

## DETERMINATION

THE OFFICE OF RAIL REGULATION'S DETERMINATION OF THE APPEALS BROUGHT BY NETWORK RAIL INFRASTRUCTURE LIMITED ("NR") AND FREIGHTLINER HEAVY HAUL LIMITED ("FHH") AGAINST DETERMINATION "ADP23" OF THE ACCESS DISPUTES PANEL IN RESPECT OF A JOINT REFERENCE BROUGHT BY NR AND ENGLISH WELSH AND SCOTTISH RAILWAY LIMITED ("EWS") RELATING TO THE TRANSFER OF CERTAIN QUANTUM FIRM RIGHTS AND ASSOCIATED TRAIN SLOTS AND ADJUSTMENT OF CERTAIN CORDON CAPS PURSUANT TO CONDITIONS J.7 AND J.8 OF THE NETWORK CODE

**DETERMINATION:** *The Office of Rail Regulation determines that NR and FHH's appeals are upheld and Determination ADP 23 is set aside. With effect from the date of this Determination, the Quantum Firm Rights and associated train slots for services between Bristol Portbury Docks and Rugeley Power Station and from all other originating points to Rugeley within SG 2309, as listed in NR's Third Party Notice dated 23 April 2007, shall transfer from EWS to FHH in accordance with Condition J.7.8.1(b) of the Code. The Cordon Cap adjustments listed in the Third Party Notice shall also take effect on the same date to support the transfer of the access rights in accordance with Condition J.8 of the Code.*

## Table of Contents

I	Introduction .....	2
II	Facts.....	2
III	Relevant Provisions of the Code and EWS's TAA.....	6
IV	The Conduct of the Appeal before ORR.....	14
V	The Grounds of Appeal and Relief sought.....	15
VI	ORR's consideration of the appeal.....	18
	Preliminary procedural issues.....	19
	Review of the Panel's interpretation of Condition J.7.....	23
	Review of the Panel's interpretation of Condition J.8.....	32
VII	Conclusion .....	36

## **I Introduction**

1. This is the determination of the Office of Rail Regulation ("ORR") of two appeals, served by NR and FHH on 12 September 2007. The Notices of Appeal challenge an undated determination "ADP23" ("the Determination") published following a hearing on 7 August 2007 before the Access Disputes Panel ("the Panel").
2. The Determination arose out of a joint reference made by NR and EWS relating to the contested transfer of certain quantum firm rights ("QFRs") and associated train slots and the adjustment of certain Cordon Caps<sup>1</sup> pursuant to Conditions J.7 and J.8 of the Network Code ("the Code"). The QFRs in dispute relate to coal freight services from various source points to Rugeley Power Station ("Rugeley") and the corresponding ancillary rights contained within Service Group 2309 ("SG 2309"), as set out in Schedule 5 to EWS's Track Access Agreement ("TAA") dated 9 February 2006. In its correspondence with NR and before the Panel, EWS objected to the transfer to FHH of all of the QFRs in SG 2309 and the proposed Cordon Cap Reductions, on the basis (i) that the proposals exceeded the scope of the services in respect of which FHH had replaced EWS and (ii) of its reasonable ongoing commercial need ("ROCN").

## **II Facts**

3. On 5 April 2007, FHH advised NR that it had secured firm contracts with International Power plc ("International Power") for the provision of transport services to its power station at Rugeley that had previously been operated by EWS. FHH was to be the sole provider of rail haulage to Rugeley. FHH requested, with effect from 3 June 2007, the transfer of the Level One and Level Two access rights and associated train slots from EWS's TAA in accordance with Condition J.7 of the Code as well as alterations to the Cordon Caps at Bristol Parkway, Cheltenham Spa and Stapleton Road stations in accordance with Condition J.8.

---

<sup>1</sup> See definition in paragraph 15 below

4. On 23 April 2007, NR sent EWS a “Third Party Notice” pursuant to Condition J.7.2 notifying it of the application made by FHH and setting out details of the Rights Subject to Surrender<sup>2</sup> in EWS’s TAA and the corresponding train slots in the working timetable. NR also specified the proposed reductions in the Cordon Caps based on its assessment of EWS’s ROCN at Bristol Parkway, Cheltenham Spa and Stapleton Road stations. NR also requested that certain train paths be re-timed or discontinued in accordance with the Cordon Cap Reductions.
5. On 10 May 2007 EWS served a Third Party Counter-Notice (“Counter Notice”) pursuant to Condition J.7.6.1 of the Code objecting to both the transfer and the Cordon Cap Reductions on the basis that the Rights Subject to Surrender extended to the entirety of the QFRs in SG 2309 and went beyond the scope of the services in respect of which FHH had replaced EWS. EWS was willing to surrender the QFRs corresponding to the number of services per day that it had previously operated on behalf of International Power, which it estimated to equate to 2 services per day. It was also willing to agree to Cordon Cap Reductions on that basis. However, EWS complained that FHH had not provided any evidence that it had won freight traffic from EWS in relation to any of the other QFRs in SG 2309. EWS also objected to the transfer and the Cordon Cap Reductions on the ground that it had ROCN for some of the QFRs in support of traffic for another 3 existing customers from Portbury to a number of destinations.
6. On 6 June 2007 NR replied to EWS’s Counter-Notice, maintaining its position in relation to the transfer of the Rights Subject to Surrender with the exception of certain rights that EWS had agreed to surrender under Condition J.2. NR believed that EWS had no ROCN to retain any of the QFRs in SG 2309. International Power had confirmed that FHH would replace EWS in the provision of coal freight services to Rugeley and that EWS would have no ongoing arrangement to serve Rugeley. NR noted

---

<sup>2</sup> See definition in paragraph 10 below.

that services to other power stations did not form part of SG 2309 as they each have their own standalone Service Group in EWS's TAA.

7. On 10 July 2007, NR and EWS made a joint reference to the Panel under Condition J.13.1 of Part J of the Code. The Panel was asked to consider, in particular:

- (a) whether FHH had replaced EWS in the provision of transport services for the purposes of Condition J.7.3;
- (b) whether EWS had demonstrated that it had reasonable ongoing commercial need ("ROCN") in support of its objections to the transfer in accordance with Condition J.7.6.1;
- (c) whether all of the QFRs in SG 2309 and the associated train slots should be granted to FHH in accordance with Condition J.7.9 or whether EWS was entitled to agree to transfer only those QFRs that were previously used by EWS to convey coal to Rugeley on behalf of International Power; and
- (d) whether, in accordance with Condition J.8.2.9, NR was entitled to make certain proposed adjustments to the Cordon Caps at Bristol Parkway, Cheltenham Spa and Stapleton Road, or whether it was required to quantify the amendments in accordance with the industry's published *Criteria for interpreting the expression ROCN (including calculating the Cordon Cap Reduction)* (the "Criteria").<sup>3</sup>

8. In the Determination, the Panel held materially:

- (a) The grant/approval of QFRs is the exclusive responsibility of ORR and Part J of the Code cannot be used for that purpose. Condition J.7 can achieve the transfer of all or part of a QFR but cannot result in a

---

<sup>3</sup> Available on the Network Rail website at [http://www.networkrail.co.uk/browse/documents/network code/changes to access rights/part j criteria/rocn\\_app letter.pdf](http://www.networkrail.co.uk/browse/documents/network%20code/changes%20to%20access%20rights/part%20j%20criteria/rocn_app_letter.pdf).

situation where the quantum has been increased or the qualitative content of a QFR has been changed.

