

***Statement of Claim ADA06***  
***for determination by Access Dispute Adjudication (“ADA”)***  
***in accordance with the provisions of***  
***Chapter G of the ADR Rules***

**1 DETAILS OF PARTIES**

1.1 The names and addresses of the parties to the reference are as follows:-

- (a) First Greater Western Limited (Company number 05113733) whose Registered Office is at Milford House, 1 Milford Street, Swindon SN1 1HL (“First Greater Western”, “First Great Western” or “FGW”) (“the Claimant”);
- (b) Network Rail Infrastructure Limited (Company number 2904587) whose Registered Office is at Kings Place, 90 York Way, London, N1 9AG (“Network Rail” or “NR”) (“the Respondent”);
- (c) Day to day contact with First Greater Western regarding this claim should be made through [REDACTED]; and
- (d) Day to day contact with Network Rail regarding this claim should be made through [REDACTED].

1.2 FGW is aware that any train operator which has a Schedule 4 in its Track Access Contract with Network Rail consistent with the Office of Rail Regulation template track access contract may be affected by the ADA finding in any of the ways sought in this sole reference. The affected parties should seek the guidance of the Hearing Chair as to any format to be used in respect of their representations.

## **2 THE CLAIMANT'S RIGHT TO BRING THIS REFERENCE**

- 2.1 This matter is referred to an Access Dispute Adjudication ("ADA") for determination in accordance with Part 3 of Schedule 4 of the Track Access Contract (Passenger Services) dated 8th December 2006 between Network Rail Infrastructure Ltd. and First Greater Western Ltd. ("The TAC").
- 2.2 The Dispute concerns interpretation of RoU Direct Costs under Type 2 Restriction of Use. The disputes process for this is defined in the contract at paragraph 13.3 of Part 3 of Schedule 4 of The TAC, and users are directed to this paragraph through paragraph 10 of the same Part 3 which refers (amongst others) to failure to reach agreement under paragraph 6 of the same Part 3, where paragraph 6 of the same Part 3 outlines arrangements for, "ROU Direct Costs compensation for Type 2 restrictions of Use".
- 2.3 Paragraph 13.3 of Part 3 of Schedule 4 of The TAC refers back to sub-paragraphs 1 and 2 of the same paragraph 13, thus reproduced here is the complete paragraph 13.1 to 13.3 of Part 3 of Schedule 4 of The TAC,

### *"13.1 Network Rail Restrictions of Use*

- (a) Within 14 days after the end of each Period, Network Rail shall provide to the Train Operator a statement (the "Day 42 Statement") showing:
- (i) all Network Rail Restrictions of Use taken during that Period;
  - (ii) any compensation calculated in accordance with paragraphs 3 and/or 4 payable by Network Rail in respect of the Network Rail Restrictions of Use identified; and
  - (iii) following any agreement or determination in the Period referred to in paragraph 13.1(a) of any RoU Losses in respect of a Type 2 Restriction of Use, a Type 3 Restriction of Use or a Sustained Planned Disruption (as applicable), any payment to be made by one party to the other,
- in sufficient detail to enable the Train Operator to make an informed assessment thereof.
- (b) The aggregate liabilities of Network Rail and the Train Operator, in respect of any and all compensation for which either is liable to the other under this Part 3 and under Part 5 in respect of each Period shall, to the extent that such compensation is not under dispute, be set off against each other and the balance (if any) shall be payable by Network Rail or the Train Operator, as the case may be, within 35 days after the end of that Period.

### *"13.2 Disputes*

Within 10 days of receipt of a statement from Network Rail under paragraph 13.1, the Train Operator shall notify Network Rail of any aspects of the statement which it disputes, giving

reasons for any dispute. Save to the extent that disputes are so notified, the Train Operator shall be deemed to have agreed the contents of the statement.

*“13.3 Dispute resolution*

The procedure for resolving disputes notified under paragraph 13.2 shall be as follows:

- (c) within seven days of service of any notice under paragraph 13.2, the parties shall meet to discuss the disputed aspects of the statement with a view to resolving all disputes in good faith;
- (d) if, within seven days of that meeting (the “first meeting”), the parties are for any reason still unable to agree the disputed aspects of the statement, each party shall promptly (and in any event within seven days) prepare a written summary of the disputed aspects of the statement and the reasons for each such dispute and shall submit the summaries to the senior officer of each party;
- (e) within 28 days of the first meeting, the senior officers shall meet with a view to resolving all disputes;
- (f) if no resolution results within 14 days of that meeting, either party may require that the matter be resolved by the relevant ADRR Panel; and
- (g) if either party is dissatisfied with the decision of the relevant ADRR Panel or the ruling of the Disputes Chairman (as the case may be), such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules (except that paragraph C6.3 of those rules shall not apply).

2.4 We are at present therefore at the stage shown at paragraph 13.3 (f) of Part 3 of Schedule 4 of The TAC.

### **3 CONTENTS OF REFERENCE**

This Statement of Claim includes:-

- (a) The subject matter of the dispute in Section 4;
- (b) A summary of the issues in dispute in Section 5;
- (c) A detailed explanation of the issues in dispute prepared by the claimant;
- (d) In Section 7, the decisions of principle sought from the ADA in respect of
  - (i) legal entitlement and
  - (ii) remedies;
- (e) Appendices and other supporting material.

