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## ACCESS DISPUTE ADJUDICATION

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### Determination in respect of dispute reference ADA21

(following a hearing held at 1 Eversholt Street, London on 18 March 2015)

#### The appointed Adjudication Panel ("Panel")

John Hewitt	Hearing Chair
Anthony Crabtree	Industry Advisor
John Boon	Industry Advisor

#### The Dispute Parties

##### For GB Railfreight Ltd ("GBRF")

Ian Kapur	National Access Manager
Steve Turner	Business Improvement Manager

##### For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Rachel Gilliland	Head of Commercial Freight
Andy Saunders	Customer Relationship Executive
Tom Causebrook	Customer Manager

#### Interested Party

##### For Freightliner Heavy Haul Ltd ("FLHH")

Lindsay Durham	Head of Rail Strategy
David Brooke	Head of Train Planning

#### In attendance:

Tony Skilton	Committee Secretary
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## **1 Introduction, Procedural History of the Substance of the Dispute and Jurisdiction**

### **1.1 The following abbreviations and terms are used in this determination:**

"ORR" means the Office of Rail Regulation

"Rule" refers to the Access Dispute Resolution Rules

"Secretary" is the Committee Secretary of the Access Disputes Committee

"SX" means, in relation to a train, Saturdays Excepted (i.e. runs Mondays to Fridays)

- 1.2 This dispute arises out of a Third Party Notice issued by GBRf (the "Applicant") to FLHH (the "Incumbent") dated 7 November 2014, making application for the transfer to GBRf of certain Quantum Access Rights and associated Train Slots held by FLHH; the application arose following GBRf being awarded a contract by Aggregate Industries UK Ltd for the movement of aggregates traffic commencing 1 January 2015. In response, FLHH issued to Network Rail a Third Party Counter Notice dated 21 November 2014. The Third Party Counter Notice accepted the transfer of certain of the Rights but FLHH objected to the transfer of a number of the Rights. On 28 November 2014, Network Rail issued a notification in which it agreed with the Applicant in respect of certain of the Rights, agreed with the Incumbent in respect of certain other Rights but required that certain of the Rights should be relinquished to Network Rail for reason of providing strategic capacity.
- 1.3 The Third Party Notice was served pursuant to Condition J7.2 of the Network Code; the Third Party Counter Notice was served pursuant to Condition J7.5 and Network Rail's response was given pursuant to Conditions J7.6 and J7.7.
- 1.4 On 5 December 2014, GBRf served a Notice of Dispute with Network Rail pursuant to Conditions J7.6 and J11.1.1, objecting in essence that Network Rail had (i) accepted that certain Rights not having been used for a significant period of time provided grounds upon which the Incumbent could object to those Rights being transferred, (ii) required Rights Subject to Surrender to be relinquished for strategic capacity, and (iii) allowed the Incumbent to retain the Quantum Access Right for an Aggregate Industries service when part of the associated Train Slot had only been used by the Incumbent for an alternative customer.
- 1.5 ADR Rule B7 applied to the situation, requiring that all disputes referred for resolution in accordance with the Rules under Part J of the Network Code shall be referred to an Access Dispute Adjudication with a right of appeal to the ORR. The Secretary accordingly registered the dispute as "ADA21" and informed FLHH of its entitlement (under Rule G18) to become involved in the dispute provided request was made before GBRf and Network Rail being informed of the date of the hearing.
- 1.6 I was appointed as Hearing Chair and on 11 December 2014 a hearing date of 14 January 2015 was set. FLHH had not requested involvement in the hearing.
- 1.7 Discussions continued between GBRf and Network Rail, together with FLHH, in an endeavour to settle matters between themselves without need for GBRf's case to be determined.
- 1.8 On 16 December 2014 Network Rail informed GBRf that its application for Surrender of Rights by FLHH would be satisfied except in respect of train 6L84(SX), regarding which an issue of principle had arisen late in the discussions. Informed of this and recognizing that the imminent Christmas/New Year holiday period would impact upon the ability of GBRf and Network Rail to hold further discussions or to prepare fully argued Statements in time for the hearing on 14 January, I decided that the hearing should be postponed and the position reviewed with the parties in the New Year; this decision was conveyed to GBRf, Network Rail and FLHH on 17 December.
- 1.9 On 22 December 2014 Network Rail advised FLHH of its revised decision, awarding further of the Rights to GBRf. Dissatisfied with this revised decision, FLHH served a Notice of Dispute on 23 December 2014 and the Secretary registered this as dispute "ADA22".

