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## ACCESS DISPUTE ADJUDICATION

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### Determination in respect of Dispute ADA20

**An Access Dispute Adjudication conducted on the basis of written representations only**

**Hearing Chair:** Clive Fletcher-Wood

**Dispute Parties:** Network Rail Infrastructure Limited ("Network Rail" or "NR")  
West Coast Railway Company Limited ("WCR")

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## 1 Introduction, Procedural History of the Dispute and Jurisdiction

1.1 In this determination the abbreviations used are as set out in the details of Parties above, in this section 1 and otherwise as specified in the text of the determination.

“ADA” means Access Dispute Adjudication held in accordance with Chapter G of the ADRR

“ADRR”, “Rules” or “Rule” refer to the Access Dispute Resolution Rules

“Incident” refers to a lineside fire on 12 July 2014 associated with the passage of train 1Z57

“LNE Route” means the London North Eastern & East Midlands Route of Network Rail

“Network” means the network in respect of which Network Rail is the facility owner and which is situated in England, Wales and Scotland

“ORR” means the Office of Rail Regulation

“ROGS” means the *Railways and Other Guided Transport Systems (Safety) Regulations 2006*

“Secretary” means the Secretary of the Access Disputes Committee

“TAC” means “Track Access Contract

1.2 This dispute concerns the entitlement of Network Rail to refuse a train operator access to part of the Network for the operation of trains hauled by steam locomotives.

1.3 On 18 August 2014 WCR served a Notice of Dispute complaining that Network Rail was refusing to consider Train Operator Variation Requests from WCR seeking access to operate Steam Driven Equipment on its LNE Route despite indication in clause 3.6 of Schedule 5 to the TAC that refusal should only be based on there being significant risk of fire and further despite WCR being prepared to provide all reasonable assurances regarding measures being in place to mitigate against Steam Driven Equipment causing fires. WCR considered Network Rail to be acting in breach of the contract. In addition to seeking reversion to proper application of the terms of the contract, WCR was seeking to establish entitlement to claim damages for loss of business. A Procedure Agreement adopting Access Dispute Adjudication as the determination procedure was entered into by the Parties on 20 August 2014, the dispute being registered by the Secretary as “ADA20”.

1.4 Meanwhile, on 19 August 2014, the LNE Route had issued a Suspension Notice to WCR, asserting a Train Operator Event of Default on the part of WCR in connection with clause 1.1(c) of Schedule 6 to the TAC. WCR served a Notice of Dispute regarding this Suspension Notice on 26 August 2014, disputing that there were grounds upon which Network Rail could assert breach of its Safety Obligations; in addition to seeking that Network Rail rescind the Suspension Notice, WCR continued to seek to establish entitlement to claim damages for loss of business. WCR was content for this Notice of Dispute to be joined together with its Notice of Dispute dated 18 August 2014 and with dispute ADA20; Network Rail raised no objection to this course of action

1.5 I was appointed as Hearing Chair on 26 August 2014 and satisfied myself that the dispute was appropriate for determination by an ADA.

1.6 WCR served its Statement of Claim on 9 September 2014. Towards achieving effective case management of the adjudication, on 12 September 2014 I issued Directions seeking early clarifications by WCR of certain points in order to enable Network Rail to deal fully with WCR's case in its Statement of Defence; guidance was provided to Network Rail as to what was then expected and the timescales for submission of further statements of case were adjusted. WCR responded on 16 September 2014 and I issued additional Directions later that day to further assist case management; also, on the basis of my reading of the material submitted, I considered it appropriate to recommend that WCR take legal advice.

- 1.7 Network Rail served its Statement of Defence on 30 September 2014 and WCR served a Response on 3 October 2014.
- 1.8 My Directions Letter of 12 September 2014 had also canvassed the possibility of dealing with liability and quantum separately. Conscious of my duty under Rule G4(b) to "*endeavour to reach fair, rapid and inexpensive determinations of disputes*" and having formed the opinion that in view of the comprehensive evidence and submissions provided by the Parties it would be possible to determine liability on the basis of the written representations already made (as permitted by Rule G15), the Parties were asked on 7 October 2014 if they were prepared to proceed in this way with any issue regarding quantum being the subject of further Directions if WCR were to succeed in establishing liability on the part of Network Rail. Both Parties consented.
- 1.9 Having reached my conclusions on the substance of the Dispute, I circulated my Determination to the Parties in draft form, following the policy of the Access Disputes Committee as set out in the Committee's Guidance HC/2012/2. The principal purpose of this process is to permit the Parties to alert the Hearing Chair to any typographical or factual errors before a Determination is finalised. On this occasion, however, I took the opportunity to invite submissions from the Parties on what remedies should be ordered within the Determination. My principal reason for doing so was that things had moved on since the Parties submitted their Statements of Case, so that not all remedies originally sought were necessarily the most appropriate way forward in the light of the findings which I had reached. My decision to seek these further submissions was also influenced by the fact that I regard constructive co-operation between industry parties as extremely important in maintaining safety standards, especially after a Dispute of this kind. I am grateful to the Parties for their submissions.
- 1.10 Having thoroughly read and understood the Statements served by the Parties, I concluded that I possessed the relevant railway expertise necessary for reaching a fair determination of the dispute and, as permitted by Rule G3, I ordered that no Industry Advisors were to be appointed for this ADA. The necessary knowledge of safety legislation is not expected from within the pool of Industry Advisors retained by the Access Disputes Committee. In contrast, my legal practice included significant involvement in matters directly relevant to the issues raised in this dispute; otherwise it would have been appropriate to have appointed a legal assessor with relevant safety experience to assist me.
- 1.11 Throughout my consideration of the Parties' submissions and in my case management generally, I was mindful that as provided for in Rule A5, I should reach my determination "on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.12 As this dispute is being determined on the basis of written representations I am not following the template Determination set out in Rule G49. In accordance with Rule G5, however, I am following the principles of Chapter G of the Rules in making this Determination.

## **2 The Incident leading to the Dispute**

- 2.1 The Dispute arises from an incident on 12 July 2014, when a charter service was operated by WCR which was to be steam-hauled from Carnforth to York. It was operating under train reporting number (headcode) 1Z57. This train was to be hauled during this part of the journey by ex-GWR 'Hall' Class no. 5972 *Olton Hall*.
- 2.2 It appears to be accepted by both Parties that shortly after crossing the boundary from NR's London North Western (North) Route to the LNE Route a small live coal fell from the locomotive, which caused a lineside fire requiring the attendance of the fire brigade.

- 2.3 Separate issues arise from this incident. The first, which I call 'The Technical Issue' concerns the way in which this live piece of coal fell from the locomotive and what steps could and should have been taken to reduce the likelihood of a recurrence of such an incident.
- 2.4 The second issue, which I call 'The Procedural Issue', initially covers the question of fact as to whether the train crew were complying with the Fire Risk Status applying at the time. The issue then broadens out to include the steps taken by the Parties in the aftermath of the incident.
- 2.5 Consideration of the Procedural Issue requires an analysis of the exchanges between the Parties after the incident. In examining these exchanges I remind myself that under Rule G4(c) an ADA should, where appropriate, '*...take the initiative in ascertaining the facts and law relating to the dispute*'.

### 3 The relevant contractual and background issues

- 3.1 WCR is a Train Operator ("TO") (which I use in preference to TOC, which is generally held to apply to franchised and open access passenger operators) operating charter services on the Network under the provisions of its TAC. The version of the TAC in force at the date of the Incident is that dated 30 August 2009. Some relevant extracts from the TAC are set out in Appendix B; others appear within the body of this Determination.
- 3.2 Conditions precedent in the TAC include the requirement for WCR to be in possession of a valid Licence granted under Section 8 of the *Railways Act 1993* and a European Licence and Statement of National Regulatory Provisions granted under the *Railways (Licensing of Railway Undertakings) Regulations 2005*.
- 3.3 Further, WCR is required to have a valid Safety Certificate (and Safety Authorisation, if required in respect of infrastructure, but none has been granted to WCR) as required by ROGS and that WCR '*...has established and is maintaining a safety management system which meets the requirements of those Regulations....*'
- 3.4 Similar provisions affect NR.
- 3.5 The Safety Obligations binding both parties appear within the Definitions section of the TAC. These are defined as meaning, '*...all applicable obligations concerning health and safety (including any duty of care arising at common law, and any obligation arising under statute, statutory instrument or mandatory code of practice) in Great Britain*'.
- 3.6 Clause 6.3 of the TAC, headed 'Safety', states that:
- In relation to Safety Obligations:*
- (a) *The Train Operator shall comply with any reasonable request by Network Rail in relation to any aspect of the Train Operator's operation which affects or is likely to affect the performance of Network Rail's Safety Obligations; and*
- (b) *Network Rail shall comply with any reasonable request by the Train Operator in relation to any aspect of the Network Rail's operation which affects or is likely to affect the performance of the Train Operator's Safety Obligations'.*
- 3.7 Schedule 6 deals with Events of Default, Termination and Suspension. The Train Operator Event of Default is defined (see Appendix "B"), as well as the rights of suspension. The heading of Clause 2.5 refers to a suspension being proportionate to the breach (discussed further below); the details in this paragraph specify that suspension is to be restricted, as far as reasonably practicable, to the vehicles, Services, Routes and categories of train movements or railway vehicles related to the relevant Event of Default.

- 3.8 The party served with a Suspension Notice which is capable of remedy is required with reasonable diligence to take the steps required in the Suspension Notice and to keep the party serving the Suspension Notice fully informed of progress.
- 3.9 A Suspension Notice is to be revoked in whole or in part as soon as practicable after the breaches have been remedied.
- 3.10 The risk of fire created by the operation of steam locomotives on a Network no longer configured for large scale steam operations (for example, by way of clearance of vegetation in cuttings and on embankments) was clearly within the contemplation of the Parties. Clause 3.6 of Schedule 5 to the TAC (quoted in Appendix "B") sets out provisions enabling NR to give notice that a steam locomotive would not be permitted to operate a planned service, with WCR having the option of cancelling the service or operating it with diesel traction instead.
- 3.11 These provisions require NR to give no less than 7 days notice if possible, but require NR to serve a Withdrawal Notice by noon on the third Working Day before a train is due to operate.
- 3.12 It is NR's submission, which is not contested by WCR, that in collaboration with WCR and DB Schenker Rail (UK), the other significant operator of steam charters, a Fire Risk Protocol ('the Protocol') has been developed to, '*...help Network Rail manage the safety and performance risks posed by steam charter operations during times of high fire risk. The protocol was also designed to give operators the opportunity to engage with Network Rail on potential mitigations which could be employed during times of high fire risk in order to maintain a degree of 'normal' or sub-optimal operation – a privilege which their Track Access Contracts do not provide*' (paragraph 5.2 of NR's Statement of Defence).
- 3.13 The Protocol did not replace any existing document. The trial of the Protocol started on 30 June 2014.