#### **4 SUBJECT MATTER OF DISPUTE**

- 4.1 This is a dispute concerning the interpretation (or meaning) of the definition of RoU Direct Costs in Part 3 of Schedule 4 of The TAC, and in particular the scope of the term in line (c) of that definition referring to train planning and diagramming costs.
- 4.2 Compensation arrangements for Type 2 Restrictions of Use are outlined in paragraph 6 of Part 3 of schedule 4 of The TAC. Paragraph 6 refers to comparison of RoU Direct Costs with the formulaic compensation provided. There is agreement by the parties that the Restriction of Use in question is a Type 2 Restriction of Use or that the process has been followed correctly. Indeed compensation has been agreed and paid for all other aspects of this transaction, leaving this discrete element of compensation isolated in dispute.
- 4.3 Annex A contains extracts of The TAC noted in 4.2 viz:
- RoU Direct Costs definition in Part 3 of Schedule 4 of the TAC; and
  - Paragraph 6 of Part 3 of Schedule 4 of the TAC.

#### **5 SUMMARY OF DISPUTE**

- 5.1 In Spring 2010 NR advised train operators that a strike by signalling staff would occur between 6th and 9th April and that operators should bid for an amended service consistent with the reduced Network available. Subsequently before 6th April NR advised tocs that the strike had been called off, and the normal timetable was reinstated.
- 5.2 It is agreed by Network Rail and FGW that the situation is consistent with an advice of RoU that is subsequently withdrawn, that the scope of the RoU means it fits the definition of Type 2 RoU, and that as a consequence because true costs are more than £10,000 more than the formulaic compensation provided (which is £nil) Network Rail would consider a claim from FGW for RoU Direct Costs.
- 5.3 NR has paid FGW elements of the claim but considers that the element covering train planning costs is not consistent with the contract. That element is now in dispute.

- 5.4 It is agreed by the parties that all steps consistent with the requirements of The TAC have been taken in a compliant manner including numerous timely discussions between the parties and the stage has now been reached where agreement on the dispute itself requires external resolution under the terms of The TAC.

## **6 EXPLANATION OF EACH ISSUE IN DISPUTE AND THE CLAIMANT'S ARGUMENTS TO SUPPORT ITS CASE**

- 6.1. The crux of the matter is whether RoU Direct Costs include all costs to the train operator of train planning and diagramming activity as a result of the RoU in question.
- 6.2. FGW believes the definition is quite clear in specifically ensuring train planning costs are covered. The contract does not say "additional costs", and it specifically includes "train planning and diagramming costs".
- 6.3. It is FGW's view that the intention of Schedule 4 is not only to incentivise Network Rail to plan with minimum disruption to services but also to compensate train operators for all costs (including costs in its base resource levels) associated with managing all restrictions of use.
- 6.4. It believes that because no (low cost) formulaic method can be found for determining train planning costs (as has been found to cater for revenue loss, road replacement cost and mileage-driven train operating savings), where categories of RoU exist where losses materially outweigh transaction costs such that actual losses are compensated (rather than reliance given solely to the formulaic approach), explicit facility for the inclusion of train planning cost (and not just out of hours work or bought in cost) is catered for.
- 6.5. If it were intended that just out of hours work were catered for then FGW believes there would be very few if any claims in the country as in practice operators gear up establishments to cater for all Restrictions of Use (whether ordinary or Type 2 or Type3 (where actual cost plus actual loss of revenue is compensated)) as part of the normal hours of duty.

- 6.6. Schedule 4 of The TAC indicates that for Type 2 Restrictions of Use Direct Costs are payable if thresholds are met. Direct Costs are specifically defined in the contract to include Train Planning and Diagramming Costs reasonably incurred by an operator as a result of a Type 2 Restriction of Use.
- 6.7. FGW believes that this represents the cost to the business of performing train planning needs caused by existence of the restriction of use. These are the costs itemised in the claim.
- 6.8. Schedule 4 is designed to incentivise Network Rail to plan its engineering operations so it has optimum impact on end-users of the railway (passengers and freight customers), and to provide compensation to operators for losses incurred by the decisions NR takes in reducing access to the railway.
- 6.9. At full compliance with the incentives provided, no compensation would be payable because engineering would be performed solely when train services were not planned to run. In such a scenario TOC train planning teams would be limited to those still required to develop timetables to meet the needs of developing demand or other commercial needs on a normal twice a year process, and therefore would be a much smaller team. It follows that the short term planning team is there to facilitate the engineering planning process and as such should be compensated fully in so far as it can be. Indeed this is clearly the intention and economic incentive of the ORR's development of Schedule 4 recognised by the Access Charge Supplement that TOCs pay to Network Rail.
- 6.10. It is clear from announcements by the ORR and by its consultants in developing Schedule 4 for the Pricing Review 08 that Type 2 compensation is intended to capture these costs. The ORR asked Faber Maunsell to devise a cost compensation mechanism that would be reflective of true costs but be simple to use.
- 6.11. In developing this Faber Maunsell discovered that costs (excluding bus costs) associated with managing a possession jumped from 6% of all costs for Restrictions of Use that were not Significant Restrictions of Use (as defined in CP3 template contracts, a definition very similar to CP4's definition of Type 2 Restrictions of Use) to 11% of costs for Significant Restrictions of Use.
- 6.12. It also found that there was no correlation between train planning costs and either duration, revenue compensation, or bus costs.

