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2 July 2010

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Dear Kara,

APPEAL UNDER REGULATION 29 OF THE RAILWAYS INFRASTRUCTURE (ACCESS & MANAGEMENT) REGULATIONS 2005 – ACCESS TO THE PORT OF FELIXSTOWE WHERE FELIXSTOWE DOCK AND RAILWAY COMPANY IS THE SERVICE PROVIDER

I am writing with regard to matters raised within the letter of Hutchison Ports (UK) ('HPUK') dated 14 June 2010. Having considered HPUK's representations, DB Schenker Rail (UK) Limited ('DB Schenker') wishes to make a number of remarks (set out in this letter) in clarification of its position. However, it should be noted that these remarks are made without the benefit of seeing a copy of HPUK's 3 June 2010 letter to ORR, which is referred to in a number of places throughout HPUK's representations.

Grounds of DB Schenker's appeal

1.1. DB Schenker refutes HPUK's assertion that in responding to ORR's request to provide a written statement of the specific grounds of its appeal, DB Schenker has gone considerably beyond that request and has sought to recast and widen the grounds that were originally contained in its appeal document dated 22 January 2010 (the matters addressed at paragraphs 1.1(b) and (c) of DB Schenker's letter dated 2 June 2010 being singled out in particular).

1.2. In respect of the issue raised at paragraph 1.1(b), DB Schenker alleges that Felixstowe Dock and Railway Company ('FDRC') has previously failed to award train slots at the Port of Felixstowe ('the Port') on a fair, transparent, non-discriminatory and consistent basis. As was made clear in previous correspondence (including DB Schenker's appeal dated 22 January 2010), this concerned the award of the 28th path by FDRC to DB Schenker's competitor without due compliance with previously published capacity allocation principles (i.e. either the original principles dated 4 August 2008 or the revised principles dated 28 May 2009). DB Schenker also made clear in its appeal document that it considered that up to and including the award of the 27th path into the Port, FDRC had transparent arrangements in place for the allocation of capacity. DB Schenker, therefore, rejects any suggestion that this is either a new matter or that ORR is being invited by DB Schenker to review the allocation of capacity at the Port since 2002.

1.3. In respect of the issue raised at paragraph 1.1(c), that FDRC's capacity allocation principles do not comply with ORR's Guidance on Appeals under the Regulations ('the Guidance') and, in particular, paragraph 1.21 with regard to identification of business opportunities, DB Schenker again disagrees with HPUK's assertion. Whilst this point is not expressly raised in the appeal document, DB Schenker did make clear that it considered that FDRC's capacity allocation

principles were unfair. Allegations concerning FDRC's non-compliance with the Guidance merely serves to clarify and substantiate that point.

1.4. DB Schenker has not sought to recast and widen its appeal and, therefore, requests ORR not to restrict its consideration and ultimate decision solely to the matters addressed in paragraphs 1.1 (a) and (d) of DB Schenker's statement (as HPUK has requested).

1.5. It is apt in this regard to raise as a reminder the very broad scope of appeal rights afforded to an appellant under Regulation 29. It would appear that HPUK is, as it has previously attempted to do by seeking to question ORR's jurisdiction in this matter, intent upon unreasonably curtailing the rights which are afforded to DB Schenker under Regulation 29.

Allocation of Capacity

2.1. DB Schenker notes HPUK's comments that it is incorrect for DB Schenker to assert that FDRC revised its capacity allocation principles in May 2009 solely on the basis that it believed that the Felixstowe Branch Line was at full capacity. In making these comments, HPUK relies on FDRC's letter dated 22 June 2009 (Appendix 4 of the appeal document). However, it was quite clear from DB Schenker's statement that its assertions in this respect were based on FDRC's letter dated 28 May 2009 (Appendix 2 of the appeal document), which set out FDRC's revised capacity allocation principles and not FDRC's letter dated 22 June 2009. That later letter was a response by FDRC to queries raised by DB Schenker in its letter dated 12 June 2009 and did not purport to represent a further revision of the capacity allocation principles.

