
An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of references ADP42 and ADP44

(following a Hearing held at 1 Eversholt Street, Euston on 25th November 2009)

The Panel

Tony Deighan (Eurostar): elected representative for Non-Franchised Passenger Class

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

Carew Satchwell: appointed representative of Network Rail

John Beer (First Capital Connect): elected representative for Franchised Passenger Class, Band 3

Panel Chairman: **Sir Anthony Holland**

The Parties

for Network Rail Infrastructure Ltd ("Network Rail")

Doug Thompson Customer Relationship Executive (DBS)

Rachel Gilliland Customer Relationship Executive (Special Trains & DRS Freight)

Geraint James Access Contract Policy Specialist

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

Nigel Oatway Access Manager

Duncan Clark Business Manager for DBS Network

Paul Gold Senior Solicitor

For Direct Rail Services Ltd ("DRSL")

Sarka Oldham Commercial Development Manager

Accompanied by

Kenneth Russell Director, John G Russell (Transport) Ltd

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked, in a joint reference from DB Schenker Rail (UK) Ltd ("DBS") and Network Rail Infrastructure Ltd ("Network Rail") to determine whether
 - 1.1. two Third Party Failure to Use Notices served by Network Rail on DBS, and relating to Quantum Access Rights to Train Slots for overnight services over the Highland Main Line between Central Scotland and Inverness and the Far North, conformed with the stipulations of Network Code Condition J5.3; and, if so

- 1.2. the Counter Notices from DBS conformed with the requirements of Network Code Condition J4.9, and established that DBS had a *“reasonable on-going commercial need”* for the Quantum Access Rights that covered the Train Slots the in question, such that those Rights should not be subject to surrender.
2. The Panel was advised that
 - 2.1. Direct Rail Services Limited (“DRSL”) was the Applicant Train Operator for the Quantum Access Rights in question, and had joined itself to the dispute as a Dispute Party, and that
 - 2.2. John G Russell (Transport) Ltd had constructed an inter-modal terminal at Inverness, and provided transshipment services for both DBS and DRSL.
3. The joint submission of the Parties asks the Panel to determine
 - 3.1. for DBS
 - ***“Firstly, that Network Rail’s First and Second Notices are invalid because they did not contain all of the required information specified in Condition J5.3, specifically Condition J5.3 (a).***
 - ***Secondly, that DB Schenker has a reasonable on-going commercial need in respect of the Quantum Access Rights specified in the First and Second Notices.”***

and ***“ that if the Panel finds in its favour in respect of bullet points one and/or two above, that Network Rail’s First and Second Notices be set aside.”***
 - 3.2. for Network Rail
 - ***“Firstly, that the First and Second Third Party Failure to Use Notices served by Network Rail on DB Schenker are valid.***
 - ***Secondly to determine that DB Schenker have failed to comply with Condition J4.9.1 in that it has failed to detail its Grounds for Objection or provide evidence to support its assertion of Reasonable Ongoing Commercial Need with the Counter Notices served in response to the First Notice and the Second Notice***
 - ***Thirdly, in the event that the Panel find in favour of the two above points, that the Panel determine that DB Schenker should relinquish those Quantum Access Rights which are the subject matter of this dispute (For the avoidance of doubt this does not include 4H44 01.40 MWX Mossend Euroterminal to Georgemas Junction in respect of Fridays only)”***.
4. The Panel acknowledges its jurisdiction in this case, which is brought under the provisions of Condition J13.1 (c). *“If within 5 working days of:...receipt by Network Rail of a Counter Notice under Condition J5.4 (b)...Network Rail and ...the Incumbent...have failed to reach agreement, ...either party...may refer the matter to the relevant ADRR Panel for determination under Part A of the Access Dispute Resolution Rules.”*

Some preliminary issues of definition; the relevant contractual provisions

5. The arguments advanced by the Parties, and the form of the determination reached by the Panel drew upon the following definitions and contractual provisions, here cited in full. The text of the following sections gives specific mention of those provisions that were considered decisive.

