

Robert Mills
Office of Rail Regulation
One Kemble Street
London WC2B 4AN

DB Schenker Rail (UK) Ltd
2nd Floor, McBeath House
310 Goswell Road
London EC1V 7LW

Nigel Oatway
Access Manager

Telephone: +44 (0)1302 577010
Fax: +44 (0)20 7833 8449
Mobile: +44 (0)7801 905240
nigel.oatway@dbshenker.com

Dear Robert,

28 January 2013

PR13 CONSULTATION ON SCHEDULES 4 & 8 POSSESSIONS AND PERFORMANCE REGIMES

This letter constitutes the response by DB Schenker Rail (UK) Limited ('DB Schenker') to the ORR's consultation document entitled "*PR13 Consultation on Schedules 4 and 8 possessions and performance regimes*" published in November 2012. This response is also made on behalf of DB Schenker's sister company, Rail Express Systems in its capacity as an operator of charter passenger services.

Introduction

1.1. DB Schenker considers that the Schedule 4 possessions regime and the Schedule 8 performance regime ('the regimes') are of great importance to freight operators as they provide a level of compensation for both planned and unplanned disruption as well as providing key incentives for continuing improvements in performance and the efficient planning of possessions. The significance DB Schenker places on the regimes can be seen in its active engagement in the industry working groups that have been established to help inform ORR's review.

1.2. As acknowledged in the consultation document, the regimes as applied to freight operators were comprehensively updated in PR08 with the aim of providing simple and standardised arrangements so as to avoid any competitive disadvantage for one freight operator over another that could occur under the previous bespoke regimes. DB Schenker considers that this was a major step forward in improving the contractual arrangements for all freight operators (whether large or small) and it, therefore, supports ORR's aim to leave the structure of the regimes intact for CP5.

1.3. However, there are many policy changes being contemplated by ORR across PR13 as a whole that will have a significant and adverse effect on the financial risk faced by freight operators. These include the introduction of a freight specific charge and the likely substantial increase in freight variable usage charge rates. Faced with the prospect of such increases in track access charges, DB Schenker is also concerned that the ORR's review of the various metrics used in the regimes may also lead to further damaging

effects on the financial risk faced by freight operators, particularly if the effects from those individual changes are not considered as a whole.

General Comments

2.1. The primary role of the regimes is to compensate operators for the financial impact of planned and unplanned service disruption attributable to Network Rail or other train operators. However, the regimes also provide important incentives for each party.

2.2. The freight Schedule 8 performance regime, in particular, provides incentives to Network Rail to ensure that the delays it causes to each freight operator are improved over expected levels. Similarly, the regime also provides incentives for freight operators to reduce delays over expected levels that their poor performance may cause to other operators on the network.

2.3. In addition, the freight Schedule 4 possessions regime also provides a key incentive to freight operators. If a freight operator knows that it will receive compensation for the effects of disruptive possessions, it is more likely to co-operate with Network Rail's proposals to plan such possessions rather than challenging them through the industry dispute resolution processes set out in Part D of the Network Code. DB Schenker considers that the value to Network Rail of being able to take more efficient possessions due to the existence of an effective freight Schedule 4 possessions regime must far outweigh the liquidated compensation sums paid to freight operators.

2.4. With these incentives in mind, DB Schenker is supportive of ORR's proposal to leave the current structure of the regimes intact under the review. However, it is very concerned that if each element of each regime (e.g. the various benchmarks and payment rates under Schedule 8) is reviewed and considered separately without cognisance of the overall effect that all of the individual changes taken together may have on each regime as a whole, the key incentives mentioned above may be reduced considerably.

2.5. For example, reducing the liquidated compensation sums in the Schedule 4 possessions regime will increase the tension between Network Rail and freight operators during the possessions planning process as freight operators are more likely to oppose and challenge possessions that cause material disruptive effects given that they will receive insufficient compensation.

