



OFFICE OF RAIL AND ROAD



## **ORR Determination :**

**Appeal made by GB  
Railfreight Limited  
pursuant to Part M of  
the Network Code  
against an Access  
Dispute Adjudication  
Determination  
(reference ADA21)**

**16 July 2015**



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# Introduction

## Summary

1. This Determination (ORR Determination) by the Office of Rail Regulation (ORR)<sup>1</sup>, concerns an appeal made by GB Railfreight Limited (GBRf or the Appellant) pursuant to Part M of the Network Code against the access dispute adjudication determination in respect of dispute reference ADA21 (the ADA Determination).
2. The matters subject to appeal concern the Appellant's dissatisfaction with the ADA Determination and the reasons behind the decision to declare its Third Party Notice as invalid. The appeal relates to one Quantum Access Right (QAR) - 6L84(SX).
3. ORR determines that the ADA Determination stands.
4. We provide a narrative on other important issues raised by this case.
5. Our decision is presented in two parts. Part 1 sets out the background to the appeal. Part 2 explains ORR's Determination. We have sought to be consistent with the terms used in the ADA Determination. The definitions set out in the Network Code and the Railways Act 1993 (the Act) apply throughout.

## Part 1: Background

### Network Code

6. The Network Code<sup>2</sup> is a set of rules which is incorporated into, and forms part of, each access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail.
7. Part M provides the process by which a party dissatisfied with either a decision of a Timetabling Panel in relation to a dispute arising under Part D, or a decision reached by Access Dispute Adjudication (ADA) in relation to a dispute arising under Part J, can appeal the matter to ORR for a determination.
8. This case concerns a dispute in respect of the application of the freight transfer mechanism at Condition J7 of the Network Code.
9. Condition J7 sets out a process whereby a freight operator can apply for rights held by another freight operator if it wins from an incumbent freight operator the contract to haul existing freight traffic.

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<sup>1</sup> Also known as the "Office of Rail and Road" reflecting the new highways monitor functions conferred on ORR by the Infrastructure Act 2015. Until this name change is confirmed by legislation, we continue to use the name "Office of Rail Regulation" in all documents, decisions and matters having legal effects or consequences.

<sup>2</sup> <http://www.networkrail.co.uk/browseDirectory.aspx?root=&dir=%5Cnetwork%20code>

## The parties

10. In this case GBRf is a party to the dispute concerning the Condition J7 path and the Appellant challenging the ADA Determination. Network Rail Infrastructure Limited (Network Rail) is the other party to the dispute. The Access Dispute Adjudication was heard by the appointed Adjudication Panel (the Panel). Freightliner Heavy Haul Limited (FLHH) was the Incumbent and was named as an interested person by the Panel.
11. With respect to the companies concerned, it is immaterial to this ORR Determination who the train operators' customers are; they are not parties to the dispute. This is an appeal about the workings of Part J of the Network Code. In this document we refer to Aggregate Industries as customer A; and Hope Construction as customer B.

## Events leading up to the appeal

12. In 2014 GBRf won a contract from customer A for the movement of aggregates traffic commencing 1 January 2015.
13. 6L84(SX) is a QAR that appeared in the Incumbent's track access contract as a service between Croft Quarry and Bow Depot<sup>3</sup>.
14. 6L44 is the headcode for a service between Hope and West Thurrock, with part of the path shared with 6L84(SX). It is used for services for customer B. It appeared in the Working Timetable but was not supported by a QAR at the time.
15. In the ADA Determination, 6L88 is described as a pathway starting at Bardon, joining the Midland Main Line at Wigston Junction and proceeds to just south of Tottenham where there is a "Y to Bow West" [near Bow Depot].
16. The Panel noted that 6L44, 6L84(SX) and 6L88 have in common a substantial run down the Midland Main Line. If they rested with a single Access Beneficiary it could decide which one to use. Otherwise, 6L84(SX) would have had priority as a firm right at Level 1.
17. On 7 November 2014 GBRf issued a Third Party Notice to the Incumbent making an application for the transfer of certain QARs associated with customer A.
18. On 21 November 2014 the Incumbent issued Network Rail with a Third Party Counter Notice. The Incumbent accepted the transfer of certain QARs associated with customer A, but objected to the transfer of others.
19. On 28 November 2014 Network Rail issued a notification, pursuant to J7.6 and J7.7 in which it agreed with GBRf in respect of certain QARs, with the Incumbent on some others, but required that certain QARs be relinquished to Network Rail