- 1.10 Disputes ADA21 and ADA22 were clearly related. On 7 January 2015 the Allocation Chair ordered that the two disputes be heard and resolved together under the provisions of Rule B20. I agreed to continue as Hearing Chair and on 12 January 2015 the three parties were informed that 18 March 2015 would be the date for the hearing. FLHH responded later on 12 January asking to be an interested party in the event of a hearing taking place for ADA21.
- 1.11 GBRf served a Statement of Claim for dispute ADA21 on 6 February 2015. Later that day, FLHH withdrew dispute ADA22, indicating that its issues with GBRf and Network Rail had been settled.
- 1.12 On 9 February, FLHH enquired as to the document format for an interested party to contribute to the hearing by way of response to the Statement of Claim. I concluded that in this unusual situation, I would accept a statement which broadly followed the published format for a Statement of Defence.
- 1.13 On 20 February 2015, Network Rail served its Statement of Defence and FLHH also provided a statement to the hearing.
- 1.14 On 20 February, GBRf enquired as to the continuing status of FLHH in relation to dispute ADA21, not having asked to be involved prior to a date first being set of hearing of ADA21 (see 1.4 and 1.5 above). After consideration of the relevant Rules, I concluded that it would be entirely appropriate in the interest of natural justice for FLHH to be present at the hearing of ADA21 and this decision was conveyed to the parties on 27 February 2015. The full text is given at Annex B.
- 1.15 On 27 February 2015, GBRf served its Statement in response to Network Rail's Statement of Defence.
- 1.16 No party served any legal submissions. In my own review of the material provided to the hearing (as required by Rule G10(c)), I did not identify any pure points of law as having been raised but there were some issues of fact to determine and also at issue was the proper interpretation or construction of the expressions "Primary Purpose" and "Primary Purpose Customer" contained in Condition J1.2. The parties were advised to this effect on 6 March and requested to include as part of their opening statements to the hearing an indication of the approach which they considered the Adjudication should adopt in the proper interpretation/construction of these definitions.
- 1.17 The hearing took place on Wednesday 18 March 2015. GBRf and Network Rail each gave opening statements and responded to questioning by the Panel; FLHH was invited to respond to questions where this was considered to be of assistance; at my invitation, FLHH commented on the issues prior to Network Rail and GBRf making their closing statements.
- 1.18 I confirm that this dispute was properly within the jurisdiction of an Access Disputes Adjudication. I further confirm that I have taken into account all of the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarized in the course of this Determination.
- 1.19 In my consideration of the parties' submissions and my hearing of the dispute, I was mindful that, as provided for in Rule A5, I should reach my determination "on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.20 The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

## **2 Relevant provisions of the Network Code**

2.1 The provisions of the Network Code in issue in this dispute reference are, principally:

2.1.1 The definitions in Part J1.2 of "Quantum Access Right", "Primary Purpose", "Primary

Purpose Customer", "Rights Subject to Surrender", "Train Slot" and "Y-Path".

2.1.2 Condition J7 - "Freight transfer mechanism".

The relevant extracts are set out at Annex 1 to this Determination.

### 3 Submissions made and outcomes sought by the Dispute Parties

3.1 GBRf's principal submissions were as follows:-

3.1.1 The dispute concerns a Level 1 Right with its associated train slot 6L84(SX). The subject Level 1 Right is a contractual right granted to FLHH in its Track Access Contract in respect of a service running from an Aggregate Industries quarry at Croft to a discharge point at Bow West, in East London. The FLHH contract to haul aggregates from and to those two points was terminated as of 31 December 2014. As of 1 January 2015 Aggregate Industries placed the business with GBRf for it to haul freight as and when required.

3.1.2 Having won the Aggregate Industries business a number of rights including in particular the subject Level 1 Right and its associated Train Slot 6L84(SX) should be surrendered to it pursuant to the Third Party Notice dated 7 November 2014 given pursuant to Condition J7.2.

3.1.3 Network Rail was wrong to hold in its response to the Third Party Notice dated 28 November 2014 that: *"It is noted that 6L84 no longer operates. This right should not transfer but instead the right and path should be relinquished to Network Rail so it can be considered for strategic capacity."*

3.1.4 FLHH has acknowledged that Train Slot 6L84 was in existence to service the Aggregate Industries business and that FLHH has now lost that business.

3.1.5 FLHH has not hauled aggregates for Aggregate Industries on the whole of Train Slot 6L84 since about 2011 when the London Olympics 2012 business ceased and when Bow East depot was closed.

3.1.6 The FLHH service which has been operating, having been offered in the Working Timetable by using part of the Train Slot 6L84 did not, at the time of the notified dispute as at 7 November 2014:

- \* have any firm Contractual Rights;
- \* does not serve Aggregate Industries, but a different customer;
- \* does not start at Croft, but at Bardon Hill;
- \* does not terminate at Bow East, but at Thurrock; and
- \* hauls a different commodity to that previously hauled for Aggregate Industries.

3.1.7 The contract GBRf has with Aggregate Industries is (like the contract FLHH held previously) referenced by volume and is not path specific.

3.1.8 That an existing Level 1 Right in a Track Access Contract cannot be used to justify the retention of the associated Train Slot that carries different product for a different customer from a different origin to a different destination and that that Train Slot cannot be considered as the Primary Purpose of the subject Level 1 Right.

