

ACCESS DISPUTES COMMITTEE

Hearing regarding ADA30

held at

1 Eversholt Street
London NW1 2DN

on

Wednesday, 13 July 2016

Panel:

Mr Peter Barber (Chair)

Mr John Boon

Mr Robert Howes

Mr Tony Skilton (Hearing Secretary)

TRANSCRIPT OF PROCEEDINGS
(ADA30)

1 CHAIR: We meet as an Access Adjudication panel today appointed by the Access Disputes
 2 Committee under Chapter G of the Access Disputes Resolution Rules to hear dispute
 3 ADA30 brought by two freight operating companies; GB Railfreight and DB Cargo
 4 (UK) against Network Rail Infrastructure Limited. There are two other freight operating
 5 companies who are interested parties, Freightliner and Freightliner Heavy Haul, and
 6 three passenger train operating companies; East Midlands Trains, XC Trains and Arriva
 7 Rail North. All are I think represented here today except not, or not yet, Arriva. Let us
 8 do the introductions first and we will go round the room starting with the Panel and first,
 9 at this stage, I want to note and draw to your attention that we're taking a full transcript
 10 of this hearing. I'll come back in a little while as to why we're doing that, but just now
 11 for the purpose of going around the room, note that it would be helpful if everybody
 12 gives their names and affiliation clearly for the benefit of the secretariat.

13 So, I, the Chair of the hearing, am Peter Barber. I'm a solicitor, formerly a
 14 partner with a law firm, Blake Lapthorn now Blake Morgan, practising in rail industry
 15 matters. I am now retired from that firm and I confirm that I have no conflict of interest
 16 in this matter. I do not act for or have any interest in any of the dispute parties or indeed
 17 interested parties now, nor have done in the past, except that a very long time ago, at
 18 privatisation and in the aftermath, I did act for Cross Country Trains.

19 Now, the advisors.

20 MR BOON: John Boon, industry advisor. I've worked for the rail industry most of my career
 21 and up until a couple of years ago, I worked for Network Rail. I have no conflicts of
 22 interest as things stand at the moment.

23 MR HOWES: Bob Howes, industry advisor to the ADC, worked for SWT until I retired. I do
 24 hold some Stagecoach shares and they control East Midlands Trains.

25 CHAIR: Shall we go round the parties, starting...

26 MR GIBBENS: I'm Spencer Gibbens, the principal sponsor for Network Rail.

27 MS BERRISFORD: Angela Berrisford, sponsor for Network Rail.

28 MS DWYER: I'm Claire Dwyer, I'm a legal director with Addleshaw Goddard appearing on
 29 behalf of Network Rail.

30 MR OATWAY: I'm Nigel Oatway, Access Manager for DB Cargo (UK).

31 MR KAPUR: Ian Kapur, National Access Manager at GB Railfreight.

32 MR COLES: I'm Nick Coles, Network Rail. I'm a Customer Relationship Executive looking
 33 after GB Railfreight.

1 MR HUNT: Martin Hunt, Senior Route Freight Manager, Network Rail.

2 MS MASI: Lanita Masi, Track Access and Network Change Manager for East Midlands
3 Trains.

4 MR BIRD: Jason Bird, Track Access Manager, Freightliner.

5 MR THACKRAY: Richard Thackray, Head of Timetabling and Diagramming at Cross
6 Country.

7 MR MCMAHON: David McMahon, Programme Manager for Network Rail.

8 MR BACON: Tom Bacon, Project Manager for Network Rail.

9 CHAIR: Right, let me just briefly recap the procedure to here. GB Railfreight initiated the
10 dispute with a notice on 6th April and a Procedure Agreement was entered into with
11 Network Rail on 21st April. DB Cargo in May declared itself a Dispute Party as well and
12 the five interested parties also declared their interest then.

13 The dispute was set for hearing today and that date has not been changed. The
14 timetable was set for submissions, statements of claim, defence, replies and further
15 submissions and that timetable was complied with and those documents have been
16 produced and, according to the Rules, we are obliged to say to what extent we have read
17 them. You can take it that we have all read all the submissions with care.

18 I just want to make a few introductory remarks. This is an unusual dispute in that
19 it primarily concerns not a dispute on the merits or the substance of balancing competing
20 interests of various participants, operators, in ongoing railway operations governed by
21 the provisions of the Network Code. That dispute of substance and as to the merits of
22 the matter was held two and a half years ago and this dispute concerns the alleged failure
23 by Network Rail, one party to the original dispute, to implement the conclusions of that
24 dispute and its determination. That was ADA17.

25 And so, this dispute has been brought nominally in the first place under ADR
26 Rule G51 which is, in effect, the only provision in the Access Dispute Resolution Rules
27 addressing the situation of a failure by a party to comply with an ADA determination.

28 As far as I am aware, this is the first dispute of that sort that has ever been
29 brought under that Rule. No doubt you will tell me if you think otherwise in due course,
30 but I haven't been able to find another one.

