
ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA05

(following a hearing held at 1 Eversholt Street, London on 10 March 2011)

The appointed Adjudication Panel ("Panel")

John Hewitt	Hearing Chair
Bill McGregor	Industry Advisor
Martin Shrubsole	Industry Advisor

The Dispute Parties

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Doug Thompson	Customer Relationship Executive (DBS)
Gordon Cox	Customer Relationship Executive (GBRf)
Dickon Court	In-house counsel (observing)

For DB Schenker Rail (UK) Ltd ("DBS")

Nigel Oatway	Access Manager
Paul Gold	Acting Head of Legal
Robert Allen	Solicitor
Gareth Davies	Sales & Marketing Manager

For GB Railfreight Ltd ("GBRf")

Steve Turner	Performance & Development Manager (part)
Ian Kapur	National Access Manager

In attendance:

Tony Skilton	Committee Secretary
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1 Introduction, Substance of Dispute and Jurisdiction

1.1 This dispute arises out of a Failure to Use: Third Party Notice Application by GBRf dated 23 December 2010. In consequence NR issued a Third Party Failure to Use Notice to DBS dated 6 January 2011. The NR Notice required that DBS surrender the following Rights:

Quantum Access Right:	4A1O 12:18 Trafford Park to Wembley EFOC;
Train Slot:	4A1O 12:18 MO Trafford Park to Wembley Yard; and
Train Slot:	4O26 12:18 SX Trafford Park to Southampton Western Docks between Trafford Park (Stannox 33033) and Nuneaton (Stannox 69021) only.

MO means Mondays only; SX means Saturdays excepted, i.e. Mondays to Fridays.

- 1.2 The Third Party Failure to Use Notice was given pursuant to Condition J5.3 of the Network Code.
- 1.3 By letter dated 20 January 2011 DBS gave a Counter-Notice pursuant to Condition J5.4 of the Network Code and objected to the loss of the above Quantum Access Rights and associated Train Slots. DBS stated that its Grounds for Objection were that it has a *"reasonable on-going commercial need"* (as defined in the Part J of the Network Code) for the Rights. The letter then went on to set out DBS' representations in support of its Grounds for Objection.
- 1.4 By letter dated 26 January 2011 NR referred the dispute for determination in accordance with the Access Dispute Resolution Rules ("the ADR Rules) pursuant to Condition J13.1(c) of the Network Code as NR disputed the validity of the Counter-Notice given by DBS.
- 1.5 A Procedure Agreement was subsequently entered into between NR and DBS, stating that the determination procedure would be an Access Dispute Adjudication ("ADA") in the first instance, with any appeal to be heard by the Office of Rail Regulation ("ORR"); this was in accordance with Rule B7 of the ADR Rules. Within the terms of the Rules, GBRf declared itself to be an interested party. In consequence the three parties have filed statements of case setting out their respective positions and submissions.
- 1.6 A hearing took place on Thursday 10 March 2011.
- 1.7 In its consideration of the parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.8 The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

2 Background, history of this dispute process and documents submitted

- 2.1 Dispute reference ADA05 was notified by NR on 26 January 2011. GBRf subsequently declared itself an interested party.
- 2.2 Following receipt of the Dispute Parties' submissions and in accordance with Rule G10(c), I considered whether there were any relevant issues of law raised by the dispute; I concluded that no such issues were raised and this was conveyed to the Industry Advisors and the Dispute Parties.
- 2.3 In summary, the written material and evidence provided over the course of this dispute process was as follows:

- 2.3.1 Statement of Claim by NR
- 2.3.2 Statement of Defence by DBS
- 2.3.3 Response statement by NR
- 2.3.4 Statement of Case by GBRf
- 2.3.5 Opening statements, responses to questions and closing remarks to the hearing on 10 March 2011 by NR, DBS and GBRf.

2.4 I confirm that the Panel has taken into account all of the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarized later in this Determination.

3 Relevant provisions of the Network Code

3.1 The provisions of the Network Code in issue in this dispute reference are, principally:

3.1.1 Condition J4 - Failure to Use

3.1.2 Condition J5 – Failure to Use: third party application

The relevant extracts are set out at Annex 1 to this Determination.