#### **4 Submissions made and outcomes sought by the Parties**

##### **4.1 WCR's Statement of Claim**

- 4.1.1 In its Statement of Claim, WCR disputed that there were grounds on which NR could assert that WCR was in breach of its Safety Obligations (as defined in Appendix "B"). After reciting the Notices of Dispute, WCR stated that its TAC provided no remedy for the Train Operator.
- 4.1.2 WCR said that NR had claimed that it was concerned about the robustness of WCR's Safety Management System ('SMS'); was concerned about inconsistent views expressed by WCR's senior management about the Incident; and was still awaiting a full response to a letter from NR dated 13 August 2014.
- 4.1.3 WCR alleged that NR's actions had been '*partial and malicious, to enable it to enforce a preference to ban steam-hauled operations on its Route*'.
- 4.1.4 In dealing with the details of the Incident WCR accepted that once the train entered the LNE Route it was required to operate under Amber conditions, '*.....with an attached diesel locomotive being used to provide assistance. The term 'assistance', as used in the Protocol, is somewhat misleading and contradictory, in as much as in railway operating terms, that word has always meant that the diesel would be used to provide tractive power, in addition to that provided by the train engine (in this case the steam locomotive) and not, as seems to be understood by the LNE Route Director, that the diesel is in replacement of the steam locomotive, in which case the Protocol should, of course, require the diesel to power the train solely. It is however a trial Protocol, intended to flush out this sort of simple error, which leads to confusion*'.
- 4.1.5 At the time that the live coal dropped, approaching Bell Busk, WCR states that power on the steam locomotive was '*....shut off (not under power as alleged by NR LNE)....*'.

- 4.1.6 WCR states that the live coal dropped because a hole had been burned in the ash-pan damper door mesh. It sets out considerations of containment across all locomotives, and then says that the decision was taken to remove the vehicle from the network as a simple, effective and swift containment.
- 4.1.7 WCR refers to a meeting with LNE Route at York, saying that there was, '*...regrettably some confusion over whether the driver of the train had been briefed fully on the operations under the trial protocol...*', going on to say that WCR's Commercial Manager, who is stated not to be involved in the '*direct structure*' of WCR's SMS, unfortunately provided information which subsequently proved to be incorrect. WCR states that this has subsequently been clarified in writing.
- 4.1.8 WCR then referred to what it claimed were failures on the part of NR in relation to a '*...very serious derailment and major fire, involving a WCR train, in Manchester in 2013*'.
- 4.1.9 WCR then summarises the exchanges between the Parties, including regretting (in its view) that the Route Director has managed to retain the viewpoint attributed to him, of deciding that the incorrect information supplied by WCR's Commercial Manager had seriously compromised WCR's SMS.
- 4.1.10 WCR then states that in spite of damp weather conditions, LNE Route continued to impose Red conditions (under the Protocol) on WCR, whereas other Routes had reverted to Green conditions.
- 4.1.11 WCR questions the right of a Route to issue a Suspension Notice, when the same requirements do not apply to other Routes. WCR said that the requests by the LNE Route Director for submissions to be made did not actually specify and explain the underpinning logic of what WCR described as his '*purported concerns*'.
- 4.1.12 A further point made by WCR is that if NR had concerns about WCR's SMS, '*...such matters should have been reported to the ORR's Railway Inspectorate, for them to carry out an investigation*'.
- 4.1.13 Determination and Remedies sought by WCR
- 4.1.13.1 WCR sought a Determination that NR had acted unreasonably and exceeded its rights in banning steam traction from its LNE Route. The remedy sought would include withdrawal of the Suspension Notice dated 13 August 2014; the provision of appropriate levels of compensation; and that NR should '*... provide a formal written assurance that it respects the provisions of the Open Access legislation and the right for steam traction to operate on the network, albeit safely and reliably. WCR is greatly concerned that there are those within NR, specifically LNE Route, who do not want to see the operation of steam on the network and will use any excuse to curtail it.*' (Para. 7.1.3 of WCR's Statement of Claim).
- 4.1.13.2 A further request for compensation then appeared, for the, '*...incorrect use of the trial Fire Risk Protocol as a contractual tool and then via the Suspension Notice of 13 August 2014*'.

## 4.2 The Directions of 12 September 2014

- 4.2.1 The first section of my Directions of 12 September 2014 was directed towards WCR, to obtain clarification of certain points which would assist NR in drafting its Defence. I asked whether WCR was seeking a Determination on NR's reasonableness overall, or whether it merely sought a decision that NR had unreasonably interpreted the TAC; whether WCR was seeking a ruling on whether LNE Route had been partial and malicious; what effect the order requested in paragraph 7.1.3 of WCR's Sole Reference Document would have; and the relevance of the derailment in 2013, which I assumed to be the derailment at Ordsall Lane Junction on 23 January 2013.

To assist me in managing the case proportionally I sought a broad indication of the quantum of WCR's claim and indicated to NR points which I wished to see addressed in its Defence and which documents NR could provide to assist the ADA.

#### 4.3 WCR's response to the Directions of 12 September 2014

- 4.3.1 On 15 September 2014 WCR replied to those Directions addressed to it. WCR confirmed that it was seeking a Determination on NR's reasonableness overall; that it did seek a Determination on the issue of malice; that it sought (but without explaining why) the written assurance referred to in its paragraph 7.1.3; and that the reference to the derailment at Ordsall Lane was to illustrate an alleged double-standard on the part of NR, claiming that NR initially denied culpability.

The indication of quantum which I sought was provided.

#### 4.4 The Directions of 16 September 2014

- 4.4.1 Having reviewed WCR's response to the first Directions, I thought it appropriate to issue further Directions on 16 September 2014.

To put matters beyond any possible doubt, I directed that NR should not include any evidence in its Defence relating to the points made in WCR's response.

I summarised the key issues as I saw them then, as being whether LNE Route was entitled to issue the Suspension Notice dated 19 August 2014; if so entitled, had any change of circumstances meant that it should subsequently have been lifted; and what losses would be recoverable by WCR in either case.

In the light of WCR's response I thought it appropriate to point out that by maintaining an allegation of malice WCR had assumed a major evidential burden, which would increase the amount of time needed to decide the ADA. Given this, I referred to the possibility of an adverse costs award.

Further, and in the light of the way in which WCR's case on losses had been drafted, I thought it appropriate to advise WCR to take legal advice at an early stage.

#### 4.5 Network Rail's Statement of Defence

- 4.5.1 NR's Defence was accompanied by 27 Appendices. Helpfully, as had been requested, these included the correspondence passing between the Parties since the Incident, and a number of other relevant documents.

- 4.5.2 In its Response (discussed further below) WCR did not challenge the accuracy of anything included in NR's Defence. It did, however, suggest that Appendix 19, showing fires attributed respectively to WCR and DB Schenker is proportionate to the number of services operated. I can say at this point that I concluded on my initial review of NR's Defence that even if this data had been normalised it bears no relevance to this Dispute and the issues which I have to decide. I have therefore ignored this Appendix.

The lack of any challenge on other points by WCR, however, enables me to accept that the record of what has passed between the Parties provided by NR is correct.

- 4.5.3 NR stated that it observed a Train Operator Event of Default (as defined) starting on 12 July 2014, which eventually led to the Suspension Notice of 19 August 2014. This according to NR concerned a, '*...non-adherence by WCR to a fire-mitigation operating instruction given to them through the Network Rail trial 'Fire Risk Protocol'...*' NR states that this required attendance by the West Yorkshire Fire Brigade (although the incident appears to have occurred in North Yorkshire, as stated elsewhere by NR) and caused significant delays and discomfort to other passenger services and passengers.

- 4.5.4 NR confirmed that the Event of Default related to breaches of Safety Obligations by WCR. The Statement of Defence included a reference to the *Health and Safety at Work Act 1974* (properly the *Health and Safety at Work etc Act 1974* ("HSWA")), and ROGS.
- 4.5.5 Key issues within NR's case were set out at paragraphs 4.12 to 4.23 of its Statement of Defence, which should be read and are repeated in full at Appendix "A".
- 4.5.6 Determination sought by Network Rail
- 4.5.6.1 NR sought a Determination that there were sufficient grounds to support NR's action to suspend WCR from operating Steam Driven Equipment on the LNE Route; that WCR is not entitled to compensation in terms of the TAC; that NR had exercised correctly and proportionately its contractual rights, as per the TAC, in relation to the safe operation of Steam Driven Equipment during times of high fire risk; and that those actions considered by NR as the suitable and sufficient remedy to WCR's breach of Safety Obligations should be completed by WCR as the concluding stage of this matter.

#### 4.6 WCR's Response Statement

- 4.6.1 In the Response Statement which WCR is entitled to submit, it states that NR had made no previous mention of the HSWA, which WCR says is inconsistent with NR's account of the scale of events. WCR states that it complies with the HSWA. It goes on to say that, '*NR does not have the role of policing safety on the network but, equally, as a Duty Holder, if they were sufficiently concerned, they should have reported the situation to the Office of Rail Regulation (ORR) and/or the Health and Safety Executive*'.
- 4.6.2 After a comment about delay, WCR goes on to say that if NR is concerned about communication with WCR's train crew and WCR's SMS that, '*...all Duty Holders have a responsibility of [sic] safety, NR has not seen it necessary to ban steam from any other Route, which would seem logical, were it to be an issue of how steam is operated or, indeed, ban all forms of traction, were it to be a communications issue which is not steam-specific. Given that they state they are so concerned with the situation, it is illogical that they did not contact the ORR, seeking a review of WCR's SMS and similar, given that their level of concern was to issue a Suspension Notice, after using inappropriate devices to ban steam on the Route. It therefore questions their motive in banning steam*'.
- 4.6.3 WCR then refers to the maintenance of the steam ban at Red for WCR and states that the partial revocation of the Suspension Notice illustrated NR acting disproportionately. WCR states that it is, '*.....a blatant nonsense to impose a suspension, based on the allegation of deficiencies in WCR's SMS, and then to revoke that suspension, whilst continuing to claim that they (NR) have still not been provided with a remedy to the perceived deficiencies*'.
- 4.6.4 Finally WCR questions the timing of the revocation and the fact that it claims that a journalist was given notification of this before WCR.

