a regime based on own delay minutes. The current third party delay regime also has difficulties because of disputes over allocation of delay minutes and the fact that Network Rail is not incentivised to minimise knock on delays. We believe there could be merit in looking at a KPI based regime which relates performance penalties to the factors under the direct control of freight operators. A third party or other regime which allowed Network Rail to recover less than 100% of its expected costs would also incentivise Network Rail to clear freight related delays as quickly as possible.

4.1.2 Caps and Benchmarks

The level of compensation payable under any regime must take into account the fact that freight operators are already incentivised to perform through their contracts with customers, that Network Rail delays can impose real additional costs and cause loss of business, and that freight operators are very much smaller than Network Rail and therefore incentivised at much lower absolute levels of penalties and, equally, seriously damaged by much smaller levels of poor performance. This is particularly true of small and new operators. We believe this justifies some asymmetry in the treatment of freight operators and Network Rail including, for example, the retention of incident and period caps.

Whatever benchmarks are chosen they should be fair among competing freight operators, they should not be reset to take into account the significant deterioration of performance since the Hatfield incident, they should be affordable and not deter new entrants.

4.2 Restriction of use regimes

The problem with introducing a restriction of use regime involving financial compensation is that there is no level of compensation which would be an effective incentive to Network Rail while at the same time being affordable by freight operators if recovered through an access charge supplement. There appears therefore, to be no alternative to a regulatory solution and code of practice which requires Network Rail to plan properly, effectively and in a timely manner to provide alternative routes with the necessary characteristics and which requires freight operators to cooperate and accept restrictions of use when they are planned properly, notified in a timely manner and an alternative route is offered.

5. Other Issues

5.1 Obligation to provide information

Essential information about the network is not always available from Network Rail and is not always provided in a user friendly format or in a timely manner. Information about the network-wide freight operating constraints should be published in a readily accessible format and should be complete and up-to-date. Variations in the freight operating constraints should be treated as Network Change and, within a control period, if objections to the change are received Network Rail should have to reinstate the capability at its own cost if freight operators require to use it.

This information should be accessible not just to freight operators but to those with a bona fide reason for requiring it. This should include consultants, developers, local authorities, port operators, customers and would-be train operators and their representatives. There is no reason why this information should be kept secret.

It is important that freight operators are not asked to fund the reinstatement of former freight operating capability which has been allowed to lapse if traffic returns to a route after a gap. The Regulatory settlement will be made on the expectation that Network Rail will provide a network with defined characteristics, these must be well understood and documented and that is what Network Rail must provide.

5.2 Consultation Rights

Whilst agreeing with EWS about the need for Network Rail to consult train operators about their future plans, we do not think the ORR proposals in this section go far enough.

Firstly, it is essential that Network Rail consult about any additional access rights sought by passenger operators, at least until there is a satisfactory mechanism in place for preserving long term capacity for freight, as proposed in our response and in the Appendix.

Secondly, there should be a requirement on Network Rail to consult the industry more widely than licenced train operators. For example, those seeking licences to run trains in the future, those operating terminals and those companies who are asking to buy train paths without becoming train operators, all have a right to know what plans Network Rail might have that would affect their businesses. We urge the Regulator to accept that these are reasonable needs, and to consider how they might be met.

5.3 Liability Caps

RFG supports the continued use of liability caps but that these should recognise the different exposure to risk faced by freight operators and the difference in scale of freight operators compared with Network Rail. This would suggest that caps should be lower for freight than for passenger operators and lower for freight operators than for Network Rail. We would not wish to see a significant increase in caps over their current levels since this could make the risks untenable, insurance being unaffordable even if it were available.

5.4 Incremental improvements and costs

RFG believes that for small adjustments to the freight operating constraints such as the reopening of a signal box funding should be rolled into the periodic review settlement since the costs are likely to be so small that Network Rail can carry them, some increased costs will be offset by reduced costs elsewhere as traffic ebbs and flows around the system.. This is also the best way to ensure fairness and consistency between all operators and customers and between existing and new traffics.

Major changes to the capability of the network eg. loading gauge enhancement, are unlikely to be paid for by a single operator but if that were the case it would be necessary to ensure that any operators who subsequently benefited from the increased capability contributed appropriately to the cost of the enhancement.

5.5 Disputed Invoices

RFG supports the suggestion that freight operators should have the right to withhold payments if invoices are believes to contain a manifest error.

5.6 Unilateral Right to Terminate

RFG supports retention of this provision.

Appendix - Preserving capacity for freight

One of the issues discussed at the ORR workshop on 12 September and of continuing concern to freight operators is how to preserve capacity for existing and future growth of freight traffic.

There are two separate issues – freight and passenger, and one freight operator and another one. We concentrate on the first of these.

There is concern in the rail freight industry that, given the SRA's role in the direction of passenger franchise operations, and in funding Network Rail, the needs of the private sector freight operators in securing and retaining long term commitments to freight paths may be at risk. This should be for a longer period that existing freight access contracts, recognising that freight is an open access operation.

