ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA33
(following a hearing held at 1 Eversholt Street, London, on 18 January 2018)

Present:

The appointed Adjudication Panel (the "Panel"):

Hearing Chair:	Richard Butler
Industry Advisors:	John Boon Tony Crabtree

Dispute Parties:

Govia Thameslink Railway Ltd ("GTR")

Tom Causebrook	Access Contracts Manager (Track)
Raj Patel	Head of Access & Regulatory
Lee Latham	Head of Attribution

Network Rail Infrastructure Ltd ("Network Rail")

Simon Henderson	Counsel
James Shackleton	Legal Director, Eversheds Sutherland (International) LLP
Sarah Williams	Customer Relationship Executive
Mark Scourfield	Customer Manager
Mark Southon	Delay Attribution Specialist

Interested parties:

None

In attendance:

Tony Skilton, Committee Secretary
Stenographer from Ubiqus

Table of Contents

Abbreviations

1. These abbreviations are used in this determination:

"ADA"	means Access Dispute Adjudication.
"ADD"	means Automatic Dropping Device.
"DAB"	means Delay Attribution Board.
"DAG"	means Delay Attribution Guide effective 18 September 2016, now known as the Delay Attribution Principles and Rules ("DAPR")."ESR" means Emergency Speed Restriction
"Eversheds"	means Eversheds Sutherland (International) LLP
"OLE"	means Overhead Line Equipment
"PGD1"	Delay Attribution Board Process and Guidance Document 1
"Rule"	refers to the Access Dispute Resolution Rules.
"Secretary"	is the Committee Secretary of the Access Disputes Committee.
"TAC"	means the Track Access Contract between the parties to this dispute.

Summary of the dispute

2. On Wednesday 29 March 2017 unit 387126 was working 1C63, the 13:28 service from Cambridge to Kings Cross. At some location on the up fast line between Potters Bar and Alexandra Palace there was some form of object (described as "debris") on the OLE and this damaged the carbon and the external metal of the pantograph. The damage went unnoticed at the time and the unit continued in service for the rest of the day, being stabled at Peterborough Nene Sidings at 22:15 where it remained overnight. The following day, Thursday 30 March 2017, the unit again operated for much of the day without incident, but while in service as 1C27 between Cambridge and Kings Cross at 21:47 the ADD activated in the Potters Bar area and the train came to a stand in New Barnet station. The unit was assisted to Hornsey Depot where the damage was discovered. It was this damage which had activated the ADD. At the hearing I was told that 331 Delay Minutes were incurred following this ADD activation.

3. Network Rail attributed the incident (incident number 013036) to GTR (Delay Code M1). GTR contends that the incident should be attributed to Network Rail under either Delay Code XO (general external object) or JX (agreed that the train has struck an unidentified object).

4. On 10 August 2017 the parties submitted to the DAB a joint Request for Guidance on this attribution, which guidance (Guidance No: DAB-44) was ratified at a meeting of DAB on 21 October 2017 and issued to the parties on 25 October 2017. The DAB agreed with Network Rail's attribution to GTR, though the DAB was not unanimous. Guidance No: DAB-44 is set out at Appendix "A" to this determination.

Procedural history of this ADA

5. GTR served Notice of Dispute on 8 November 2017 and under Rule B6 the dispute was referred to an ADA and registered as ADA33. I was appointed as Hearing Chair on 10 November 2017 and the hearing date was set for 18 January 2018.

6. Under Rule G16 the Secretary required GTR to serve its Statement of Case by 17:00 on Monday 27 November 2017, Network Rail to serve a Statement of Defence by 17:00 on Monday 11 December 2017; GTR to serve any response statement by 17:00 on Monday 18 December 2017 and, by 17:00 on Tuesday 9 January 2018, GTR and Network Rail to serve any written legal submissions not already put forward along with any additional information or responses to questions asked by me.

7. On 24 November 2017 Eversheds, acting for Network Rail, formally requested an extension to the date for service of the Statement of Defence to 17:00 on 15 December 2017, suggesting that GTR be allowed until 17:00 on 22 December 2017 to serve any response. I decided that this request should be declined and this was advised to the parties later on 24 November 2017, the terms of which – setting out my reasoning – is set out in Appendix "B" to this determination.

8. GTR served its Statement of Case on 24 November 2017, Network Rail its Statement of Defence on 8 December 2017 and GTR its Statement of Response on 15 December 2017. On 20 December 2017 the Secretary submitted to the parties a list of issues of law (as required by Rule G9(c)) and a list of questions which I had prepared in conjunction with the appointed Industry Advisors. A skeleton argument was received from Network Rail on 9 January 2018 and answers to questions were provided by both parties on that same date. So I am grateful to be able to record that both parties responded fully and in good time.

9. In view of the potential complexity of exchanges during the hearing, I directed (as provided in Rule G44) that a full transcript should be taken to assist the Panel's subsequent consideration of the issues. At the start of the hearing I explained to the parties that I regarded the record or transcript of the hearing as being an aide memoire for the Panel in its consideration of the issues and not a document for issue to the parties or for eventual publication.

Evidence and submissions

10. The hearing took place on Thursday 18 January 2018. Each party made opening statements, responded to questions from myself and the Industry Advisors, and made closing submissions. Mr Mark Scourfield (who had provided a witness statement) was available to

give oral evidence on behalf of Network Rail but in fact was not called upon to do so. The parties' respective statements of case also recorded matters of evidence and where that evidence was accepted by each party it has been treated as admitted fact.

11. It is in the nature of an adjudication that material put before the panel by the parties can sometimes be an undifferentiated mixture of evidence and submission. At the start of the hearing I invited the parties to consider whether they wished to question the status of anything subsequently said. In the event, neither party chose to do so.

Preliminaries

12. I have taken account of all of the submissions, arguments, evidence, answers to questions and information provided over the course of this dispute process, both oral and in writing. This is so even though only certain parts of this material may specifically be referred to or summarised in this determination.

13. I am satisfied that the matter in dispute raises issues which should properly be heard and determined by an ADA duly convened in accordance with Chapter G of the Rules.

14. By Rule A5 I must reach my determination 'on the basis of the legal entitlements of the Dispute Parties and upon no other basis', which I do.

15. Nothing in this Determination should be taken to imply any ruling on legal responsibility for damage. This was not part of the submitted dispute and is likely to depend on different considerations to those material in this ADA.

Jurisdiction

16. When the Statements of Case were received, it was evident that this ADA was brought on two bases:

    (a) Under paragraph 16.1, Schedule 8 of the TAC by which (after other procedures have been followed – and the parties agree that they have been) either party may refer a notified dispute concerning performance sums for resolution in accordance with the Rules (in para 2.1 of GTR's Statement of Claim and para 2.4 of Network Rail's Statement of Defence); and

    (b) Under Condition B2.4.4 of the Network Code (incorporated into the TAC by clause 2.1 of the TAC) by which parties who cannot agree on the attribution guidance of the DAB must refer the matter for determination in accordance with the Rules (in the opening paragraph of the Notice of Dispute and para 2.4 of Network Rail's Statement of Defence).

17. Under Rule B6 all disputes referred under Condition B2.4.4 of the Network Code must be referred to an ADA in accordance with Chapter G of the Rules. The dispute referred under paragraph 16.1, Schedule 8 of the TAC has been allocated to the same ADA.

Accepted facts

18. There is no disagreement between the parties as to the following facts, largely taken from paragraphs of GTR's Statement of Case to which Network Rail expressly confirms in its Statement of Defence that it takes no issue:

19. On 30 March 2017 the 21:47 Cambridge to London Kings Cross service operated by unit number 387126 experienced an ADD in the Potters Bar area, coming to a stand in New Barnet station. An ADD activation causes the pantograph of the train to break contact with the overhead line traction power supply equipment. The device activates when an issue is detected with either the pantograph or the overhead line system. This is to prevent further damage to either the train or infrastructure.

20. Following the activation the driver examined the pantograph from ground level at 22:30 hours but was unable to see any damage. At 23:05 it was logged by the Shift Signalling Manager at Kings Cross Signal Box that the Down Fast, Down Slow and Up Slow lines had all been examined and normal running had resumed.

21. Unit 387126 was assisted to Hornsey Depot where damage was found to the carbon and the external metal of the pantograph.

22. Footage from the unit's onboard pantograph camera was observed at the time of the incident. GTR's engineers were unable to see anything occurring for the night of 30 March. This was because it was too dark to make anything out on the film. Further investigations by GTR engineers revealed that the pantograph did strike something hanging or attached to the OLE the previous day (29 March) whilst the unit was working 1C63, the 13:28 service from Cambridge to Kings Cross. The object on the OLE was situated between Potters Bar and Alexandra Palace on the Up Fast line.

23. On 29 March it was not known that the unit had struck the debris on the OLE. The unit did not display any issues on 29 March and continued in service for the rest of the day, finally being stabled at Peterborough Nene Sidings at 22:15 hours and where it remained overnight.

24. At 05:33 on 30 March the unit departed the sidings operating 5P03, an empty coaching stock move to Peterborough station. From Peterborough it then operated 1P03, the 06:15 service to Kings Cross. Unit 367126 went on to work a trip back to Peterborough, and a further trip back to Kings Cross before being stabled at Welwyn Garden City sidings.

25. The unit was at Welwyn Garden City sidings from 11:19 to 16:35. It went back into service working three more trips between Cambridge and Kings Cross before the ADD activation occurred whilst the unit was operating 1C27.

26. For a pantograph to be checked, access is required to the roof of the train and an isolation of the overhead line system must be taken. This is not possible at stabling facilities such as Peterborough Nene Siding or Welwyn Garden City where unit 387126 had been stabled. GTR has processes in place for pantographs to be checked. A pantograph will be checked for one of the following two reasons: (a) It has been reported or suspected that the pantograph has been damaged or has a fault; or (b) it is due for inspection as part of the mileage based maintenance regime. GTR's Class 387 pantographs are inspected every 20,000 miles.

27. It was not known or suspected by GTR on 29 March that the unit had struck an object on the overhead line equipment. Unit 387126 was not due for the pantograph to be inspected, having last received an inspection as recently as 20 March.

Disputed issues of law

28. These are the issues which I identified for the parties to address:

    1 Whether GTR deploying unit 387126 in service on 30 March with a damaged pantograph represents a failure by GTR to mitigate the effects of the object strike to the pantograph which took place on 29 March under Schedule 8, para 5.1(b) of the Track Access Agreement ("TAC")?

    2 Whether it is to be treated as a separate incident for the purposes of Schedule 8, para 5.3 of the TAC?

    3 Whether, as a matter of interpretation of the TAC and the industry provisions incorporated into it by reference, the test to be applied in determining this dispute is: (a) that in Schedule 8, paras 5.2 and 5.3 of the TAC; or (b) Prime Cause in the DAG; or (c) some combination of the two?

    4 Whether, on the application of the relevant test, the Minutes Delay which arose following the activation of the ADD on unit 387126 on 30 March are properly attributable to GTR or to Network Rail?

Propositions framed by GTR

29. In its Statement of Claim GTR had already framed some mixed propositions of submission, fact and law and since Network Rail addressed (and disputed) those issues (as well as addressing those framed by me) it will be helpful to recite GTR's propositions too:

    Issue 1 Network Rail has not demonstrated reasonableness in the allocation of this delay incident as it is unreasonable for GTR to undertake the suggested mitigation.

    Issue 2 Network Rail argues that 'the Prime Cause' of delay relates to a train failure on 30 March where GTR argues that the 'Prime Cause' was an object on the OLE on the 29th [March].

    Issue 3 That the conclusion of and principle prescribed in Access Dispute Determination AD39 are not relevant to this incident.

    Issue 4 The attribution of this delay to the train operator as opposed to the infrastructure provider will mean that the cause of this delay is not accurately identified and reported.

