

## ACCESS DISPUTE ADJUDICATION

### Determination in respect of dispute reference ADA50

(following a hearing held at via Zoom videoconference, on 02 March 2021)

#### Present:

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

**Hearing Chair:** Jacqueline Findlay  
**Industry Advisors:** John Beer  
Tony Crabtree

#### Dispute Parties:

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

Jack Eagling Head of Timetabling and Long-Term Traincrew Planning  
Ian Kapur Head of Strategic Access Planning

##### Network Rail Infrastructure Limited ("NR")

Rob Williamson Customer Relationship Executive - Freight  
Georgina Collinge Customer Relationship Executive  
Megan Holman Customer Manager  
Adam Hodgson Policy Advisor

##### DB Cargo (UK) Ltd ("DBC")

Nigel Oatway Access Manager  
Jonathan Clarke Business Development Manager Industrial Sales

#### Interested parties:

None

#### In attendance:

Tamzin Cloke, Committee Secretary  
Mike Pybus (Network Rail, observing for professional development)

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## Abbreviations

1. These abbreviations are used in this determination

"ADA"	means Access Dispute Adjudication.
"Rule"	refers to the Access Dispute Resolution Rules.
"Secretary"	refers to the Secretary for the purposes of the ADR Rules and the Secretary of an ADA.

## Summary of the dispute

2. The dispute concerns the transfer of Freight Access Rights, to give effect to the operation of spoil traffic between Angerstein Wharf, in London, and Roxby Gullet, a Biffa waste site near Scunthorpe in Lincolnshire. The service was operated by GBRf from January 2019 until July 2019. This was via a direct contractual relationship with Peter Norris Haulage Ltd ("PN"). Since January 2020 DBC has operated a spoil service between these locations, on behalf of Eco Railfreight ("ER") with whom it has a contractual relationship. The DBC service has operated by a process of weekly bidding to NR's timetabling team to use Train Slots normally, or previously, operated by GBRf. GBRf commenced an application to obtain Access Rights for the operation during 2019, but the process was not completed until after GBRf's operation ceased.
3. On 04 November 2020 DBC initiated the Freight transfer mechanism in Part J of the Network Code, by sending a Third Party Notice to GBRf, requesting the transfer of a Quantum Access Right ("QAR") and what it considered to be associated Train Slots between Angerstein Wharf and Roxby Gullet, pursuant to Condition J7.1.2(a).
4. On 18 November 2020 GBRf responded by means of a Third Party Counter Notice to NR, in which it contested the transfer on the grounds that DBC was operating traffic for a different end-customer to the one that GBRf had served. GBRf also requested evidence that DBC could satisfy Condition J7.3.1(d) (suitable facility access) at Roxby Gullet and stated that, regardless, Train Slot 6O57 in particular should not form part of the transfer as it was not underpinned by any Access Rights. It was now for NR to decide, under either Condition J7.6 or Condition J7.7 (as applicable), whether it agreed with the Incumbent or Applicant.
5. Between 24 November 2020 and 12 January 2021 exchanges took place between NR, GBRf and DBC, as NR sought further information to assist the decision making. This included questions about the commercial relationship (if any) between ER and PN, and the Train Slots that underpinned the Access Right between Angerstein Wharf and Roxby Gullet.
6. On 12 January 2021, NR issued a Decision Letter under Condition J7.7, stating that it agreed with the Applicant (DBC) that the Access Right should transfer from GBRf to DBC, and with it the Train Slots for 6E58 [FSX] and [FO] up until the point that they conflicted with 6D20, a service operated by GBRf. This was at a location to be agreed between the operators, most likely near Doncaster. NR accepted GBRf's contention that, as 6O57 had no Access Rights, it should not transfer to DBC.
7. On 26 January 2021 DBC wrote to NR stating it believed the decision not to include Train Slot 6O57 in the transfer was in error, as it could reasonably be considered an Ancillary Movement under paragraph 2.2 of Schedule 5 to the model freight access contract and therefore both had Access Rights and should be transferred, to give effect to the Access Right between Angerstein Wharf and Roxby Gullet. On 29 January 2021, after GBRf had commenced formal dispute proceedings, NR issued a revised decision, agreeing with DBC's assertion regarding Train Slot 6O57.
8. Communication between the Parties continued up until the first submission deadline for the hearing, but without success in resolving the dispute.

