

**IN THE MATTER OF THE ARBITRATION ACT 1996 AND****IN THE MATTER OF AN ARBITRATION****DISPUTE CONCERNING ACCESS****TO**

R.S.  
6th July 2000.

**NORTH WESTERN TRAINS COMPANY LIMITED****Claimant****- and -****RAIL TRACK PLC****Respondent****INTERIM AWARD****WHEREAS:**

1. The Respondent, Railtrack PLC ("Railtrack"), is the facility owner of railway track infrastructure in England, Wales and Scotland ("the Network").
2. The Claimant, North Western Trains Company Limited ("NWTC"), is a franchised passenger train operating company which operates train services for the carriage of passengers by railway over part of the Network.

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3. The contract pursuant to which NWTC obtains access over part of the Network and operates trains thereon is and has at all material times since 28<sup>th</sup> March 1996 been contained in a Track Agreement (Passenger Services) between Railtrack and NWTC (formerly known as North West Regional Railways Limited) dated 28<sup>th</sup> March 1996 ("the Track Access Agreement" or "the TAA").
4. Disputes have arisen between Railtrack and NWTC as to whether certain Engineering Allowances specified in Diagram 1 to Appendix I to Schedule 4 of the TAA ("Schedule 4"), and in the Rules of the Route subsequently notified by Railtrack to NWTC, constitute Network Possessions, and therefore Railtrack Possessions, within the meaning of Schedule 4; if so whether NWTC is entitled to any and if so what compensation under Schedule 4 if and to the extent that the Engineering Allowances specified in the Rules of the Route exceed those specified in Diagram 1; if not, whether NWTC is entitled to any and if so what compensation under Schedule 4 in respect of Temporary Speed Restrictions imposed by Railtrack; and in either event whether NWTC is precluded by paragraph 6.2 of Schedule 4 from claiming compensation in respect of the foregoing matters in respect of the period prior to 3<sup>rd</sup> May 1998.
5. These disputes were referred to the Access Dispute Resolution Committee ("the Committee"), which, following a hearing on 24<sup>th</sup> June 1999, issued their Determination No. AD 18 in respect thereof.
6. Being dissatisfied with this Determination, NWTC exercised its right under paragraph 6.3 of Schedule 4 to refer the matter for arbitration in accordance with part C ("the Arbitration Rules") of the Access Dispute Resolution Rules.
7. The undersigned, RICHARD SIBERRY QC, of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3ED, has been duly appointed as Arbitrator to hear and determine the foregoing disputes in accordance with the Arbitration Rules.
8. The Seat of this Arbitration is in England.

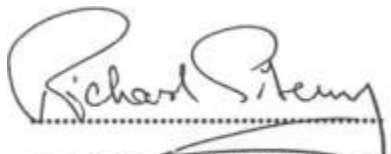
9. The parties having exchanged pleadings and written submissions, an oral hearing took place on Monday, 19<sup>th</sup> June 2000, at the London offices of Simmons & Simmons, Railtrack's Solicitors. NWTC was represented by Burges Salmon, its Solicitors, and its case was presented at the hearing by Mr. Simon Coppen, a Partner at Burges Salmon. Railtrack was represented by Simmons & Simmons, and by Mr. Michael Patchett-Joyce, of Counsel, who presented Railtrack's case. Certain outstanding points were dealt with in correspondence following the hearing.

**NOW I, RICHARD SIBERRY QC**, having taken upon myself the burden of this reference and having carefully considered the parties' pleadings and written and oral submissions and the documents presented in evidence, **for the REASONS annexed hereto which form part of this Award, DO MAKE, ISSUE AND PUBLISH THIS MY INTERIM AWARD, as follows:**

- (1) **I AWARD AND DECLARE that the Engineering Allowances notified to NWTC through the Rules of the Route qualify as Railtrack Possessions within the meaning of Schedule 4;**
- (2) **I AWARD AND DECLARE that the Engineering Allowances specified in Diagram 1 to Appendix I to Schedule 4 comprise part of the Possessions Allowance to which Railtrack was and is entitled;**
- (3) **I AWARD AND DECLARE that, to the extent that the Engineering Allowances notified to NWTC through the Rules of the Route exceed those specified in Diagram 1, NWTC was in principle entitled to compensation in respect thereof, to be calculated in accordance with Schedule 4;**
- (4) **I AWARD AND DECLARE that NWTC is not entitled to such compensation in respect of any period prior to 3<sup>rd</sup> May 1998;**

- (5) I AWARD AND DIRECT that Railtrack shall bear and pay its own legal costs and expenses of this arbitration, together with my fees and expenses as Arbitrator, in the total sum of £ 16,773.12 (inclusive of VAT at 17.5%), and shall pay 70% of NWTC's legal costs and expenses, which I reserve the power to assess if not agreed; PROVIDED THAT if NWTC shall have paid any part of my fees and expenses, the same shall forthwith be reimbursed by Railtrack;
  
- (6) I RESERVE TO MYSELF the resolution of all other claims and issues in this Arbitration, and the power to make a further Award or Awards in respect thereof.

Dated London ..... July 2000.

  
 RICHARD SIBERRY QC  
 ARBITRATOR

WITNESSED BY

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 Chambers Essex Cour  
 24 Lincoln's Inn Fields  
 London WC2A 3ED



**REASONS ATTACHING TO AND FORMING  
PART OF INTERIM AWARD**

1. I shall first set out or summarise the relevant provisions of the TAA.
2. The TAA itself contains the following, amongst other, express terms:

Clause 1.1 - Definitions

"In this Agreement where the context admits:

"Access Conditions"

"Applicable Rules of the Route"

"Applicable Rules of the Plan"

"Routes"

Clause 1.2 - Permission to use

means The Railtrack Track Access Conditions 1995 as modified from time to time;

means the Rules of the Route described in Schedule 4;

means the Rules of the Plan described in Schedule 4;

means that part of the Network described in Schedule 2."

"References in this Agreement to permission to use the Routes shall, except where the contrary is indicated, be construed to mean permission:

1.2.1 to use the track comprised in the Routes ... ;

1.2.2 to make Ancillary Movements; and

1.2.3 to Stable ... ,

... and such permission is subject, in each case and in all respects, to:

- (a) the Access Conditions;
- (b) the Applicable Rules of the Route; and



(c) the Applicable Rules of the Plan

and to any other restriction on such permission which may from time to time be imposed by Railtrack in accordance with this Agreement."

