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

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### **Determination in respect of reference ADP47**

*(following a Hearing held at 1 Eversholt Street, Euston on 11<sup>th</sup> February 2010)*

#### **The Panel**

**Tony Deighan** (Eurostar): elected representative for Non-Franchised Passenger Class,  
**Lindsay Durham** (Freightliner Ltd): elected representative for Non-Passenger Class, Band 2  
**Nick Hortin** (First ScotRail): elected representative for Franchised Passenger Class, Band 1  
**Carew Satchwell**: appointed representative of Network Rail

Panel Chairman: **Sir Anthony Holland**

#### **The Parties**

##### **for GB Railfreight Ltd ("GBRf")**

<b>Steve Turner</b>	Contract Manager
<b>Andy Moyle</b>	Head of Procurement

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

<b>Gordon Cox</b>	Customer Relationship Executive
<b>Geraint James</b>	Commercial Advisor

#### **In Attendance**

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

<b>Nigel Oatway</b>	Access Manager
<b>Alasdair Kenneth</b>	Contract Administrator Manager, Network Business Segment

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

1. The Panel was asked, in a joint reference from GBRf and Network Rail to determine certain questions as to GBRf's Rights of access in Doncaster Up Decoy Yard in respect of trains serving Freightliner Railport <sup>1</sup>, namely
  - 1.1. whether GBRf should be required to make any supplemental payment to Network Rail, over and above its normal regulated Track Access Charge, for use of the length of track within Up Decoy Yard that runs from Signal 1418 in the vicinity of Bridge 323E to the

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<sup>1</sup> Several of the locations bearing on this dispute are referred to variously under different names. For the avoidance of ambiguity, this determination makes use of the name applicable at the date of the Hearing. All references in quotations are tied back to a common name, and can also be identified by reference to the plan and photographs in Annexes 1 and 2.

boundary with Freightliner Railport, ("the Network line") in order to gain access to Freightliner Railport; and

- 1.2. whether the terms of a Facility Access Agreement between GBRf and DB Schenker ("DBS") had a bearing upon this matter, and, if so, whether Network Rail should be meeting the costs of invoices, raised against GBRf by DBS, and which GBRf had declined to pay since 2008.
2. The facility now leased and operated by Freightliner Limited, and known as "Freightliner Railport" is variously referred to in maps, Agreements and submissions, as Doncaster Railport, or Doncaster Europort. Except when quoting from sources using other nomenclature this facility is referred to in this determination as "FL Railport"
3. The Panel acknowledges its jurisdiction in this case, which is brought under the provisions of Clause 13 of the GBRf Track Access Agreement. However, the Panel also took account of the Master Facility Access Agreement between DBS and GBRf. This was first mentioned in a joint Skeleton Submission, and, as a result of directions that had been issued by the Panel Chairman, was produced so that the Panel could consider its content and import.
4. The Panel noted that DBS was present as "a party that is likely to be materially affected by the outcome of the reference" [sub-paragraph (c) of Definition of "Dispute Party" in ADR Rules].
5. The Panel was asked

**5.1. by GBRf to find**

- (a) That the line from Bessacarr Jcn to the Doncaster Europort boundary is part of NRs 'Network' as defined in the Track Access Contract.**
- (b) That this part of the Network is subject to the Track Access Contract (Freight Services) between Network Rail Infrastructure Ltd and GB Railfreight Ltd.**
- (c) That no third party should charge for access to this part of the Network and to the extent First GBRf have incurred any such charges then they should be refunded by NR from the date operations into the Europort commenced in January 2006.**
- (d) That First GBRf should not be required to pay any third party for future access to this part of the Network and any such charges should be for the account of NR. and**

**5.2. by Network Rail, to note its views that:**

- (a) "NR agrees with the assertion made at point (a)– the panel do not need to deliberate on this issue**
- (b) NR agrees with the assertion (point [5.1](b)) that this part of the Network is subject to the Track Access Contract (Freight Services) with GB Railfreight Ltd. This issue is not in dispute.**
- (c) NR is not party to the bilateral Facility Access Agreement between GBRf and DBS. It is not sighted of the rights and obligations in this agreement neither can it be bound by the terms of this agreement. NR cannot be held responsible for the consequences of a bilateral contract which the parties entered into willingly and freely. It is therefore denied that NR is responsible for the costs associated with the agreement.**