4 Submissions made and outcomes sought by Dispute Parties

4.1 NR's principal submission was as follows:-

4.1.1 The substance of DBS's Counter-Notice was that it had a Reasonable Ongoing Commercial Need. Guidance on the interpretation of this expression has been given by the ORR in a document headed:

**“PART J (CHANGES TO ACCESS RIGHTS) OF THE NETWORK CODE
CRITERIA FOR INTERPRETING THE EXPRESSION “REASONABLE ON-
GOING COMMERCIAL NEED**

Condition J4 (Failure to Use) and J9 (Rights Review Meetings)

In order to demonstrate:

(a) *for the purposes of Condition J4.10.2), that it has a 'reasonable on-going commercial need' in respect of any of the Rights Subject to Surrender specified in a Failure to Use Notice; and*

(b) *...*

a Train Operator must be able to show all of the following:

(i) Commitment *...*

(ii) Acceptable reasons for failure to use – May include

- *Seasonal factors, e.g. commodities for which demand varies during the course of the year;*
- *Non-economic issues beyond the train operator's control;*
- *A strike or other industrial action;*

(iii) Committed resources *...*

(iv) Reasonable on-going prospect of use *...”*

NR accepted that DBS' Counter-Notice met the criteria as regards Commitment, Committed resources and Reasonable on-going prospect of use but contended that it had failed to establish Acceptable reasons for failure to use. NR asserted that DBS had not met the criteria as regards Acceptable reasons for failure to use. NR submitted that for the DBS Counter-Notice to be valid DBS was obliged to demonstrate compliance with all four criteria; and that it failed to do so.

- 4.1.2 The reason why NR asserted that DBS had failed to demonstrate Acceptable reasons for failure to use was that DBS was the owner of the Trafford Park terminal and DBS had closed the terminal for a period for its own economic reasons. NR submitted that such a decision was wholly within the control of DBS and did not amount to an Acceptable reason for failure to use.
- 4.1.3 NR's written submission stated that it sought the following determination:
- 4.1.3.1 a determination as to whether the reason for the failure to use set out in the Counter-Notice constitutes an acceptable reason for the Failure to Use as set out in the Criteria and therefore whether DBS has proven that it has 'Grounds for Objection' in support the Counter-Notice;
- 4.1.3.2 in the event the adjudication is determined in favour of NR, NR requests, in accordance with Condition J4.21.1 of the Network Code that the Train Operator has no Grounds for Objection to the Rights Subject to Surrender and that the rights to be surrendered are surrendered; and
- 4.1.3.3 in the event the adjudication is determined in favour of DBS, NR requests that it is determined in accordance with Condition J4.11 of the Network Code that the Failure to Use Notice shall cease to have effect.
- 4.2 DBS' principal submissions were as follows:
- 4.2.1 That the global economic circumstances surrounding its decision to close, on a temporary basis, its Trafford park terminal did amount to an acceptable reason for failure to use.
- 4.2.2 Shortly prior to the hearing DBS made a further submission to the effect that the Third Party Failure to Use Notice has ceased to have effect by reason of the fact that on 8 March 2011 it made use of the relevant Train Slot and that the Use Quota was met within the meaning of Condition J4.6(b).
- 4.2.3 DBS's written submission and subsequent oral submission sought the following determinations:
- 4.2.3.1 that its Grounds of Objection in respect of all or any of the Rights Subject to Surrender is substantiated and, therefore, the Third Party Failure to Use Notice shall cease to have effect.
- 4.2.3.2 that the Third Party Failure to Use Notice shall be set aside.
- 4.3 GBRf's submissions were as follows:
- 4.3.1 That the trigger point under the Use It or Lose It provisions of the Network Code is that the train has not run for 90 days. GBRf alleged that subject train had not run for 752 days.
- 4.3.2 The non-use of the Train Slot by DBS runs counter to its claim of having a reasonable on-going commercial need to retain them.
- 4.3.3 GBRf's written submissions stated that it sought the following determination:
- 4.3.3.1 that the Panel find in favour of the claimant and determine that in accordance with condition J4.12.1 of the Network Code, DBS has no grounds for objection in respect of all or any of the Rights Subject to Surrender.
- 5 Oral exchanges at the Hearing**
- 5.1 At the hearing the parties' respective representatives provided further evidence and made a number of submissions and observations in the course of various exchanges.

