

THE OFFICE OF RAIL REGULATION'S DETERMINATION OF THE APPEAL BY DB SCHENKER RAIL (UK) LIMITED ("DBS") PURSUANT TO CONDITION J13.3 AND PART M OF THE NETWORK CODE AGAINST DETERMINATIONS ADP42 AND ADP44 OF THE ACCESS DISPUTES PANEL (THE "PANEL") OF THE ACCESS DISPUTES COMMITTEE IN RESPECT OF A JOINT REFERENCE BY DBS AND NETWORK RAIL INFRASTRUCTURE LIMITED ("NR") CONCERNING THE VALIDITY OF TWO THIRD PARTY FAILURE TO USE NOTICES SERVED BY NR ON DBS.

DETERMINATION: The Office of Rail Regulation determines the appeal in the manner set out in paragraphs 88 to 90 below.

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I Introduction

1. This is the determination by the Office of Rail Regulation (“ORR”) of the appeal brought by DBS on 18 December 2009 (“the Appeal”). The Notice of Appeal challenges the Panel’s determination in references ADP42 and ADP44 dated 7 December 2009 (“the Panel’s Determination”).
2. The Panel’s Determination arose out of a Joint Reference by NR and DBS relating to the validity of two Third Party Failure to Use Notices (“the Notices”) served by NR pursuant to Condition J5.1 of the Network Code (“the Code”) on 24th September 2009 and 30th September 2009 and the contents of DBS’ Counter Notices. The Notices were served as a result of applications made by Direct Rail Services Limited (“DRSL”) for train slots between Grangemouth and Inverness, to which the Quantum Access Rights affected by the Notices related.
3. In summary, DBS alleged that the Notices were invalid and asserted a reasonable ongoing commercial need in respect of the affected Quantum Access Rights (“the Rights”). NR submitted that the Notices were valid and that DBS’ Counter Notices were invalid.

II Background to this Appeal

4. NR served a notice dated 24th September 2009 (“the First Notice”) which was the subject of reference ADP42 and which related to the following access rights contained within DBS’ Track Access Contract (Freight Services) dated 9 February 2006:
4H44 01.40 MWX Mossend Euroterminal to Georgemas Junction;

4H44 01.40 WO Mossend Euroterminal to Georgemas Junction.

5. NR served a notice dated 30 September 2009 (“the Second Notice”) which was the subject of reference ADP44 and which related to the following access right:

6H44 01.53 MO Mossend Euroterminal to Inverness TC.

6. DBS sent a letter dated 8 October 2009 (its first Counter Notice) to NR in which it stated that it considered the First Notice to be invalid for failing to specify the train slots to which the affected Rights related, denied that there had been any Failure to Use in respect of the first right specified, as it was regularly used on Fridays, and asserted a reasonable ongoing commercial need for the specified Rights on the basis that it had a reasonable prospect of gaining a customer contract for traffic that would utilise those Rights.
7. DBS sent a further letter to NR dated 13 October 2009 (its second Counter Notice) in which it stated that it considered the Second Notice to be invalid for the same reasons as those asserted in respect of the First Notice. It also asserted a reasonable ongoing commercial need for the specified Right on the basis that it had a reasonable prospect of gaining a customer contract for traffic that would utilise that Right.
8. In its reply dated 15 October 2009 to DBS’ letter dated 8 October concerning the First Notice, NR treated that letter as a Counter Notice and did not accept DBS’ allegations concerning the invalidity of the First Notice, the use of the second specified Right or its reasonable ongoing commercial need. However, for the

avoidance of doubt, it set out the relevant Train Slots to which the rights corresponded. It informed DBS that pursuant to Condition J13.1(c), it would request that the matter be dealt with in accordance with the Access Dispute Resolution Rules.