5.1. Access Dispute Resolution Rules

“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

<i>“Train Slot”</i>	<i>“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]</i>
<i>“Applicant”</i>	<i>has the meaning ascribed to it in: Condition J5.1(a); or (b) Condition J7.2, as applicable;</i>
<i>“Quantum Access Right”</i>	<i>“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]</i>
<i>“Incumbent”</i>	<i>“has the meaning ascribed to it in: (a) Condition J5.1(b)(ii); or (b) Condition J7.2, as applicable”</i>
<i>“Rights Subject to Surrender”</i>	<i>“means, in relation to: (a) a Failure to Use Notice; (b) a Third Party Failure to Use Notice; (c) a Third Party Notice; or (d) a notice under Condition J9.2.1, as applicable, the Quantum Access Right to which such notice refers and: (i) any Train Slot or part of it in the Working Timetable which relates to that Quantum Access Right; (ii) any Ancillary Movements and Stabling that Network Rail determines: (A) are directly associated with the relevant Quantum Access Right; and (B) will no longer be required by the relevant Train Operator following the surrender or reduction of the Quantum Access Right, as applicable; and (iii) any Bid relating to any such Quantum Access Right;”</i>

Part J – Changes to Access Rights

J4 Failure to Use

...

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".*

.....

J4.9 Counter Notice

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

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

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

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

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

4.10 Grounds for Objection

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

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

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

- (a) set out in Condition J4.10.1(b); or
- (b) that it has a reasonable on-going commercial need in respect of any or all of the Rights Subject to Surrender.

4.12 Surrender of Access Rights

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

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

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

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 Contents of a Third Party Failure to Use Notice

A Third Party Failure to Use Notice shall specify:

- (a) the Failure to Use which Network Rail considers has occurred;

- (b) *the Rights Subject to Surrender, which Network Rail requires the Incumbent to surrender; and*
- (c) *the date on which the surrender is intended to take effect.*

5.4 *Application of Conditions*

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

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

5.5 *Counter Notice*

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

The Evidence laid before the Panel

6. The Joint Submission of the parties, incorporating

- Appendix 1 - Network Rail's Third Party Failure to Use Notice dated 24/09/09 ('the First Notice')
- Appendix 2 - Network Rail's Third Party Failure to Use Notice dated 30/09/09 ('the Second Notice')
- Appendix 3 - DB Schenker's Counter Notice dated 08/10/09 to the First Notice
- Appendix 4 - DB Schenker's Counter Notice dated 13/10/09 to the Second Notice
- Appendix 5 - Network Rail's response dated 15/10/09 to DB Schenker's first Counter Notice
- Appendix 6 - Network Rail's response dated 30/09/09 to DB Schenker's second Counter Notice
- Appendix 7 - Letter from DB Schenker's customer dated 28th September 2009, but only supplied to Network Rail on 11th November 2009, confirming commitment to future traffic.

7. Submission from DRSL, incorporating

- Appendix 1 - DRSL Application Letter to Network Rail dated 17th September 2009
- Appendix 2 - DRSL Application Letter to Network Rail dated 25th September 2009
- Appendix 3 - JG Russell Letter of Intent dated 17th September 2009
- Appendix 4 - DRSL Letter to Network Rail dated 6th February 2009
- Appendix 5 - NR response to DRSL Letter dated 17th February 2009
- Appendix 6 - Photographs from the trial service between Coatbridge and Inverness (from 28th September 2009)

8. Opening statements (also supplied in hard copy) from Network Rail, DBS and DSRL, followed by questioning of company representatives by the Panel.