### 5 **Issues and Considerations**

#### 5.1 Safety-related issues

- 5.1.1 At root this is a contractual dispute, or it could not be determined by an ADA. My decision, however, turns on safety-related issues. Given this, I think it appropriate to make some introductory comments on safety.
- 5.1.2 In some disputes – although I emphasise not in this one – a party sometimes seeks to play a 'safety card' with a flourish, as if it is a trump card which cannot be questioned. This is an entirely inappropriate way in which to approach safety issues. This is because there are few absolutes in safety law. So although at first sight the requirement in the TAC for each party to comply with '*all applicable obligations*' may seem onerous, this must be interpreted to reflect



the way in which safety law is enforced on the Network. This issue bears further discussion, not least, because of some of the statements relating to safety made by WCR in its pleadings.

- 5.1.3 The HSWA is general law applying to all employers. As such, many of its provisions lay down high level principles, which are in most cases subject to a test of what is reasonably practicable. Further, the principles are frequently expanded into greater detail in subordinate legislation. While much of this is of general application, for example the *Management of Health and Safety at Work Regulations 1999*, even provisions of this kind are covered in subordinate legislation applying to railways (which would, where relevant, apply even if a heritage railway were capable of operating without any employees).
- 5.1.4 In relation to this Dispute, ROGS are the most relevant Regulations. In particular I bear in mind the duty of co-operation imposed by Regulation 22, and the requirements for an SMS set out in Schedule 1 (Appendix "C").
- 5.1.5 WCR is quite correct in saying that NR does not *'have the role of policing safety on the network'*; a statement with which I assume NR would concur. But this area requires a more subtle investigation than is suggested by that statement.
- 5.1.6 It is not much more than 10 years ago since Railtrack accepted the Safety Cases of TOs, and then audited compliance through its Safety and Standards Directorate. This led to the somewhat unusual position of Railtrack effectively policing its own customers, yet there being a 'one-way mirror', enabling Railtrack to have full visibility of its customers' safety performance, while TOs had no visibility of Railtrack's safety performance.
- 5.1.7 The position now is that NR and train operators obtain a Safety Certificate and/or Authorisation from the ORR and have to submit an Annual Safety Report to the ORR. Even in this situation, however, those operating trains on the Network and NR are dependent on the safety of each other's operations to run a safe railway. Each industry party must therefore be alert to the safety performance of the other party. To what extent, however, are they under a duty to go any further?
- 5.1.8 If contracting out a task which forms part of one's undertaking there is a high duty to be satisfied with the safety procedures of the contractor. The same does not apply between a TO and NR, but responsibilities remain nonetheless. One party must be cautious not to interfere in the running of the other's undertaking, not least because it might therefore be fixed with a degree of responsibility for matters beyond its control, but there is a duty to act if a railway industry party has concerns about the other's safety performance. This general duty is articulated in the specific terms of WCR's TAC, in the requirement for each Party to act on the reasonable requests of the other relating to Safety Obligations, and ultimately in the rights of suspension. Mirroring the tests in general law such as 'reasonable practicability', is the contractual requirement for any right of suspension to be proportionate to the breach (discussed further below).
- 5.1.9 An issue that permeates this dispute is the requirement that an SMS must include: *'procedures to ensure that accidents, incidents, near misses and other dangerous occurrences are reported, investigated and analysed and that necessary preventative measures are taken'*. As can be seen in Appendix "C", Schedule 1 to ROGS deals with SMSs and Article 2 sets out the basic requirements of an SMS. The section quoted above appears at 2(f)(ii). In my judgment this duty must be conducted honestly and transparently, sharing information with other industry parties where appropriate. Even if this were not the case, the power in WCR's TAC for either Party to make reasonable requests of the other relating to Safety Obligations is relevant in this context.
- 5.1.10 Clearly the first duty on the Parties is to discuss any safety concerns with the other, whether these concerns arise from day-to-day operations on the Network or, as in this case, arise from a specific incident.
- 5.1.11 WCR asserts on two occasions that NR should have raised its concerns with (in my words) Railway Safety within the ORR. The position can be reached in which one industry party

feels that it is compelled to raise safety concerns with the regulator. Between parties in a continuing contractual relationship that is not an easy decision and requires fine judgment. I say this on the basis of my own experience, having had to advise clients on a number of occasions as to whether the time had come to raise concerns with a safety regulator, and in which way they should be raised. As discussed below, since I first had to advise on this point the procedure has been codified.

5.1.12 I also observe that confidence in another party's safety performance can be affected by a number of factors, although most powerfully by their actions. I return to this issue below.

## 5.2 What fire restrictions were in place at the time of the Incident?

5.2.1 It is clearly important to understand what fire restrictions were in place at the time of the Incident, and for me to make the appropriate findings of fact.

5.2.2 WCR's understanding is set out at paragraph 4.1.4 above, including its view that the term 'assistance' used in the Protocol was misleading.

5.2.3 The Protocol was submitted by NR as Appendix 21 to its Defence. It defines Amber status as, 'Steam ban in place – steam locomotives can only operate through an agreed mitigation\* which is to the satisfaction of the relevant Route(s)'.

5.2.4 The '\*' footnote states that:

*'Agreed mitigations could include but are not limited to:*

- *change of route (differing gradients used in the train plan)*
- *change of traction (differing the steam loco to one known to pose less risk)*
- *change of load*
- *change of driver technique*
- *change of operation mode to 'diesel providing tractive effort from the rear' (TW 1 CI 16) with steam locomotive still at the head of the train but only partially lubricated/opened up/steaming; or*
- *Change of operation mode to 'diesel inside steam' (formerly 'light steam' operation – i.e. the steam locomotive sits at the front of the train formation partially lubricated/opened up/steaming but with the assisting diesel locomotive second in formation providing the tractive effort)'.*

5.2.5 Thus the Protocol itself does not include any section resembling the words used by WCR in its Statement of Claim to convey WCR's understanding of what was meant by an Amber restriction.

5.2.6 The mitigation measures in force at the time of the Incident are set out in the e-mail issued from the 'NOC National Operations Centre' at 12 55 on 7 July 2014, forward at 13 45 on that day by Nick Coles (Acting Customer Relationship Executive for Direct Rail Services and Charters) to seven WCR addressees, specifically referring to restrictions on the LNE and Wessex Routes which would affect WCR operations.

5.2.7 For the LNE Route the restriction was shown as:

*'Amber – With immediate effect until 23 59 on Sunday 13 July  
All steam locomotive operations to be with the steam locomotive NOT providing power and diesel traction assisting throughout'.*

5.2.8 While I accept that in these circumstances the diesel locomotive is doing more than assisting, as it is required to provide all the train's tractive power, I find that this instruction is entirely clear and unambiguous in saying that steam locomotives were not to provide tractive power within the LNE Route area on 12 July 2014.

5.2.9 WCR's Statement of Claim was signed by its Commercial Manager, who we are told within it is not '*...involved in the direct structure of the Company's Safety Management System*'.

WCR's Response was unsigned, but was submitted after WCR had reviewed NR's Statement of Defence. It seems unusual, to say the least, that having reached the case of formal pleadings in a dispute turning almost entirely on the interpretation of Safety Obligations, WCR's pleaded case should rely in part on an apparent failure on the part of WCR to understand (and/or accept) what restrictions actually applied to 1Z57.

- 5.2.10 This in itself raises questions about the efficacy of WCR's SMS. Other queries also arise from WCR's pleadings. In paragraph 4.6.1 above I quoted WCR's view that if NR was sufficiently concerned it should have reported WCR; I quoted WCR in saying that this report should have been made to the, '.....*Office of Rail Regulation (ORR) and/or the Health and Safety Executive*'.
- 5.2.11 Reiterating that WCR's Response Statement is unsigned, it is still surprising that any formal pleading from a company holding a Safety Certificate should apparently not appreciate that the HSE lost all responsibility for safety on the operational railway when the ORR assumed responsibility as the safety regulator in the railway industry pursuant to the *Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006*.
- 5.2.12 NR's case rests on WCR's actions following the Incident, not on the pleadings. But if the pleadings betray misunderstandings over factual issues and the law underpinning railway operations, as they clearly do, I consider that I should place an appropriate degree of weight on these factors in determining the Dispute.
- 5.3 Was the driver of 5972 aware of the Amber restriction?
- 5.3.1 WCR's pleadings are not entirely clear on this point. Its Statement of Claim states that, '*The train was being operated under the new trial Fire-Risk Protocol*' which implies that the train was being driven in accordance with the Protocol, and that the driver must therefore have been aware of it. Later in the Statement of Claim, however, WCR refers to '*some confusion about whether the driver of the train had been briefed fully on the operations under the trial protocol*'. WCR refers to information having been provided which subsequently proved to be incorrect, but that the matter had since been clarified in writing.
- 5.3.2 In WCR's letter of 22 July 2014 to NR (Appendix 2 to NR's Defence) WCR state that, '*At the point at which the fire occurred the locomotive was not working (contrary to anecdotal reports)....*', implying that the driver was aware of the restrictions.
- 5.3.3 WCR sent various documents to NR under cover of an e-mail at 17 57 on 28 July 2014. This included an undated WCR Incident Report Form naming the train crew and which appears to have been completed by the driver. The final sentence reads, '*The locomotive was worked throughout Network Rail LNE & E Mids Route, in accordance with the Amber warning given out*'.
- 5.3.4 I note the driver's claim that 5972 was worked '*in accordance with the Amber warning*', which does not say either that he was or was not aware of the Amber status, but appears to be intended to convey the meaning that he was, without actually saying so.
- 5.3.5 On 4 August 2014, however, under cover of an e-mail sent to WCR at 11 42, NR provided the transcript of a voice recording of a conversation between the shift signalling manager in York IECC and the Route Control Manager reporting on the signalling manager's conversation with the driver of 1Z57, including referring to the fact that the driver reported to the signaller that he had, '*no notice at all to run under an amber condition*'.
- 5.3.6 At 10 04 on 5 August 2014 WCR confirmed that, '*...the driver had not been fully briefed, as to the new fire-risk status and protocol, which concurs with the voice tapes*'. The author of the e-mail apologised for his previous assumption and understanding.
- 5.3.7 While this appears to be clear, on 8 August 2014 WCR's Chairman ('the Chairman') became involved in discussions with NR, writing to the LNE Route Director ('the Route Director') on that day. A telephone conversation took place between the Chairman and the Route Director

on 12 August 2014, referred to in letters written by each of them the next day. The Route Director included the following in his letter, as a specific point: *'The steam locomotive provided traction during the incident and was not operated in accordance with the Amber status of the Steam Operation protocol. Your team initially declared that there was no such breach of the protocol, then later confirmed to my team that the protocol was breached due to a failure in communications between your operations management and the crew (resulting in the driver not being briefed on the status of the protocol). Surprisingly, you advised me last night that there was no such failure in communications and that the driver and your management were both mistaken. Can you please clarify, unambiguously, what actually occurred and why the Steam Operation protocol was breached? Clearly, whatever the cause of the breach, we need to be assured that this is fully rectified before we can re-instate your steam operations'*.