9. NR sent a letter dated 20 October 2009 in very similar terms in respect of the Second Notice, responding to DBS' Counter Notice dated 13 October 2009.
10. The parties submitted a Joint Reference to the Panel. The parties were in agreement that except in relation to the two matters which were the subject of the reference (set out below) there had been no deficiencies in the procedure used.
11. DBS' submissions to the Panel were in substance those which it had made in its Counter Notices. It alleged that by failing specifically to list the Train Slots to which the Rights related, the First Notice did not comply with Condition J5.3(a) and was therefore invalid; that no Failure to Use (as defined in Part J of the Code) had occurred in respect of the Friday Quantum Access Right (a point which NR conceded) and that DBS had a reasonable ongoing commercial need for the Rights as it had a reasonable prospect of gaining a customer contract for traffic that would utilise those Rights.
12. NR denied that the First Notice was invalid on the basis that Condition J5.3 does not specifically require the Slots to be listed. Further, the First Notice stated in general terms that the Failure to Use was in respect of those Train Slots to which the listed Rights related and that DBS held no other Rights or Train Slots which related to the Highland Main Line on weekday nights, so there was no question of ambiguity. NR also denied that DBS had provided

any real evidence of a reasonable on-going commercial need for the Train Slots and was in fact currently allowing DRSL to use the Train Slots in question on a spot bid basis. Further, it alleged that since DBS had failed to provide such evidence within the time frame required by Condition J4.9.1 of the Code, its Counter Notice was invalid. NR also noted that the traffic contemplated by the contract would initially be seasonal and that DBS was well-placed to commit resources to such traffic.

13. DBS alleged that the Second Notice was invalid for the same reason alleged in respect of the First Notice and also submitted that it had a reasonable ongoing commercial need for the Right as it had a reasonable prospect of gaining a customer contract for traffic that would utilise this Right. NR denied that the Second Notice was invalid or that DBS had a reasonable ongoing need for the affected Right for the same reasons given in respect of the First Notice.
14. DRSL became a Dispute Party and provided a submission in response to the Joint Reference submission. It informed the Panel that (redacted) had constructed an inter-modal terminal at Inverness and provided transshipment services for both DBS and DRSL.
15. A hearing before the Panel was held on 25 November 2009.

III The Panel's Determination

16. DBS invited the Panel to determine that:
 - (i) *NR's First and Second Notices were invalid as they did not contain all the information required by Condition J5.3, specifically Condition J5.3(a) ;*

- (ii) *DBS has a reasonable ongoing commercial need in respect of the Rights specified in the First and Second Notices.*
- 17. DBS requested that the Notices be set aside if the Panel found in its favour on either of the above points.
- 18. NR invited the Panel to determine that:
 - (i) *NR's First and Second Notices were valid;*
 - (ii) *DBS failed to comply with Condition J4.9.1 in that it has failed to detail its Grounds for Objection or provide evidence to support its assertion of reasonable ongoing commercial need with the Counter Notices served in response to the First and Second Notices.*
- 19. NR requested that DBS be ordered to relinquish those Rights which are the subject matter of the dispute (and did not include the right on which NR had made a concession, namely the 4H44 01.40 MWX Mossend Euroterminal to Georgemas Junction in respect of Fridays only (the "Friday Train Slot")) if the Panel found in its favour on either of the above points.
- 20. The Panel divided its findings into findings of fact, findings of entitlement and its determination. There is a substantial degree of overlap between the latter two categories in the Panel's Determination. The main findings are summarised below.
- 21. The Panel was satisfied that the parties had correctly identified the substance and sequence of questions to be answered, namely:
 - (i) the technical validity of NR's Notices;
 - (ii) the procedural validity of DBS' Counter Notice;

- (iii) the cases made, primarily by DBS, but also by DRSL, in respect of 'reasonable ongoing commercial need.'

22. It decided that:

- (i) *'There is significant latitude in relation to the format and degree of detail that NR is required to include in a Third Party Failure to Use Notice, provided that it meets the three stipulations in Condition J5.3'*
- (ii) The Notices complied with the requirements of Condition J5.3.
- (iii) The First Notice complied with the requirements of Condition J5.3 by virtue of the following:
 - (a) it listed the Rights which were to be surrendered and covered the Train Slots by inclusion of the sentence:
'For the avoidance of doubt, this notice also requests the surrender of any Train Slots held by DB Schenker which were secured in exercise of those Quantum Access Rights.'
 - (b) it identified the nature and extent of the Failure to Use, in compliance with the definition of a Failure to Use in Condition J4.2(b) by inclusion of the following sentence:
'Network Rail's records show that the Train Slot secured in exercise of this Quantum Access Right by DB Schenker was last used on 13 June 2008.'
 - (c) it did not express the date on which the surrender was to take place in terms of a precise date but as the derivative of the working through of processes described elsewhere in Part J. The Panel regarded the formula used as satisfying the requirements of

Condition J5.3(c) in a case where there might be an expectation that a Third Party Failure to Use Notice would elicit a Counter Notice.