- (d) *... Without prejudice to these assertions [above at 5.2 (c)] NR has previously offered to facilitate an industry solution for this location based on revised and simplified operational activity which is fully compliant with safety rules and regulations. DBS and Freightliner have confirmed with NR they will engage to assist in delivering this”.*

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

6. The Panel’s attention was drawn to the following definitions, contractual provisions, and precedents as relevant to its determination:

#### **6.1. 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”.*

#### **6.2. Definitions**

<i>“Network”</i>	<i>‘Network means the network of which Network Rail is the facility owner and which is situated in England, Wales and Scotland’. Part A Network Code (1 September 2008)</i>
<i>“conflict”</i>	<i>“In the event of any conflict of interpretation between this code and an Access Agreement (not including this code) the following order of precedence shall apply: (1) this code; and (2) the Access Agreement” Network Code Part A1.1 (h)</i>

<p><b>4. STANDARD OF PERFORMANCE</b></p>	<p><b>4.1 General standard</b></p> <p><i>Without prejudice to all other obligations of the parties under this contract, each party shall, in its dealings with the other for the purpose of, and in the course of performance of its obligations under, this contract, act with due efficiency and economy and in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced:</i></p> <ul style="list-style-type: none"> <li>(a) <i>network owner and operator (in the case of Network Rail); and</i></li> <li>(b) <i>train operator (in the case of the Train Operator).</i></li> </ul>
<p><b>5. PERMISSION TO USE</b></p>	<p><b>5.1. Permission to use the Network</b></p> <p><i>Network Rail grants the Train Operator permission to use the Network.</i></p> <p><b>5.2 Meaning</b></p> <p><i>References in this contract to permission to use the Network shall, except where the context otherwise requires, be construed to mean permission:</i></p> <ul style="list-style-type: none"> <li>(a) <i>to use the track comprised in the Network for the provision of the Services using the Specified Equipment;</i></li> <li>(b) <i>.....</i></li> </ul> <p><i>and such permission is subject, in each case and in all respects to:</i></p> <ul style="list-style-type: none"> <li>(i) <i>the Network Code; and</i></li> <li>(ii) <i>the Operating Constraints.</i></li> </ul> <p><i>[Model Freight Track Access Agreement November 2009]</i></p>
<p><b>"Operating Constraints"</b></p>	<p><i>means:</i></p> <ul style="list-style-type: none"> <li>(a) <i>the Rules of the Route;</i></li> <li>(b) <i>the Rules of the Plan; and</i></li> <li>(c) <i>the Working Timetable and all appendices to the Working Timetable including the sectional appendices as defined in the Working Timetable and all supplements to the sectional appendices;</i></li> </ul> <p><i>[Definitions: Model Freight Track Access Agreement November 2009]</i></p>

<p><b>13. DISPUTE RESOLUTION</b></p>	<p><b>13.1 Arbitration</b></p> <p><b>13.1.1 Arbitration</b></p> <p><i>A Relevant Dispute shall be referred to arbitration in England in accordance with the Access Dispute Resolution Rules in force at the time of the reference (the “ADRR”), as modified by this Clause 13, unless:</i></p> <p><i>(d) the Relevant Dispute is referred to the relevant ADRR Panel ... under Clause 13.3;</i></p> <p><i>(e) the parties otherwise agree in writing....</i></p> <p>[Model Freight Track Access Agreement November 2009]</p>
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### **6.3. EWS Method of working for Freightliner Railport (14<sup>th</sup> October 2008)**

#### **“3.3 EWS Duties for Arriving Trains for Other Freight Operating Companies**

*The EWS PIC [Person in Charge] is in charge of all arriving movements into the FL Railport.*

*The EWS PIC will be informed by the Signal Box when the train is stood at either signal 1405 or 1403.*

*The EWS PIC will then check and make sure the points at signal 1418 and outer points to the Railport are set correctly.*

*Once the EWS PIC has set the correct road, they will give the ‘SLOT’ within the Up Decoy Cabin to accept the train up to the Railport.*