Positions taken by each party – Relationship between Schedule 8 and the DAG

30. Having considered the parties' statements of case and the terms of the TAC, in the run-up to the hearing I asked a number of questions of the parties, prepared with the assistance of the Industry Advisors, encouraging the parties to articulate their positions on a number of specific interpretation questions. Their answers have been very helpful, read with their Statements of Case and oral submissions made at the hearing, in identifying the decisive questions to be answered in resolving this dispute.

31. In particular, the parties were asked to address the question whether there is a material difference between paragraph 5 of Schedule 8 on the one hand and the definition of Prime Cause in the DAG on the other. For their own quite different reasons, the parties did not consider that a choice needs to be made as between these two regimes for the purposes of this dispute. Their positions relevant to this were as follows:

32. **GTR's case -** It was GTR's case that the object strike on 29 March constituted the only contributory incident to be taken into account. On GTR's case, the ADD activation on 30 March was not a separate contributory incident. Rather, the ADD activation was part of the object strike incident which commenced on 29 March.

33. It was GTR's case that in this dispute the dominant cause test ("caused wholly or mainly" in para 5.2 and 5.3 of the TAC) and the immediate cause test (in the definition of Prime Cause) produce the same result. Given its case that there was only one single contributory incident (the object strike of 29 March) in GTR's submission the dominant cause falls to be allocated to Network Rail under paragraph 5.2(b).

34. Similarly, on GTR's case the Prime Cause was the object strike, as without this there would have been no delay, with the result that the delay falls to be allocated to Network Rail under the DAG too.

35. **Network Rail's case -** It was Network Rail's case that the object strike on 29 March and the ADD activation on 30 March were linked but separate events.

36. Network Rail says that the guidance provided by the DAG is accepted by all industry participants as providing binding guidance and illustrations as to how the provisions of the TAC are to be construed. By Condition B1.3 of the Network Code, the Delay Attribution Principles and Rules (i.e. what was known at the time of the incident as the DAG) are incorporated into and form part of the Network Code. The fact that the DAG acknowledged (see paragraph 1.2.1 of the DAG) that it was not a complete set of "rules" does not detract from the fact that, as part of the Network Code, the DAG was a binding document. Paragraph 3.1.1 of the DAG simply acknowledged that it is possible that parties to a particular TAC may have entered into different contractual obligations from those assumed by the DAG. There is no suggestion that that is the case here.

37. Accordingly both sources are relevant. The TAC sets out the parties' respective obligations and the DAG provided binding and practical guidance as to how those obligations are to be construed on a day to day basis. Both parties accept that the concept of Prime Cause is relevant and applicable to the allocation of delay and neither party has made any criticism of the guidance set out in the DAG. On the facts, although the DAG provides helpful guidance, it is probably not strictly necessary to go further than the terms of the TAC since (says Network Rail) it is plain and obvious that the delay was caused by circumstances within GTR's control or by a circumstance affecting GTR's stock.

38. So on Network Rail's case, Schedule 8 and the DAG do not create parallel regimes. The words "wholly or mainly" in paragraphs 5.2 and 5.3 do not require an analysis of causal potency and it is neither appropriate nor helpful to analyse matters in terms of any "dominant cause" test. Network Rail does accept however that the phrase "wholly or mainly" recognises that there might be more than one cause for a particular incident of

delay and accepts that in such a situation the attribution of the delay is to the party which is mainly responsible (Statement of Defence, para 5.13).

39. On Network Rail's case what matters is the Prime Cause as defined in paragraph 2.7.1 of the DAG. The relationship between Schedule 8 and the DAG then requires the allocation of responsibility for that Prime Cause by applying paragraphs 5.2 and 5.3 of Schedule 8.

40. As to that, on Network Rail's case it was the activation of the ADD on 30 March which constituted the relevant incident. That was the only thing which caused any delay and until it happened there was no incident which called for the allocation of responsibility for delay. The ADD activation was therefore the Prime Cause of the delay and under both sub-paragraphs 5.3(a)(ii) and (iii) of Schedule 8 it falls to be allocated to GTR. In Network Rail's submission, the cause of the ADD activation on 30 March is irrelevant to the issue in dispute.

Positions taken by each party – Delay on a day subsequent to an incident

41. In the pre-hearing question and answer stage, the parties usefully addressed the question whether, under the terms of the TAC, is it possible to attribute Delay Minutes incurred on one day to an incident which took place on an earlier day.

42. **GTR's case -** GTR's case is that the TAC does not restrict the allocation of Delay Minutes only to the day the incident began. There are no provisions within Schedule 8 that prevent the Delay Minutes being attributed to an incident that commenced the previous day. GTR gave as an example the impact of an incident happening late at night which continued after 02:00 into the next day.

43. Of course, as already recorded, in this dispute it is GTR's case that there was only one incident that started on 29 March and finished on 30 March.

44. **Network Rail's case -** It is Network Rail's case that "the plain intention" of para 5 of Schedule 8 is to allocate responsibility for delay which occurs on a particular day as a result of an incident which occurred on that same day.

45. However, Network Rail did concede that it is "theoretically possible" that the Prime Cause of the delay on a particular day is an incident which occurred on an earlier day. But Network Rail submitted that this would only occur where the incident remained the direct cause of the delay because there was no opportunity for the other party to address matters. In such a 'no-opportunity' case, Network Rail accepted that it could not be said that the circumstances were within the control of the other party.

46. Network Rail suggested that it is highly unlikely that this would in fact occur because the circumstances where there is genuinely no potential for the other party to be in control and to be able to take steps to address matters are likely to be very rare.

Attribution procedure in Schedule 8

47. Paragraph 5 of Schedule 8 of the TAC is set out in Appendix "C" to this Determination.

48. Under Schedule 8 Network Rail must record the Minutes Delay for each Train scheduled in the Applicable Timetable at each Recording Point and where the Minutes Delay which that

Train has accrued since the last Recording Point are greater than or equal to three minutes, Network Rail must also record (i) the incident(s) causing each minute of any delay included in Minutes Delay; and (ii) those Minutes Delay for which Network Rail is unable to identify a cause (para 4.1(d) and (e)).

49. By paragraph 5.1(a), where there is more than one "incident", allocation of responsibility for those recorded Minutes Delay first requires Network Rail to identify the incidents which must be considered, which will include, as appropriate, contributory incidents and deemed incidents:

(a) Contributory incidents - All incidents which *contributed* to the Minutes Delay (para 5.1(a)).

(b) Deemed incidents - Failure to take reasonable steps to avoid or mitigate the effect of an incident (para 5.1(a)(i) and 5.1(b)) is to be treated as if it were a separate incident.

50. Turning to the fact that the delay in the present case was on a different day to the object strike, there is no time restriction in Schedule 8 which excludes potential contributory incidents on the ground that they took place too long before the Delay Minutes started. In particular, the words "… on a day …" in the opening sentences of both para 5.2 and para 5.3, and the words "for each day" in the first sentence of para 4.1 simply reflect the fact that Schedule 8 operates as a daily performance regime with each day standing and reported specifically (although aggregated on a 28-day periodic basis for payment calculation and billing). But there is no textual basis for understanding Schedule 8 as preventing the attribution of Minutes Delay incurred on one day to an incident which took place on an earlier day. Of course, in practice the greater the period of time between an incident and delay occurring, the more likely it is that there will be some failure to mitigate or some further incident representing an intervening cause. But under the Schedule 8 regime there is no specified time cut off.

51. As already indicated, neither party in this dispute contends that there is anything in Schedule 8 which compels a different conclusion, though Network Rail contends that it should only happen very rarely.

52. In relation to each contributory incident (other than planned incidents), the scheme of Schedule 8 requires Network Rail to identify whether it was caused wholly or mainly by matters falling within an area of responsibility of Network Rail (para 5.2, 2nd sentence) or the train operator (para 5.3, 2nd sentence). On the natural meaning of the phrase "wholly or mainly", it addresses the most influential (or potent) cause of each incident, irrespective of whether the incident came first or second in time relative to any other contributing incident. Minutes Delay are to be allocated to Network Rail or to the train operator accordingly.

Delay Attribution under the DAG

53. With some alterations, the DAG was re-named the "Delay Attribution Principle and Rules" with effect from 1 June 2017 and Part B of the Network Code was re-issued, with amendments, with effect from the same date.

54. The DAB has published PGD1 which helpfully summarises the key ideas within the concept of "Prime Cause" in these terms:

> "The principles of root and prime cause and the application thereof is one of the most misunderstood and therefore debated issues in the attribution world. However it is worth noting that there is an important difference between capturing and understanding a root cause of a fault or failure and the root cause of a delay incident. Attribution should be based on PRIME cause which is defined … as:-

- Prime Cause is the immediate cause or event that results in delay to a train.
- Until the Prime Cause event occurs there will be no delay.
- Without that event, delays would not have occurred.
- Prime cause is NOT a reaction to a previous incident.
- Where a delay that would not have ordinarily occurred is caused by a human error or oversight then that delay should be considered as a potential new prime cause.
- One of the key considerations to be made when identifying if an event is a new Prime Cause is what reasonable opportunities there were to mitigate the delay event occurring – if there was opportunity to prevent the occurrence then it could be considered a new Prime Cause."

55. In contrast with the dominant cause concept used in paragraphs 5.2 and 5.3 of Schedule 8, delay attribution under the DAG is concerned with identifying "the immediate cause or event". Two illustrations from PGD1 show this clearly. In example 9 vandals place a large obstruction on the line which is hit by a train. The train is subsequently removed but the event results in a cracked rail being found during a track examination. The following day an ESR is in place which remains until the rail can be replaced. PGD1 identifies the prime cause of the delay as "ESR due to cracked rail. Delay Code IR (DAPR O2.4)". The explanation is that whilst the root cause of the ESR being in place is the vandalism, the prime cause of delay the next day is the ESR which was implemented for the cracked rail. It adds that "The responsibility and incentive needs to sit with Network Rail Maintenance to effect repair."

56. The next example in PGD1, example 10, then develops the guidance as follows. After the object strike in example 9 the train involved is taken to depot and examined. Due to the damage sustained it is not made available for the next morning's service with a replacement unit also not being available. The first two services of that unit's diagram are cancelled as a result. PGD1 identifies the prime cause as "Stock Provision Delay Code M* (DAPR L2.1)". This is explained as follows. "Whilst the root cause of the non-provision of stock is the vandalism on the previous day, the prime cause of the cancellations on the next day is the lack of stock availability. The responsibility of stock provision sits with fleet maintenance to affect repair or provide suitable replacement stock. (This allocation of responsibility is provided that no attempt to balance stock was prevented by Network Rail overnight in which case a merge to the vandalism incident may be appropriate – see DAPR L2.3 a and b)".

57. It can be seen from these examples that on the "immediate cause or event" part of the definition of Prime Cause, causal potency has no role to play in this analysis. On those words

alone, in each case, the immediate cause or event – the cause or event which immediately precedes the delay in chronological sequence – has been identified as the Prime Cause. Earlier causes, however potent, are relegated to the status of root cause.

58. However, the words given in PGD1, "One of the key considerations to be made when identifying if an event is a new Prime Cause is what reasonable opportunities there were to mitigate the delay event occurring – if there was opportunity to prevent the occurrence then it could be considered a new Prime Cause." must also be considered. These words are looking back in time from the "delay event" to earlier "reasonable opportunities" to prevent the occurrence of the delay event. If they exist, then those opportunities will constitute the Prime Cause. In example 9, the train operator had no reasonable opportunity to influence the ESR and so there was no new Prime Cause which could be attributed to the train operator. Example 10 is an illustration of a case in which putting a replacement train into service in the place of train which it knew to be damaged fell within the train operator's area of contractual responsibility.

59. The factual distinction between example 10 in PGD1 and the present case is that GTR did not know of the pantograph damage.