- (iv) The argument that the definition of Failure to Use in Condition J4.2(b) required the train slots to be listed was specifically rejected in this instance on the basis of:
 - (a) the general reference by NR to Train Slots set out at paragraph 22(iii)(a) above;
 - (b) the fact that *'all the rights in this instance were Level 1 Rights (ie. specific as to timings etc and not capable of confusion with other rights.)'*
- (v) There might be occasions where the clarity of purpose of a notice might be enhanced by the inclusion of details of the service group or require additional citations but such considerations were not required in this instance.
- (vi) DBS did not provide any evidence of reasonable ongoing commercial need *with* its notice as required by Condition J4.9.1: neither an assertion, nor a letter (that of 28 September) or a letter sent on November 11th (four weeks after the Counter Notice) fulfilled that requirement.
- (vii) Accordingly, the Counter Notice had no effect and there was no basis or requirement for the Panel to consider the merits of any arguments in respect of DBS' reasonable ongoing commercial need.
- (viii) NR was therefore entitled to proceed as if, in accordance with J4.9.2:

"No [valid] Counter Notice is served within 10 working days of receipt of a Failure to Use Notice:

 - (a) *the Train Operator will be deemed to have agreed to the surrender specified in the Failure to Use Notice".*

There is no impediment to NR implementing the Surrender of Rights provisions of Condition J4.12 in respect of the Rights cited in the First and Second Notices and transferring them to DRSL.

- (ix) Nothing in the Panel's Determination interfered with the parties' agreement that DBS should continue to enjoy a Quantum Access Right and a Train Slot corresponding to the current Train Slot for a 01:57 6H44 FO Service.

IV The Conduct of the Appeal before ORR

- 23. As a result of the determination, NR issued a notice to ORR dated 15 December 2009 of relevant modifications to DBS' track access contract as a result of the Panel's Determination.
- 24. DBS issued its Notice of Appeal on 18 December 2009 pursuant to Condition J4.12 and Part M of the Code ("the Notice of Appeal").
- 25. ORR indicated that it was minded to hear the appeal and to treat (redacted) as an interested party in a letter to the parties dated 24 December 2009. It invited representations on these two issues by 8 January 2010 and responses from DRSL and NR to the Notice of Appeal by 1 February 2010.
- 26. DBS provided representations in its letter dated 8 January 2010. It questioned whether (redacted) could be treated as an interested party on procedural grounds and questioned the relevance of its potential input to an appeal which would turn on a point of contractual interpretation. However, it assumed that any comments (redacted) wished to make could be channelled through DRSL in any event.

27. DRSL also provided representations in a letter dated 8 January 2010. It considered it unnecessary for ORR to hear the appeal on the basis that Part J was followed in all respects, DBS was not in doubt as to the Train Slots to which the Notices related and there was no danger of detrimental precedents being set. However, should ORR be minded to hear the appeal, it agreed that (redacted) should be treated as an interested party.
28. NR sent representations by email on 8 January 2010 in which it indicated that it was content for (redacted) to be treated as an interested party. It did not object to DBS' entitlement to bring the appeal but suggested that the proper forum in which to consider the interpretation of Part J was in an industry review of that Part of the Network Code. Further, it indicated that it would be willing to provide an undertaking that all future Third Party Failure to Use Notices would include a list of the relevant train slots.
29. NR also made some short substantive representations on the questions arising in the appeal. These largely repeated its submissions before the Panel and are summarised along with its later Response dated 1 February 2010 in section VI below.
30. ORR set out its decision to hear the appeal in a letter to the parties dated 14 January 2010. It also confirmed to the parties in that letter that the notice of relevant modifications to DBS' track access contract referred to in paragraph 23 above would have no effect, pending determination of this appeal.

31. NR and DRSL sent their responses to the Notice of Appeal in letters to ORR dated 1 February 2010. Those representations are summarised in section VI below.
32. DBS sent its reply to NR's and DRSL's responses in a letter to ORR dated 12 February 2010. Those representations are summarised in section VI below.

