

ACCESS DISPUTE ADJUDICATION

Determination in respect of Dispute ADA24

Hearing held at 1 Eversholt Street, London NW1 on Wednesday 18 November 2015

Present:

The appointed Adjudication Panel (the "Panel"):

Hearing Chair: Clive Fletcher-Wood
Industry Advisors: Anthony Crabtree
Ian Mylroi

Dispute Parties:

XC Trains Ltd ("XC")

Tamzin Cloke Interim Head of Track Access & Possession Strategy
Will Rogers Production Director
Ian Hyde Head of Fleet & Engineering

Network Rail Infrastructure Limited ("Network Rail" or "NR")

Lee Tuttle CrossCountry Performance & Relationship Manager
Helen Eaton Senior Rail Vehicle Interface Engineer
Aiden Martin Customer Manager

Interested Parties:

DB Schenker Rail (UK) Ltd ("DBS")

Nigel Oatway Access Manager

First/Keolis Transpennine Ltd ("TPE")

Laura Price Interim Commercial Contracts Manager

In attendance:

Tony Skilton Secretary, Access Disputes Committee ("ADC")

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1 INTRODUCTION, SUBSTANCE OF DISPUTE AND JURISDICTION

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

“ADA” means an Access Dispute Adjudication

“ADRR” means the Access Dispute Resolution Rules

“Condition” means a numbered condition of Part G of the Network Code (1 August 2010 version)

“Parties” means the Dispute Parties and the Interested Parties

1.2 This dispute arises out of a complaint that GOTCHA was initially represented to XC by NR as being a non-disruptive programme that did not require the use of the Part G Network Change process and that consequently XC did not have opportunity to challenge NR by means of a consultation process, nor to seek any compensation. There had subsequently been a number of operational and performance problems encountered with XC services operating through the GOTCHA equipment installed at Sessay on the East Coast Main Line. XC now considered that the programme should have been consulted under the Part G process and that NR should compensate XC accordingly.

1.3 I am satisfied that the matters in dispute raise issues which should properly be heard and determined by an ADA duly convened in accordance with Chapter G of the ADRR to hear a dispute pursuant to Condition G11.1.

1.4 In its consideration of the Parties' documents and submissions and at the Hearing of the dispute the Panel has been mindful that, as provided for in Rule A5, “each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis”.

2 HISTORY OF THIS DISPUTE PROCESS AND DOCUMENTS SUBMITTED

2.1 XC commenced the dispute resolution process with the ADC pursuant to Condition G11.1(a) by Notice of Dispute served on 1 June 2015, requesting that it be referred to an ADA for determination. The dispute was registered as ADA24 and a Procedure Agreement with regard to it was entered into between the Dispute Parties on 22 June 2015, agreeing that the determination procedure would be an ADA in the first instance. Following efforts by the Dispute Parties to resolve matters between themselves, I was appointed as Hearing Chair on 1 September 2015.

2.2 Operators of trains passing through Sessay were informed by ADC of the potential ADA hearing and Freightliner Ltd, Freightliner Heavy Haul Ltd, GB Railfreight Ltd, Grand Central Railway Company Ltd, Northern Rail, DBS and TPE declared themselves to be interested parties. Documents were served to these interested parties throughout the process, but only DBS and TPE chose to be represented at the hearing.

2.3 In the interests of effective case management, I held a Directions Hearing with the Dispute Parties on 9 September 2015, as a result of which both XC and NR agreed that the ADA should proceed on the basis of a ‘split trial’, with the first hearing only determining the question of principle, as to whether the introduction of GOTCHA constituted Network Change, with the matter of compensation being left to be pursued depending upon the decision regarding the issue of principle. NR agreed to provide an explanation of its policy regarding GOTCHA installation and a timetable was agreed upon for the ADA process in the event that NR’s explanatory document did not enable XC to withdraw its dispute. I confirmed these arrangements with a Directions Letter dated 10 September 2015. 18 November 2015 was set as the date for the ADA Hearing if required.

- 2.4 The explanatory document from NR did not enable XC to withdraw its dispute and consequently, in accordance with Rule G17 and within the time limits agreed at the Directions Hearing, the Dispute Parties served the specified Statements of Case and submissions. Additionally, the Dispute Parties responded within set timescales to further Directions Letters and requests issued on 28 September 2015, 13 October 2015, 23 October 2015, 3 November 2015 and 9 November 2015, in which information was required to provide clarification of points emerging.
- 2.5 As a preliminary matter in its Statement of Defence, NR challenged the entitlement of XC to bring this matter into dispute. NR quoted explanatory note B(ii) to Part G of the Network Code, which states "*Network Changes can either be physical or operational but operational changes are only Network Changes if they last, or are likely to last, for more than six months.*" NR asserted that the introduction of GOTCHA at Sessay and Cholsey was neither a physical change to the Network - the layout, configuration and condition remaining the same - nor was it an operational change as no change to any standard, operational instruction or any change to the operational nature of train services on NR's infrastructure was undertaken due to WHEELCHEX systems already existing at these locations. Where GOTCHA had been introduced in a new or moved location, NR had followed the Network Change process due to changes to the operational railway. I addressed this challenge in the Directions Letter dated 3 November 2015 on the grounds that the Panel was persuaded that there were issues between the Dispute Parties which required adjudication and its provisional view was to prefer XC's submission that Condition G1.11(a) entitles XC to seek redress. If wishing to continue with an argument that the ADA should not proceed, NR was invited to make submissions and provide the authorities upon which it relied; NR did not pursue this course of action and I therefore considered the challenge to have been dismissed.
- 2.6 The Directions Letter dated 3 November 2015 incorporated my conclusions as to relevant issues of law raised by the dispute, thereby satisfying Rule G10(c).
- 2.7 On 13 November 2015 XC advised the Secretary that it had become appropriate to withdraw an element of its case. To help ensure that the Panel and Parties were suitably focussed upon the remaining issues on the day of the hearing, XC was requested to provide a summary of the amended case which it would be running and this was provided on 16 November 2015.
- 2.8 NR expressed concern to the Secretary about this process and the fact that XC was, in NR's view, allowed to raise fresh issues.
- 2.9 On 17 November 2015 NR drew the Secretary's attention to decision NV21 of the former Network and Vehicle Change Committee ("NVCC"), which NR regarded as a relevant precedent and which the Panel interpreted as a hope on NR's part that XC might withdraw its Claim.
- 2.10 The Hearing took place on 18 November 2015. Given the developments in the preceding two days I thought it appropriate to hold a preliminary discussion to deal with procedural issues before opening the formal hearing. At the opening of the formal hearing both Dispute Parties confirmed that they wished to proceed, following which the Dispute Parties made opening statements and the Interested Parties present were invited to explain their interests in the dispute. The Dispute Parties were then questioned by the Panel and the Interested Parties were given opportunities to comment. The Dispute Parties also had opportunity to make a closing statement at the conclusion of the oral exchanges.
- 2.11 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarised in this determination.