60. Delay attribution has already been considered in a number of disputes before the Access Dispute Resolution Committee and I turn to those determinations before considering the correct allocation in this case:

AD39 (Access Dispute Resolution Committee, 5 October 2004)

61. A train stabled in Bridge Road, Colchester caught fire. The fire was presumed to have started within the train as a result of a car tyre having been put into the train and being set on fire by a vandal trespassing on the network. Before the fire could be extinguished it had damaged signalling cables in the area, causing delay to services. This cabling could not be repaired until the train had been moved away. The Committee determined that the delay should be allocated to the train operator and not to Network Rail.

62. Of the two possible routes by which delay allocation might be brought to the Committee (under paragraph 16.1, Schedule 8 of the TAC in the case of a notified dispute concerning performance sums and under Condition B2.4.4 of the Network Code in the case of parties who cannot agree on the attribution guidance of the DAB), it appears that AD39 was brought solely under Condition B2.4.4 of the Network Code (para 3).

63. In the present dispute both GTR and Network Rail have addressed AD39 extensively, both in their written statements and in submissions, because the facts of AD39 obviously offer possible parallels with those in the current dispute. So the determination and the Committee's reasoning require careful examination.

64. Speaking of the relationship between Schedule 8 of the TAC and the DAG, the Committee said this:

> "6. The Committee considered that its standing in the case derived from the fact that delay attribution is first and foremost a matter of the application of the relevant section (in this case section 5 of Schedule 8) of the Track Access

Agreement between the parties. The Delay Attribution Guide is a convenient accumulation of the case law in relation to Delay Attribution, but

6.1. it is, in every case, subordinate to the provisions of the Track Access Agreement, and

6.2. it relates to the way in which incidents that have occurred should, in accordance with the Track Access Agreement, be charged to the account of one or other party. It is not any part of a mechanism by which one or other party is held responsible in law for an incident."

65. This explanation for the relationship between Schedule 8 and the DAG only goes so far. It is correct that the DAG is subordinate to the TAC. That follows from the hierarchy established by the following provisions:

(a) Clause 5.7 of the TAC (Performance) which gives effect to Schedule 8;

(b) Clause 2.1 of the TAC (Incorporation) by which The Network Code forms part of the contract;

(c) Condition B1.3 of the Network Code by which (on its present wording) the Delay Attribution Principles and Rules are incorporated into and form part of the Network Code;

(d) Condition A1.1 (h) of the Network Code, "In the event of any conflict of interpretation between this code and an Access Agreement … the following order of precedence shall apply: (1) this code; and (2) the Access Agreement.";

(e) Para 1.2 of the DAG: "It is intended that the Delay Attribution Guide is the source of guidance on the Delay Attribution process as a whole for all parties to the Track Access Contract …" and para 3.1.1: "The Guide reflects the principles of the Track Access Contract and Network Code as set out in the Track Access Contract in Schedule 8 and in the Network Code, Part B. As this document is a guide and not a contractual document, the guide may not be a perfectly accurate reflection of those contractual entitlements."

66. Since the DAG expressly acknowledges that it is not a contractual document, its express incorporation into the Network Code and the precedence of the Network Code over provisions internal to the TAC cannot result in contractual precedence of the DAG over Schedule 8. So the Committee's view that the DAG is "subordinate to the provisions of the Track Access Agreement" must be correct. However, the suggestion that the DAG is merely an "accumulation of the case law in relation to Delay Attribution" does not fully do justice to the significance of the DAG which, as already discussed, also contains its own criteria for delay attribution, "Prime Cause", and its own working definition of those criteria.

67. In its determination in AD39, the Committee used the capitalised terms "Delay" and "Delay Incident", but these are not defined terms in Schedule 8, which as the Committee acknowledged, contains the contractual scheme to be applied. The Committee relied heavily on its earlier decision in AD27 and considered that it could detect in AD27 a "simple principle", which it described in these terms:

"7. In AD27, the Committee had looked at two instances of trespass, and had determined to which party those incidents should be allocated, by direct reference to the wordings of section 5 of Schedule 8 of the Track Access Agreement. The significance of the AD27 determination was that it established a simple principle, namely that until the trespass had been discovered there was no Delay Incident; only after its discovery was there a Delay Incident, which, because it was a matter "originating from or affecting the Network", fell logically to be allocated to the responsibility of Network Rail.

8. The Committee considered that AD27 had established a distinction that was of direct relevance to this case, namely that the (largely mechanistic) process that, in accordance with the terms of the Track Access Agreement, attributes an Incident that causes Delay to one or other of the contracting parties, is something totally different in kind from the discovery and attribution of the cause of that Incident. Attribution to the right contracting party is a function of the operation of Schedule 8 in relation to quantified Delays that have occurred, and as such is the proper province of the TRUST Delay Attribution Guide. Establishing possible chains of causality, relates, speculatively, to matters which may or may not have led to Delay, and which are not therefore themselves Delay Incidents; as such they have no part in the operation of Schedule 8, nor are they within the province of the TRUST Delay Attribution Guide."

68. The Committee then went on to apply the simple principle which it considered could be discerned in AD27 like this:

"9. In respect of the current case, the Committee was of the view that, until the fire on the train was reported (at 23:56, by the local Fire brigade), there was no Delay Incident. Thereafter, there was Delay, and that Delay should properly all be attributed to the fact of the Fire on the Train, and not to any speculation as to how the fire came to be on the train."

69. It therefore went on to attribute the delay to the train operator, adding:

"12. The Committee could see no logical circumstance where a Fire on a Train, however started, could be construed as anything other than a "circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation"). Furthermore, and for the avoidance of doubt, given that the parties were agreed that there had not been any failures in the management of the aftermath of the fire that would warrant the creation of a second incident, all the 1,897 minutes of Delay noted above must also be allocated to the Fire on the Train."

AD27 (Access Dispute Resolution Committee, 19 December 2001)

70. Before considering AD39 further, it will be helpful to summarise the earlier determination in AD27 (Access Dispute Resolution Committee, 19 December 2001). In that dispute, two independent suicide attempts had been made: one at Chelmsford involving trespass directly onto tracks (possibly via the station) and the other at Colchester by jumping from a platform. The Committee determined that responsibility for the resulting delays under Schedule 8 of the TAC should be allocated to the network operator in both cases, pointing out that any

potential redress that the network operator might choose to seek from the Station Operator in the Colchester case could be pursued in a different forum.

71. Of the two possible routes by which delay allocation might be brought to the Committee (under paragraph 16.1, Schedule 8 of the TAC in the case of a notified dispute concerning performance sums and under Condition B2.4.4 of the Network Code in the case of parties who cannot agree on the attribution guidance of the DAB), it appears that AD27 was brought solely under paragraph 16.1, Schedule 8 (para 4.2).

72. As to the suggestion made by the Committee in AD39 that AD27 "established a simple principle, namely that until the trespass had been discovered there was no Delay Incident; only after its discovery was there a Delay Incident", this supposed principle is nowhere stated in the AD27 determination. Indeed it is very difficult to see how the determination in AD27 can be generalised into a principle that there can be no delay incident until the incident has been discovered. Rather, AD27 illustrates what all or virtually all delay cases necessarily have in common, which is that until an incident has manifested itself, there will be no delay.

73. The incidents falling for consideration in AD27 were (i) the trespass onto the tracks by the person seeking to commit suicide and (ii) the collision between that unfortunate person and the train. In time sequence the trespass preceded the collision but the Committee in AD27 did not content itself with applying a mechanistic approach to causation by treating the incident latest in time and therefore closest to the onset of the delay as being the sole or main cause of the delay. Rather, in AD27 the Committee correctly recognised that the causation problem which it had to resolve turned on the words "wholly or mainly" in paras 5.2 and 5.3 of Schedule 8.

74. With regard to the incident at Chelmsford, signallers were aware of the trespass and were cautioning trains towards the trespasser. The Committee was satisfied that "the behaviour of the FGE train crew, in seeking to assure the safety of the female trespasser, and of the Network, was wholly consistent with any general duty of care, implied or explicit, within the Track Access Agreement" (para 15)

75. In paragraph 14 of its determination it identified and examined a number of factors relevant to identifying what "wholly or mainly" caused each of the suicide incidents. It observed that the TAC imposed on both parties the obligation to use "reasonable endeavours to reduce trespass" and that in AD3 and again in AD16 the Committee had construed this obligation as "… a test of reasonableness of endeavours, where two parties are involved, [which] must relate to the relative opportunity, and authority, of the two parties to take action to counter a particular threat. … account needs to be taken of the economic signals and incentives within the attribution process; for example, parties responsible for ensuring adequate policing of premises should be required to accept the penalties where events occur that showed policing to have been ineffective."

76. Alternative causal agents were considered but ultimately rejected on the ground that they did not "wholly or mainly cause" the collision incident. In relation to the Colchester incident: "It is of the nature of stations that persons are in the immediate vicinity of the Network, and not separated from it by any barrier that can prevent trespass. This does not relieve other parties from making "reasonable endeavours" to preserve life or the safety of the Network,

but nor does it make them "equally" or "wholly or mainly" responsible for any incident, or for any delay or consequential delay" (para 16.2.4).

77. So having addressed the "wholly or mainly caused" question by analysing alternative causal agents and the respective areas of responsibility of the network operator and the train operator and the opportunities for avoiding the events which had unfolded, in AD27 the Committee concluded (paragraph 14.3) that "… the bulk of the "opportunity, and authority", and therefore the responsibility for the prevention of trespass onto the Network must rest with "Railtrack in its capacity as operator of the Network".

78. This was not a "largely mechanistic" approach but a careful and clearly reasoned application of the "wholly or mainly" causation language in paragraph 5 of Schedule 8.

79. A further reflection on AD27, not stated in the determination but surely material to assessing the causative potency of the tragic events in that case is this. Given the sudden appearance of each trespasser on the track in front of a train, each collision appears to have been inevitable and from that moment on simply a function of momentum. Certainly there is no suggestion in the determination that the driver of either train had any opportunity to influence the distressing outcome. So it is unsurprising and surely correct that the causatively most potent factor was the trespass, which fell within the network operator's sphere of responsibility, and not the collision which was, given the trespass, inevitable.

80. So AD27 usefully addressed the "caused wholly or mainly" test in Schedule 8 of the TAC. The reasoning also reflects "one of the key considerations to be made when identifying if an event is a new Prime Cause" in PGD1, namely to ask "what reasonable opportunities there were to mitigate the delay event occurring – if there was opportunity to prevent the occurrence then it could be considered a new Prime Cause."

81. However, AD27 did lack the specific feature which both the present ADA33 and AD39 have in common - namely incidents whose impact remained latent for a period of time. So it is now necessary to return to AD39.

Further analysis of AD39 (Access Dispute Resolution Committee, 5 October 2004)

82. Having applied its simple principle and largely mechanistic approach, the Committee in AD39 failed to assess as a potential dominant cause any earlier incident (i.e. the trespass) in the manner adopted in AD27 and as required by paragraph 5 of Schedule 8.

83. The incidents falling for consideration in AD39 were (i) the trespass onto the railway (which may or may not have been facilitated by a broken fence), (ii) the unauthorised entry onto the train by the trespasser followed by the start of the tyre fire (or perhaps by the tyre having been thrown into the train from the trackside and the lighting of the tyre) and (iii) the consequent fire damage to the signal cabling.

84. Although it is not possible to say with certainty how the Committee would have analysed what wholly or mainly caused these incidents, as it had in AD27, it seems highly likely that it would have considered the activities of the trespasser within the train to have been the sole or main cause of the damage to the signal cabling. On that basis its attribution (to the train operator) would have been the same. Indeed, that might well have been the correct attribution even had there been no delay as between the lighting of the tyre and the

discovery of the fire and the consequent delay. The fire damage to the cabling would still have been wholly or mainly caused by the activity of the trespasser within the train and not by the trespasser's entry onto the network through a fence (broken or not).