- 6.13. It discovered a loose but incomplete correlation between other costs and train mileage change and suggested a formulaic rate per train mile mechanism that would apply to all RoU to cover other costs including train planning costs.
- 6.14. It was therefore not possible to devise a fair automated system for compensating train planning costs in the way it was possible to devise such systems to compensate for bus costs and train mileage driven savings.
- 6.15. The CP4 consultants report indicates that 87% of possessions have relatively low train planning costs and these varied between £72 and £4,032. None of these therefore had no cost and it is a fact that at least one RoU is planned without overtime being worked. The costs therefore include in at least one RoU solely normal time worked.
- 6.16. The CP4 determination therefore continues CP3 practice in not providing train planning compensation for standard possessions and continues its practice of providing full compensation (where this covers transaction costs) for a TOC's train planning team in so far that it is engaged in the management of restrictions of use of sixty hours or more (previously (in CP3) defined as Significant Restrictions of Use), because such RoU are already subject to the possibility of real cost compensation work.
- 6.17. Throughout CP3 Network Rail honoured payment of train planning costs based on the work undertaken as part of their normal duties by existing train planning staff in dealing with possessions of 60 hours duration.
- 6.18. Nowhere in the ORR's findings can it been found that such an arrangement should cease. Its determination regarding changes to Access Charge Supplements listed factors entertained in reaching revised values. This did not include reflection of any reduced train planning compensation facility.
- 6.19. In Network Rail's advice to the ORR on Access Charge Supplement values Network Rail used ATOC-provided information to Faber Maunsell on existing non-bus-driven costs to determine its view.
- 6.20. Relevant extracts from reports are indicated at Annex C.

## **7 DECISION SOUGHT FROM THE ADJUDICATION**

### **7.1. FGW seeks:**

7.1.1. that the ADA determines that the intention of the definition of RoU Direct Costs in Part 3 of Schedule 4 of the TAC is to include the cost of train planning activity including when this is incurred as part of the current establishment and salaried base; and

7.1.2. that the ADA determines as a result FGW's claim for staff payment for work on the strike timetable referred to in this Statement should be met whether or not such work was undertaken by additional staff or on an overtime basis.

7.2. There is agreement between the parties that the money resting on this interpretation dispute is £[REDACTED] and FGW believes should the dispute be resolved in FGW's favour then Network Rail should pay this amount to it (in accordance with the payment procedures contained in The TAC).

7.3. FGW believes any costs incurred by ADA as a result of this adjudication should be covered as explained by the Network Code, and that any costs not catered for by the Network Code parameters are borne by Network Rail.



## 8 APPENDICES AND ANNEXES

The Claimant confirms that it has complied with AD Rule G17 (a) (ix) of the Access Dispute Resolution Rules, which requires that

*“Copies of the following documents shall also be annexed and cross referenced to the reference:*

*(A) the relevant extracts of contractual Documents containing the provision(s) under which the referral to the ADA arises and/or provision(s) associated with the substance of the dispute; and*

*(B) [the relevant extracts of] any other Documents referred to in the reference”. [AD Rule G17 (a) (ix)]*

The following Annexes are herewith:

Annex A: containing contract extracts referred to in paragraph 4 of this Statement;

Annex B: containing contract extracts referred to in paragraph 5 of this Statement; and

Annex C: containing report extracts supporting statements included in paragraph 6 of this Statement.

## 9 SIGNATURE

For and on behalf of
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**Annex A (contains extracts referred to in paragraph 4 of the Statement)**

**Definition of RoU Direct Costs in of Part 3 of schedule 4 of The TAC:**

"

**"RoU Direct Costs"**

means the aggregate amount of:

- (a) bus and taxi hire costs;
- (b) publicity costs;
- (c) train planning and diagramming costs; and
- (d) other costs directly related to the organisation and management of the Train Operator's response to a Type 2 Restriction of Use,

reasonably incurred by the Train Operator as a result of a Type 2 Restriction of Use, adjusted by:

- (i) adding any increase in RoU Variable Costs; and
- (ii) deducting any decrease in RoU Variable Costs;

"

**Paragraph 6 of Part 3 of schedule 4 of The TAC:**

**"6. RoU Direct Costs compensation for Type 2 Restrictions of Use**

**"6.1 Compensation arrangements**

- (h) Following receipt of an RoU Claim Notice in respect of a Type 2 Restriction of Use, Network Rail and the Train Operator shall (if they have not already done so) commence negotiations in respect of the RoU Direct Costs compensation to be paid by one party to the other in respect of such Type 2 Restriction of Use and, subject to paragraph 10, shall continue such negotiations in good faith until they are concluded.
- (i) Once the compensation referred to in paragraph 6.1(a) has been agreed or determined (and has been compared against any amounts calculated under paragraph 4 together with any other amounts paid or due to the Train Operator from Network Rail in relation to such Restriction of Use) then, in the event of:
  - (iv) a shortfall for the Train Operator, the compensation to be paid by Network Rail to the Train Operator shall be the full amount of the RoU Direct Costs actually incurred by the Train Operator less any amounts calculated under paragraph 4 which have already been paid or are due for such Restriction of Use and any other amounts in respect of any RoU Direct Costs received by the Train Operator from Network Rail in respect of such Restriction of Use; or
  - (v) an overpayment by Network Rail to the Train Operator, the compensation to be paid by the Train Operator to Network Rail shall be the difference between the amount received by the Train Operator which was calculated under

paragraph 4 and the RoU Direct Costs actually incurred by the Train Operator in respect of such Restriction of Use.

- (j) Network Rail shall include in the statement provided by it in respect of each Period under paragraph 13.1(a) details of the compensation agreed or determined under this paragraph 6 and paragraph 10 to be payable in respect of any Type 2 Restriction of Use taken in that Period and that compensation shall be due and payable by the relevant party to the other in accordance with paragraph 13.1.”

**Annex B** (contains extracts referred to in paragraph 5 of the Statement)

Paragraph 2.9(c) of Part 3 of schedule 4 of The TAC:

Definition of Type 2 Restriction of Use in of Part 3 of schedule 4 of The TAC:

“

**“Type 2 Restriction of Use”**

- means:
  - (b) a single Restriction of Use of more than 60 consecutive hours (excluding any part of that Restriction of Use which occurs during a Public Holiday); and
  - (c) which results in a Service being Disrupted

but excluding any Restriction of Use which falls within the definition of Type 3 Restriction of Use;

”

**“2.9 Changes to Restrictions of Use**

...