3 RELEVANT PROVISIONS OF THE NETWORK CODE

- 3.1 The provisions of the Network Code particularly relevant to this dispute are Part G Definitions and Conditions G1, G2, G10 and G11 (1 August 2010 edition). These are attached as Appendix "B" to this determination and also reproduced as appropriate within this determination.

4 SUBMISSIONS MADE AND OUTCOMES SOUGHT BY THE DISPUTE PARTIES

- 4.1 In its Statement of Claim XC sought the following determination:

- 4.1.1 That the implementation of the GOTCHA programme, issued as NME/2013/GOT1, has resulted in a material effect on Operators and should have been subject to Condition G1.1 of the Network Code; and
- 4.1.2 That as a result, NR should issue a Network Change notice with immediate effect, in order that XC can accept [that notice] on the basis that (a) all sites are fitted with RFID (Radio Frequency Identification) readers, and (b) that data is sent through in a suitable condition and timely manner. This will additionally enable XC to re-open discussions with NR regarding compensation resulting from that Network Change.

- 4.2 The summary which XC provided as its amended case set out the issues quite succinctly, explaining that XC believed that NR should have consulted the change from WHEELCHEX to GOTCHA for three reasons:-

- 4.2.1 It is evident that, following 610 delay minutes, 15 full and 15 part cancellations, which represent over 10% of Voyager cancellations for the relevant year, the introduction constituted a material change to XC's operations. The numbers contrast with zero activations for WHEELCHEX in the previous year. XC believed that when one year's dataset varies so wildly from another and there was a different system operating in each year, then there is value in comparing the operational statistics. XC believed this to be supported by the fact that its maintenance scheme, which is compliant with the relevant Group Standards, increased and therefore XC would not have expected to see a material increase in cancellations.
- 4.2.1 It remains clear that NR foresaw the need for increased management of the WILD process in order to smoothly manage the transition between WHEELCHEX and GOTCHA to make them of a similar impact on the operation of the Network. This was evidenced in Appendices F and J to XC's submitted documents, as well as paragraph 4.15 of NR's Statement of Defence. XC remained unaware of NR undertaking such measures for other projects that NR deemed to be of No Material Effect. XC maintained that if Operators are asked by the Infrastructure Controller to change their maintenance processes to avoid operational impact, comply with this instruction and despite this suddenly begin to experience delays and cancellations, then there has been a change to the Network of material effect. XC also believed that NR's request implied that NR considered it to be a change – if there was no change then why was the request made?
- 4.2.3 Since commencement of the exchange of papers between both Dispute Parties it had come to XC's attention that there may also be an issue with calibration or functionality of the equipment at Sessay. XC was not the only operator to be concerned about this; XC had had some dialogue with "Virgin Trains East Coast" following a recent activation at Sessay (XC's Appendix L) and XC also understand that Grand Central Railway also had concerns.

XC was concerned, following the supply of data from NR on 13 November 2015, that the following issues had been uncovered:-

(a) That there are far more readings/activations for GOTCHA than WHEELCHEX (2,284 to 746), indicating that one is substantially more sensitive than the other;

(b) That GOTCHA and WHEELCHEX are not recording the same trains – XC could only find that 22 matching records between the two [dummy running] datasets match;

(c) That of those recorded there is a larger than expected variance, in both directions, rather than (as expected and stated by NR) GOTCHA always reading higher than WHEELCHEX;

(d) These results contradicted the [2008] test report, also provided by NR on 13 November 2015, which stated that GOTCHA and WHEELCHEX agree with each other 88.2% of the time. Of the 22 trains that were recorded by both systems during dummy running, only eight readings were within 10kN of each other. One varied by 118kN.

XC believed there to be an implication, from the data supplied, that both systems are reading differently and therefore reacting differently.

4.3 In its Statement of Defence NR sought the following determination:

4.3.1 That the change of equipment from WHEELCHEX to GOTCHA at Sessay and Cholsey was a like-for-like replacement and that no change to the physical or operational nature of the Network was made and therefore the Network Change process was not required to be carried out; and

4.3.2 That like-for-like replacements do not require the Network Code Part G "Network Change" process to be performed.

5 ORAL EXCHANGES AT THE HEARING

5.1 As explained in paragraph 2.10 above I thought it appropriate to hold a preliminary meeting before the formal hearing started. At the preliminary meeting I explained the Panel's understanding of the importance of the Network Change process, which has much greater importance beyond its being a vehicle to permit Access Beneficiaries to obtain compensation when appropriate. An important aspect of the Network Change process is that it is the vehicle for an informed debate between NR and Operators concerning changes to the Network.

5.2 Later in the preliminary session I explained that the Panel believed that there is consensus that if NR introduces equipment which is better able to detect defects in rolling stock, then that is to be welcomed by the industry as being a good thing. Therefore nothing in the Panel's approach to the dispute was to be seen as judgmental on the merits or otherwise of replacing WHEELCHEX by GOTCHA; the question to be decided was whether it was Network Change.

5.3 I then explained why I had requested XC to summarise its case, following the withdrawal on 13 November 2015 of one of its heads of claim. I pointed out that this was not an unusual process and that although XC had commented on documents recently provided by NR (in response to Directions), it had not actually raised any fresh points. NR accepted that there was nothing unfair in this process and raised no further objection.

5.4 Next I turned to the provision on the previous day by NR of the Determination in NV21, which it was relying on as a precedent and which, it seemed to me, NR hoped might persuade XC to withdraw its case. I explained that I had reviewed ADA Determinations to identify any relevant precedent, but had not done so with NVCC Determinations.