## **Procedural history of this ADA**

9. GBRf served Notice of Dispute on 26 January 2021, as required under Conditions J7.6 and J12.1.1 of the Network Code. The Secretary registered the dispute as ADA50. I was appointed as Hearing Chair on 29 January 2021 and after liaison with the Parties the hearing date was set for Tuesday 02 March 2021.
10. On 29 January 2021 DBC wrote to the Secretary requesting to be considered a Dispute Party, for the purposes of the hearing, which I agreed to.
11. On my behalf, under Rule G16 the Secretary required GBRf to serve its Statement of Case by 16:00 on Friday 05 February 2021, NR to serve a Statement of Defence by 16:00 on Friday 12 February 2021; DBC to serve its statement by the same deadline; GBRf to serve any response statement by 16:00 on Friday 19 February 2021 and, by 16:00 on Tuesday 23 February 2021, all Parties to serve any written legal submissions not already put forward.
12. Owing to misreading the deadline, GBRf served its Statement of Case, by mutually agreed extension between the Parties, to the Secretary on Tuesday 09 February 2021. NR and DBC were given an extension until 16:00 on Tuesday 16 February to serve their Statements, which they did. GBRf then served its Statement of Response on 19 February. On 23 February GBRf and NR served their legal submissions; DBC had nothing further to add.
13. On 24 February 2021 the Secretary submitted to the Parties a Directions Note, to which responses were due by 17:00 on 25 February (NR) and 17:00 on 26 February (GBRf and DBC). A list of issues of law which I had identified as arising in this dispute (as required by Rule G9(c)) was sent to the Parties on 26 February. This was followed, on 01 March 2021, by a list of questions which I had compiled to enable the Parties to be prepared for issues which I wished to explore at the hearing.
14. The proceedings were audio-recorded to assist the Secretary in compiling a record and to assist the Panel's subsequent consideration of the issues. I regard the record of the hearing as being an aide memoire for the Panel in its consideration of the issues and not a document for issue to the Parties for eventual publication.

## **Evidence and submissions**

15. The hearing took place on Tuesday 02 March 2021. Each Party made an opening statement, responded to questions from myself and the Industry Advisors, and had the opportunity to make a closing submission. The Parties' respective statements of case also recorded matters of evidence and where that evidence was accepted by each Party it has been treated as admitted fact.

## **Preliminaries**

16. I have taken account of all of the submissions, arguments, evidence, answers to questions and information provided over the course of this dispute process, both oral and in writing. This is so even though only certain parts of this material may specifically be referred to or summarised in this determination.
17. I am satisfied that the matter in dispute raises issues which should properly be heard and determined by an ADA duly convened in accordance with Chapter G of the Rules.
18. By Rule A5 I must reach my determination 'on the basis of the legal entitlements of the Dispute Parties and upon no other basis', which I do.

## **Jurisdiction**

19. When the Statements of Case were received, it was evident that this ADA was brought on the following basis:

- (a) GBRf was dissatisfied with the decision made by NR to support DBC in the application for the transfer of Access Rights and Train Slots between Angerstein Wharf and Roxby Gullet pursuant to Condition J71.2(a) of the NC.
- (b) Under Rule B7 all disputes under Part J of the Network Code must be referred to an ADA in accordance with Chapter G of the Rules. Pursuant to Condition J7.8.2 of the NC, GBRf referred the matter to this ADA.

### Accepted facts

- 20. There is no disagreement between the parties as to the following facts:
  - a) GBRf operated spoil traffic from Angerstein Wharf to Roxby Gullet on behalf of PN between January and July 2019. Although Firm Access Rights were applied for during this time they were not granted within this window and, therefore, GBRf operated under the general freight spot bid provision as set out in Schedule 5 of its Track Access Contract.
  - b) In Autumn 2019 GBRf ceased this operation and DBC since January 2020 has operated a new similar traffic flow on behalf of Eco Railfreight ("ER").
  - c) On 4 November 2020 DBC issued a Third Party Notice to GBRf pursuant to Condition J7.2 of the Network Code requesting the transfer of the QAR and associated Train Slots that it believed related to the provision of the transport services.
  - d) NR issued a decision on 12 January 2021 and an amended decision on 29 January 2021.