Clause 1.4 - Access Conditions

"Where the context admits, words and expressions defined in and rules of interpretation set out in the Access Conditions shall apply throughout this Agreement and references to the Access Conditions in such words, expressions and rules shall be construed as references to this Agreement."

Clause 3 - Permission to use the Routes

"Railtrack hereby grants the Train Operator permission to use the Routes."

Clause 5 - Access Conditions

"5.1 The Access Conditions are incorporated in and shall form part of this Agreement. "

Clause 8.3 - Liability for Late Trains

"The rights and obligations of the parties set out in Schedules 4 and 8 represent the parties' sole entitlement as between themselves to any compensation in respect of any damage, losses, claims, proceedings., demands, liabilities, costs, damages, orders and out of pocket expenses arising from cancellations, interruptions or delays to trains."

3. The Railtrack Track Access Conditions 1995 as incorporated into the TAA ("the TAC"), which have not since been revised in any respect material to the present disputes, contain the following, among other, express conditions:

Part A - Organisation of the Access Conditions and Definitions Condition A1 -

General

Condition 1.1 - General Interpretation

"In these Access Conditions, unless the context otherwise requires:

- (f) *Include*  
The words "include and "including" are to be construed without limitation"

## Condition 1.2 Definitions

"Routes" means, in respect of an Access Agreement, those parts of the Network which a Train Operator has permission to use pursuant to that agreement;

"Rules of the Plan" means rules regulating, for any part of the Network, the standard timings and other matters necessary to enable trains to be scheduled into the Working Timetable applicable to that part of the Network, being rules which specify (amongst other matters):

- (a) the timings (including specified allowances) allowed for travel between specified points on the Network for each type of train and for each type of traction used, taking into account any particular constraints imposed by railway vehicles which may form part of the train;
- (b) timing margins or allowances for stopping at junctions and other specified points;
- (c) minimum timing margins or headways between successive trains travelling on the same section of track;
- (d) minimum and maximum time periods for stopping at stations and other specified points;
- (e) restrictions as to the speed of railway vehicles on any section of track; and
- (f) any Priority Dates referred to in Part D of these Access Conditions;

"Rules of the Route" means rules regulating, for any part of the Network, each of the following matters:

- (a) the location, number, timing and duration of any possessions of any track or section of track, which enable inspection, maintenance, renewal and repair thereof or of any other railway asset or any other works in relation thereto, and any restrictions regarding those possessions;
- (b) any temporary speed and other restrictions on the operation of trains on any section of track, which may be necessary to carry out any inspection, maintenance, renewal or repair referred to in paragraph (a) above; and

- (c) any alternative train routes or stopping patterns which may apply during any possessions referred to in paragraph (a) above;

and, for the purpose of this definition, track shall be regarded as subject to a possession if it has been temporarily taken out of service for the purposes stated in paragraph (a) above;

"Working Timetable" means the timetable which Railtrack is obliged to draw up pursuant to Condition D.3.6.1."

#### Part D - Timetable Change

This part sets out the procedures by which the Working Timetable, Rules of the Route and Rules of the Plan may be developed and changed, and regulates the bidding process which ultimately results in an agreed Working Timetable. Amongst other things, it provides, in a definition section, that:

"Non-Compliant Bid'

(a)

(b)

means any Bid which either:

is not within or is inconsistent with the rights of the Bidder under an Access Agreement or access option; or

conflicts with either of the applicable Rules of the Route or the applicable Rules of the Plan."

Part D also contains procedures for Bidders to make representations, objections and alternative proposals in relation to proposed changes to the applicable Rules of the Route and the applicable Rules of the Plan (condition 3.4.3), for the review by Railtrack of any such representations, objections and proposals (condition 3.4.4), for the referral by a Bidder of Railtrack's Rules of the Route/Plan Proposal to a Timetabling Committee (condition 3.4.5), for the incorporation of the applicable Rules of the Route and the applicable Rules of the Plan in the Bidding Information Railtrack produces for each Bidding Period (condition 3.4.7), and for development of a procedure enabling accepted bids to be revised to permit Railtrack to take possession for the purpose of carrying out work included in the applicable Rules of the Route (condition 3.4.8).

4. The Access Dispute Resolution Rules are annexed to the T AC.
5. Schedule 4 to the TAA identifies the Applicable Rules of the Route and the Applicable Rules of the Plan, and contains provisions relating to compensation for Possessions, and to protected journey times. Part A to Schedule 4 provides, by paragraphs 1 and 2 respectively, that "The Applicable Rules of the Route" and "The Applicable Rules of the Plan", are respectively those Rules of the Route and those Rules of the Plan in force from time to time in relation to that part of the Network comprising the Routes (these paragraphs also identify the documents respectively containing the Applicable Rules of the Route and the Applicable Rules of the Plan as at 30<sup>th</sup> September 1995); and by paragraph 3, for the procedure to be complied with by Railtrack in relation to the taking of any Possessions which are not described in the Applicable Rules of the Route.
6. Part B to Schedule 4 contains the provisions relating to compensation for Possessions, and to protected journey times. It includes the following express provisions:

Paragraph 1 - Definitions

"1.1 In this Schedule 4 and its Appendices unless the context otherwise requires:-

"Corresponding Day"

- (a)
- means in respect of any day (the "first day")
- a day in respect of which the Services scheduled in the Working Timetable first published in respect of that day are the same as would have been scheduled on the first day but for the Possession taken on the first day and which is contained in:
- (i) either of the first Summer Timetable and the first Winter Timetable preceding the Summer Timetable or Winter Timetable which includes the first day; or
- (ii) if there is no such day in the timetables referred to in (i) above, either of the second Summer Timetable and the second Winter Timetable preceding the Summer Timetable or Winter Timetable which includes the first day; or

- (b) where no day is found under (a) above, the day in respect of which the Services scheduled in the Working Timetable first published in respect of that day are most similar to the Services which would have been scheduled on the first day but for the Possessions taken on the first day, and which is contained in any of the timetables referred to in (a) above; or
- (c) such other day as the parties may agree.