2.6. In addition, rebasing the Schedule 8 performance regime benchmarks to reflect performance over the previous Control Period will penalise those parties that have improved their performance with lower benchmarks whilst rewarding those parties that have worsened their performance with higher benchmarks. Such action can only undermine the incentive to strive for continuing improved performance by reducing the likelihood of long term investment in relevant equipment and processes

...

2.7. In order to address some of the difficulties and concerns that have been emerging from the 'piecemeal approach' to reviewing the various elements of the freight Schedules 4 possessions regime and the freight Schedule 8 performance regime, the Rail Freight Operators' Association ('RFOA'), set out a number of principles and solutions which could be adopted to simplify any calibration in its letter to ORR dated 16 November 2012 (see Annex 1). DB Schenker supports the comments, principles and solutions set out in RFOA's letter.

ORR's Specific Questions

Background and Context

Q1. What are your views on whether or not passengers and freight customers are adequately consulted on the planning of possessions? What activity currently takes place?

3.1. It is clear that the way in which Network Rail plans and carries out its possessions on the network can have a material effect on customers (both passenger and freight) as services can be revised, delayed and in some cases not be able to operate at all. It is essential, therefore, that customers are properly informed about the effects on services that they use and rely upon. Given that freight operators have strong commercial/contractual arrangements in place with their customers for the transportation of their goods, the onus is on the freight operator concerned to ensure that Network Rail takes into account in its possession planning process any relevant freight services that may be affected by any possession.

3.2. In cases where the possible disruption to freight services may materially impact on departure/arrival times, restrict the amount of goods that can be carried or, in a worse case scenario, result in a service not being able to operate at all, DB Schenker would consult with the customers concerned as soon as possible. This consultation would make the customers concerned aware of the nature of the disruption, when it is planned to take place and enable discussions to take place on possible alternative arrangements to minimise the likely effects. Any views from customers will be collated together with DB Schenker's own representations and fed back and discussed with Network Rail.

3.3. DB Schenker, therefore, considers that freight customers are already adequately consulted on the planning of possessions that affect their services.

Q2. What are your views on whether we should encourage Network Rail to consult with passengers and freight customers in the planning of its possessions?

3.4. There is no need for Network Rail to consult separately with freight customers over its planning of possessions as this role is already undertaken by freight operators through ...

their commercial/contractual relationships with their customers. To ensure the possession planning process is carried out efficiently and effectively, it is essential that the overall effect of a possession on freight services is considered and discussed with Network Rail. Only freight operators (after consultation with their affected customers) are in a position to consider such overall effects, as an individual freight customer will not be in a position to understand what impact the possession will have on resource provision (i.e. locomotives, wagons and drivers), any consequential effects on other freight customers and how the disruptive effects as a whole can be minimised.

3.5. Therefore, if Network Rail was to consult freight operators and their many customers separately over its planning of possessions, it is likely to receive mixed and conflicting information which would only add unnecessary time and delay into the process and increase the likelihood of disputes arising.

Q3. If we were to encourage Network Rail to consult with passengers and freight customers in the planning of its possessions, do you have any suggestions on how we might go about doing this, for example, how such an obligation would be phrased and monitored?

3.6. Given its responses to Q1 and Q2 above, DB Schenker considers that there is no need for ORR to impose obligations on Network Rail to consult freight customers on the planning of its possessions.

Issues relating to Schedules 4 & 8

Q4. Do you agree with the SDG research findings and conclusions on whether to set Schedule 4 and 8 payment rates so they do not compensate train operators in full for the impact of service disruption due to Network Rail and other train operators? If not, please tell us why?

3.7. SDG's research findings and conclusions closely reflect the views expressed by DB Schenker through its active participation in the SDG work (i.e. that there will be no overall industry benefit in setting Schedule 4 and 8 payment rates so that they do not compensate train operators in full for the impact of service disruption). As highlighted in the consultation document in respect of the freight Schedules 4 and 8 regimes, any proposal to further reduce the Network Rail payment rates contained therein would merely reduce the recovery of costs and losses incurred by freight operators without providing any counter-benefits such as increasing the incentive on Network Rail to minimise disruption to freight services on the network.