V Relevant Provisions of the Code

33. The relevant provisions of the Code are annexed to this determination.

VI The parties' submissions

DBS

34. DBS considers the Panel's finding concerning the validity of the Notices to be incorrect. Specifically, it considers that the Notices did not meet the requirements of Condition J5.3(a).
35. It argues that the Panel erred in its findings on the approach to interpretation. Firstly, it erred in its finding that:
'...Part J remains imprecise in legal clarity and in part can attract ambiguity in its interpretative effect.... In answering the questions posed...[the Panel] must clearly distinguish between those provisions...that are clear and unambiguous , and therefore compliance by a party is a matter of simple 'yes' or 'no' and those provisions that are less clear and potentially ambiguous, and where therefore the Panel has to exercise a judgment as to whether a party has placed a reasonable construction upon the wording in question, and if so, has adequately complied with that reasonable construction.'

36. Secondly, it erred in its finding (set out at paragraph 22(i) above) that *'there is significant latitude in relation to the format and degree of detail that NR is required to include.'* It states that the requirements are precise and the information to be specified is unambiguous.
37. DBS disagrees with the Panel's finding that for the purposes of Condition J4.2(b), the general statement that *'The Train Slot secured in exercise of this Quantum Access Right was last used on [date]'* suffices, since Condition J4.2(b) requires NR to specify the *'Failure to Use that NR considers has occurred.'*
38. Given that the relevant definition of Failure to Use set out in Condition J4.2.1(b) states that it occurs when *'the Train Operator fails to make use of a Train Slot which has been included in the Working Timetable which relates to that Quantum Access Right'*, DBS argues that NR should set out the relevant Train Slots included in the Timetable which it considers the operator to have failed to use and should not leave the train operator to speculate as to which are relevant.
39. Further, the specific date mentioned in the formulation referred to at paragraph 36 above (in this instance, 13 June 2008) relates to a Friday. In relation to the First Notice, this could only relate to the Quantum Access Right 4H44 01.40 MWX Mossend Euroterminal to Georgemas Junction and not to the other Quantum Access Right 4H44 01.40 WO Mossend Euroterminal to Georgemas Junction.
40. Moreover, since NR accepted that no Failure to Use occurred with respect to the Friday Train Slot, the Panel should have considered the relevance of the date (Friday 13 June 2008) in determining whether or not NR's general statements combined with a specific date were sufficient to meet the requirements of Condition J5.3(a).

41. In addition, since NR accepted there was no Failure to Use with respect to the Friday Train Slot but did not accept this in relation to Tuesday, Thursday and Saturdays, this indicates that it considered the Right in question to relate to four separate Train Slots. Therefore, the general formulation referred to at paragraph 36 above could not suffice.
42. DBS also argues that the fact that the Rights in this instance were Level 1 Rights is irrelevant for the purposes of meeting the requirements of Condition J5.3(a).
43. It notes that the Panel did not comment specifically on the wording of the Second Notice but assumes that the same comments that were made in respect of the First Notice would apply.
44. In general, DBS submits that general and unspecific statements can lead to confusion and disputes and are not sufficient to satisfy the requirements of Condition J5.3. It also considers that the Panel was incorrect to find, in effect, that in some cases general statements could be qualified by other general statements by virtue of the finding set out at paragraph 22(v) above. It states that the Panel's decision could create a harmful precedent to the detriment of Train Operators.

NR

45. NR requests that the Panel's decision be upheld on the basis that the Notices were valid and contained sufficient information to enable DBS properly to respond. It states that the use of Condition J5 by DRS to obtain unused capacity and the service of the Notices

upon DBS was in line with the principle and intent governing Condition J5.

46. It argues that since the Notices related to Level 1 Quantum Access Rights, there was no room for doubt as to the Train Slots to which they related. They are specific in their construction and only entered into the Working Timetable at the request of the train operator.
47. NR maintains that the general statement relating to Train Slots (set out at paragraph 22(iii)(a) above) is not ambiguous. Furthermore, at the time of issue of the Notices, there were no other overnight Class 4 Train Slots held by DBS between Mossend and Inverness which could have caused confusion with the Train Slots in question. Therefore, DBS did not have to speculate as to the relevant Rights and was able to respond to the Notices. It was not disadvantaged.
48. Further, NR provided details of the affected Train Slots in its responses to DBS' Counter Notices. Those responses were included in the submission to the Panel.
49. NR suggests that there is no requirement within Condition J4.2.1(b) to identify the Train Slot in respect of which the Failure to Use has occurred. Rather, the Failure to Use is in respect of '*a Train Slot...which relates to that Quantum Access Right*' [emphasis added by NR]. Therefore, the Train Slot is analysed to understand when the Quantum Access Right to which the Train Slot is related was last used and is required merely to pass the Failure to Use test as a precursor to service of the Notice.
50. NR points out that DBS makes no mention in its Notice of Appeal of the Panel's findings in respect of the First and Second Counter Notices. Given that it has not appealed the Panel's decision