- 5.2 It emerged that the principal facts underlying the question whether the Counter-Notice be valid or not and whether there has been a Cessation of Failure to Use were not in dispute. These facts are as follows:
- 5.2.1 DBS is the owner and operator of the Trafford Park terminal.
 - 5.2.2 The Rights subject to surrender have not been used since after 12 February 2009. It was stated at the hearing that the Train Slot 4O10 Trafford Park to Southampton via Wembley had been used up until 12 February 2009 and this was not disputed.
 - 5.2.3 The period of Failure to Use in which the Use Quota has not been met exceeded the Use Period.
 - 5.2.4 The relevant Use Quota is one. The relevant Use Period (for present purposes) is 65 days.
 - 5.2.5 In or about mid-February 2010 DBS closed the Trafford Park terminal. This was stated to be in response to *"the Global economic recession which has led to unprecedented falls in trade and the movement of freight."* The closure was intended to be a temporary measure. DBS also stated that in respect of services from Southampton, it had not had sufficient low platform container wagons viably to meet customers' requirements, whilst the route was not cleared to W10 standards.
 - 5.2.6 The Trafford Park terminal had also serviced traffic to Felixstowe and to Moss End. The Felixstowe business moved partly to another rail carrier and partly to road transport. The Moss End business moved to road transport.
 - 5.2.7 Quantum Access Rights for DBS to run the 1218 train were requested in an application to NR dated 13 March 2009. These Rights are proposed in the 29th Supplement to the Track Access Agreement which is currently going through NR's consultation process.
 - 5.2.8 NR did not dispute an email dated 2 October 2010 sent by DBS in which it notified NR of its intention to reactivate the train 4A10. During the course of October 2010 DBS provided NR with confidential commercial correspondence regarding its need for the Rights.
 - 5.2.9 In mid-November 2010 Trafford Park terminal was partially re-opened for international traffic from and/or to Duisburg. For this flow containers are craned off the Duisburg train and return just in time for the return journey. This flow does not require containers to be stacked.
 - 5.2.10 In early March 2011 the Trafford Park terminal re-opened for Southampton traffic. An incoming train service ran on Monday 7 March 2011 and the first train out was on Tuesday 8 March 2011. This ran pursuant to a Spot Bid. NR did not exercise the right it claims to have to exercise a discretion to decline a Spot Bid because at the time, (i.e. in October 2010), it was not aware of GBRf's proposed requirements.
 - 5.2.11 DBS plan to run a 5 day service SX.
 - 5.2.12 The re-opening of the Trafford Park terminal by DBS followed on from the opening up to W10 gauge capability of the route to Southampton via Coventry and Leamington on 23 February 2011.
 - 5.2.13 DBS' Rights to the subject trains do not stipulate a right to W10 route capability.
- 5.3 At the hearing DBS sought to assure the Panel that, with the knowledge of NR, the resumption of the service in March 2011 was planned as from 2 October 2010 and that a lead time of several months was not unusual. DBS was also keen to assure us that this was not a case where DBS was holding onto to capacity for which it has no commercial need to prevent it being used by a competitor.
- 5.4 DBS urged that the reasons given demonstrated that DBS had an acceptable reason for the failure to use.
- 5.4 Equally NR was anxious to assure the Panel that it was not looking to punish DBS. NR submitted it must look at the facts. DBS failed to use the Train Slots for a considerable period and another operator was keen to make use of them and run a service. NR submitted that whether Trafford Park terminal be open or closed is a business decision solely within DBS' control. The closure was not forced upon it by a third party or by an event of nature over which it had no control. In these circumstances NR submitted that the reason for the closure did not amount to an Acceptable reason for failure to use.

- 5.5 GBRf submitted that in considering the points which had been made DBS was required to satisfy each of the four criteria. GBRf further submitted that DBS had not satisfied the Acceptable reason requirement and that the DBS Rights should fall away.
- 5.6 As regards the J4.6 point DBS submitted that the scheme existed to ensure that network capacity was to be used. If not used Rights granted might be lost or surrendered so as to be available for use by another operator. J4.6 when read with J4.5 and J.10.2 (b) made clear that the risk of losing Rights came to an end if exercise of the Rights resumed. That is to say if there ceased to be a failure to use.
- 5.7 NR submitted that the interpretation contended for by DBS could not be accepted as a sustainable approach. NR submitted that J4.6 only applied up to the time when a Failure to Use Notice was given. Once given J4.6 ceased to have any application. NR noted that the point had only been raised by DBS the day prior to the hearing and that there had been little time to consider it in depth. However NR accepted that it had been aware since October 2010 that DBS proposed to resume running the train. Further NR did not wish to seek an adjournment and was content that the issue had been well discussed during the course of the hearing.