...

Q5. Do you agree that we should continue to set Schedule 4 and 8 payment rates so that they compensate train operators for the full financial impact of service disruption due to Network Rail and other operators, where we do so currently? If not, please tell us why?

3.8. DB Schenker agrees that Schedule 4 and 8 payment rates should be set so that they compensate train operators for the full financial impact of service disruption due to Network Rail and other operators.

Q6. Are you of the view that there are other steps we could take to encourage train operators to have a stronger influence on the behaviours of Network Rail, in addition to those we are doing already?

3.9. DB Schenker considers that freight operators are already sufficiently incentivised to engage with Network Rail to minimise the disruptive effects of possessions/poor performance on freight services in order to protect the commercial relationships with their customers. This is because disruption from poor performance and possessions is likely to result in adverse impacts on costs, revenues and reputation which could lead to customers switching their business to other transport modes. Therefore, ORR should be under no illusion that the disadvantage outlined in paragraph 2.23 of the consultation document of adopting option (a) over option (b) would occur in respect of freight operators.

3.10. Consequently, DB Schenker considers that freight operators already engage fully with Network Rail to try and influence its behaviours so there is little further that ORR could and should do in this respect over and above what it already does.

Q7. Do you agree with our proposal not to introduce the Joint Restrictions of Use concept into Schedule 4 of template track access contracts? If not, please tell us why?

3.11. The background and views surrounding the possible introduction of a Joint Restrictions of Use concept as set out in paragraphs 2.27 to 2.37 appear to relate solely to issues concerning the template Schedule 4 passenger possessions regime. Therefore, whilst DB Schenker has no strong views on whether or not the concept should be introduced into the Schedule 4 passenger possessions regime, it certainly considers that the concept is unnecessary in respect of the Schedule 4 freight possessions regime. DB Schenker, therefore, agrees with ORR's proposed course of action.

Q8. To what extent (if at all) do you think the current contractual wording of Schedules 4 and 8 is acting as a barrier to Network Rail and train operators minimising disruption to passengers and freight customers during extreme disruption, e.g. during severe weather? If you are of the view that it does act as a barrier, we welcome any specific proposals on

...

how it can be improved.

3.12. DB Schenker considers that the current contractual wording of the freight Schedule 4 possessions regime does not act as a barrier to Network Rail and freight operators minimising disruption to freight customers during extreme disruption.

Schedule 4 passenger possessions regime

Q9-Q19

3.13. Questions 9 to 19 relate to the Schedule 4 passenger possessions regime. Therefore, as a freight operator, DB Schenker has no particular comments to make in response to these questions.

Schedule 4 freight possessions regime

Q20. Do you consider the current regime appropriately compensates freight operators for losses resulting from severe disruption caused by possessions? If not, what do you consider the level of compensation should be based on?

3.14. DB Schenker remains of the view that the structure of the Schedule 4 freight possessions regime introduced at the start of CP4 remains fit for purpose and should, therefore, be retained for CP5. In addition, DB Schenker also considers that the current regime does appropriately compensate freight operators for losses resulting from severe disruption caused by possessions in particular circumstances (i.e. those causing the severest level of disruption).

3.15. In return for the introduction of the Schedule 4 freight possession regime in CP4, freight operators relinquished their rights to claim through the Network Change procedure for any actual losses incurred as a result of the disruptive effects of relevant possessions. Given that Network Rail would have paid out compensation to freight operators in CP4 if the Network Change possession regime had continued, funding for the Schedule 4 freight possessions regime was originally calculated on the basis of the estimated total amount of Network Change claims Network Rail would have been liable for. This amount was estimated at £9m per annum (+/- 50%). If the actual amount Network Rail paid out in the first year of operation of the Schedule 4 freight possessions regime fell outside of this range, then it was agreed that the regime would be reviewed.