31 Because of this unusual circumstance, before the Procedure Agreement was
32 settled in the first place between GB Railfreight and Network Rail, the ADC Secretary
33 asked ORR if it would accept jurisdiction as the appeal body in the event of an appeal

1 from this, instead of what would be the default appeal procedure for an ADA which is
2 arbitration. ORR declined to accept that jurisdiction on the basis that it did not consider
3 the circumstances of this dispute to be 'exceptional circumstances' which would justify
4 its taking the role as the appellate body under Chapter B of the Access Dispute
5 Resolution Rules, though in its letter of reply, ORR did acknowledge that it raises
6 serious issues and stated that if, in the course of the dispute, what it called 'systemic'
7 issues arise concerning among other things the Network Code, for example, as to
8 enforcement of its provisions, then ORR would be pleased to hear this in due course to
9 see if something needed to be done; so there is that background.

10 And that is partly why in my summary of the legal issues, which are in
11 accordance with the normal procedure under Part G, I noted that there are key issues
12 arising as to general remedy and enforcement in these sorts of disputes, as well as
13 dealing with the practicalities of what has now been offered by Network Rail as its
14 specific solution to what, in its latest submission, became Network Rail's admitted
15 failure to comply with the determination of ADA17; and that, I should explain, accounts
16 for why I thought it would be helpful to have a full transcript of this hearing, because
17 there are these broader issues of remedy and enforcement under the Access Dispute
18 Resolution Rules for these kinds of dispute, which are of possibly general application,
19 which one imagines could prove more than usually contentious, and which could be the
20 subject of appeal. I wouldn't want, among other things, any appeal to be prejudiced or
21 hampered by the need to deal with arguments as to what was actually said at this hearing
22 or as to who was given the opportunity to speak in what circumstances and so on, so that
23 is why I thought it was sensible to exercise the facility of having a full transcript instead
24 of a record taken by the Secretary.

25 I give you notice that in all probability that the transcript will be published with
26 the written determination and will constitute the record of all exchanges at the hearing.
27 It will, of course, as these things always are, be edited and all persons will have the
28 opportunity to look at it and comment on, as I think they say, Hansard principles, that's
29 to say correcting of errors, not correction of the substance.

30 So, briefly, the order of proceedings for today will take their usual course which
31 is, first, opening statements if required on behalf of each Dispute Party. We have just
32 received written copies of opening statements from the two Claimants, which we have
33 had a short time to read but no doubt they will want to make their statements.

1 MS DWYER: We have not received copies of those.

2 CHAIR: Right. It's not obligatory that you should. I don't imagine they received copies of
3 whatever statement -

4 MS DWYER: I'd be very happy hand them round.

5 CHAIR: You're welcome to give it to them as you like and to us, but the point about the
6 opening statements is that they're not necessarily responding to pre-delivered things.

7 Then, I would invite initial statements or comments from interested parties if they
8 want to. We will probably then have a short adjournment and then we will go into the
9 oral exchanges, questions and answers. At that stage, I would ask for questions as far as
10 possible to be put through the leads for each party so that everyone can keep up with
11 what's going on and so can the secretariat.

12 I will then later invite closing statements as required from the Dispute Parties and
13 the interested parties and at the end, assuming we get to an end today, I will if possible
14 give an indication of the result and/or any further information which we need to get
15 through to a result. We will try to get as far as we can towards a resolution, a known
16 resolution, today.

17 So, that's by way of introduction, so let's move straight to the opening statements
18 and we will start with GB Railfreight as the initiating Claimant. Can I just be clear, are
19 there written copies?

20 MR KAPUR: I produced 12.

21 CHAIR: Is that what's just gone round?

22 MR KAPUR: Do we have enough?

23 CHAIR: GB Railfreight and DB?

24 MR KAPUR: Just GB's.

25 THE HEARING SECRETARY: How many more do we need?

26 MR KAPUR: Three. Four. Sorry, I did 12, I thought 12 might be enough, obviously not.

27 CHAIR: I don't think it's technically essential that everybody be provided with a copy but...

28 MS DWYER: If you'd like to use the time now, we can hand round copies of our submissions
29 as well for your benefit.

30 CHAIR: Oh well, do, yes, good idea. Thank you. Yes, there is no mandatory protocol as to
31 providing written copies of these things, before or during, but always helpful afterwards
32 anyway.

33 MR KAPUR: Does everyone have a copy?

1 CHAIR: Right, are we all adequately furnished?

2 MR KAPUR: So, this is the opening statement by GB Railfreight for ADA30. Clay Cross
3 Down Goods Loop, capable of holding a trailing length of a 640m train, was part of
4 Network Rail's national Network in Control Period 4, and is also deemed part of the
5 national Network in Control Period 5.

6 The funding for maintaining the capability of this Loop throughout Control
7 Period 5 is already in place. If Network Rail has allocated this money to other activities,
8 it needs to reprioritise and allocate it back to this piece of infrastructure. Money is
9 available. It's just how Network Rail has chosen to currently allocate it that seems to be
10 an unnecessary restriction in this case.