- (c) Where a change to a Restriction of Use reduces the impact of the Restriction of Use and accordingly changes its type or means that there is no Restriction of Use in accordance with paragraph 2.9(a), the Train Operator may, within 28 days of the date on which the change to the Restriction of Use was notified to the Train Operator by Network Rail, serve a notice on Network Rail which sets out any costs to which the Train Operator is already committed or has already incurred and any costs associated with responding to the Restriction of Use (both before and after the change). The Train Operator shall be entitled to recover such costs provided that such costs are reasonable and were properly committed or incurred in the circumstances. For the purposes of this Clause 2.9(c), references to “costs” shall mean those categories of costs which the Train Operator would have been entitled to recover under this Schedule 4 for that type of Restriction of Use which the Restriction of Use was classified as prior to its change. “

Paragraph 2.6 (b) of Part 3 of schedule 4 of The TAC:

**“2.6 Type 2 Restriction of Use**

...

- (b) If either party reasonably believes or expects that the difference between RoU Direct Costs calculated in accordance with paragraph 6 and the costs calculated under paragraph 4 would exceed £10,000 then that party will be entitled to require that the costs be calculated in accordance with paragraph 6 by serving an RoU Claim Notice within the time periods set out in paragraph 2.8.

...”

**Annex C** (contains extracts from other documents to illustrate points made in paragraph 6 of the Statement.)

- 5.67 Given the importance attached to the existence of such caps, Schedule 8 of the model freight contract has been drafted on the basis of reciprocal annual Network Rail and train operator caps.
- 5.68 Further information on the model freight performance regime is set out in paragraphs 7.47-7.63.

### **Restrictions of use/variations to services**

- 5.69 The arrangements under which Network Rail is able to carry out restrictions of use on its network (e.g. for engineering possessions, through imposing temporary speed restrictions, etc) are set out in Part D of the network code. Both the passenger and model freight contracts contain compensation regimes for such restrictions in Schedule 4. Following the changes introduced as part of PR08 there are no longer compensation arrangements for restrictions of use in Part G of the network code.
- 5.70 The intention of both regimes is to incentivise the safe, early, efficient planning of engineering work by Network Rail. However, these regimes work differently to reflect the differing circumstances of each market.

#### *Schedule 4 of the model passenger contract*

- 5.71 The possessions compensation regime for passenger operators has developed over the course of a number of periodic and interim reviews. The key principles of the regime following PR08 are:

- (a) operators should receive compensation for all disruptive possessions, thereby ensuring that Network Rail is incentivised to plan all work carried out on the network efficiently;
- (b) such compensation should be based on the degree of disruption experienced, no matter whether the possession is related to maintenance, renewals or enhancement work; and
- (c) to minimise transaction costs, formulaic compensation is available for less disruptive possessions, with the ability to claim actual revenue and cost compensation where possessions are long or disruption is sustained;

Re Statement  
para. 6.8

Re Statement  
para 6.16

- (d) formulaic revenue compensation is based on operator specific Schedule 8 payment rates, with discounts available depending on the notification provided by Network Rail to the train operator which reflect the likely impact on operators and revenue;
- (e) different revenue compensation algorithms apply where a train-bus-train movement misses monitoring points, or for a high-speed diversion;
- (f) formulaic cost compensation encompassing compensation for rail replacement buses (with compensation differentiated by type of train operator) and changes in train mileage (with compensation differentiated by type of rolling stock).

5.72 Generally, we would expect franchised passenger track access contracts to incorporate the template Schedule 4 as it appears in the model passenger contract. However, where applicants are seeking a bespoke regime, we would want to be sure that it would:

- (a) incentivise Network Rail to plan possessions early and to manage them efficiently;
- (b) incentivise the parties to limit the effects of possessions on the passenger timetable;
- (c) ensure that no perverse incentives are caused between different operators' possessions and performance regimes;
- (d) not alter the value of Network Rail's expected cash flows; and
- (e) not require unnecessarily burdensome additional systems for processing data.

5.73 Franchised passenger train operators pay for the possessions regime through access charge supplements. The sum of these access charge supplements is equal to the total expected compensation payments Network Rail will pay to operators for withholding access to the network<sup>62</sup>.

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<sup>62</sup> Access charge supplements for franchised passenger operators are set out in Table 26.3 of the Determination of Network Rail's outputs & funding for 2009-14.

Re Statement  
para 6.10

2.1.6

All the Train Operators indicated that rail replacement buses were the most significant costs. Our analysis of the 80 sample possessions is shown below in Table 2.1<sup>4</sup>.

Table 2.1 – Analysis of Sample Possessions by Type of Cost.

Type of Costs	RoUs % of Total Costs	SRoUs % of Total Costs
Rail replacement buses	94%	89%
Other costs	6%	11%

significant factor in costs  
← SRU v non-SRU

Re Statement  
para 6.11

2.1.7

ATOC provided us with data from an exercise undertaken to investigate the scale and type of possession costs experienced by Train Operators, eleven of whom provided data. The overall split between bus costs and other costs for each category of possession in 2006/2007 is shown below in Table 2.2.

Table 2.2 – Rail Replacement Bus Costs as a Percentage of Total Costs (2006/07).