3.16. As stated in paragraph 4.8 of the consultation document, actual payments by Network Rail fell just outside of the upper end of the range which resulted in ORR directing that the level of the liquidated payment rates should be reduced by around 30% so that the total level of compensation per annum would be more closely aligned to the

...

midpoint of the funding limits originally set (i.e. £9m). Therefore, given that the payment rates have been reduced to meet Network Rail's budgetary constraints, DB Schenker considers that the current regime no longer adequately compensates freight operators under the liquidated elements of the regime, particularly as the value of each freight train on the network has risen through increased productivity (i.e. more product is being carried on fewer longer trains).

3.17. Instead, DB Schenker considers that the level of compensation should broadly reflect the average financial impact of the disruption with a suitable discount if Network Rail notifies full details of the possession sufficiently in advance (i.e. before T-12). The liquidated sums (pre-notification factor) should, therefore, be based in DB Schenker's view on the liquidated payment rates which already apply to instances of Service Variation and Cancellation which are more closely aligned with average losses.

Q21. Do you consider that the current regime appropriately incentivises Network Rail to reduce the amount of disruption faced by freight operators due to possessions? If not, how do you think incentive effects can be strengthened?

3.18. Whilst the Schedule 4 freight possession regime provides some incentives on Network Rail to reduce the amount of disruption faced by freight operators due to possessions, DB Schenker considers that, on its own, the regime will not provide strong enough incentives in this respect. This is because the amount of compensation payable under the Schedule 4 freight performance regime would likely be far outweighed by any compensation payable to passenger operators if possessions are taken at a different time as well as any additional costs incurred by Network Rail by implementing possessions to avoid freight services. This imbalance will have course been further enhanced by the recent reduction in payment rates under the Schedule 4 freight possessions regime. Therefore, in most cases, if there are freight trains in the way of any possession plans, sadly, more often than not Network Rail is likely to elect to pay the compensation and take the possession.

3.19. However, what the Schedule 4 freight possession regime does achieve in the way of an incentive effect is to facilitate the increased cooperation of freight operators working together with Network Rail to help facilitate efficient engineering access in the knowledge that they will receive a level of compensation for any disruptive effects they are exposed to. In the absence of such a regime, there would be little incentive on freight operators to agree to any disruptive possessions knowing that they would incur service disruption and resulting costs and losses that would not be subject to compensation. This would likely lead to a significant increase in disputed possessions through the relevant processes set out in Part D of the Network Code which could result in costly delays to Network Rail's possession planning processes as well as an increase in management time and effort that

...

could be much better spent elsewhere.

Q23. If Schedule 4 compensation payment rates for freight operators were increased, should this be funded by government? If so, please explain why you think this should be the case? If not, please tell us why?

3.20. DB Schenker believes that it does not necessarily follow that an increase in compensation payment rates would require an increase in the level of funding over and above the original level of £9m (+ 50%) set in CP4 (uplifted for inflation). An increase in funding in such circumstances would only become necessary if the level of disruptive possessions remained at least static or was increased giving rise to a similar or a higher number of claims. Conversely, an appropriate increase in compensation payment rates with a reduction in the number of claims would leave the funding level intact. This could be particularly likely given the increases in productivity achieved by freight operators mentioned in paragraph 3.16 above which has led to a 28.4% reduction in the number of trains when compared to the original base year of 2006/07.

3.21. Given the indication in paragraph 4.9 of the consultation document that ORR has sufficient information about payment levels over CP4 to make an assessment of the level of funding over CP5, DB Schenker believes that this information should be made available to the Schedules 4 & 8 freight working group so that an assessment can be made as to whether compensation payment rates could be increased without affecting the current level of funding (i.e. £9m (+/-50%) uplifted for inflation).

3.22. Notwithstanding the comments made in paragraphs 3.20 & 3.21 above, even if the level of funding did require increasing as a result of a rise in compensation payment rates coupled with an increase in disruptive possessions, DB Schenker believes that this would be more than sufficiently funded through the cost reductions that could be achieved by Network Rail through the taking of those possessions more efficiently as a result of increased co-operation from freight operators. If freight operators have sufficient comfort that in return for accepting an increased level of disruption that they are likely to receive compensation that is more closely aligned to their resulting costs and losses incurred, they are much more likely to collaborate with Network Rail's possession plans rather than being forced to continually challenge them.