### Disputed issues of law

- 21. These are the issues which I identified for the parties to address:

#### Issue 1

- 22. Whether the interpretation of the term "Third Party" is limited to one single party where the provision of substantially the same transport service is transferring from one Train Operator to another.
- 24. Which organisation can be considered the relevant freight customer referred to in Condition J7.3.1 (e) of the Network Code. GBRf submits that the ability of DBC to transfer the Access Right sought depends upon it being determined that ER can be considered the relevant freight customer.
- 25. Condition 7.3.1(e) of the NC provides that the Applicant "must attach a letter from the relevant freight customer confirming the circumstances which mean Condition J7.1.2(a) applies." The issue is to address the meaning and identity of the "relevant freight customer." GBRf challenges the application of Condition J7 for the transfer of the Access Rights sought because the Third Party Customer of DBC is ER and is not the same third party customer with whom GBRf had a commercial relationship for the rail haulage of spoil from Angerstein Wharf to Roxby Gullet namely PN.
- 26. Whether the decision in ADA21 should be followed as a persuasive authority or should be distinguished.

#### Issue 2

- 27. Whether the Third Party Notice is valid and whether to be valid it is necessary to establish that suitable access to the relevant facility has been granted by the party that controls the relevant facility. Is GBRF entitled to request evidence that DBC was able to fulfil Condition 7.3.1(d) which states that when making a J7 freight transfer application, "the applicant shall specify in the application that it has suitable access to and from any relevant facility to meet its obligations under clause 6.4 of its access agreement".

### Issue 3

28. Which Train Slots should be labelled as Ancillary Movements to the QAR subject to transfer. Determination of the definition and extent of the term “Ancillary Movements.”
29. What Train Slots should be correctly considered as part of the Rights Subject to Surrender. GBRf asserted that should the transfer of the Train Slots occur as requested it would give rise to a clash in the Working Timetable with other Train Slots held by GBRf for traffic on behalf of Biffa which are underpinned by Firm Access Rights and this would result in the over-subscription of the terminal at Roxby Gullet.

### Determination

30. Having carefully considered all submissions and evidence and based on my analysis of the issues and submissions, I determine as follows:

### Issue 1

31. I determine that the Third Party Notice is valid. Condition 7.1.2(a) applies when an application for QAR from an Applicant is a Train Operator, who is replacing the incumbent in the provision of transport services to a third party, where the QAR relates to the provision of those transport services.
32. I determine that DBC is the Train Operator who is replacing the Incumbent, GBRf, in the provision of transport service to a third party, PN, where the QAR relates to the provision of those transport services.
33. GBRf had a contractual relationship with PN when operating the service. DBC has a contractual relationship with ER and ER, in turn, has a contractual relationship with PN. This is on the basis of the emails from James Harrison of 18 January 2021 and Liam Higgins of 16 February 2021 (Appendix B). PN ceased direct management of the operations in Autumn 2019 and since January 2020 DBC has operated a new and similar traffic flow on behalf of ER.
34. I am satisfied that the transport services are so closely related as to satisfy the requirements of Condition 7.1.2(a). The transport services are the same, namely the transportation of spoil belonging to PN from Angerstein Wharf to Roxby Gullet and the insertion of ER into the contractual chain between PN and DBC, the freight Train Operator satisfies the test in Condition 7.1.2(a) of replacing GBRf in the provision of transport services to a third party. In my view the third party sub-contractor can be considered the relevant freight customer, as referred to in Condition J7.2.1 (a).
35. In November 2020, DB Cargo sought to transfer to itself a Firm Access Right deemed to be associated with this traffic, pursuant to the freight transfer mechanism set out in Condition J7.2.1 (a) of the Network Code. This requires the Applicant to attach a letter from the relevant freight customer confirming the circumstances in which this condition applies.
36. In support of its application DBC provided an email from the Third Party, ER, a company with whom GBRf has never held a commercial relationship for the operation of the traffic. GBRf submits that the correspondence from ER is not relevant because the relevant letter must come from the freight customer for whom the Access Rights were established.
37. In my view on the basis that ER is the Third Party the evidence submitted by DBC is sufficient.
38. In my view had PN inserted an intermediary and that intermediary had sub-contracted the transport services to GBRf, GBRf would have continued to operate the transport services using the Rights Subject to Surrender.
39. I am satisfied that the second test in Condition J7.12(a) is satisfied namely that the QAR relates to the provision of those transport services.