3.1.9 GBRf's written submission stated that it sought the following determination:

3.1.9.1 The Primary Purpose condition cannot be used to determine a decision in instances where there is more than one train involved in a dispute for a path; and

3.1.9.2 The Primary Purpose condition cannot be used to determine a decision involving a service that is not underpinned with Rights; and

3.1.9.3 The Right subject to Surrender (6L84) and its associated Train slot should be transferred to GBRf and that Network Rail should identify an alternative pathway for 6L44 (Hope - West Thurrock service) between Kettering North Junction and South Tottenham.

3.2 Network Rail's principal submissions were as follows:

3.2.1 Its overriding aim when determining disputed grounds of objection set out in Third Party Counter Notices given under Condition J7.5 is to ensure that existing rail freight traffic continues to be hauled by rail. That aim is underpinned by the application of the facts to the definitions of Primary Purpose, Primary Purpose Customer and Rights Subject to Surrender as set out in Condition J7.

3.2.2 The Panel should adopt the exact literal interpretation of the expression "Rights Subject to Surrender" such that the freight hauled by FLHH for a third party customer (Hope Construction) from Hope to Thurrock using part of the line covered by Train Slot 6L84 is included within the subject Right so that the third party customer can be regarded as a Primary Purpose Customer thus giving FLHH a valid ground of objection to a Condition J7 transfer taking place.

3.2.3 That the Rights Subject to Surrender comprise 6L84 and its associated Y-Path, which is 6L44.

3.2.4 In the alternative 6L84 originally hauled aggregates for Aggregate Industries from Croft to Bow East. That service has not operated since 2011 and that the sidings at Bow East to which the train ran closed when the Olympic Park was constructed over those very sidings. Thus it submits that the tonnage hauled on 6L84 on behalf of Aggregate Industries has ceased so that GBRf is not replacing FLHH in the provision of freight services hauled on 6L84. Further, any future need for GBRf to haul freight on 6L84 would be for new business for Aggregate Industries, and not the business hauled on 6L84 some four years ago.

3.2.5 That in tripartite discussions between Network Rail, GBRf and FLHH, GBRf has agreed that FLHH can retain the rights for the following services:

- \* 6M84 SX-Y 15:02 Bow East to Croft Quarry 18:32
- \* 6M84 SX-Y 15:02 Bow East to Bardon Hill 18:45

which are the return workings of 6L84, from which Network Rail concludes that if 6L84 were to be transferred to GBRf, GBRf is unlikely to use it.

3.2.6 That there is a regular and viable service hauling freight for Hope Construction and that this would be lost to rail if the transfer to GBRf went ahead and when there is no existing requirement for GBRf to haul aggregates on 6L84 for Aggregate Industries.

3.2.7 Network Rail's written submission sought in the determination:

3.2.7.1 Clarification as to the meaning behind the Primary Purpose definition and whether this covers both a single train conveying multiple goods and two services sharing a common pathway; and

3.2.7.2 Confirmation that a service that is regularly running should take priority over an unused Right which has not run for a significant period; and

3.2.7.3 Deriving from the above matters of principle, that 6L84 should not transfer to GBRf. Instead Network Rail believed that 6L44 should remain with FLHH and that the access Right and associated path for 6L84 should return to Network

Rail to be considered for strategic capacity. Network Rail noted that FLHH had confirmed willingness to relinquish the Right for 6L84 back to Network Rail.

#### **4 Oral exchanges at the Hearing**

- 4.1 At the hearing the parties' respective representatives provided further evidence and made a number of submissions and observations in the course of various exchanges.
- 4.2 There was little dispute between the parties as to the underlying facts, particularly those set out in paragraphs 3.1.2 to 3.1.7 above.
- 4.3 For example, it was not in dispute that freight has not been hauled on 6L84 since 2011. It was also not in dispute that in the 12 months prior to 7 November 2014 no tonnage was hauled on 6L84 whether for Aggregate Industries or any other customer and that FLHH operated on 6L44 hauling freight for Hope Industries from Hope to Thurrock. Although Network Rail submitted that this business would be lost to rail if 6L84 were to transfer to GBRf, Network Rail did not provide any evidence to support that submission.
- 4.4 GBRf frankly accepted that it has not as yet won any business from Aggregate Industries to haul freight from Croft to Bow East, the sidings of which no longer exist. However, GBRf has hauled freight from Croft to other destinations. Further, GBRf is seeking to win new business which may involve using part of 6L84 and that it takes time to work up and win such new business.
- 4.5 GBRf also contested that because it had conceded FLHH should retain the return workings mentioned in paragraph 3.2.5 above that amounted to evidence that it was unlikely to use 6L84 if it was transferred. Further reference was made to new business GBRf was seeking to win and that it had other arrangements in hand for return workings.
- 4.6 FLHH objected to the transfer of 6L84 not because it had retained Aggregate Industries traffic but because it wished to use part of the pathway for the Hope Construction business and that it also was seeking to win new business to Bow.
- 4.7 It was also not in dispute that the Adjudication is to be based on the facts as they were as at 7 November 2014 when the Third Party Notice was issued and that such access Rights, if any, as may have been granted subsequently were not material factors to be taken into account.
- 4.8 It was also not in dispute that in October 2014 Network Rail agreed in principle to sell 6L44 to FLHH but had not agreed the specificity of that sale. FLHH had sought Level 1 Rights but Network Rail was only willing to sell at Level 2 because the Midland Main Line south of Leicester had been declared 'Congested'. Rights have now been granted, but subsequent to 7 November 2014.
- 4.9. Network Rail frankly acknowledges that, looking back, FLHH should have relinquished 6L84 four years ago when it ceased to be used to haul freight from Croft to Bow East, and that Network Rail should have challenged FLHH on this and used Condition J4 to remove 6L84 from FLHH's Track Access Contract.
- 4.10 Finally, it may be observed that:
  - 4.10.1 6L44 pathway starts at Hope on a Y and joins the Midland Main Line just south of Sheffield and then proceeds to just south of Tottenham where there is a Y to West Thurrock;
  - 4.10.2 6L84 pathway starts at Croft on a Y and joins the Midland Main Line just south of Wigston Junction and then proceeds to just south of Tottenham where there is a Y to Bow East;

