

Emily Bulman
Principal Economist
Telephone: 020 7282 3892
Fax: 020 7282 2041
E-mail: emily.bulman@orr.gsi.gov.uk



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Distributed to: Ian Cleland (Network Rail); Lindsay Durham (Freightliner HeavyHaul); Nigel Oatway (DB Schenker); and Steve Turner (First GB Railfreight).

Cc: Simon Ball (Colas Rail); David Brewer (Confederation of UK Coal Producers); Chris Connelly (Direct Rail Services); and Nigel Yaxley (Association of Coal Importers).

Coal spillage charge variation notice, 2010 - 11

1. We thank Network Rail for its letter, dated 11 August 2010, setting out its proposal for a variation to the coal spillage charge along with a summary of the outcome of the consultation, which Network Rail carried out in accordance with paragraph 2.11.4 of schedule 7 of the freight track access contract.

2. In our final determination of Network Rail's output and funding for 2009-14¹, we said that at the end of each year Network Rail, in consultation with freight operators, should propose to us a change to the level of the coal spillage charge. Its proposed change should be based on the change in the number of points failures due to coal spillage, compared to the baseline of 2007-08².

Network Rail's proposal

3. We note that Network Rail complied with the time limits set out in paragraph 2.11.3 of schedule 7 of the freight track access contract. This requires Network Rail to identify, compare and notify train operators and ourselves of the difference in the number of relevant points failures in 2009-10, against the baseline points failures in 2007-08, within 28 days of the last day of that financial year.

4. Similarly, Network Rail is obliged to observe paragraph 2.11.4, which requires it to consult on and agree any proposed variation to the coal spillage charge rate within 84 days of the last day of that financial year. We understand that Network Rail is proposing a

¹ Determination of Network Rail's outputs and funding for 2009-14. This document can be accessed on our website at: <http://www.rail-reg.gov.uk/upload/pdf/383.pdf>

² Baseline points failures. This document can be accessed on Network Rail's website at: <http://www.networkrail.co.uk/browse%20documents/regulatory%20documents/access%20charges%20reviews/cp4%20charges/f%20-%20baseline%20points%20failures.pdf>

reduction in the coal spillage charge of 24.14%, on the basis that the number of points failures due to coal spillage has fallen from 203 in the baseline, to 154 in 2009-10.

Issues

5. We have looked at the documentation provided, including the correspondence with consultees. We understand that DB Schenker is challenging 19 of the incidents in 2009-10, and it considers that the total number of points failures owing to coal spillage in 2009-10 was 135, and so the reduction in the charge should be 33.50%.

6. Further to this, DB Schenker has challenged the way in which the causes of points failure have been attributed in the baseline of 2007-08. We understand that DB Schenker considers that only points failures which are solely caused by coal spillage should be included.

7. Network Rail has stated that the baseline cannot be reopened, and that points failures attributable to coal spillage have been determined consistent with the approach for the baseline which was audited and approved by the independent reporter.

8. For this reason, Network Rail has been unable to reach agreement with the industry as to the proposed reduction in the coal spillage charge. While Network Rail has not formally stated that its letter of 11 August 2010 is a referral to us for a determination of the variation to the charge, under section 2.11.5 of schedule 7 of the freight model track access contract, we are treating it as such.

Our decision

9. While we accept that requests were made by the parties for further information following the initial consultation, we note that Network Rail did not allow for this, and hence the full process set out in paragraph 2.11.4 of schedule 7 was not completed within the required time period of 84 days. We would like to remind Network Rail that it must ensure that it allows sufficient time for this process in 2011-12.

10. We are satisfied with Network Rail's interpretation of "attributable", which is that it consists of points failures where coal spillage is reported to be a contributory factor. We consider that any comparisons, for the purposes of this exercise, should be made on a consistent basis. Since it is apparent that the baseline points failures of 2007-08 include all incidents where coal spillage has been reported as a contributory factor, we consider that the proposed approach by Network Rail to quantify points failures on the same basis is appropriate. Further to this, we understand that the baseline approach and data suggested by Network Rail was audited by the independent reporter, Halcrow, who confirmed that Network Rail's assessment was appropriate at the time of the 2008 periodic review.

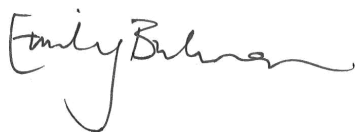
11. For these reasons, we consider that a reduction of the coal spillage charge of 24.14% should be applied from 1 April 2010.

12. We plan to review track access charges, including the coal spillage charge, for CP5³, and we will fully consult on any proposed changes. We consider that during the review, any issues, including those raised by DB Schenker, can be properly discussed and we can ensure that the total cost recovered by the coal spillage charge is based on robust information.

13. We continue to support initiatives to reduce coal spillage on the network, and we are pleased to see that the number of points failures related to coal spillage has reduced in 2009-10. This suggests a considerable effort made by the industry to reduce coal spillage where practicable. We hope that this trend will continue.

14. If you would like to discuss any aspect of this letter, please do not hesitate to contact me.

Yours faithfully

A handwritten signature in black ink that reads "Emily Bulman". The signature is written in a cursive style with a long, sweeping underline.

Emily Bulman

³ Control Period 5, we expect for this to be the period from 1 April 2014 – 31 March 2019.