- 5.5 I reminded the Parties that previous decisions are of persuasive authority only, and any decisions under the previous dispute resolution system carried less authority because the earlier decisions were not compliant with Article 6 of the European Convention of Human Rights. Nonetheless, NV21 did repay examination.
- 5.6 The first important point in NV21 concerned compensation to Operators (on the introduction of WHEELCHEX), with the NVCC concluding that compensation should not be paid to an Operator if WHEELCHEX detected a wheel defect requiring immediate action to be taken under the relevant Railway Group Standard. I observed that this reflected discussions between the Panel members prior to the hearing. The claim for compensation was to follow the decision in principle; I had not heard any argument so my comments were not binding, but I was having difficulty in understanding how there could be any entitlement to compensation if an Operator's train had to be restricted in any way because of a genuine defect. Further, to the extent that claims had not been pursued through the Delay Attribution process, an attempt to obtain compensation through an ADA could be seen as a collateral attack on the Delay Attribution process. All that said, these comments were only indicative and XC may well be in a position to claim for further losses.
- 5.7 Another very useful point to emerge from NV21 emphasised the importance of Network Change beyond the issue of compensation, with its example of an Operator being able to suggest better operational solutions for the location of WHEELCHEX than that suggested by (then) Railtrack.
- 5.8 I then explained the Panel's preliminary view of the considerable volume of evidence in the documents submitted by the Dispute Parties. While emphasising that the minds of the Panel Members remained open, the Panel would be looking at NR to provide arguments as to why the replacement of WHEELCHEX by GOTCHA did not amount to Network Change. At this stage the Panel provided to the Parties graphs containing analysis by the Panel of some of the data provided by NR, with an explanation.
- 5.9 It is for Dispute Parties to run their own cases, so I offered time to XC to decide whether it wished to continue with its Claim and to NR to decide if it wished to continue to defend the Claim, while observing that a precedent might prove useful to the industry.
- 5.10 The preliminary hearing was then adjourned.
- 5.11 At the start of the formal hearing XC confirmed that it wished to continue with its Claim, which NR was not prepared to concede. The record below provides a brief summary of the oral points which contributed to the Panel's decision and is not a verbatim record of the hearing, nor does it include every point discussed.
- 5.12 The Dispute Parties then made opening statements which are annexed in Appendix "A" to this determination.
- 5.13 DBS explained the reason for its attending the hearing and this is also set out in Appendix "A" to this determination.
- 5.14 TPE's presence was because it currently operated trains through Sessay and anticipated operating more services on that route in future.
- 5.15 In relation to NR's opening statement, NR confirmed that although it included a reference to compensation, it accepted that that was not an issue before the hearing. NR's interpretation of XC's case in NR's opening statement was not thought to be an accurate summary, which NR also accepted.
- 5.16 NR maintained that GOTCHA was not more sensitive than WHEELCHEX, even though it was producing more activations and was more consistent at picking up low level defects. NR held the view that there is no evidence to suggest that GOTCHA is better at picking up higher level alarms.

- 5.17 The Panel's analysis identified WHEELCHEX activations at Sessay of up to 400kN during the "dummy running" period, while GOTCHA activations were as high as 600kN. NR suggested that all higher activations seemed to be from freight trains. At the hearing NR also said that it might be relevant that the Fast lines at Sessay were the only GOTCHA installations where the line speed is 125 mph; subsequently NR advised the Panel that there is a similar line speed at Cheddington, although XC services do not operate over this GOTCHA installation.
- 5.18 NR's interpretation was that it had advised Operators to revise their wheelset procedures, rather than asking them to do so. It accepted that Operators had done so. It submitted that the meaning of the words in the briefing to ATOC (quoted at 6.12 below) was that Operators would receive the data from 'dummy running' and must then decide what use to make of that data. As far as XC was concerned, NR suggested that as the first alarm at Sessay occurred 6 weeks after GOTCHA went live, XC had ceased to examine or act on the data.
- 5.19 XC confirmed that it had altered its wheelset maintenance policy, with increased frequency of visits of XC's Voyager sets to Central Rivers and increased time on the wheel lathe. XC was unable to understand why in spite of this there were now more wheel defect activations.
- 5.20 NR was unable to comment on the suggestion that if data is produced of a higher quality and an Operator was giving more attention to wheelset maintenance then this was likely to be regarded as having a material effect on the operation of trains on the Network.
- 5.21 Although it was said at the hearing that GOTCHA is more tolerant to track conditions than WHEELCHEX, the Panel now understands that this is not in fact correct. Any WILD equipment will be affected by the condition of the track where it is fitted. It is possible to maintain track at a GOTCHA installation mechanically, which is not possible at WHEELCHEX locations. Therefore track condition is more easily maintained at a GOTCHA installation than one fitted with WHEELCHEX.
- 5.22 XC had no questions for NR, nor did the Interested Parties have any questions. After a further short adjournment to permit NR to decide whether it had questions for XC (which in the end it did not), NR wished to point out that the period during which the WILD equipment at Sessay had not been functioning was too short to support a finding of 'double Network Change', with which the Panel agreed.
- 5.23 NR then submitted that any Network Change arising from changes to wheelset maintenance was an Operator's Network Change. The Panel observed that the data leading to changed maintenance policies emerged from NR and the suggestions that wheelset maintenance policies should be reviewed was made by NR.
- 5.24 The Dispute Parties then made short closing statements.

6 ANALYSIS, CONSIDERATION OF ISSUES AND SUBMISSIONS, CONCLUSIONS

- 6.1 The phrase 'any Operator' as used in this determination should be understood to refer to any Access Beneficiary as defined by Part G, and 'Operator' should be understood in that context.
- 6.2 The Panel reminded itself that in the context of this dispute the definition of Network Change in Part G means:

in relation to an Access Beneficiary:

(a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:

(i)

(ii) trains operated by..... that Access Beneficiary on the Network; or

(b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:

(i) is likely materially to affect the operation of trains operated by.....that Access Beneficiary on the Network; and

(ii) has lasted or is likely to last for more than six months, including

(x) a temporary speed restriction;

(y) a material change to the location of any of the specified points referred to in Condition B1.1(a); or

(z) a change to the method of delivery of any operational documentation (other than Railway Group Standards) owned or used by an Access Party; or

(c) any material variation to an established Network Change.....

The Panel did not regard this as an especially high hurdle to surmount, given the inclusion of the words 'likely to' in the definition.