4.10.3 6L88 pathway starts at Bardon on a Y and joins the Midland Main Line at Wigston Junction and then proceeds to just south of Tottenham where there is a Y to Bow West.

4.11 Thus all three paths have in common a substantial run down the Midland Main Line. Obviously not all three pathways could be used at the same time. Where the rights were in common ownership, the owner would decide which train was to operate. If the rights were vested in different parties and there was a conflict, Network Rail said that priority would be given to 6L84 since it had a Quantum Access Right.

## 5 Analysis and consideration of issues and submissions

5.1 As mentioned previously, the underlying facts are not really in dispute. The parties seek a determination based on the proper interpretation of the current version of Part J of the Network Code.

5.2 In the United Kingdom the rail industry is heavily regulated by statute. The ORR has the duty and power to oversee and amend the Network Code from time to time as seen fit. The Network Code is binding on those engaged in the industry.

5.3 A revised edition of Part J of the Network Code was issued on 29 June 2012 following extensive consultation within the industry.

5.4 Interpretation of the Network Code is akin to interpretation of subordinate legislation. The general principles to be applied to that exercise are:

5.4.1 The document should be construed as a whole, so that internal inconsistencies are avoided where possible;

5.4.2 Words which are reasonably capable of only one meaning must be given that meaning whatever the result – the literal rule;

5.4.3 Ordinary words must be given their ordinary meanings and technical words their technical meanings, unless an absurdity would result – the golden rule;

5.4.4 Where a word or expression is expressly defined, effect must be given to the express definition in preference to the conventional meaning of the word or expression;

5.4.5 Where a word or phrase or expression is of uncertain meaning it should be construed in the light of surrounding words in context;

5.4.6 Where the intention of the legislation is to cure a defect, any ambiguity is to be resolved in such a way as to favour that aim – the mischief rule;

5.4.7 Where there is prior legislation on the matter in issue or the like matter, it can be used as an aid to construing the version in issue.

5.5 It is clear from Condition J1.1 – the Overview – that Part J provides a mechanism by which Rights vested in an Access Beneficiary's contract can be removed. There are different ways in which that might come about, including, as here, an application by a third party who wishes to use the Right in question.

5.6 In general terms Part J recognises that a haulier may win or lose business and that where a substantial amount of business is lost to a rival or competitor it may be appropriate that specific rights or Train Slots might be transferred to the rival or competitor so that it may service the new business acquired. Condition J7.1 enables an applicant to make an application for the transfer of a right. By Condition J7.1.2(a) the applicant must be a party who is: *"a Train Operator, who is replacing the Incumbent in the provision of transport services to a third party, where the Quantum Access Right relates to the provision of those transport services..."*

5.7 It seems to the Panel that properly construed there are two limbs to the definition of an applicant. The first is that it is replacing the incumbent in the provision of transport services to the third party customer. In the subject case it was not in dispute that GBRf was replacing FLHH in the transport of aggregates for Aggregate Industries in general terms, and these were transport services.

5.8 The second limb is whether the Quantum Access Right sought to be transferred relates to those transport services. The subject right sought to be transferred is 6L84(SX) which runs from Croft to Bow East. The questions are:

- 5.8.1 Was that a transport service provided by FLHH to Aggregate Industries? And
- 5.8.2 Was GBRf going to replace FLHH in the provision of that service?