- 5.3.8 In his letter of 1 September 2014 the Chairman said, *'Clearly there is some debate as to whether the driver had been properly briefed about the Fire-Risk Protocol or was taking it upon himself to try and mitigate his actions locally in conversation with your signaller on the day. That incident was regrettable and should be a matter for our internal audit and disciplinary arrangements; it hardly indicates failure of the Safety Management System that would merit such a disproportionate response as your total ban on steam locomotive operations.'*
- 5.3.9 Seeking to summarise WCR's position on this point: initially NR was told that the driver had been briefed about the Amber restriction, then it was told that he had not been briefed. The Chairman then told the Route Director that the driver and WCR's management had been mistaken in what NR was told. In the final letter the Chairman felt that there was still 'debate' as to whether the driver had been briefed.
- 5.3.10 In my judgment, WCR's pleaded case has sought to convey the impression that the driver was briefed, but without actually saying so.
- 5.3.11 I find that the driver had not been briefed as to the Amber status applying within LNE Route on 12 July 2014. I find that this does represent a failure in WCR's SMS.
- 5.3.12 Further, however, the inconsistent information provided to NR after the Incident represents a different failure, one which in my judgment is even more important than the initial failure to brief the driver.
- 5.4 Was 5972 providing tractive power at the time of the Incident? How relevant is this issue?
- 5.4.1 It is WCR's case that power on 5972 was *'shut off'* and that the train was *'not under power'* when the live coal fell from the locomotive. Again these words require careful examination.
- 5.4.2 Appendix 27 to NR's Statement of Defence is a line diagram provided by NR (and not contested by WCR). The fire occurred on a falling grade of 1-in-197, immediately after the summit of the climb from Hellifield. Depending on the speed at which the train was travelling on reaching the summit, the driver may have closed the regulator shortly after reaching the summit, but his own statement in WCR's Incident Report (referred to at paragraph 5.3.3 above) does not make this clear. Therefore I am not sure on what basis WCR makes the claim that it does on this point.
- 5.4.3 NR also exhibits an extract from You Tube, which it places approximately 2 km (the scale on the plan being in km, although the site of the fire is quoted in miles and chains) beyond the site of the fire. It is presumably on this basis that NR has shown a point on which it says that the *'Loco shuts off steam'*.
- 5.4.4 I am not an expert in the operation of steam locomotives, but on viewing the You Tube extract before reading NR's explanation I had concluded that the locomotive was under power from the start of this sequence at 02 23, until at about 03 10 when much blacker smoke was produced by the locomotive, which suggested to me that the driver had closed the regulator.

- 5.4.5 As I have found that the driver of 5972 was not aware of the Amber restriction, it is not surprising that it appears that 5972 was using tractive power within LNE Route, but this tells us nothing about whether it was doing so when the live coal fell from the train. I do not consider, however that this particular issue will assist in deciding any question which I need to determine.
- 5.4.6 I reach this conclusion because the Amber restriction in force must be read in conjunction with the examples of mitigating measures set out in the Protocol. LNE Route knew that 1Z57 was entering its Route from the London North Western Route, where the fire risk status was Green. Even if the driver of 1Z57 had been aware of the Amber restrictions, he still had to maintain steam pressure within LNE Route, so requiring the firebox to continue to be fired in order to provide the necessary heat.
- 5.4.7 Further, the location of the fire was less than 1 km into LNE Route. I accept WCR's conclusion as to how the live coal fell from the train. The hole that had been burned in the ash-pan damper door mesh occurred at some point between the Fitness-to-Run Examination and the site of the fire, but to have been large enough to permit a live coal to fall this must have occurred somewhere in London North Western Route, where the locomotive was permitted to provide the tractive power for the train.
- 5.4.8 Therefore I make no finding as to whether the locomotive was providing tractive power when the live coal fell, as I do not need to reach a finding on this point.
- 5.4.9 A point emerges, however, which will be relevant when I discuss below what investigation WCR should have instituted following the incident. As already explained above, I conclude that WCR has endeavoured in its pleadings to convey a number of impressions, but without going as far as specific statements on the points concerned. If 5972 ceased to provide tractive effort on crossing into LNE Route, then the tractive effort should have been provided by what I take to be a Class 47 locomotive at the rear of the train (presumably 47580 *County of Essex*). As I understand it, both locomotives are required to be fitted with a data recorder (Railway Group Standard ('RGS') GM/RT 2472, Issue 1 (as the required date for compliance with Issue 2 has not yet been reached)). A proper and adequate investigation by WCR would have provided evidence from the both locomotives' data recorders to confirm which was providing tractive effort at the relevant time.
- 5.5 The duty to investigate
- 5.5.1 At paragraph 5.1.9 above I refer to the fact that Schedule 1 of ROGS sets out what must be included within an SMS, quoting the section dealing with the duty to investigate any incident or other dangerous occurrence.
- 5.5.2 The Rail Safety and Standards Board ('RSSB') discusses this in its *Duty of Co-operation Guide*. Part I summarises the duty by saying that:
- After an incident transport operators should work together as agreed to ensure an effective investigation.*
- Transport operators should act on recommendations and report progress to the lead investigation body and input into SMIS.*
- Transport operators should collaboratively review and learn from investigation reports.*
- Part II of the RSSB's Guide expands on this statement; the relevant extract appears in Appendix A.
- 5.5.3 The RSSB Guide was produced in conjunction with the ORR. It helpfully includes a section dealing with the escalation of safety concerns, which echoes material available on the ORR's website. These documents had not been published when I first had to advise on this delicate point (see paragraph 5.1.11 above), but do reflect the views which shaped the advice which I gave to my clients.

- 5.5.4 RGS GO/RT3119 explains the circumstances in which either a Formal Investigation or a Local Investigation should be held. The RSSB (which is the authority for the issue of RGSs) also produces a Guidance Note (GO/GN3519) which gives helpful examples of the information which is required to assist the process of an investigation; this advice is relevant whatever type of investigation takes place.
- 5.5.5 While arguably the Incident could have been regarded as having fallen into category B2.2.1(e), '*Traction and Rolling Stock Defects on a running line likely to affect system safety or resulting in the evacuation of the train*', I do not go so far as saying that a Local Investigation was necessarily mandated by this RGS. But if WCR concluded that a Local Investigation was not required (and LNE Route did not suggest that one was required, although it is for a Duty Holder to decide what level of investigation is needed), WCR remained under a duty to perform its duty to investigate and analyse incidents so that necessary preventative measures can be taken, as explained in paragraph 5.1.9. Performing this duty was an essential part of WCR's SMS.
- 5.5.6 Quite apart from the contractual duty under the TAC to act on reasonable requests relating to Safety Obligations already discussed, the RSSB guidance quoted at paragraph 5.5.2 supports the conclusion that WCR should have shared the output of its investigation with LNE Route. As will be seen below, it was this output which LNE Route repeatedly requested to see, requests which I regard as reasonable.
- 5.5.7 At paragraphs 2.3 and 2.4 above I distinguished between the Technical Issue and the Procedural Issue. There can be no doubt that WCR's duty to investigate the Incident covered both Issues.
- 5.6 The Technical Issue
- 5.6.1 The Technical Issue can be disposed of relatively quickly. As already stated above, I accept WCR's evidence relating to the cause of the live coal falling from the train, and therefore make a finding to that effect.
- 5.6.2 The evidence provided by NR, as Appendix 6 to its Defence, including Appendices 6a – 6e, indicates that the Technical Issue was competently and seriously addressed by WCR. Appendix 6a is the covering letter to LNE Route; Appendix 6b is entitled *Risk Assessment of WCR Operations*. It includes a comprehensive history of WCR's risk assessment process.
- 5.6.3 Separately (at Appendix 4 to NR's Defence) in the e-mail of 28 July 2014 referred to at paragraph 5.3.3 above, WCR had advised LNE Route of its conclusion relating to the ash-pan on 5972, and its comparison of GWR's practice in designing locomotives, in comparison with the former LMS locomotives operated by WCR.
- 5.6.4 I therefore find that in dealing with the Technical issue (but only the Technical Issue) WCR complied with all the requirements placed on it by general law and by the terms of its TAC.
- 5.7 The Procedural Issue
- 5.7.1 It will be obvious from the discussion in the sections above identifying which fire restrictions were in force at the time and whether the driver of 5972 was aware of the Amber restriction, that the issues still to be determined arise in respect of the Procedural Issue. The duty to investigate applies as much to the Procedural Issue as to the Technical Issue. Both Issues require separate examination in this Dispute.
- 5.7.2 This examination relies on the record of correspondence between the Parties provided by NR.
- 5.7.3 On 17 July 2014 the Route Director wrote to WCR, mentioning NR's rights under the TAC, including the right to serve a Suspension Notice. The letter requested an investigation by WCR in order to provide a detailed report to NR, to include details of any mitigating actions. The letter referred to the expressed intention of LNE Route to notify other Routes of this letter. NR's request to WCR for sight of the outcome of WCR's investigation is, in my

judgment, a reasonable request relating to a Safety Obligation as defined by the TAC.