- 6.3 There is, of course, a slight artificiality in dealing with a retrospective Network Change claim, as the Panel thinks that it could be argued in some circumstances that even if in retrospect it is clear that the Change did in fact materially affect the operation of trains on the Network, it might not have been apparent beforehand that it was likely to do so. Therefore evidence of an actual material effect on the operation of trains would not always be conclusive, but the Panel did not think that issue to be relevant in this dispute and therefore did not need to consider this question any further.
- 6.4 While the Panel's investigation had concentrated primarily on the GOTCHA site at Sessay, the Panel concluded that its examination of whether GOTCHA is a like-for-like replacement for WHEELCHEX applies at all GOTCHA sites. It accepted, however, that in some cases, such as the replacement of WHEELCHEX at one location by GOTCHA in a different location, NR had followed the Network Change procedure.
- 6.5 I had explained in the Directions Letter of 3 November 2015 the Panel's presumption that it would not amount to Network Change if GOTCHA was, in fact, a like-for-like replacement for WHEELCHEX. The Panel took the view that a like-for-like replacement would not have any greater material effect on the operation of trains on the Network than the original equipment. The Panel was therefore seeking to decide as a matter of fact whether this was the case.
- 6.6 If, however, GOTCHA was not a like-for-like replacement, then even though it was accepted to be another form of WILD equipment, its installation would amount to Network Change under the definition in (c) above if it was a material variation to an established Network Change. The Panel felt that for the purpose of determining this dispute the test of materiality in (a) and (c) of the definition was the same.
- 6.7 In Directions I had postulated the possibility of a Network Change having occurred if the WHEELCHEX equipment (which NR accepted required the Network Change process to be adopted when it was introduced) had ceased to function for a long enough period to amount to Network Change under (a)(ii) of the definition; in which case the question arose as to whether its replacement by a functioning WILD equipment, whether WHEELCHEX or GOTCHA, might itself amount to Network Change. For the purposes of this dispute this was defined as 'double Network Change'.
- 6.8 In the event, however, while the analysis carried out by one of Industry Advisors made it clear that WHEELCHEX at Sessay was no longer functioning in any real sense from February 2014, as the GOTCHA equipment became operational on 30 June 2014, the period during which there was no functioning WILD equipment at Sessay was less than the period of 6 months required to establish Network Change under (c) within the definition.
- 6.9 As an observation, the Panel noted with surprise that what appeared to be an important step in comparing the two systems had relied on incomplete data, not least because for most of the period of 'dummy running' WHEELCHEX was not functioning on three of the

four tracks at Sessay, a fact which appeared neither to have been recognised nor understood by either Dispute Party (or any other Operator as far as the Panel is aware).

- 6.10 As recorded above, during this dispute a number of Directions Letters were issued seeking information from the Dispute Parties to enable the Panel to understand the effect of introducing GOTCHA at Sessay, not least why XC had started to experience a significant numbers of GOTCHA activations requiring its trains to be taken out of service, in spite of revisions to its wheelset policy and contrary to its previous experience. Nor did the Panel understand why it was XC in particular which was experiencing these changes. Even at the end of the oral hearing there were a number of questions which the Dispute Parties were unable to answer, but it was not in fact necessary for these questions to be answered for the Panel to reach its decision as to whether the introduction of GOTCHA as a replacement for WHEELCHEX amounted to Network Change.
- 6.11 The Panel felt that there was merit in reaching its decision by examining firstly the effect of the material available to NR before the installation of GOTCHA at Sessay. This material appeared in the Dispute Parties' Statements of Case and in the additional material provided in response to the Directions Letters issued during the dispute.
- 6.12 One document relied upon by XC was an extract from a briefing on GOTCHA given to ATOC by NR on 28 January 2015 (Appendix D to XC's Statement of Claim). This included the statement that, '*Condition based maintenance allows for more informed pro-active maintenance...GOTCHA will provide wheel condition data*'.

This led on to:

'Operators, TOCs and FOCs must use the Dummy Running period of 6 to 8 weeks to act on the impact data provided by Gotcha to adjust their wheelset maintenance activities (where necessary).' [The emboldening appears in the original document].

The next section was headed, 'GOTCHA – Previous questions from ATOC'. Question 1 referred to the, '*Request from the GOTCHA delivery project for TOCs and FOCs to 'adjust' their wheelset maintenance policy to account for the change from Wheelchex to Gotcha data*'.

- 6.13 Quoting from NR's response (extracts only):

'The presentations at these kick-off meetings informed operators (stakeholders) that we would expect the GOTCHA system to pick up on more impacts and that these impacts could read slightly higher than WHEELCHEX for the same event. The reasons for this was [sic] principally that WHEELCHEX is life-expired and in many cases in poor condition. This system condition obviously affects WHEELCHEX accuracy and reliability of the data received. Installing a brand new modern GOTCHA system meant that more damage would be recorded and the accuracy of the readings over WHEELCHEX would be improved. As thought, we have seen this elevation in the number of impact [sic] and that they generally read higher than [sic] WHEELCHEX.

*The recommendation during the kick-off meetings was '**Operators, TOCs and FOCs must use the shadow running period of 6 to 8 weeks to act on the data provided by Gotcha to adjust their wheelset maintenance activities.**' This recommendation was to take account of GOTCHA giving higher wheel impact readings than WHEELCHEX and to minimize any operational impact'.*

- 6.14 The Panel concluded that the implications of this extract were entirely clear: that NR knew by then that higher wheel impact readings would be provided by GOTCHA, which was a more reliable system than WHEELCHEX, which was why Operators were advised to adjust their wheelset maintenance activities. However, as explained above, in the

Panel's view, the period of dummy running failed to provide NR or Operators with any meaningful data.