The Panel concluded on the agreed facts before it that the answer to both questions was: No. The transport service related to 6L84(SX) ceased in 2011 and was not thereafter provided by FLHH. There was no expectation, contractual or otherwise, that GBRf would provide a transport service utilising 6L84(SX) as of 1 January 2015 or in the immediate future. GBRf may have had an expectation that some new business might emerge from Aggregate Industries that might entail utilising part of the route covered by 6L84(SX) but no more than that. It seems to the Panel that such a vague possibility cannot be considered as GBRf replacing FLHH in the provision of an (existing) transport service.

5.9 On these findings we conclude that GBRf was not an applicant within the meaning of Condition J7.1.2(a) and thus it was not in a position to serve a valid Third Party Notice under Condition J7.2. This of itself is sufficient to dispose of the Adjudication but in case it be held this conclusion is incorrect and out of deference to the parties which sought further guidance, we set out below our conclusions on other issues argued before us.

5.10 By Condition J7.2.1 an applicant seeking a transfer of Quantum Access Right is required to serve a Third Party Notice on the incumbent holder of the right in issue. The incumbent is entitled to object to a transfer and if it wishes to do so must serve a Third Party Counter Notice on the applicant. There are two limbs to the ground of objection that:

- 5.10.1 It has used the right for a Primary Purpose, and
- 5.10.2 It requires to continue to use the right to convey traffic for the Primary Purpose Customer [emphasis added].

5.11 For ease of reference the definitions of those two expressions defined in Part J are:

"Primary Purpose" means conveying 50% or more of the gross tonnage transported using the Rights Subject to Surrender, over the 12 month period immediately preceding the date of service of the Third Party Notice, for a Primary Purpose Customer

"Primary Purpose Customer" means a customer or customers other than the third party referred to in Condition J7.1.2(a)

5.12 Network Rail upheld FLHH's contentions that Hope Construction was a Primary Purpose Customer (as defined) and that in the twelve months prior to the date of the Third Party Notice (namely 7 November 2014) it had conveyed 50% or more of the gross tonnage transported using the subject right for a Primary Purpose Customer.

5.13 The definition of a Primary Purpose Customer is that of a customer or customers other than the third party referred to in Condition J7.1.2.(a). As regards the subject case, the identity of the 'third party' referred to in Condition J7.1.2(a) is plainly Aggregate Industries. Thus Hope Construction is potentially a Primary Purpose Customer. Did FLHH convey 50% or more of the gross tonnage transported using the subject right in the twelve months preceding the Third Party Notice for Hope Construction? We find that it did not. The data provided by Network Rail, and which was not contested, was that in the twelve months prior to 7 November 2014 no tonnage was transported using 6L84 on its own but that 100% of the tonnage transported using



6L84 in conjunction with 6L44 was Hope Construction traffic. We reject the notion that 6L44 was used in conjunction with 6L84; there is no need or reason to combine the two. The fact they may share a common pathway for part of the route is immaterial. It seems to us that all of the Hope Construction business was carried using the rights associated with 6L44 alone.

- 5.14 Accordingly if required to do so we would have concluded that 6L84 was not used for a Primary Purpose or for a Primary Purpose Customer.
- 5.15 Network Rail argued that the rights subject to surrender were 6L84 with its associated Y-Path of 6L44. We reject that argument. We find that the Train Slots 6L84 and 6L44 are two separate and distinct paths which although they share common track are capable of being subject to quite different legal rights. For example 6L84 is subject to a Level 1 Right whereas (now) 6L44 is subject to a Level 2 Right, and must give preference. They are thus separate subsisting rights. They appear separately in the Working Timetable.
- 5.16 As part of its argument Network Rail took us into the complexities of the definition of a Y-Path. For the purposes of Part J, Y-Path is a defined term, namely: *"a Train Slot incorporated in the Working Timetable that is identified as such by the incorporation of the letter 'Y' in the operating characteristics part of the Train Slot's heading."*
- 5.17 As a matter of fact as regards the Working Timetable current as at 7 November 2014 both 6L84 and 6L44 appeared in the Working Timetable and in both cases the letter 'Y' was incorporated in the operating characteristics part of the Train Slot's heading.
- 5.18 GBRf drew the attention of the Panel to definitions set out in Schedule 5 of its Freight Track Access Contract which included a definition of a Y Path for the purposes of that document. The definition is set out in Annex 3.
- 5.19 Whilst it might be hoped that within a complex regulated industry terms of art might bear the same meanings or definitions across several documents that may be aspirational. The Panel is concerned with the proper construction of Condition J7 of the Network Code. The general principles we must follow are that where the document incorporates a definition of the term 'Y-Path' that is a definition we must adopt unless an absurdity would result (see para 5.4.3 above). We find no such absurdity arises if we adopt the definition set out in Condition J7. We are reinforced in this general approach because Network Code: Part A – General Provisions Condition A1.1 - General Interpretation provides that unless the context otherwise requires
- "(h) 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"*
- 5.20 In fact drawing on the explanation set out in 4.10 above all three Train Slots identified start with a 'Y' and end with a 'Y'. GBRf suggested that a more accurate or descriptive adverb to adopt for those paths might be 'X' paths but that is not a term of art defined in Condition J7. We conclude that for the purposes of Condition J7 each of 6L84 and 6L44 are separate Y-Paths because both are designated as such in the Working Timetable. We consider that the fact each of them has a Y at each end does not of itself preclude them from being Y-Paths within the definition of Condition J7.
- 5.21 We conclude that adopting the definition of Y-Path as set out in Condition J7 Network Rail is in error in concluding 6L44 was an associated Y-Path of 6L84.
- 5.22 Given that this is a determination concerning the Network Code Condition J7 as revised in June 2012, the Panel has given careful consideration to the previous version to see if it is of any assistance in the proper interpretation of the current version. We have concluded that it is not.
- 5.23 As part of its submissions Network Rail requested the Panel to consider whether Condition J7 allows for the transfer of a Quantum Access Right in relation to traffic that has ceased, and we have addressed that in relation to the facts as found by us. Network Rail went on to refine that question in relation to traffic that has ceased and which would result in the loss of viable traffic