#### **3.4 EWS Duties for Departing Trains for Other Freight Operating Companies**

*The EWS PIC is in charge of all departing movements out of the FL Railport.*

*When the train is ready to depart the Railport, it will proceed up to and come to a stand at the Stop Board at the outer gate of the Railport.*

*The EWS PIC will then check and ensure that the outer points of the Railport are set correctly.*

*Once the EWS PIC has set the correct road, they will advise the Driver of the train that they can proceed on there [sic] journey”*

### **The Evidence laid before the Panel**

#### **7. The Joint Submission of the parties, incorporating**

- 7.1. Appendices A to C, Photos and Maps of layout and ownerships:
- 7.2. Appendix D: Directions from Disputes Chairman dated 27<sup>th</sup> January 2010.
- 7.3. Appendix E: details of Invoices raised by DBS against GBRf differentiating between those that have been settled and those still outstanding.
- 7.4. Appendix F: Specific responses from Network Rail to Questions posed by Disputes Chairman,

*"As regards the GBRf Track Access Contract, I note that GBRf and Network Rail appear to be in agreement that Network Rail is the owner and operator of all the infrastructure used by GBRf to obtain access to the Europort, and that there is only the single boundary between Network Rail's infrastructure and that controlled by Europort. Can the parties please advise, in relation to that single boundary,*

- what are the governing agreements (e.g connection agreement, private siding agreement etc) and between which parties? What obligations do those agreements impose on the parties?*

**Answer: "The governing agreements are the current DB Schenker Method of Working. There is no Connection Agreement in place with Doncaster Railport"**

- how is the recognised safe method of working for moving trains across that boundary defined? Whose is the directing mind for determining that safe method of working, and for ensuring that it is executed in practice?*

**Answer: "The recognised safe method of working for Doncaster Railport is as defined by the Method of Working for Up Decoy Yard. The directing mind is DB Schenker"**

- does that safe method of working impose any duties upon the staff or agents of any party other than Network Rail, GBRf or the operators of Doncaster Europort ? If so, who is that party, and what are the duties? How are those duties documented, and which party has obligations to which other for their proper execution?*

**Answer: "Network Rail are [sic] not party to the DBS Method of Working. The Special Instructions for Doncaster Signal Box says that:**

***"Decoy Up sidings***

***You must obtain permission of the Decoy Shunter before authorising a movement to the Up yard. The Decoy Shunter will obtain permission from you before allowing a train to proceed towards signal 1418 or 1437."***

8. Opening statements from GBRf, and Network Rail and questioning by the Panel.

**The Panel's findings in respect of facts** (See also Annex 1 and 2 for visual clarification of this section)

9. The Panel found that

- 9.1. Although DBS is the facility Owner for the largest part of Up Decoy Yard, the single track that connects with the rest of the Network at signal 1418 beneath Bridge 323E, and leads to the Boundary with FL Railport, remains within the facility ownership of Network Rail. In the remainder of this determination, this segment of track will be referred to as "the Network line".
- 9.2. Operationally "the Network line" serves to provide access to 4 signalled Reception Sidings and two unsignalled "Cripple sidings" (via the hand points adjoining signal 1418), and also (via the opposite leg of the hand points giving access to FL Railport), 8 double ended sidings, leading into the New Ballast stockpile, and the engineers' "Wood Yard".. Trains moving to or from the latter facilities are predominantly Network services, operated by several Train Operators on behalf of Network Rail.
- 9.3. Access to any of the other sidings served from "the Network line", apart from FL Railport, can only be reached by passing into or via the area for which DBS is the Facility Owner. It is also the case that for trains stabled or marshalled in any of these sidings, shunting or ancillary movements at the South end of the sidings will require to

move onto "the Network Line". This is not the case with shunting movements within FL Railport where there is an independent East Headshunt.