concerning the validity of the Counter Notices and it is now more than 90 days since receipt of those Counter Notices, DBS has failed to realise its assertion of a reasonable ongoing commercial need. In those circumstances, it would be unfair for DRSL to be disadvantaged over what is effectively a drafting issue.

51. NR notes DBS' submission regarding the date 13 June 2008 set out at paragraph 39 above. It notes that in DBS' First Counter Notice dated 8 October 2009, no mention of this Quantum Access Right is made and that in its response dated 15 October 2009, it is stated that DBS' failure to respond on this Quantum Access Right will, on the basis that the Notice is valid, be treated as Deemed Acceptance of Surrender by DBS. This matter was not referred to in the submission to the Panel and NR *'can only assume that this omission reinforces the position that DBS has accepted the surrender of this Quantum Access Right.'*
52. NR does not accept that the issue in DBS' submissions concerning the validity of the date, referred to at paragraph 40 above, is a matter which DBS can raise now since NR does not consider it to have formed part of the dispute before the Panel.
53. NR also relies on ORR's determination of the appeal against the decision in ADP 23¹ to support its argument that unless an incumbent can prove that a Failure to Use has not occurred, the only defence to an application under J5 should be proof of reasonable ongoing commercial need.

¹ Available on the ORR website at <http://www.rail-reg.gov.uk/upload/pdf/ADP23-orr-determ-160108.PDF>

DRSL

54. DRSL's submissions echo many of NR's arguments. It emphasises in its submissions that DBS would not have been in doubt as to the affected Train Slots because:
- (i) The rights were clearly described;
 - (ii) DBS was informed that it was to surrender any Train Slots secured in exercise of those Rights;
 - (iii) The dates when the Train Slots were last used were specified;
 - (iv) The only Level 1 rights that have been bid by DBS into the Working Timetable appear as WFX Train Slots between Mossend Euroterminal and Inverness TC;
 - (v) NR provided further clarification in its response letters.
55. It points out that DBS has not provided evidence of reasonable ongoing commercial need or sought to appeal the Panel's finding concerning its Counter Notice, whereas DRSL has made a strong case for reasonable ongoing commercial need.
56. DRSL also seeks to rely on ORR's determination in the appeal against the decision in ADP23.
57. DRSL refers to ORR's duties pursuant to section 4 of the Railways Act 1993 and seeks a finding that the rights which are the subject of this appeal are transferred to DRSL on the basis of reasonable ongoing commercial need.

DBS' Response

58. DBS refutes the suggestion that service of the Notices was 'in line' with the principle and intent underpinning Condition J5 since the Notices did not comply with the requirements of Condition J5.3.
59. DBS also rejects NR's contention that it sought to retain the Rights without providing sufficient evidence of its ongoing need for that capacity. It reiterates the fact that it did inform NR of its 'reasonable ongoing commercial need' in its Counter Notices and subsequently provided evidence in support. At the hearing, the Panel's Determination concerning the invalidity of its Counter Notices (referred to at paragraphs 22(vi) and (vii) above) meant that the merits of its arguments as to its 'reasonable ongoing commercial need' did not fall to be considered. However, DBS accepts that it did not challenge that particular aspect of the Panel's determination since this would have *'little prospect of success as [DBS] had evidently erred in not sending the letter from its customer with its Counter Notices.'* It states that it had instead relied on a general wording in its Counter Notices in what it alleges is *'much the same way as NR had in respect of Condition J5.3(a).'*
60. DBS emphasises the fact that the use of the wording *'shall specify'* in Condition J5.3 indicates that the provision of the information in J5.3(a), (b) and (c) is mandatory.
61. DBS considers NR's reliance on ORR's conclusion in its determination of the appeal from the decision in ADP23 to be misplaced. It considers ORR's conclusion that the only right of challenge to such a notice to be on the basis of 'reasonable ongoing commercial need' to be based on the version of the Code in force at

the time of that determination. The revision of the Code on 17 October 2007 included a right of challenge to a Third Party Failure to Use Notice on the basis of invalidity, pursuant to Condition J7.6.1. Therefore, ORR's previous determination would not apply to disputes arising under the revised Code and *'the implication of the revision to Part J is that NR is bound by strict compliance with the notice provisions under Part J.'*