operating for another customer. The suggestion was made that the Hope Construction business would be lost to rail if FLHH was required to transfer 6L84(SX) to GBRf. No evidence to support that proposition was put before the Panel and the question is thus hypothetical. Given that in most cases determinations are made on the facts as found, the Panel declines to express a view on a hypothetical situation on which the facts are far from clear.

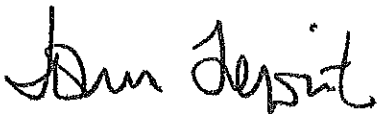
## **6 Determination**

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

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

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

I confirm that, so far as I am aware, this Determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



**John Hewitt  
Hearing Chair**

12 May 2015

## Annex 1 to Access Dispute Adjudication determination of reference ADA21

### Extracts from Network Code

#### From Condition J1.2 - "Interpretation"

"Primary Purpose"	means conveying 50% or more of the gross tonnage transported using the Rights Subject to Surrender, over the 12 month period immediately preceding the date of service of the Third Party Notice, for a Primary Purpose Customer
"Primary Purpose Customer"	means a customer or customers other than the third party referred to in Condition J7.1.2(a)
"Quantum Access Right"	means any 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 right
"Rights Subject to Surrender"	means, in relation to: (a) a Failure to Use Notice; or (b) a Third Party Notice, as applicable, the Quantum Access Right to which such notice refers and: (i) any Train Slot, including any Y-Path, or part of it in the Working Timetable which relates to that Quantum Access Right; (ii) any Ancillary Movements or Stabling that Network Rail (or the Applicant in relation to Condition J7.3) considers: (A) are directly associated with the relevant Quantum Access Right; and (B) will no longer be required by the relevant Part J Access Beneficiary following the surrender or reduction of the Quantum Access Right, as applicable; and (iii) any Access Proposal relating to any such Quantum Access Right
"Train Slot"	has the meaning shown in Part D of this code
"Y-Path"	means a Train Slot incorporated in the Working Timetable that is identified as such by the incorporation of the letter "Y" in the operating characteristics part of the Train Slot's heading.

#### From Condition D1.1.11

"Train Slot"	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
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## **Condition J7 - Freight transfer mechanism**

### **7.1 Application of this Condition J7**

- 7.1.1 This Condition J7 applies only to services for the carriage of goods by railway.
- 7.1.2 This Condition J7 applies only to an application for a Quantum Access Right from an Applicant which is either:
- (a) a Train Operator, who is replacing the Incumbent in the provision of transport services to a third party, where the Quantum Access Right relates to the provision of those transport services (subject, where applicable, to any competitive tendering process amongst other parties); or
  - (b) a Freight Customer Access Option Holder, where the Quantum Access Right sought is:
    - (i) currently held by an Incumbent which is a Train Operator for the provision of transport services to or on behalf of that Freight Customer Access Option Holder; and
    - (ii) one which that Freight Customer Access Option Holder intends (subject, where applicable, to any competitive tendering process amongst other parties, including, if applicable, the Incumbent) to draw down into the Access Agreement of a Train Operator (whether or not the Incumbent) so that such Train Operator can become an Appointed Operator to provide those transport services to or on behalf of the Freight Customer Access Option Holder.

### **7.2 Third Party Notice**

- 7.2.1 Where a Part J Access Beneficiary wants to hold a Quantum Access Right ("the Applicant") that is substantially similar to an existing Quantum Access Right of another Part J Access Beneficiary (the "Incumbent") then it shall serve a Third Party Notice on the Incumbent and send a copy of that notice to Network Rail.