- 5.7.4 WCR's reply dated 22 July 2014 refers to a letter from NR of 18 July 2014, which I assume refers to NR's letter of 17 July. It does provide information to NR, especially on the Technical Issue, but cannot be regarded as being an adequate report of an investigation.
- 5.7.5 NR clearly took this view, as an e-mail from the Route Director dated 25 July 2014, sent while he was abroad, made it clear that he did not regard WCR's letter of 22 July 2014 as the investigation report which he was expecting to see. The Route Director explained in some detail what he did consider that the investigation report should cover. What he requested reflects the guidance given by the RSSB quoted in paragraph 5.5.2 above, and must therefore also be regarded as a reasonable request.
- 5.7.6 Within the material sent by WCR in the e-mail of 28 July 2014 referred to at paragraph 5.3.3 there was also an Engineer's Report dealing with the Technical Issue.
- 5.7.7 In reply to this e-mail the Route Director sent an e-mail at 20 18 on 29 July 2014, saying that he was not convinced that WCR *'has the root cause correctly identified nor that you have correct/sufficient mitigations'*. He said, however, that this could be discussed at the meeting due to take place the following day.
- 5.7.8 No note of the meeting is included in the evidence before me, but Appendix 6 (referred to at paragraph 5.6.2) was sent by WCR to NR on 1 August 2014. This material was limited to the Technical Issue.
- 5.7.9 The next item included in NR's evidence is the e-mail from NR to WCR sent at 11 42 on 4 August 2014 covering the evidence from York IECC discussed at paragraph 5.3.5. The Route Director comments twice in this e-mail to suggest that there remained a question as to how WCR controls its operations.
- 5.7.10 At 13 01 on 4 August 2014 the Route Director followed up his e-mail of 11 42, expressing concern that WCR's processes and operational control were not achieving consistently the management level intent to comply with the Protocol. He sought a clear response on the question as to why the evidence of the signaller was not consistent with what the Route Director had by then been told by WCR. He set out three other requirements: completion of the actions agreed at the 30 July 2014 meeting; that a clear statement was required of what would be done to remove the risk of fires and confirmation that these steps had been completed; and that confirmation would be provided that relevant WCR staff had been briefed.
- 5.7.11 WCR replied on 5 August 2014, in an e-mail timed at 10 04. Some points arising from this e-mail were referred to in paragraph 5.3.6 above. In the remaining two paragraphs WCR provided a copy of a new Train Crew Notice and went on to say that WCR did not think that the failure to observe the Protocol was the cause of the fire. WCR felt that its risk assessment review had dealt with the issue, which WCR hoped could be closed.
- 5.7.12 While for the reasons discussed above I accept that the fact that the driver of 1Z57 was not aware of the Amber restriction did not cause the fire, this response did not deal with a number of points made by NR, which I have already held to be reasonable requests.
- 5.7.13 The Route Director replied at 18 29 on the same day. This was a careful reply, couched in moderate language. He expressed concern that although it was helpful to have clarity on whether 1Z57 was operating in accordance with the Protocol, he was concerned that this had not been identified during WCR's own investigation. It was of further concern that WCR's SMS had broken down in respect of the communication of safety critical messages to train crew, he would welcome clear advice as to what WCR was putting in place to avoid this kind of procedural failure in future.
- 5.7.14 He went on to restate what LNE Route required to adjust the Protocol status and reminded WCR that he had not received any response to three points included in his e-mail of 13 01 on

5 August 2014. The final paragraph read, *'As consistently asked for, clear mitigation actions and a commitment by WCR to adhere to those is required'*.

- 5.7.15 Taking stock at this point: I find that WCR was by now clearly in breach of contract because of its continued failure to respond adequately to reasonable requests made by NR relating to Safety Obligations. Repeated requests for the outcome of WCR's investigation had not been addressed; indeed there is no evidence to suggest that there was any, or any adequate, investigation by WCR of the Procedural issue. WCR appears to have thought that the actions taken in relation to the Technical Issue were all that was required.
- 5.7.16 In these circumstances NR was entitled to have serious concerns about the efficacy of WCR's SMS. Further, to the extent that WCR's SMS was not functioning properly, this was a breach of the Condition Precedent set out at paragraph 3.3.
- 5.7.17 WCR responded in a letter of 8 August 2014 from its Chairman to the Route Director. The letter was headed *'Fire-risk and Line-side Fires'*. The first paragraph reads: *'I refer to previous correspondence and discussion about the above. I have instructed my staff that no further correspondence is to be exchanged on this matter. Following your meeting and our subsequent risk review, I am now content that necessary controls are in place to cover the suitability and inspection of our steam locomotives and the operation of these, according to the prevailing fire-risk status, in order to reduce the risk to as low a risk as is reasonably practicable. In light of the confusion that arose over fire-risk status on 12/07 (although I do not believe that it had any effect of [sic] the incident), I am satisfied that the communication processes have now been strengthened to the extent that such information will be conveyed to my train crews. This information has been sent to you already and I do not believe that you need any further information, in order to lift your ban on steam operation.'*
- 5.7.18 The second paragraph refers to the operation of steam trains in what the Chairman described as other Zones, saying that, *'It would be useful to know why you believe you should continue to take a stand, which is at variance with the other Routes, other than, as I see it, your determination to teach us a lesson. I am fully aware of the rights reserved to you but I believe you are using these to pursue an agenda, over and above that of fire-risk; if so, I consider that totally unacceptable, although I sincerely hope that I am wrong on this point'*.
- 5.7.19 The remainder of the letter criticises (to use as mild a word as possible) aspects of NR's performance which are not related to this Dispute.
- 5.7.20 The instruction in the second sentence of the letter, that WCR's staff should enter into no further correspondence on fire risk and lineside fires (the heading of the letter), is one that should never have been given. Quite apart from my finding that even before this letter was sent WCR was in breach of contract, an instruction of this kind tells staff that they were not to meet the obligation to co-operate set out in Regulation 22 of ROGS. That on its own would prejudice the proper operation of WCR's SMS. For the purposes of this Determination I do not need to decide whether the issue of an instruction of this kind could potentially create personal liability under Section 37 of the HSWA.
- 5.7.21 The Chairman and the Route Director spoke by telephone on 12 August 2014, but I do not have any record of this call. The Chairman wrote to the Route Director again on 13 August 2014. The opening paragraph reads: *'Following our phone call yesterday, I wish to reiterate my point that it is actions, not paperwork that has results. Furthermore, we are not obliged to supply you with details that you have requested, save that we give the assurance (as has already been given, several times) that the matter has been given our attention and that we are satisfied that the risk has been reduced to as low as reasonably practicable. Please also note that on no account will I give you an undertaking that fire-risk will be completely eliminated, any more than East Coast would of their train reliability or, indeed, that I would expect you to give me one of total 100% performance for the Route – it would be wholly foolish to do otherwise'*.
- 5.7.22 The letter goes on to say that performance and financial penalties underpin LNE Route's actions and referred to the fact that Red status was still maintained even though it was raining.



- 5.7.23 The letter must have been sent by e-mail or fax, as the Route Director replied on the same day referring to the Chairman's letters of 8 and 13 August 2014. This letter notes the observation that the Chairman was satisfied that WCR had the necessary controls in place, but commented that it was important that WCR's team convinced NR's team of the same.
- 5.7.24 This was the letter referring to the telephone conversation of 12 August 2014 which appeared to reverse WCR's position once again on what the driver knew. The Route Director asked for unambiguous clarification of what had actually occurred, saying that NR needed to be assured that whatever caused the breach had been fully rectified. The Route Director also sought confirmation of an oral commitment by WCR to operate only two selected steam locomotives. Finally the Route Director sought clarification of what was to be done about ensuring the effectiveness of fire reduction mechanisms.
- 5.7.25 In relation to the issues raised by the Chairman which are not covered by this Dispute, the Route Director offered to discuss these when they next met.
- 5.7.26 While it not clear (from NR's Appendix 6) what further reports were expected in relation to fire reduction systems, on the key issue of safety-related communications the Route Director had been advised by the Chairman that the driver and WCR's management had been wrong in the previous information provided to NR (which had, of course, itself changed over time).
- 5.7.27 In these circumstances it was entirely reasonable for the Route Director to ask once again for clarification of what actually occurred and why the Protocol had been breached. He could have done no less.
- 5.7.28 On 19 August 2014 NR issued a Suspension Notice to WCR. The letter stated that the action being taken followed the recent breakdown of talks between the two organisations concerning a Train Operator Event of Default and what NR described as unresolved safety issues remaining from it.
- 5.7.29 The Suspension Notice sets out the history of the matter, saying that the conflict between the views expressed by the Chairman in the 12 August telephone call, when contrasted with WCR's earlier views illustrated that there was no common view from WCR as to the root cause of the breach and further that the Event of Default extended, '*...more substantially into the area of general concern about the Safety Management System in place at WCR and its required application and fulfilment*'.
- 5.7.30 The Suspension Notice went on to refer to a period of 5 weeks during which LNE Route thought that the Event of Default had been capable of remedy, setting out steps which NR considered could provide the remedy required.
- 5.7.31 The provisions relating to a Train Operator Event of Default are set out in Schedule 6 of the TAC. The TO is required to declare a Train Operator Event of Default to NR, and vice versa. This is clearly appropriate in the event, for example, of an Insolvency Event, of which the TO will be aware before NR. It is less easy to understand how this can be expected to work in the event of a breach by the TO of Safety Obligations, '*...which, by itself or taken together with any other such breach, event or circumstance, Network Rail reasonably considers constitutes a threat to the safe operation of any part of the Network...*'. Taken literally this means that the TO is required to declare an Event of Default when NR has reached a necessarily subjective view which might by then not have been conveyed to the TO.
- 5.7.32 There is no obligation on NR to serve an Event of Default Notice on the TO when it has formed the view quoted above; it is entitled simply to issue a Suspension Notice, which must specify the Event of Default.
- 5.7.33 While a process which required an Event of Default Notice to be served by one Party on the other might be preferable, I do not think that this contractual lacuna has disadvantaged WCR in any way. The correspondence recited above made it quite clear what NR was seeking in order to remedy the concerns that it had about WCR in respect of the Process Issue; concerns which I have held to be justified.