Operator	Bus Costs (£'000s)			Total Costs (£'000s)			% Total Costs		
	RoU	SRoU	Part G	RoU	SRoU	Part G	RoU	SRoU	Part G
1	1 040	92	365	1 040	92	365	100%	100%	100%
2	576	0	156	576	0	1 796	100%	N/A	9%
3	380	440	180	500	580	240	76%	76%	75%
4	1 134	1 222	0	1 134	1 811	0	100%	48%	N/A
5	473	358	0	473	473	0	100%	76%	N/A
6	295	222	8	324	350	9	91%	63%	89%
7	236	0	0	236	0	0	100%	N/A	N/A
8	1 468	558	0	1 468	584	0	100%	96%	N/A
9	1 660	0	1 200	1 660	0	1 500	100%	N/A	80%
10	1 813	97	306	2 664	184	612	68%	53%	50%
11	475	0	712	475	0	712	100%	N/A	100%
Total	9,550	2,989	2,927	10,550	4,075	5,233	89%	78%	56%
12 <sup>5</sup>	492	0	0	5,900	0	0	8%	N/A	N/A

2.1.8

The data above confirms that rail replacement bus costs are the most significant costs to Train Operators. However, it is likely that the data overstates the proportion of total costs, since 'Schedule 4' disruption is not normally compensated for costs, except in the case of a Major Project Notice, hence costs other than buses may be difficult to identify.

2.1.9

We concluded that rail replacement bus costs should lie at the heart of any proposed cost compensation mechanism. Chapter 3 of this report describes our detailed analysis of this type of cost and our development of a compensation mechanism.

<sup>4</sup> Note: this ignores the impact of changes in train mileage (whether positive or negative) which in many cases were not supplied by Train Operators.

<sup>5</sup> An exceptional case



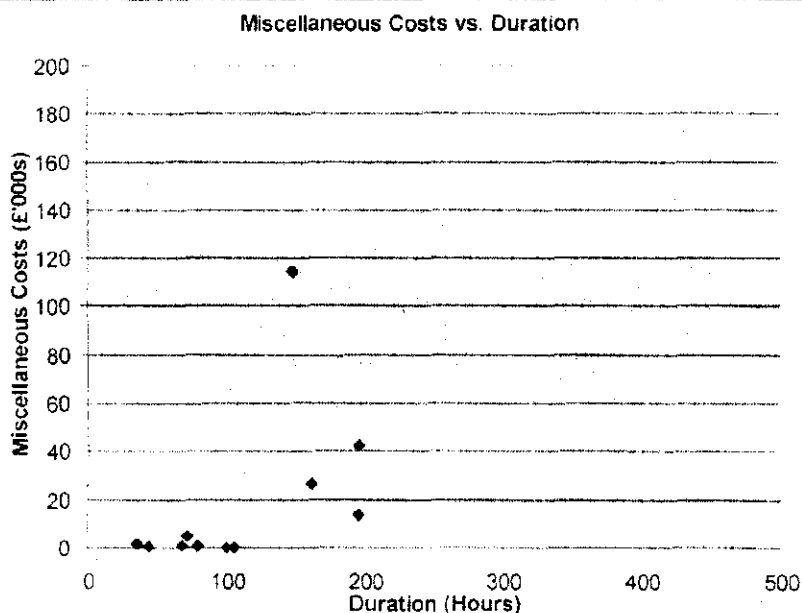
Re Statement  
para 6.12

and therefore due to the simple nature of their timetable, less train planning time will be required). There are no apparent relationships between train planning costs and duration, Schedule 4 revenue compensation or bus costs.

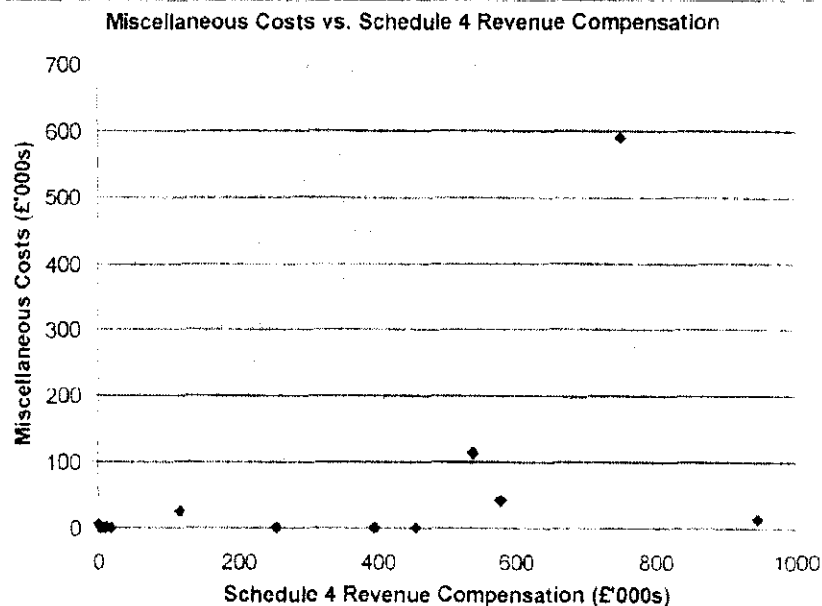
#### Miscellaneous Costs

Of the example possessions that quoted other 'miscellaneous' costs separately, 64% were below £6,000. Miscellaneous costs ranged between £72 and £589k. These costs might include staff training or temporary maintenance facilities. Figures E.6 and E.7 show plots of miscellaneous costs against duration and against Schedule 4 revenue compensation. These values appear good indicators of when miscellaneous costs become more variable, but poor indicators of the value of these costs.

**Figure E.6 - Miscellaneous Costs vs. Possession Duration.**



**Figure E.7 - Miscellaneous Costs vs. Schedule 4 Revenue Compensation.**



## 4.2 All Other Costs

4.2.1 In order to perform more detailed analysis, the 'other costs' were allocated into three categories:

- Publicity costs,
- Train planning costs; and
- Miscellaneous costs.