- (b) FHH had replaced EWS in providing coal freight services from Bristol Portbury Docks ("Portbury") to Rugeley but went beyond replacing the service provided by EWS as it sought to increase the coal movements from 2 train slots per day to 4 train slots per day pursuant to a firm contract. The rights transferred should be no more than those required to enable FHH to replace EWS and the request for all of the rights in SG 2309 appeared excessive.
- (c) On the facts, EWS had not run any trains to Rugeley since International Power had cancelled its programme with EWS in February 2007. EWS did not have any firm contract in relation to past or future tonnage. EWS had not demonstrated ROCN for the QFRs or any of the associated train slots in the timetable or provided any evidence in support of its retention of such QFRs.
- (d) In the absence of a firm contract between EWS and International Power, it was difficult to determine the extent of the service provided by EWS in order to establish a benchmark for assessing the scale of the transfer of rights. In such circumstances, the nature of the service should be determined by taking a conservative view based on a reasonably representative sample of the past history of the service provided.
- (e) NR had not assessed the share of the QFRs and associated train slots that should be transferred and should have sought evidence from FHH to ensure that no more slots were requested than were required to replace the service provided by EWS.
- (f) On the evidence as presented, FHH should not require more than 3 slots per day in order to replace EWS. A transfer of rights to 3 slots a

day between Portbury and Rugeley appeared reasonable as it enabled FHH to provide the transport service previously provided by EWS and to have adequate flexibility to meet the needs of International Power.

- (g) In relation to Cordon Caps, whilst NR must abide by the criteria prescribed by ORR, it exercises a discretion to propose adjustments that it considers to be reasonable and practicable. It is not mandatory that the extent of any reduction to the Incumbent's Cordon Caps should be equal to the increase in the Applicant's Cordon Caps. NR should reassess the Cordon Cap Reductions on the basis of the Panel's finding that only 3 slots per day should be transferred to FHH.

### **III Relevant Provisions of the Code and EWS's TAA**

9. The relevant version of Part J of the Code that was in force at the time of the dispute is that published on 26 October 2006. Part J is entitled "Changes to Access Rights" and *"provides a number of mechanisms by which a Train Operator's track access rights can be changed, either at the Train Operator's instigation or in circumstances where the Train Operator would prefer to retain the rights concerned"*. The purpose of Condition J.7 is to establish a mechanism for the transfer of access rights where a train operator replaces another in the provision of freight transport services. Conditions J.7 and J.8 apply only to freight Train Operators.
10. The following definitions in Part J are materially relevant to the present dispute:

**"ADRR Determination"** means a determination made by the relevant ADRR Panel [...], where such determination has not been referred to the Office of Rail Regulation under either Condition J13.3 or J14.2 within the time limit for such referral.

**"Quantum Firm Right"** means a Firm Right 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.

**"Firm Right"** has the meaning ascribed to it in the relevant Access Agreement, and any reference in an Access Agreement to a "Firm Contractual Right" shall be deemed to be a reference to a "Firm Right".

**"Access Right"** means, in relation to an Access Agreement, permission to use track for the purpose of the operation of trains on that track by a beneficiary and rights ancillary thereto which are provided or charged for in the Access Agreement in question.

**"Cordon Cap Increase"** has the meaning ascribed to it in Condition J.8.3.1.

**"Cordon Cap Reduction"** has the meaning ascribed to it in: (a) Condition J6.2.2 or (b) Condition J8.2.2, as applicable.

**"Existing Cordon Cap"** means, in relation to an Access Agreement, a cordon cap specified in that Access Agreement concerning a location to which any Rights Subject to Surrender which are Level Two Rights under that Access Agreement relate.

**"Rights Subject to Surrender"** means, in relation to:

...  
(c) a Third Party Notice;

...  
as applicable, the Quantum Firm Right to which such notice refers and:

- (i) any Train Slot or part of it in the Working Timetable which relates to that Quantum Firm Right;
- (ii) any Ancillary Movements and Stabling that Network Rail determines:
  - (A) are directly associated with the relevant Quantum Firm Right; and
  - (B) will no longer be required by the relevant Train Operator following the surrender or reduction of the Quantum Firm Right, as applicable; and
- (iii) any Bid relating to any such Quantum Firm Right.

11. In so far as they are material to the present dispute, the relevant provisions of Condition J.7 of the Code provide:

**"7. Freight transfer mechanism**  
7.1 Application of this Condition J7

7.1.1 This Condition J.7 applies only to services for the carriage of goods by railway.

7.1.2 This Condition J7 applies only to an application from the Applicant which requests a Quantum Firm Right for the

*provision of transport services to a third party that the Applicant will, (subject, where applicable, to any competitive tendering process amongst other parties) replace the Incumbent in providing.*

*7.1.3 This Condition J7 shall not apply to applications under an Access Agreement by third party Train Operators that are substantially similar in nature to applications made under this Condition J7.*

## *7.2 Third Party Notice*

*If Network Rail receives an application from a Train Operator (the "Applicant") requesting a Quantum Firm Right that is substantially similar to an existing Quantum Firm Right of another Train Operator (the "Incumbent") then, within 10 Working Days following receipt of the Applicant's application, Network Rail shall serve a Third Party Notice on the Incumbent and send a copy of that notice to the Office of Rail Regulation. If the Applicant's application does not comply with Conditions J7.1 and J7.2, 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.*

## *7.3 Applicant's responsibilities*

*When making an application to Network Rail of the type described in Condition J7.2, the Applicant shall:*

- (a) at the same time as submitting the application to Network Rail, send a copy of the application to the Incumbent; and*
- (b) specify in the application:*
  - (i) the date on which the Applicant requests that the Quantum Firm Right takes effect in its Access Agreement; and*
  - (ii) that the Quantum Firm Right sought is for the provision of transport services to a third party that the Applicant will (subject, where applicable, to any competitive tendering process) replace the Incumbent in providing.*

## *7.4 Contents of Third Party Notice*

*A Third Party Notice shall specify:*

- (a) the Quantum Firm Right sought by the Applicant;*

- (b) *the Rights Subject to Surrender, which Network Rail requires the Incumbent to surrender in order to accommodate the Applicant's request; and*
- (c) *the Train Slots in the Working Timetable that Network Rail believes correspond to the Rights Subject to Surrender.*

7.5 ...