11 On 4th November 2014, Network Rail's proposed Short Term Network Change
12 for removing Clay Cross Down Goods Loop clearly stated that the timescale for reversal
13 would have been eight months. On this basis, GB Railfreight cannot understand why
14 Network Rail is proposing a reinstatement time scale of over two years from today. GB
15 Railfreight does not believe that Network Rail is taking the directions of ADA17
16 seriously, nor ever has been.

17 Why has the timescale changed from eight months to over two years for this
18 reinstatement?

19 ADA17 determination on 3rd January 2014 stated that the Loop be reinstated in a
20 form at least equivalent to the physical form and layout in which it stood immediately
21 prior to the Implementation Stageworks. This specifically describes the layout as at
22 2013 when it was disconnected.

23 GB Railfreight believes that as the Loop has not technically been changed and
24 Network Rail had been directed to merely reconnect it as per the 2013 layout, there
25 should be no changes of Standards to be incorporated. No re-design has been directed
26 and if any new line speed was incorporated around the Loop it shouldn't have been as it
27 too had no established Network Change to support it.

28 The written submission from Network Rail dated 6th July 2016 reads as a list of
29 why Network Rail thinks it shouldn't reinstate the Loop for two years from this point.

30 The section on possession planning is nothing special to this particular item of
31 infrastructure. That process is business as normal and is not a reason in itself to try to
32 extend the time for reinstatement. Indeed, an ADR direction for reinstatement, coupled
33 with a breach of Network Rail's Licence Condition for not maintaining it in use as stated

1 in its own Short Term Network Change, is a strong place to be for making quick
2 decisions on which possession regime it needs to be taken and by when.

3 Having compared brand new Network Rail enhancement schemes with what
4 Network Rail describes in its paper, GB Railfreight cannot believe the figures quoted for
5 this reconnection. It doesn't believe that Signalling Standards have changed since
6 Network Rail most recently had possessions planned for the Loop's reinstatement, nor
7 can it believe a £10m figure as being the best possible price for Network Rail to actually
8 want to carry out the job at the best possible rate.

9 CHAIR: Thank you. DB Cargo?

10 MR OATWAY: Thank you, Mr Chairman. I'm here today on behalf of DB Cargo (UK)
11 Limited to present its case in respect of this dispute with Network Rail. DB Cargo has
12 set out its detailed representations in its two statements submitted to the Secretary on 3rd
13 and 26th June respectively, the first constituting DB Cargo's Statement of Claim and the
14 second, its response to Network Rail's Statement of Defence.

15 Given that the Panel will have considered these representations, in my opening
16 remarks I merely wish to draw out the key issues as far as DB Cargo is concerned.

17 This dispute concerns a failure of Network Rail to carry out specific remedies in
18 relation to Clay Cross Down Loop, the "Loop", as directed in a determination of a
19 previous Access Dispute Adjudication, ADA17, which was issued on 3rd January 2014.

20 In summary, Network Rail is required to reinstate and reconnect to the Network
21 the Loop to its full length of 649m. Any such reinstatement and reconnection shall be
22 commenced and completed prior to the date of commencement of the Timetable coming
23 into effect in December 2014.

24 Just over a month after the determination was published, Network Rail indicated
25 that the reinstatement and reconnection of the Loop would likely be delayed from the
26 December 2014 Timetable to Summer 2015. This was followed shortly after by an
27 indication that Network Rail was considering postponing the reinstatement and
28 reconnection of the Loop until it was deemed necessary in a future Control Period, CP6
29 or beyond.

30 Subsequently, with no sign of Network Rail progressing the reinstatement and
31 reconnection of the Loop, it became clear to DB Cargo that Network Rail appeared to
32 have disregarded determination ADA17, a view that was substantiated at the East
33 Midlands Route Schemes review meeting on 30th March 2016 when Network Rail

1 reported that the matter was now closed as it was being dealt with through the Access
2 Disputes Resolution procedure.

3 Notwithstanding the remarks it has made in this opening statement thus far, DB
4 Cargo obviously welcomes Network Rail's recent confirmation in its representations to
5 the hearing that it is now wholly committed to reconnecting and reinstating the Loop,
6 although its indicative timescales for implementation still leave a lot to be desired as far
7 as DB Cargo is concerned, i.e. around four years after the date originally directed in
8 ADA17.

9 However, given that Network Rail has provided similar information to DB Cargo
10 in the past which has not led to the Loop's reinstatement and reconnection, DB Cargo
11 remains doubtful that Network Rail's new arrangements will actually be implemented,
12 particularly given that the Loop's reinstatement and reconnection is subject to the
13 successful completion of the various stages of Network Rail's proposed reinstatement
14 process.