"Network Possession"

"Notification Factor"

"notified"

"Period"

means a Possession (other than a Competent Authority Possession, Part G Possession or Operator Possession) for the purpose of or in association with inspection, maintenance, renewal, repair, enhancement or other modification of the Network or track, including each of the following types of restriction where notified for or in association with any such purpose:

- (a) blockage;
- (b) temporary speed restriction;
- (c) single line working;
- (d) interruption to power supplies;
- (e) diversion; and

(f) weave

but excluding any restriction of use notified by reason of the condition of the Network or track and not for or in association with any of the aforementioned purposes:

shall have the meaning set out in paragraph 4.2:

shall, in respect of a Possession, have the meaning set out in paragraph 4.1 and "notification" shall be construed accordingly;

means each consecutive period of 28 days during the term of this Agreement commencing on and including 1 April in each year provided that:

(a) the first such Period shall commence on 1 April 1996 and end at 23:59 hours on 27 April 1996 from which time the subsequent Period shall commence; and

"Possession"

"Possessions Allowance"

"Railtrack Possession"

- (b) the length of the first and last such Period in any relevant year may be varied up to 7 days on reasonable prior notice from Railtrack to the Train Operator;

means any restriction of use of all or any part of the Routes, notified by or at the direction of Railtrack;

means the Network Possessions which Railtrack is entitled to notify without making any payment to the Train Operator, as provided in paragraphs 2.4 and 2.8;

means a Network Possession or Station Possession;

- 1.2 Subject to paragraph 2.7 a Possession shall be regarded as taken at the time(s) at which the notification states it will have effect."

#### Paragraph 2 - Application of Schedule 4

"2.1 The provisions of this Part B of Schedule 4 shall be without prejudice to:

- (a) Railtrack's right to take Possessions under or pursuant to the Applicable Rules of the Route and the interim arrangements described in paragraph 3 of Part A of this Schedule 4; and
- (b) any rights pursuant to the Access Conditions that the Train Operator may have to challenge any decision of Railtrack pursuant to the Access Conditions;

and notwithstanding the other provisions of this Part B of Schedule 4 Railtrack shall use all reasonable endeavours to take Network Possessions which are outside of Free Periods within the bounds established by the Possessions Allowance. Railtrack's obligation to use all such reasonable endeavours shall be subject to the provisions of Part D of the Access Conditions.

2.2 The provisions in paragraph 2.6 regarding payments by Railtrack shall apply to Possessions notified by Railtrack to the Train Operator and taken in accordance with:

- (a) the Applicable Rules of the Route; or

- (b) the interim arrangements described in paragraph 3 of Part A of this Schedule 4;

and incorporated into the Working Timetable on any day.



2.3 Railtrack shall not be obliged to make payments to the Train Operator under this Part B of Schedule 4 for any Railtrack Possession if and to the extent that it is taken during any Free Period.

2.4 Without prejudice to the provisions of paragraph 2.3, Railtrack shall not be obliged to make payments to the Train Operator for the taking in respect of any section of Route specified in Column A of Appendix 1 of any Network Possession of a type specified in Column B of Appendix 1 for that section of Route for a duration which is equal to or less than that specified in Column C of Appendix 1 for that section of Route or of any Network Possession specified in Diagram 1 of Appendix 1 for the section of Route as the case may be during any period to which Appendix 1 applies (the "relevant period") if and to the extent that:

- (a) the total number of such Network Possessions for that section of Route not falling wholly within Free Periods, notified by Railtrack to the Train Operator as being required during the relevant period does not exceed the relevant threshold specified in the relevant segment in Column D of Appendix 1 or specified in Diagram 1 of Appendix 1 for the section of Route as the case may be; and
- (b) that Network Possession is taken on more than 28 days notification to the Train Operator

and for these purposes:

- (i) where any Network Possession is taken in respect of more than one section of Route specified in Column A of Appendix 1 or specified in Diagram 1 of Appendix 1 as the case may be that Network Possession shall be treated as a separate Network Possession in respect of each section of Route; and
- (ii) where two or more Network Possessions are taken contemporaneously in respect of a single section of Route specified in Column A of Appendix 1, or specified in Diagram 1 of Appendix 1 as the case may be, those Network Possessions shall be treated as separate Network Possessions unless otherwise specified in Appendix 1.

2.6 Subject to paragraphs 2.3, 2.4 and 2.5 Railtrack shall make payments to the Train Operator for Possessions taken on or in relation to the Routes on the following basis:

- (a) for each Railtrack Possession which is outside the Possessions Allowance, in accordance with paragraph 3;

- 2.7 Railtrack shall be deemed to have taken a Railtrack Possession where having notified that Possession to the Train Operator Railtrack cancels that Possession:
- (a) if that Possession is one or one of a series of Rail track Possessions which is taken on five or more consecutive days or is one of a number of Railtrack Possessions taken on the same day in each of six or more consecutive weeks after 7 days prior to the Priority Date for the relevant Passenger Development Periods; and
  - (b) if otherwise, on less than 112 days notice to the Train Operator."

Paragraph 3 of Schedule 4 sets out the procedure for calculation of the compensation payable in respect of all Railtrack Possessions outside the Possessions Allowance, by reference, among other things, to the amended Timetable provisions in paragraph 14 of Schedule 8, to Notification Factors, and to Corresponding Days.

#### Paragraph 4 - Notification

"4.1 For the purposes of this Part B of Schedule 4 details of a Possession shall be treated as notified to the Train Operator when the Train Operator is supplied by Railtrack with sufficient information to determine in respect of that Possession:

- (a) its type;
- (b) its duration;
- (c) its location;
- (d) the time(s) at which it will commence; and
- (e) the time( s) at which it will cease

and any other information reasonably required by the Train Operator so as to determine the likely effect of that Possession on Trains, whether supplied as part of the Applicable Rules of the Route, amendments to the Applicable Rules of the Route in accordance with the procedures established under Condition D3.4.8 of the Access Conditions or under the interim arrangements established under paragraph 3 of Part A of this Schedule 4.

4.2 The Notification Factor in respect of a Railtrack Possession shall be equal to:

- (a) 0.5, if details of the Possession are notified to the Train Operator as part of the Bidding Information for the first Bidding Period in the relevant Passenger Development Period applicable to the period when the Railtrack Possession is taken;
- (b) 0.6, if details of the Railtrack Possession are notified to the Train operator after the date referred to in paragraph 4.2(a), but more than 72 days, before the Railtrack Possession is taken;
- (c) 0.8, if details of the Railtrack Possession are notified to the Train Operator 72 days or less, but more than 28 days, before the Railtrack Possession is taken; and
- (d) 1.0, if details of the Railtrack Possession are notified to the Train Operator 28 days or less, but not later than 2200 hours on the day prior to the day on which the Railtrack Possession is taken."