#### 7.6 *Third Party Counter Notice*

7.6.1 *The Incumbent may, within 10 Working Days of receipt of a Third Party Notice, serve a Third Party Counter Notice on Network Rail:*

- (a) *specifying that it objects to the surrender of the Rights Subject to Surrender because it has a reasonable on-going commercial need for all or any of the Rights Subject to Surrender; and*
- (b) *providing evidence in support of its objection.*

7.6.2 *If the Incumbent disagrees with the Train Slots shown in the Third Party Notice as corresponding to the Rights Subject to Surrender, it shall include in the Third Party Counter Notice details of the Train Slots that it asserts correspond to the Rights Subject to Surrender.*

7.6.3 ...

7.6.4 ...

7.7 ...

#### 7.8 *Surrender of access rights*

7.8.1 *If it is Determined that the Incumbent has no reasonable on-going commercial need for 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 J7.8.2, in the event of an ADRR Determination; or*

- (b) *specified in the Office of Rail Regulation Determination, if applicable.*

7.8.2 *In the event of an ADRR Determination in accordance with Condition J7.8.1, 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.*

7.8.3 *In respect of this Condition J7.8, 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.*

..."

12. In so far as they are material to the present dispute, the relevant provisions of Condition J.8 of the Code provide:

***"8. Cordon Cap Reduction (transfer)***

***8.1 Application of this Condition J8***

*This Condition J8 shall not apply if, in accordance with Condition J7, the Incumbent and Network Rail agree or it is Determined that in relation to any Quantum Firm Right sought by the Applicant there are no Rights Subject to Surrender.*

***8.2 Existing Cordon Cap adjustments procedure***

8.2.1 *Where any Rights Subject to Surrender specified by Network Rail in a Third Party Notice relate to Level Two Rights and concern a location where either the Incumbent has an Existing Cordon Cap or Network Rail considers that a new Cordon and/or Cordon Cap should be incorporated into the Applicant's Access Agreement the provisions of Condition J8 will apply in addition to Condition J7.*

8.2.2 *The Third Party Notice, in addition to the matters set out in Condition J7.4, may specify any reduction to an Existing Cordon Cap (the "Cordon Cap Reduction") that Network Rail considers should be made if Rights Subject*

*to Surrender were surrendered by the Incumbent under Condition J7.*

*8.2.3 The Cordon Cap Reduction shall be based on Network Rail's assessment of the Incumbent's reasonable on-going commercial need for its Existing Cordon Cap, having had regard to any rules or criteria as determined and published from time to time under Condition J12.*

*8.2.4 ...*

*8.2.5 If the Incumbent does not agree to the Cordon Cap Reduction, it shall serve a Third Party Counter Notice, as part of its notice served in accordance with Condition J7.6:*

- (a) specifying that it objects to the Cordon Cap Reduction because it has a reasonable on-going commercial need for its Existing Cordon Cap; and*
- (b) providing evidence in support of its objection.*

*8.2.6 .....*

*8.2.7 ....*

*8.2.8 ...*

*8.2.9 Where the Cordon Cap Reduction is specified in a Third Party Notice, 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.*

### *8.3 Cordon Cap Increase*

*8.3.1 If Network Rail considers that a new Cordon and/or Cordon Cap should be incorporated into the Applicant's Access Agreement, it shall serve a notice on the Applicant specifying the increase that Network Rail considers should be made to the Applicant's Existing Cordon Cap or, where no Cordon or Cordon Cap exists in the Applicant's Access Agreement, provide to the Applicant a new Cordon and/or Cordon Cap (in either case a "Cordon Cap Increase") to take effect at the same time as the corresponding Relevant Surrender.*

*8.3.2 ...*

*8.3.3 ...*

*8.3.4 Subject to Condition J8.4, a Cordon Cap Increase shall be granted to the Applicant:*

- (a) *as from the date of the corresponding Relevant Surrender; and*
- (b) *for a period of time:*
  - (i) *equal to that which the Incumbent would have enjoyed had its Existing Cordon Cap remained unchanged; or*
  - (ii) *until the expiry of the Applicant's Access Agreement,**whichever is the shorter.*

**8.4 Office of Rail Regulation's consent to or Determination of Cordon Cap Increase**

**8.4.1** *Subject to Condition J8.4.2, a Cordon Cap Reduction and a Cordon Cap Increase shall have effect only with the Office of Rail Regulation's consent in accordance with Condition J10. Such consent shall be sought by Network Rail submitting the relevant modifications to the Incumbent's and Applicant's Access Agreements to the Office of Rail Regulation for consent within 10 Working Days after the later of:*

- (a) *...*
- (b) *...*
- (c) *the relevant ADRR Determination.*

**8.4.2** *...*

**8.4.3** *The Cordon Cap Reduction and Cordon Cap Increase shall have effect from the date the Office of Rail Regulation issues a notice to the parties giving its consent to the reduction or increase. If the Office of Rail Regulation does not consent to the reduction or increase, it shall issue a notice to the parties setting out why consent has been refused.*

13. Condition J.13 provides for a dispute resolution mechanism as follows:

**"13. Dispute resolution**

**13.1** *If within 5 Working Days of:*

- ...*
- (e) *receipt by Network Rail of a Third Party Counter Notice under Condition J7.6.1;*
- (f) *receipt by Network Rail of a Third Party Counter Notice under Condition J8.2.5;*
- ...*

*Network Rail and the Train Operator or the Incumbent (as the case may be) have failed to reach agreement on whether the [...], Specified Relevant Surrender or Cordon Cap Reduction (as the case may be) shall have effect, [...] either party, [...] may refer the matter to the relevant ADRR Panel in accordance with Part A of the Access Dispute Resolution Rules.*

*13.2 In determining matters referred to it under Condition J2, the relevant ADRR Panel shall have due regard to any criteria which the Office of Rail Regulation has most recently published (and identified as such) in relation to the surrender or adjustment of Access Rights.*

*13.3 If either Network Rail, the Train Operator or the Incumbent is dissatisfied with any decision of the relevant ADRR Panel in relation to any matter referred to it under Condition J13.1(a)-(e) or (h), that party may, within 10 Working Days of the ADRR Panel Determination, refer the matter to the Office of Rail Regulation for Determination under Part M."*

