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## **An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE**

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### **Determination in respect of reference ADP41**

*(following a Hearing held at 1 Eversholt Street, Euston on 11th November 2009)*

#### **The Panel**

**Elaine Davies** (Eurostar): elected representative for Non-Franchised Passenger Class,

**Ian Kapur** (GB Railfreight): elected representative for Non-Passenger Class, Band 2

**Gabrielle Ormandy**: appointed representative of Network Rail

**Dave Walker** (New Southern Rly): elected representative for Franchised Passenger Class, Band 3

Panel Chairman: **Sir Anthony Holland**

#### **The Parties**

##### **for First Scotrail Ltd ("FSR")**

**Mike Price**                      Contracts Advisor

##### **for Network Rail Infrastructure Ltd ("Network Rail")**

**Chris Hassall**              Acting Customer Relationship Executive (FSR)

**Doug Thompson**          Customer Relationship Executive (DBS)

**Geraint James**            Access Contract Policy specialist

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

**Nigel Oatway**              Access Manager

**Paul Gold**                    Senior Solicitor

#### **Brief Summary of Dispute, and the jurisdiction of the Panel**

1. The Panel was asked, in a joint reference from First ScotRail Ltd ("FSR") and Network Rail Infrastructure Ltd ("Network Rail") to determine whether Network Rail's interpretation and application of Network Code Condition J5.1 was correct in relation to a request from FSR that it serve on DB Schenker Rail (UK) Ltd ("DBS") a *"Third Party Failure to Use Notice"* in relation to Train Slots for services crossing the Forth Rail Bridge; specifically, that Network Rail had refused to issue such a notice, on the grounds that the circumstances of the case did not qualify to be dealt with under the provisions of Condition J5.1.
2. The joint submission of the Parties asks the Panel to determine whether
  - 2.1. ***"First ScotRail's application under Condition J5.1 of the Network Code was compliant with the provisions of Condition J5" or***
  - 2.2. ***"Network Rail's rejection of FSR's application under Network Code Condition J 5.1 was made on the basis of a correct interpretation of Network Code Condition J"?***

3. The Panel acknowledges its jurisdiction in this case which is brought under the provisions of Condition J14.1 *"Right of Appeal to relevant ADRR Panel"* which states *"Without prejudice to the provisions of Condition J13, if any Access Party is otherwise dissatisfied as to any matter concerning the operation of Part J in respect of any access agreement, that party may refer the matter to the relevant ADRR Panel for determination under Part A of the Access Dispute Resolution Rules."*
4. The Panel was asked to consider an objection, from FSR, to the attendance and participation in the dispute of DBS. The Panel determined that
  - 4.1. DBS was a legitimate *"Dispute Party"*, as *"a party that is likely to be materially affected by the outcome of the reference and has notified the Secretary in accordance with rule A1.35 of its wish to participate as a dispute party"* [sub-paragraph (c) of Definition of *"Dispute Party"* in ADR Rules]; and furthermore that
  - 4.2. this matter of eligibility of interested parties to have the standing, and rights of participation, of Dispute Parties, had been tested and determined by the ORR in its *"Decision on Grand Central Railway Company Limited's Notice of Appeal against the decision of the Timetabling Panel made on 4<sup>th</sup> October 2006"* issued on 24<sup>th</sup> October 2006.

### **Some preliminary issues of definition; the relevant contractual provisions**

5. In relation to the provisions of Network Code Part J5, the Panel's attention was drawn to the following definitions, contractual provisions, and precedents as relevant to its determination:

#### **5.1. Access Dispute Resolution Rules**

##### ***"Precedent"***

A1.17 *In reaching its determination, the Panel shall:*

- (a) *take note of its prior determinations (and those of any predecessor body) and of any other relevant tribunal other than a superior tribunal, as persuasive authority but need not be bound by the same;*
- (b) *be bound by any relevant decision of any superior tribunal..."*

##### ***"Determinations and Remedies"***

A1.18 *The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis".*

#### **5.2. Definitions**

*"Train Slot"*

*"Means a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement" [Network Code Part D]*

*"Applicant"*

*has the meaning ascribed to it in:  
Condition J5.1(a); or  
(b) Condition J7.2,  
as applicable;*

*"Contingent Right"*

*has the meaning ascribed to it, if any, in the relevant Access*

**Agreement" [Network Code Part J]**

within FSR's Track Access Agreement "Contingent Right" is defined at Schedule 5 as "a right under this Schedule 5 which is not a Firm Right and which is subject to the fulfilment of all Bids in respect of competing Firm Rights and any additional contingency specified in this schedule 5"