6 Analysis and consideration of issues and submissions

Part J of the Network Code makes recurrent use of the defined term "Quantum Access Right" and the qualifiers "relate" and "in respect of".

- *"Quantum Access Right means a Firm Right, any Contingent Right or any Level Three Right as such under an Access Agreement in respect of a number (or quantum) of Train Slots in any specified period (including rights to Train Slots in respect of additional trains or relief services), and includes part of such a Firm Right, Contingent Right or Level Three Right"*
- *"relate" and "in respect of" in relation to a Train Slot and a Quantum Access Right where these terms are used together, means that the Train Slot in question has been secured by the Train Operator in accordance with Part D in the exercise of that Quantum Access Right";*

It was apparent to the Panel that the Parties, in their respective presentations, were of one mind that a Train Slot, such as 4O26, could relate to a combination of parts of Rights, and that there was NOT a requirement that an individual Train Slot, has to correspond to a single explicit Right.

The Panel was not specifically asked to adjudicate on the correctness of this common perception but found, in its deliberations, that the latitude it implied to allow the assembly of Train Slots from an amalgam of Rights had a bearing upon the force of the respective arguments.

Cessation of Failure to Use

- 6.1 It will be convenient to take the Condition J4.6 point first. We approach construction of the words used following the standard principles of the interpretation of instruments. The language is clear. J4.2 of the scheme sets out the circumstances in which a failure to use might arise. If NR considers that a failure to use has arisen it has the power to serve a notice – J4.3. An operator which receives such a notice is entitled to object to it by giving a counter-notice - J4.10. If the operator fails to do so the default position is that the operator is deemed to have agreed to the surrender of the subject Rights and those Rights are deemed to have been surrendered as of the date when NR notify the ORR of the consequent modifications to the operator's Track Access Agreement pursuant to J4.9.2(c).
- 6.2 Where a counter-notice is given NR may accept it as being valid. If it does not accept it as being valid, Network Code Condition J13.1 requires that NR must, within five working days, refer the dispute to be determined in accordance with the ADR Rules.

- 6.3 If it is determined that the operator has no grounds for objection in respect of all or any of the subject Rights then such rights which are to be surrendered are surrendered from the date on which notice is given to the ORR of the ADA determination pursuant to J4.12.2.
- 6.4 The scheme appears to be that the Rights will only be surrendered as of the date when notification of such surrender is given to the ORR. Until that time the Rights remain vested in the operator.
- 6.5 The language of J4.6 seems to us to be quite clear and provides that the 'alleged' failure to use shall cease to be continuing if the operator makes use of a relevant Train Slot such that the Use Quota is met.
- 6.6 We must infer that J4.6 was intended to have some effect and purpose.
- 6.7 The scheme does not expressly state what the consequence is if a failure to use shall cease to be continuing. We infer that if NR accepts that the failure to use has ceased to exist, the Failure to Use Notice becomes otiose and is in effect deemed withdrawn or of no effect. We conclude this because the loss of Rights is potentially a serious matter for an operator. J4.6 appears to serve to give to the operator one last chance to resume using the Rights, in the knowledge that if it fails to take advantage of the 'warning shot' consequences will flow. The loss of the Rights only arises at the conclusion of the process when the ORR is given formal notification of the events which have occurred. It seems to us that this is consistent with the "Use It or Lose It" approach. Moreover there is nothing in the scheme to suggest that the Rights are suspended or to be treated in any different way during the course of any dispute process.
- 6.8 The mischief of failure to use that the scheme addresses is that unused Rights should be taken away from an operator so as to be available to another operator who may wish to make use of them. If the operator resumes using the Rights granted to him there is no longer a mischief to address.
- 6.9 Taken in context the scheme does not appear to be punitive in nature and is designed to ensure that Rights granted are used. Only if they are not are there consequences.
- 6.10 NR submitted that J4.6 ceases to operate once a Failure to Use Notice is given. If NR is right it must follow that the use of the relevant Train Slot such that the Use Quota is satisfied must occur prior to the giving of the Failure to Use Notice. However if the Train Slot has been used and if the Use Quota has been met then circumstances giving rise to an alleged failure to use simply would not arise in the first place. If the Rights are being used then there cannot be a failure to use.
- 6.11 We have to reject NR's submission. We conclude that the provisions of J4.6 were inserted into the scheme to bring to an end the Lose It process once the operator has resumed using the Train Slot to an acceptable level. In the absence of any end date in J4.6 to the time when an operator can bring the period of failure to use to an end we conclude that it shall apply during the period from the giving of a Failure to Use Notice right down until the date when the surrender of the Rights is to take effect, which, broadly will be the date when the appropriate notification is given to the ORR.
- 6.12 This construction does raise an anomaly. J4.6 is not best drafted. The consequence is that if a contested notice is referred for determination under ADRR and if the determination goes against the operator the operator will still have a window of opportunity (we accept a small window) to save its position by using a relevant Train Slot and endeavoring to meet the Use Quota before the date on which the determination is notified to the ORR. If it can do so then it will have demonstrated the cessation of a failure to use and the clock will have to start over again. The Panel does not consider this to be a satisfactory situation and clarity is called for. We express the hope that an early opportunity may be taken to re-visit Condition J4.6 and to redraft it.
- 6.13 In the present case it was not in dispute that on 8 March 2011 DBS made use of a Train Slot such that the Use Quota for the Quantum Firm Right for 4A10 was met. This train ran with the