- 6.15 During the oral exchanges at the hearing NR's lead representative submitted that wheelset maintenance is an Operator's responsibility and that NR had only advised Operators to adjust their policies, rather than asking them to do so. (NR's lead representative also sought to argue that GOTCHA was only picking up more low level data. In response the Panel quoted back an example he had used of being able to monitor an XC train on a long journey from the South-West to Scotland with a steadily developing wheel defect picked up by the GOTCHA installations over which the train passed).
- 6.16 The Panel accepts that Operators are responsible for their own wheelset maintenance and that the argument submitted by NR on this point at the hearing was legally correct, although the word used in the briefing to ATOC was that Operators 'must' adjust their wheelset maintenance policies, which is entirely different.
- 6.17 Given the Panel's interpretation of this document, on the basis of it alone the Panel does not understand how, given NR's state of knowledge by the time of the briefing, it can credibly be argued now that the replacement of WHEELCHEX by GOTCHA was not likely materially to affect the operations of trains on the Network and so amount to Network Change.
- 6.18 If further support for the Panel's view were needed, it also took note of the Minutes of a meeting held on 16 March 2015 between NR and representatives of XC, Virgin Trains (presumed to be "Virgin Trains East Coast") and Grand Central. The final words on the first page read:
- 'In the transition from WHEELCHEX to GOTCHA NR foresaw that there may be more recording of high impact loads and communicated this to operators through stakeholder fora'.*
- 6.19 Again these words can only be understood to mean that if NR had properly directed its mind to the issue, it was anticipating that the introduction of GOTCHA was likely materially to affect the operation of trains on the Network.
- 6.20 As an observation, it seemed to the Panel that throughout this dispute NR had concentrated primarily on the fact that in principle it had not changed its own operating procedures, therefore Network Change has not occurred. As XC withdrew its head of claim relating to the provision of information, the Panel did not need to reach any conclusion as to whether NR's operating procedures had in fact changed, regardless of its intentions, but does feel that concentration on this aspect may have blinded NR to the real issue, that more wheel impacts were being recorded and at a higher level, and that this had been anticipated by NR before the installation of GOTCHA.
- 6.21 Without in any way seeking to diminish the time and effort devoted by the Dispute Parties in providing the considerable volume of information that they did, and with thanks to the considerable amount of work put in by the Industry Advisors in seeking to identify information from the data, the experience after the installation of Gotcha at Sessay became live can be summarised by saying that the expectations of NR were fulfilled, in that more impacts were recorded, and at a higher level.
- 6.22 The Panel has no hesitation in reaching this conclusion on reviewing the evidence made available to it during this dispute, relying in part on its own examination of the evidence, as shared with the Parties during the hearing. (It should be noted, however, that the Panel's own analysis was using data provided by NR only shortly before the hearing (which is not a criticism of NR), which was supplied without any caveats or explanation and which may not have been complete. Nor was there sufficient time before the hearing to check any of the conclusions reached by the Panel with NR).

6.23 However unsatisfying it might be, for the Panel as well as the Parties, that nobody still appears to understand why it is principally XC experiencing the problems that it is, what is obvious is that something has changed to lead to this result; therefore the conclusion that NR should have known that the introduction of GOTCHA was likely materially to affect the operation of trains on the Network is reinforced by the clear evidence that it has in fact done so.

7 DETERMINATION

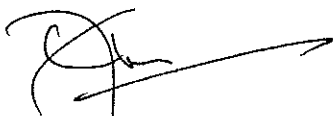
7.1 Having carefully considered the submissions and evidence as set out in sections 2 to 5 and based on the analysis of the issues and submissions set out in section 6,

I DETERMINE THAT the replacement of WHEELCHEX by GOTCHA constitutes Network Change.

7.2 I make no order for costs.

7.3 I record the fact that XC's decision not to pursue a claim for compensation within this ADA was made in order to achieve finality, to allow NR to decide whether to appeal the decision in principle. XC made this decision on the basis that it would be entitled to raise a claim for any compensation which it claimed arose from the Network Change which this ADA determined to have occurred, either in a subsequent ADA or in any other forum permitted by the ADRR.

7.4 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 Access Dispute Resolution Rules.



Clive Fletcher-Wood
Hearing Chair

8th December 2015

APPENDIX "A"

OPENING STATEMENTS TO THE HEARING

Opening statement by XC Trains

XC has worked with the GOTCHA Project over a number of years and fully supports the equipment's inclusion on the Network as an upgrade to and potential improvement on WHEELCHEX. We asked for this Adjudication following several months of disappointing negotiation with, and attempts to obtain transitional relief from, NR following the installation of Gotcha, primarily at Sessay on the East Coast Main Line. It is XC's belief that, following issues which became apparent after live running commenced, that NR should have consulted the change from WHEELCHEX to GOTCHA as a Network Change under Condition G1.1 of the Network Code. This is for three reasons.

Firstly, it is evident that, following 610 delay minutes, 15 full and 15 part cancellations, which represent over 10% of Voyager cancellations for the relevant year prior to submitting our claim, the introduction constituted a material change to our operations. The activations contrast with zero activations for WHEELCHEX in the previous year. XC believes that when one year's dataset varies so wildly from another and there was a different system operating in each year, then there is value in comparing the operational statistics.

Secondly, it remains clear that NR foresaw the need for increased management of the WILD process in order to smoothly manage the transition between WHEELCHEX and GOTCHA to make them of a similar impact on the operation of the Network. This is evidenced in Appendices F and J to XC's submission, as well as paragraph 4.15 of NR's Defence. We remain unaware of NR undertaking such measures for other projects that they deem to be of No Material Effect. XC maintains that if we are asked by the Infrastructure Manager to change our maintenance processes to avoid operational impact, comply with this instruction and despite this suddenly begin to experience delays and cancellations then there has been a change to the Network of material effect.

Thirdly, since the exchange of papers between both parties has commenced it has come to XC's attention that there may also be a bigger issue than previously thought with calibration or functionality of the equipment at Sessay, which would perhaps explain the unexpectedly high number of activations we have experienced. We are not the only operator to be concerned about this; we have had some dialogue with Virgin Trains East Coast following a recent activation at Sessay, which was far higher than they would expect to see for a locomotive of the size involved (Appendix L) and we understand that Grand Central Railway also has concerns. Using the dummy parallel running data supplied by NR on 13 November 2015, we have calculated that of the 2,284 and 746 records supplied for GOTCHA and WHEELCHEX respectively only 22 concerned the same axle and headcode at the same date and time. Of these 22 the variance between forces recorded was between plus or minus 35% and 36%. It is our Head of Fleet and Engineering's professional opinion that this variance is concerning; we would expect from the discussions we've had thus far to see GOTCHA consistently reading slightly higher than WHEELCHEX but not that it can read higher and lower than WHEELCHEX. These results contradict the test report, also sent by NR on 13 November 2015, which states that GOTCHA and WHEELCHEX agree on activation level 88.2% of the time, with GOTCHA having a higher mean reading of 65kN. Of the 22 trains that were recorded by both systems during dummy running, only eight readings were within 10kN of each other. The highest variance in force read was 118kN. We believe this leads into a further question – is the equipment at Sessay defective? And what processes does NR have in place to ensure its accuracy, beyond stating it is "self-calibrating"?

XC would like to register its disappointment that this issue has ended up at an Adjudication. Traditionally XC's Fleet Team has had a very good working relationship with NR and it was not until NR refused our request in January 2015 for transitional relief (Appendix C) following the earliest spate of activations, that we realised there was likely to be an issue in reaching

resolution. The historically good working relationship, based on trust and acting in good faith is what led us to accept the Notice of No Material Effect in November 2013; we did not anticipate any problems, let alone problems we would be unable to resolve between us.