85. The simple principle and largely mechanistic approach of AD39 seems to amount to this: (i) identify the incident which is last in time (and which is therefore the proximate or immediate cause of the Minutes Delay), (ii) identify under para 5.2 or 5.3 or 5.4 whether the final incident is within the responsibility of Network Rail or the train operator or is a joint responsibility, (iii) attribute the delay to that party/those parties. But this is a different approach to the "wholly or mainly caused" test set out in Schedule 8 and applied in AD27. It renders the collection of contributory incidents required by para 5.1(a) pointless because, on the simple principle and largely mechanistic approach, it is only the final incident before the delay which has to be analysed to identify its cause.

ADP30 (Access Dispute Panel of the Access Disputes Committee, 13 February 2008)

86. This determination was also referred to by the parties.

87. An empty coaching stock train travelling from Moorgate to Bedford came to an unplanned stop after emerging from Elstree Tunnel. The driver contacted the signaller and said that the unit had a massive air-leak and that he had lost every ounce of air from his door reservoir. On being asked by the signaller, the driver denied that he had struck anything. However, on return of the unit to depot engineers found that the loss of air pressure had been caused by a failed Norgren filter and that there was evidence consistent with impact damage. A dispute emerged as to whether the loss of air pressure and the consequent unplanned stop had resulted from the Norgren filter (i) failing because it had been improperly fitted or (ii) being hit by an obstruction in the tunnel. This pure dispute of fact was referred to the Committee, which was divided. The Panel Chairman found as a fact, in accordance with the view of the majority of the Panel, that on the balance of probability, theory (ii) was correct. This finding of fact decisively resulted in the allocation of the delay to Network Rail.

88. The entire substantive part of the determination is concerned with an investigation of the cause of the Norgren filter failure. Although the determination quotes from AD39, it does not illustrate a mechanistic approach. Rather, it recognises that where the cause of an incident is disputed, a proper investigation is required on an adjudication and that where there is conflicting evidence, the cause of the delay incident must be identified on the basis of the greater probability (paragraph 38.2).

89. Example 2 given in PGD1 recognises the same need for investigation of cause. In that example, a train running on the Network comes to an unexpected stop. The driver inspects and reports an oil leak affecting the engine. The train is taken out of service and examined that night and after investigation it is ascertained that the oil leak was due to damage from striking an unknown object prior to the failure. The initial attribution will be train failure (Delay code M* - DAPR Section G1) but as a result of the further investigation into the cause of the incident, the final attribution will be object strike (Delay code JX - DAPR Section Q4).

90. During this ADA33 hearing, warnings were given on behalf of Network Rail about the consequences for the industry if anything in this determination were to encourage extended enquiries into lengthy and potentially infinite chains of causation.

91. These concerns are understandable. Delay attribution is an important component of a system of incentivisation of industry participants, carefully recalibrated for each control period. It depends on many decisions being taken by managers on a daily basis and it is a system which could plainly be overwhelmed if it were taken to require the investigation of lengthy chains of causation. It does not. Nothing in the TAC or in this determination or in these illustrations of investigation of cause requires or encourages the investigation of lengthy (still less potentially infinite) chains of causation.

92. It is true that sub-paragraph 5.1(a) of Schedule 8 requires account to be taken of "all incidents contributing" to Minutes Delay or a Cancelled Stop. Admittedly the "all" here is not further defined or qualified, though there are two matters must be specifically taken into account in (i) and (ii). However, by necessary implication, in order to give workable efficacy to these provisions within the industry, "all incidents contributing" can only include those incidents which make a direct and substantial contribution to the Minutes Delay. That is the way in which these provisions have been applied in the industry, as is apparent from the previous delay attribution determinations discussed in this determination (most particularly AD27) and also the guidance in the DAG and the examples in PGD1.

Application of Schedule 8 to the facts of the present dispute

93. Following the steps required by the Schedule 8 regime as identified above, this is the effect of Schedule 8 on the facts of this case:

94. **Step 1 – Identify the contributory incidents -** The parties to this dispute are willing to assume as a fact that debris on the OLE damaged the pantograph of unit 387126 in service on 29 March 2017. They are also willing to assume that the activation of the ADD on 30 March 2017 was a belated automated response to that damage. Both the object strike and the ADD activation can each properly be termed an "incident" within the ordinary meaning of that word. But in the present case, GTR maintains that there is one incident only: the continuum which began with the object strike on 29 March and ended with the ADD activation on 30 March. Network Rail, on the other hand, maintains that there were two incidents: the object strike on 29 March and the ADD activation on 30 March.

95. Had the ADD activation been triggered instantaneously upon the object strike, it might have been unnecessary to ask the "one incident or two?" question. An intended, instantaneous and automated safety based response would normally be seen as part of the object strike incident itself. But because there was in fact a delay, it is unrealistic to conjoin the two as one incident and to do so could skew the reasoning. If, for instance, a GTR employee had in fact spotted the pantograph damage overnight but had carelessly done nothing about it, then conjoining the object strike and the ADD activation into one incident (the object strike) makes it difficult to operate the allocation provisions in paragraphs 5.2 and 5.3 properly. The carelessness might be the cause of the ADD activation but it is not the cause of the object strike.

96. Indeed, even if the activation had been instantaneous, it might still be necessary in certain cases to distinguish the object strike from the automated response and to treat them as two separate incidents. Take facts such as ADP11 (Access Disputes Panel of the Access Disputes Committee, 14 November 2005), for instance. In that case, the Line Interference Monitor ("LIM") on a Class 377 Electrostar unit was tripped as a result of encountering a 200Hz

frequency on the line. As in the present dispute, the response was not immediate, but it caused an overnight LIM re-set and in consequence of this unexpected re-set, the unit left the depot late the following morning. The Panel allocated the delay to the train operator having made decisive findings of fact which included (i) the absence of any safety need for such an automated response, (ii) that no other class of train using the line had its LIM tripped by this frequency and (iii) that a programming change had since been approved for the Electrostar LIM to prevent it tripping at this frequency in the future. In the case of such an unnecessary automated response, it is likely to be necessary to separate the initial trigger from the automated response and treat them as two separate incidents in order for the delay allocation provisions in paragraph 5.2 and 5.3 to work correctly, even if the automated response is instantaneous. It is all the more important to do so when the automated response is not instantaneous.

97. For these reasons, I determine that there are two separate incidents to be considered here: the object strike on 29 March and the ADD activation on 30 March.

98. Each of those two incidents was contributory to the Minutes Delay because, but for the first, the Minutes Delay would not have occurred and, but for the second, the Minutes Delay would not have occurred.

99. It is not submitted by either party that the non-identification of the pantograph damage overnight was an actual "incident" within the meaning of paragraph 5.1(a), and this is surely a correct interpretation of the word "incident", which is active and not passive. That said, a feature of this dispute strongly pressed by Network Rail is that it was within the control of GTR to undertake a manual inspection of the pantograph overnight on 29/30 March, and that it did not do so. If this has a role in the analysis, it is either: (i) as a deemed incident under para 5.1(a)(i) and 5.1(b) (failure to mitigate) or (ii) as a factor which reduces the causal potency of the object strike, as discussed below.

100. **Step 2 – Identify what wholly or mainly caused each incident** – Only one cause of the object strike on 29 March has been suggested. It was (it is accepted for the purposes of this dispute) the presence of debris on the OLE. There are two candidates for being treated under the TAC as the sole or main cause of the ADD activation on 30 March, namely (i) the object strike of 29 March and (ii) GTR's failure to identify the pantograph damage overnight on 29/30 March.

101. **GTR's case on mitigation** - GTR maintained that the identification of the pantograph damage could not be considered to be "steps to avoid and mitigate effects" of the object strike, on the ground that there was no report that the pantograph had been or might have been damaged and so there was no reason to carry out an inspection. On GTR's case the unit was subject to a robust maintenance regime and there was no reason to expect that the pantograph was not in a fit state of repair. Only if there had been a report of damage or suspected to damage to the pantograph and had GTR then failed to carry out an inspection could there have been a failure to mitigate.

102. **Network Rail's case on mitigation -** It is Network Rail's primary case that the obligation in paragraph 5.1(a)(i) and (b) to mitigate the effect of an incident causing delay was not triggered because the object strike on 29 March did not cause delay. There was no incident to be mitigated until delay had occurred, i.e. at 22:30 on 30 March. On Network Rail's case,

the delay was caused by the ADD activation and that was a circumstance within the control of GTR or arose from an act or omission of GTR. Subject to that primary case, if, contrary to Network Rail's primary position, a duty to mitigate does arise in circumstances where no delay has yet occurred, then it is Network Rail's position that the action of putting the Unit into service with a damaged pantograph plainly amounted to a failure to mitigate.

103. **"Caused wholly or mainly" -** It is Network Rail's case that this dispute is to be resolved by applying the test of Prime Cause in paragraph 2.7.1 of the DAG and it does not accept that the language of paragraphs 5.2 and 5.3 of Schedule 8 calls for an analysis as to whether it was the object strike or the non-identification of the pantograph damage which "wholly or mainly" caused the ADD activation incident on 30 March. Nevertheless, before turning to the definition of Prime Cause in the DAG, this is the question which is now addressed.

104. In determining whether it was the object strike which "wholly or mainly" caused the ADD activation, it must be relevant to consider the practicability or otherwise of a manual inspection of pantographs while the unit was stabled overnight. GTR's failure to identify the pantograph damage overnight is the only other causal agent in the frame.

105. Where an intermediate examination is wholly impossible (as it would be, for instance, had the ADD activation taken place further down the line on the same journey as the unnoticed object strike) then the train operator's failure to identify the damage could not be regarded as a causal agent at all. If, on the other hand, the unit had returned to depot overnight and a careless manual inspection had failed to identify the damage, then the causal potency of the object strike would shrink to such an extent that the ADD activation will have been wholly or mainly caused by the careless inspection. Although delay attribution under Schedule 8 is done on a no-fault basis, the "wholly or mainly caused" test must involve assessing the causal potency of competing causes, as was done in AD27, and that will bring into account errors by and failures of the parties, whether or not they amount to breaches of the TAC.

106. The difficulty in this dispute is that the facts fall between these two extremes. The unit was stabled in a place where no manual inspection was safely possible. Here it is helpful to summarise Network Rail's case on the issue first, followed by GTR's.

107. **Network Rail's case** - Network Rail does not criticise GTR for stabling units in a place where no inspection is possible, but (to paraphrase Network Rail's case) it contends that it is a choice representing a commercial weighing of risk. Network Rail says that GTR could adopt a comprehensive nightly inspection regime. This would reduce the number of delay incidents attributed to GTR but it would come at a cost. GTR is making a commercial risk based judgment in choosing not to stable trains in a place where nightly inspections of pantographs can be routinely carried out. GTR reaps the cost savings of that choice and it cannot complain on the occasions when delays which would have been avoided by a more costly inspection regime are attributed to it. These are circumstances within the control of the train operator in its capacity as an operator of trains (para 5.3(a)(ii) of Schedule 8) and any delay consequences of not doing it must be allocated to the train operator regardless of fault.

108. Network Rail says that there are any number of ways in which the parties can manage their agreed risks. It is a matter for each party to consider the risks which it has accepted and how best to manage them. Doubtless an element of that risk assessment is a judgment as to how

often a pantograph is likely to be damaged e.g. by debris in circumstances where that does not give rise to immediate delay.

109. In any event, any suggestion that the only way of managing the risk of damaged pantographs requires “returning all units with pantographs to depots each night” for manual inspection would, on Network Rail’s case, be wrong. By way of example, a train operator could manage the risk of damaged pantographs by reviewing pantograph CCTV footage to ascertain actual or possible damage and then and only then, direct the unit to a depot for further manual inspection. In these circumstances there would be no requirement for “all units with pantographs” to be stabled at a depot each night.

110. On Network Rail’s case, a consideration of the resourcing and timetable implications of daily stabling at a depot of all units with a pantograph and the industry implications of such is not necessary. Further, any such consideration would require considerable evidence as to the alternative ways the industry could manage its respective agreed risks. Such evidence is not before the adjudication tribunal such that any adjudication tribunal decision on the point would necessarily be of little value and possibly misleading. Further, on Network Rail’s case it is not material to this adjudication and the issue in dispute.