#### Paragraph 6 - calculations in respect of Possessions

"6.1 Within **14** days after the end of each Period, Railtrack shall provide the Train Operator with a statement showing in sufficient detail to enable the Train Operator to make an informed assessment thereof:

- (a) all Possessions taken during that Period and distinguishing between:
  - (I) Possessions within the Possessions Allowance;
  - (ii) Railtrack Possessions outside the Possessions Allowance;
  - (iii) Competent Authority Possessions;
  - (iv) Part G Possessions; and
  - (v) Operator Possessions; and
- (b) any compensation payable in respect of the Railtrack Possessions identified in paragraph 6.1 (a)(ii).

6.2 Within 10 days of receipt of each such statement from Railtrack, the Train Operator shall notify Railtrack of any aspects of the statement which it disputes, giving reasons for any dispute. Save to the extent that any such disputes are so notified, the Train Operator shall be deemed to have agreed the contents of each statement.

- 6.3 The parties shall, within 7 days of service of any notice under paragraph 6.2, meet to discuss any disputed aspects of the statement with a view to resolving all disputes in good faith. If, for any reason, within 7 days of that meeting, the parties are still unable to agree any disputed aspects of the statement, each party shall promptly (and in any event within 7 days) prepare a written summary of the disputed aspects of the statement and the reasons for each such dispute and submit such summaries to the senior officer of the party. The senior officers shall, within 28 days of the first meeting of the parties, meet with a view to resolving all disputes. If no resolution results before the expiry of 14 days following that meeting, then either party may require that the matter be resolved by the Access Dispute Resolution Committee and if either party is dissatisfied with the decision of that Committee or the ruling of the Chairman thereof (as the case may be) such party shall be entitled to refer the matter for arbitration, pursuant in each case to Part C of the Access Dispute Resolution Rules."

Paragraph 7 deals with protected journey times, and provides, among other things, that Railtrack shall not propose, nor agree to, any amendments to the Applicable Rules of the Route or the Applicable Rules of the Plan which would prevent it from accommodating certain Key Journeys and journey times.

7. Appendix I to Schedule 4 comprises:

- (1) A list (dated 29<sup>th</sup> February 1996) in tabular form, of Possessions Allowances, specifying Route Sections, types of Possession, duration thereof, and the applicable Possession Allowances in respect thereof (i.e. the number of times the specified Possessions may be taken) for each timetable year;
- (2) Diagram 1 (dated 29<sup>th</sup> February 1996) to Appendix I, headed  
"Regional Railways Northwest Schedule 4 EWD [every working day]  
Engineering Allowance",  
comprising a schematic map of that part of the Network which includes the Routes operated by NWTC, and specifying, by box times as shown on the map, with accompanying notes, every working day Engineering Allowances, in minutes, applicable to various section of those Routes. Two different types of Engineering Allowance are indicated on Diagram 1, as follows:

"

, D

A train terminating at this point from the direction indicated picks up the time in the box in minutes

D A train passing this point in the direction indicated picks up the time in the box in minutes."

- (3) General Notes and Explanatory Notes (dated 29<sup>th</sup> February 1996), General Note 13 of which is in the following terms:

"Included within the Possessions Allowance are the number and type of Temporary Speed Restrictions permitted for each Route section in Diagram 1 of this Appendix 1. The Diagram 1 indicates the additional journey time permitted in respect of, or in connection with Possessions for the relevant Route sections, subject to notes A to R and the and the [sic] directional notes on the Diagram."

8. The Applicable Rules of the Route and the Applicable Rules of the Plan issued subsequent to conclusion of the T AA have included or referred to certain Engineering Allowances in excess of those specified in Diagram 1. Thus, for example, in the Rules of the Plan for the Summer 1998 timetable (issued on 28<sup>th</sup> June 1997), Rule

5.1 O(c), "Standard Engineering Allowances", provides that:

"The standard engineering allowances in the Summer 1998 timetable are shown in map form as part of Rules of the Route".

The Railtrack North West Zone Rules of the Route for June 1998-May 1999 (originally issued on 28<sup>th</sup> June 1997), which are said to contain "A full listing of the available possession times for the North West Zone," include, as page viii, a schematic map of daily standard Engineering Allowances for 1998/99, shown (as in the case of Diagram 1) by box times with accompanying notes. Some of these box times exceed the equivalent box times (if any) shown in Diagram 1.

9. It was common ground between the parties that the daily standard Engineering Allowances specified in the Applicable Rules of the Route have been built in to the Working Timetables - that is to say, the journey times of trains over sections of the Routes subject to Engineering Allowances have been calculated by adding such Engineering Allowances to what would otherwise have been the journey times of trains over the sections in question, and the Working Timetables have allowed for such extended journey times.
  
10. It was also common ground that, with regard to the North West Zone of the Network, it has not been the usual practice of Railtrack to notify Temporary Speed Restrictions (TSRs") required for engineering purposes (such as track maintenance, or "bedding down" of new track) through the Rules of the Route procedure. Instead TSRs are usually advised to Train Operating Companies ( "TOCs" - such as NWTC) through Weekly Operating Notices.
  
11. In view of the foregoing, the Working Timetable will contain "tolerances" for TSRs to be imposed within the scope of the Engineering Allowances notified through the Rules of the Route procedure.
  
12. If no TSR is imposed in respect of a section of the Route to which an Engineering Allowance is applicable, a train may travel over that route section in a faster time than that allowed for in the Working Timetable (which will include full allowance for the applicable Engineering Allowance). However, if it does, the train will then be held at the end of the route section to conform with the journey time provided in the Working Timetable.
  
13. The existence of Engineering Allowances, and the fact that these are built in to Working Timetables, provides a degree of robustness to Working Timetables, such that they can be adhered to notwithstanding the imposition of a TSR, provided the TSR does not result in additional journey time in excess of the applicable Engineering Allowance.