9. A written statement from Mr Kenneth Russell of John G Russell (Transport) Ltd.

The Panel's findings in respect of facts

10. The Panel was satisfied that the point at issue related to the interpretation of the provisions of Conditions J5 and J4, principally in respect of matters of administration of "Changes to Access Rights" within the Network Code. However, those matters of administration related directly to practical commercial and train operating considerations affecting DBS, DSRL and Network Rail, and such practicalities needed to be understood, as giving credence to any ultimate determination.
11. The services subject to these Failure to Use proceedings derive from the Firm Level 1 Rights within Service Group 4402 in DBS' Track Access Agreement where they are listed as
- 11.1. **4H44 01:40 MWX** Mossend Euroterminal to Georgemas Junction CE
- 11.2. **4H44 01:40 WO** Mossend Euroterminal to Georgemas Junction CE and
- 11.3. **6H44 01:53 MO** Mossend Euroterminal to Inverness TC
- These rights are all subject to Flex of +/- 30minutes.
12. Service Group 4402 also contains Level 1 rights for reciprocal Southbound services which do not require passage over the Highland Main line during night time Maintenance "White Period" Hours.
13. These Rights have been bid into the Working Timetable in accordance with Part D of the Network Code, and appear as **WFX** Train Slots between Mossend Euroterminal and Inverness TC only.
14. The Working Timetable also contains a Train Slot **6H44 01:57 FO** Mossend Euroterminal to Inverness TC.
15. The 4H44 and 6H44 MO Train Slots, intended for the passage of Intermodal trains conveying goods to North of Scotland Supermarkets, (and sometimes referred to as the "Safeway Flyer" paths), have not been used by DBS in recent times. Accordingly, on 17th September DRSL (in accordance with Network Code Condition J5.1) made application that Network Rail issue a Third Party Failure of Use Notice to DBS in respect of the Quantum Access Rights for **4H44 01:40 MWX & WO** Mossend Euroterminal to Georgemas Junction. A second complementary application was sent on 25th September in respect of **6H44 01:53 MO** Mossend Euroterminal to Inverness TC. DRSL demonstrated their reasonable commercial need for the applications with a Letter of Intent (dated 17th September 2009) from John G Russell (Transport) Ltd, stating *"regarding the provision of a dedicated intermodal rail service between Coatbridge and Inverness I am pleased to confirm that John G Russell (Transport) Ltd. are able to start a six day round trip service and wish to contract with Direct Rail Services Ltd for the provision of rail traction, and wagon provision."*
16. In response to these two applications, Network Rail issued
- 16.1. Network Rail's Third Party Failure to Use Notice dated 24/09/09 ('the First Notice'), which relates to the Quantum Access Rights subject to surrender for
- 16.1.1. **4H44 01:40 MWX** Mossend Euroterminal to Georgemas Junction CE; and
- 16.1.2. **4H44 01:40 WO** Mossend Euroterminal to Georgemas Junction CE;
- and stated that *"the Train Slot secured in exercise of this Quantum Access Right by DB Schenker was last used on 13th June 2008"*.
- 16.2. Network Rail's Third Party Failure to Use Notice dated 30/09/09 ('the Second Notice'), which relates to the Quantum Access Right subject to surrender for **6H44 01:53 MO** Mossend Euroterminal to Inverness TC, and stated that *"the Train Slot secured in exercise of this Quantum Access Right by DB Schenker was last used on 4th June 2007"*.

17. DBS in turn, served Counter Notices, dated respectively 8th and 13th October, in each case disputing the validity of Network Rail's Notices, and also asserting "*reasonable on-going commercial need*" for the Rights and Train Slots in question.
18. When further correspondence failed to find common ground, the matter was registered as a dispute with the ADC Secretary. After the submission of a Joint Skeleton submission (11/11/2009), the parties were issued with supplemental directions (13/11/2009); as a sequel to addressing the questions posed, DBS and Network Rail reached agreement that the existing FO Class 6 service (currently **6H44 01:57 FO** Mossend Euroterminal to Inverness TC), which serves a different category of traffic, would retain an appropriate Quantum Access Right and Train Slot, irrespective of the Panel's determination of the other issues of procedure.
19. On 11th November, DBS supplied Network Rail with the text of a letter dated 28th September 2009 from the Stobart Group stating "*Further to our recent collaboration for both our International and Domestic business, we now have a requirement for an additional new service (time sensitive traffic) overnight from Mossend/Grangemouth to Inverness. ... to commence this service at a date to be agreed in the coming weeks*".
20. On Monday 28th September 2009 DRSL commenced running a new Mossend to Inverness service on behalf of JG Russell on a Monday to Thursday basis, using the 4H44 Train Slots in the Northbound direction on a Spot Bid basis, but using a new path (i.e. not in Service Group 4402) in the Southbound direction. DRSL were advised that a Friday Train Slot was not available "*due to the Rules of the Route restriction that meant that only 6H44 could have rights to run.*" and that "*There was no Saturday path available due to signal box manning issues*" [DRSL's submission to the Hearing, paragraph 6.1.5]
21. The maintenance "White Period" on Highland Main Line is constrained by the timing of Passenger Services (including the Sleeper services); 4H44 and 6H44 MO are timed to pass through the "White Period", requiring any possession to be lifted and re-instated. Network Rail asserts that it has carried out extensive studies of the options for a second overnight Northbound Freight path and concluded that this is feasible on a Thursday/Friday night with an adjustment to the Rules of the Route (whence the agreement alluded to in paragraph 18 above) but cannot be found for other weeknights without extensive changes to other Passenger services and/or the Rules of the Route for the whole week.
22. The Russell terminal at Inverness has capacity to deal with up to four trains per day, but cannot deal with more than one train at a time.