Schedule 8 passenger performance regime

Q24-Q31

3.23. Questions 24 to 31 relate to the Schedule 8 passenger performance regime. Therefore, as a freight operator, DB Schenker has no particular comments to make in response to these questions.

...

Schedule 8 freight performance regime

Q32. Do you agree that we should keep the Network Rail payment rate the same, but uplifted for inflation? If not, please tell us why?

3.24. DB Schenker would be much better placed on forming a view on ORR's proposal to keep the Network Rail payment rate the same (uplifted for inflation) if it had a grasp on the likely overall financial effect on freight operators that will result from the review of all of the various individual metrics and relevant provisions making up the Schedule 8 performance regime as a whole.

3.25. However, given that the likely overall financial effect on freight operators cannot be quantified from the information contained in the consultation document, DB Schenker remains concerned that it will be detrimental to freight operators. This concern is reinforced by the likelihood that the Train Operator payment rate is set to increase substantially whilst the Network Rail payment rate is to remain the same. On its own this will tip the financial balance of the regime adversely towards freight operators.

Q33. Do you think that the current Network Rail payment rate accurately reflects the financial impacts incurred by freight operators as a result of Network Rail caused delays to freight trains? If not, please tell us why?

3.26. It would be extremely difficult to say that the Network Rail payment rate accurately reflects the financial impacts incurred by freight operators as a result of Network Rail caused delays to freight trains because the one uniform rate applies to each and every different type of freight train irrespective of commodity carried and identity of freight operator involved. Whilst ORR suggests in paragraph 6.12 of the consultation document that its initial analysis relating to delay impacts on freight operators and freight user costs leads it to believe that the Network Rail payment rate may currently over-compensate freight operators for delays, an alternative view of that analysis could equally conclude that the current Network Rail payment rate of £17.47 may under-compensate freight operators given the suggested range of £2.90 to £23.10.

3.27. However, as the current uniform rate was set at the beginning of CP4 by ORR after obtaining relevant information from a survey of freight operators, DB Schenker has no reason to believe that it is not, on average and in the round, a good reflection of the financial impacts faced by freight operators.

3.28. That said, since the beginning of CP4 the average payload per freight train has continued to increase which means the commercial cost of delay has become greater. DB Schenker also believes that the Network Rail payment rate, unlike its passenger

...

counterpart, does not take into account the marginal revenue effect of delay. DB Schenker considers that these factors should also be taken into account by ORR in its review of the Network Rail payment rate.

Q34. Do you agree that we should re-examine the evidence base for the Network Rail payment rate with the freight industry and Network Rail in CP5, and if necessary adjust the rate to reflect cost and revenue impacts on freight operators due to Network Rail caused delays? If not, please tell us why?

3.29. DB Schenker disagrees with ORR's proposal to re-examine the evidence base for the Network Rail payment rate in CP5 and, if necessary adjust the rate, because this will impose a great degree of uncertainty on freight operators. If a comprehensive review cannot be undertaken in time for implementation in CP5, then it should instead be undertaken in time for implementation in CP6.

Q35. Do you agree that we should keep the Network Rail cancellation payments the same but uplift them for inflation? If not, please tell us why?

3.30. DB Schenker considers that as a minimum, the cancellation payments should remain the same (uplifted for inflation). However, as mentioned in paragraph 3.28 above, since the beginning of CP4, the average payload per train has continued to increase which means the commercial cost of delay, as well as cancellation, has become greater. Therefore, DB Schenker considers that this factor should also be taken into account by ORR in its review of the cancellation payments.

Q36. Do you agree that we should update the congestion factor used in the calculation of adjustments to the freight operator benchmark, in order to take into account of evidence being collected as part of the update of the capacity charge? If not, please tell us why?