14. Railtrack has submitted Schedule 4 Period Reports (so-called Day 42 Statements) in purported compliance with paragraph 6.1 of Schedule 4. Railtrack has not included, in the details provided of Possessions taken during the Periods in question and compensation payable in respect of Railtrack Possessions outside the Possessions Allowance, any details of Engineering Allowances, or the extent to which (if at all) these exceed the Engineering Allowances specified in Diagram 1, nor has Railtrack specified any compensation payable in respect of Engineering Allowances.

15. NWTC did not, however notify Railtrack that it disputed any of the Day 42 Statements provided by Railtrack up to and including that for the Period ending 2<sup>nd</sup> May 1998. In respect of subsequent Periods, on 2<sup>nd</sup> June 1998 NWTC asked Railtrack to show Engineering Allowances in the Day 42 Statements with effect from Period 2 1998/99, viz. from 3<sup>rd</sup> May 1998, onwards.

16. NWTC's principal submissions were, in summary, as follows:

- (1) An Engineering Allowance is a restriction of use of that section of the Routes to which it applies, in that it constitutes a restriction on the manner in which NWTC is able to use the Routes, whether or not engineering work is actually being carried out and/or whether or not a TSR has actually been imposed in respect of the section of the Routes in question;
- (2) For the purpose of the Schedule 4 definition of "Possession", a restriction in respect of timetabling (i.e. the fact that an Engineering Allowance has to be built into the Working Timetable) is sufficient; a restriction of use does not, for the purposes of this definition, have to comprise a physical impediment such as those enumerated in the Schedule 4 definition of "Network Possession";
- (3) What is more, a restriction of use does not, for the purposes of the Schedule 4 definition of "Possession", have to amount to a contractual restriction - e.g. a derogation from NWTC's right to operate trains in accordance with the Working



Timetable. If Railtrack's submissions on this point (see below) were correct, Schedule 4 would have no purpose;

(4) Accordingly, an Engineering Allowance (which is notified by or at the direction of Railtrack) is a "Possession" within the Schedule 4 definition of "Possession";

(5) What is more, an Engineering Allowance is a Possession "for the purpose of or in association with inspection, maintenance, renewal, repair, enhancement or other modification of the Network or track", and is accordingly a "Network Possession" and therefore a "Railtrack Possession" within the respective Schedule 4 definitions thereof; the purpose of an Engineering Allowance is demonstrated by its name, viz. to allow for the performance of functions of an engineering nature, and this is demonstrated by the way that Engineering Allowances have changed, for example, in relation to a new route to Manchester Airport, in respect of which there was originally no Engineering Allowance, but as the need has arisen for routine engineering work, there is now an Engineering Allowance;

(6) NWTC's interpretation of "Network Possession" as including Engineering Allowances is consistent with the definition of Rules of the Route in the T AC: the concluding paragraph of that definition does not lead to the conclusion that track is not to be regarded as subject to a Possession unless it is temporarily taken out of service;

(7) Engineering Allowances notified in accordance with the Rules of the Route procedure meet the notification requirements of paragraph 4.1 of Schedule 4, in that the Train Operator is thereby supplied by Railtrack with sufficient information to determine in respect of that Possession the type, duration, location, commencement and cessation times, and the likely effect of that Possession on Trains;

- (8) The fact that Engineering Allowances are included in the Rules of the Route is further confirmation of their nature as Network Possessions. The fact that NWTC did not object to (proposed) Engineering Allowances in the course of the Part D procedures does not preclude NWTC from advancing a claim for Schedule 4 compensation;
- (9) Paragraph 2.4 of Schedule 4 (which includes a bespoke amendment to the template Schedule 4), by its references to Diagram 1, creates a Possessions Allowance in respect of the Engineering Allowances specified in Diagram 1, as further explained by General Note 13 to Appendix I; if there had been no Diagram 1, there would have been no Possessions Allowance in respect of Engineering Allowances;
- (10) In accordance with the practice in the North West Zone of the Network, TSRs imposed in connection with engineering work were not notified in accordance with the Rules of the Route procedure: the Engineering Allowances as thus notified and as incorporated into the Working Timetable enabled TSRs involving extra journey times falling within the scope of such Engineering Allowances to be taken without any effect on the Working Timetable. The Possessions Allowance in Diagram 1 would be ineffective unless it applied to Engineering Allowances, as distinct from individual TSRs, which were not notified in accordance with paragraph 2.4(b) of Appendix 4;
- (11) If, contrary to NWTC's primary contention, Engineering Allowances do not qualify as Railtrack Possessions, TSRs for the inspection, maintenance, repair or renewal of the Network should be notified in accordance with the Rules of the Route procedure, and compensated in accordance with Schedule 4, without the benefit of a Possessions Allowance, where such notification is on less than 28 days' notice (except where Railtrack is entitled in accordance with the TAC to impose the relevant TSR without following the Rules of the Route procedure).

(In the event that it failed in its primary case, NWTC sought a declaration accordingly, as set out in its Solicitors' letter of 23<sup>rd</sup> June 2000);

- (12) The Day 42 Statements provided by Railtrack were not statements provided in accordance with paragraph 6.1 of Schedule 4, because they failed to meet a fundamental requirement thereof, namely to identify Engineering Allowances as Possessions; they were therefore not Statements to which the dispute notification provisions of paragraph 6.2 applied, so that NWTC's failure to notify any disputes prior to 2<sup>nd</sup> June 1998 (when it required Railtrack to show Engineering Allowances in its Day 42 Statements with effect from Period 2 of 1998/99, beginning 3<sup>rd</sup> May 1998), does not preclude NWTC from claiming compensation as appropriate in respect of earlier periods.