4.2.2

*Re Statement  
para 6.12*

Appendix D describes our analysis of these other costs based on the 34 possessions in our sample for which data was provided. As a result we concluded that the data did not support a simple relationship between costs and cost drivers. We also looked at whether a relationship could be found between 'other costs' and rail replacement bus costs (which account for the other 90% of costs). If this were the case then 'other costs' could be accounted for simply by uplifting the rate for rail replacement bus costs. However, the data did not support such a relationship.

4.2.3

However, many of these 'other costs' would be expected to be related to the degree of operational disruption faced by the Train Operator, for example, the train planning involved in responding to the possession. Some of the plots supported this hypothesis, or at least did not discount it. We therefore concluded that compensation should be provided for these costs at a fixed rate per Modified Train Mile (MTM). Where MTM is defined as the number of train miles which suffer alteration (compared to the normal timetable) as a result of a possession, with a positive sign always applied. Thus, both terminating trains short and additional train miles due to a diversion are counted as positive.

4.2.4

*Re Statement  
para 6.13*

Therefore, in addition to a mechanism to compensate for the change in train mileage we propose a further element of compensation for disruption based on a rate per MTM. This would sweep up all three categories of costs (publicity, train planning and miscellaneous costs). A rate of £0.873 per MTM was calculated from the 80 sample possessions as shown below in Table 4.1.

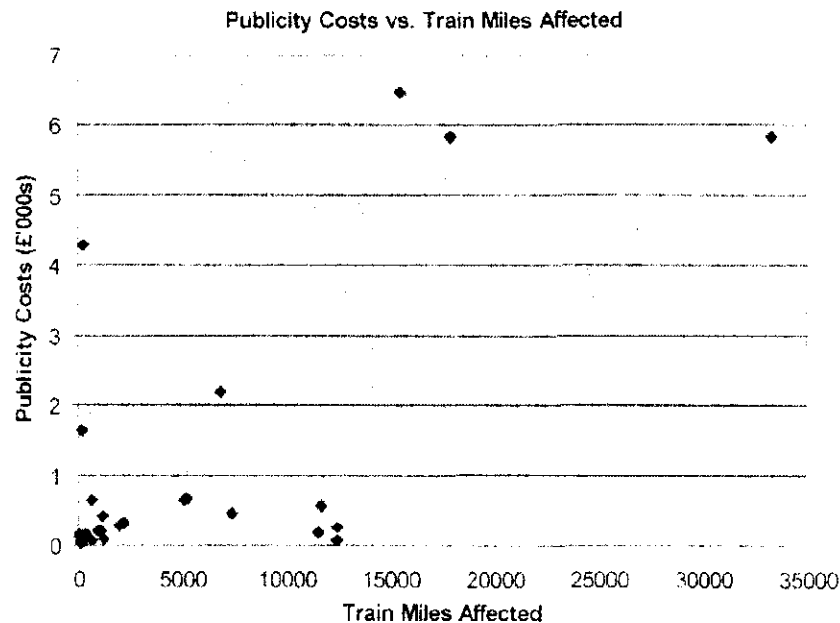
**Table 4.1 – Calculation of Rate per Modified Train Mile.**

Possessions	Total Other Costs (£'000s)	Total Modified Train Miles ('000s)	Rate per MTM (£)
80	163	263	0.58

### Publicity Costs

Of the example possessions that quoted publicity costs separately, 80% were below £750 and 87% were below £2,200. Publicity costs ranged between £13 and £6,470. There are no apparent relationships between publicity costs and duration, train miles affected or bus costs. Plots of these relationships are shown in the Appendix. Figure E.4 shows the plot of publicity costs against Train Miles Affected.

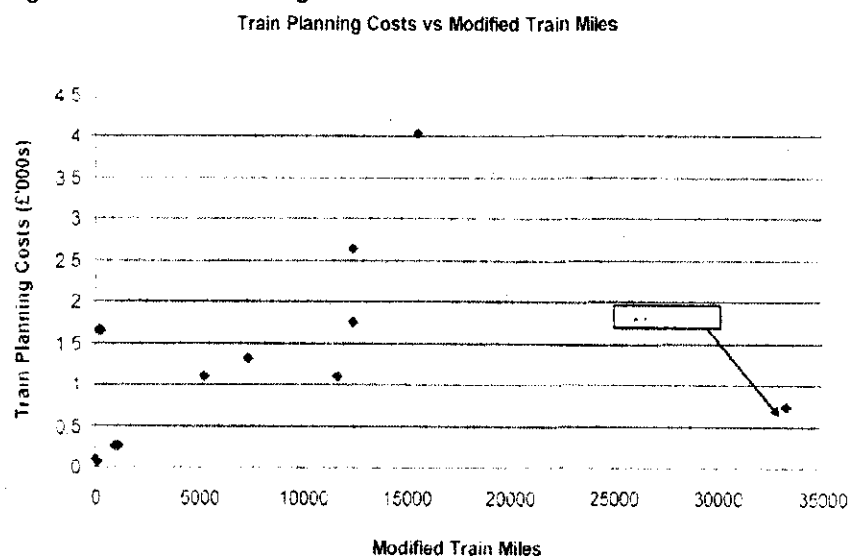
Figure E.4 - Publicity Costs vs. Train Miles Affected.



### Train Planning Costs

Of the example possessions that quoted train planning costs separately, 87% were below £1,800. Train Planning Costs ranged between £72 and £4,032. Figure E.5 shows the plot of train planning costs against Modified Train Miles.

Figure E.5 - Train Planning Costs vs. Modified Train Miles.



This plot shows that some sort of linear relationship can be observed (with the exception of a couple of outliers, one of which can be explained by the fact that it is a frequent airport service).