- 5.7.34 I have already found that even before 13 August 2014 WCR was in breach of the terms of its TAC, by failing to respond adequately or at all to reasonable requests from NR relating to Safety Obligations. While hindsight suggests that it might have been preferable to have referred once more (since NR's letter of 17 July 2014) to the processes contained within Schedule 6, WCR can have been left in no doubt what was required of it by NR and at no stage before 13 August 2014 did it suggest that NR was not entitled to the information that it sought. Until that date the points were simply never addressed by WCR in its correspondence with NR; afterwards the entitlement of NR to further information was denied, but without any reference to how that denial (which contradicted both the terms of the TAC and the duty of investigation) was justified.
- 5.7.35 From 13 August 2014 it was quite clear that WCR did not intend to provide any further information to NR. The Suspension Notice followed on the fourth working day afterwards.
- 5.7.36 Subsequently WCR wrote to NR at a senior level, but a copy of that letter was not included in the evidence submitted by NR. On 29 August 2014 the Route Director spoke to the Chairman, recording the conversation in an e-mail sent to WCR (as the Chairman does not use e-mail) at 20:33 that evening. Clearly there had been no meeting of minds, as the Route Director had repeated the steps that NR considered WCR should take, with WCR responding that there had been no process failure but being unwilling to explain what caused the Protocol to be breached. The Route Director reiterated the need for him to receive a response to his letter of 13 August 2014.
- 5.7.37 Reference has already been made at paragraph 5.3.8 above to the Chairman's letter in the context of what the driver of 1Z57 knew. The letter included a statement that the Chairman regarded NR's action as '*disproportionate*'. The letter ends by saying, '*My timely response to your concerns regarding line-side fire risk, the successful implementation of the Protocol through the rest of the UK, the change in the weather and now your shift of focus, from the very real need to reduce the likelihood of line-side fire to imply a systemic failure of our SMS, all highlight that it is your actions, which have caused the issue to spiral. Resolution remains simple – retract the suspension, compensate for the aggravation and the matter is resolved*'.
- 5.7.38 Reviewing the correspondence at this point, I find that NR had every reason to have continued to have real concerns about the effectiveness of WCR's SMS. While I have explained that I find that the Technical Issue had been dealt with appropriately, the same cannot be said of the Procedural Issue.
- 5.7.39 There is no evidence to suggest that WCR has carried out any proper investigation; I find that there has been no adequate investigation by WCR into the Procedural Issue sufficient to comply with its legal duties. Its responses to NR on the key issue of safety-related communications were contradictory and confused. It was failing to respond to reasonable requests from NR, the Chairman had given an entirely improper direction to his staff and it was clear that NR was not going to receive anything more than assurances from WCR that it was satisfied with the position.
- 5.7.40 I have already found that WCR was in breach of its TAC before 13 August 2014; what happened afterwards accentuated the degree to which WCR was in breach.
- 5.7.41 The question of proportionality must be examined, to decide whether NR was entitled to issue a Suspension Notice. There is another potential weakness in the TAC, in that as is often the case, headings in the TAC, '*.....are for convenience of reference only and shall not be used in the construction of this contract*' (Clause 1.2(c) of the TAC). The enjoiner that suspension should be proportionate to the breach only appears as a heading to Clause 2.5 of Schedule 6 of the TAC, thus is not to be used in construing the TAC. The actual restrictions are those referred to in paragraph 3.7, whereby suspension should be limited to given Routes, etc.
- 5.7.42 That said, as a matter of general law the exercise of any contractual remedy should be proportionate to the breach concerned, so I am prepared to accept that there should be a test of proportionality. The question therefore is whether NR's action was proportionate.

- 5.7.43 I have already held that NR was justified in holding genuine and serious concerns about the efficacy of WCR's SMS. Direct negotiations with the Chairman of WCR had made it clear that there would be no further co-operation from WCR to resolve these concerns. Under these circumstances I do not think that NR can simply have ignored its own concerns, so there was no feasible solution available to NR other than issuing a Suspension Notice.
- 5.7.44 Therefore I find that the issue of a Suspension Notice was proportionate.
- 5.8 So why has the Suspension Notice been revoked in part?
- 5.8.1 On 30 September 2014 NR revoked the Suspension Notice in part, specifying that it would be reinstated if a fire risk arose and if the Protocol were to be re-activated. NR stated that, '*...it continues to be unsatisfied that WCR have yet to remedy the breach of their Safety Obligations relating to their non-adherence to the trial Fire Risk Protocol, and that this revocation in part only comes as the trial of the Fire Risk Protocol has now concluded*'.
- 5.8.2 In its Response Statement, quoted in part at paragraph 4.6.3, WCR was strongly critical of the partial revocation of the Suspension Notice while NR was still expressing itself as unsatisfied that WCR had not yet remedied the breach of Safety Obligations leading to the imposition of the Safety Notice.
- 5.8.3 On this point I can agree with WCR; it clearly is illogical to have imposed the Suspension for safety-related reasons and then to lift it, albeit only in part, while those safety concerns have still not been addressed.
- 5.8.4 However, my agreeing with WCR on this point does not assist WCR overall. As I have found that NR was entitled to impose the Suspension Order, and that it was a proportionate remedy, and as WCR has still not remedied the breach, I regard NR as being under no obligation to revoke the Suspension at all. If the Suspension were still in place I would have held that to be justified.
- 5.8.5 It is possible that the pressure which arises in any litigation might have led NR to this decision, to avoid being wrong-footed on this issue in this ADA, but there is no evidence before me to explain NR's thinking on this point.
- 5.9 Should Network Rail have taken any further steps than it did?
- 5.9.1 It is logical to deal here with WCR's contention that if NR had the concerns that it did, it should have raised them with the ORR; and that these concerns should not have been limited to steam operations on the LNE Route.
- 5.9.2 Since I was first involved in striking this delicate balance in advice given to clients, guidance has been provided to duty holders by the RSSB and the ORR. The RSSB recommends a formal escalation process; the ORR clearly regards such a report as being a last resort, but had I been advising NR on this point, I would have advised that the line at which a report to the relevant liaison inspector would be appropriate had been reached, if not crossed. But this was a relatively fast-moving situation, and I do not think that it would have been responsible of NR to have relied on prompt action from the ORR. It had remedies available to deal with its justified safety concerns; it exercised those remedies.
- 5.9.3 I can also accept WCR's point that the issues which NR was seeking to address were not limited to steam operations, nor solely to LNE Route. With hindsight it is apparent that the issue was one which might more appropriately have been dealt with by NR centrally (indeed that might have helped as the issues between WCR and NR do appear to have become personalised by WCR). But it is easy to make such a judgment in hindsight, whereas the problem arose on LNE Route and the discussions were being handled by LNE Route.
- 5.9.4 Once again, however, my view does not assist WCR, because of my finding that the Suspension Notice was justified and proportionate. The fact that the Suspension Notice was not imposed across the Network, and to cover all WCR's operations, will have assisted WCR

operationally and commercially, as it was still able to operate all its services on other Routes, and diesel-hauled services on LNE Route, but this cannot be held against NR to benefit WCR in this Dispute.

5.10 Was Network Rail entitled to use the Fire Risk Protocol as a way of restricting WCR's operations on the Network?

5.10.1 NR accepts at paragraph 6.4 of its Defence that it was not an appropriate use of the Fire Risk status to deny access to LNE Route for WCR's steam services, while permitting it to DB Schenker. It submits, however, that had it not done so it would have issued the Suspension Notice earlier, so that WCR suffered no loss as a result.

5.10.2 In the light of my examination of the correspondence between the Parties above, I accept this explanation.

5.11 Malice, good faith and the supposed intention to drive out steam

5.11.1 My Directions of 16 September 2014 hoped to persuade WCR that an allegation of malice was not appropriate and risked increasing the length of any hearing. In the event WCR adduced no evidence beyond mere assertions in its pleadings on this issue. NR, advisedly in my view, effectively ignored it. As we have not had a hearing I need to make no finding on this point, but I do observe that allegations of this kind do not assist the ADA process and arguably breach the general requirement of Rule A9(c) to avoid antagonistic or unduly adversarial behaviour.

5.11.2 At Rule A9(b) there is a requirement for Parties to conduct themselves with good faith with the objective of resolving a dispute. I interpret this as including a requirement for transparency in submissions. I have already commented on a number of points in WCR's pleadings in which I have concluded that an impression was trying to be conveyed which was not plainly expressed, where the plain expression would not have been supportable.

5.11.3 In this context I think it relevant to say that I accept NR's submission at paragraph 6.15 of its Defence that the statement that the withdrawal from the Network of 5972 as an appropriate corrective action was indeed misleading, as WCR sought to claim credit as a corrective action for a decision to withdraw 5972 from service which a variety of published material suggests was to happen in any event in order to place the locomotive in a museum. I had identified the points that NR makes in this context before actually reaching this section of NR's Defence.

5.11.4 While I have remained conscious throughout this Dispute of the duty placed on me to determine it on the basis of the Parties' legal entitlements, I think it worth observing that a Party does not assist itself by making misleading statements in its pleadings.

5.11.5 As to the supposed intention to drive out steam, in view of the findings that I have made I do not think it necessary to make a finding on this point, which has not been adequately pleaded. I do, however, observe that the Fire Risk Protocol seems much more flexible than the relevant provisions in the TAC, which therefore seems to me to make the operation of specific steam services more, rather than less, likely.

5.11.6 Similarly, throughout the correspondence between the Parties the Route Director kept explaining which steps would be satisfactory to enable the Red status to be lifted. It was WCR which chose not to take those – reasonable – steps.

5.12 Outstanding points raised by WCR

5.12.1 There are a number of other points raised by WCR, which I think it necessary to deal with for the sake of completeness.

5.12.2 The first is the point argued in WCR's Response Statement, that NR referred in its Defence to the HSWA, which had not been mentioned in previous correspondence. This point carries no

weight whatsoever. NR's concerns about WCR's SMS had been very clearly articulated, as explained above. It would have been patronising for NR to have referred in detail to ROGS and to explain that ROGS were issued under the enabling powers contained in the HSWA. This should have been clearly understood by WCR.