3.31. Before answering ORR's specific question, DB Schenker has strong concerns over ORR's proposal to update the freight operator benchmark to reflect the performance of freight operators during the two year calibration period (i.e. 1 April 2010 to 31 March 2012) not least because DB Schenker for various reasons has not yet been able finally to agree and 'sign off' with Network Rail any of its period delay minutes statements since Period 5 2011/12 (i.e. Summer 2011).

3.32. However, DB Schenker's main concern with a rebasing of the freight operator benchmark at the start of each Control Period using data from the previous Control Period is the fact that it penalises parties who have improved their performance over that time period by imposing a tighter benchmark whilst at the same time rewarding those parties who have performed poorly through the award of a higher benchmark. This can only lead

...

to a reduction in the incentive to continue to improve performance which should be a serious concern for all stakeholders, including Network Rail and ORR.

3.33. Notwithstanding the above, DB Schenker notes that ORR has rejected the suggestion by freight operators that a longer calibration period should be considered on the basis of the reasons given in paragraph 6.33 of the consultation document. DB Schenker has carefully considered these reasons and believes that do not in fact justify such a rejection:

(a) it is desirable to use the most recent data possible as this better reflects the current network characteristics and service patterns.

The freight operator benchmark is normalised across the network and applies equally to all freight operators so it is not dependent on normal fluctuations to network characteristics and traffic patterns. In any case, the freight operators' proposal would still incorporate all of the data that ORR proposes to use.

(b) it is desirable to use time periods that relate to Network Rail financial years so improvement trajectories can be applied to Network Rail's benchmarks in a way that is simple and transparent

The freight operator's proposal was also based on Network Rail's Financial Years (i.e. by using 3 instead of 2).

(c) year-on-year fluctuations in performance due to external factors such as a severe winter can have a significant impact on benchmarks. A two year period helps minimise the impact of these fluctuations while still ensuring the data used is relatively recent.

DB Schenker believes that the freight operators' proposal will minimise the impact still further as a view commonly held by statisticians is that larger sample sizes generally lead to greater, not lesser, precision as fluctuations can be spread over a longer time period.

(d) due to the high volume of data required for the update of benchmarks and payment rates, it would be costly to use data from a longer time period than necessary.

DB Schenker believes as CP4 freight delay data is readily available it is no more costly to use three years worth of data than it is to use two.

3.34. In addition, DB Schenker would also remind ORR of the alternative proposal put forward in section 5 of RFOA's letter dated 16 November 2012 (see Annex 1) which suggested that freight operators would consider as a compromise the freight operator benchmark being reset to CP4 entry level.

...

3.35. Returning to ORR's specific question, DB Schenker agrees that the congestion factor used in the calculation of adjustments to the freight operator benchmark should be revisited in light of the evidence being collected in connection with the update of the capacity charge.

Q37. Do you agree that the Network Rail £ per delay minute payment rates used in the calculation of the freight operator payment rate should be weighted by third party freight operator delay affecting each service group? If not, please tell us why?

3.36. DB Schenker agrees with the proposal that the Network Rail £ per delay minute payment rates used in the calculation of the freight operator payment rate should be weighted by third party freight operator delay affecting each service group. DB Schenker is hoping that this proposal should ensure that the freight operator payment rate will not be unduly influenced by some of the extremely high payment rates applying to passenger trains operating at times when there are very few freight services running (e.g. during the passenger 'peak') and, therefore, little propensity for third party delay. DB Schenker looks forward to reviewing Network Rail's calculations at the Schedules 4 & 8 freight working group.

Q38. Do you agree with our proposal to continue to set the bonus payment rates at 50% of the level of the compensation payment rate? If not, please tell us why?

3.37. DB Schenker strongly disagrees with ORR's proposal to continue to set the bonus payment rates at 50% of the level of the compensation rate. Whilst DB Schenker notes ORR's reason for wanting to continue with the proposal (i.e. it would offer more protection for smaller freight operators from improvements in Network Rail's performance), DB Schenker believes that the proposal distorts the regime for all freight operators because it results in insufficient cost recovery for the regime to be financially neutral at benchmark levels of performance. Therefore, if any operator (large or small) is generally operating at benchmark performance over the course of a year, instead of the regime being financially neutral, the operator will in fact be making net payments to Network Rail by paying out more whilst over benchmark and receiving less when under benchmark.