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<sup>3</sup> Bow Depot - Stanox code 52608: Bow East Olympics Freightliner Heavy Haul, also known as Bow Depot FHH or in the ADA Determination as Bow East.

for consideration for retention as strategic capacity. Strategic capacity is a means of retaining capacity on the network for future use when it has been surrendered by operators.

20. On 5 December 2014 GBRf served a Notice of Dispute with Network Rail pursuant to Conditions J7.6 and J11.1.1. The Notice set out objections, in essence, that:

*“Network Rail had*

- (i) accepted that certain Rights not having been used for a significant period of time provided grounds upon which the Incumbent could object to those Rights being transferred,*
- (ii) required Rights Subject to Surrender to be relinquished for strategic capacity, and*
- (iii) allowed the Incumbent to retain the Quantum Access Right for..[customer A]..service when part of the associated Train Slot had only been used by the Incumbent for an alternative customer.”*

21. The Access Disputes Adjudication Secretary registered the dispute as ADA21. The Hearing Chair was appointed and a Hearing date was set. However, discussions continued between the parties. On 16 December 2014 Network Rail informed GBRf that its application for the surrender of QARs would be satisfied, except for 6L84(SX). In turn the Incumbent served a Notice of Dispute that initiated ADA22, although that dispute was later withdrawn. A Hearing for ADA21 was set for 18 March 2015.
22. The ADA Determination in respect of ADA21 was dated 12 May 2015, in which it determined that the QAR for 6L84(SX), and the associated train slot for 6L88, should not be surrendered to GBRf.
23. On 19 May 2015 GBRf lodged an appeal with ORR. Network Rail offered no further representations in response.

## **ADA21**

### **The submissions**

24. In this section we summarise briefly each party's position as set out in the ADA Determination.

#### **GBRf**

25. GBRf's principal submissions at the time of the Hearing, in summary, were that the dispute concerned a QAR issued at Level 1 – 6L84(SX). Once in its Rights Table this would entitle GBRf to a Train Slot in Network Rail's Working Timetable. GBRf contended that having won customer A's contract, 6L84(SX), which had been established to serve customer A, should be transferred to it from the Incumbent.

26. GBRf claims that Network Rail was wrong to hold that 6L84(SX) no longer operates and that the right should not transfer but should be relinquished to Network Rail to be considered for strategic capacity.
27. Among other matters GBRf asserted that an existing QAR at Level 1 in a track access contract cannot be retained on the basis that it is being used for a different customer, from a different origin to a different destination. The Primary Purpose rule cannot therefore be used as grounds for retaining the associated Train Slot.
28. GBRf sought a determination that:
  - The Primary Purpose<sup>4</sup> condition cannot be used to determine a decision in instances where there is more than one train involved in the dispute for a path.
  - The Primary Purpose condition cannot be used to determine a decision involving a service that is not underpinned by access rights.
  - 6L84(SX) and its associated Train Slot should be surrendered to GBRf and an alternative pathway identified by Network Rail for 6L44.