- 5.12.3 Similarly, although it might have been helpful if NR had reminded WCR of the wording within the TAC referring to the duty to meet reasonable requests, parties to TACs - who must inevitably hold a Safety Certificate or Authorisation - should be familiar with the duties placed on them in their TAC, especially those relating to safety.
- 5.12.4 WCR questions the fact that different Routes might have a different fire risk status under the Protocol. Given how weather conditions can vary across Great Britain, this seems to be perfectly sensible.
- 5.12.5 Separately, WCR queries the right of a Route to issue a Suspension Notice. It is not entirely clear whether WCR argues that a Route cannot issue a Suspension Notice, or whether a Suspension Notice should not apply only to one Route. As to the first point, the Suspension Notice was issued on writing paper showing that it emanated from Network Rail Infrastructure Limited, and was signed with that title (the absence of the word 'for' in the signature block is not significant). Given this, I find that the Suspension Notice was valid, without needing to consider whether it would have been valid if it had been issued by LNE Route in its own name.

Turning to the second point, at paragraph 3.7 I have discussed the requirements of a Suspension Notice, referring to the duty on the issuing party to restrict the effect of the Notice as far as reasonably practicable, including Routes as one of the examples of such a restriction. WCR's point seems therefore to argue against the terms of the TAC. Further, in a period of sustained wet weather in Scotland while there was hot weather in South West England, WCR would presumably feel aggrieved if the fire risk status across the entire Network were to be held at Red.

- 5.12.6 WCR's reference to the derailment at Ordsall Lane Junction (of which I was already aware, as I read all RAIB reports in a different capacity to that of a Hearing Chair) was seeking to introduce material prejudicial to NR which did not relate to this Dispute. Whatever failings were illustrated on the part of NR in that derailment, it is totally irrelevant to this Dispute and should not have been cited. I would have taken the same view even if the derailment had occurred in LNE Route.
- 5.12.7 Similarly, whether the partial revocation of the Suspension Notice was or was not notified to a journalist before WCR was told of this decision is of no relevance in this Dispute. If true, however, this cannot have assisted in restoring constructive relations between the Parties, and the restoration of constructive relations at the conclusion of this Dispute will be extremely important.

## **6 Determination**

- 6.1 Having carefully considered the written submissions and evidence provided, I determine as follows:
- 6.1.1 There were sufficient grounds to support Network Rail's action to suspend WCR from operating Steam Driven Equipment on the LNE Route;
- 6.1.2 WCR is not entitled to compensation in terms of the Track Access Contract;
- 6.1.3 Network Rail has exercised correctly and proportionately its contractual rights, as per the Track Access Contract with WCR, in relation to the safe operation of Steam Driven Equipment during times of high fire risk; and
- 6.1.4 That Network Rail's conduct has been reasonable.

6.1.5 Within 28 days of the date of this Determination, WCR is to provide details to Network Rail (in writing) to explain:

- (a) Its procedures for briefing staff on operating instructions and methods of work;
- (b) How it ensures that records of these briefings (including confirmation of receipt of relevant notices) are maintained; and
- (c) What methods WCR adopts for monitoring the efficacy of these procedures.


Further, by the same date WCR is to advise Network Rail of the principal point of contact between WCR and Network Rail on all safety-related matters and to ensure that this information is kept up-to-date when it becomes necessary for another member of WCR's management to take on this role.

6.2 As the Chairman of WCR has confirmed to me in writing that the instruction given to his staff reported in his letter of 13 August 2014 has been withdrawn, which I very much welcome, I do not need to make any order relating to this point in this Determination.

6.3 Network Rail invited me to order that a meeting should now be held between the Parties. I do not wish to make such an order, primarily because I feel that the way in which WCR has accepted the points and observations made in the Determination on seeing the draft encourages me to believe that a constructive and co-operative relationship can be restored between the Parties, for their mutual advantage and to benefit safety overall. If this is right, then there is no need for me to order that a meeting should be held, as the Parties will want to meet in any event. If it is wrong, then any meeting held solely because the Parties have been ordered to attend it is unlikely to be productive.

6.4 I make no order for costs.

6.5 I confirm that, so far as I am aware, this determination and the process by which it has been reached is compliant in form and content with the requirements of the Rules.



Clive Fletcher-Wood  
Hearing Chair

24 October 2014

## APPENDIX "A"

### KEYS ISSUES DETAILED IN NETWORK RAIL'S STATEMENT OF DEFENCE (Paragraphs 4.12 - 4.23)

- 4.12 In response to the Hearing Chair (Direction 3(a) dated Friday 12 September), Network Rail is able to confirm that the Safety Obligations breached by WCR are the requirements by ROGS to:
- (a) manage and communicate safety-related information to its workforce;
  - (b) risk assess suitably and sufficiently the prevailing risks related to its management and communication of safety-related information (in this particular case, the safety-related information from Network Rail's trial Fire Risk Protocol);
  - (c) put in place safety measures identified by the risk assessment;
  - (d) make arrangements for planning, organising, controlling, monitoring and reviewing these measures; and
  - (e) co-operate to a reasonable level so as to achieve the safe operation of the railway.
- 4.13 Furthermore, Network Rail is able to confirm for the Hearing Chair that the particular actions required of WCR to remedy these breaches were contained within its letter to WCR of Wednesday 13 August (Appendix 13), which requested:
- (a) an investigation and unambiguous explanation of the events of Saturday 12 July involving 1Z57 – specifically, the suspected failure in communications which saw a non-adherence by WCR to the Fire Risk Protocol 'Amber' operating instruction;
  - (b) following an investigation, evidence of a clear and concise list of controls and corrective actions that WCR would commit to implement in order to avoid a repeat of this type of incident (i.e. a non-adherence to the Fire Risk Protocol);
  - (c) a formal response on the verbal commitment by WCR to operate only two selected steam locomotives on LNE & EM which, given their design, would reduce fire risk; and
  - (d) any possible clarification as to what would be done to ensure the effectiveness of fire-reduction mechanisms highlighted by WCR in their list of technical actions (which came out of their risk assessment meeting of Wednesday 30 July).
- 4.14 While these particular actions remain unfulfilled, Network Rail has not been able to reconcile itself that WCR (as required by clause 6.3 of the Track Access Contract) has complied with reasonable requests about aspects of their operations which affects or is likely to affect the performance of Network Rail's Safety Obligations – namely Network Rail's performance in managing the risk of lineside fires.
- 4.15 Network Rail has valid concerns that WCR has not provided detailed clarification on these items, especially point (a) in paragraph 4.13 (i.e. the request for an investigation and unambiguous explanation of events). In response to this point, WCR has previously provided inconsistent answers which has had the effect of reducing LNE & EM's confidence in WCR and in particular their Safety Obligations.
- 4.16 To clarify for the Hearing Chair, Network Rail accepts all of the following items have been supplied by WCR in response to either Network Rail directions or points of issue:
- (a) evidence from WCR of mitigation actions to prevent lineside fires and remove fire risk, but these were not accompanied with dates for completion (Appendix 6a);
  - (b) an initial formal statement from the driver of 1Z57, but this is now questioned by Network Rail as it seems contrary to subsequent evidence which has come to light (Appendix 4e);
  - (c) clarification from WCR's engineer on the cause of the lineside fire on Saturday 12 July – a piece of falling burning ash (Appendix 4b);
  - (d) an assessment by WCR of their own Risk Assessment, Train Preparation, Steam Locomotive Operations and Fitness-To-Run procedures (Appendix 6b, 6c, 6d and 6e; and
  - (e) A Train Crew Notice by WCR concerning the Fire Risk Protocol (Appendix 9a).

- 4.17 Network Rail confirms that those actions highlighted in paragraph 4.13 remain. For the avoidance of all doubt, Network Rail is concerned that these actions have not been met and that a number of inconsistencies and contradictions have preceded the completion of these actions.
- 4.18 Under Schedule 6 section 2.5.3 of the Track Access Contract, Network Rail considers there to be contractual grounds for WCR to complete the outstanding actions requested of them by Network Rail's Suspension Notice, whereby:
- 2.5.3 *The party served with a Suspension Notice which specifies an Event of Default which is capable of remedy shall:*
- (a) *with all reasonable diligence, take such steps as are specified in the Suspension Notice to remedy the Event of Default; and*
- (b) *keep the party serving the Suspension Notice fully informed of the progress which is being made in remedying the Event of Default.*
- 4.19 Network Rail does not consider that WCR has fulfilled the contractual obligation stated in Schedule 6 section 2.5.3 of the Track Access Contract.
- 4.20 Network Rail is able to qualify, for the benefit of the Claimant (WCR paragraph 6.2 xii), and at the request of the Hearing Chair (Direction 3(b) dated Friday 12 September), that its ability to suspend WCR from operating Steam Driven Equipment only, on LNE & EM only, is in compliance with the Track Access Contract under Schedule 6 section 2.5.1, whereby:
- 2.5 *Suspension to be proportionate to breach*
- 2.5.1 *Notice served under paragraph 2.3 in respect of any of the Train Operator Events of Default specified in paragraphs (a) and (c) to (f) (inclusive) of paragraph 1.1 shall, so far as reasonably practicable, apply only to the:*
- (a) *railway vehicles;*
- (b) *Services;*
- (c) *Routes; and*
- (d) *categories of train movements or railway vehicles, (or (as the case may be) parts or part of them) to which the relevant Train Operator Event of Default relates.*
- 4.21 Network Rail considers that its suspension of WCR from operating Steam Driven Equipment on LNE & EM complied with the Track Access Contract in the respect that it was specifically, reasonably and appropriately applied to both the '*categories of train movement or railway vehicles*' and the '*Route*' involved in the Train Operator Event of Default. Thus, the suspension was proportionate to the breach.
- 4.22 In reply to the Hearing Chair's letter of Tuesday 16 September, Network Rail can confirm that it has revoked its Suspension Notice in part, on a temporary basis, following the conclusion of the trial of the Fire Risk Protocol on Wednesday 17 September. This was done under Schedule 6 section 2.5.4 of the Track Access Contract. This change of circumstance removed – on a temporary basis only – the remedy sought in the letter of Wednesday 13 August (Appendix 13).
- 4.23 Network Rail has made clear that its suspension of WCR from operating Steam Driven Equipment on LNE & EM will be reinstated in the event that a fire risk, as defined in Schedule 5 section 3.6 (c) of the Track Access Contract, returns to LNE & EM and the now 'dormant' Fire Risk Protocol is employed once again. In the event that the Fire Risk Protocol is employed, Network Rail will provide notice of a suspension of Steam Driven Equipment on LNE & EM again and will require evidence that the remedy cited within its letter of Wednesday 13 August has been applied.