The Contentions of the Parties

23. The Panel decided that the Parties had correctly identified that the successive questions posed were dependent, one upon the other, and should be addressed in the following sequence
 - 23.1. the technical validity of Network Rail's Third Party Failure to Use Notices:
 - 23.2. the procedural validity of DBS' Counter Notice; and
 - 23.3. the cases made, primarily by DBS, but also by DRSL, in respect of "*reasonable on-going commercial need*".
24. The Panel satisfied itself that the contrasting arguments of the Parties in respect of each of these areas of dispute, could be summarised as follows.
25. For Network Rail;

- 25.1. that it had accepted the “commercial need” of DRSL to acquire the Quantum Access Rights for the 4H44 Train Slots, and considered DRSL’s application that it serve a Third Party Failure to Use Notice upon DBS to be justified in terms of Condition J5.1;
 - 25.2. that it had in turn served Third Party Failure to Use Notices on DBS that were self-evident in their meaning and intention, and compliant with Condition J5.3;
 - 25.3. that DBS, in its Counter Notice, which was required to conform with the provisions of Condition J4.9, had failed to comply with the mandatory requirement that “it must provide evidence with the Counter Notice in support of its contentions {specifically in relation to “reasonable on-going commercial need” as required by J4.9.1(d) and J4.10.2 (b)}; and therefore
 - 25.4. DBS should be considered to have failed to serve a Counter Notice and therefore “be deemed to have agreed to the surrender specified in the Failure to Use Notice” [Condition J4.9.1(a)].
26. For DBS:
- 26.1. that Network Rail’s Third Party Failure to Use Notices were inadequate to fulfil Condition J5.1 (specifically, because they did not give details of Train Slots, they did not adequately identify “the Failure to Use that Network Rail considers has occurred” J5.1(a)), in relation to the definition of Failure to Use in Condition J4.2.1(b), and had therefore required DBS to seek clarification of the Rights (and related specific Train Slots) Subject to Surrender; and
 - 26.2. that in its Counter Notices, which it had served to protect its position, and not because it thereby acknowledged the validity of the Third Party Failure to Use Notices, it had asserted its “reasonable on-going commercial need”, and that that was, by custom and practice, deemed sufficient to protect its position; and
 - 26.3. that there was a genuine traffic opportunity, likely to be ready to operate from early in the New Year, in respect of movements on behalf of the Stobart Group and Tesco;
27. For DRSL;
- 27.1. that it and Network Rail had complied with the relevant provisions of Part J to enable DRSL to acquire Firm Rights to the Train Slots that it had been using to move actual traffic since early in September 2009.

The Panel’s findings in respect of entitlements

28. The Panel acknowledged that Part J remains imprecise in legal clarity and in part can attract ambiguity in its interpretive effect. It accepted therefore that, in answering the questions posed in paragraph 24 above it must clearly distinguish between
 - 28.1. those provisions (of Part J of the Network Code) that are clear and unambiguous, and therefore compliance by a party is a matter of simple “yes” or “no”; and
 - 28.2. those provisions that are less clear and potentially ambiguous, and where therefore the Panel has to exercise a judgement as to whether a party
 - 28.2.1. has placed a reasonable construction upon the wording in question, and if so
 - 28.2.2. has adequately complied with that reasonable construction.
29. In making this distinction, the Panel recognises that it needs to confine itself to determining what the wording of the relevant parts of Conditions J4 and J5, taken in conjunction, mean, and require the parties to do or to supply.

