



RAIL BRIEFING

Access to ports and terminals

July 2009

In this Rail Briefing we look at a complex area of law which deals with how freight operators can achieve access to ports and terminals. Although we look at some general principles, a complete in-depth analysis of the law is outside the scope of this briefing.

Before the introduction of the Railways Infrastructure (Access and Management) Regulations 2005 ("*the Regulations*") facility owners of ports and terminals were not obliged to provide access to third parties. These facilities fell within an exemption¹ excluding s.17 of the Railways Act 1993 (as amended) which imposes a general requirement to provide access. With the introduction of the Regulations the position changed.

In this briefing we take the opportunity to consider how freight operators may achieve access to ports and port terminals by reference to the Regulations. We also briefly look at:

- (a) Connection Agreements; and
- (b) Proposals to extend the exemption for ports and port terminals to terminals generally

and how these work alongside the Regulations.

The Regulations

Although the Regulations have recently been amended by The Railways Infrastructure (Access and Management) (Amendment) Regulations 2009 the provisions we are interested in remain unaltered.

Regulation 6 applies to both international groupings and any railway undertakings for the purposes of operating any type of rail freight service seeking access to terminals and ports. It requires an applicant to be provided with track access subject to restrictions only if "viable alternatives by rail under market conditions exist".

Although the meaning of this phrase is rather opaque, ORR has issued guidance in its capacity as an appeals body (see <http://www.rail-reg.gov.uk/upload/pdf/275.pdf>) which sets out the framework within which it will consider any applications. Broadly speaking, ORR requires objective reasons for a refusal to provide access, which may be due to:-

1. non-availability of capacity;
2. refusing to deal with applicants of poor repute on financial or safety grounds;
3. imposing restrictions or refusing access on the basis of sound, non-discriminatory safety and security requirements;
4. imposing reasonable restrictions designed to ensure efficient utilisation of the facility or improve performance; and/or
5. imposing restrictions reflecting the technical limitations of the site or approaches to the site (e.g. capacity constraints on railway network approaching a port or terminal).

In the same guidance it also states:

"We have a duty to strike a balance between the applicant's right of access, the legitimate commercial interests of the facility owner and the maintenance of a long-term investment incentive. We would, therefore, be unlikely to determine that access should be granted in circumstances where the facility owner justifies why access has been refused or made subject to restrictions, particularly where there is no evidence that the facility owner had an incentive to restrict access in order to restrict competition in downstream markets where it is, or is potentially, active".

Any applicant is afforded the right of appeal to the ORR under Regulation 29 "if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved".

It should also be noted the obligation to provide access is not dependent on any management arrangements at a particular facility. Thus a facility need not be owned and operated by the same organisation – it could, for example, be operated by a third party under a management contract or on lease such as to a rail freight operating

¹By virtue of Article 5 of The Railways (Class and Miscellaneous Exemptions) Order 1994, although Birmingham Freightliner Terminal (now closed), Trafford Park Euroterminal, Mossend Euroterminal, Stratford Freightliner Terminal & Willsden Euroterminal are explicitly excluded from the exemption and therefore subject to s.17 of the Act

company. Where this is the case, the Regulations still apply with the party responsible for managing access having to use reasonable endeavours to provide suitable access.

Facility owners remain free to enter into commercial arrangements in relation to their facilities and services that are within the scope of the Regulations without ORR's approval.

Connection Agreements

Ports which have been linked to the network since 1994 will be covered by a Connection Agreement entered into with NRIL which typically contains an arrangement whereby it can claim back the costs of maintaining the connection from the connected party – usually the port or terminal owner. NRIL reserves ancillary rights to enter onto the Port premises for the purposes of maintenance, renewal of network etc (clause 7).

Other key terms include clause 5.2 (which prevents NRIL from severing the connection to the network except in the case of an emergency) and clause 6 which requires both parties to agree arrangements for the safe handover of rolling stock.

Connection Agreements are treated as access agreements under the Railways Act 1993 and as such are subject to ORR approval since they will be typically negotiated between NRIL and the port owner/operator.

A model form is available from the website http://www.networkrail.co.uk/documents/4266_Model%20Connection%20Contract.pdf.

A Proposal to extend the exemption to terminals generally

The ORR issued a draft General Approval for consultation on 22 June 2009. Whilst we will look at the draft regulations and proposals in more detail in the briefing note next month, it is interesting to note the ORR has indicated it will review the ports and terminals freight facility market with a view to establishing a long term exemptions policy.

Contacts



Richard Walford
Partner

Tel: 0117 939 2295

Email: richard.walford@burges-salmon.com



Christopher Bartlett
Associate

Tel: 0117 902 7234

Email: christopher.bartlett@burges-salmon.com

Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

© Burges Salmon LLP 2009. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.