#### **Network Rail**

29. Network Rail claimed that its overriding aim was to ensure that existing rail traffic continued to be hauled by rail. It was claimed that this aim was underpinned by elements in Condition J7, namely Primary Purpose, Primary Purpose Customer and Rights Subject to Surrender.
30. Network Rail argued that the Panel should adopt a literal interpretation of 'Rights subject to surrender'. Further, freight hauled by the Incumbent for a third party customer [customer B] using part of the route covered by 6L84(SX) is included within the subject QAR, thus providing valid grounds for objection under the Primary Purpose rule. It contended that the Rights Subject to Surrender should comprise 6L84(SX) and 6L44 as an associated Y-Path.
31. Network Rail noted that the service underpinned by 6L84(SX) was for hauling aggregates from Croft Quarry to Bow Depot. That service had not operated since 2011, when the sidings at Bow Depot closed as the contract to haul aggregates for construction of the Olympic Park had been completed, and the terminal was subsequently redeveloped<sup>5</sup>. There was no actual use for 6L84(SX) and if it were to be used, that would be for new and not existing business.

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<sup>4</sup> Primary Purpose is explained in more detail [below](#).

<sup>5</sup> Paragraph 3.2.4.

32. Network Rail also indicated that if 6L84(SX) were transferred, GBRf would be unlikely to use it because the return leg, 6M84, had been left with the Incumbent. However, the customer B's services [using 6L44] could be lost to rail.
33. Network Rail sought:
- Clarification as to the meaning behind the Primary Purpose definition.
  - Confirmation that a regular running service should take priority over an unused QAR.
  - That 6L44 should remain with the Incumbent and 6L84(SX) should return to Network Rail.

## **The Hearing**

34. The ADA Determination reports that the parties provided further evidence, submissions and representations. Among other matters:
- It was admitted by GBRf that it had not won any business from customer A to haul freight from Croft Quarry to Bow Depot, the sidings of which no longer exist. Although it had hauled freight from Croft Quarry to other destinations and was seeking new business that might "involve using part of 6L84[SX]"<sup>6</sup>.
  - The Incumbent objected to the transfer of 6L84(SX) because it wished to use part of the path for traffic for customer B.
  - Network Rail admitted that with hindsight 6L84(SX) should have been relinquished four years previously and removed from the Incumbent's track access contract<sup>7</sup>.

## **The ADA Determination**

35. The ADA Determination reviewed relevant aspects of Part J of the Network Code. It was not disputed that GBRf was replacing the Incumbent in the provision of transport services for customer A.

### **Transport service**

36. The Panel found that the transport service related to 6L84(SX) ceased in 2011 and was not thereafter provided by the Incumbent. There was no expectation that GBRf would provide a transport service utilising 6L84(SX) as of 1 January 2015 or in the immediate future. The Panel said that a vague possibility of new traffic emanating from customer A could not be considered as replacing the Incumbent in the provision of a transport service.

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<sup>6</sup> Paragraph 4.4

<sup>7</sup> Paragraph 4.9



37. The Panel concluded therefore that GBRf was not actually an Applicant within the meaning of Condition J7.1.2(a) and thus could not serve a Third Party Notice under Condition J7.2.
38. The Panel said that this on its own would be enough to dispose of the Adjudication. However, it also set out its conclusions on the other issues.

### **The Primary Purpose rule**

39. The Panel noted that Network Rail had upheld the Incumbent's contention that customer B was a Primary Purpose Customer. The Panel held that the identity of the third party in Condition J7.1.2(a) is plainly customer A. As customer B is a customer other than customer A, it is therefore potentially a Primary Purpose Customer. In the twelve months prior to 7 November 2014 no tonnage was transported using 6L84(SX) on its own. The Panel rejected the notion that 6L84(SX) was used in conjunction with 6L44. Any traffic that had flowed for customer B had been carried using 6L44.
40. The Panel said it could have concluded that 6L84(SX) was not used for a Primary Purpose or for a Primary Purpose Customer.

### **Y-Paths**

41. The Panel rejected Network Rail's argument that the rights subject to surrender were 6L84(SX) with its associated Y-Path of 6L44. The Panel found that 6L84(SX) and 6L44 are separate and distinct paths while sharing a common pathway for part of the route and are capable of being subject to different legal rights.
42. As a matter of fact both 6L84(SX) and 6L44 had appeared in the Working Timetable with the letter 'Y' appearing in the operating characteristics. The Panel concluded that it is concerned with the definition in the Network Code and not with the Incumbent's track access contract. The Panel said that Network Rail was in error by concluding that 6L44 was an associated Y-Path of 6L84(SX)<sup>8</sup>.