17. Railtrack's principal submissions were, in summary, as follows:

- (1) Engineering Allowances are not in the nature of Possessions; they are "specified allowances", as referred to in the TAC definition of the Rules of the Plan, and as originally set out in a schematic map included in the Applicable Rules of the Plan at the time the TAA was entered into; they are incorporated into the Working Timetable to give it consistency and robustness;
- (2) An Engineering Allowance is not and cannot be a Possession within the Schedule 4 definition, because it is not a restriction of use of all or any part of the Routes. For the purpose of this definition, "restriction of use of... the Routes" must mean restriction of use by the relevant TOC, and it must (having regard to the definition of "Routes" as meaning those parts of the Network which the TOC has permission to use pursuant to its TAA) mean a restriction as compared to the use to which the TOC is contractually entitled;
- (3) A TOC's contractual entitlement to run trains is embodied in the applicable Working Timetable, which takes account of (i.e. makes full allowance for)

Engineering Allowances provided for in the Rules of the Plan and/or the Rules of the Route, which Rules form part of the Bidding Information provided to the TOC at the beginning of the process which leads to the adoption of a Working Timetable. Neither the Working Timetable, nor any Engineering Allowance which forms an integral part thereof, can be viewed as imposing any "restriction of use" on the TOC, because the TOC has no right to run any train otherwise than in accordance with the Working Timetable;

(4) The above submissions as to the meaning of "restriction of use of ... the Routes" are supported by the cases of *Cleveland Petroleum Co Ltd v Dartstone Ltd* [1969] 1 WLR 117 (Court of Appeal) and *Re Ravenscroft Properties Ltd* [1978] 1 QB 52 (Mocatta J), in both of which it was held (in reliance on the decision of the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269) that restrictive covenants in leases were not "restrictions" or in restraint of trade for the purposes of the common law on restraint of trade or the restrictive trade practices legislation, because they did not involve the obligor giving up any freedom that he already had. A grant of limited or regulated rights cannot be characterised as a "restriction";

(5) A TOC cannot complain (and should not be entitled to claim compensation) in respect of a detriment (eg. an increase in Engineering Allowances) suffered as a result of an alteration in the Rules of the Route to which it made no objection (in this connection, I was referred to a statement in the Committee's Determination No. AD 17, which involved another TOC);

(6) If, contrary to the foregoing, Engineering Allowances fall within the definition of Possession, they do not fall within the definition of Network Possession, and are therefore not Railtrack Possessions: they comprise a different type of restriction to those listed in the definition of Network Possession, which are all specific restrictions designed for the purpose of carrying out work. The stipulation in Condition 1.1(f) of the TAC that the word "including" is to be

construed without limitation, does not apply where the context otherwise requires: the "*aflike kind*" rule of construction should be applied for the purposes of the definition of Network Possession, so as to exclude Engineering Allowances;

(7) The last paragraph of the TAC definition of "Rules of the Route" is indicative that a Possession involves the taking out of service of something (i.e. track or the ability to use track) that was previously in service. Engineering Allowances do not involve the taking of anything out of service;

(8) Diagram 1 sets out the TSR element of Railtrack's Possessions Allowance, as explained in General Note 13. If a TSR (as customarily notified in Weekly Operating Notices and not by the Rules of the Route procedure) is imposed, and if the extra journey time it would otherwise involve is no greater than the Engineering Allowance(s) specified for the relevant section(s) of track in Diagram 1, no compensation is payable. If, however, such extra journey time exceeds such specified Engineering Allowance(s), compensation is payable in respect of the excess time, either under Schedule 4 (if notified in accordance therewith) or under Schedule 8 (if not) - according to Railtrack, delays due to TSRs feature in the calculation of payments under Schedule 8. However, no compensation is payable merely by virtue of the fact that an Engineering Allowance as notified by the Rules of the Route procedure exceeds the equivalent Engineering Allowance (if any) in Diagram 1;

(9) If Engineering Allowances are Network Possessions, Railtrack would have a "perverse incentive" to limit the Engineering Allowances proposed for every Working Timetable to those specified in Diagram 1, with the result that the Timetable would be less robust and customer disruption would be more likely;

- (10) Moreover, in the case of those T AAs based on the template Schedule 4 and without a Diagram 1, Railtrack would have no Possessions Allowance in respect of EWD Engineering Allowances;
- (11) The Schedule 4 concept of "notification" refers to matters arising during the timetable period, not to limits imposed prior to its inception;
- (12) NWTC is not entitled to the Declaration sought in respect of its alternative case, because Railtrack is under no obligation to notify TSRs or other Possessions in accordance with the Rules of the Route procedure (though if it does not, it may have to pay compensation in accordance with the less favourable Schedule 8 regime);
- (13) If Engineering Allowances are Possessions, so that details thereof should, pursuant to paragraph 6.1 of Schedule 4, have been provided in the Day 42 Statements, the Day 42 Statements actually provided, however deficient, were nonetheless paragraph 6.1 Statements, to which the disputes notification provisions of paragraph 6.2 applied. Notwithstanding any such deficiencies, NWTC was in possession of all relevant information to enable it "to make an informed assessment" of the Statements provided. Accordingly, NWTC is not now entitled to claim in respect of the period prior to 3<sup>rd</sup> May 1998.

18. If NWTC was and is entitled to compensation under Schedule 4 in respect of Engineering Allowances which exceed those specified in Diagram 1, the parties were agreed that such compensation falls to be assessed by reference (among other things) to the so-called Corresponding Day mechanism (see paragraph 3 of Schedule 4, and the definition of "Corresponding Day"). There does not appear to be any issue between the parties as to the principles governing the assessment of any such compensation - at least, I was not invited to resolve any such issue. The parties were also agreed that I should not (at least at this stage) determine the quantum of any compensation payable.

19. I was provided with a copy of the Committee's Determination No. AD 18, from which this Arbitration is, in effect, an appeal. Before summarising my conclusions, it is right that I should record the Committee's conclusions, which were, in summary, as follows:

- (1) The Engineering Allowances specified in Diagram 1 "are not themselves to be understood as Network Possessions"; however
- (2) The inclusion of Diagram 1 implies the parties' recognition of "a contractual obligation in respect of the values for engineering allowances that might be set as a result of the Rules of the Route procedure," which the parties should take account of "in seeking agreement on the Rules of the Route for future timetables";
- (3) For the period since 2<sup>nd</sup> June 1998 [sic], Railtrack should, in calculating Schedule 4 compensation in respect of notified Possessions (including TSRs) (and in view of the special features of NWTC's TAA), take account of any significant differences between the agreed Rules of the Route Engineering Allowances and those specified in Diagram 1;
- (4) NWTC is not entitled to any such compensation in respect of the period before 2<sup>nd</sup> June 1998 [sic].

20. Schedule 4 compensation is payable for Railtrack Possessions outside the Possessions Allowance (and for certain other types of Possession not material to the present dispute), if notified in accordance therewith. I am bound to say that I do not understand on what basis Schedule 4 compensation can be payable in respect of Engineering Allowances in excess of those specified in Diagram 1, unless they are indeed (contrary to the Committee's conclusions) Network Possessions, and therefore Railtrack Possessions.