15 Furthermore, if Network Rail is committed to the reinstatement and reconnection
16 of the Loop, DB Cargo would have expected Network Rail to have reported that its
17 reinstatement process is already well underway and not seemingly awaiting the outcome
18 of this hearing. DB Cargo therefore disagrees with Network Rail's submission that no
19 determination is required from today's hearing in respect of the reconnection and
20 reinstatement of the Loop.

21 Consequently, DB Cargo continues to seek a determination that Network Rail
22 should (a) comply with determination ADA17 and reinstate and reconnect the Loop to
23 the Network as soon as possible and in any event no later than the time needed for it to
24 be available for use from the May 2017 Timetable or such other date that may be
25 determined by this hearing and (b) that DB Cargo should be awarded costs given that this
26 dispute reference has only become necessary due to the Defendant's disregard of
27 determination ADA17 in respect of the Loop.

28 Finally, on a point of principle, DB Cargo considers that the disregarding of an
29 ADA determination is a serious matter that can only undermine and reduce confidence in
30 the industry's Access Disputes Resolution process. Therefore, in addition to seeking the
31 remedies already stated, the purpose of this dispute reference is also to ensure that this
32 issue of non-compliance by Network Rail does not go unnoticed and left unchallenged.

33 DB Cargo also considers that disregard of an ADA determination may also

1 constitute a breach of the Defendant's Network Licence, a fact that has already been
2 recognised by Network Rail in past correspondence as well as possibly being a breach of
3 DB Cargo's Track Access Contract with Network Rail.

4 Thank you.

5 CHAIR: Thank you very much. Network Rail?

6 MS BERRISFORD: Thank you, opening submissions on behalf of Network Rail, Access
7 Dispute Adjudication ADA30.

8 These proceedings have been brought about following Network Rail's failure to
9 comply with the direction made on 3rd January 2014, ADA17. Network Rail apologises
10 for that failure which it is clear should not have occurred. Network Rail wishes to
11 provide assurances that Network Rail is committed to the reinstatement and reconnection
12 of the Loop to the Network in accordance with the requirements of ADA17 and as soon
13 as can be reasonably and practically achieved taking into consideration all the relevant
14 constraints.

15 Given Network Rail's commitment to reinstalling the Loop, the remaining issues
16 for consideration and determination seem to be -

17 (1) Timetable for the reinstallation. The Claimants seek to have the Loop
18 reinstalled no later than the start of May 2017, sorry, no later than the start of the May
19 2017 Timetable. Unfortunately this is simply not achievable. Network Rail appreciates
20 that criticism can be made regarding Network Rail's failure to comply with the order,
21 but respectfully submits that the determination as to the timing of the reinstatement
22 should look at the present position, taking into account all reasonable and practical
23 considerations. The earliest realistic date at which the Loop could be reinstated is
24 September 2018.

25 (2) Length of the Loop to be installed. The length of the Loop was determined by
26 ADA17 as being 649m. Network Rail cannot state that it would be confident of the
27 exact length of the Loop which would be installed. This is because the design now has
28 to take into considerations the new Standards along with an increase in the line speed.
29 Network Rail is conscious that ADA17 required reinstatement at 649m and is committed
30 to making extensive efforts to ensure that the Loop is, if not 649m, as close to it as
31 reasonably practicable.

32 (3) Possible line speed reduction. The speed on the Main Line was increased as
33 part of a Network Change between St Pancras and Sheffield. The Loop needs to be

1 designed and constructed so as to ensure safe entry and exit from the Loop, taking into
2 account that increase. For Network Rail to install the Loop in the same position, the
3 original 15mph entry speed limit and 25mph exit speed limit could potentially be
4 maintained. The issue produced by this is then to maintain the current increased line
5 speed on the Midland Main Line. Here there is the potential that speed will have to
6 decrease by five to 30mph. Network Rail will not know the exact figure until the design
7 is produced. This will obviously have an impact upon current performance but also on
8 any future journey time improvement projects such as Derby Journey Time
9 Improvement.

10 (4) Costs incurred by the claimants in bringing about AD30. Network Rail is
11 prepared to pay the reasonable and properly vouched costs of each of the Claimants' cost
12 incurred in bringing this ADA30, to be assessed by the Hearing Chair summarily if not
13 agreed.

14 Thank you.

15 MS DWYER: I would now like to say a few words in respect of the legal issues. Thank you,
16 Angela, for reading that statement out. You will find in your pack some written legal
17 submissions to deal with the issues helpfully raised by the Hearing Chair last Friday.

18 You will also find within the pack, just so you know you have it available, the
19 detailed written timeline which the Hearing Chair asked for last Friday. We've also
20 provided some photographs to show you something about the Loop, a diagram which we
21 can talk you through which explains the configuration of the Loop and we also have this
22 morning available, should you wish to see it, a film taken some time ago showing a
23 journey across the length of the Loop so you can actually start to appreciate the practical
24 issues we're dealing with in respect of the line speeds and so on. We can come back to
25 that later if you wish us to.