3.38. Although it appears that the only reason ORR is continuing with this proposal is for the protection of small freight operators, DB Schenker has seen no evidence that small operators actually want or need this protection as opposed to the alternative of having bonus rates set at 100%.

3.39. DB Schenker firmly believes, therefore, that bonus payment rates should be reset to 100%. If any small operator does in fact want to opt for 50% bonus payment rates, then it should be possible to achieve this by way of a bespoke amendment to its Schedule 8

...

performance regime and not by way of penalising all other freight operators operating under the template regime.

Q39. Do you agree with our proposal not to require Network Rail to offer incident caps in return for an access charge supplement? If not, please tell us why?

3.40. In paragraph 7.13 of the consultation document, there is clear evidence that the incident cap applying to charter operators is leading to a significant funding issues for Network Rail. In respect of the freight incident cap which, unlike the charter passenger incident cap, is subject to an access charge supplement, no such evidence is given.

3.41. Therefore, in order to be able to give an informed answer to this question, DB Schenker would have expected similar information to be included in the consultation document showing the total amount of delay (and its value) in excess of any incident caps against the total amount of access charge supplement that has been collected by Network Rail. If the amounts are broadly equal, DB Schenker would see no justification to remove the requirement for Network Rail to offer a menu of incident caps.

Q40. Do you agree that incident caps are something that could be provided by the private insurance market if Network Rail were not to offer incident caps at a reasonable price? If not, please tell us why?

3.42. In principle, DB Schenker would have thought that incident cap insurance could conceivably be provided by the private insurance market but it is unaware of any specialist providers who currently offer such protection. However, even if there were to be specialist providers out there willing to offer protection in this regard, DB Schenker believes it would be very unlikely to receive appropriate insurance for a reasonable price given that this would be a new area for the private insurance market and charges may well, therefore, carry significant risk premiums and be subject to a high deductible.

Q41. Do you agree that we should continue to allow operator specific annual liability caps? If not, please tell us why?

3.43. DB Schenker strongly agrees with ORR's proposal to continue to allow operator specific annual liability caps as these offer important protection for freight operators and Network Rail providing certainty about the maximum liabilities they may face under the regime.

...

Q42. Should we continue to set reciprocal annual liability caps for smaller and new freight operators? If not, please tell us why?

3.44. DB Schenker considers that ORR should not need to continue to set reciprocal caps for smaller and new freight operators. Such operators should be permitted, as larger freight operators already are, to agree their own annual liability caps with Network Rail (subject to ORR approval) to meet their own specific requirements including taking account of their projected growth profile.

Q43. Should we continue to set reciprocal annual liability caps in instances where Network Rail and freight operators cannot agree on the level the cap should be set at? Or are caps on annual liability something the private insurance market could provide if no agreement is reached?

3.45. DB Schenker strongly believes that ORR should continue to set reciprocal annual liability caps in cases where Network Rail and freight operators cannot agree on a specific level that the cap should be set at. In cases where Network Rail and the freight operator do agree the level of the cap, that agreement will continue to be subject to ORR's approval so it logically follows that ORR should also set an appropriate level of the cap in cases where the parties cannot agree. DB Schenker would be concerned that if that facility was withdrawn, one of the parties could prevent a cap being set by merely refusing to agree to any reasonable proposal.

3.46. As indicated in paragraph 3.42 above, DB Schenker is unaware of any specialist providers who currently offer protection for performance incident caps, let alone performance annual caps. If there were to be specialist providers out there willing to offer protection in this regard, DB Schenker believes it would be very unlikely to receive appropriate insurance for a reasonable price given that this would also be a new area for the private insurance market and charges may well, therefore, carry significant risk premiums and be subject to a high deductible.