**"Quantum Access Right"** *"Means a Firm Right, any Contingent Right or any Level Three Right as such under an Access Agreement in respect of a number (or quantum) of Train Slots in any specified period (including rights to Train Slots in respect of additional trains or relief services), and includes part of such a Firm Right, Contingent Right or Level Three Right" [Network Code Part J]*

**"Incumbent"** *"has the meaning ascribed to it in:  
(a) Condition J5.1(b)(ii); or  
(b) Condition J7.2,  
as applicable"*

**Part J – Changes to Access Rights**

**J4.2 Failure to Use**

- 4.2.1** *"Subject to Conditions J4.2.2, J4.2.3 and J4.4, a Failure to Use in relation to a Quantum Access Right occurs if:*
- (a) in any First Working Timetable (as defined in Part D) established by Network Rail after the Commencement Date, the Train Operator fails to secure one or more Train Slots in respect of that Quantum Access Right; or*
  - (b) the Train Operator fails to make use of a Train Slot which has been included in the Working Timetable and which relates to that Quantum Access Right".*

**J5. Failure to Use: third party application**

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

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

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

### 5.3. Relevant Precedent

*"In respect of the proposition that changing the Bid, and any offers, by replacing "PRDC" with "Railnet sidings", would achieve technical compliance that would permit Network Rail to allocate the Train Slots in question, the Panel found that, because it would not be feasible to operate any service corresponding to such a bid, such an arrangement would be a contrivance such as has elsewhere been condemned by the Regulator in his determination of the appeal in the case of ttc132 (Network Rail Infrastructure Ltd vs Eurostar (UK) Limited; 11<sup>th</sup> October 2002)). In that determination the Regulator's findings were all predicated on the assertion that **"The working timetable is a timetable of real train movements, not fictitious ones. This is apparent from its purpose and the provisions of the network code which say how the timetable is made up"**(paragraph 68)." [paragraph 17, Determination TTP10]*

### The Evidence laid before the Panel

6. The **Joint Submission** of the parties, incorporating
  - 6.1. Appendix 1: Exchange of e-mails, FSR to Network Rail and Vice versa: request from FSR that Network Rail issue J5 Third Party Failure to Use Notice to DBS
  - 6.2. Appendix 2. Formal letter of 11/09/2009 from Network Rail to FSR rejecting **"Application made pursuant to J5 of the Network Code"**
  - 6.3. **"ORR's decision on the application under section 22A of the Railways Act by Freightliner Heavy Haul and application under section 22 of the Railways Act by DB Schenker for access rights to Longannet Power Station" ("ORRFHH")** issued on 8<sup>th</sup> September 2009.
7. **Statement from DBS in connection with the hearing of a dispute between First ScotRail Ltd ('the Claimant') and Network Rail Infrastructure Ltd ('the Respondent') concerning the operation of Condition J6 of the Network Code (ADP41)** (dated 09/11/2009);
8. Opening statements from FSR, Network Rail and DBS, and questioning by the Panel.

### The Panel's findings in respect of facts

9. The Panel was satisfied that the point at issue related to the interpretation of the provisions of Condition J5.1. However, that point of principle was driven by practical train operating considerations affecting FSR, DBS and Network Rail, and these needed to be understood, in order to give credence to any ultimate determination.
10. Prior to the re-opening of the Sterling –Alloa –Kincardine line ("SAK") in 2008, all rail-borne movements of coal to Longannet Power Station reached their destination via the Forth Bridge and Dunfermline. DBS (and its predecessor EWS) holds Level 1 Firm Rights for such coal movements (i.e. via the Forth Bridge) for imported coal from Clydeport's Hunterston Coal Import Terminal, and Level 2 rights for coal from other sources. In order to provide Train Slots to fulfil these rights Network Rail was obliged to commit a significant proportion of the available line capacity across the Forth Bridge.