### **Impact on rail traffic**

43. Network Rail asked the Panel to consider whether Condition J7 allows for the transfer of a QAR right in relation to traffic that has ceased and which would result in the loss of viable traffic. The ADA Determination stated that no evidence was presented that customer B's traffic would be lost to rail if 6L84(SX) was transferred to GBRf. The Panel declined to express a view on a hypothetical situation on which "the facts are far from clear"<sup>9</sup>.

### **ADA Determination**

44. The ADA Determination is:

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<sup>8</sup> Paragraph 5.21

<sup>9</sup> Paragraph 5.23



### **"6 Determination**

Having considered carefully the submissions and evidence as set out in sections 3 and 4, and based on my analysis of the legal and contractual issues as set out in section 5,

**I DETERMINE that the Third Party Notice served by GBRf dated 7 November 2014 was not a valid notice and that GBRf is not entitled to the transfer of Train Slot 6L84(SX) as it seeks.**

**In the absence of a valid Third Party Notice the notification issued by Network Rail pursuant to Network Code Condition J7.6 as regards Train Slot 6L84SX is also invalid and of no effect so that in consequence Train Slot 6L84(SX) remains vested in FLHH unless and until terminated or transferred in accordance with Condition J7.**

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."

## **Part 2: ORR Determination**

### **ORR's approach**

45. ORR's responsibility is to ensure that the Network Code provides appropriate contractual certainty for all affected parties. We administer appeals under the Network Code neutrally and independently. We base our decisions on the merits of each case and the evidence presented. Further details are in our guidance *Network Code appeals, March 2015*<sup>10</sup>.
46. GBRf (the Appellant) issued its Notice of Appeal to ORR on 19 May 2015 pursuant to Condition J11.1(*sic*). We read J12.1 for J11.1, as Part J has recently been revised and J12 is the renumbered condition covering appeals to ORR. We accepted that it met the requirements of Condition M2.1. The Appellant copied its Notice of Appeal by email to Network Rail, the Incumbent and the ADA Secretary.
47. Pursuant to Condition M4 we decided to hear the appeal, given in particular that we considered that it raised important issues about the working of the freight transfer mechanism at Condition J7.
48. We reminded Network Rail on 28 May 2015 that it had ten working days from the date of the Notice of Appeal (effectively 20 May 2015) to issue a Respondent's Notice [under Condition M5]. No representations from Network Rail were received.
49. We included the Incumbent in this process. It raised an issue about disclosure of information. However we noted that ADA21 was already in the public domain

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<sup>10</sup> [http://orr.gov.uk/data/assets/pdf\\_file/0008/17594/network-code-appeals.pdf](http://orr.gov.uk/data/assets/pdf_file/0008/17594/network-code-appeals.pdf)

(through the ADA website). We therefore posted the appeal on our website in full<sup>11</sup>, following our usual procedures.

50. The facts of the case and processes followed are not contested nor in doubt. Background is presented in the ADA Determination and the Appellant's Notice of Appeal. As we received no other substantive responses to the appeal, our determination relies on these documents as the only evidence presented to us.
51. We then considered the issues involved in this appeal and whether the case has been proven that the ADA Determination is either wrong or unjust because of a serious procedural or other irregularity. Our consideration of the main points of the appeal is set out below.
52. The Appellant stated that it was dissatisfied with the ADA Determination because the reasons behind it were based upon a flawed application of the relevant conditions. Further, the ADA Determination was incomplete. We have therefore considered whether the ADA Determination was wrong, or unjust because of a serious procedural or other irregularity, within the meaning of Condition M3.1, including whether it was incomplete.