14. Schedule 5 to EWS's TAA defines a **"Firm Right"** as:

*"(a) in the case of a Bidder, a right under its regulated access agreement in respect of the number (or quantum) of Freight Train Slots in any specified period, including, as appropriate, rights to Freight Train Slots in respect of timing (...), Origin, Destination, Routing, Intermediate Points, Total/Maximum Services per Week, Total/Maximum Services per Day, Standard Specified Equipment (Timing Load), Route Availability, Loading Gauge, provision of Electricity for Traction, a specific Maximum Length of Train where this is greater than that contained in the Operating Constraints, Special Terms and Access Right Type; and*

*(b) in the case of Network Rail, a right under the Rules of the Route or the Rules of the Plan,*

*which, in either case, is not expressed to be a Contingent Right or to be subject to any contingency outside the control of the holder of the right but which is, in a case within paragraph (a) above, subject to:*

*(i) the Operating Constraints (except in relation to the length of a Train where a Maximum Length of Train has been agreed);*

*(ii) the exercise by Network Rail of any applicable Flexing Right; and*

*(iii) the operation of any other provision of the Network Code."*

15. Schedule 5 provides the following definitions in relation to access rights:

**“Access Right Type”** indicates, in relation to each Service shown in the Rights Table, whether that Service is a Level One Right (L1), a Level Two Right (L2), or a Level Three Right (L3)

**“Cordon”** means a location on the Network stated in Column 1 of the Table in paragraph 2.2.8;

**“Cordon Cap”** means, in relation to a Cordon, the maximum number of Train Slots in respect of any Service to which a Level Two Right applies per Day in a specified direction whose Routing passes through the Cordon and to which the Train Operator is entitled, as stated in Column 2 of the Table in paragraph 2.2.8;

**“Level One Right”** or **“(L1)”** means a Firm Right to a Train Slot relating to a Service in respect of which “L1” is noted in the column headed “Access Right Type”, the Service Characteristics of which are set out in the Rights Table;

**“Level Two Right”** or **“(L2)”** means a Firm Right to a Train Slot relating to a Service in respect of which “L2” is noted in the column headed “Access Right Type”, the Service Characteristics of which are set out in the Rights Table; and

**“Level Three Right”** or **“(L3)”** means a right, which is subject to Condition D3.2.1(c), D3.2.4(a), D3.2.6(a) or D4 of the Network Code, to a Train Slot relating to a Service in respect of which “L3” is noted in the column headed “Access Right Type”, the Service Characteristics of which are set out in the Rights Table.

#### **IV The Conduct of the Appeal before ORR**

16. By Notices of Appeal dated 10 and 12 September 2007 respectively, NR and FHH appealed the Panel’s determination to ORR under Condition J.13.1 (e), J.13.3 and Part M of the Code. On 18 September 2007, ORR provisionally indicated that it was minded to hear the appeals and after giving the parties an opportunity to comment on its proposals, confirmed its decision on 11 October 2007.

17. On 2 November 2007, ORR decided, in accordance with Condition M.6.1 that the appeals should proceed by way of a review of the Determination.
18. EWS responded to the Notices of Appeal on 22 October 2007 and NR and FHH submitted their Replies respectively on 14 and 16 November 2007. Between 6 and 10 December 2007, the parties submitted their comments on the detailed note of the hearing ("Record of the Hearing") before the Panel, which had not previously been made available to all the parties.

## **V The Grounds of Appeal and Relief sought**

19. In their Notices of Appeal, NR and FHH put forward the following arguments in essence:
- (a) The Panel erred in its interpretation of Condition J.7.1.2 by requiring the actual use of the QFRs by the Incumbent to be replaced by an identical or nearly identical use of the QFRs. That requirement does not feature in Condition J.7. The Panel therefore wrongly took account of the contractual terms between EWS and International Power and required the contractual terms between FHH and International Power to be the same or nearly the same.
  - (b) Even if the Panel was correct to take account of EWS's historical use and contractual terms, it applied a measurement that was too narrow and did not give FHH sufficient "headroom" in the number of train slots available. The Panel did not provide reasons or justification in support of its conclusion and only took account of the evidence provided by NR and EWS without addressing FHH's arguments. The determination of 3 train slots per day is insufficient and discriminatory as it provides no flexibility for FHH compared to the 5 services a day that EWS enjoyed in serving Rugeley. In replacing EWS in providing transport services to Rugeley, FHH should enjoy the same level of rights and flexibility enjoyed by EWS.

- (c) The Panel wrongly concluded that NR was expected, as part of the process under Condition J.7, to request and assess evidence from the Applicant demonstrating that the share of QFRs and associated train slots sought were required to replace the service previously operated by the Incumbent. That requirement is incompatible with the 10 working day time limit imposed on NR, which would require NR only to check compliance on the face of the application.
- (d) The Panel wrongly interpreted Condition J.7.6.1 so as to allow the Incumbent to challenge the Third Party Notice on grounds other than its ROCN. The Determination allows EWS to retain access rights in circumstances where it has not demonstrated any ROCN.
- (e) The Panel's interpretation of Condition J.7 produces absurd results as it means that the Condition J.7 transfer mechanism cannot be used to transfer QFRs in a situation where the Incumbent cannot use them all because of its own resource constraints and where the Applicant and the third party wishes them to be used. Instead the parties have to revert to the mechanisms under ss.17-22A of the Railways Act 1993 ("the Act").
- (f) The Panel's interpretation is not consistent with the duties imposed on ORR by s.4 of the Act or with ORR's published criteria in relation to ROCN.

20. NR and FHH request that the determination in ADP23 be set aside and replaced with a ruling that:

- (a) in accordance with Condition J.7, FHH has replaced EWS in the provision of transport services to Rugeley;
- (b) EWS has not made any attempt to provide evidence to support a claim of ROCN;

(c) the Incumbent has no right to challenge a Third Party Notice on the basis that the Rights Subject to Surrender do not fulfil the criteria in Condition J.7.3(b)(ii);

(d) the QFRs and associated train slots for services between Portbury and Rugeley and from all other originating points to Rugeley within SG 2309, as listed in the Third Party Notice, should be transferred from EWS to FHH in accordance with Condition J.7.8.1; and

(e) the Cordon Caps as listed in the Third Party Notice take effect to support the transfer of rights in accordance with Condition J.8.

21. In its Response, EWS opposes the appeals and requests ORR to uphold the Determination and to determine that the remaining QFRs in SG 2309 should be dealt with through Conditions J.2, J.4 or J.9 as appropriate. In support of the Determination, it relies principally on the following arguments:

(a) Condition J.7.1.2 stipulates that it applies only in respect of the provision of transport services that the Applicant will replace the Incumbent in providing. That implies that the transport services exist, that they have been operated by the Incumbent on behalf of the third party in question and that the third party requires the Applicant to replace the Incumbent in providing them. Consequently, Condition J.7 cannot be used to request QFRs that are required for new or additional transport services that the Incumbent was not providing at the date of the application.