knowledge, approval and cooperation of NR. In these circumstances the Panel is of the view that DBS has established the requirements of J4.6. As a result the failure to use complained of ceased for the purposes of J4.5 such that the failure to use is no longer continuing. In consequence the subject Third Party Failure to Use Notice ceased to be of effect and is to be set aside.

Reasonable On-Going Commercial Need

- 6.14 The finding set out above in paragraph 6.13 alone is sufficient to dispose of the issue before the Panel. However the parties had prepared their submissions on the basis that they considered that the issue of reasonable on-going commercial need was important to them and to the industry. Out of deference to the arguments put before us and in case it be held at any appeal that the Panel was wrong to find that the Failure to Use Notice has ceased to be of effect we go on to set out our findings in relation to this issue.
- 6.15 An operator can avoid the consequences of a loss of Rights by giving a counter-notice and demonstrating that it has a reasonable on-going commercial need for the subject Rights. Where NR does not accept the grounds for objection given by an operator it is required to refer the dispute to an ADA.
- 6.16 Condition J12.1 of the Network Code provides that the expression 'reasonable on-going commercial need' shall be interpreted in accordance with rules or criteria (if any) determined and revised from time to time in accordance with a process set out in J12.
- 6.17 Condition J13.2 of the Network Code provides that in determining matters in accordance with the ADR Rules due regard is to be given to any criteria which the ORR has most recently published (and identified as such) in relation to the surrender or adjustment of Access Rights.
- 6.18 Following consultation within the industry the ORR has approved criteria to be published on Network Rail's website. The current version of the criteria was approved and published in June 2005 in a document entitled "*PART J (CHANGES TO ACCESS RIGHTS) OF THE NETWORK CODE CRITERIA FOR INTERPRETING THE EXPRESSION "REASONABLE ON-GOING COMMERCIAL NEED"*
- 6.19 The relevant criteria are summarized in paragraph 4.1.1 above. This was not in dispute. The criteria impose a mandatory obligation on the operator to show satisfaction of all four criteria identified. We infer that the criteria were established following wide consultation within the industry in order to provide an objective test to apply to ascertain whether in any given factual situation the operator has been able to demonstrate reasonable on-going commercial need.
- 6.20 The Panel is concerned only with one of the criteria – Acceptable reason for failure to use.
- 6.21 DBS submits that it has met the test. The facts relied upon by DBS were not in dispute to any material extent. The question is whether the summation of those facts is sufficient to meet the criteria.
- 6.22 The Panel notes DBS' submission that the grounds relied upon relate to the period of the closure of the Trafford Park terminal, and the reasons therefore, coupled with the re-opening of the terminal and the imminent introduction of W10 gauge capability. The Panel accepts DBS' submission that the ORR's published set of criteria is not prescriptive in that it lists and highlights examples of matters which **may** amount to an acceptable reason. The Panel concludes that additional or other matters might in context also amount to an Acceptable reason.
- 6.23 The Panel notes that the examples cited in the criteria are all matters which are outside the control of the operator; matters akin to *force majeure*. Thus the Panel concludes that when preparing the criteria the ORR (and by definition the industry) had in mind that there was to be excluded matters which were in the control of the operator. The logic appears to be that an operator was to be excused from the obligation to use its Rights if some non-economic outside force prevented it from doing so but was not to be so excused if could have exercised