To conclude, XC is seeking a decision from the Panel that the implementation of the GOTCHA programme, issued as NME/2013/GOT1, has resulted in a material effect on operators and should have been subject to Condition G1.1 of the Network Code and that as a result NR should issue a Network Change notice with immediate effect. XC is hopeful that this will enable us to open constructive dialogue with NR on satisfying our concerns about system calibration and the provision of transitional relief to cover the losses we are suffering.

Opening statement by Network Rail

Network Rail would like to start by thanking the Panel for their concise, timely and clear direction throughout this process, which has aided Network Rail greatly in answering any questions raised by XC and the Panel swiftly and also allowed us to focus on the key points.

Network Rail would also to thank XC for their co-operation over key points raised and that this dispute has not degraded our day to day business interactions and professionalism between the two companies has been maintained throughout.

In the wider context of this dispute, Network Rail would like to highlight previous determination NV21 from 9 April 2001 surrounding the introduction of WHEELCHEX, in particular paragraph 5.6 which states "given that the WHEELCHEX equipment is essentially aimed at providing a measure of the actual level of compliance with Group Standards, **it would seem inappropriate that a Train Operator whose rolling stock was thereby found to be out of compliance, should be entitled to any form of compensation for the need, in the event of an alarm, to respect defined operational rules...**". It is Network Rail's view that this determination removes the right of the Claimant to seek compensation for WILD activations if GOTCHA is not found to be a like-for-like equipment replacement for WHEELCHEX. However, Network Rail still firmly believes that the installation of GOTCHA at WILD sites which operated previously under WHEELCHEX is a like-for-like replacement of equipment. No physical or operational characteristics of the Network have been changed in any way through the introduction of GOTCHA to constitute Network Change of any description.

There were 26 WILD sites on the Network that operated under WHEELCHEX. As of today 1 site is in the process of being removed, 3 sites still continue to operate under WHEELCHEX (though GOTCHA is installed at these locations it is yet to be commissioned) and 22 sites operate solely under the GOTCHA system. XC operates over 9 GOTCHA sites and 2 WHEELCHEX sites. Details can be provided if required.

Network Rail understands that XC has recently revised its claim to include the following 3 elements:

- That zero level 2 or above alarms per year is the norm and that any increase on this, in XC's view, amounts to Network Change;
- That increased management of the day to day WILD process amounts to Network Change; and that
- The variation in data between WHEELCHEX and GOTCHA amounts to Network Change.

It is Network Rail's view that "zero activations one year should be followed by zero activations in subsequent years" is not a sound argument with respect to the like-for-like replacement of the equipment amounting to Network Change. It should be noted that XC did in fact have 241 activations under WHEELCHEX at Sessay in the year prior to GOTCHA being commissioned. Network Rail does concede that there were no level 2 or above activations in the previous year and maintains that any increase from zero, year on year, should not be attributed to the replacement of the equipment unless any of the alarms themselves are disputed. Network Rail has evidence into the recent Virgin Trains East Coast activations in October 2015 (which it would like to share with the Panel and other Parties) which XC has highlighted, both in its Response to Network Rail's Statement of Defence and in its recently revised Claim, and

welcomes questions on how wheel defects can be generated where no preventative maintenance regime would prevent their occurrence.

Network Rail believes XC's statement about Network Rail not engaging with the industry for previous like-for-like equipment replacement to be incorrect. Network Rail undertook a similar like-for-like equipment replacement with Hot Axle Box Detection ("HABD") equipment which started in 2003 and resulted in 217 sites being replaced so far, with 10 still awaiting replacement. Network Rail did not undertake Network Change for this process, except for where sites were new or moved as we have done consistently with the GOTCHA replacement.

The HABD project did involve industry engagement through various high level groups and forums starting with the HABD Strategy Group which included representatives from Operators and ATOC. In 2007, this group evolved into the Infrastructure / Vehicle Remote Condition Monitoring ("RCM") Group to oversee all equipment installed on the Network that monitors any interface between vehicles and infrastructure (such as WILD, HABD, Pantograph Monitoring and Acoustic Axle Bearing Monitoring). This group meets regularly to define the strategy for such equipment and also to provide updates on installation programmes, such as HABD and GOTCHA. Network Rail believes this demonstrates that it does undertake such industry consultation measures for other projects that it deems to be of No Material Effect.

Network Rail believes that increased industry engagement does not amount to Network Change. The trial report for product acceptance of GOTCHA (submitted previously as Appendix F) states in its conclusion that compared to WHEELCHEX, GOTCHA does detect a higher number of wheels at an early stage of defect development. Due to this, Network Rail submitted this data to Operators to allow them to adjust their preventive maintenance regimes if they deemed it necessary.

Network Rail believes that the variation in data between WHEELCHEX and GOTCHA does not amount to Network Change due to the variability and probability involved in detecting wheel defects. The variance in the data is a function of the way WILD systems in general operate and in the event that WILD equipment detects a wheel defect, it cannot be expected to be detected by another set of WILD equipment for various reasons, including the equipment not being located in exactly the same place and rotational and lateral deviation of the wheel itself changing the point of impact on the rail. Network Rail has not had the opportunity to respond to this point in detail and welcomes further questions from the Panel around this point.

Network Rail considers the replacement of WHEELCHEX with GOTCHA as like-for-like, and does not consider the delays and cancellations incurred by XC to be as a result of the like-for-like replacement but rather as a direct result of the wheel defects themselves.

Opening remarks by DB Schenker

DBS is represented today at this hearing in the capacity of an interested party because this dispute highlights a matter of principle that has become widespread across NR. That matter of principle concerns the consultation of changes to the network by NR through the use of an informal process involving "No Material Effect Letters" ("NME") rather than notifying such changes formally through Part G of the Network Code. This practice by NR is, in DBS's view, counterproductive and can result in much additional time and effort both on the part of NR and each Access Beneficiary involved. This informal process has been devised and implemented by NR itself and, therefore, unlike Part G, has no formal rights for Access Beneficiaries to request further information, etc.

The definition of Network Change in Part G of the Network Code commences "*means in relation to an Access Beneficiary...*" and goes on use the words "*likely materially to affect*". This suggests to DBS that there doesn't actually need to be a demonstrable material effect for the change to be issued as a Network Change proposal, just a good probability that there may be one. In issuing a NME letter, however, it appears that NR has already presumed on behalf of the Access Beneficiaries involved that the proposed change will have no material effect upon them. The concern is how does NR know this? It is not an operator of trains nor does it,

or can it, reasonably be expected to know the details of each Access Beneficiaries' business and operations. It is a matter for the Access Beneficiaries concerned to judge and decide whether a proposed change will have a material effect on their businesses.