30. For the specific purposes of Part J, two new defined terms are introduced, *"Quantum Access Right"* and *"Rights Subject to Surrender"* both of which are expressed in 'catch all' terms, to cover both the different types of rights, and also the various practical formats into which they may have been translated within the Working Timetables.

<i>"Quantum Access Right"</i>	<i>"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]</i>
<i>"Rights Subject to Surrender"</i>	<i>"means, in relation to:</i> <i>(a) a Failure to Use Notice;</i> <i>(b) a Third Party Failure to Use Notice;</i> <i>...</i> <i>as applicable, the Quantum Access Right to which such notice refers and:</i> <i>(i) any Train Slot or part of it in the Working Timetable which relates to that Quantum Access Right;</i> <i>(ii) any Ancillary Movements and Stabling that Network Rail determines:</i> <i>(A) are directly associated with the relevant Quantum Access Right; and</i> <i>(B) will no longer be required by the relevant Train Operator following the surrender or reduction of the Quantum Access Right, as applicable; and</i> <i>(iii) any Bid relating to any such Quantum Access Right;"</i>

31. The Panel concluded that there is significant latitude in relation to the format and degree of detail that Network Rail is required include into a Third Party Failure to Use Notice, provided that it meets, the three stipulations in Condition J5.3, i.e.

"A Third Party Failure to Use Notice shall specify:

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

32. The Panel is satisfied that those Network Rail Notices that are the subject of this dispute do meet this specification. Considering the Notice of 24th September 2009, the Panel finds that

- 32.1. the Quantum Access Rights which are to be surrendered [i.e. Condition J5.3 (b)] are clearly identified, as

32.1.1. **4H44** 01:40 MWX Mossend Euroterminal to Georgemas Junction CE; and

32.1.2. **4H44** 01:40 WO Mossend Euroterminal to Georgemas Junction CE;

32.1.3. whilst the Train Slots are covered by the sentence *"for the avoidance of doubt this notice also requests the surrender of any Train Slots held by DB Schenker which were secured in exercise of these Quantum Access Rights"*,

- 32.2. the nature of the Failure to Use, and the extent thereof is identified, in compliance with the definition of a Failure to Use in Condition J4.2(b) by the sentence "Network Rail's records show that the Train Slot secured in exercise of this Quantum Access Right by DB Schenker was last used on 13th June 2008";
- 32.3. the expression of "*the date on which the surrender is intended to take effect*" is not given in terms of a precise date, but as the derivative of the working through of the processes prescribed elsewhere in Part J. Thus "*...this will be in with effect from the date on which notice is given to the office of Regulation [sic] pursuant to Condition J4.8 (c) and Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the DB Schenker Rail (UK) Limited Track Access Contract no more than 10 Working Days after the date on which DB Schenker agrees to the surrender*". The Panel is content that this formula is appropriate and adequate for the requirements of Condition J5.3 (c), in a case where there might be an expectation that a Third Party Failure to Use Notice would elicit a Counter Notice.
33. The Panel notes that DBS has sought to argue that J4.2 (b) [*"...a Failure to Use in relation to a Quantum Access Right occurs if:...(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"*]. requires the notice to specify the Train Slots, which in this case were for services between Mossend and Inverness only (i.e. no Train Slots had been secured for services beyond Inverness to Georgemas Junction); and that therefore, because the formulation is in terms of Quantum Access Rights, Network Rail's Third Party Failure to Use Notice is not valid. Given the formulation used by Network Rail, and in particular that in paragraph 32.1.3 above, and that all the rights in this instance were Level 1 Rights (i.e. specific as to timings etc. and not capable of confusion with other rights), the Panel considers this to be a spurious argument. The Panel does accept that there might be occasions where the clarity of purpose of a notice might be enhanced by the inclusion of details of the service group, or require the citation of e.g. "*any Ancillary Movements and Stabling that Network Rail determines:*"
- (A) *are directly associated with the relevant Quantum Access Right; and*
 - (B) *will no longer be required by the relevant Train Operator following the surrender or reduction of the Quantum Access Right, as applicable",*
- but finds that such considerations are not required in this instance.
34. The Panel therefore considers that the Network Rail Third Party Failure to Use Notices of the 24th and 30th September 2009, are adequately compliant with Condition J5.3 and are thus Valid Notices.
35. In respect of the Counter Notices served by DBS, the Panel notes that DBS seeks to contest Network Rail's Third Party Failure to Use Notices on two grounds, namely
- 35.1. that "*pursuant to Condition J5.4(b)*" [*Condition J4.9.1(a)*] "the Notices were not valid; an argument that the Panel does not, for the reasons set out above, consider to be sound; and
 - 35.2. "*Notwithstanding the above contention, DB Schenker has a reasonable on-going commercial need for the Quantum Access Right specified in the Third Party Failure to Use Notice as it has a reasonable prospect of gaining a customer contract that would utilise this Quantum Access Right*" [Notices of 8th and 13th October 2009]
36. The Panel finds that a case on the grounds of "*reasonable on-going commercial need*" should
- 36.1. be brought under Condition J4.9.1 "*(d) [there are Grounds for Objection to the proposed surrender within Condition J4.10, detailing the Grounds for Objection on which it relies]*"; and that
 - 36.2. Condition J4.10.2 provides that.