(b) the Panel adopted the correct approach by establishing the nature and extent of the transport services that FHH was replacing EWS in providing. There was sufficient evidence before the Panel to suggest that FHH was seeking to operate a

number of trains far in excess of the levels that EWS was previously operating.

- (c) NR should have satisfied itself about the nature of the commitment that FHH had entered into with International Power for the purpose of assessing whether FHH's application satisfied the requirements of Condition J.7.1.2 and J.7.3. Instead, NR did not see the contract between FHH and International Power but simply allowed FHH's application for the transfer of the entirety of the QFRs and train slots contained in SG 2309, including those from other source points even those in respect of which FHH had no requirement for in any event.
- (d) NR also wrongly requested the transfer of a significant proportion of EWS's Cordon Caps at Bristol Parkway and Cheltenham Spa even though FHH intended to operate its services via a different route.
- (e) S. 4 of the Act does not require Condition J.7.1.2 to be interpreted in any manner other than in accordance with the usual rules applying to the construction of contracts.

## **VI ORR's consideration of the appeal**

22. This is the first time that ORR has been asked to determine an appeal in relation to Part J of the Code. It is apparent from the parties' pleadings and from the concerns expressed by the Panel in the Determination itself, that there is some confusion about how the provisions of Conditions J.7 and J.8 are intended to operate in practice as well as the extent of the parties' legal entitlements pursuant to them.

### **Preliminary procedural issues**

23. ORR notes that several procedural issues have arisen, both as regards the conduct of proceedings before the Panel and before ORR. Before it deals with the substance of the appeals, ORR proposes to set out its views on these issues. It should be noted that such views are provided in the context of the particular circumstances arising in the present case and of the version of the Code in force at the material time.

#### *Publication of the Determination and the Record of the Hearing*

24. As a preliminary point, ORR notes that it has proved difficult to understand from the Determination itself (which is undated) exactly whose evidence was put before the Panel and what evidence was taken into account in its deliberations. Some light has been shed on the matter from the Record of the Hearing. However, that record was not made available as a matter of course to all the parties or ORR until some time after the appeals were lodged. Although Rule A1.68 of the Access Dispute Resolution Rules (“ADRR”) does not impose any obligation on the Panel to make its transcript available, ORR recommends that, if the Record of the Hearing is to be made available, it should be provided to all the participants at the hearing at the same time and no later than when the Determination is published. ORR also recommends that, as a matter of good practice, the Determination should be dated and should list all the parties to the dispute and the attendance and status of any witnesses or interested parties.

#### *Role of the Applicant in appeals*

25. Two issues have arisen regarding the status of FHH, as the Applicant, in the reference before the Panel and in an appeal before ORR. ORR deals with each in turn.

26. Before the Panel, FHH declared itself an interested party in the reference and sought to make written submissions to the Panel. By Directions given on 18 July 2007, the Chairman of the Panel ruled that FHH did not have the standing of a dispute party and would not be allowed to make direct representations to the Panel. Instead, as evident from the Record of the Hearing, it was permitted to attend parts of the hearing and provide a statement as a witness in support of NR and the Panel treated its written submissions as a witness statement.

27. ORR notes that under the ADRR in force at the material time, a “dispute party” is defined as “*a person who:*

- (a) *has made a claim in the dispute;*
- (b) *has had a claim made against him; or*
- (c) *a party that is likely to be materially affected by the outcome of the reference and has notified to the Secretary in accordance with rule A1.35 of its wish to participate as a dispute party”*

28. In order to make a notification under Rule A1.35 of the ADRR, the party must be an “industry party” which is in turn defined as “*a facility owner or a beneficiary which in either case is a party to an Access Agreement.*”

29. Accordingly, as FHH is a beneficiary which is a party to an Access Agreement and was likely to be materially affected by the outcome of the reference to the Panel, there was nothing in principle to prevent it from being included as a party to the dispute, subject to its compliance with the notification procedures. Technically, therefore, the Panel committed a procedural error in refusing to give FHH standing as a dispute party and limiting the extent of its participation during the reference. However, as this error was not a point of appeal in the Notices of Appeal, ORR makes no formal finding in this respect.

30. As regard the status of an Applicant in an appeal before ORR, by letter of 26 September 2007, EWS contested the right of an Applicant to appeal the

Determination on the basis that Part J precludes any appeal by the Applicant since, under Condition J.7.8.3, the Applicant “*shall accept that the Determination will dispose of the matter between the Applicant and Network Rail*”.

31. For the following reasons, ORR does not consider that the provisions of Part J are intended to oust the right of appeal by an Applicant:

- (a) Condition J.13.3 expressly refers to “*either Network Rail, the Train Operator or the Incumbent*” [emphasis added] as having the right to appeal the relevant Panel’s Determination. From that wording, it is clear that the Train Operator must be a party other than the Incumbent and the term refers to the definition of Train Operator as the “Applicant” in Condition J.7.2.
- (b) Condition J.7.8.3 is not intended to preclude the Applicant’s right of appeal but deals with the finality of the Determination once any rights of appeal have expired or have been exhausted.
- (c) Pursuant to Part M of the Code, an Appellant is defined as “*any industry party seeking to challenge a determination made under this code...*”. For the reasons set out in paragraph 29 above, FHH satisfies the definition of an “industry party” and therefore has its own self standing right of appeal under Part M.

ORR therefore rejected EWS’s argument and determines that FHH had the right to appeal the Determination to ORR.

#### *Role of third parties in disputes*

32. International Power, as the owner and operator of Rugeley, provided evidence in a letter dated 7 August 2007 to the Panel as to its contractual arrangements with EWS and FHH. As is evident from the Record of the Hearing, that letter was read out to the Panel and a representative from

International Power attended the hearing and answered questions from the Panel.

33. It is clear that International Power is materially affected by the outcome of the reference and any appeal from it. Whether International Power has an access agreement and is an “industry party” is a matter of fact which the Panel should have established prior to the hearing before it. If International Power is an “industry party” and had complied with the notification procedure in Rule A1.35 of the ADRR then the Panel should have treated it as a “dispute party”. If International Power is not an “industry party” then in such circumstances it was open to the Panel to treat International Power as a witness in support of one of the dispute parties and to allow it to attend the Panel hearing in respect of the matters that directly concern it.

*Purported Notice under Condition J.7.8.2 and waiver of appeal*

34. On 13 September 2007, NR served a notice on FHH purporting to give effect to the Determination (“the Purported Notice”) and notified ORR pursuant to Condition J.7.8.2. By letter dated 26 September 2007, EWS submitted that, by serving such notice, NR was “accepting” the ADRR Determination and therefore had waived any right of appeal.
35. ORR rejects that interpretation as, for the purposes of establishing the date of a transfer of QFRs under Condition J.7, the reference in Condition J.7.8.2 to “ADRR Determination” means “*a determination made by the relevant ADRR Panel [...], where such determination has not been referred to the Office of Rail Regulation under either Condition J13.3 or J14.2 within the time limit for such referral*”. In the present case, the Notice of Appeal was served on 12 September 2007 and the Purported Notice was served on 13 September 2007. Accordingly the Purported Notice could not take effect under Condition J.7.8.2 and, in accordance with Condition J.7.8.2 (b), the transfer of any QFRs was stayed pending the appeal.