111. Network Rail’s case is that GTR's contractual responsibilities include an obligation to carry out pre-service checks (which is accepted by GTR – Paragraph 5.2 of the Statement of Claim) and also “Without prejudice to the other provisions of this contract: the Train Operator shall maintain and operate the Specified Equipment used on the Network in accordance with Clause 4.1 with a view to permitting the provision of the Services on the Routes in accordance with the Working Timetable and the making of Ancillary Movements” (TAC, Clause 6.1(a)). The definition of "Specified Equipment" in Clause 1.1 of the TAC includes railway vehicles. It is Network Rail’s case that the obligation is an absolute one and not limited, for instance, to taking reasonable steps to carry out maintenance.

112. **GTR’s case** - GTR says that it is material to consider what the nationwide resourcing and timetable implications of carrying out pantograph inspections every night would be. Using GTR’s operation as a case study the following would need to be taken into consideration:

a. On 29 March 2017 there were 533 units in the GTR fleet, 294 of these were fitted with pantographs.

b. On that date there were only 4 GTR depots where pantographs could be inspected; these were Bedford, Selhurst, Hornsey and Three Bridges (Class 700 only).

c. Manual inspections are only carried out at depots as safe access must be gained to the roof in environment free from live overhead line equipment.

d. The depots themselves only have limited capacity to carry out the inspection as other maintenance must be carried out.

e. The majority of units will be stabled at locations away from depots.

f. On routes such as LNE, Anglia and LNW there are multiple operators all with pantograph fitted rolling stock which would all need to be inspected. Taking these all back to depots would use a lot of network capacity and would reduce Network Rail’s access to maintain the network.

g. On parts of the network, such as GTR's Thameslink operation, services keep operating throughout the night, meaning rolling stock is not necessarily available for inspection.

113. On GTR's case, as the example of GTR's operation shows, the industry does not have the capability to carry out pantograph inspections on every overhead electric unit or locomotive every night. The implications of this would be significantly multiplied if all train operators were required to carry out manual inspections every time a unit or locomotive was taken off the network.

114. **Conclusion on what "wholly or mainly" caused the ADD activation** – Had the ADD activation taken place immediately after the object strike, then there could have been no serious doubt that the ADD activation would have been wholly or mainly caused by the object strike. No other event or factor would have been in the frame as a causal agent for the ADD activation. AD27, as discussed above, offers an illustration of a process begun by the first incident (in that case the trespass) leading to a second incident (the collision between the train and the trespasser) where the second incident was for practical purposes unavoidable and therefore inevitable. In those circumstances, the Committee in AD27 recognised that the second incident was wholly or mainly caused by the first incident and that the delay should be allocated under paragraph 5.2(b) to the network operator, on the ground that the first incident fell within circumstances within its control.

115. In the present case, there was a delay between the first incident and the second and so it is necessary to determine whether the second incident was in a realistic and practical sense unavoidable, such that the second incident was wholly or mainly caused by the first. Alternatively, given that the unit was under the control of GTR throughout the period between the first and the second incident, does its failure to put an undamaged unit into service on 30 March constitute an intervening cause of the second incident?

116. It is correct, as submitted by Network Rail, that by Clause 6.1 of the TAC (General) "Without prejudice to the other provisions of this contract: (a) the Train Operator shall maintain and operate the Specified Equipment used on the Network in accordance with Clause 4.1 with a view to permitting the provision of the Services on the Routes in accordance with the Working Timetable and the making of Ancillary Movements." But the words "in accordance with Clause 4.1" are significant. Under clause 4.1 of the TAC (General Standard)

> "Without prejudice to all other obligations of the parties under this contract, each party shall, in its dealings with the other for the purpose of, and in the course of performance of its obligations under, this contract, act with due efficiency and economy and in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced … train operator (in the case of the Train Operator)."

117. This general standard is a realistic and practical one, not theoretical and absolute, and Clause 6.1 of the TAC must be read with it.

118. Having given careful consideration to the case advanced by each party on this issue, I hold that the ADD activation on 30 March was wholly or mainly caused by the object strike of 29 March for the purposes of paragraph 5.2(b) of Schedule 8, for these reasons:

a. While GTR does have an obligation to maintain the railway vehicles which it puts into service as part of the no-fault risk allocation within the TAC, this could not decisively determine questions of causation, even if it were an absolute obligation. If it did, then delay arising from an ADD activation which immediately followed an object strike would logically have to be allocated to the train operator because the cause of the ADD would have to be ascribed to the defective condition of the unit, even though that condition had arisen only a fleeting moment beforehand. Network Rail expressly accepted that this would not be the correct outcome.

b. For the purposes of causation, therefore, it is necessary to consider whether the delay between the object strike and the ADD activation offered to GTR an opportunity to avoid the ADD activation in the realistic and practical sense in which causation must be approached in the real world.

c. It is not suggested by Network Rail that GTR knew of the object strike on 29 March.

d. As already explained, there is nothing in Schedule 8 which restricts attribution of delay on a given day to incidents occurring on that same day.

e. It is plainly not possible for every unit with a pantograph to be subjected to a physical pantograph inspection every night. Certainly it is GTR's case that this is not possible in the case of its own units, many of which of practical necessity have to be stabled in sidings, and Network Rail has not sought to adduce evidence to the contrary. Network Rail did raise the possibility of pantograph CCTV review as a prompt for physical inspection where the CCTV review suggests the possibility of damage. GTR described the CCTV review process which was in fact carried out after the ADD activation and for such a process to be carried out manually, in respect of each pantograph in the fleet and as a matter of nightly routine, is plainly not a practical proposition. No evidence was adduced as to the possibility of automated CCTV review using recognition software or the like and according to GTR the pantograph cameras in use on Class 387 units do not include a lowered pantograph within their field of vision.

f. So, on the evidence, I cannot conclude that there is any realistic and practical way in which GTR could have identified the pantograph damage overnight on 29/30 March as a matter of routine.

119. For these reasons, nothing which GTR did or failed to do as between the object strike and the ADD activation can be taken to have wholly or mainly caused the ADD activation within the meaning of paragraph 5.3(a) of Schedule 8. On these facts, in terms of causation, despite the lapse of time between the object strike and the ADD activation, the case is not materially different to the case of an ADD activation shortly after the object strike.

120. It follows that the ADD activation on 30 March was wholly or mainly caused by the object strike on 29 March by circumstances within the control of Network Rail in its capacity as operator of the network for the purposes of paragraph 5.2(b) of Schedule 8.

Application of definition of Prime Cause to the facts of the present dispute

121. As already discussed, under the DAG delay attribution is based on Prime Cause which is defined as "the immediate cause or event that results in delay to a train". Until the Prime Cause event occurs there will be no delay and without that event, delays would not have occurred. Prime cause is not a reaction to a previous incident. Where a delay that would not have ordinarily occurred is caused by a human error or oversight then that delay should be considered as a potential new prime cause." According to PGD1, "One of the key considerations to be made when identifying if an event is a new Prime Cause is what reasonable opportunities there were to mitigate the delay event occurring – if there was opportunity to prevent the occurrence then it could be considered a new Prime Cause."

122. **GTR's case** – GTR's case is that the immediate cause requirement creates a "last opportunity rule" and it follows that if a party has the opportunity to mitigate against the delay and fails to do so then the responsibility for delay should be attributed to that party. However if the party does not have the opportunity to mitigate, the delay should be attributed to whichever party was responsible for the Prime Cause.

123. GTR points out that PGD1 states that one of the key considerations to be made when identifying if an event is a new Prime Cause is what reasonable opportunities there were to mitigate delay event occurring. In the case of the incident in this dispute GTR says that there were no reasonable opportunities that GTR could have taken, which is why the Prime Cause should be attributed as the object strike on 29 March.

124. **Network Rail's case -** It is Network Rail's case that this dispute is to be resolved by applying the test of Prime Cause, that the object strike caused no delay, that the ADD activation did cause delay and that there is no Prime Cause until there is delay.

125. The Prime Cause is "The immediate cause or event that results in delay to a train …". On Network Rail's case "Immediate" in this context refers to the cause/event which is nearest in time to the delay occurring. This is distinct from the separate possible definition of 'immediate', which refers to something occurring instantaneously. In the vast majority of circumstances the two will be simultaneous i.e. the 'immediate' cause/event giving rise to delay will give rise to 'immediate' or instantaneous delay. In contrast, in a small minority of circumstances, the delay will not occur instantaneously to the incident causing delay occurring, but the latter can still properly be considered as the immediate cause/event. For example, if delay had occurred on 29 March sometime after the object strike but before GTR had had the opportunity to control or manage the circumstances (e.g. before GTR had had the opportunity to inspect and either repair or replace the unit), then the Prime Cause of the delay may well have been the object strike.

126. On the facts, the delay did not occur on 29 March. On Network Rail's case GTR had had the opportunity to control or manage the circumstances, e.g. to have a system in place which resulted in pantographs being checked overnight as a matter of course. It was as a result of GTR management decisions and undoubtedly in awareness of both its obligations in cl 6.1(a) of the TAC (see paragraph 5.5 of the Statement of Defence) and its agreed risk allocation in para 5.3 of Schedule 8, that there was no checking system in place and this pantograph was not checked.

127. Network Rail says that when, on 30 March, the unit failed, the cause, the Prime Cause, was the ADD activation. The ADD activation was "by circumstances within the control of [GTR]" (see Schedule 8, para 5.3(a)(ii)) and/or because of a "circumstance originating from or affecting rolling stock operated by … [GTR]…" (see Schedule 8, para 5.3(a)(iii)) and as such, properly attributable to GTR.

128. Prime Cause cannot be a reaction to a previous incident and on Network Rail's case the activation of the ADD is not a "reaction" to the object strike.

129. Network Rail contends that the absence of a manual inspection of the pantograph overnight on 29/30 March 2017 appears, on the facts, to have been a deliberate and positive decision of GTR in the context of how it chose to manage its agreed contractual risks as set out in Schedule 8 cl 5.3 of the TAC. "As such it seems inaccurate to describe it as either a human error or an oversight."

130. **Conclusion on the Prime Cause resulting in the delay** – In deciding whether the Prime Cause of the delay following the ADD activation was (i) the object strike of 29 March or (ii) the ADD activation itself, each part of the definition of Prime Cause needs to be considered:

131. **"the immediate cause or event that results in delay to a train"** – As Network Rail accepts, the word 'immediate' does not, in the sense the word is used here, mean that there can be no lapse of time as between the relevant cause or event on the one hand and the onset of the delay on the other. What is meant is *logically* immediate ("proximate"). The idea is very clearly articulated in paragraph 16.1 of the determination in AD39 (Access Dispute Resolution Committee, 5 October 2004) in these terms:

> "because delay only occurs once there is an actual incident, it should be attributed, as between the Train Operator and Network Rail, by reference to which body has the responsibility for the factor which makes the decisive difference between no Delay Incident and an actual Delay Incident."

132. Put another way, it is seeking to identify the party within whose area of responsibility lies the last opportunity to avoid the delay.

133. As Network Rail has said, the TAC does place on the train operator a contractual obligation to maintain trains in service. But as discussed above in relation to Schedule 8, causation must be approached in a realistic and practical way. As stated in PGD1, "One of the key considerations to be made when identifying if an event is a new Prime Cause is what reasonable opportunities there were to mitigate the delay event occurring – if there was opportunity to prevent the occurrence then it could be considered a new Prime Cause."

134. Network Rail says that "GTR had had the opportunity to control or manage the circumstances, e.g. to have a system in place which resulted in pantographs being checked overnight as a matter of course." but for the reasons already discussed, it was not a realistic or practical proposition for GTR to check all of its pantographs overnight as a matter of routine. So in the relevant realistic and practical sense, GTR did not have the opportunity to avoid the delay incident. They were presented with no "reasonable opportunities … to mitigate the delay event occurring". It follows that the immediate cause of the delay was the object strike and not the ADD activation.