11. With the opening of the SAK, DBS has, since December 2008, transferred the routing of the Hunterston to Longannet coal away from the Forth Bridge route, and has been granted any required Train Slots for that route under the Spot Bidding process. Pending the conclusion of an appropriate Supplemental Track Access Agreement to confer Level 1 rights over the SAK, DBS did not surrender its Rights still to move coal to Longannet via the Forth Bridge, but also did not bid for any Train Slots to fulfil those rights in either the current May 2009 Working Timetable or December 2009 Working Timetable. As a consequence,
  - 11.1. capacity over the Forth Bridge has been released for the possible benefit of other Train Operators, and
  - 11.2. FSR has obtained Contingent Rights to operate additional passenger services between Edinburgh, and Fife and Aberdeen, over the Forth Bridge, and has bid for, and secured, in the December 2008 Working Timetable, Train Slots to fulfil the terms of its Contingent Rights.
12. Following publication of **ORRFHH**, which reduced the quantum of Level 1 Rights for DBS services over the SAK to Longannet (as compared with DBS' previous Spot Bid rights), and contemplated that DBS might require to continue to route some coal via the Forth Bridge (ORRFHH paragraphs 38 and 51), DBS has given notice that it needs to retain Rights to move coal to Longannet via the Forth Bridge, and has bid for some Train Slots in the May 2010 Timetable for coal to pass to Longannet via the Forth Bridge. Any capacity that might be allocated to fulfilment of these Firm Rights of DBS could affect the capacity available to FSR for the fulfilment of its Contingent Rights, and FSR would not be entitled to Train Slots that conflicted with Train Slots granted to DBS.
13. FSR is therefore concerned to protect the full range of services operated under its Contingent Rights, and to achieve this is seeking to ensure that it has Firm Rights for the services in question. FSR's application to Network Rail to issue a Failure to Use Notice to DBS is predicated upon the statement that *"We [FSR] believe that it is reasonable to require DB Schenker to surrender the rights so that you can make our rights firm.....I shall therefore be grateful if you will serve the appropriate Third Party Failure to Use notice on DB Schenker Limited as contemplated by Clause 5.1 of Part J of the Network Code within the required 10 working days"*. [E-mail.FSR to Network Rail of 09/09/2009]

### **The Contentions of the Parties**

14. The Panel considered that the contrasting assertions of the Parties in respect of the construction to be placed upon Condition J5.1, in respect of the circumstances above, could be summarised as follows.
15. For Network Rail;
  - 15.1. J5.1 relates to allocating the use of a Train Slot;
  - 15.2. Network Rail is sympathetic to FSR's aspirations, insofar as it *"can demonstrate a reasonable commercial need"* [J5.1 (b) (i)] for capacity across the Forth Bridge;
  - 15.3. because DBS has not Bid for any Train Slots for coal across the Forth Bridge in the current Timetable there is no Train Slot that *"was secured in exercise of a Quantum Access Right of another Train Operator (the "Incumbent");"* [J5.1 (b) (ii)]; and therefore
  - 15.4. there is no basis of issuing a Third Party Failure to Use Notice.

16. For FSR:

- 16.1. J 5.1 is intended to achieve FSR's aim of causing DBS to surrender the rights that bar FSR's Contingent Rights;
- 16.2. it did not accept Network Rail's contention that where the Incumbent had not secured a Train Slot, J5.1 did not apply, because this would open up the possibility that a Train Operator could use Firm Rights that were not translated into Train Slots to block the aspirations of other Train Operators to secure Firm Rights in their place. FSR argued that this would be contrary to the purpose of J5.1; and
- 16.3. it was reasonable to construe references to "*the Train Slot*" in J5.1 (b) as relating to the Train Slots that FSR was operating currently under its Contingent Rights.

17. For DBS;

- 17.1. DBS could not contemplate surrendering any of its Rights to move coal over the Forth Bridge until it could be satisfied that it had secured necessary Level 1 Rights to move the traffic via the SAK;
- 17.2. in view of previous rulings [the Panel acknowledged the findings, and the comments of the Regulator, as recorded in determination TTP10], DBS considered that it had acted correctly in not bidding for Train Slots incorporating passage across the Forth Bridge, when it was moving the traffic over the SAK using Spot Bid Rights, and actively seeking a Supplemental Track Access Agreement to give it Firm Level 1 Rights on the SAK and thus a basis for surrendering its need for coal capacity on the Forth Bridge;
- 17.3. in view of ORRFHH, DBS was faced with a changed expectation that might require it still to need coal capacity across the Forth Bridge.