Taking as an example the future needs for greater port capacity in the UK, it is clearly necessary for the UK authrotiies to demonstrate that adequate infrqscture investment wil lbe made alongsode the investment by the private sector in ports, shipping, terminals, wasgons etc, It is governemtn policy to encourage the growth of ports to cope with planned traffic growth ; it is not reasonable for such private sector invewtment to haqppen without a commitment from Goverment, the infrasctuere provider, tro ensure that infrascture, capabilty and capcity, ill be provided, reserved or enahynbced to enable suc hrpivate3 secto0r investment not only to service the needs of the UK but also enable investors to obtain a resonable return on their investmetn.

It is thus entirely proper for the ORR to provide the mehcanism fo rensuring that there is a long term infrasctuere chain on the railways for freight ; this includes the reservation of capcity as well as capabilty.

Without such long term commitments, there is a risk that the SRA woud ihnstruct Nmetwork Rail to downgreade its network to the detrimnet of freight. It may then be that the SRA woud be failing in its duty to promote freight, but that is of little comfprt to freigtht operators.

How to achieve capacity reserved for freight, even if it is not used every day, week or month? We argue that it must nevertheless be available to enable new business to be planned and to cater for changes in demand.

Defining a path

To reserve a path, or a family of paths, they must be capable of definition. A start was made in the SRA's Capacity Utilisation Policy, June 2003, which listed, in Appendix D, the Long Distance Statement for Freight over a number of major routes. For each route, it lists the number of trains in a typical weekday off-peak hour, and in a typical 24 hour period in a weekday, for 2002, 2006 and 2011.

It does not define the characteristics of the train, allow for turning on or off these main routes, of peak hour requirement of the problem of creating joined up paths between and along two separate routes. This is the same problem that Virgin Cross-Country faces. However, it is a start.

Converting these aspirations into paths, for example on the West Coast Main Line, involved months of laborious timetabling work, but the outcome was the creation of firm paths for freight, using different parts of the route and of different characteristics. These could and should be preserved as firm paths for which freight operators are contractually entitled, whether freight uses them or not.

Extending this to the whole of the main network would involve:

- deciding how much freight capacity should be allowed for in which years – the WCML capacity was defined as part of the original ORR decision on the PUG2 agreement. Similar figures could be worked up on the basis of the SRA's Appendix D

- deciding how much growth should be allowed for, and over what period.

- deciding on the mix of train characteristics now and in the future

- ensuring that paths contained the possibility of reasonable connections to other routes or branch lines.

The sum total of the above would constitute the contractually committed freight paths on the main network to be provided by Network Rail.

The important thing is that these paths should not be made available to non-freight users except on a spot basis. We do not agree with the Rail Regulator that this would be unacceptable as it woud ldeprive passneger operators of capacity.

Regular reviews and changes

The freight industry needs certainty of available capacity and capability to be able to plan its investments. However, there must be provision for making changes as conditions vary. We believe that the basic contractual rights should be there for at least 10 years, with the presumption of their continuing indefinitely. The capacity allowed for at the start of the process should reflect the planned growth of the industry, but with an additional flexibility to allow for unexpected changes alterations to demand.

An expected change in demand is the planned new 10 m tonnes a year coal terminal at Immingham, and additional demand for trains if major port expansions proceed. These should all be allowed for. However, there are also changes for demand that cannot now be forecast, but which could occur within the period of the 10 year horizon. We suggest that this should be catered for by taking, for the ten year horizon:

- current contractual paths
- increased by 80% (TYP growth)
- add in expected additional traffic from know planned developments

These forecasts and capacity reservations should be reviewed every, say, five years, hopefully as part of the periodic reviews.

At subsequent reviews, a new growth figure could be substituted by the ORR subject to consultation with the industry.

If there is not enough capacity on a route…

The above capacity demand should put alongside the current passenger train requirements. Both passenger and freight traffic should be subject to timetable adjustment to see whether both demands can be met. If so, then the freight paths can be confirmed. If not, then freight should be allocated the maximum available, whilst other solutions are considered for passenger, freight or infrastructure changes.

If the SRA wishes to increase passenger services…

It would be necessary to study the timetable to see if this were possible without affecting the contractual freight rights and existing passenger services.

The freight paths, being contractual and, even if not used, available for new or altered services, must be retained. If on the above basis, additional passenger trains are not possible, then infrastructure changed would be necessary to accommodate such new services.

Conclusion

The principle that capacity must be preserved for new traffic is fundamental to enable the indsustry to attract such traffic, and is a long term requirement.

It is necessary because the rail freight industry is fundamentally different from the passenger industry, with the latter not only being protected against down-side risks but also working on shorter, and fixed length franchises.

The means by which this can be achieved must be a matter for further consultation with the industry. Its importance cannot be over emphasised.