Therefore if NR decides to issue a NME letter rather than a Network Change proposal, DBS would argue that it has at best gained nothing but at worst has wasted its time and created risk. Access Beneficiaries who consider that there is likely to be a material effect on their businesses after receiving a NME letter will no doubt request NR to reissue the proposal using the formal Network Change process or alternatively, if NR is reluctant to do so, will refer the matter for determination to an ADA. If, on the other hand, Access Beneficiaries after considering the proposal conclude there is not likely to be a material effect then NR will presumably proceed with implementation without using Part G. This could import a large degree of risk for NR because if, once implemented, the change does turn out to have a material effect it could leave NR open to subsequent claims/disputes that it has implemented a Network Change without using the Part G process.

Alternatively, if NR issues the proposal as a Network Change in the first place, then if Access Beneficiaries after considering the proposal conclude there is not likely to be a material effect then they will accept the Network Change and things will move on with NR gaining the certainty that there can be no further right of reply if an Access Beneficiary has failed to raise its concerns during the consultation. In addition, if there is likely to be a material effect from a proposed change on an Access Beneficiary, that party has the ability under Part G to raise its concerns accordingly as part of the process and discussions can focus on those concerns rather than wasting valuable time arguing the principle of whether or not it is a Network Change.

In conclusion, DBS therefore submits that NR has nothing to lose by issuing all change proposals through Part G but certainly has much to gain from having increased certainty going forward. DBS believes that its views are supported by the conclusions of NV55 which, in referring to an earlier decision in AD1, stated "It is not open for any party to keep a proposal for change outside the formal processes of Part G unless all parties agreed".

APPENDIX "B"

EXTRACTS FROM THE NETWORK CODE, PART G (1 August 2010)

Definitions

- "change" Includes:
- (a) improvement or deterioration, enlargement or reduction; and
 - (b) for the purposes of paragraph (b) of the definition of Network Change, a series of changes
- "established Network Change" Means a change falling within the definition of "Network Change" and which:
- (a) in the case of a Network Change proposed by Network Rail, Network Rail is entitled to carry out having complied with the procedural and other requirements of this Part G; and
- "Network Change" means, in relation to an Access Beneficiary:
- (a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:
 - (i) the Network; or
 - (ii) trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; or
 - (b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:
 - (i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; and
 - (ii) has lasted or is likely to last for more than six months, including
 - (x) a temporary speed restriction;
 - (y) a material change to the location of any of the specified points referred to in Condition B1.1 (a); or
 - (z) a change to the method of delivery of any operational documentation (other than Railway Group Standards) owned or used by an Access Party; or
 - (c) any material variation to an established Network Change, other than an authorised variation,
- but does not include a closure (as defined in the Railways Act 2005) or a change made under the Systems Code

CONDITION G1 - NETWORK CHANGE PROPOSAL BY NETWORK RAIL

1.1 Notice of proposal

Subject to Conditions G1.9 and G1.10, if Network Rail wishes to make a Network Change, it shall:

- (a) give notice of its proposal for Network Change to:
 - (i) each Access Beneficiary that may be affected by the implementation of the proposed Network Change;
 - (ii) the Secretary of State, and Scottish Ministers if they may be affected by the implementation of the proposed Network Change;
 - (iii) the Office of Rail Regulation; and
 - (iv) each Passenger Transport Executive that may be affected, Transport for London if it may be affected and the Welsh Assembly Government if it may be affected, by the implementation of the proposed Network Change; and
- (b) without delay publish on its website a summary of its proposal for Network Change.

1.2 Content of notice of proposed Network Change

A notice of a proposed Network Change given by Network Rail under Condition G1.1 shall:

- (a) state the relevant response date and the obligations of Access Parties under Conditions G1 and G2;
- (b) indicate whether and to what extent the proposed Network Change has been progressed using the Complex Projects Procedure;
- (c) indicate whether the proposed Network Change is a Short Term Network Change;
- (d) invite the persons specified in Condition G1.1(a)(ii)-(iv) to submit comments by the relevant response date;
- (e) contain:
 - (i) the reasons why it is proposed to make the change, including the effects it is intended or may reasonably be expected to have on the operation of the Network or on trains operated on the Network;
 - (ii) a specification of the works to be done (including a plan showing where the work is to be done and the parts of the Network and associated railway assets likely to be affected);
 - (iii) the proposed times within which the works are to be done and when they are intended or may reasonably be expected to be begun and completed;
 - (iv) Network Rail's proposals (if any) for the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of the change;
 - (v) in the case of a Short Term Network Change:
 - (vi) any additional terms and conditions which Network Rail proposes should apply to the change, including any proposed variation procedure;
 - (vii) the results of any consultation undertaken in accordance with Condition G5; and

- (viii) the results of any Preparatory Works undertaken in accordance with Condition G6;
and
- (f) be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to be expected of the persons specified in Condition G1.1(a), to enable any such person to assess the likely effect of the proposed change on its business and its performance of any obligations or the exercise of any discretions which it has in relation to railway services.

1.3 Consultation

- 1.3.1 Network Rail shall, after giving notice of any proposal for Network Change under Condition G1.1, consult with each operator of railway assets likely to be materially affected by the proposed change to the extent reasonably necessary so as properly to inform that operator of the change and to enable that operator to assess the consequences for it of the proposed change.
- 1.3.2 After consultation under this Condition G1.3, Network Rail may notify a later relevant response date to the persons to whom the notice of proposal for Network Change was given.

1.4 Obligations on Access Beneficiaries to facilitate Network Change

- 1.4.1 Except in the circumstances and to the extent specified in Condition G1.4.2, an Access Beneficiary shall, when consulted by Network Rail under Condition G1.3, take all reasonable steps to comply with any written request of Network Rail to provide Network Rail, within a reasonable period of time and at no cost to Network Rail, with:
 - (a) a preliminary estimate of those costs, losses and expenses referred to in Condition G2.2; or
 - (b) a preliminary written response in respect of the proposed Network Change, which shall:
 - (i) be binding on the Access Beneficiary, unless the Access Beneficiary indicates otherwise; and
 - (ii) if it is negative, include reasons.
- 1.4.2 An Access Beneficiary shall not be obliged to comply with a request from Network Rail under Condition G1.4.1:
 - (a) unless:
 - (i) the relevant response date is 60 or more days after the date on which the proposal for Network Change was given; and
 - (ii) the request is made at the same time as Network Rail gives its notice under Condition G1.1; or
 - (b) to the extent that the Access Beneficiary is unable to comply with such a request, having regard to the information reasonably available to it.