2.6 The industry recommendations on the passenger regime centred on the development of a tiered structure of compensation for possessions in Schedule 4. For franchised passenger operators, in return for the payment of an access charge supplement this would provide formulaic cost and revenue compensation for all possessions, but with additional compensation available depending on the level and impact of disruption. As a consequence Part G compensation for possessions would be withdrawn. In summary the characteristics of each of the proposed tiers were:

- type 3 possessions: single possession greater than 120 hours (includes public holidays), would receive formulaic compensation as default but with the possibility of actual revenue losses and costs (subject to a materiality threshold);
- type 2 possessions: single possession greater than 60 hours, but equal to or less than 120 hours, (excludes public holidays), would receive formulaic compensation as default but with the possibility of actual costs (subject to a materiality threshold and in respect of categories of direct costs only) mirroring existing Significant Restrictions of Use arrangements; and
- type 1 possessions: all other possessions would receive formulaic based revenue and cost compensation.

*Re Statement  
para 6.16*

2.7 In addition to this it was also proposed to compensate for sustained planned disruption on a similar basis to type 3 possessions, which would be triggered when:

- the revenue loss compensation;
  - over 3 consecutive periods is greater than 20% of defined Service Group revenue; or

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document can be accessed at:  
[http://www.rail-reg.gov.uk/upload/pdf/pr08-poss-recs\\_comp\\_regime\\_310108.pdf](http://www.rail-reg.gov.uk/upload/pdf/pr08-poss-recs_comp_regime_310108.pdf)

<sup>7</sup> Periodic review 2008: Recommendation to ORR on changes to the regime for disruptive possessions, Schedule 4 policy group, March 2008. This document can be accessed at [http://www.rail-reg.gov.uk/upload/pdf/pr08-rcomd\\_fwubp\\_290208.pdf](http://www.rail-reg.gov.uk/upload/pdf/pr08-rcomd_fwubp_290208.pdf)

## Passenger regime

### Our determination

26.6 Our determination on the passenger regime set out a new tiered structure of compensation in schedule 4 for CP4. For franchised passenger operators, in return for the payment of an access charge supplement, schedule 4 will provide formulaic cost and revenue compensation for all possessions, but with additional compensation available depending on the level and impact of disruption. As a consequence, part G compensation for possessions will be withdrawn. In summary the characteristics of each of the proposed tiers are:

- type 3 possessions: single possession greater than 120 hours (includes public holidays), will receive formulaic compensation as default but with the possibility of actual revenue losses and costs (subject to a materiality threshold);
- type 2 possessions: single possession greater than 60 hours, but equal to or less than 120 hours, (excludes public holidays), will receive formulaic compensation as default but with the possibility of actual costs (subject to a materiality threshold and in respect of categories of direct costs only) mirroring existing Significant Restrictions of Use arrangements; and
- type 1 possessions: all other possessions will receive formulaic based revenue and cost compensation.

*Re Shint  
para 6.16*

26.7 In addition to this, compensation will be available for "sustained planned disruption" on a similar basis to type 3 possessions. This would be triggered when:

- the revenue loss compensation;
  - over 3 consecutive periods is greater than 20% of defined service group revenue; or
  - over 7 consecutive periods is greater than 15% of defined service group revenue; or
- the difference between formulaic cost compensation and reasonably incurred costs is greater than £0.5m over 3 consecutive periods or £1m over 7 consecutive periods (apart from Chiltern, Merseyrail, C2C, London Overground and open access operators where values of £0.25m and £0.5m respectively will be used to reflect the limited ability of smaller operators to absorb exceptional costs).

26.8 Open access passenger operators will be able to claim compensation for type 3 possessions and sustained planned disruption (i.e. compensation for significant disruption), but will need to pay an access charge supplement (like franchised operators) to be able to claim compensation for type 1 and type 2 possessions.

26.9 One of the main developments is the introduction of a cost formula to compensate for bus and train mileage costs resulting from possessions, consisting of:

page 22 fully redacted

26.13 We consider that where there are bespoke compensation arrangements related to specific works on the West Coast Main Line (WCML) that had already been agreed for the next control period, these should remain in place.

#### *Access charge supplements*

26.14 We stated in our final conclusions on possessions compensation that we would revise the access charge supplements to be consistent with our determination on expenditure and network availability. In its response to our draft determinations and after our final conclusions on possessions compensation, Network Rail suggested that access charge supplements should also be amended as follows:

- uplifted to reflect the impact on possessions compensation (through the introduction of emergency timetables) of the increased frequency of extreme weather which Network Rail states is likely to occur in the future;
- uplifted to reflect real revenue growth, to the extent to which TOCs will be able to claim actual revenue loss through schedule 4; and
- amended to reflect only the maintenance and renewals elements of the proposed PDI-P target (possessions disruption index for passengers) - the original supplement reflected the total PDI-P target which also included enhancements.

26.15 We have considered each of these changes and have concluded that:

- we should not include an uplift for the assumed increased frequency of extreme weather as we consider that this is already reflected in the £5m allowance we have made for emergency timetables;
- we should amend the access charge supplements to reflect the impact of expected real revenue growth for passenger train operators since this is the basis on which compensation will be paid. This increases the allowance for negotiated revenue compensation from 1.9% to 2.3%;
- we should amend the access charge supplements to reflect maintenance and renewal PDI-P only and to reflect our determinations on expenditure.

26.16 The overall impact of these changes is to increase total access charge supplements in each year, the difference being in excess of £3m in the final year of CP4. The final access charge supplements are shown in Table 26.3.