### **7.3 Applicant's responsibilities**

- 7.3.1 When making an application to the Incumbent of the type described in Condition J7.2, the Applicant shall specify in the application:
- (a) the Quantum Access Right sought by the Applicant;
  - (b) the Rights Subject to Surrender which the Applicant requires the Incumbent to Surrender in order to accommodate the Applicant's request;
  - (c) the date on which the Applicant requests that the Quantum Access Right takes effect in its Access Agreement;
  - (d) that it has suitable access to and from any relevant facility to meet its obligations under clause 6.4 of its Access Agreement; and
  - (e) that the Quantum Access Right sought has the characteristics described in either Condition J7.1.2(a) or Condition J7.1.2(b) (as the case may be). Where Condition J7.1.2(a) is being relied on, the Applicant must attach a letter from the relevant freight customer confirming the circumstances which mean Condition J7.1.2(a) applies.

### **7.4 Acceptance of surrender**

- 7.4.1 If the Incumbent agrees to the surrender specified in the Third Party Notice, then:
- (a) it shall, within 10 Working Days, give notice to that effect to the Applicant and copy this to Network Rail;

- (b) the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent's (and, if applicable, Appointed Operator's) Access Agreement on the date on which notice is given to the Office of Rail Regulation pursuant to Condition J7.4.1(c); and
- (c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Beneficiary agrees to the surrender pursuant to Condition J7.4.1(a).

## **7.5 Third Party Counter Notice**

7.5.1 The Incumbent may, within 10 Working Days of receipt of a Third Party Notice, serve a Third Party Counter Notice on Network Rail specifying that it objects to the surrender because the Incumbent:

- (a) has used the Rights Subject to Surrender for a Primary Purpose; and
- (b) requires to continue to use the Rights Subject to Surrender to convey traffic for the Primary Purpose Customer ("Grounds for Objection").

7.5.2 The Incumbent shall provide evidence in support of its Grounds for Objection. The Incumbent shall send a copy of any Counter Notice, subject to the redaction of any commercially sensitive information, to the Applicant.

7.5.3 If the Incumbent disagrees with:

- (a) any Train Slots shown in the Third Party Notice as relating to the Quantum Access Right; or
- (b) any Ancillary Movements or Stabling the Applicant included in the Third Party Notice as being directly related to the Quantum Access Right and no longer required by the Incumbent following the surrender of the Quantum Access Right; or
- (c) any Access Proposal shown in the Third Party Notice as relating to the Quantum Access Right,

it shall include in the Third Party Counter Notice details of why it disagrees with the Applicant.

7.5.4 If the Quantum Access Right sought by the Applicant is the subject of a competitive tendering process amongst other parties including the Incumbent, then the Incumbent:

- (a) may notify Network Rail of this process; and
- (b) if it has done so, the period of 10 Working Days referred to in Condition J7.5.4 shall be deemed to commence on the date that the third party or Freight Customer Access Option Holder (as the case may be) indicates, at the end of the relevant tendering process, its intention to contract.

7.5.5 If no Third Party Counter Notice is served within 10 Working Days of receipt of a Third Party Notice:

- (a) the Incumbent will be deemed to have agreed to the surrender of the Rights Subject to Surrender specified in the Third Party Notice and the Applicant will notify Network Rail, copied to the Incumbent, that this is the case;
- (b) the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent's (and, if applicable, Appointed Operator's) Access Agreement with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J7.5.4(c); and

- (c) Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Incumbent's, Applicant's and, if applicable, Appointed Operator's Access Agreements no more than 10 Working Days after the date on which the Part J Access Beneficiary is deemed to have agreed the surrender pursuant to Condition J7.5.4(a).

## **7.6 Network Rail agrees with Incumbent**

- 7.6.1 If Network Rail considers that the Grounds of Objection in the Third Party Counter Notice have been substantiated then, subject to any appeal under Condition J11, the Applicant's application will have failed. Network Rail shall notify the Applicant in writing that this is the case, copied to the Incumbent, within 5 Working Days of receipt of the Third Party Counter Notice and shall set out the reasons for such failure.

## **7.7 Network Rail agrees with Applicant**

- 7.7.1 If Network Rail considers that the Incumbent's Grounds of Objection in the Third Party Counter Notice have not been substantiated, then Network Rail shall notify the Incumbent in writing that this is the case, copied to the Applicant, within 5 Working Days of receipt of the Third Party Counter Notice.
- 7.7.2 Where the Incumbent has disagreed with the Applicant in accordance with Condition J7.5.2, then Network Rail shall, in the notification referred to in Condition J7.7.1, set out what it determines the Rights Subject to Surrender to be.

## **7.8 Surrender of Access Rights**

- 7.8.1 The surrender of the Rights Subject to Surrender will be deemed to have occurred:
  - (a) where either the Incumbent accepts Network Rail's decision made pursuant to Condition J7.7 or there is an ADRR Determination, on the date on which such notice is given to the Office of Rail Regulation pursuant to Condition J7.8.2; or
  - (b) on the date specified in the Office of Rail Regulation Determination, if applicable.
- 7.8.2 In the event of the Incumbent accepting Network Rail's decision or there is 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 Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of the acceptance or of the relevant ADRR Determination, as applicable and shall include a copy of the relevant ADRR Determination, if applicable, 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.