62. Further, DBS relies upon ADR Rule A1.18 to emphasise that disputes are to be determined by ADP on the basis of the legal entitlements of the parties and upon no other basis. Therefore, the applicable version of the Code should be used. DBS is entitled to challenge notices pursuant to Condition J5.4(b) [Counter Notices]. It therefore considers that *'this is not a mere difference of opinion over contractual wording as [NR] suggests, but a legitimate challenge under the provisions of Condition J5'* as a result of the invalidity of the notices.
63. In relation to the wording of Condition J5.3(a), DBS states that *'if only the Rights Subject to Surrender needed to be specified in a Third Party Failure to Use Notice along with a vague and general statement about failure to use a Train Slot that has been included in the Working Timetable which is supported by a Quantum Access Right in question, as [NR] contends in this case, then DBS submits that Condition J5.3(a) would be unnecessary. In fact it appears that all [NR] has done to meet the requirement of Condition J5.3(a) is merely include the definition of 'Failure to Use' as set out in Condition J4.2.1(b).'* DBS considers that to specify the actual 'Failure to Use' which has occurred, NR needs at least to specify the actual Train Slot which it considers the Incumbent to have failed to use, irrespective of whether or not NR believe that the Incumbent may be able to deduce those Train Slots

for itself from the information provided. DBS considers the issue of what it may or may not have been able to deduce to be irrelevant.

64. DBS also notes that the definition of 'Rights Subject to Surrender' also includes any Train Slot in the Working Timetable which relates to the Quantum Access Right in question. There may be an argument, therefore, that NR is also required to specify the relevant Train Slots under Condition J5.3(b).
65. DBS argues that while NR provided lists of Train Slots in its letters dated 15 and 20 October 2009, this does not alter the fact that the Notices themselves were invalid. DBS considers that what NR should have done was to reissue the Notices with all of the correct information required in compliance with Condition J5.3.
66. DBS considers the undertaking offered by NR referred to at paragraph 28 above to be unnecessary because NR is already obliged to provide details of the Train Slots in any future Third Party Failure to Use Notice in order to comply with Condition J5.3.
67. DBS disagrees with NR's objection, referred to at paragraph 52 above, to DBS raising an argument concerning the validity of the date, referred to at paragraph 40 above, since it considers that the Panel's finding at paragraph 32.2 of its decision suggests that it did take the date into account in its deliberations.
68. DBS states that the representations it makes should serve equally as a reply to DRSL's Response, to the extent that DRSL raises the same points as NR.

VII ORR's consideration of the Appeal

69. ORR has considered all written submissions from DBS, NR and DRSL in reaching this determination. ORR has not found it necessary to rely on DBS' argument (referred to at paragraph 40

above) concerning the validity of the date referred to in the First Notice, and therefore makes no findings on the parties' arguments concerning the question of whether it was an issue raised before the Panel or whether it can be raised in this appeal. ORR also decided that in view of the nature of the issues raised in the appeal and the submissions of all the parties, it was not necessary for it to seek the views of (redacted).

70. This determination focuses on those matters raised in the parties' submissions which are directly relevant to and determinative of the issues raised in this appeal.
71. The central issue which arises is one of contractual interpretation of the relevant provisions of Part J, namely the meaning of Condition J5.3(a) and the related provision Condition J4.2.1(b). ORR determines that the following is the correct interpretation of the relevant provisions.
72. Condition J5.3 sets out three matters which are required to be included in any Failure to Use Notice. The wording '*shall specify*' makes it clear that the three elements are mandatory.
73. Condition J5.3(a) sets out the first of these three elements. This provision requires NR to specify the '*Failure to Use which Network Rail considers has occurred.*'
74. 'Failure to Use' is a defined term. It is defined as having '*the meaning ascribed to it in Condition J4.2.1.*'
75. In this appeal, the relevant limb of Condition J4.2.1 is (b). Condition 4.2.1(b) states:

‘4.2.1 Subject to Conditions J4.2.2, J4.2.3 and J4.4, a Failure to Use in relation to a Quantum Access Right occurs if:

...