*We stated  
para 6.18*

*(no mention of  
change of  
status of  
train planning costs.)*

- 2.19 Finally, we have accepted some proposed drafting amendments that were suggested in consultation responses, including a revision to the wording of the indexation provision.
- 2.20 A clean copy of the Schedule 4 for franchised passenger operators and of the Schedule 4 for open access operators can be found at Annex 2 and Annex 3 respectively.

### Access charge supplements

- Re Statement  
para 6.19*
- 2.21 Schedule 4 for franchised passenger operators is funded by access charge supplements. In our consultation document we reviewed the assumptions underpinning Network Rail's calculations and calculated new access charge supplements by:
- revising network availability forecasts;
  - removing the uplift Network Rail applied to the marginal revenue effect (MRE) rates to reflect recent real revenue growth as the schedule 8 periodic review recalibration only intends to increase rates in line with inflation;
  - replacing Network Rail's forecast of expenditure for CP4 with our assessment given in the draft determinations; and
  - reducing the uplift for emergency timetable possessions from £8.5m to £5m, as we consider that Network Rail's estimate over represents the impact of extreme events.
- 2.22 Together these changes reduce access charge supplements due in the final year of CP4 by 29% compared to Network Rail's estimates in their Strategic Business Plan update. The resulting access charge supplements are shown in table 3.
- 2.23 Network Rail has subsequently reviewed the proposed access charge supplements and is content that the proposed changes are consistent with the draft determinations. However Network Rail considers that it would be appropriate that, were any of the assumptions further revised in our final determinations, the proposed access charge supplements be amended. We



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## 6. Negotiated compensation for costs

### 6.1 Methodology

Under the ISG recommendations, TOCs will be able to claim for costs over and above the cost formula in respect of Type 2 and Type 3 possessions, and in respect of periods of Sustained Planned Disruption.

Type 2 and Type 3 possessions together cover the same possessions as the current SROU definition (in the sense of 60+ hour possessions). Similarly, it is intended that possessions covered by Sustained Planned Disruption are intended to be broadly similar in scale to those currently covered by Major Project Notices (which are SROUs by definition) and by large Network Changes.

In summary, therefore, the circumstances in which TOCs will be able to negotiate additional cost compensation broadly correspond to possessions which currently qualify as SROUs or Part G. We have therefore estimated the cost of what negotiated compensation would have been in 2006/07, based on the level of non-bus costs in the ATOC data provided to Faber Maunsell<sup>11</sup>.

We have included all non-bus costs relating to SROUs, and (as with the cost formula, above) 50% of non-bus costs relating to Part G possessions, to give an estimated total of £2m for 2006/07, or 1.6% of the £143m compensation under the revenue loss formula<sup>12</sup>.

We have therefore estimated negotiated cost compensation in CP4 as being 1.6% of payments under the revenue loss formula, giving expected payments as follows:

**Figure 9: Estimated negotiated compensation re costs  
(M&R activity only, pre-efficiency)**

	2009/10	2010/11	2011/12	2012/13	2013/14
Network total	2.9	2.8	2.9	2.7	2.8

*All costs in £m, 06/07 prices*

<sup>11</sup> We have assumed that bus costs are covered by the costs formula with over- and under-compensation in respect of individual possessions balancing out in the long run

<sup>12</sup> Erratum note: as a result of a spreadsheet error discovered just before submitting the SBP update, the methodology described above was inadvertently applied to the costs in respect of the 11 TOCs in the ATOC sample, rather than to all TOCs. Total costs for 2006/07 were therefore estimated at £2m (as stated above) rather than £4m (which would have been the correct figure). This resulted in Schedule 4 costs in CP4 being under-stated by approximately £3m per year. This has not been corrected in the plan or in the models.

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**Figure 2: Summary of methodology (before adjustments for efficiency, WCML issues and Amended Timetables)**

	"Type 1" Restrictions of Use (ROUs)	"Type 2" ROUs	"Type 3" ROUs	Sustained Planned Disruption (SPD)
Revenue loss formula (RLF)	<ul style="list-style-type: none"><li>• Calculate 2006/07 unit costs, i.e. £ of Schedule 4 per unit volume of activity (or per £ of spend).</li><li>• Adjust for proposed changes to Notification Factors and anticipated recalibration of Schedule 8.</li><li>• For WCML only, uplift unit costs to reflect lack of WCML data in 2006/07.</li><li>• Apply unit costs to projected activity volumes (or £ of spend) in CP4.</li></ul>			
Negotiated compensation for revenue loss	N/A	N/A	Apply a % uplift to RLF, based on: <ul style="list-style-type: none"><li>• % of total RLF relating to Type 3 possessions and/or periods of Sustained Planned Disruption; and</li><li>• analysis of differences between the RLF and estimates of actual revenue loss from MOIRA</li></ul>	
Cost formula	<ul style="list-style-type: none"><li>• Assume that, in aggregate, the cost formula gives an amount equal to total industry bus costs (net of savings in mileage-related costs) as estimated from data provided by ATOC.</li><li>• Extrapolate over CP4 pro rata to the RLF</li></ul>			
Negotiated compensation for costs	N/A	<ul style="list-style-type: none"><li>• Assume that compensation equals total industry non-bus costs (for the relevant possessions) as estimated from data provided by ATOC.</li><li>• Extrapolate over CP4 pro rata to the RLF.</li></ul>		

Note: the only part of the new Schedule 4 for which historic data is available (based on the current Schedule 4) is the revenue loss formula. For the revenue loss formula, it has therefore been possible to derive unit Schedule 4 costs and apply them to projected CP4 activity volumes. This accounts for approximately 85% of the total Schedule 4 cost. For other parts of the new Schedule 4, other approaches have had to be used, as shown above.

Re Statutory para 6.19.

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