## **7.9 Grant to Applicant**

- 7.9.1 Network Rail shall, through the issue of a notice to both the Applicant and the Incumbent, grant to the Applicant the rights surrendered by the Incumbent under this Condition J7. Such rights shall be granted to the Applicant:
  - (a) as from the latest of the following dates on which:
    - (i) notice is given to the Office of Rail Regulation pursuant to Condition J7.5.4(c), J7.4.1(c) or J7.8.2 or the date specified in the Office of Rail Regulation Determination (as applicable);
    - (ii) the date on which the Applicant requested that the Quantum Access Right take effect in its Access Agreement pursuant to Condition J7.3.1(a); or
    - (iii) the Applicant's Access Agreement is modified to include, where applicable, any

relevant Restrictive Provisions associated with such rights contained in the Incumbent's Access Agreement; or

- (iv) the relevant Cordon Cap Increase, if any, has effect pursuant to Condition J8;
- (b) with Service Characteristics in substantially the same form as the Rights Subject to Surrender; and
- (c) for a period of time:
  - (i) equal to that which the Incumbent would have enjoyed had the rights remained with the Incumbent; or
  - (ii) until expiry of the Applicant's Access Agreement,whichever is the shorter.

#### **7.10 Access Proposals**

7.10.1 Where any Rights Subject to Surrender surrendered under this Condition J7 include the surrender of an Access Proposal, Network Rail's obligations under Condition D2.4 shall, in respect of that Access Proposal:

- (a) cease to have effect in relation to the Incumbent as from the date the surrender takes effect in accordance with this Condition J7; and
- (b) be deemed to have effect in relation to the Applicant as from the date the Access Proposal is granted to the Applicant in accordance with condition J7.10.

## **Annex 2 to Access Dispute Adjudication determination of reference ADA21**

### **e-mail from Committee Secretary to parties dated 27 February 2015 setting out position of Freightliner Heavy Haul Ltd as an interested party**

Withdrawal of dispute ADA22 by FLHH has caused GBRf to enquire as to the continuing status of FLHH in relation to GBRf's dispute ADA21. The Hearing Chair has considered the matter and asked me to advise you as follows:-

"I understand that prior to introduction of revised ADR Rules in 2010, it was the convention that access parties which had not formally declared themselves to be a Dispute Party in any matter would nevertheless - at the Chairman's discretion - be permitted to observe at dispute hearings and they were usually given opportunity to contribute comments towards the end of the hearing proceedings; this convention had the benefit of openness which enabled avoidance of other access parties raising disputes (or appeals) when impacted upon by determinations.

The 2010 Rules formalised the position of interested parties by defining "Involved Party" and "Dispute Party" and then - in relation to Access Dispute Adjudication proceedings - set down in Rules G18 and G19 the timescale and process for an Involved Party or third party to become a "claimant, defendant or interested party in the dispute". The Rules do not indicate what part an interested party might play at a hearing.

In the context of ADA21, GBRf is quite right that FLHH did not avail itself of the provisions of Rule G18 but subsequently raised its own dispute (ADA22). The Order of the Allocation Chair that ADA21 and ADA22 be heard and resolved together has to be understood as requiring FLHH to take a formal interest in all aspect of GBRf's ADA21 (and vice versa until ADA22 fell away).

The position of FLHH consequently becomes something of a "grey area" under the Rules, but the Rules cannot be expected to address every eventuality and I am assisted by Rule G20, which allows me to consider and determine the request from FLHH to be an interested party following withdrawal of ADA22. Chapter G of the Rules (particularly in Rules G5, G10, G11 and G16) also give me authority to manage the dispute arrangements as I see fit provided that I keep within the Principles.

In my view, having read the Statements already served by GBRf and Network Rail, it will be entirely appropriate in the interests of natural justice for FLHH to be present at the hearing of ADA21 as an interested party.

I have noted that FLHH has provided a Statement to the hearing in the capacity of an interested party. I am prepared to admit that Statement as being for the information of the hearing and I will be happy to examine its content with GBRf and Network Rail during the hearing as may be deemed necessary. I do not expect to discuss the Statement with FLHH directly during the course of the hearing but I do anticipate inviting FLHH to contribute any comments towards the end of the hearing.

Except to the extent that my determination addresses the decisions sought by GBRf and Network Rail, I will not be responding to the decisions sought by FLHH in its Statement."



**Annex 3 to Access Dispute Adjudication determination of reference ADA21**

**Extracts from GBR's Track Access Contract (Freight Services)  
dated 29 January 2008**

**Schedule 5, Section 1.1 - "Definitions"**

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

- (a) depart from one or more origins to the same destination; and/or
- (b) arrive at one or more destinations from the same origin,

as set out in the Right Table provided that the Train operator shall not be entitled to more than one Y Path Option within any one Y Path on any particular day; and

**"Y Path Option"** means, in relation to a Y Path, one origin and one destination from a combination of one or more origins and one or more destinations.