26 So, turning to the legal issues, you will find a detailed copy of this in your pack,
27 as I say. Basically, to start with, the Claimants have asked that the Defendant comply
28 with the determination of ADA17 and they've asked for their legal costs. We on the side
29 of Network Rail have agreed to both. Just to reinforce, we treat this matter extremely
30 seriously and the process is already underway to commit to reinstatement of the Loop.

31 The only remaining issues are therefore, as Angela has said, the timing of the
32 reinstatement and the reinstatement and the reconnection, so from our side of the table,
33 we don't think you need to look further, to any further legal issues, but as you have

1 raised them, we have something to say about them.

2 The first question you raised, the Hearing Chair raised, was in respect of
3 enforcement and we say the failure to implement a determination is dealt with under the
4 ADRR as presently written itself. The legal mechanisms for enforcement are confined to
5 those in the ADRR and are as prescribed by law as remedies for breach of contract, so
6 the only relevant remedies available to the Panel today are the payment of compensation
7 or an order to take action or an order to pay costs.

8 As we all know, this dispute has been referred to the process of adjudication
9 under the ADRR rules. That is the remedy for the breach of any Track Access Contract.

10 This is, as the Hearing Chair has already said, a contractual mechanism which
11 sets out the procedure for dealing with rail disputes.

12 Accordingly, the means of enforcement of the decisions and the remedies granted
13 can only be as the parties have all agreed, so as are set out in the ADRR themselves so
14 we cannot go outside what the ADRR presently says about enforcement.

15 As a matter of law, this is actually very usual. For example, I direct you to the
16 processes of arbitration and expert determination in which it's quite common for there to
17 be a contractual mechanism to resolve disputes and the ultimate means of enforcing any
18 decisions which come out of those contractual mechanisms is to take them to court. That
19 is the ultimate way to do it.

20 So, what do the ADRR actually say? Well, the ADRR have to say this about the
21 failure to comply with a determination and it's the Rule as already cited by the Hearing
22 Chair this morning, G51: "if a Dispute Party fails to comply with the terms of the
23 determination, that failure will be dealt with by way of a new dispute through the
24 appropriate mechanism" and accepted by the first Claimant in paragraph 2.1 of its
25 Statement of Claim.

26 So, once you've brought that new dispute, which we are presently dealing with,
27 you have to turn to the terms of the ADRR themselves to consider how they deal with the
28 legal consequences of failure to comply with the terms of the determination and I've then
29 summarised in the legal submissions the four options which are given to the Panel in
30 their determination.

31 There are four remedies which can be granted; an order to pay an amount of
32 money including damages; an order to take or not take any specified action; a
33 determination as to the meaning of an agreement and the payment of interest. You also,

1 of course, have the power to award costs as set out in rules G52 to G55.

2 These remedies are said to be without limitation and those require some
3 consideration. They do not permit the Panel completely unfettered discretion. The Panel
4 has to make their orders in compliance with the provisions of the English law which
5 expressly applies under G65 and in accordance with the principles set out in Chapter A
6 of the ADRR and these provide at Rule A5 that every forum, and that is defined to
7 include the Hearing Chair of an Adjudication, shall reach its determination on the basis
8 of the legal entitlements of the dispute parties and on no other basis. Each and every
9 forum shall act in accordance with the law and all its decisions, including its
10 determinations and decisions on procedure shall be in accordance with the law.

11 Furthermore, if you are dealing with precedents, each forum is bound by any
12 relevant decision of the courts and, of course, by any ORR determinations.

13 As regards remedies, Rule A6 provides that the Panel shall either grant any
14 specific remedy available under the Access Conditions or underlying contract, or where a
15 specific remedy is provided for at law, grant that remedy, or where the choice of remedy
16 is not a matter of entitlement, as it isn't here, but is a question of properly falling within
17 the discretion of the forum, exercise that discretion in accordance with any requirements
18 and criteria set out in the Access Conditions and underlying contract after due
19 consideration.

20 The underlying contract which applies to this dispute is, as DB Cargo has said,
21 the Track Access Contract. It's in standard form and it expressly incorporates the
22 Network Code at clause 2.1 which itself incorporates the ADRR so you get back to
23 where I started from, which is that the question of remedies goes back to the ADRR.
24 The available remedies are those applying under ADRR. Furthermore, those remedies
25 are limited by law. It's a contract between the relevant parties; the remedies for civil
26 claims for breach of contract under English law are long established. They are limited to
27 damages for breach of contract; that is, compensation to put the party back in the
28 position he would have been in had the contract been performed, or in the limited
29 circumstances were it available, specific performance of the contract.

30 As I've said, ultimately any Claimant can ask the court to enforce a contract and
31 in the case of a breach of contract, it is for the court to grant those remedies. In this case,
32 the parties have agreed to submit their disputes to Adjudication under ADRR, but the
33 Hearing Chair must follow the requirements of English law in determining what

1 remedies are granted. He cannot go beyond what a court could order as a matter of
2 English law. Accordingly, the remedies to be granted are confined to the payment of
3 compensation, an order to take or not to take action, determination of the meaning of a
4 document and the payment of interest.