## **Review of the Panel's interpretation of Condition J.7**

### *Summary of the parties' submissions*

36. NR and FHH contend that the Panel adopted an overly narrow interpretation of Condition J.7.1.2 by confining the scope of the transfer to EWS's historical usage. The Panel took account of irrelevant considerations such as the contractual terms between EWS and International Power and required the replacement to cover identical or nearly identical use of the QFRs.
37. EWS supports the interpretation and approach adopted by the Panel in the Determination.

### *ORR's analysis*

38. Given the importance of the matters raised in this dispute for the transfer of access rights, ORR first provides an overview of the structure and purpose of Condition J.7 before it reviews the Determination itself.

### General overview

39. The purpose of Condition J.7 is to establish a mechanism for the transfer of access rights where a train operator replaces another in the provision of freight transport services.
40. Condition J.7 forms but one mechanism amongst others in Part J of the Code and care should be taken to ensure that it does not encroach upon matters that are intended to be dealt with under different provisions.
41. Condition J.7 also has to be seen in the context of the relevant provisions of the Act. NR and FHH submit that Condition J.7 should be interpreted in the light of ORR's duties under s. 4 of the Act, including those which require ORR (i) to promote the use of the railway network in Great Britain;

(ii) to promote the efficiency and economy on the part of persons providing railway services and (iii) to promote competition in the provision of railway services for the benefit of users of railway services.

42. ORR's decision to incorporate the Part J mechanism as part of the Code and, therefore, the TAA involved, in itself, a balancing of ORR's s. 4 duties. The provision of a contractual industry process for the transfer of unused access rights encourages competition in the provision of railway services and promotes efficiency and economy on the part of those providing the services. However, ORR's appeal jurisdiction under Part M of the Code arises contractually and not as a result of ORR's general regulatory functions. In light of this, ORR does not accept that it should apply its s. 4 duties when interpreting Condition J.7 of the Code and instead considers that it should apply the usual legal rules of contractual interpretation.

43. It is important to address the interplay between Condition J.7 and the statutory regime under ss.17 to 22A of the Act. Under ss.17 and 18 of the Act, a party can approach ORR for directions to enter into, and to seek approval of, a TAA. Under s. 22 of the Act any amendment to a TAA has to receive ORR approval. S. 22A of the Act gives ORR the power to require the parties concerned to amend their TAA to permit more extensive use.

44. Condition J.7 (and Condition J.8) operates independently from the statutory regime as Part J of the Code is incorporated into each TAA. Under these industry processes, the parties can modify their TAA without requiring specific approval from ORR under s. 22 of the Act. Instead, Part J requires the parties to notify ORR of any changes to their TAA made under the Part J mechanisms, so that ORR can keep an up-to-date record of the agreements in force.

#### *ORR's Review of the Determination*

45. In the Determination, the Panel correctly held that, in light of the statutory regime, Condition J.7 cannot result in an outcome where the quantum of access rights is increased or the qualitative content of a QFR has been changed. However, it stated that it had difficulty in construing Condition J.7 due to the lack of definition as well as clarity in Part J of the Code. In particular, several terms including "provision of transport services", "third party" and "replace" had no defined meaning. It therefore attempted to apply its own interpretation, taking into account the facts of the specific case and the normal operation of the timetabling provisions of Part D of the Code.
46. In the present case, the definition of the word "replace" in Condition J.7.1.2 is critical to the scope of the J.7 transfer mechanism. In ORR's view, the Panel became confused at this point as it attempted to construe that term by reference to the contractual arrangements between the parties. It also shifted its attention from the **access rights** that are the subject of the transfer application and focused instead on the relevant **train slots** that are intended to accompany the access rights that are transferred. In so doing, it distorted the legal requirements of Condition J.7 and misconstrued the parties' legal entitlements under that process.
47. ORR sets out first its construction of Condition J.7.1.2 and then explains how the transfer mechanism in Condition J.7 is intended to operate in practice.

#### Construction of Condition J.7.1.2

48. Condition J.7 is phrased in terms of "**Quantum Firm Rights**" as defined in Part J (see paragraph 10 above). ORR understands those definitions as meaning that Condition J.7 applies to the **access rights** themselves plus a certain number of train slots. However, although the access rights themselves are not necessarily timed or routed, the train slots associated with them will be, as set out in the current working timetable. In the

absence of any spot bidding, the new operator will take the slots that are currently available and will have to re-bid for slots at the next timetable. Therefore if a train operator requires access rights over and above those that have already been granted to the Incumbent Train Operator, the appropriate method to obtain them is that contained within ss.17 to 22A of the Act.

49. In practice, as defined in the TAA, there are two types of access rights that qualify as a "Quantum Firm Right"<sup>4</sup>. These are:

- (a) **Level One Rights:** These are Firm Rights which have an origin and a destination, they are routed and timed subject to a standard flexing provision of +/- 30 minutes;
- (b) **Level Two Rights:** These are Firm Rights with an origin and destination but not necessarily routed and timed.

50. It is those access rights which form the subject matter of a transfer under Condition J.7 and which comprise the focus of any dispute. It is only by identifying those access rights, in the first place, that the corresponding train slots in the working timetable can be identified.

51. It is true that various terms in Condition J.7.1.2 are left undefined. In the absence of a specific definition, the terms used should be given their ordinary meaning. Even if they are defined in another part of the Code, that definition will not necessarily apply to Part J as each part of the Code has its independent definitions other than those set out in Part A, which apply more generally.

52. Condition J.7.1.2 applies in respect of QFRs "*for the provision of transport services to a third party*". "Transport services" should be read in light of Condition J.7.1.1 and therefore means services for the carriage of goods

---

<sup>4</sup> See paragraph 15 above.

by railway. The meaning of “third party” will depend on the facts of the individual case. It will usually be referring to the person who is receiving the transport services. In the present case, ORR considers the “third party” to be the owner of Rugeley, International Power.

53. ORR notes that the Panel interpreted “replace” in Condition J.7.1.2 and Condition J.7.3 so that in effect the replacement service had to be the same or nearly the same as the service provided by the Incumbent.