1.5 Reimbursement of costs

Subject to Conditions G1.4 and G2, each Access Beneficiary shall be entitled to reimbursement by Network Rail of 75% of all costs incurred by that Access Beneficiary in assessing any Network Change proposed by Network Rail. Those costs shall be the minimum reasonably necessary for that Access Beneficiary to carry out that assessment.

.....

1.9 Changes to the operation of the Network

In the case of a Network Change within the meaning of paragraph (b) of that term's definition, Network Rail may commence implementing the procedure set out in this Part G and shall, upon notice being given by the relevant Access Beneficiary to Network Rail at any time after the expiry of the relevant period, promptly commence implementing and thereafter comply with that procedure as if that change were a Network Change proposed by Network Rail.

1.10 Network Change for safety reasons

To the extent that a Network Change within the meaning of paragraph (a) of that term's definition is required to be made by Network Rail for safety reasons, Network Rail shall not be obliged to implement the procedure set out in this Part G in relation to that change until the change has lasted for three months. Upon expiry of the relevant period, Network Rail shall promptly commence implementing and thereafter comply with the procedure set out in this Part G as if the relevant Network Change were a Network Change proposed by Network Rail.

CONDITION G2 - RESPONSE BY ACCESS BENEFICIARY TO NETWORK CHANGE PROPOSAL

2.1 Obligation to give notice of response

2.1.1 The Access Beneficiary shall give notice to Network Rail if it considers that:

- (a) one or more of the following conditions has been satisfied:
 - (i) the implementation of the proposed change would necessarily result in Network Rail breaching an access contract to which that Access Beneficiary is a party;
 - (ii) Network Rail has failed, in respect of the proposed change, to provide sufficient particulars to that Access Beneficiary under Condition G1.2;
 - (iii) the implementation of the proposed change would result in a material deterioration in the performance of that Access Beneficiary's trains which cannot adequately be compensated under this Condition G2 or (where that Access Beneficiary is a Train Operator) in respect of a Restriction of Use in connection with the implementation of the proposed change under that Train Operator's Access Agreement; or
 - (iv) the proposed change does not adequately take account of the reasonable expectations of the Access Beneficiary as to the future use of the relevant part of the Network; and/or
- (b) one or more of the conditions set out in Condition G2.1.1(a) has been satisfied but it is prevented by Condition G5.7 from objecting to the proposed Network Change and the proposed Network Change is not, on the basis of the available evidence and taking account of the alternative solutions available and the progress made with the proposed Network Change, to the benefit of the industry as a whole; and/or

2.1.2 Any notice of the kind referred to in Condition G2.1.1(a) above shall include the reasons for the Access Beneficiary's opinion.

The notice referred to above shall contain such detail as is reasonable to enable Network Rail to assess the merits of the Access Beneficiary's decision.

CONDITION G10 - ESTABLISHMENT AND IMPLEMENTATION

10.1 Implementation of a Network Rail proposed Network Change

10.1.1 Network Rail shall be entitled to implement a proposed Network Change if:

(a) it has not received a notice from any Access Beneficiary under Condition G2.1 by the relevant response date; or

(b) it has received notice by the relevant response date from an Access Beneficiary under Condition G2.1(c) and either the amount of any compensation referred to in Condition G2.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; and

(c) there is no other unresolved dispute under this Part G (whether under this Condition G10 or otherwise) as regards the proposed change between Network Rail and any affected Access Beneficiary.

10.1.2 Network Rail may, if it considers it expedient to do so in order to confirm whether or not Condition G10.1.1 has been satisfied, issue a notice to all affected Access Beneficiaries when it reasonably believes it is entitled to implement a proposed Network Change.

10.1.3 Network Rail's entitlement to implement a proposed Network Change shall be treated as confirmed 21 days after it has served a notice in respect of that Network Change in accordance with Condition G10.1.2 unless it receives notice from an Access Beneficiary within those 21 days disputing Network Rail's entitlement to implement that proposed Network Change under Condition G10.1.1 and giving full particulars of its reasons.

10.1.4 If Network Rail does not agree with the contents of a notice served by an affected Access Beneficiary in accordance with Condition G10.1.3, Network Rail may:

(a) refer the matter for determination in accordance with the ADRR and Condition G11 shall apply; or

(b) withdraw the proposed Network Change.

10.2 Implementation of a Sponsor proposed Network Change

.....

10.3 When a Network Change may not be implemented

10.3.1 Network Rail shall not be entitled, and a Sponsor shall not be entitled to require Network Rail, to implement a proposed Network Change unless it is so entitled to implement, or require the implementation of that Network Change under Condition G10.1.1 or Condition G10.2.1.

10.3.2 For the purposes of the Conditions G10.1.1 and G10.2.1, unresolved disputes shall include:

(a) a notice has been served under Condition G2.1.1(a) or (b) or Condition G4.1.1(a) or (b) which has not been withdrawn, resolved under Condition G11 or agreed not to apply; and

(b) a notice has been served under Condition G2.1.1(c) or Condition G4.1.1(c) or (d) which has not been agreed or resolved as referred to in Condition G10.1.1(b) or G10.2.1(b) or (c) or otherwise agreed, resolved or withdrawn.

CONDITION G11 - APPEAL PROCEDURE

11.1 *Right of referral in accordance with the ADRR*

If any Access Party is dissatisfied as to:

- (a) any matter concerning the operation of the procedure in this Part G;
- (b) the contents of any notice given under Condition G2.1, G4.1, G5.5, G8.1.1 or G10 (and, in particular, the amount of any compensation referred to in those Conditions);
- (c) any estimate referred to in Condition G1.6 or G3.6;
- (d) the:
 - (i) proposed Expiry Date; or
 - (ii) estimated timescale in which a Short Term Network Change can be reasonably reversed,in a notice of proposed Network Change given under Condition G1.1; or
- (e) the reasons given by Network Rail as to why it does not believe that the effect of the Short Term Network Change is preventing the Access Beneficiary using the Network in accordance with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network under Condition G8.1.4(b),

that Access Party may refer the matter for determination in accordance with the ADRR.