21. The Committee said, in the course of their Determination, that Engineering Allowances were not commonly understood in the industry to be Network Possessions (see paragraph

6.1). However, it was not suggested on behalf of Railtrack, nor was any evidence adduced, that as a matter of industry custom or usage the phrases "Possession" and/or "Network Possession" had acquired a particular meaning which necessarily excluded Engineering Allowances from their scope. I was invited to consider the issues arising as issues of construction of the relevant contractual provisions, set against the contractual matrix, and having regard in particular to the purpose of Engineering Allowances and the context in which they are developed and announced.

22. I concluded that the principal grounds advanced by NWTC in support of their contention that Engineering Allowances were (at least for the purposes of the TAA with which these proceedings are concerned) Possessions, Network Possessions and therefore Railtrack Possessions, within the respective Schedule 4 definitions, as summarised at subparagraphs 16(1)-(10) above, are well-founded, and that Railtrack's submissions to the contrary effect, as summarised at subparagraphs 17(1)-(11) above, are flawed.

23. My reasons for these conclusions as follows:

- (1) I accept Railtrack's submission that the phrase "any restriction of use of ... the Routes" in the Schedule 4 definition of "Possession", means restriction of use by the relevant TOC, in this case NWTC;
- (2) An Engineering Allowance (which, as was common ground, will be "built into" the Working Timetable - as an "integral part" thereof, to use Railtrack's phrase) involves what, as a matter of ordinary language, is clearly a restriction of use of the Route in question. The journey time of a train passing over a section to which an Engineering Allowance applies will be increased, whatever the means by which that Allowance is taken up (e.g. by the train proceeding more slowly over the section in question, or halting at signals or at a station at the beginning or end of the section). The TOC's use of the Route in question is subject to a restriction as compared to what would have been the position had there been no Engineering Allowance, in which event (all other things being equal) the timetabled journey



time could have been shorter. As NWTC contended, there is a restriction of use irrespective of whether or not engineering work is actually being carried out and/or whether or not a TSR has actually been imposed;

(3) I reject Railtrack's submissions to the effect that, for the purposes of the definition, "restriction of use" means restriction as compared to NWTC's contractual entitlement, and that, as Engineering Allowances are built into the Working Timetable (which embodies or regulates the TOC's contractual entitlement to run trains), they cannot as a matter of definition involve such a "restriction of use". It is clear that there are other types of Possession, such as blockages, which, if notified in accordance with the Rules of the Route procedure, will be built into the Working Timetable, but which are nonetheless indubitably Possessions. Railtrack's submission on this point involves the proposition that no restriction of use thus notified and incorporated into the Working Timetable can constitute a Possession within the meaning of Schedule 4. That cannot be right - if it were, it would not only severely restrict the application of Schedule 4: it would be contrary ego to paragraph 2.2 thereof;

(4) The cases relied on by Railtrack raised the very different issue of whether a conditional grant of rights can amount to an unlawful restraint of trade or restrictive practice, and give no assistance in construing the phrase "restriction of use" in the present context;

(5) If, as I conclude, Engineering Allowances which are built into the Working Timetable are "restriction[s] of use of ... the Routes" and therefore Possessions within the Schedule 4 definition, they are also Network Possessions, because they are clearly Possessions "for the purpose of or in association with inspection, maintenance, renewal, repair, enhancement or other modification of the Network or track", as indeed their very name suggests: they are restrictions of use for the purpose of allowing a limited amount of engineering work to be carried out, or for associated purposes, without disrupting the running of trains in accordance

with the Working Timetable. The "purpose" element of the definition of Network Possessions is thus satisfied. Neither definition requires the existence of any physical impediment, such as a blockage or TSR. I reject Railtrack's submission that a restriction has to be of like kind to those specifically enumerated in the definition of Network Possession, to fall within that definition. There is nothing in the context which requires me to construe "including" as subject to an *"of like kind"* limitation, and so I must and do construe it, as required by Condition 1.1(f) of the TAC (see also clause 1.4 of the TAA), without limitation;

(6) I agree with NWTC that its submissions are consistent with the TAC definition of Rules of the Route. The fact that Engineering Allowances are now specified in schematic maps included within the Rules of the Route, which are described as comprising "A full listing of the available possession times for the North West Zone", is itself an indication that the draughtsman of the Rules of the Route regarded Engineering Allowances as Possessions. The final paragraph of the Rules of the Route definition is of a clarificatory nature: it is clearly not intended to be a comprehensive statement of when track is subject to a Possession, and does not advance Railtrack's case;

(7) I do not regard Railtrack's "perverse incentives" argument as casting any light on the proper construction of the relevant provisions of the parties' contract. I see no reason not to assume that Railtrack has introduced and will continue to introduce whatever Engineering Allowances it considers proper to allow for engineering works to be carried out or associated restrictions to be imposed without causing undue disruption to the Working Timetable, even if this results in Railtrack having to pay Schedule 4 compensation to the extent that such Allowances exceed those specified in Diagram 1. The theoretical possibility that Railtrack might trim Engineering Allowances to those specified in Diagram 1 to the prejudice of proper maintenance and running of the Network is not a reason for

giving the words and phrases in issue a different meaning from that which they would otherwise bear;

(8) Nor do I see why a failure to object to (proposed) Engineering Allowances in the course of the Part D procedures should prevent NWTC from claiming Schedule 4 compensation if otherwise appropriate. The (proposed) Engineering Allowances may be perfectly reasonable - indeed, it has not been suggested that any of the Allowances in question in the present case were not. Incorporation in the Working Timetable of time allowances or other provision for any type of Network Possession does not preclude a claim for compensation if the Possession in question exceeds the Possessions Allowance;

(9) I also agree with NWTC that Engineering Allowances notified in accordance with the Rules of the Route procedure meet all the requirements of paragraph 4.1 of Schedule 4. Railtrack is thereby supplied with sufficient information to determine in respect of such Possessions the type (Engineering Allowance), duration (box time and/or period to which the Rules of the Route apply), location (relevant section of the Routes), commencement and cessation times (beginning and end of period to which the Rules of the Route apply), and the likely effect of such Possessions on trains. I could see no basis for Railtrack's submission that the Schedule 4 concept of "notification" refers only to matters arising during the Timetable period. It clearly applies to Possessions notified by the Rules of the Route procedure and incorporated into the Working Timetable (see e.g. paragraph 2.2 of Schedule 4);