40. I determine that the facts and circumstances in the case of ADA21 can be distinguished from the facts of this case. In ADA 21 there was a cessation of transport services between 2011 and 2015 and although in 2015 there may have been an expectation that new business might emerge that might entail using part of the route it was thought to be only a vague possibility. In the present case although there may have been a pause between GBRf ceasing operation of the transport service and DBC commencing operations the transport service were the same, namely the transportation of spoil belonging to PN from Angerstein Wharf to Roxby Gullet. I find that the circumstances of this case are sufficiently different for it to be distinguished from ADA 21 where it was found that the Third Party Notice was not valid.

## Issue 2

41. Condition J7.3.1(d) provides that when making an application to the Incumbent of the type described in Condition J7.2, the Applicant shall specify in the application that it has suitable access to and from any relevant facility to meet its obligations under clause 6.4 of its access agreement.
42. DBC submits that the Condition J7 freight transfer mechanism does not require the Applicant to provide the Incumbent evidence to support the statement in its Third Party Notice confirming it has secured access to meet its obligations under clause 6.4. Whilst the Incumbent may of course have concerns in this respect, such concerns would not on their own constitute formal 'Grounds of Objection' and therefore a reason to issue a Third Party Counter Notice for the purposes of Condition J7.5.
43. I am satisfied that DBC has suitable access to Roxby Gullet. I determine that it was sufficient for DBC to specify in the application that it has suitable access to and from the relevant facility to meet its obligations under clause 6.4 of its access agreement. There is no burden of proof in Condition J7.3.1(d) or in Condition J7 generally on DBC because GBRf has no entitlement to determine whether DBC is meeting the terms of clause 6.4. It is NR that has these entitlements. GBRf is not entitled to request proof of the access arrangements particularly where those arrangements are commercially confidential. I determine that DBC provided information to NR that permission is granted to enable the transport services to access Roxby Gullet for the purposes of meeting its obligation under clause 6.4 of the access agreement and this is sufficient.

## Issue 3

44. I am tasked with considering which Train Slots should be labelled as Ancillary Movements to the Firm Access Right subject to transfer. Determination of the definition and extent of the term "Ancillary Movements."
45. Initially NR decided that only the 6E58 Access Right and 6E58 Train Slot up until an agreed point were to be granted under the Application and this was included in the first decision issued. DBC submitted additional information to NR which when considered led to a revision being made to that decision. The revision allowed for Train Slot 6O57 Doncaster Down Decoy - Angerstein Wharf to also be transferred from GBRf to DBC on the basis that this was an Ancillary Movement to allow the empty wagons to complete a return journey.
46. DBC sought a determination that the decision made pursuant to Condition J7.7, as amended by the addition of associated Train Slot 6O57 to the Rights Subject to Surrender should stand.
47. DBC has been using Train Slot 6E58 and 6O57 on a week by week basis to support its operations of the transport services with the permission of GBRf. DBC included both Train Slot 6E58 and 6O57 in its Third Party Notice on the basis of the information that was then available. GBRf in its Third Party Counter Notice did not state that Train Slot 6O57 was not associated with the QAR as required by Condition J7.5.3(b). GBRf stated that Train Slot 6O57 should not be included in the transfer because it was not underpinned by access rights. The situation was in fact that the return empty wagons from Roxby Gullet to Angerstein Wharf were operating using a number of different Train Slots over a circuitous route via Peterborough and Tonbridge using Train Slots 6O75 and 6Y58.

48. With a view to identifying which Train Slots should be included in the transfer, a recess was directed to facilitate discussions on this point between the representatives of DBC and GBRf. Following those discussions, in particular, regarding the return working Train Slots of 6O57 and 6O75 because Train Slot 6O75 was used by GBRf for the empty services going back to Angerstein Wharf, it was agreed between DBC and GBRf that Train Slot 6O75 should be transferred as the Train Slot associated with the transport service.
49. I determine that Train Slot 6E58 Angerstein Wharf to Roxby Gullet and Train Slot 6O75 from Doncaster to Tonbridge should be considered part of the Rights Subject to Surrender and should be transferred to DBC from GBRf.