135. **"Until the Prime Cause event occurs there will be no delay and without that event, delays would not have occurred"** – This part of the definition of Prime Cause is clearly met. Until the object strike there was no delay and without it the ADD activation would not have occurred and so there would have been no delay.

136. **"Prime cause is not a reaction to a previous incident"** – Neither party has suggested that the object strike was a reaction to an earlier incident.

137. **"Where a delay that would not have ordinarily occurred is caused by a human error or oversight then that delay should be considered as a potential new prime cause"** – Network Rail does not argue that GTR's failure to identify the pantograph damage was due to human error or oversight.

138. **Conclusion -** For these reasons I hold that the Prime Cause of the delay following the ADD activation on 30 March was the object strike on 29 March. As both Network Rail and GTR accept that an unidentified object was struck by unit number 387126 on 29 March 2017, Delay Code JX with an incident attribution to Network Rail is appropriate.

139. In the light of these conclusions, it is not necessary to address how an ADA should proceed in the event that it concludes that Schedule 8 and the DAG test of Prime Cause lead to different results. However, the textual differences between Schedule 8 and the definition of Prime Cause in the DAG are unsatisfactory and on different facts to those in the present dispute they might be capable of giving rise to different results. In Appendix "D" to this determination I set out some observations not forming part of this decision upon either legal entitlement or remedy (see Rule G48(j)(iii)) but highlighting some of the issues which might prompt consideration of drafting changes to the template Schedule 8 to avoid difficulties in the future.

Determination

140. Having carefully considered all submissions and evidence and based on my analysis of the issues and submissions, I determine as follows:

    a. With regard to the dispute concerning performance sums notified for resolution in accordance with the Rules and brought under paragraph 16.1, Schedule 8 of the TAC, I determine that the delay following the ADD activation on unit number 387126 on 30 March 2017 forming the 21:47 service from Cambridge to London Kings Cross service in the Potters Bar area should be allocated to Network Rail under the terms of paragraph 5.2(b) of Schedule 8 of the TAC.

    b. With regard to the determination sought by the parties under Condition B2.4.4 of the Network Code as a result of the parties' inability to agree on the attribution guidance of the DAB in Guidance No. DAB-44, I determine that the Prime Cause of the delay following the said ADD activation on 30 March 2017 was that an unidentified object was struck by unit number 387126 on 29 March 2017 and that Delay Code JX with an incident attribution to Network Rail is appropriate.

    c. As no circumstances of the kind referred to in Rule G54 exist in this ADA, I make no order as to costs.

Declaration by Hearing Chair

141. This determination is legally sound and appropriate in form.

Richard Butler
Hearing Chair

1 February 2018

APPENDIX "A"

Delay Attribution Board Guidance No. DAB-44

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

Guidance No: DAB-44

Attribution of Responsibility for train failures as a result of damage sustained by an object strike on the previous day

1. Introduction

The Delay Attribution Board (the Board) received a Request for Guidance in connection with the attribution of TRUST incident number 013036 involving in a unit failure (ADD activation) as a result of damage sustained following an object strike that occurred on the unit's previous day in service.

1.1. The Board received the joint Request for Guidance from Govia Thameslink Railway (GTR) and Network Rail Infrastructure Ltd (Network Rail) on the 10th August 2017.

1.2. The Board was asked the following:

1.2.1. Guidance from the Board is sought for the resolution of an issue which despite discussion at the required levels of escalation a solution has not been agreed.

1.2.2. To provide guidance regarding the responsibility and attribution of an incident where a train failure was as the result of damage sustained by an object strike the previous day.

1.2.3. Whether, in this circumstance, attribution would be to Operator responsibility in respect of the unit failure or to Network Rail as an object strike.

2. Information Received

2.1. The Parties have discussed the issues relevant to this matter, in accordance with the agreed procedures for obtaining agreement in relation to disputed attribution as set out in Part B of the Network Code. However, they have been unable to reach a common position. The Parties are therefore both agreed that the issues raised should be referred to the Board for guidance and have prepared a joint submission accordingly, incorporating their respective interpretations.

2.2 GTR was unaware of any damage sustained (on the 29th March 2017) until the failure of the train the following day and believe a degree of reasonableness should be applied. GTR therefore believes that Network Rail should be responsible and the incident allocated to Delay Code JX (MISC OBJ) or XO (EXT OBJECT) as appropriate.

2.3 Network Rail believes the incident should remain allocated to GTR responsibility as the unit entered service with a defect (whether known or unknown) resulting in an ADD operation and attributed to Delay Code M1 (PANTO/SHOE)

APPENDIX "A"

Delay Attribution Board Guidance No. DAB-44

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

3. Factual Background to the incident

3.1. The Parties submitted the agreed factual background and their respective views on how the incident should be attributed:

3.1.1 On 30th March 2017, 1C27 (Unit 387126) experienced an ADD activation in the Potters Bar area coming to a stand in New Barnet station.

3.1.2. The unit, number 387126, was travelling from Cambridge to Kings Cross.

3.1.3 The driver examined the pantograph from ground level at 22:30 hours but was unable to see any damage.

3.1.4 At 23:05 it was logged by the SSM Kings Cross PSB that the down fast, down slow and up slow have been examined and normal running had resumed.

3.1.5 Unit 387126 was assisted to Hornsey Depot where damage was found to the carbon and the external metal of the pantograph.

3.1.6 Pantographic camera footage was subsequently reviewed and the damage was found to have been sustained the previous day (29th March 2017) whilst the unit was working 1C63 Cambridge to Kings Cross between Potters Bar and Alexandra Palace on the up fast line.

3.1.7 The camera footage showed a foreign object striking the pantograph but the origin and identity of this object is unknown.

3.1.8 The unit did not incur any problems at this point and it continued in service for the rest of the day, finally being stabled overnight at Peterborough Nene sidings after arriving there at 22:15.

3.1.9 On 30th March 2017 at 05:33 the unit worked 5P03 to Peterborough Station to form 1P03 Peterborough to Kings Cross.

3.1.10 387126 went on to work one return trip from Kings Cross to Peterborough before being stabled at Welwyn Garden City sidings later that morning.

3.1.11 The unit was at Welwyn Garden City sidings from 11:19 to 16:35, when it returned to service working three more return trips between Cambridge and Kings Cross before the ADD activation occurred.

3.2 The incident was attributed to GTR responsibility (M1 Delay Code) based on the information available at the time of the incident occurring under DAG reference 4.4.1.2(a) and 4.12.4.2(e)

3.3 The cause of damage was identified (and is not being disputed by Network Rail) as damage sustained due to an object strike the previous day (29th March 2017).

4. Operator's View

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

4.1 GTR has supplied Network Rail with several pieces of evidence to support the GTR view that it is unreasonable to believe GTR should or could have prior knowledge of the damage which had been caused.

4.2 GTR provided the following appendices to support this submission but they are not replicated in this Guidance Note:-

- Appendix 1 - 387126 Unit diagram for 29th and 30th March 2017
- Appendix 2 - Still shots taken from the Pan camera
- Appendix 3 - Unit maintenance history.

4.3 GTR believes it was not possible to mitigate the ADD activation as GTR was unaware of the damage caused the previous day. Diagnostics cannot be used to find this type of issue and so could only have been identified during a specific visual inspection.

4.4 Information from GTR was requested by Network Rail as to why the pantograph was not checked before the unit went into service 30th March 2017, GTR responded that the train was stabled overnight in Peterborough Nene sidings. There are no facilities at this location to check pantographs, the lighting is poor and most importantly an isolation would have to be taken which would affect other Operators both on and off Network. GTR does not believe it is reasonable for Train Operators to check pantographs each time a train comes into or out of service when there is no prior knowledge of any unit issues.

4.5 Whilst GTR has investigated and demonstrated that the train was struck by a foreign object neither GTR nor Network Rail have been able to ascertain what the object was, where it originated from or how it came to be in contact with the train.

4.6 As the object and its origin are unidentified a specific cause code cannot be cited. Therefore GTR believes this incident should be coded to either Delay Code XO as a general external object or in accordance with the guidance and principles set out in DAG 4.15.2.4(g or i) where the Parties agree the train has struck an unidentified object and apply Delay Code JX.

4.7 GTR does not believe DAG 4.4.1.2(a) or 4.12.4.2(e) applies in this instance as GTR does not believe the cause of the incident to be a unit fault as the cause of the damage has been identified.

4.8 It is unreasonable and unrealistic to assume Train Operators should be able to check every pantograph prior to entering service. There are not enough Depots in which to stable every train overnight and the Network and its sidings do not provide adequate safety and lighting for staff to do a visual inspection of the pantograph. Overhead power needs to be isolated each time a staff member checks a pantograph. If Network Rail expects Train Operators to check every pantograph prior to entering service a lot of work will have to be done on the timetable to ensure each unit can be returned to Depot and checked each evening before being sent back out to the sidings where they will be stabled until the next duty.

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

5. Network Rail's View

5.1. Network Rail acknowledges that the root cause of the failure may well have been the object strike the previous day as identified in the CCTV footage.

5.2. As no infrastructure damage was sustained or any reports received on the day of the object strike, Network Rail was not aware of it and therefore did not attend site to examine possible causes or identify the object. Network Rail was advised of the GTR findings through the dispute process on 31 March 2017 - 2 days after the strike and therefore had no opportunity to examine the lineside. No delays were incurred as a result of this event.

5.3. Network Rail cannot confirm what the object was or how it came to be in contact with the train nor can Network Rail categorically conclude it was the ultimate cause of the failure and ADD activation.

5.4. Network Rail has reviewed the photographs forwarded by GTR of the damaged Pantograph and finds it remarkable that the ADD did not operate at the time of the impact. Particularly as the GTR Performance Support Engineer stated that the damage caused a large air leak.

5.5. Similarly Network Rail acknowledges GTR's view that it could not effectively identify that there was any damage to the unit prior to entering service, but ultimately it is GTR's responsibility to carry out any relevant pre-service checks and the unit did enter service with a (subsequently identified) defect. It is the Train Operators responsibility to ensure any train entering service is fit to do so.

5.6. The unit ran all the next day with no adverse effects or defect reports until the ADD activation. Potentially this train could have run around for days with this defect before finally succumbing to the damage sustained from the object strike.

5.7. The object strike and failure are not instantaneous and it is believed that GTR is the only Party that could mitigate the incident from occurring. Network Rail therefore believes that DAG (as in play at the time) 4.4.1.2a applies in this scenario and the incident should be coded to M1 as GTR responsibility.

5.8. Network Rail believes that guidance on the correct attribution of this incident exists in the following sources:

5.8.1. The Delay Attribution Guide (now DAPR) requires attribution to prime cause. This is defined as "The immediate cause or event that results in delay to a train is known as 'Prime Cause'. Until a Prime cause has occurred there will be no delay to a train

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

service. For the avoidance of doubt, 'Prime Cause' cannot be a reaction to a previous incident."

5.8.2. Examples of the Application of Prime Cause can be found in DAB Process and Guidance Document PGD1. Example 9 and example 10 in PGD1 illustrate circumstances where an event on one day has impact on a following day and the attribution is to the cause of delay on the following day, not the cause of the incident on a previous day.

5.9. Network Rail understands that precedent has been set for the attribution of responsibility for incidents of this type, such as:

5.9.1. Guidance note: DAB-5 refers to an incident on a day where a unit failed and, although it was established the root cause originated from a Network issue the previous day, the DAB found the TOC responsible because the delay was "circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation)".

5.9.2. Determination: ADP 11 reached the same conclusion as DAB-5. ADP11 applied the principle that responsibility under Schedule 8 was allocated in relation to the circumstances at the time that the delay commenced - not an event that occurred the previous day.

5.9.3. Determination: ADP30 (object strike at Elstree Tunnel) the incident was deemed the responsibility of Network Rail as it was established that the unit entered service in a fit state and that the object strike (no object was located) was instantaneous with the failure which caused the delay (air loss and brake application).