54. “Replace” is not defined in the Code but according to its ordinary and common meaning, it means “to take or fill the place of”. ORR considers that the phrase “.....for the provision of transport services to a third party that the Applicant will....replace the Incumbent in providing”, that appears in both Conditions J.7.1.2 and Condition J.7.3, could be more clearly drafted. In order to construe its meaning, we consider it appropriate to have regard to the particular context of such a phrase.

55. A transfer of access of rights under Condition J.7 could take place in a variety of circumstances. ORR considers that in an industry such as the coal freight industry, it is highly likely that a replacement operator will transport its freight using different trains or through different routes or at different times. It may offer the transport service to a greater or lesser degree. There may be capacity constraints for either the Incumbent or the Applicant. There may be other factors which influence the extent of deliveries, for example seasonal or other changes in coal demand or changes in coal imports.

56. In light of the analysis in paragraphs 54 and 55, for the purposes of Condition J.7.1.2 and Condition J.7.3, ORR considers that the meaning of “replace” should be attributed to the **provider** of the services and not the actual transport services themselves. ORR considers that this means that there is no requirement that the transport services provided by the

Applicant should necessarily be identical to those provided by the outgoing Incumbent provider.

57. Contractual arrangements may prove relevant in appropriate cases where there is some debate about the extent of the replacement and the Incumbent's need to retain some access rights for its ROCN under Condition J.7.6.1. There may be cases of partial replacement where the outgoing Incumbent freight operator continues to supply some transport services to the same third party. However, that was not the case in the present case as the Panel concluded that EWS had not provided sufficient evidence to demonstrate that it had ROCN in respect of the QFRs in SG 2309 in question. That finding was not contested by the Appellants or, indeed, EWS, who has not brought an appeal in respect of the Panel's finding.

58. For those reasons, the extent of historical usage or the contractual arrangements between the Incumbent and the third party and the Applicant and the third party are irrelevant for the construction of Condition J.7.1.2. The Panel erred in taking such irrelevant considerations into account in its Determination and confused the issue of "replacement" under Condition J.7.1.2 with the assessment of ROCN under Condition J.7.6.1.

#### *Operation of Condition J.7 in practice*

59. This misunderstanding also led the Panel into error about the way in which Condition J.7 operates in practice. In particular, it criticised NR for failing to check that the Application complied with the requirements of Conditions J.7.1.2 and J.7.3 and for failing to assess the share of QFRs and associated train slots that should be transferred to FHH. It also allowed the Incumbent, EWS, to contest the transfer, not on the legitimate basis of any established ROCN, but on the basis of its objections about the extent of the access rights and slots that the Applicant should obtain under the

transfer. In so doing it misconstrued the requirements imposed by Condition J.7 and the parties' legal entitlements.

60. ORR sets out its understanding of the way in which the provisions of Condition J.7 are intended to apply in practice at each stage and then discusses the application of those principles to the present case.

*Stage 1: Receipt and review of the Application*

61. Under Condition J.7.2, NR must, within 10 working days of its receipt of the application, either reject the application or serve a Third Party Notice. When reviewing the application's compliance with Condition J.7.1.2, J.7.1.3 and J.7.3, NR must be satisfied that:

- (a) the application specifies that the Applicant will replace the Incumbent in the provision of transport services to a third party;
- (b) the access rights requested are not substantially similar to rights that are the subject of applications under access agreements; and
- (c) the QFRs requested are substantially similar to the existing QFRs of the Incumbent Train operator, who is being or has been replaced by the Applicant.

62. Conditions J.7.1, J.7.2 and J.7.3 do not require the Applicant to provide evidence in support of its application. Condition J.7.3 merely requires the Applicant to specify:

- (a) the date on which the Applicant requests that the QFRs take effect in its TAA (J7.3(b)(i)); and
- (b) that the QFRs sought are for the provision of transport services to a third party that the Applicant will (subject, where applicable,

to any competitive tendering process) replace the Incumbent in providing (J7.3(b)(ii)).

63. It follows that, in order to be satisfied that the Applicant has replaced or will replace the Incumbent, NR can rely on a statement from the Applicant without seeking additional evidence, such as contractual documentation or witness statements, to substantiate the Applicant's position. That limited review is also appropriate given the strict timeframe of 10 Working Days in which NR must take its decision under Condition J.7.2.

64. Accordingly, in the present case, the Panel was wrong to conclude that, on receipt of the application, NR should have sought evidence from FHH to demonstrate that the requested transfer did not exceed the number of slots necessary to replace EWS.

*Stage 2: Quantification of the QFRs and corresponding Train Slots in the Third Party Notice*

65. Condition J.7.4 sets out what has to be included in a Third Party Notice as follows:

- (a) the QFRs sought by the Applicant;
- (b) the Rights Subject to Surrender, which Network Rail requires the Incumbent to surrender in order to accommodate the Applicant's request; and
- (c) the Train Slots in the Working Timetable that Network Rail believes correspond to the Rights Subject to Surrender.

66. In the present case, the application requested the transfer of all Level One and Level Two access rights in SG 2309 and the associated train slots in the working timetable. The access rights in SG 2309 are all dedicated to the transport of coal to Rugeley from different origins including certain

ancillary movements (such as overnight storage for wagons or return routes for empty wagons) for the routes where Rugeley was the ultimate destination.

67. Accordingly, in the present case, as FHH had fully replaced EWS in the provision of coal freight services to Rugeley, it was entitled to request all of the rights in SG 2309 that were dedicated for that purpose as well as all of the train slots that corresponded to those rights in the working timetable. NR correctly identified those QFRs as the Rights Subject to Surrender in the Third Party Notice. The Panel therefore wrongly concluded that NR had failed to assess appropriately the share of QFRs and associated train slots that should be transferred.

*Stage 3: Challenge by the Incumbent*

68. Condition J.7.6 provides that the Incumbent may challenge the validity of the application in a "Third Party Counter Notice" and on the basis of one ground only – namely its ROCN. To set out its case, the Incumbent must:

- (a) object to the surrender of the Rights Subject to Surrender Review because it has a ROCN for all or any of them; and
- (b) provide evidence in support of its objections.

69. There is no provision in Condition J.7.6 for the Incumbent to challenge the extent of the QFRs being transferred to the Applicant<sup>5</sup>. ORR considers that that is because, if the Incumbent does not have any ROCN for those access rights then there is no legitimate reason why it should be concerned that the rights are being transferred away from its ownership. In such circumstances the transfer will not affect the Incumbent's operations as it no longer needs or uses the rights. Of course, if industry

---

<sup>5</sup> Under Condition J.7.6.2, as part of its case on ROCN, the Incumbent may contest the train slots identified in the Third Party Notice and provide details of the train slots which it asserts correspond to the Rights Subject to Surrender. However, that is not the same as challenging the underlying QFRs.

parties consider that the effect of the Code in this regard is too draconian it is up to them to suggest changes to it.