18. All Parties were in agreement that Condition J5.1 was not a model of clear drafting.

**The Panel's findings in respect of entitlements**

- 19. The Panel, whilst sympathetic to the common view in 18 above, accepted that it must confine itself to determining what the wording of Condition J5.1, taken in its entirety, meant, and not what it might be comforting to think it was intended to mean. The Panel therefore construed J5.1 on the following basis.
- 20. The issuing of a Third Party Failure to Use Notice by Network Rail to an Incumbent is dependent upon the fulfilment of four specific stated pre-conditions: as these pre-conditions are all linked by "*and*", the Panel considered that all four must be met or no notice can be issued.
- 21. J5.1 (a) states that the route to the issuing of a notice starts with "*an application from a Train Operator (the "Applicant") for a Quantum Access Right to a Train Slot*"; this means that the Applicant (in this case FSR) is seeking (i.e. does not already possess) Rights such that it may become the Train Operator authorised to make use of a specific Train Slot; this in itself implies that the Train Slot sought is one that pre-exists the application and is not a Train Slot already secured by the Applicant (i.e. FSR);
- 22. "Train Slot" is itself a defined expression, ("*Means a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement*" [Network Code Part D]) and relates to the totality of the capacity Network Rail is required to allocate for the complete passage of the relevant service.

23. In J5.1 (b) this definition is further qualified, in relation to both the Applicant and the Incumbent, viz
- (b) *the Train Slot*: [i.e. the Train Slot that is the subject of the application]
    - (i) *is one in respect of which the Applicant can demonstrate a reasonable commercial need; and*
    - (ii) *was secured in exercise of a Quantum Access Right of another Train Operator (the "Incumbent"); and*
    - (iii) *is one in respect of which there is a continuing Failure to Use by the Incumbent,*
24. The Panel noted that the parties had focussed their disagreement upon the meaning of Condition J5.1(b) (ii), and the Panel considered this first, as failure to fulfil any one of the four pre-conditions would validate Network Rail's decision to decline to issue a Third Party Failure to Use Notice.
- 24.1. J5.1 (b) (ii) makes clear that the Train Slot that is the subject of an application needs to derive from the Quantum Access Right of *"another Train Operator (the "Incumbent")*, which cannot therefore be FSR *"the Applicant"*. Furthermore, as a Train Slot has no substance other than when incorporated as an entry in a Working Timetable, *"was secured in exercise of a Quantum Access Right"* can only mean that the Right was converted by the Incumbent from latent obligation to practical reality by the process of Bidding and Offering prescribed in Part D (Timetable Change). Had DBS, the Incumbent, made a bid, the Train Slot that would have been secured would have been one permitting the passage of a Freight train over the Forth Bridge en route between Hunterston and Longannet (or vice versa).
- 24.2. FSR did not make explicit precisely in its notice what Train Slot(s) it currently has *"secured in exercise of"* its Contingent Rights; however, to the extent that those Train Slots relate to services between Edinburgh, Fife and Aberdeen, FSR's Train Slots have very little in common with the Quantum Firm Rights to move coal from Hunterston to Longannet held by DBS (at most no more than timings between Dalmeny Junction and Inverkeithing or Charlestown Junctions); therefore
- 24.2.1. it would not be reasonable to equate a Train Slot between Hunterston with Longannet with one between Edinburgh and Aberdeen, and
  - 24.2.2. the common fragment of both Train Slots (i.e. across the Forth Bridge) does not qualify to fulfil the definition of a Train Slot; therefore
- 24.3. FSR's case falls because
- 24.3.1. DBS has not secured a Train Slot, and even if it had
  - 24.3.2. the Train Slot secured in relation to movements between Hunterston and Longannet, would not have sufficed for a passenger service between Edinburgh, Fife and Aberdeen.
25. On the basis of this construction of Condition J5.1(b) (ii) the Panel questions Network Rail preparedness to concede that FSR fulfilled Condition J5.1 (b) (i). Whilst FSR has a *"reasonable commercial need"* for paths across the Forth Bridge to operate passenger services between Edinburgh, Fife and Aberdeen, FSR's *"commercial need"* cannot be fulfilled in terms of the Train Slots that might be *"secured in exercise of"* DSB's Level 1 Rights..

26. As FSR does not fulfil either of J5.1 pre-conditions (b) (i), or (b) (ii), a consideration of (b) (iii) might be considered superfluous. In the event, the parties and the Panel were agreed that there was no Failure to Use by the Incumbent as the Incumbent, for responsible and previously tested reasons, had elected not to exercise the right to secure a Train Slot between Hunterston and Longannet via the Forth Bridge in the December 2009 Working Timetable. The Panel therefore concluded that, because of its failure to meet the requirements of J5.1(b) (ii), by extension FSR's notice did not meet the requirements of J5.1(b) (iii).

**The Panel's Determination:**

27. **The Panel therefore determines that Network Rail was correct to decline to issue a Third Party Failure to Use Notice to FSR in the circumstances of this case.**
28. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.



**Sir Anthony Holland**  
**Panel Chairman**

23.11.2009