its Rights but chose not to do so. Thus if an operator took a course of action which had the inevitable consequence that it would not be able to exercise its Rights such course of action would not amount to an Acceptable reason for doing so.

- 6.24 In the present case the course of action taken by DBS which had the consequence of preventing it using the subject Rights was its decision to close its Trafford Park terminal. It was not in dispute that this course of action was taken for economic reasons. There was no evidence before the Panel as to DBS' financial position and as to the reasonableness or otherwise of the decision to close the terminal. The Panel was told that staff were made redundant or laid off and this would not have occurred if the situation had not been serious. How serious or how dire the situation was and whether it was justified on an objective basis we simply do not know. What alternative courses of action were considered and rejected we do not know.
- 6.25 We conclude that whatever the financial position of DBS might have been, the decision to close the terminal was that of DBS and the closure was not forced upon it by a non-economic outside event over which DBS had no control.
- 6.26 The Panel was not persuaded that the issue of W10 gauge capability was a compelling reason for not using the train slots. The evidence before us was that the decision to close the terminal was taken on economic grounds, as were DBS' decisions as to what size of fleet of low platform container wagons it should own and how it should deploy them to best advantage. The Panel accepts that the new availability of W10 gauge capability makes renewed use of the terminal a more attractive option, but does not consider that it was relevant to the decision not to use Train Slots that related to rights to W8 capability. In these circumstances we find that the absence of W10 gauge capability was not part of an acceptable reason for DBS' failure to Use the subject Train Slots.
- 6.27 The Panel concludes that DBS has failed to establish the failure to use was due to an Acceptable reason. In consequence DBS has failed to establish all four criteria required to show reasonable on-going commercial need.

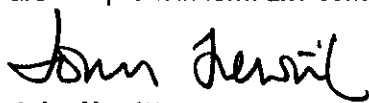
7 Determination

Having considered carefully the submissions and evidence as set out in sections 2, 4 and 5, and based on the Panel's analysis of the issues and submissions set out in section 6,

I DETERMINE that:

- 7.1 The Third Party Failure to Use Notice dated 6 January 2011 is no longer valid and of effect because DBS has ceased the failure to use complained of by making use of the relevant Train Slots such that the Use Quota is met in conformity with J4.6.
- 7.2 If it be held upon any appeal that DBS has not ceased the failure to use, DBS has not made out its ground of objection of Reasonable On-going Commercial need.
- 7.3 Whether or not this Determination is the subject of an appeal, the Panel would wish the difficulties that it has had in the interpretation of and the implications of Part J, and the issue if the intended force of the definitions cited, to be drawn to the attention of those parties currently contemplating the redrafting of Part J.

I confirm that, so far as I am aware, this Determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



John Hewitt
Hearing Chair
8 April 2011

Annex 1 to Access dispute Adjudication determination of reference ADA05

Extracts from Network Code

4. Failure to Use

4.1 *Application of Conditions J4 and J5*

Conditions J4 and J5 shall apply to a Failure to Use where the condition in Condition J4.2.1 is satisfied in whole or in part before the date on which these Conditions take effect.

4.2 *Failure to Use*

4.2.1 Subject to Conditions J4.2.2, J4.2.3 and J4.4, a Failure to Use in relation to a Quantum Access Right occurs if:

- (a) in any First Working Timetable (as defined in Part D) established by Network Rail after the Commencement Date, the Train Operator fails to secure one or more Train Slots in respect of that Quantum Access Right; or
- (b) the Train Operator fails to make use of a Train Slot which has been included in the Working Timetable and which relates to that Quantum Access Right.

4.2.2 Condition J4.2.1(a) shall not apply to Level Two Rights, Contingent Rights or Level Three Rights where Network Rail has been unable to accommodate the Train Operator's Bid into the First Working Timetable.