(10) The bespoke paragraph 2.4 of Schedule 4 of NWTC's TAA, read in conjunction with the definition of Possessions Allowance, makes clear the intention of the parties to this TAA to create a Possessions Allowance in respect of the Engineering Allowances specified in Diagram 1. Indeed, it recognises the character of Engineering Allowances as Network Possessions, by referring to "any Network Possession specified in Diagram 1", where what Diagram 1

specifies are the Engineering Allowances themselves. I accept NWTC's submission that the Possessions Allowance applies to Engineering Allowances as distinct from TSRs. If it applied to TSRs, it would, as NWTC pointed out, be ineffective in the instant case, because less than 28 days' notification is provided of TSRs (cf. Schedule 4, paragraph 2.4(b)). Although General Note 13 refers to TSRs, it goes on to explain that "Diagram 1 indicates the additional journey time permitted in respect of, or in connection with, Possessions for the relevant Route sections", and Diagram 1 does this by means of Engineering Allowances specified in box times;

- (11) Given that Engineering Allowances are specified in the Rules of the Route and thereby incorporated into the Working Timetable, it would be odd if the availability of Schedule 4 (or Schedule 8) compensation for any increase in such Allowances over and above the Possessions Allowance in respect thereof as specified in Diagram 1, were to depend, as Railtrack contended, on whether TSRs were actually imposed, the extra journey time for which exceeded the Diagram 1 Engineering Allowance but did not exceed the increased Engineering Allowance. The imposition of such TSRs would not affect the running of trains in accordance with the Working Timetable: it would therefore not result in any additional restriction of use as compared with the restriction inherent in the Working Timetable. One would not expect compensation to be payable merely because some slack in the Working Timetable was taken up.

24. The Committee clearly regarded Diagram 1 as embodying "a contractual obligation in respect of the values for engineering allowances that might be set as a result of the Rules of the Route procedure", and felt that compensation should in principle be payable if the Diagram 1 Engineering Allowances were exceeded (paragraphs 8.2 - 8.5 of their conclusions). I am reassured by the fact that my decision leads to a similar conclusion to theirs, albeit by a different route.

25. In view of my decision that Engineering Allowances are Network Possessions and therefore Railtrack Possessions, it is not necessary for me to deal with NWTC's alternative case to the effect that, if they were not, then TSRs, which have in practice usually been advised in Weekly Operating Notices, should instead have been notified in accordance with the Rules of the Route procedure, or with Railtrack's objections to NWTC's revised formulation of this alternative case.

26. I therefore turn to deal with the issue as to whether NWTC is precluded by paragraph 6.2 of Schedule 4 from advancing a claim for compensation in respect of the Periods prior to 3<sup>rd</sup> May 1998. I concluded that NWTC is deemed, by paragraph 6.2, to have agreed the contents of the Day 42 Statements provided by Railtrack in respect of the Periods up to and including 2<sup>nd</sup> May 1998, notwithstanding the failure of these Statements to mention Engineering Allowances or compensation payable in respect thereof. I did so for the following reasons:

- (1) It is clear that a Day 42 statement which does not accurately record all the Possessions and the compensation payable in respect thereof may nonetheless be a paragraph 6.1 statement for the purposes of paragraph 6.2 (ie "such [a] statement" within the meaning of the first line of paragraph 6.2). If total accuracy were essential before paragraph 6.2 could apply to the statement in question, there would be no scope for the practical application of paragraph 6.2 or paragraph 6.3: any dispute would be bound to be resolved in Railtrack's favour;
- (2) Thus, for example, if all Possessions were accurately recorded, but the compensation was not properly calculated, the statement would still be a paragraph 6.1 statement: the contrary was not suggested by NWTC;
- (3) It seemed to me that the key was whether, having regard to the content of the statement and to any other knowledge possessed by NWTC, NWTC was in a position to make an informed assessment of the accuracy of the statement. In

deciding whether it was or not, its knowledge of relevant matters cannot be disregarded;

(4) In the present case, NWTC had full details of the Engineering Allowances, and of the Possessions Allowance in respect thereof, having been notified of them by, respectively, the Rules of the Route and Diagram 1. It thus had the necessary knowledge to recognise that an entire category of Possession had been wrongfully omitted from the Day 42 Statements, and to assess the extent to which such Possessions fell outside the Possessions Allowance in respect thereof. I cannot absolve NWTC entirely from the consequences of its failure, before about 2<sup>nd</sup> June 1998, to recognise (if that be the case) that, as it subsequently contended and as I have held, Engineering Allowances are Network Possessions. It was, from the outset, in a position to recognise this and therefore make an informed assessment that the Day 42 Statements were incomplete, and in what relevant respects;

(5) It would be absurd if, for example, the personnel involved in checking a Day 42 Statement realised immediately that a particular category of Possession had been omitted, but if NWTC could nonetheless safely ignore the paragraph 6.2 deadline for objections because the statement was thus inaccurate in a fundamental respect: such inaccuracy cannot of itself be a ground for disapplying paragraph 6.2;

(6) It was suggested that the division of responsibility within NWTC would have meant that those responsible for timetabling matters and therefore aware of the extent of Engineering Allowances would not have been involved in matters relating to the assessment of Schedule 4 compensation. However, it was surely incumbent on NWTC management to ensure that those assigned the task of checking Day 42 Statements were supplied with the necessary information in NWTC's possession to enable them properly to carry out that task;

- (7) The above conclusions are reinforced by the fact that the whole scheme of paragraph 6 is directed at the early identification and resolution of disputes about the content of Day 42 Statements - see also paragraph 6.3. Indeed, my jurisdiction derives ultimately from service of a paragraph 6.2 notice or notices. The commercially desirable end of early identification and resolution of such disputes would not be well served if information always available to NWTC could be resurrected long after the event to enable a challenge to be mounted to a Day 42 Statement.

27. With regard to costs, NWTC have succeeded on the main issue that was argued before me. In the circumstances, I thought it appropriate to award them their costs, subject to a discount to reflect the fact that they failed on the paragraph 6 issue. The discount of 30% takes account of the fact that I have ordered Railtrack to pay all my fees and expenses in relation to the conduct of this Arbitration, including the costs of this Award, and the fact that I have not ordered it to reimburse any part of the Arbitration Fee paid by NWTC pursuant to Rule C5.1 of the Arbitration Rules.