- 9.4. Access to Up Decoy Yard from the South end can be from either of two routes, from the ECML via the Up Goods 1 line, or via Low Ellers curve from St Catherine's junction. Visibility for any train entering the yard from either of these two routes is impaired by Bridge 323E, and permission to enter is conditional upon the clearing of either signal 1405 or 1403.
- 9.5. The Signaller in Doncaster Signalbox cannot clear either of signals 1403 or 1405 without confirmation, through the operation of the "SLOT" in the Up Decoy Cabin, that "the Network line" is clear of conflicting moves or obstructions.
- 9.6. Responsibility for controlling safely all train movements over "the Network line" needs to be vested with a single authority. The "directing mind" accountability for supervising safe movements over the Network Line into the DBS leased part of Up Decoy Yard, is vested with the Person in Charge employed by DBS..
- 9.7. The Panel can see, and understand that, in the absence of fixed signals to control all movements using "the Network line",
  - 9.7.1. there is a pragmatic logic for Network Rail to vest responsibility for the control of all trains using "the Network line" with DBS's Person in Charge; and that
  - 9.7.2. DBS would in turn have an interest in exercising such control over all movements affecting tracks within its facility.
- 9.8. That said, the Panel notes that on the great bulk of the Network, this responsibility to assure the safety of all Train Operators with access to the Network, is vested with Network Rail, and is discharged through the operation, by Network Rail employees, of the relevant signalling and control systems.
- 9.9. The Panel found difficulty in differentiating the nature of the responsibilities, and accountabilities, of the Person in Charge of Up Decoy Yard, when controlling trains over "the Network Line", from those of any other signaller, pilot-man or crossing-keeper engaged or employed by Network Rail to control trains on other parts of the Network.

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

10. The Panel considered that the contrasting assertions of the Parties in respect of the physical considerations set out above, could be summarised as follows.
11. For **GBRf**
  - 11.1. inter modal services operated by GBRf run daily into FL Railport. These services run over Network Rail lines, including "the Network line", for the totality of their journey, and are governed by the GBRf Track Access Agreement up to the boundary with FL Railport; beyond which point the services are subject to the Facility Access terms agreed with FL Railport.
  - 11.2. GBRf acknowledges the need for a single directing mind to control services over "the Network line", but sees this as the exercise of an authority that is properly Network Rail's; therefore the costs of exercising such authority should be borne by Network Rail and deemed to be met from the Track Access charges paid by each Train Operator.
  - 11.3. GBRf has a Master Facility Access Agreement with DBS which governs the terms of its access to a list of facilities for which DBS is the facility owner. Since the commencement of GBRf services to FL Railport in 2006 first EWS, then DBS, have

invoiced GBRf such sums in relation to Up Decoy Yard as have been set out in the Freight Facility Agreement.

- 11.4. GBRf contends that it initially accepted and settled those invoices on the basis that it understood that access to FL Railport over “the Network line” required its trains to pass through the EWS/DBS facility. Since discovering that “the Network line” is wholly on Network Rail land GBRf has declined to settle DBS’ invoices, asserting that the service that it receives from DBS in relation to “the Network line” should be provided and/or paid for by Network Rail.

12. For **Network Rail**;

- 12.1. “the Network line” is part of the Network and GBRf’s rights of access are covered by the Track Access Charges set out in its Track Access Agreement;
- 12.2. *“NR is not a party to the bi-lateral facility access agreement between First GBRf and DB Schenker. NR is not aware of the rights and obligations contained within the bi-lateral agreement. NR cannot be held responsible for the costs of a party incurred where the parties have entered into such an agreement in these circumstances”.* [Joint submission paragraph 6.4];
- 12.3. NR concedes that the arrangements for operating “the Network line” may require to be reviewed or revised, in the current circumstances where several Train Operators operate over the line, and is seeking to bring the parties together to review the options at a meeting on March 11<sup>th</sup> 2010.