## APPENDIX "B"

### EXTRACTS FROM THE TRACK ACCESS CONTRACT (CHARTER PASSENGER SERVICES)

#### Schedule 5

- "Specified Equipment" means any rolling stock which:
- (a) is registered with Network Rail's rolling stock library;
  - (b) is able to be used on the relevant parts of the Network in accordance with the Applicable Timetable Planning Rules; and
  - (c) has obtained vehicle and route acceptance for its use on the relevant parts of the Network;
- "Steam Driven Equipment" means Specified Equipment, of which the primary means of propulsion is steam power.

3.6 Without prejudice to the other provisions of this contract, the provisions below shall apply when the Specified Equipment contained in a Train Operator Variation Request includes Steam Driven Equipment:

- (a) where it appears there may be a serious risk of fire if a Train Slot is operated using Steam Driven Equipment, Network Rail shall take all precautions that are reasonably practicable in assessing the weather forecasts received from the Meteorological Office or other like body and other reports referred to in paragraph (c) below and notify the Train Operator in accordance with paragraph (b);
- (b) if Network Rail considers that there may be a serious risk of fire if a Train Slot is operated using Steam Driven Equipment, it shall reasonably endeavour to give the Train Operator not less than seven days notice to that effect, provided that Network Rail shall have no liability to the Train Operator as a result of its failure to do so;
- (c) subject to paragraph (a) above and notwithstanding paragraph (b), on or at any time before noon on the third Working Day prior to the day on which a Service or the first of a series of Services is planned to be operated using Steam Driven Equipment (each an "Affected Train Service"), Network Rail may give notice ("Withdrawal Notice") to the Train Operator that, in view of one or more weather forecasts received by Network Rail from the Meteorological Office or other like body or one or more reports concerning fire risks received by Network Rail from any occupier of land adjacent to the routes over which the Affected Train Service is planned to operate:
  - (i) Network Rail reasonably considers that there is a significant risk of fire if the Affected Train Service is operated using Steam Driven Equipment;
  - (ii) accordingly, the permission granted to the Train Operator pursuant to this contract to operate the Affected Train Service using Steam Driven Equipment is withdrawn; and
  - (iii) requesting the Train Operator to notify Network Rail on or before 1500 hours on the second Working Day prior to the day on which the Affected Train Service is planned to operate whether it wishes to operate the Affected Train Service using Diesel or Electric Equipment, failing which each Affected Train Service shall be deemed to be cancelled but without either party having any liability to the other under this contract or otherwise in respect of such cancellation and the Working Timetable shall, where necessary, be amended accordingly;
- (d) if the Train Operator notifies Network Rail, in accordance with paragraph (c)(iii) that it wishes to operate the Affected Train Service using Diesel or Electric Equipment, such notification shall be treated as a Train Operator Variation Request accepted by Network Rail, and the Working Timetable shall, where necessary, be amended accordingly; ...

## Schedule 6

### **1 Events of Default**

1.1 The following are Train Operator Events of Default:

...

(c) (i) any breach by the Train Operator of this contract, its Safety Obligations or any of the Collateral Agreements; or

(ii) any event or circumstance which is reasonably likely to result in any such breach,

which, by itself or taken together with any other such breach, event or circumstance, Network Rail reasonably considers constitutes a threat to the safe operation of any part of the Network;

...

(e) any breach of this contract or any material breach of any of the Collateral Agreements by the Train operator which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to Network Rail; and

(f) any breach of this contract or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material disruption to train operations of other train operators.

...

### **2 Suspension**

2.1 *Right to suspend*

2.1.1 Network Rail may serve a Suspension Notice where a Train Operator Event of Default has occurred and is continuing.

...

2.2 A Suspension Notice shall specify:

...

(e) whether the party serving the Suspension Notice reasonably considers that the Event of Default is capable of remedy, and where the Event of Default is capable of remedy:

(i) the steps reasonably required to remedy the Event of Default; and

(ii) a reasonable grace period for the defaulting party to remedy it .....

...

2.5 *Suspension to be proportionate to breach*

2.5.1 A Suspension Notice served under paragraph 2.3 in respect of any of the Train Operator Events of Default specified in paragraphs (a) and (c) to (f) (inclusive) of paragraph 1.1 shall, so far as reasonably practicable, apply only to the:

(a) railway vehicles;

(b) Services;

- (c) Routes; and
  - (d) categories of train movements or railway vehicles,  
(or (as the case may be) parts or part of them) to which the relevant Train Operator Event of Default relates.
- 2.5.2 A Suspension Notice served under paragraph 2.4 in respect of any of the Network Rail Events of Default specified in paragraphs 1.3(a), (c) and (d) shall, so far as reasonably practicable, apply only to the:
- (a) railway vehicles;
  - (b) Services;
  - (c) Routes; and
  - (d) categories of train movements or railway vehicles,  
(or (as the case may be) parts or part of them) to which the relevant Network Rail Event of Default relates.
- 2.5.3 The party served with a Suspension Notice which specifies an Event of Default which is capable of remedy shall:
- (a) with all reasonable diligence, take such steps as are specified in the Suspension Notice to remedy the Event of Default; and
  - (b) keep the party serving the Suspension Notice fully informed of the progress which is being made in remedying the Event of Default.
- 2.5.4 Where a party served with a Suspension Notice has complied with its obligations under paragraph 2.5.3 (whether in whole or in part) and it is reasonable for the suspension effected by the Suspension Notice to be revoked (whether in whole or in part), the party which served the Suspension Notice shall revoke the suspension to that extent. Such revocation shall be effected as soon as practicable after the remedy in question by notice to the other party specifying the extent of the revocation and the date on which it is to have effect.

## APPENDIX "C"

### EXTRACTS FROM RAILWAYS AND OTHER GUIDED TRANSPORT SYSTEMS (SAFETY) REGULATIONS 2006

#### Regulation 22

##### **Co-operation**

**22.**—(1) Every person to whom this paragraph applies shall co-operate as far as is necessary with a transport operator to enable him to comply with the provisions of these Regulations.

(2) Paragraph (1) applies to—

(a) any transport operator whose operations may affect or may be affected by operations carried out by the duty holder; and

(b) an employer of persons or a self-employed person carrying out work on or in relation to premises or plant owned or controlled by the duty holder.

(3) Every transport operator shall co-operate, insofar as is reasonable, with any other transport operator who operates on the same transport system where that other transport operator is taking action to achieve the safe operation of that transport system.

(4) In paragraph (2) "duty holder" means a transport operator referred to in paragraph (1).

#### Schedule 1

##### SAFETY MANAGEMENT SYSTEM

##### **Requirements on the safety management system**

**1.** The safety management system shall—

(a) describe the distribution of responsibilities, within the operation, for the safety management system;

(b) show how control of the safety management system by the management on different levels is secured;

(c) show how persons carrying out work or voluntary work directly in relation to the operation and their representatives on all levels are involved with the safety management system; and

(d) show how continuous improvement of the safety management system is ensured.

##### **Basic elements of the safety management system**

**2.** The basic elements of a safety management system are—

(a) a statement of the safety policy which has been approved by the chief executive and communicated to all persons carrying out work or voluntary work directly in relation to the operation;

(b) qualitative and quantitative targets for the maintenance and enhancement of safety and plans and procedures for reaching those targets;

(c) procedures to meet relevant technical and operational standards or other requirements as set out in—

(i) TSIs;

(ii) national safety rules;

(iii) other relevant safety requirements; and

(iv) decisions of the Office of Rail Regulation addressed to the transport operator in question, and procedures to ensure compliance with the requirements listed in this paragraph throughout the life-cycle of any relevant equipment or operation which is subject to the requirement in question.

(d) procedures and methods for carrying out risk evaluation and implementing risk control measures when—

(i) there is a change in the way in which the operation in question is carried out; or

(ii) new material is used in the operation in question, which gives rise to new risks in relation to any infrastructure or the operation being carried out;

(e) provision of programmes for training of persons carrying out work or voluntary work directly in relation to the operation and systems to ensure that the competence of such persons is maintained and that they carry out tasks accordingly;

(f) arrangements for the provision of sufficient information relevant to safety—

(i) within the operation in question; and

- (ii) between the operator in question and any other transport operator or an applicant for a safety certificate or a safety authorisation who carries out or who intends to carry out operations on the same infrastructure;
- (g) procedures and formats for the documentation of safety information;
- (h) procedures to control the lay out of, and changes to, vital safety information;
- (i) procedures to ensure that accidents, incidents, near misses and other dangerous occurrences are reported, investigated and analysed and that necessary preventative measures are taken;
- (j) provision of plans for action, alerts and information in the case of an emergency which are to be agreed with any public body, including the emergency services, that may be involved in such an emergency; and
- (k) provisions for recurrent internal auditing of the safety management system.

## APPENDIX "D"

### EXTRACT FROM PART II OF THE RSSB'S PUBLICATION "DUTY OF CO-OPERATION GUIDE"

#### **B4.4 Incident investigation and analysis**

Transport operators on the mainline rail network have established through Railway Group Standards, (including the Rule Book) and individual company procedures, robust arrangements for the reporting, investigation and follow up of incidents. The structure of the mainline industry requires a high degree of cooperation to operate these arrangements which should be reflected in the SMS and company procedures of each transport operator. The following relates to the stages in the process after the reporting of incidents (see B3.8).

#### **Investigation**

In the case of major incidents Network Rail will take the lead but for all others:

- Immediately after an incident, transport operators should work together to preserve evidence, make relevant staff available for witness statements and determine forward responsibilities for any subsequent investigation.
- Through discussion, the relevant transport operators should agree on which organisation will lead the investigation (usually the IM), the type of investigation to be undertaken and a suitable remit to determine root cause (including full consideration of underlying human factor issues). The investigation should then be undertaken in accordance with the remit. All transport operators are required to make relevant staff available to support the investigation.
- After completion of the investigation, the draft report should be circulated for review and comment by affected transport operators before completion and publication.

#### **Recommendations**

- Investigation reports may contain recommendations on one or more transport operators to prevent reoccurrence. These operators will be required to review the recommendation(s) and develop a suitable response, which should then be communicated to the lead investigation body and input to SMIS.