5 So I then come on to the Hearing Chair's second question, which is concerned
6 with what are the injunctive and financial remedies available. I'm going to look first of
7 all at injunctive remedies. The Hearing Chair, we agree, can order that a party takes an
8 action, and in ADA17 has already done so. Ultimately such an order can be enforced
9 through the court given that it's a contractual remedy to which the parties have agreed.
10 A failure to honour it is a breach of contract. In fact, Rule G6 envisages that in
11 appropriate circumstances, an application can be made through the Adjudication itself, so
12 you can apply to the court for interlocutory relief. Now, the reason that Rule is there is
13 because if that Rule wasn't there, you couldn't apply to the court until the ADA had been
14 determined and you actually had a contractual decision, so you actually had to have
15 permission to go to the court partway through the process. Once the process has ended,
16 you can go to the court to enforce the decision.

17 The Hearing Chair has asked us what legal constraints are applicable to an order
18 that a party takes an action and there's no guidance, express guidance, on this in the
19 ADRR, so it is a matter for the discretion of the Hearing Chair as to whether a remedy is
20 granted.

21 So, we say that the Hearing Chair should approach the question of whether how
22 and when an action should be ordered with the same caution and applying the same
23 principles which fall to be considered by a court when determining whether to order a
24 party to carry out an action, known as a mandatory injunction. The orders have to be
25 very precisely defined so it is absolutely crystal clear what is to be done and by when.
26 The need for certainty is an absolute and primary requirement.

27 So, we say that that would involve setting the order out extremely clearly, making
28 sure that it is absolutely capable of being performed because you're being ordered to do
29 it and must be within the power of the person to whom it's directed.

30 We say that that would involve you taking account of all practical and fiscal
31 constraints because you're ordering someone to do something and ultimately, that can be
32 taken to the courts for enforcement.

33 That's what we have to say about injunctive remedies. The only financial

1 remedy is the payment of compensation and we note in saying this that neither of the
2 Claimants before us today have asked for compensation to be ordered.

3 So, the legal constraints on financial compensation are those which apply to the
4 award and assessment of damages for breach of contract. As we know, damages for
5 breach of contract are designed to put the recipient in the position he would've been in
6 had the contract been performed and compensated for breach of contract. They are to
7 compensate for loss and not punish a wrong doer.

8 The principles for the award of damages are well established. It's for the
9 Claimant to prove a loss. The Claimant must mitigate his loss, keep it to a minimum.
10 The loss to be compensated should've been caused by the relevant breach of contract and
11 should be in the reasonable contemplation of the parties to the contract, i.e. not too
12 remote.

13 We say as to the question of a deterrent award that the Panel doesn't have power
14 to make a deterrent award because the ADRR do not provide for such awards to be
15 made. As a matter of English law, the Hearing Chair does not otherwise have the power
16 to make such an award and there are several reasons for that. One is that such an award
17 would be in the nature of a penalty and penalties remain unenforceable under English
18 law. As to punitive or exemplary damages, they are not provided for under the ADRR
19 and English law only permits such awards of damages in three very specific
20 circumstances. The reference I have given you there is the leading case of *Rookes v*
21 *Barnard* in 1964 and I've given you the three examples at the bottom of the page. None
22 of them apply.

23 We also say that it's not the role of ADRR Adjudication to issue deterrents.
24 ADRR and Adjudication is the means of resolving disputes between parties. In this case
25 the parties have sought orders to carry out a previous determination so that is the issue
26 for the Hearing Chair to determine. If the ADRR had intended to grant the Hearing
27 Chair the power to issue deterrent awards, that would've been written into the ADRR.
28 We also say that to do so would be to trespass on a matter which is properly within the
29 jurisdiction of the Office of Rail and Road as the independent regulator of the rail
30 industry and we note as previously said, that the ORR has the power in appropriate
31 circumstances as regulator to issue penalties and fines.

32 So, the final question which I'll deal with very briefly is the Hearing Chair's
33 question as to when the defaulting party proposes its own remedy which in time

1 (inevitably), scope or substance falls short of implementing the original determination,
2 what tests are appropriate to be applied; practicality, internal regulation and external
3 impact.

4 We say that this takes us back to the question of what you can actually order.
5 You are constrained by legal, practical and fiscal constraints. It is the same as when you
6 are dealing with the grant of an order. You have to act within the law and take account
7 of those practical constraints, so the most you can order Network Rail to do is that which
8 is agreed, it has already agreed to do, so to implement the Loop as soon as it can within
9 its power and bearing in mind the fiscal and practical constraints.

10 They conclude our submissions.

11 CHAIR: Thank you very much, that's most helpful. Do you want at this stage to direct us to
12 the additional material you've provided apart from which we've asked for, or would you
13 prefer to leave that until we get into a more, sort of, exchange type of discussion?

14 MS DWYER: Of course, I've no wish to prolong the proceedings. I wonder whether it would
15 be appropriate for you to have time to read, for example, through the detailed timeline
16 and to look at the photographs.