70. In the event that the transfer includes QFRs that are not needed by the Applicant, that situation should not hold up the transfer of the rights under Condition J.7. Instead, any excess should be addressed by NR at the next Rights Review Meeting with the Applicant under Condition J.9 in conjunction with the other mechanisms in Conditions J.2 and J.4.

71. Accordingly, in the present case, the Panel erroneously allowed EWS to challenge the extent of QFRs that should be transferred to FHH even though it found, as a matter of fact, that FHH had replaced EWS in the provision of coal freight services to Rugeley and EWS had not demonstrated any ROCN in respect of the access rights in question pursuant to Condition J.7.6. Moreover, the Panel allowed itself to be drawn into a debate about the number of train slots associated with the QFRs that it was reasonable to include in the transfer in circumstances where EWS had not established any ROCN or directly challenged the slots in its Counter Notice.

72. In attempting to determine the number of QFRs that should be transferred, the Panel took account of irrelevant considerations including its view of the reasonable number of train slots to be transferred based on EWS's historical usage and its contractual arrangements with International Power. Moreover, in so doing, the Panel reached a determination without providing adequate reasoning as to why the transfer of three slots was appropriate. For all of the above reasons, that conclusion must therefore be set aside.

### **Review of the Panel's interpretation of Condition J.8**

#### *Summary of the parties' submissions*

73. FHH contends that the Panel erred in its approach to Condition J.8 and that ORR should determine that the Cordon Caps as listed in the Third Party Notice should take effect to support the transfer of rights under Condition J.7.

74. EWS supports the interpretation and approach adopted by the Panel in the Determination in relation to Condition J.8. In its view, NR wrongly requested the transfer of a significant proportion of EWS's Cordon Caps at Bristol Parkway, Cheltenham Spa and Stapleton Road even though FHH intended to operate its services via a different route.

#### *ORR's analysis*

#### General overview

75. Condition J.8 sets out a mechanism for changes to Cordon Caps to be made where:

- (a) a transfer of access rights under Condition J.7 has taken place; and
- (b) adjustments to Existing Cordon Cap levels are required because of the transfer.

76. Like Condition J.7, Condition J.8 is expressed in terms of QFRs. ORR's observations, at paragraphs 39 to 44 above, regarding the interplay between Condition J.7 and the other provisions of Part J of the Code and the statutory regime apply equally to Condition J.8.

77. In order for Condition J.8 to apply in conjunction with Condition J.7, the following requirements must be satisfied:

- (a) There must be, in accordance with Condition J.7, Rights Subject to Surrender.

- (b) The Rights Subject to Surrender, as specified in the Third Party Notice must relate to Level Two rights and concern a location where either the Incumbent has an Existing Cordon Cap or Network Rail considers that a new Cordon and/or Cordon Cap should be incorporated into the Applicant's TAA.

78. By virtue of Condition J.8.2.3, when assessing the level of the Cordon Cap Reduction, NR must assess the Incumbent's ROCN for its Existing Cordon Cap, having regard to any rules or criteria as determined and published from time to time under Condition J12. The Criteria were published in June 2005. According to those Criteria, the calculation of the Cordon Cap Reduction is based upon the relationship of the rights transferred under Condition J.7 to the Incumbent operator's actual average daily usage of the cordon before transfer in accordance with a specified formula.

79. If the Incumbent wishes to challenge the Cordon Cap Reduction in its Counter Notice, Condition J.8.2.5 provides that the only ground upon which the Incumbent can rely is that it has a ROCN for its Existing Cordon Cap. Moreover, according to the Criteria, it must provide evidence of its ROCN in a "tangible manner" in support of its objections in the Counter Notice.

80. According to the Criteria, in order to demonstrate that it has a ROCN to retain some or all of its Existing Cordon Cap, the Incumbent operator must be able to show:

- (a) Commitment – it has a commitment with a third party which cannot be satisfied, in whole or in part, without use of the relevant Cordon Cap in respect of which it claims that it has a ROCN. Evidence of commitment can include a customer contract;

- (b) Acceptable reasons for failure to use (this may include seasonal factors, non-economic issues beyond the train operator's control, a strike/industrial action);
- (c) Committed resources; and
- (d) Reasonable on-going prospect of use.

#### ORR's Review of the Panel's Determination

81. In the Determination, the Panel found that NR had not adequately demonstrated that it had applied the calculation of the Cordon Cap Reduction prescribed in the Criteria but nevertheless under Condition J.8.3 was able to exercise some discretion in reaching a reasonable assessment of the Cordon Cap proposals. It directed NR to reassess the proposed Cordon Cap Reductions taking account of the Panel's finding that only 3 slots should be transferred to FHH.

82. In the light of the errors in the Panel's interpretation and application of Condition J.7, that direction cannot stand. ORR considers that NR did not adequately set out its calculations and reasoning in the Third Party Notice in line with the requirements of the Criteria, as might have been expected. However, in practice, it had correctly deducted the number of requested QFRs from EWS's Existing Cordon Caps. Moreover, EWS had not provided any concrete evidence of ROCN in respect of its Cordon Caps at Bristol Parkway, Cheltenham Spa and Stapleton Road. In such circumstances the Cordon Cap adjustments specified in the Third Party Notice should stand.

## **VII Conclusion**

83. For the above reasons, ORR makes the following determination:

- (a) ORR allows the appeals brought by NR and FHH and sets aside Determination ADP 23.
- (b) ORR declares that in circumstances where the Applicant has wholly replaced the Incumbent in the provision of transport services to a third party and the Incumbent has not demonstrated any ROCN in respect of the QFRs sought, the Applicant is entitled to request the transfer of all the QFRs in the applicable Service Group. The Incumbent has no right to challenge a Third Party Notice on any basis other than its ROCN and, failing that, cannot object to the transfer of the QFRs in question.
- (c) In accordance with Conditions J.7.8.1, J.8.4 and J.10.2, with effect from the date of this Determination:
  - (i) the QFRs and associated train slots for services between Portbury and Rugeley and from all other originating points to Rugeley within SG 2309, as listed in the Third Party Notice, shall transfer from EWS to FHH in accordance with Condition J.7.8.1; and
  - (ii) the Cordon Cap adjustments as listed in the Third Party Notice shall take effect to support the transfer of rights in accordance with Condition J.8.
- (d) ORR directs NR to notify it of the relevant amendments to the parties' TAAs within 14 days of the date of this Determination.

- (e) In the light of the genuine uncertainty regarding the application of Conditions J.7 and J.8 and in the absence of any request from any of the parties, the parties' costs should lie where they fall.

A handwritten signature in black ink, appearing to read 'B Kogan', with a stylized, cursive script.

Brian Kogan

Deputy Director, Access, Planning and Performance  
Duly Authorised by the Office of Rail Regulation

16 January 2008