## The Appeal

### Application of Condition J7

53. Condition J7, by virtue of Condition J7.1.1, applies only to services for the carriage of goods. This is simply to draw a distinction between freight and other types of rail traffic. The traffic involved is the carriage of goods.
54. Condition 7.1.2(a), relevant to the Appellant's situation, states that Condition J7 only applies to an application for a QAR from an applicant that is:  
*...a Train Operator, who is replacing the Incumbent in the provision of transport services to a third party, where the Quantum Access Right relates to the provision of those transport services (subject, where applicable, to any competitive tendering process amongst other parties); or...*
55. The crux of the ADA Determination concerned:
  - whether 6L84(SX) related to a transport service provided by the Incumbent to customer A; and
  - whether the Appellant was replacing the Incumbent in providing that service.
56. The Appellant contends that 6L84(SX) relates to transport services provided by the Incumbent for customer A. Since 1 January 2015 it has held the contract for customer A and therefore, in essence it contends that, the right should follow the contract.

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<sup>11</sup> <http://orr.gov.uk/what-and-how-we-regulate/track-access/the-network-code/current-appeals>

57. The Appellant favours a broad view of Condition J7 that a Train Operator taking over the business of an Incumbent for a particular customer would be entitled to all the QARs associated with that customer. We note that Condition J7.1.2 specifically refers to the provision of transport services to a third party. Although it refers to "a" third party, it only works in context of Conditions J7.3(e) and J7.5(a) if it is a specific third party. Condition J7.2(a) should be understood in that context.
58. Condition J4.1 sets out arrangements for when there has been a failure to use a QAR. The circumstances are when the Access Beneficiary fails to secure the quantum of Train Slots permitted, or when the Access Beneficiary fails to make use of a Train Slot included in the Working Timetable. 6L84(SX) was an unused right within the meaning of Condition J4.1.
59. The freight traffic associated with 6L84(SX) ceased in 2011. It is key that it is not a current transport service now or at the time of the events leading up to the Appellant's Third Party Notice. The prospects of new business using the specific right were limited by the removal of the sidings at Bow Depot. Any traffic using the right would have been new business and not business lost by the Incumbent with the transfer of the contract. It would have required a new (different) destination and any matching of timings would have been coincidental. 6L84(SX) was unused at the time of the Appellant's Third Party Notice. It was redundant as the Incumbent had not used it for some time and there was little or no prospect of it being needed again. It did not relate to the provision of transport services by the Incumbent for the customer concerned.
60. Therefore, the Panel's finding that J7.1.2(a) does not apply is not wrong or unjust. Further, this decision rested on the interpretation of J7.1.2(a) alone and so was not undermined by any other interpretations and findings in the ADA Determination. The Panel was correct that the application of that clause alone was sufficient to dispose of the matter (paragraph 5.9). GBRf was not in a position to legitimately issue a Third Party Notice under Condition J7.2 in respect of 6L84(SX).
61. So for Condition 7.1.2(a) parties must look at the transport services actually provided and not entirely rely on what is in a contract with the customer.

#### **Primary Purpose and Primary Purpose Customer**

62. Network Rail had upheld the Incumbent's contention that customer B was a Primary Purpose Customer. The ADA Determination indicates that this was because 6L84(SX) was used in conjunction with 6L44. Transport services for customer B were provided using 6L44.
63. The definition of a Primary Purpose Customer is a customer(s) other than the third party referred to in Condition J7.1.2(a). That would be a customer other than

customer A, in this case. However, ORR considers that this must be the customer where the QAR concerned relates to transport services provided to that customer. It cannot be just any other customer of the Incumbent reliant on another QAR. The Primary Purpose rule relates to the transport service using a specific QAR.

64. Therefore the Panel was correct that, if required to, it could have concluded that 6L84(SX) was not used for a Primary Purpose or a Primary Purpose Customer [as contended by the Incumbent and upheld by Network Rail]<sup>12</sup>. In any event this aspect of the case does not affect the ADA Determination that the Appellant was not in a position to issue a Third Party Notice.