Compensation related to charter operators

Q44. Do you agree that a separate charter operator payment rate should be calculated using the same methodology used to calculate the freight operator payment rate, but based on delays caused by charter operators to other train operators? If not, please tell us why?

3.47. DB Schenker agrees with the proposal that a separate charter operator payment rate should be calculated using the methodology used to calculate the freight operator payment rate but instead based on delays caused by charter operators to other train operators. DB Schenker is hoping that this proposal should ensure that the charter

...

operator payment rate will not be unduly influenced by some of the extremely high payment rates applying to passenger trains operating at times when there are very few charter passenger services running (e.g. during the weekday passenger 'peak') and, therefore, little propensity for third party delay.

3.48. DB Schenker believes that if this proposal is adopted, then Network Rail's calculations should be discussed at the Schedules 4 & 8 freight working group, participation in which could also be extended to charter operators.

Q45. Do you agree with our proposal not to require Network Rail to provide incident caps to charter operators on the basis this currently results in a subsidy to charter operators? If not, please tell us why?

3.49. From the evidence included in paragraph 7.13 of the consultation document it appears that the current incident cap of £5,000 offers significant financial protection to charter operators from the impacts of their own poor performance. Therefore, if that protection was removed thus making charter operators liable for every minute of third party delay they cause, this would have a considerable financial effect on those operators which may result in a reduction in the number of charter trains operated, particularly those using heritage traction (steam or diesel) which appear historically to have a greater propensity to cause delay.

3.50. Whilst the incident cap is primarily there to offer financial protection to charter passenger operators from the effects of their poor performance, it also recognises that unlike performance regimes that apply to all other services that operate on the network, the charter performance regime has no benchmark and, therefore, charter operators are liable for every minute of third party delay without any offsetting incentive or ability to generate bonus payments for improved performance.

3.51. DB Schenker considers that if ORR wishes to proceed with the proposal to remove the incident cap, then it would be fair and equitable for the charter performance regime to be revised more fundamentally to provide benchmarks based on an assessment of historic performance. The benchmarks should, as is in the case of the freight performance regime, be set as industry benchmarks that are normalised by train miles and, therefore, can be applied equally to all charter operators to avoid any discriminatory effects.

3.52. Given that the information to derive the benchmarks should be readily available to Network Rail, DB Schenker's proposal should be achievable for implementation at the start of CP5, particularly if it is developed through the auspices of the Schedules 4 & 8 freight working group, participation in which could be extended to include charter operators.

...

Q46. Do you agree that incident caps are something that could be provided to charter operators by the private insurance market? If not, please tell us why?

3.53. In principle, DB Schenker would have thought that incident cap insurance could conceivably be provided by the private insurance market but it is unaware of any specialist providers who currently offer such protection. However, even if there were to be specialist providers out there willing to offer protection in this regard, DB Schenker believes it would be very unlikely to receive appropriate insurance for a reasonable price given that this would be a new area for the private insurance market and charges may well, therefore, carry significant risk premiums and be subject to a high deductible.

Q47. Are you content for us to set the Network Rail payment rate in the charter operator performance regime so it is the same as the Network Rail payment rate in the freight performance regime? If not, do you have any proposals on how we should update it including on the evidence we could use?

3.54. DB Schenker is content for ORR to set the Network Rail payment rate in the charter operator performance regime so it is the same as the Network Rail payment rate in the freight performance regime. However, consideration should also be given to whether the Network Rail payment rate should reflect the marginal revenue effect that poor network performance causes to charter trains.

Q48. Are you of the view that there are any other areas of the charter Schedule 8 performance regime that should be amended?

3.55. As outlined in its answer to question 45 above (paragraphs 3.49 to 3.52), if ORR proceeds with its proposal to remove the incident cap, DB Schenker believes that the charter performance regime should be fundamentally revised so that it becomes a benchmarked regime in keeping with all other performance regimes in place for services operating on the network. The benchmarks should be normalised and set at an industry level so that they apply equally to all charter passenger operators.

Yours sincerely,

Nigel Oatway
Access Manager

...