5.10. Network Rail believes the events of the 29th March 2017 are separate to those on the 30th March 2017 and that Network Rail had no opportunity to have prevented the

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

delay. The object strike incident occurring on the 29th March 2017 resulted in no delay being incurred.

5.11. Network Rail believes that Schedule 8 Paragraph 5.3a (ii and iii) apply in this instance and specifies that an Operator is deemed responsible where an incident;

(a) is caused wholly or mainly:

(ii) (whether or not the Train Operator is at fault) by circumstances within the control of the Train Operator in its capacity as an operator of trains; or

(iii) (whether or not the Train Operator is at fault) by any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation),

5.12. Network Rail therefore asserts that the delay attribution and subsequent responsibility for TRUST incident 013036 should be based on the known facts. The delay incident was caused by the ADD activation on 1C27 on the 30th March 2017. Attribution should therefore be to GTR with Delay Code M1.

6. Locus of the Board

6.1 The Board reviewed its locus in respect of providing guidance on this issue. The Board's locus to provide guidance is set out in the Network Code Conditions B2.4.3 and B6.1.3.

6.2 The Board noted that while it could offer guidance to the Parties regarding how incidents of this nature should be attributed, this guidance was not binding on either Party. If either of the Access Parties were dissatisfied with the guidance provided they could refer the matter to Access Dispute Adjudication (ADA).

6.3 If the issue was referred to ADA, then an Access Dispute Adjudication Panel (ADA Panel) would be formed to consider the dispute. In doing so, the ADA Panel would take account of the guidance provided by the Board but would not be bound by it. The ADA Panel would then make a determination that was binding on the Parties concerned. This document is therefore being prepared as the vehicle for providing the guidance and the reasons for how the Board arrived at its position both to the Parties and, if necessary, to the relevant ADA Panel.

6.4 The Board agreed that it should seek to provide guidance that meets with the delay attribution vision:

"For all parties to work together to achieve the prime objective of delay attribution - to accurately identify the prime cause of delay to train services for improvement purposes".

6.5 The Board would need to consider if, in providing guidance, an amendment to the Delay Attribution Guide should be proposed, to improve clarity.

APPENDIX "A"

Delay Attribution Board Guidance No. DAB-44

DAB
Delay Attribution Board

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

7 Consideration of the Issues

7.1 The Board at its meeting on 26th September 2017, considered the Request for Guidance and took account of the following:

7.1.1 The facts provided by both GTR and Network Rail in connection with the incidents disputed between the Parties and their Request for Guidance.

7.1.2 The information provided by the representatives in response to questions raised by the Board prior to the Board Meeting (Set out in Appendix A).

7.1.3 Additional information provided by the representatives of GTR and Network Rail at the Board Meeting (Set out in Appendix B).

7.1.4 The guidance provided within the Delay Attribution Guide (that was in place at the time of the incident occurring, prior to the name change in this case) and any prior related DAB Guidance.

7.2 In coming to its conclusion the Board regarded the following points as particularly relevant:

7.2.1 The definition of Prime Cause as set out in DAG 2.7.1

7.2.2 The conclusion of and principles prescribed in Access Dispute Determination AD39 (Colchester train fire)

7.2.3 No delay event occurred at the point of the object strike.

7.2.4 It is an Operator's responsibility to ensure that trains entering service are fit for operation.

APPENDIX "A"

Delay Attribution Board Guidance No. DAB-44

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

8 Guidance of the Board

8.1 Based on the information presented in respect of the disputed incidents the Board agreed by majority vote (9 in support, 2 not in support), the following:

8.1.1 That GTR should be wholly responsible in terms of Delay Attribution for the incident;

8.1.2 That in line with the Delay Attribution Guide in force at the time, the incident should be attributed to the Operator;

8.1.3 The DAPR requires reviewing to ensure that the principles and rules that should be applied to incidents of this nature (prior day issue causing a next day delay event) is clearly prescribed.

8.2 In line with the Delay Attribution Guide in force at the time, the incident should be allocated to Delay Code M1

This guidance was approved by the Delay Attribution Board on 24th October 2017	Richard Morris (Chairman)
Signature:	

APPENDIX A

Questions submitted by Board members and the respective responses from GTR and Network Rail in advance of the meeting.

Questions for GTR:-

Q - Did the unit traverse that specific piece of line since the object strike?

A - Not as far as GTR is aware. However, GTR do not believe this question is relevant.

Questions for Network Rail:-

Q - Does Network Rail expect Train Operators to inspect all aspects of a train before entering service from a non-depot location?

A - Network Rail would expect trains to enter operation fit for service and without inherent risk to failure on the Network. Network Rail would expect train crew to inspect trains in a manner that is compliant with relevant safety and regulatory standards. The due diligence of such inspections is out-with Network Rail responsibility.

Q - Where does the reference to the air leak come from mentioned in Bullet 5.4, as there is no other reference - is this actually relevant to the ADD or not?

A - The source of the reference is from the GTR Performance Support Engineer. The relevance of this reference from the Network Rail perspective is that where the impact was

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

sufficient to cause a large air leak it was remarkable that the ADD did not operate at the time of the impact

APPENDIX B

Additional information provided by Network Rail and GoVia Thameslink Railway during further questioning by Board members at the meeting.

Q - How regularly does GTR review the PAN CAM footage - is it proactively or reactively?

A - Believed it is reviewed as required.

Q - How regularly does GTR examine the pantographs on trains?

A - Pantographs are checked when trains are on the maintenance depots using cherry pickers but obviously require OLE isolations to do so otherwise will be as required.

Q - What do both Parties feel is 'reasonable' in terms of the number of days between an object strike and train failure?

A - (NR) - Same day as next day there is opportunity to mitigate overnight, it is just up to the TOC if they take that opportunity.

A - (GTR) - Had the train gone into a depot that night and the opportunity to examine the train wasn't taken then GTR would agree with the NR stance. Usually trains go to depot every 2 days.

Q - Can GTR confirm there was no trigger to examine the pantograph?

A - No, until the pantograph camera footage was reviewed there was no indication that the train had struck anything.

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

Q - Does GTR believe that it has a contractual obligation to provide stock for service in a fit state?

A - Yes GTR does believe that it has a contractual obligation to provide stock for service in a fit state but in this case no damage was known about so it did not enter service with a known defect.

Q - What do the Parties believe to be the Prime Cause in this instance?

A - (NR) - Train failure. The object strike is seen to be the Root Cause

A - (GTR) - Train failure but as caused by the unknown object strike.

Q - On the day of the incident occurring, which Party is believed to be in the best position to mitigate that incident?

A - (NR) - Train Operator as a defective pantograph.

A - (GTR) GTR could not mitigate as the defect was not known about or possible to identify whilst stabled.

Q - Did NR examine the OLE and site of the incident?

A - Yes, the site was examined.

Q - Can NR clarify the site exam - was it at the location of the object strike or ADD activation?

A - It was at the site of the ADD activation as the object strike was not known about at the time of the incident.

Q - Was the object strike and train failure at the same location?

A - They were in the same section but on the UP and DOWN lines

Q - Is it agreed beyond doubt that the object strike on the previous day caused the train failure on the next day?

A - (GTR) - The pantograph camera was fully reviewed and the object strike was all that could be identified. The failure itself occurred at night so as it was dark nothing could be ascertained at that point.

Q - NR mentions the 22.00 cut off for agreeing the plan of the day. Does NR believe that as the train was still in service post 22.00 that could constitute a same day incident?

A - Regardless of the 22.00 cut off in this instance GTR provided a train for service with a defect. NR will accept incidents to infrastructure defects in similar circumstances. For example a train hit the buffer stops at Kings Cross on a Thursday. The resulting delays on the Friday due to the resulting infrastructure restriction were taken by NR, regardless of the known cause.

APPENDIX "A"

Delay Attribution Board Guidance No. DAB-44

Delay Attribution Board
Floor 8
1 Eversholt Street
London
NW1 2DN

APPENDIX "B"

Response (sent on 24 November 2017) to request for extension to the date of service for the Statement of Defence

"Having considered the Principles and the specific objectives of the ADA process to endeavour to reach fair, rapid and inexpensive determinations balancing the formality to achieve a fair and efficient process with the accessibility required so that the process is quick and easy to use (ADR Rule G4) and my present understanding of the objective importance of the dispute to Govia Thameslink Railway Ltd ("GTR") and NR, the likely complexity of the issues, the likely significance of the issues to the industry and the likely scale of financial issues (ADR Rule G5) I direct under ADR Rule G12 that the timetable initially indicated to the parties should be adhered to. My reasons are:

1 The written legal submissions which the parties have been directed to serve by 1700 on Tuesday 9 January 2018 need to be informed by and to respond to the itemised list of legal issues referred to in ADR Rule G9(c). My obligation as Hearing Chair is to provide that list "promptly" and for the benefit of the parties and their advisors; my intention is to supply the list before Christmas to give the maximum possible time for preparation of legal submissions.

2 If, as sought by Eversheds Sutherland, I direct an extension of the date for service of the Statement of Defence of 7 days to 1700 on 15 December 2017, the consequential extension to GTR of time for service of the Reply to 1700 on 22 December 2017 will make it practically impossible for me to distil the issues from the statements of case and to itemise them in the list before Christmas.

3 On the other hand, since GTR has already set out the substance of its appeal in the Notice of Dispute and since NR already knows the facts put before the Delay Attribution Board, NR and its advisors are already equipped to analyse NR's case to a very significant extent, leaving the time after receipt of GTR's formal statement of case for articulating their analysis in the formal defence in answer to the particular way the statement of case is put.

4 I appreciate that Lee Latham of GTR will be on annual leave from 14 December 2017 and it may well be that she is unable to have input following GTR's receipt of the list of issues until after Christmas. But GTR more generally, and NR and its advisors will benefit from having the maximum amount of time to prepare submissions if the original timetable is kept.

The normal method of service of documents in an ADA is electronically to the Secretary and to the parties (ADR Rule G22). I would ask that the parties and their advisors use this method unless there are pressing reasons (for instance, the provision of large scale engineering drawings) and even then, that the bulk of any given communication is electronic even if hard copies of selected documents have to be delivered."

APPENDIX "C"

Paragraph 5, Schedule 8 of the TAC

5 Allocation of responsibility for Minutes Delay and Cancelled Stops

5.1 Assessment of incidents causing Minutes Delay and Cancelled Stops

(a) In assessing the cause of any Minutes Delay or Cancelled Stop, there shall be taken into account all incidents contributing thereto including:

(i) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents; and

(ii) where a Restriction of Use overruns due to the start of such Restriction of Use being delayed by a late running Train, the incident(s) giving rise to that late running;

(b) The parties shall take reasonable steps to avoid and mitigate the effects of any incidents upon the Trains and any failure to take such steps shall be regarded as a separate incident;

(c) Network Rail shall identify:

(i) in respect of each incident recorded under paragraph 4.1(e)(i) as causing Minutes Delay, the extent to which that incident caused each of the Minutes Delay; and

(ii) in respect of each incident recorded under paragraph 4.1(b), the extent to which that incident caused the Cancelled Stop;

(d) So far as Network Rail is reasonably able to do so, it shall identify whether responsibility for incidents causing Minutes Delay or Cancelled Stops is to be allocated to Network Rail or to the Train Operator or to them jointly in accordance with the following provisions of this paragraph 5.

5.2 Network Rail responsibility incidents

Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which Network Rail is allocated responsibility pursuant to this paragraph 5.2 shall be allocated to Network Rail. Unless and to the extent otherwise agreed, Network Rail shall be allocated responsibility for an incident other than a planned incident (as defined in paragraph 5.7), if that incident is caused wholly or mainly:

(a) by breach by Network Rail of any of its obligations under this contract; or

(b) (whether or not Network Rail is at fault) by circumstances within the control of Network Rail in its capacity as operator of the Network; or

(c) (whether or not Network Rail is at fault) by any act, omission or circumstance originating from or affecting the Network (including its operation), including, subject to paragraph 5.3(b)(i), any incident in connection with rolling stock on the Network for which any train operator other than the Train Operator would be allocated responsibility if it were the Train Operator under this contract.