(b) the Train Operator fails to make use of a Train Slot which has been included in the Working Timetable and which relates to that Quantum Access Right.’

76. Condition J4.2.2. relates to J4.2.1(a) and is therefore not relevant for present purposes. However, Condition J4.2.3 relates to J4.2.1(b) and states:

‘4.2.3 For the purposes of Condition J4.2.1(b), the Train Operator fails to make use of a Train Slot if it uses the Train Slot for less than the Use Quota during the relevant Use Period.’

77. ‘Use Quota’ and ‘Use Period’ are defined terms which are set out in Condition J4.3.

78. While the wording of Condition 4.2.1(b) states that a Failure to Use relates to a Quantum Access Right, its meaning is defined as an actual failure to make use of a Train Slot for a defined period of time. Therefore, the requirement to specify the Failure to Use in Condition J5.3(a) should in substance amount to providing a description of a failure to make use of a Train Slot for a particular period.

79. Further, the fact that three required elements are listed in Condition J5.3 makes it clear that those elements are discrete and distinct. The second of those elements (Condition J5.3(b)) requires the notice to specify the *‘Rights Subject to Surrender, which Network Rail requires the Incumbent to Surrender.’* An interpretation of Failure to Use which focuses on the related right rather than what the Incumbent

has in substance failed to use (the Train Slot) would in effect, give Conditions J5.3(a) and (b) overlapping meanings. The structure of Condition J5.3 militates against such a construction.

80. Therefore, ORR considers that on an objective reading of the relevant contractual provisions, specification of the relevant Failure to Use in any case as stipulated in Condition J5.3(a) requires specification of the relevant Train Slot which has not been used.
81. In the light of its finding concerning the requirements of Condition J5.3(a), it is not necessary for ORR to make any findings in this appeal concerning DBS' argument, referred to at paragraph 64 above, concerning the meaning of Condition J5.3(b).
82. ORR considers the Panel's description (set out at paragraph 35 above) of the approach to contractual interpretation to be adopted to be unclear and potentially misleading. In interpreting the provisions of Part J, the Panel is to ascertain the objective meaning of the provisions, namely the meaning which it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. For the avoidance of doubt, the process is not to work backwards from an interpretation adopted by one party and consider whether that particular interpretation is reasonable.
83. It follows from the findings above that ORR does not uphold the Panel's finding that Condition J5.3 allows for '*significant latitude*' in relation to the format and degree of detail provided. It sets out three requirements to be satisfied. The first of those, in substance,

includes reference to the Train Slots which are the basis of the definition of a Failure to Use.

84. It also follows that the category of right to which the Train Slots relate does not alter the requirement set out in Condition J5.3(a). ORR has noted NR's and DRSL's submissions which suggest that since in this instance, the slots relate to Level 1 rights, DBS would not have had difficulty in identifying the relevant Train Slots. ORR recognises the fact that on the facts of this case, it would seem that DBS was indeed able to identify the affected Train Slots. However, the issue of DBS' state of knowledge is not relevant to the question of the proper legal construction of the Code's requirements in relation to the contents of a valid notice.

85. ORR has also noted the fact that NR set out the specific Train Slots in subsequent correspondence. Again, however, this does not alter the fact that the Notice itself did not comply with the requirements of the Code. NR provided the further information, while maintaining in that correspondence that its original Notices were valid. For the avoidance of doubt, had NR chosen to reissue the Notice and include that information, the corrected Notice could have been held to be valid. However, on the facts of this case, this is not the course of action NR adopted. In view of the fact that NR was to a large extent acting on behalf of DRSL it is regrettable that it did not do so.

86. NR and DRSL have both referred in submissions to ORR's determination of the appeal against the decision in ADP23 in which a finding was made that in cases of Freight Transfer, the Incumbent cannot challenge the Third Party Notice on any ground other than reasonable ongoing commercial need.

87. ORR does not consider any findings made in the appeal of ADP23 or any submissions concerning it raised in this appeal to affect its determination of the correct interpretation of the relevant conditions in Part J concerning Third Party Failure to Use Notices as set out above. The finding from the appeal of ADP23 referred to by NR and DRSL needs to be read in context. In that appeal, the challenges made did not amount to allegations that the original notice was itself invalid due to missing information required by the Code. The finding stated that a notice cannot be challenged on grounds other than those which can legitimately be raised in a Counter Notice pursuant to Part J. The finding needs to be read and understood in the context of an appeal concerning permissible challenges to a valid notice.