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

13. The Panel considered that the main issue in this case related to the rights GBRf (and other Train Operators) acquired by the terms of the “Permission to Use the Network” [Clause 5 of the GBRf Track Access Agreement]. Given Network Rail’s own stated position that “the Network line” was a part of the Network like any other, the Panel could not see that there would be any case for Network Rail charging any premium for its use, over and above the standard Network Access charges.
14. The Panel endorsed a general principle that GBRf could not expect to transfer onto a third party responsibility for the settlement of charges that it had committed itself to in a bi-lateral agreement freely entered into. The Panel also found that the specific wording within the Freight Facility agreement with DBS, as it related to Up Decoy Yard was sufficiently broad that it was not self-evident that charges did not apply in relation to moves into FL Railport over “the Network line”.
15. That said, the Panel considered that there was something intrinsically anomalous about Network Rail relying upon a *de facto* delegation, to one of the competing Freight Train Operators, of responsibility for the control and supervision of all users of “the Network line”. In such circumstances it would be unusual if there were not a clear contractual basis for determining the respective duties, obligations and responsibilities, in what is, to all appearances, a relationship between a principal and its agent.

**The Panel’s Determination:**

16. The Panel therefore determines, in respect of the representations made by the parties, as follows



- ***That the line from Bessacarr Jcn to the Doncaster Europort boundary is part of NRs 'Network' as defined in the Track Access Contract.***
  - ***That this part of the Network is subject to the Track Access Contract (Freight Services) between Network Rail Infrastructure Ltd and GB Railfreight Ltd.***
  - ***NR agrees with the assertion made at point (a)– the panel do not need to deliberate on this issue***
  - ***NR agrees with the assertion (point (b)) that this part of the Network is subject to the Track Access Contract (Freight Services) with GB Railfreight Ltd. This issue is not in dispute.***
- 16.1. The Panel acknowledges and agrees with the basic proposition that trains operated by GBRf over the stretch of railway line between Doncaster signals 1403 or 1405 and the boundary with Freightliner Railport, ("the Network line") derive their entitlement to access that stretch of line from the terms of the GBRf Track Access Agreement. However,
- 16.2. Network Rail depends, for the safe regulation of trains over this stretch of line (i.e. for the discharge of its responsibilities towards GBRf, FL and other Train Operators in respect of Clauses 4 and 5 of their Track Access Agreements), upon the "degree of skill, diligence, prudence and foresight" of staff employed by a third party, namely DBS.
- ***That no third party should charge for access to this part of the Network and to the extent First GBRf have incurred any such charges then they should be refunded by NR from the date operations into the Europort commenced in January 2006.***
  - ***That First GBRF should not be required to pay any third party for future access to this part of the Network and any such charges should be for the account of NR.***
  - ***NR is not party to the bilateral Facility Access Agreement between GBRf and DBS. It is not sighted of the rights and obligations in this agreement neither can it be bound by the terms of this agreement. NR cannot be held responsible for the consequences of a bilateral contract which the parties entered into willingly and freely. It is therefore denied that NR is responsible for the costs associated with the agreement.***
  - ***Without prejudice to these assertions NR has previously offered to facilitate an industry solution for this location based on revised and simplified operational activity which is fully compliant with safety rules and regulations. DBS and Freightliner have confirmed with NR they will engage to assist in delivering this.***
- 16.3. The Panel is quite clear that the responsibility for assuring the regulation and safe passage of trains over all parts of the Network, and for providing or procuring all services necessary to achieve this lies totally and unequivocally with Network Rail. In this context, the Panel supports the (abridged) proposition that ***"First GBRF should not be required to pay any third party for future access to this part of the Network"***.
- 16.4. For the avoidance of doubt, the Panel wishes to emphasise that its finding at 16.3 above should not be interpreted as expressing a view on the merits and applicability of the Facility Access Agreement between GBRf and DBS, as currently drafted, as it relates to the matter of access to Freightliner Railport. Furthermore, in relation to the invoices outstanding from GBRf to DBS, the Panel endorses the general proposition that parties alone are responsible for ensuring that they only enter into such contracts

as are worded in terms that clearly meet their requirements. For this reason, the Panel cannot

16.4.1. intervene in any initiative by either party to renegotiate terms; or

16.4.2. determine in favour of an interpretation of a relationship that is at odds with what appears on the face of a contract; or

16.4.3. induce a third party to take over any of the duties or obligations of such a contract.

16.5. Without prejudice to the generality of the foregoing paragraph, the Panel notes that the meeting to be held on 11<sup>th</sup> March 2010 will provide Network Rail with the opportunity to resolve/address the ambiguities in the current arrangements at this location.

17. 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**

25th February 2010