2.2. DB Schenker also notes HPUK's confirmation that FDRC felt able to set aside its capacity allocation principles to award the 28th path to DB Schenker's competitor despite (a) the Felixstowe Branch Line and Port terminal capacity being extremely limited and (b) the severe operational problems and customer issues the allocation of this capacity would (and indeed allegedly has) caused. Furthermore, HPUK seeks to justify the abandonment of its capacity allocation principles on that occasion on the basis that exceptional circumstances had arisen and it would have been a waste of time adhering to those principles, particularly as FDRC had already unilaterally decided who would be allocated the 28th path in any case. DB Schenker considers that the purpose of having fair, transparent and non-discriminatory capacity allocation principles is that these should be followed in all cases to allow all customers and freight operators at the Port the opportunity to bid for available capacity (particularly in circumstances where capacity might be limited). DB Schenker submits that the published capacity allocation principles should not be unilaterally set aside by FDRC at the behest of any particular customer, otherwise there would be no certainty going forward that capacity allocation is being made by FDRC on a fair, transparent, consistent and non-discriminatory basis.

2.3. HPUK also seeks to justify its allocation of the 28th path by reference to paragraph 2.7 of the Guidance and, in particular, the wording '*we expect each facility owner to determine its access criteria based purely on the legitimate commercial interest of that facility*', DB Schenker submits that this part of the Guidance cannot be construed in such a way (as HPUK would suggest) so as to afford the service provider with *carte blanche* in pursuing its own commercial interests vis-à-vis capacity allocation. This would effectively negate the objective and purport of the Regulations. Indeed, paragraph 2.7 of the Guidance stipulates:

'Our approach is, therefore, designed to strike a balance between the interests of the applicants and the facility owners. Our aim is to facilitate reasonable requests for access, whilst at the same time protecting the legitimate commercial interests of the facility owner.'

Application of a construction advocated by HPUK, where a facility owner is permitted to change capacity allocation principles on grounds of its own commercial expediency and without consultation with applicants, will lead to a substantial imbalance in the relative positions of the applicant and facility owner.

2.4. DB Schenker fundamentally disagrees with HPUK's assertions that the actions taken by FDRC in respect of the allocation of capacity since May 2009 has been in accordance with the Regulations and the Guidance. DB Schenker fails to see how (a) the unilateral revision of the published capacity allocation principles by FDRC, (b) a setting aside of those principles to allocate the 28th path and (c) a further unilateral revision back to its original capacity allocation principles can be in any way seen to accord with the Regulations and Guidance.

2.5. DB Schenker also disagrees with HPUK's assertion that any delay in considering DB Schenker's capacity allocation request is entirely as a result of DB Schenker's failure to engage constructively with FDRC. It is clear from the appeal documentation and subsequent representations of DB Schenker that FDRC has prevaricated over this matter since June 2009, for example, by changing its capacity allocation principles, setting aside those principles to allocate capacity to DB Schenker's competitor, refusing to disclose information concerning charging for access at the Port and not making available its own capacity studies when reasonably requested to do so. It also appears that HPUK's recollection of events is incorrect. For example, HPUK believes FDRC suggested that the parties meet to clarify whether the capacity did exist before entering into more detailed discussions. However, it is clear from Appendix 5 of the appeal document that it was DB Schenker (and not FDRC) that suggested a meeting between the parties, which subsequently took place over 2 months later on 19 November 2009. DB Schenker's recollection is confirmed in FDRC's letter dated 29 September 2009 (Appendix 6 of the appeal document) which states *'On that basis, we [FDRC] would like to take up your offer of a meeting.....'*

2.6. DB Schenker rejects HPUK's assertion that the reason DB Schenker has yet to receive copies of FDRC's capacity studies is entirely due to its own actions. DB Schenker requested copies of those studies in advance of the 19 November 2009 meeting (DB Schenker's letters dated 22 October & 17 November 2009 refer attached as Appendices 1 & 2 of its letter to ORR dated 31 March 2010). It appears from HPUK's comments, however, that FDRC had no intention of sharing those studies with DB Schenker except at the meeting that took place on 19 November 2009 despite those studies having been completed in July 2009 (South Terminal) and September 2009 (North Terminal) respectively. It is interesting to note that copies of these studies have still not been disclosed to DB Schenker.