4.2.3 For the purposes of Condition J4.2.1(b), the Train Operator fails to make use of a Train Slot if it uses the Train Slot for less than the Use Quota during the relevant Use Period.

4.3 *Use Quota and Use Period*

4.3.1 The Use Quota and Use Period:

- (a) shall be as determined, and revised from time to time, by the Office of Rail Regulation for the purpose of this Condition J4.3 following such consultation as the Office of Rail Regulation may consider appropriate; and
- (b) following such determination or revision, shall be published by Network Rail in its network statement, and on its website.

4.3.2 The Office of Rail Regulation may:

- (a) determine different Use Quotas and/or different Use Periods for different categories of services for the carriage of:
 - (i) passengers by railway; and
 - (ii) goods by railway;
- (b) specify the characteristics of train movements that will count or will not count, as applicable, toward any Use Quota; and
- (c) specify such other matters as the Office of Rail Regulation considers are necessary or expedient to give effect to any Use Quota and any Use Period.

4.4 *Certain periods to be disregarded*

Any period of non-use shall be disregarded for the purpose of determining whether a Failure to Use has occurred under Condition J4.2.1(a) or (b) if, and to the extent that, such non-use is attributable to non-economic reasons beyond the Train Operator's control.

4.5 *Service of Failure to Use Notice*

If Network Rail considers there is a Failure to Use by a Train Operator and that Failure to Use is continuing:

- (a) it may serve a Failure to Use Notice on the Train Operator requiring the Train Operator to surrender Rights Subject to Surrender; and
- (b) if it does so, it shall send a copy of the notice to the Office of Rail Regulation.

4.6 *Cessation of Failure to Use*

A Failure to Use shall cease to be continuing for the purpose of Condition J4.5 if:

- (a) in relation to a Failure to Use under Condition J4.2.1(a):

- (i) the Train Operator Bids for a Train Slot in respect of the relevant Quantum Access Right before the compilation of a subsequent First Working Timetable; and
 - (ii) Network Rail has not served a Failure to Use Notice before the Bid under Condition J4.6(a)(i) is made; and
- (b) in relation to a Failure to Use under Condition J4.2.1(b), the Train Operator makes use of a relevant Train Slot such that the Use Quota is met.

4.7 *Contents of a Failure to Use Notice*

A Failure to Use Notice shall specify:

- (a) the Failure to Use which Network Rail considers has occurred; and
- (b) the Rights Subject to Surrender which Network Rail requires the Train Operator to surrender.

4.8 *Acceptance of surrender*

If the Train Operator agrees to the surrender specified in the Failure to Use Notice then:

- (a) it shall, within 10 Working Days, give notice to that effect to Network Rail and the Office of Rail Regulation;
- (b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J4.8(c); and
- (c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Train Operator's Access Agreement no more than 10 Working Days after the date on which the Train Operator agrees to the surrender pursuant to Condition J4.8(a).

4.9 *Counter Notice*

4.9.1 The Train Operator may, within 10 Working Days of receipt of a Failure to Use Notice, serve a Counter Notice on Network Rail stating that:

- (a) it considers the Failure to Use Notice to be invalid;
- (b) there has been no Failure to Use or that the Failure to Use was not continuing at the date of the service of the Failure to Use Notice; and/or
- (c) any Ancillary Movements and/or Stabling specified in the Failure to Use Notice as being Rights Subject to Surrender:
 - (i) are not directly associated with the relevant Quantum Access Right; and/or
 - (ii) would still be required by the Train Operator following the surrender of the relevant Quantum Access Right; and/or
- (d) there are Grounds for Objection to the proposed surrender within Condition J4.10, detailing the Grounds for Objection on which it relies,

and must provide evidence with the Counter Notice in support of its contentions. The Train Operator shall send a copy of any Counter Notice and such evidence to the Office of Rail Regulation.

4.9.2 If no Counter Notice is served within 10 Working Days of receipt of a Failure to Use Notice:

- (a) the Train Operator will be deemed to have agreed to the surrender specified in the Failure to Use Notice;
- (b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J4.9.2(c); and
- (c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Train Operator's Access Agreement no more than 10 Working Days after the date on which the Train Operator is deemed to have agreed to the surrender pursuant to Condition J4.9.2(a).