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

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

37. However the Panel also finds that Condition J4.9.1 states that when serving any Counter Notice, the Train Operator

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

38. The Panel was advised, by the Disputes Chairman that a requirement that a proposition be supported by evidence is, in this particular instance, not legally satisfied merely by an assertion made without support of evidence.

39. The Panel considered the Counter Notices as served by DBS, and concluded that, notwithstanding such other background information that it might have been given, such as the letter from Stobart supplied to Network Rail on 11th November 2009, and representations made at the hearing, its mandate to consider whether or not DBS had a "reasonable on-going commercial need" had to be determined on the **evidence**, as opposed to any assertion, provided ***"with the Counter Notice in support of its contentions"***.

40. After careful consideration the Panel concluded that DBS had not supplied any evidence of "reasonable on-going commercial need" **with** its Counter Notice, and that neither an assertion, nor a letter (that of 28th September) sent on November 11th (four weeks after the Counter Notice), fulfils that requirement. Failure to comply with such an unequivocal formulation as ***"must provide evidence with the Counter Notice in support of its contentions"*** has therefore to imply that

40.1. the Counter Notice does not have effect;

40.2. the Panel has no basis or requirement to consider the merits of any arguments brought by DBS in relation to "reasonable on-going commercial need"; and

40.3. Network Rail is entitled to proceed as if, in accordance with J4.9.2,

" no [valid] Counter Notice is served within 10 Working Days of receipt of a Failure to Use Notice:

(a) the Train Operator will be deemed to have agreed to the surrender specified in the Failure to Use Notice;" and therefore

40.4. Network Rail shall be entitled to proceed to carry out the processes for "Surrender of Access Rights" as prescribed in Conditions J4.12 and J5.4(d), and their transfer to the Applicant, DRSL.

The Panel's Determination:

41. The Panel therefore determines that

41.1. Network Rail's Third Party Failure to Use Notices to DBS were valid in the terms of Condition J5.3.

41.2. DBS's Counter Notices to the Third Party Failure to Use Notices, were defective in that they did not comply with the mandatory requirement in Condition J4.9 to "provide

evidence” to support a case for “*reasonable ongoing commercial need*” as required by Conditions J5.4, J4.9.1 (d) and J4.10.2 (b); and that

- 41.3. a defective Counter Notice should be deemed to have no effect, and thus to result in the circumstances contemplated in Condition J4.9.2, in which case
- 41.3.1. the Panel has no requirement to consider or determine matters of DBS’ “*reasonable on-going commercial need*”; and
- 41.3.2. there is no impediment to Network Rail implementing the Surrender of Rights provisions of Condition J4.12 in respect of the Quantum Access Rights as cited in its Third Party Failure to Use Notices of 24th and 30th September 2009, and transferring those Rights to the Applicant DRSL.
42. For the avoidance of doubt the Panel is satisfied that nothing in this determination interferes with the agreement of the parties that DBS should continue to enjoy a Quantum Access Right and a Train Slot corresponding to the current Train Slot for a 01:57 6H44 FO service.
43. 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

7. 12. 2009