17 CHAIR: That's precisely what we will do unless you wanted to introduce it -

18 MS DWYER: The material sits as it is.

19 CHAIR: Okay, that's fine.

20 MS DWYER: As you say, you may find the little film helpful because it actually illustrates
21 some of the difficulties we're trying to explain in the paper.

22 CHAIR: Okay, I think we will read this first and then we'll - yes, we'll adjourn. Fine, thank
23 you very much. That, therefore, I understand concludes Network Rail's opening
24 submission so now I would invite the interested parties if they wish to make any
25 statement or opening comments. In no particular order, that's how they're listed on the
26 hymn sheet. Freightliner and Freightliner Heavy Haul, do you wish to say anything?

27 MR BIRD: Not at the moment, thank you.

28 CHAIR: East Midlands?

29 MS MASI: Not at the moment.

30 CHAIR: Cross Country?

31 MR THACKRAY: The same position.

32 CHAIR: So, no statements or comments at this stage from the interested parties. In that case,
33 ladies and gentlemen, thank you very much, we will have an adjournment to consider the

statements that have been made and the additional material.

Adjournment

MS DWYER: Do you think we could make two very short points at some point in the next session just to respond to points? They're practical points that have been raised on the opening submissions.

CHAIR: Practical points, what, as to the —?

MS DWYER: One is to the length of the Loop and the other one as to the establishment of the Network Change.

CHAIR: I think we'll come to that as we go through matters regarding the length of the Loop and the Network Change. I think we will come to that in due course as we go through.

MS DWYER: That's fine. If we don't then I'll pick it up again.

CHAIR: If we don't then obviously you can pick up on it.

MS DWYER: Thank you very much.

CHAIR: What I propose to do now is to embark on a question and answer session following this structure, dealing with matters first to do with the practical remedy of reinstatement of the Loop - as to what that should constitute and will constitute. Looking first at the applicable constraints in principle and then assuming we can decide what are properly applicable constraints and how those actually apply in practice here. We will then later go on to issues regarding the other remedies and enforcement. In the first place, I am going to take Network Rail's paper provided this morning, very helpful, in response to our request for a timeline showing critical path dates headed Reinstatement and Reconnection of the Loop. Does everybody have a copy of that? *(Pause)* I think the sensible way to deal with it as we go through each topic, whether in this paper or otherwise, is if we try and get some order to it and if I kick off with questions, then the Industry Advisers and then an opportunity for the parties to ask each other questions on it but through me rather than firing off as a free for all.

My first question, and really this goes across the whole piece, starting with the authority and funding section of this paper and also the previous legal submissions and also the submissions made before the hearing; the question of the applicability of authority and funding, as outlined here. The process to obtain funding for the reinstatement and reconnection is already in progress and a site visit was undertaken on

Monday. Network Rail says it needs to obtain funding for this individual project, there is no general fund which can be used. Then it goes on to other funding stages, financial authority allocated by Programme Board, submission to the Investment Panel and then various GRIP stages.

Am I right in thinking that the specific organs or processes mentioned here, the Programme Board, the Investment Panel and the GRIP “governance in railway investment projects” authorisation and assessment stages are all internal Network Rail processes?

MR GIBBENS: There is two parts to it then. The agreement of the funding is an external process and I’ll explain a little bit more about that. The investment is an internal process. Taking that second one first and given the likely outcome of today, I expect that to be a formality, but that is part and parcel of Network Rail’s governance where we need to apply for the funds, we need to have them authorised.

CHAIR: and this is the Investment Panel?

MR GIBBENS: So this is the Investment Panel, yes.

CHAIR: It is a Network Rail Investment Panel?

MR GIBBENS: It is a Network Rail Investment Panel, yeah.

CHAIR: What about the Programme Board for that?

MR GIBBENS: The Programme Board is an industry body that is chaired by the Department for Transport and the Clay Cross Loop is part and parcel of the Sheffield to St Pancras line speed improvements. That is something that is contained with our plans for CP5 but that project is currently - its anticipated cost is already, without the Clay Cross Loop - in excess of funds that we have available.

CHAIR: Does that Programme Board - well, it says it allocates funds?

MR GIBBENS: So what we will then need to do is we will need to go to the Programme Board with a recommendation from the CP5 allocation to the Midland Main Line programme as to where we will take that funding from.

MR HOWES: To reprioritise it?

MR GIBBENS: To reprioritise.

CHAIR: By what enactment or authority is the Programme Board established? You say it includes the Department for Transport.

MR GIBBENS: It’s chaired, it’s the Department for Transport’s instrument, if you like. They chair it and it’s their governance as to the CP5 enhancement funding.