### **Additional Matters on which the parties seek guidance**

#### **Actions of GBRf in removing Train Slots pending the ADA hearing**

50. GBRf removed the element of the Y path relating to Train Slot 6O57 10:51 SX Doncaster Down Decoy to Angerstein Wharf from the Working Timetable and permanently replaced it with Train Slot 6O57 10:51 SX Doncaster Down Decoy to Eastleigh Yard after NR issued the revised decision.
51. DBC's view is that the actions of GBRf undermine the Condition J7 and request my views on this and whether the actions of GBRf were reasonable under the circumstances. Mr Eagling, on behalf of GBRf, at the hearing explained that GBRf contributes to a group called the Capacity Management Review Group, and if there is capacity that is no longer needed it is surrendered to that group. If there is capacity that GBRf thinks might be helpful to the business going forward, attempts are made to repurpose and reuse that to grow the business. Mr Eagling explained that this is what happened on this occasion but that with hindsight this should not have happened until the determination of this ADA. I agree with him and it is regrettable that it happened.
52. It is my view that the actions of GBRf had the potential effect of pre-empting the outcome of this ADA, however, I accept the explanation from Mr Eagling about the reasons for the actions taken.

#### **Association of Firm Access Rights and Train Slots**

53. The ability to associate Train Slots and with Firm Access Rights is currently open to subjective determination and it has been put to me that it is unclear if the two can be associated. NR and DBC submit that Firm Access Rights and Train Slots can be associated when minor variances exist. GBRf agrees with this in principle.
54. It is my view that each case must be decided on its facts but in general, as in the circumstances before me, Firm Access Rights and Train Slots can be associated when they share substantially similar characteristics. In this case the Arrival Window was quite different (13:15 – 14:15) compared to the Train Slot (arrival 08:41 FSX and 08:46 FO in the May 2020 timetable and 07:32 FSX and 08:32 FO in the December 2020 timetable). However, on the basis that the Origin, Destination and Departure Window matched, in my view it is enough to establish that there were substantially similar characteristics. In my view a pragmatic approach is required in approaching this matter and the fact that the Train Slot is outside the Arrival Window of the QAR does not negate the establishment of association when the other characteristics of Origin, Destination and Departure Window are similar.
55. In short, a Train Slot does not need to match all of the contractual characteristics set out in columns 1 to 18 of the Rights Table in order to be considered "related" to a QAR under the definition of "Rights Subject to Surrender" within Condition J1.2 sub-paragraph (i) "any Train Slot, including any Y-Path, or part of it in the Working Timetable which relates to that Quantum Access Right." However, a Train Slot does need to match substantially the contractual characteristics. The word "substantially" is being used in its ordinary sense meaning to a significant extent or more than 50%.



56. I confirm that application in this case is correct and the Train Slot can be related to the Access Right when the Origin, Destination and Departure Window all match.

**Late Submission of Information**

57. It is my view that the obligation is on operators, whether the Applicant or Incumbent to provide sufficient evidence for their Third Party Notice, or Third Party Counter Notice in the first instance to substantiate their submissions. This case has involved late disclosure of additional information which has made it harder for NR to discharge its obligation under Part J and made this ADA more complicated than it needed to be.

58. I find that NR discharged its obligations under Part J of the Network Code, acted in good faith and reasonably and that its decision should stand subject to the amendments in relation to the associated Train Slots.

59. As no circumstances of the kind referred to in Rule G54 exist in this ADA, I make no order as to costs.

**Declaration by Hearing Chair**

60. This determination is legally sound and appropriate in form.

A handwritten signature in black ink, appearing to read 'J. Findlay', written over a horizontal line.