2.7. DB Schenker has not stated, as HPUK asserts, that the entire UK port industry should be required by ORR to enter into the template access contract that DB Schenker has proposed. The template DB Schenker has proposed has already been approved for use by ORR in respect of access to the Port of Immingham and DB Schenker understands that the template is being 'rolled out' by ABP for use in its other rail connected ports, including Southampton (another large 'deep sea' container port). DB Schenker had also understood that FDRC had agreed with ORR's view that increased use of template agreements could help to ensure a level

playing field for all companies and lead to a reduction in transaction costs. DB Schenker is, therefore, surprised to see HPUK's comments implying that the use of template agreements would have the effect of undermining competition by removing one of the ways in which ports can freely compete with each other (i.e. by offering different contractual terms to attract customers). This template is of course intended to cover rail access and associated services to a port, not the commercial arrangements between the port and its customers. However, notwithstanding these comments, DB Schenker explained to FDRC in its letter dated 22 October 2009 (Appendix 1 to DB Schenker's letter to ORR dated 31 March 2010) why it had used the template agreement that it had, but that it was willing to consider alternative template agreements.

Charging Arrangements

3.1. DB Schenker has already set out in its previous representations why it is concerned that the charging arrangements and level of charges currently in place for access and services at the Port are not being applied on a fair, transparent or consistent basis to the different operators using the Port. It appears that FDRC has responded to ORR on this particular issue in a letter dated 3 June 2010. As already mentioned, DB Schenker has not seen the contents of that FDRC letter and so it has nothing further to add, suffice it to say that it questions the relevance HPUK places on Network Rail's Statement of Connected Facilities Details in support of its position. It is clear that this document is produced by Network Rail to meet the requirements of Regulation 11(4) and to assist understanding as regards the locations of ports, terminals and service facilities to which Regulation 6 and 7 may apply. DB Schenker submits that the information set out in this document does not release a service provider from conformance with its obligations under the Regulations as a whole and, in particular, Regulation 6(3) which states:

'[the] service provider must ensure that the entitlements conferred by this regulation are honoured, and that access to, and the supply of, services is granted in a transparent and non-discriminatory manner.'

Proposed ORR Directions

4.1. DB Schenker is surprised to note that HPUK's position remains that there is insufficient capacity to accommodate an additional service at the Port in light of its contrary representations to DfT and the planning authorities (namely that capacity not only exists for a further two trains but that two more could be accommodated if operators could reduce dwell times in the terminals at the Port). These representations were (as previously explained) in this respect of FDRC's application to delay the implementation of certain railway works that it is required to fund, including the dualling of the Felixstowe Branch Line. DB Schenker understands that the relevant planning permission (which was granted by Ipswich Borough Council on 17 June 2010) was sought on the premise that current capacity is more than sufficient to cater for existing and predicted future demand over the coming years (paragraphs 3.3 to 3.5 of DB Schenker's letter to ORR dated 31 March 2010 refer). DB Schenker is not aware that HPUK has sought to reconcile these contradictory positions in this respect (i.e. on the one hand informing ORR/DB Schenker that there is little or no capacity at the Port whereas on the other demonstrating to DfT/planning authorities that there is no need for it to carry out and fund the capacity enhancing rail works now as current capacity is more than sufficient to meet demand).

4.2. DB Schenker notes that HPUK completely rejects DB Schenker's suggestion that in the event that ORR determines that there is no capacity for an additional service at the Port FDRC should be directed to enter into the proposed agreement for DB Schenker's existing two services. This is on the premise that with the exception of the charges that are currently being applied, the contractual basis on which DB Schenker's two existing services operate at the Port are not subject of this appeal. DB Schenker disagrees. It is clear from the appeal document (which included the proposed agreement in which these two services were included) that DB Schenker's existing two services at the Port are very much part of its appeal.

4.3. DB Schenker acknowledges that in Network Rail's Statement of Connected Facilities Details it is stated that DB Schenker's charges in respect of its own Light Maintenance Depots depend on multiple variables and are subject to commercial confidentiality. However, unlike the Port, Regulation 6 does not apply to DB Schenker's light maintenance depots as they are not terminals or ports. DB Schenker argues, therefore, that any comparison with FDRC's obligations under the Regulations in this respect is not relevant.

Visit to Port of Felixstowe

5.1. Finally, DB Schenker wishes to express its thanks to HPUK and ORR for allowing its representative to attend the visit of ORR to the Port on 29 June 2010.

Yours sincerely,


Nigel Oatway
Access Manager