VIII Conclusion

88. It follows that ORR reverses the Panel's finding at paragraph 41.1 of its Decision that the Notices issued by NR on 24th and 30th September 2009 were valid, for the reasons set out above. As to the Panel's findings at paragraph 41.2 and 41.3.1, these remain correct in terms of DBS' challenge on the grounds of reasonable on-going commercial need. However, it follows from the reversal of the finding at paragraph 41.1 that the issue of the invalidity of the Notice, a matter set out in Condition J.4.9.1(a), has been determined to have been substantiated and, the finding at paragraph 41.3.2, which states that there is *'no impediment to NR implementing the Surrender of Rights provisions of Condition J4.12'* is consequently reversed. Condition J4.11(a) provides that where it is agreed or Determined *'that the matters set out in Condition J4.9.1(a), (b) or (c) have been substantiated... the Failure to Use Notice shall cease to have effect to the extent so agreed or Determined.'*

89. ORR has given very careful consideration to the consequences which flow from these findings and the appropriate remedy in the circumstances of this case and whether, in the overall interests of justice and on the facts of this particular case, it could limit its determination to a declaration as to the correct legal interpretation and decide that it was not necessary for the process of issuing the relevant notices to be repeated.
90. ORR has concluded, having regard to Rule 1.19, that in this case the remedy is a matter of entitlement and that the Panel would not have had any choice but to determine that NR's Notices cease to have effect, given the wording of Condition J4.11(a). Nonetheless ORR considers it necessary to underline the fact that it is disappointed with this outcome, which effectively necessitates the reissue of the Notices and the repetition of the process. As stated above, and as DBS itself pointed out, if NR had responded properly to DBS' Counter Notices on the validity point and re-issued its Notices at that stage, this appeal process could have been avoided.



Jessica Walters
Deputy Director, Legal Services
Duly Authorised by the Office of Rail Regulation
30 March 2010

ANNEX

Relevant Provisions of the Code

Part J - Changes to Access Rights

DEFINITIONS

“**Failure to Use**” has the meaning ascribed to it in Condition J4.2.1;

...

4.2 *Failure to Use*

4.2.1 Subject to Conditions J4.2.2, J4.2.3 and J4.4, a Failure to Use in relation to a Quantum Access Right occurs if:

- (a) in any First Working Timetable (as defined in Part D) established by Network Rail after the Commencement Date, the Train Operator fails to secure one or more Train Slots in respect of that Quantum Access Right; or
- (b) the Train Operator fails to make use of a Train Slot which has been included in the Working Timetable and which relates to that Quantum Access Right.

...

4.2.3 For the purposes of Condition J4.2.1(b), the Train Operator fails to make use of a Train Slot if it uses the Train Slot for less than the Use Quota during the relevant Use Period.

...

4.9 *Counter Notice*

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

- (a) it considers the Failure to Use Notice to be invalid;

- (b) there has been no Failure to Use or that the Failure to Use was not continuing at the date of the service of the Failure to Use Notice; and/or
 - (c) any Ancillary Movements and/or Stabling specified in the Failure to Use Notice as being Rights Subject to Surrender;
 - (i) are not directly associated with the relevant Quantum Access Right; and/or
 - (ii) would still be required by the Train Operator following the surrender of the relevant Quantum Access Right; and/or
 - (d) there are Grounds for Objection to the proposed surrender within Condition J4.10, detailing the Grounds for Objection on which it relies,
- and must provide evidence with the Counter Notice in support of its contentions. The Train Operator shall send a copy of any Counter Notice and such evidence to the Office of Rail Regulation.

4.10 *Cessation of notice*

If the Train Operator and Network Rail agree or it is Determined:

- (a) that the matters set out in Condition J4.9.1(a), (b) or (c) have been substantiated; or
- (b) that the Train Operators's Grounds for Objection have been substantiated in respect of any or all of the Rights Subject to Surrender,

the Failure to Use Notice shall cease to have effect to the extent so agreed or Determined.

...

5.3 *Contents of a Third Party Failure to Use Notice*

A Third Party Failure to Use Notice shall specify:

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

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

5.4 *Application of Conditions*

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

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