### Y-Paths

65. The ADA Determination says that Network Rail's submissions took it to the complexities of Y-Paths (paragraph 5.16). In the Network Code a Y-Path means:

*"... a Train Slot incorporated in the Working Timetable that is identified as such by the incorporation of the letter "Y" in the operating characteristics part of the Train Slot's heading."*

66. The Appellant meanwhile drew attention to the definition in its track access contract:

*"Y Path" means, in relation to a specified Service (which may be shown in one or more Service Group References and as identified by the letter "Y" in the column headed "Days per Week"), where the Train Operator has the Firm Right to that Service to:*

- (a) depart from one or more origins to the same destination; and/or*
  - (b) arrive at one or more destinations from the same origin,*
- as set out in the Rights Table provided that the Train Operator shall not be entitled to more than one Y Path Option within any one Y Path on any particular day;*

67. The Panel concluded that, adopting the definition of Y-Path in Part J of the Network Code, Network Rail was in error in concluding 6L44 was an associated Y-Path of 6L84(SX).
68. The Appellant believed that the view of Y-Paths in the ADA Determination contained numerous inconsistencies and errors and the emphasis placed upon this issue distorted the outcome. Moreover, the Appellant contended as part of this Appeal that the ADA Determination presented a confused view of the differences between Firm Access Rights and Train Slots and this had led to an incorrect determination being reached.
69. Further the Appellant claimed that in paragraph 5.19 of the ADA Determination the Panel discarded the definition in the track access contract as it 'was deemed contradictory with the Network Code...'. The Appellant disagrees with the view

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<sup>12</sup> See paragraph 5.14 of the ADA Determination.

that these two definitions are contradictory and instead considers they are complementary.

70. ORR considers that the definitions in the Network Code and in track access contracts are not inconsistent. A QAR with a Y-Path in the Rights Table should appear as a Y-Path in the Working Timetable, assuming that the Train Operating Company has made an access proposal for both. The track access contract concerns the allocation of QARs. The Working Timetable is how those rights are expressed in a timetable period as Train Slots.
71. Network Rail concluded that 6L84(SX) is in a Y-Path with 6L44. In our view it is not enough that they happened to share paths over the same part of the Midland Main Line or were individually listed with a Y in the Working Timetable to demonstrate that they were Y-Paths with each other for the purpose of the track access contract.
72. We see no error in the ADA Determination inference that 6L84(SX) and 6L44 are separate paths and not formally Y-Paths with each other.
73. Even if the definition in track access contracts had been more closely relied on this would not have demonstrated that 6L84(SX) was in a Y-Path with 6L44 since the latter did not appear as such in the Incumbent's Rights Table. Even if they were in a Y-Path with each other that would not have affected the determination that the Appellant was not in a position to issue a Third Party Notice.

#### **Regular running services**

74. The Appellant considered that Network Rail's view, that a regular running service should take priority over an unused right which has not run for a significant period of time, was erroneous and was not based on a legal entitlement.
75. Network Rail said its aim was preventing the loss of viable rail traffic. This is not a relevant factor in the application of the Network Code. We have found no explicit Network Code condition that regular running services take priority over unused rights, for the purposes of Condition J7. ORR's view is that the Network Code should be applied as intended, thus protecting contractual certainty. That will ultimately encourage the transport of freight by rail.
76. Network Rail's statement could be a reference to the effective position under Condition 7.1.2(a) that there is no current transport service to be transferred, but the effect of transfer might compromise the transport services for another customer. However, it does not appear to have been presented in precisely those terms but rather as a separate contention.
77. It is not clear that Network Rail has ever faced an application from an Access Beneficiary concerning a Failure to Use of 6L84(SX). This procedure would have been available to the Appellant, but instead it seems it chose to seek the transfer



of the QAR. Even if the Appellant had used the procedures in Condition J5.1 it would have needed to demonstrate a reasonable commercial need.