4.10 *Grounds for Objection*

4.10.1 The Train Operator may object to a surrender specified in a Failure to Use Notice relating to services for the carriage of passengers by railway on the grounds that:

- (a) the Rights Subject to Surrender are essential for the fulfillment of the Train Operator's Franchised Services; or
- (a) the Rights Subject to Surrender relate to an enhancement of the Network for which the Train Operator is contracted to pay through access charges.

4.10.2 The Train Operator may object to a surrender specified in a Failure to Use Notice relating to services for the carriage of goods by railway on the grounds:

- (a) set out in Condition J4.10.1(b); or

- (b) that it has a reasonable on-going commercial need in respect of any or all of the Rights Subject to Surrender.

4.11 *Cessation of notice*

If the Train Operator and Network Rail agree or it is Determined:

- (a) that the matters set out in Condition J4.9.1(a), (b) or (c) have been substantiated; or
 - (b) that the Train Operator's Grounds for Objection have been substantiated in respect of any or all of the Rights Subject to Surrender,
- the Failure to Use Notice shall cease to have effect to the extent so agreed or Determined.

4.12 *Surrender of Access Rights*

4.12.1 If it is Determined that the Train Operator has no Grounds for Objection in respect of all or any of the Rights Subject to Surrender, then the rights that are to be surrendered will be surrendered, and removed in their entirety from the Train Operator's Access Agreement, from the date:

- (a) on which notice is given to the Office of Rail Regulation pursuant to Condition J4.12.2, in the event of an ADRR Determination; or
- (b) specified in the Office of Rail Regulation Determination, if applicable.

4.12.2 In the event of an ADRR Determination in accordance with Condition J4.12.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Train Operator's Access Agreement no more than 10 Working Days after the date of that ADRR Determination and shall include a copy of the relevant ADRR Determination with such notice.

4.13 *Bids*

Where any Rights Subject to Surrender surrendered under this Condition J4 include the surrender of a Bid, Network Rail's obligations under Condition D4.7.1 shall cease to have effect in respect of that Bid as from the date the surrender takes effect in accordance with this Condition J4.

5. **Failure to Use: third party application**

5.1 *Third Party Failure to Use Notices* *If:*

- (a) Network Rail receives an application from a Train Operator (the "Applicant") for a Quantum Access Right to a Train Slot; and
- (b) the Train Slot:
 - (i) is one in respect of which the Applicant can demonstrate a reasonable commercial need; and
 - (ii) was secured in exercise of a Quantum Access Right of another Train Operator (the "Incumbent"); and
 - (iii) is one in respect of which there is a continuing Failure to Use by the Incumbent,

then within 10 Working Days following receipt of the Applicant's application Network Rail shall serve a Third Party Failure to Use Notice on the Incumbent and send a copy of the notice to the Office of Rail Regulation. If the Applicant's application does not comply with this Condition J5.1, then within 10 Working Days following receipt of the Applicant's application Network Rail shall serve a notice on the Applicant rejecting its application and setting out its reasons for rejecting the application.

5.2 *Cessation of Failure to Use*

For the purposes of Condition J5.1(b)(iii), whether a Failure to Use has ceased to be continuing shall be determined in accordance with Condition J4.6.

5.3 *Contents of a Third Party Failure to Use Notice*

A Third Party Failure to Use Notice shall specify:

- (a) the Failure to Use which Network Rail considers has occurred;
- (b) the Rights Subject to Surrender, which Network Rail requires the Incumbent to surrender; and
- (c) the date on which the surrender is intended to take effect.

5.4 *Application of Conditions*

The following Conditions shall apply following service on the Incumbent of a Third Party Failure to Use Notice as they apply to a Failure to Use Notice:

- (a) J4.8 (Acceptance of surrender);
- (b) J4.9 (Counter Notice);
- (c) J4.11 (Cessation of notice);
- (d) J4.12 (Surrender of Access Rights), where in respect of this Condition J5, any relevant Determination will be between Network Rail and the Incumbent, and the Applicant shall accept that the Determination will dispose of the matter as between the Applicant and Network Rail; and
- (e) J4.13 (Bids), as if that Condition referred to a surrender under this Condition J5.

5.5 *Counter Notice*

Subject to the redaction of any commercially sensitive information, the Incumbent shall send a copy of any Counter Notice issued under Condition J5.4(b) to the Applicant.