Jacqueline Findlay

Hearing Chair

14 April 2021

## Appendix A to Access Dispute Adjudication determination of reference ADA50

### Extracts from Network Code Part J and Part D

#### 1.2 Interpretation

1.2.1 Where the following definitions are used in this Part J, they shall have the meanings shown below:

“Access Proposal”	has the meaning shown in Part D of this code;
“Access Right”	means, in relation to an Access Agreement, permission to use track for the purpose of the operation of trains on that track by a beneficiary and rights ancillary thereto which are provided or charged for in the Access Agreement in question;
“Access Right Change”	amendment or limitation of a Part J Access Beneficiary’s Firm Right in order to achieve Better Use;
“Ancillary Movements”	has the meaning shown in Part D of this code;
“Applicant”	has the meaning shown in: (a) Condition J5.1(a); or (b) Condition J7.2, as applicable;
“Incumbent”	has the meaning shown in: (a) Condition J5.1.1(b)(ii); (b) Condition J7.2; or (c) Condition J10.1.2(b);
“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”	<p>means, in relation to:</p> <ul style="list-style-type: none"> <li>(a) a Failure to Use Notice; or</li> <li>(b) a Third Party Notice,</li> </ul> <p>as applicable, the Quantum Access Right to which such notice refers and:</p> <ul style="list-style-type: none"> <li>(i) any Train Slot, including any Y-Path, or part of it in the Working Timetable which relates to that Quantum Access Right;</li> <li>(ii) any Ancillary Movements or Stabling that Network Rail (or the Applicant in relation to Condition J7.3) considers: <ul style="list-style-type: none"> <li>(A) are directly associated with the relevant Quantum Access Right; and</li> <li>(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</li> </ul> </li> <li>(iii) any Access Proposal relating to any such Quantum Access Right;</li> </ul>
“Third Party”	means an Access Beneficiary or a Potential Access Party who has submitted an Access Right Change proposal to Network Rail;
“Third Party Counter Notice”	means a notice given by the Incumbent to Network Rail under Condition J7.5.1
“Third Party Notice ”	means a notice given under Condition J7.2;
“Train Slot”	has the meaning shown in Part D of this code;
“Y-Path”	<p>means a Train Slot incorporated in the Working Timetable which</p> <ul style="list-style-type: none"> <li>(a) departs from one or more Origins to the same Destination: and/or</li> <li>(b) arrives at one of more Destinations from the same Origin,</li> </ul> <p>that is identified as such by the incorporation of the letter “Y” in the operating characteristics part of the Train Slot’s heading.</p>

*From Part D:*

**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;

## 7 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 specified in the notice

is given to the Office of Rail and Road pursuant to Condition J7.4.1(c); and

- (c) Network Rail shall notify the Office of Rail and Road 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 and Road pursuant to Condition J7.5.5(c); and
- (c) Network Rail shall notify the Office of Rail and Road 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 J7.5.5(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 J12, 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 Incumbent response to Network Rail's notification under Condition J7.7**

- 7.8.1 Upon receipt of a notice under Condition J7.7.1, the Incumbent shall respond the Network Rail in writing within 10 Working Days stating that it either accepts or disagrees with Network Rail's decision
- 7.8.2 If the Incumbent disagrees with Network Rail's decision under Condition J7.7, then in addition to its response under Condition J7.8.1, it shall also at the same time refer the matter for determination in accordance with the ADRR
- 7.8.3 If the Part J Access Beneficiary fails to respond to Network Rail in accordance with Condition J7.8.1, it will be deemed to have accepted Network Rail's decision.

**7.9 Surrender of Access Rights**

- 7.9.1 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 and Road pursuant to Condition J7.8.2; or
  - (b) on the date specified in the Office of Rail and Road Determination, if applicable.
- 7.9.2 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 and Road 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.



## 7.10 Grant to Applicant

7.10.1 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:
  - (i) the date stated in a notice given to the Office of Rail and Road pursuant to Condition J7.5.5(c), J7.4.1(c) or J7.8.2 or the date specified in the Office of Rail and Road Determination (as applicable);
  - (ii) the date 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
- (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.

## 7.11 Access Proposals

7.11.1 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.

Appendix B to Access Dispute Adjudication determination of reference ADA50  
Correspondence taken from DBC submission to ADA50 (Annexes)

From: Liam Higgins  
Sent: 16 February 2021 12:51  
To: Jonathan Clarke  
Cc: Nigel Oatway  
Subject: RE: Peter Norris Haulage

Afternoon Jon

Yes I can confirm that Eco-Railfreight arrange all the unloading slots with Biffa and arrange the train haulage for Peter Norris to run from Angerstein Wharf to Roxby.

I'm currently waiting for Peter Norris to also confirm this in writing, once I receive it I will send it over ASAP.