5.3 Train Operator responsibility incidents

Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which the Train Operator is allocated responsibility pursuant to this paragraph 5.3 shall be allocated to the Train Operator. Unless and to the extent otherwise agreed, the Train Operator shall be allocated responsibility for an incident other than a planned incident (as defined in paragraph 5.7) if that incident:

(a) is caused wholly or mainly:

(i) by breach by the Train Operator of any of its obligations under this contract; or

(ii) (whether or not the Train Operator is at fault) by circumstances within the control of the Train Operator in its capacity as an operator of trains; or

(iii) (whether or not the Train Operator is at fault) by any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation), including any such act, omission or circumstance originating in connection with or at any station (other than in connection with signalling under the control of Network Rail at that station or physical works undertaken by Network Rail at that station), any light maintenance depot or any network other than the Network; or

(b) causes delay to:

(i) rolling stock operated by or on behalf of another train operator which is delayed in entering or leaving the Network due to any act, omission or circumstance originating in connection with a light maintenance depot or network other than the Network and, as a result of that delay, rolling stock operated by or on behalf of the Train Operator which is scheduled to leave or enter the Network at the connection with that light maintenance depot or other network is then delayed behind the first mentioned rolling stock; or

(ii) the commencement of a Train's journey, which is caused by the late running for any reason whatever of any rolling stock included in that Train when that rolling stock is operated by or on behalf of another train operator.

5.4 Joint responsibility incidents

(a) Network Rail and the Train Operator shall be allocated joint responsibility for:

(i) any incident which is not a planned incident (as defined in paragraph 5.7), caused by an act, omission or circumstance originating in connection with or at a station which:

(1) is an act, omission or circumstance which affects the Network, or its operation, and prevents a Train entering or passing through a station at the time it is scheduled to do so; and

(2) prevents the access of passengers through the station to or from the Train;

and paragraphs 5.2 and 5.3 shall not apply to any such incident; or

(ii) any identified incident in respect of which Network Rail and the Train Operator are equally responsible and for which neither Network Rail nor the Train Operator is allocated responsibility under paragraph 5.2 or 5.3.

(b) Unless and to the extent otherwise agreed, Minutes Delay or Cancelled Stops caused by incidents for which Network Rail and the Train Operator are allocated joint responsibility pursuant to paragraph 5.4(a) shall be allocated 50% to Network Rail and 50% to the Train Operator.

APPENDIX "D"

Issues for future consideration in the drafting of Template Schedule 8

1. These observations concern the relationship between the Schedule 8 regime contained in the TAC on the one hand, and the scheme set out in the DAG on the other. On the face of it, these are two quite distinct parallel regimes. Schedule 8 is concerned with the calculation of Performance Sums and the attribution of delay for the purposes of those calculations. The DAG is concerned with the accurate and consistent recording of the prime cause of delay for performance improvement purposes. The two regimes use different language and disputes about them are brought before the Access Disputes Committee by different routes (under paragraph 16.1, Schedule 8 of the TAC in the case of a notified dispute concerning performance sums and under Condition B2.4.4 of the Network Code in the case of parties who cannot agree on the attribution guidance of the DAB).

2. Earlier determinations by the Access Dispute Resolution Committee have addressed these contrasts in varying ways, giving varying emphasis to one or other in a manner which might have been influenced by the route taken, but in general the approach has been largely to elide the two regimes.

3. The different causation language used in the two regimes is, on a textual basis, conflicting. Under the Schedule 8 regime, all incidents which contributed to the Minutes Delay must be identified (para 5.1(a)) and attribution then depends on identifying what "wholly or mainly" caused that incident (para 5.2, 2nd sentence and para 5.3, 2nd sentence). In ADA33, although Network Rail did not welcome the description of this causation test as "a dominant cause" test, this does not seem to be an inapt short-hand label for it and GTR was content to adopt the label.

4. The 18 September 2016 version of the DAG, which was the edition relevant to ADA33, contained at para 3.3.1 the words "The Guide reflects the principles of the Track Access Contract and Network Code as set out in the Track Access Contract in Schedule 8 and in the Network Code, Part B. As this document is a guide and not a contractual document, the guide may not be a perfectly accurate reflection of those contractual entitlements." The words "not a contractual document" left no doubt that insofar as there may be conflicts as between the DAG and provisions internal to the TAC, then the TAC (specifically Schedule 8) must prevail. However, the Delay Attribution Principles and Rules which came into effect on 1 June 2017 are worded differently. The equivalent provision, C1.1, says simply that "This document reflects the principles of the Track Access Contract and Network Code as set out in the Track Access Contract in Schedule 8 and in the Network Code, Part B."

5. Condition B 1.3 of the Network Code, on its present wording, incorporates the Delay Attribution Principles and Rules into the Network Code such that they are to be taken to form part of the Network Code, i.e. to be as if internal to the Network Code. And by Condition A1 1.1 (h) of the Network Code the order of precedence is: (1) the Network Code and then (2) the Access Agreement.

6. This change seems to tilt the balance decisively towards the primacy of the DAG over Schedule 8. But it also sharpens the conflicts referred to in this appendix and arguably makes

the need to address these conflicts more important. If there is wording in Schedule 8 which is inconsistent with the Delay Attribution Principles and Rules and which is redundant because of the primacy of the latter, then it is at best confusing and it could well give rise to future disputes over the extent of the redundancy.

7. In the general law, the decision of the House of Lords in the case of *Leyland Shipping Company Limited* v *Norwich Union Fire Insurance Society Limited* [1918] A.C. 350 (which was not referred to in ADA33 and which played no part in its determination) illustrates and explains the operation of the "dominant cause" test in a contractual context.

8. In contrast, delay attribution under the DAG is based on the concept of Prime Cause which is defined as "the immediate cause or event that results in delay to a train". On the ordinary meaning of these words, this is a different approach to causation because it is addressing what is often referred to in the general law as "proximate cause" or, as it is sometimes put, it creates a "last opportunity rule" of causation. Again, in ADA33 it should be recorded that Network Rail did not welcome the introduction of such further terms. For its part, GTR adopted the view that the immediate cause requirement does create a "last opportunity rule".

9. *Davies* v *Mann* (1842) 10 M&W 546; 152 ER 588 350 (which again was not referred to in ADA33 and which played no part in its determination) is the classic illustration in the general law of a causation test based on "immediate cause", although it is a tort and not a contract case. These two cases, and particularly the *Leyland Shipping* case, illustrate just how different these tests are as seen through the eyes of judges.

10. What is described here as a dominant cause test ("wholly or mainly", in the language of Schedule 8) is language seeking the most potent (or influential) cause of a contributory incident. It is by no means inevitable that that cause is the same as Prime Cause, given that Prime Cause is defined as "the immediate cause" of the delay. Where a delay arises from several causes, the immediate cause will ordinarily be the last in time whereas the dominant cause could well be an earlier one.

11. By paragraph 5.1(a), where there is more than one "incident", allocation of responsibility for those recorded Minutes Delay first requires Network Rail to identify the incidents which must be considered, which will include, as appropriate, contributory incidents and deemed incidents:

    (a) **Contributory incidents** - All incidents which contributed to the Minutes Delay (para 5.1(a)). As a matter of logic, contributory incidents include (i) incidents but for which the delay would not have occurred; (ii) incidents but for which the delay would have been shorter; and (iii) incidents which are concurrent contributors to the Minutes Delay (incidents A and B where, but for B there would have been as much or some delay because of A and but for A there would have been as much or some delay because of B) and (iv) the specific case dealt with in para 5.1 (a)(ii), namely "where a Restriction of Use overruns due to the start of such Restriction of Use being delayed by a late running Train, the incident(s) giving rise to that late running".

(b) **Deemed incidents** - Failure to take reasonable steps to avoid or mitigate the effect of an incident (para 5.1(a)(i) and 5.1(b)) is to be treated as if it were a separate incident.

12. The next stage of the Schedule 8 procedure is to identify what wholly or mainly caused each contributory incident. On a superficial reading of sub-paragraphs 5.2, 5.3 and 5.4 of Schedule 8 it might seem that this results in one of three possible attributions of those Minutes Delay:

a. For all of the Minutes Delay to be attributed to Network Rail under sub-paragraph 5.2

b. For all of the Minutes Delay to be attributed to the train operator under sub-paragraph 5.3

c. In the special cases referred to in sub-paragraph 5.4, for all of the Minutes Delay to be allocated to Network Rail and to the train operator on a 50:50 basis.

13. But on a closer reading of the words used in paragraph 5, that does not appear to be its effect. In a case involving several contributory incidents, under sub-paragraph 5.1(d) Network Rail is required to identify responsibility for each incident by identifying whether its dominant cause falls within 5.2 or 5.3. On the literal reading of this requirement, where there are (say) two contributory incidents, one caused by a circumstance within 5.2 (a) or (b) or (c) and the other caused by a circumstance within 5.3 (a) or (b), then an apportionment of the Minutes Delay is required by para 5.1(c)(i) ("… the extent to which …") coupled with the absence of any "no-apportionment" language in 5.2 and 5.3 and the fact that those sub-paragraphs are dealing with allocation of responsibility for "incidents" and not "delay". This is so even outside the special case of 5.4. This is not the way in which Schedule 8 is operated in practice, but it is hard to escape the literal meaning of the words used.

14. As to the DAG, section A1.1 of the Delay Attribution Principles and Rules explains the rationale for the DAG in these terms:

"1.1.1 The accurate identification of the causes of Minutes Delay, Cancellations, Diversions and other events is of prime importance to enable all parties to whom delay is attributed to identify action plans to improve operational performance. The Delay Attribution Vision and Statement of Good Practice (shown at the front of this document) underpins the way in which this will be achieved.

1.1.2 This document gives guidance on coding and attribution of 'Minutes Delay' and Cancellations so that there is a consistency of application and approach by all parties involved in the process of Delay Attribution."

15. So the stated function of the DAG is the improvement of functional performance. On its face it does not purport to offer guidance material to the calculation of Performance Sums or the assessment of Minutes Delay for the purpose of calculating Performance Sums, which is left to be regulated by Schedule 8 of the TAC. As para 3.1.1 of the DAG explains "The Guide reflects the principles of the Track Access Contract and Network Code as set out in the Track Access Contract in Schedule 8 and in the Network Code, Part B. As this document is a guide

and not a contractual document, the guide may not be a perfectly accurate reflection of those contractual entitlements." (emphasis supplied);

16. The DAG is seeking to put incentives in the right place for performance improvement purposes. The incentive could have been placed on the industry party within whose sphere of responsibility the original incident occurred. But in fact, the DAG places the incentive instead on the industry party within whose sphere of responsibility the main opportunities for avoiding or minimising the delay consequences are likely to arise.

17. The PGD1 analysis of example 9 for the purposes of the definition of Prime Cause in the DAG is not inevitably the same as a Schedule 8 analysis based on the same facts. Under the Schedule 8 regime, the contributing incidents are (i) the obstruction placed on the track by the vandal; (ii) the train hit, (iii) the cracked rail, (iv) the ESR. Depending on the circumstances, the dominant cause of incidents (ii), (iii) and (iv) might very well be (i), and the causative potency of (i) is not necessarily dissipated overnight.

18. So, for these reasons, I recommend that consideration be given to revision of the current wording of Schedule 8 in the light of (at least) the answers to these questions:

    a. Is the concept of contributory incidents in para 5.1(a) a helpful one?

    b. Is it compatible with the concept of Prime Cause?

    c. If apportionment of Minutes Delay arising from multiple contributory incidents is not to be possible outside the special case of para 5.4, should the wording of 5.1 and 5.2 and 5.3 be amended to make this clear?

    d. Should the dominant cause language in the second sentences of 5.2 and 5.3 be changed to reflect the "immediate cause" language of the definition of Prime Cause in the DAG?