78. Condition J4.1 Failure to Use becomes relevant if the Access Beneficiary fails to make appropriate use of the relevant Train Slot in the Working Timetable. Network Rail may then serve a Failure to Use Notice requiring an Incumbent to surrender the Rights Subject to Surrender. There is no formal requirement for Network Rail to do this, although there is a requirement to hold Rights Review Meetings under Condition J9.
79. Network Rail will agree no doubt that if 6L84(SX) had been relinquished when it became unused then the situation leading up to this appeal would not have arisen. The picture would have been clearer for all parties. There are reasons why FLHH might want to retain Level 1 rights on busy networks even if they are unused. This however leads to other problems in terms of the strategic capacity available for freight. It would be preferable for the rail industry as a whole for Train Operators to surrender rights that are no longer needed. They should not be encouraged to retain unused rights. That is a rationale behind Conditions J4, J5 and J9. Condition J7 is intended for other purposes, namely the transfer of freight rights.
80. Our view is that Track Access Contracts should be kept up to date with changes to the traffic that is passing. Indeed, the model freight track access contract only allows for access proposals to be rolled forward for a year before they have to be supported by QARs contained in the contract, and the failure of the parties to the FLHH contract to do this has led in part to the present dispute.

### **FLHH's track access contract**

81. ORR has a role in approving Access Agreements under the Act. On 3 March 2015 we issued Directions to Network Rail and FLHH to amend the latter's track access contract. As part of that case, GBRf made representations making ORR aware of ADA21. ORR's Directions however only related to new or amended rights and did not cover relinquished rights, which were outside the scope of those directions. ORR's directions were that 6L44 be incorporated as a QAR at Level 2. The relevant amendments were made by the parties. As a result of the ADA Determination and this ORR Determination we do not consider it necessary to review ORR's Directions in respect of FLHH's track access contract.

### **ORR Conclusions**

82. Having considered the appeal and the evidence presented we find that the Panel was correct in determining that GBRf's Third Party Notice in respect of 6L84(SX) was not valid.

83. The decision whether or not the Third Party Notice was valid depends on the interpretation of Condition J7.1.2. It does not depend on other elements considered as part of the Hearing, even though the Panel did cover them in its findings. We are content with the Panel's interpretation of J7.1.2.
84. If Condition J7 did apply it could have a perverse effect of limiting capacity for what is already congested network (for part of the path) for a destination that no longer exists and for no current transport service. Rather such rights should have been surrendered by FLHH.
85. There is no procedure in the freight transfer mechanism under Condition J7 for rights to be surrendered to Network Rail. Therefore the ADA Determination is correct that 6L84(SX) would remain vested with the Incumbent until surrendered back to Network Rail using other processes (such as Condition J4).
86. We have provided commentary on the other issues raised in this dispute. We believe that the ADA Determination is robust on the elements considered.
87. The Appellant questioned whether Network Rail's statement that "*a service that is regularly running should take priority over an unused Right which has not run over a significant period*" was correct. We have found no specific reference to that in Part J of the Network Code. It cannot be relied on as the basis of a decision. It is however perhaps one way of describing the outcome of this case, in that the statement and the effect of the ADA Determination coincide.
88. We can see in this case that there were perceived benefits:
- For FLHH to retain 6L84(SX) after 2011, especially if part of the path was used for services without firm rights.
  - For Network Rail to seek the surrender of 6L84(SX) but not its transfer, especially if the path (or part of it) was also used by 6L44 which is a current service with a Train Slot in the Working Timetable.
  - For GBRf to seek the transfer of 6L84(SX), especially if it would have been unlikely to acquire similar new rights at Level 1 on busy (or congested) infrastructure.
89. However, it would have been better for 6L84(SX) to have been surrendered when it ceased to be needed in 2011 under Condition J4.
90. If a party believes that the outcomes from applying the provisions of the Network Code might lead to distortions or undesirable outcomes, or clarifications are needed, it can propose changes to the Network Code (under Part C). ORR makes no comment on the relevance of that here but the Network Code must be applied as it stands.
91. We make no order in respect of costs under Condition 8.1.1(d).



## ORR Determination

92. ORR determines that the ADA Determination stands.
93. The date of this ORR Determination is 16 July 2015.



**Robert Plaskitt**

**Duly authorised by the Office of Rail Regulation**