Kind Regards  
Liam Higgins | General Manager - Freight



Eco-RailFreight.

E [Liam.Higgins](mailto:Liam.Higgins) | M | W [www.eco-railfreight.com](http://www.eco-railfreight.com)

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[www.eco-railfreight.com](http://www.eco-railfreight.com)

**From:** James Harrison  
**Sent:** 18 January 2021 10:34  
**To:** Liam Higgins ; Julian Holloway  
**Cc:** Craig Brear; Mick Brear  
**Subject:** RE: Norris/Morris

Morning Gents,

I've put together a schedule for the inputs until the end of February 21.

Julian/Liam – When the new ADT's land; we can look at increasing P Norris/Wales inputs. (Finning's have stated mid-February)

#### Jan 21 – Rail Schedule

25<sup>th</sup> Monday - Eco Power / Leeds  
26<sup>th</sup> Tuesday – Eco Power / P Norris / Part Rubble  
27<sup>th</sup> Wednesday – Eco Power / Manchester  
28<sup>th</sup> Thursday - Eco Power / Manchester  
29<sup>th</sup> Friday - Eco Power / Manchester  
30<sup>th</sup> Saturday - Eco Power / Manchester

#### Feb 21 – Rail Schedule

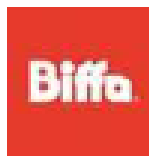
1<sup>st</sup> Monday - Eco Power / Leeds  
2<sup>nd</sup> Tuesday – Eco Power / P Norris/Part Rubble  
3<sup>rd</sup> Wednesday – Eco Power / Manchester  
4<sup>th</sup> Thursday - Eco Power / Manchester  
5<sup>th</sup> Friday - Eco Power / Manchester  
6<sup>th</sup> Saturday - Eco Power / Manchester

8<sup>th</sup> Monday - Eco Power / Leeds  
9<sup>th</sup> Tuesday – Eco Power / P Norris/Part Rubble  
10<sup>th</sup> Wednesday – Eco Power / Manchester  
11<sup>th</sup> Thursday - Eco Power / Manchester  
12<sup>th</sup> Friday - Eco Power / Manchester  
13<sup>th</sup> Saturday - Eco Power / Manchester

15<sup>th</sup> Monday - Eco Power / Leeds  
16<sup>th</sup> Tuesday – Eco Power / P Norris/Part Rubble  
17<sup>th</sup> Wednesday – Eco Power / Manchester  
18<sup>th</sup> Thursday - Eco Power / Manchester  
19<sup>th</sup> Friday - Eco Power / Manchester  
20<sup>th</sup> Saturday - Eco Power / Manchester

22nd Monday - Eco Power / Leeds  
 23<sup>rd</sup> Tuesday – Eco Power / **Morris Wales**  
 24<sup>th</sup> Wednesday – Eco Power / Manchester  
 25<sup>th</sup> Thursday - Eco Power / Manchester  
 26<sup>th</sup> Friday - Eco Power / Manchester  
 27<sup>th</sup> Saturday - Eco Power / Manchester

Kind regard



James Harrison / Site Manager

Mobile Office

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Wash your hands frequently



Practice social distancing



Follow hygiene protocols



Stay at home if you have symptoms

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Enter either Wttid: 6057 or UID:
and any of the following fields, if known:
Origin:                               Origin time:       Days:
Start date:                           Type: WTT (wtt,stp,vst,var,can)
Lc Wttid   Origin      Destination  Typ Days   From      To        Uid
236057C   DONCONDCY 10:51 EASTLGHYD 17:51 WTT SX    15/02/21 14/05/21 H02992
236057C   DONCONDCY 10:51 ANGSTNWGB 18:37 WTT SX    14/12/20 12/02/21 H92702
236057C   DONCONDCY 10:51 GRAINGBYF 18:12 WTT SX    14/12/20 12/02/21 H92703
  
```

(Note: table shows that the 2<sup>nd</sup> & 3<sup>rd</sup> entries, which include associated Train Slot 6057 10:51 SX Doncaster Down Decoy to Angerstein Wharf, were terminated on 12/02/21 and replaced with the 1<sup>st</sup> entry).

**Appendix C to Access Dispute Adjudication determination of reference ADA50  
Responses to final Directions letter (of 01.03.2021), provided verbally during the hearing**

**1. How many WTT arrivals are scheduled at Roxby Gullet each day?**

Three. 06:00 to 11:08 (DBC); 08:39 to 14:02 (GBRf); 13:39 to 18:14 (GBRf).

**2. How much use is actually made by each of the Parties each week? A rough estimate will suffice.**

**Annex 2 of DBC's Statement suggests one per week in January and February 2021.**

06:00 to 11:08 approx. 6 per week. 08:39 to 14:02 approx. 6 per week, Monday to Saturday. 13:39 to 18:14 due to commence April 2021, Monday to Friday.

**3. Do the Parties know of any other operators going into Roxby Gullet?**

No.

**4. Annex 2 of DBC's Statement refers to Eco Power. Are Eco Power and Eco Railfreight the same company? Does GBRf have a contract with Eco Power and/or a contract with Eco Railfreight?**

EcoPower and EcoRailfreight are sister companies. GBRf does not hold a contract with either.

**5. DBC asserts in its Statement at 4.18 that Eco Railfreight, acting as Peter Norris Haulage's intermediary, has a verbal agreement with Biffa to operate up to 2 trains a week from Angerstein to Roxby Gullet. If this is the case how can this be reconciled with GBRf's assertion in its response at 2.2 that "...on several occasions where a GBRf train has arrived into Scunthorpe to be told that the terminal at Roxby Gullet is already occupied by two DBC trains"?**

This referred to a specific issue on Tuesday 9<sup>th</sup> February, which has not been repeated and was not believed to be an issue with the WTT.

**6. The letter from Biffa dated 28 January 2021 (Appendix 4.2 of GBRf's Statement of Claim) states "Biffa Waste services Ltd. Confirms that it is now only gives permission to GB Railfreight Ltd, to enter its rail terminal at Scunthorpe (Roxby) at the times slots specified below and that it requires train slots on Network Rail's network to match these terminal slots". Could GBRf explain what this means?**

The letter was to demonstrate that only GBRf has access to the terminal between 13:39 to 18:14.

**7. What discussions have taken place, if any, between DBC & GBRf since the new arrangement instigated in January 2020?**

Initially (early 2020) phone calls and emails between GBRf and DBC on a weekly basis. Currently weekly correspondence with NR acting as 'middleman'.

**8. Why did the paper trail for these matters only begin in November 2020?**

DBC wanted to submit the third party notice in February 2020, but did not have the supporting customer letter until November 2020.

**9. Can GBRf explain why it removed 6O57 from the WTT given the serving of DBC's Third Party Notice and the pending ADA?**

An attempt to repurpose capacity and a lack of internal communication about the pending dispute: "it's probably regrettable that we made a bid when we have, I think with hindsight perhaps we shouldn't have done that and we should have held onto it." DBC and NR accepted GBRf's reasoning.

**10. What are the operational arrangements now for DBC's empty wagons, i.e. what has happened to TS6O57 since it was removed from the WTT?**

DBC relies on weekly bidding to NR for available timetable space. This has caused some fluctuation in arrival times.

**11. Are there written contracts between Peter Norris, Eco Railfreight and DBC?**

A written contract exists between DBC and Eco Railfreight.

**12. What information did DBC have on 4 November 2020 when submitting the Notice to seek the transfer of the Access Right which would fulfil Condition J7.3.1(e) of the Network Code?**

DBC was operating the train, the duration of operation and the letter from Eco Railfreight.

**13. Given the response by GBRf and DBC to Point 3 of the Hearing Chair's Directions note of 24/2/21 (Details of Track Access Rights used to underpin train movements from between Angerstein Wharf and Roxby Gullet) – if train slot 6057 should not be sought under Part J to underpin DBC's movement of the traffic, what train slots does GBRf believe that DBC should be seeking to acquire?**

This was answered elsewhere and is reflected in the Determination.

**14. Noting question 13, above, as GBRf underpinned its carriage of the Angerstein Wharf – Roxby Gullet traffic with Train Slots 6E58, 6D21 and 6O75 does DBC still stand by the inclusion of 6O57 in its Third Party Notice?**

DBC wasn't aware of the other Train Slots GBRf was using at the time and had thought 6O57 was the correct slot to include; had it been aware of the others it would have put those in instead.