- 1 CHAIR: Is that established by primary legislation, secondary legislation?
- 2 MR GIBBENS: No, it's an industry process.
- 3 CHAIR: But established by what? Originally by the Department for Transport?
- 4 MR GIBBENS: I don't know the answer to that.
- 5 MS DWYER: I'm afraid it's not something I know the answer to either.
- 6 MR GIBBENS: It's not legislation but we have in place between Network Rail and the
7 Department a Memorandum of Understanding. There is a set of governance requirements
8 through that Memorandum of Understanding between Network Rail and the Department.
- 9 CHAIR: So a Memorandum of Understanding between Network Rail and –?
- 10 MR GIBBENS: The Department for Transport.
- 11 CHAIR: The Department for Transport.
- 12 MR GIBBENS: As part of that Memorandum of Understanding, it sets out the governance
13 requirements for the enhancement spend over the current Control Period.
- 14 CHAIR: For the enhancement spend?
- 15 MR GIBBENS: Correct.
- 16 CHAIR: Right. Does anybody know the legal status of this Memorandum of Understanding?
- 17 MS DWYER: No, not immediately, we'd have to find that out.
- 18 MR GIBBENS: We're just talking about the fact that there isn't any method to bypass it. So
19 we have to agree the reprioritisation of the money within the programme allocation.
- 20 CHAIR: For enhancement?
- 21 MR GIBBENS: Yes
- 22 CHAIR: Could we just, on that note, could we mark that down as something on which we may
23 want further information? If we compile a list as we go along as to the legal status of
24 that Memorandum and therefore that process. As a supplementary to that, if that process,
25 by whatever authority, applies to enhancement funding, is there a similar process that
26 applies to renewal or reinstatement funding?
- 27 MR GIBBENS: So renewals funding is governed within each of Network Rail's individual
28 Routes and prioritised against need and safety requirements.
- 29 CHAIR: That sounds like you're saying that's governed by Network Rail?
- 30 MR GIBBENS: Correct.
- 31 CHAIR: Internally?
- 32 MR GIBBENS: Yes.
- 33 CHAIR: Right. So the process which we were just talking about does not apply to renewals

1 and reinstatements?

2 MR GIBBENS: Correct, but it doesn't apply to renewals. What I would suggest is that this
3 activity that we are here discussing is all part and parcel of the enhancement scheme to
4 increase the line speed between London and Sheffield and therefore is only an issue
5 because of that enhancement project.

6 CHAIR: Why do you say that?

7 MR GIBBENS: Because there was no renewal need to take this Loop out or to do anything
8 with it, it was in a good state. So the reason it had been disconnected was to allow for
9 the enhancements to the line speeds.

10 CHAIR: That is a self-imposed reason, self-imposed by Network Rail. So putting it back to
11 forming a usable part of the Network, as per among other things, the decision of ADA17,
12 is not, one would think, for the purpose of enhancement but of putting it back to what it
13 was?

14 MR GIBBENS: Well I think I'm just going back to the root cause of why we're in the position
15 that we're in. There was no renewal needed at Clay Cross, it was an adequate piece of
16 equipment from a performance and a sustainability perspective, if you like. So it would
17 have been left alone had it not been for the enhancement scheme coming along. Now
18 Network Rail can have a look at where the funding to reinstate this would come from but
19 I would still argue that there it is preferable to look to the enhancement portfolio to find
20 this funding than to take it from the renewals portfolio that is providing performance and
21 safety and sustainability across the Network.

22 CHAIR: Might it not be the case that where Network Rail gets the money from is irrelevant?

23 MR GIBBENS: I agree with you, I agree with you. So we are saying that we will reinstate
24 this Loop, that's clearly what we're saying as part of the submission. What we're trying
25 to set out here is simply a timeline as to how we can get the Loop reinstated. These are
26 critical gateways as we're going along the steps to get to that point. So where the money
27 comes from is not relevant to....

28 CHAIR: What I'm trying to get at is whether they're self-imposed gateways or externally
29 imposed gateways?

30 MR GIBBENS: The Investment Panel is internally imposed, it is part of our governance
31 structure, so it is not something that we can avoid. I don't expect it to be anything other
32 than a formality. At the moment we're arguing that the money needs to come from the
33 enhancement portfolio because we don't want to jeopardise the safety and sustainability

1 of the railway. So if the money is going to come from the enhancement portfolio, the
 2 enhancement portfolio has to be reprioritised and we need to make sure we have industry
 3 and Department agreement.

4 CHAIR: Alternatively, if someone is under a legal obligation to do something by virtue of, in
 5 this case, a determination of a contractually binding dispute resolution process, isn't it up
 6 to that body to find the funding they need?

7 MR GIBBENS: I'm just saying I wouldn't want to do that without consultation. That's all
 8 I'm saying.

9 CHAIR: I'm trying to get not at not what you want to do but what you're actually legally
 10 obliged to do.

11 MR GIBBENS: So if we just went ahead and funded this right now, the money has got to
 12 come from somewhere and there's got to be some process of determining what's the best
 13 place for that to come from. Yes, we are legally obliged to do it, we've said we would
 14 do it but the money is still finite.

15 CHAIR: Yes, but you were legally obliged by a certain time which, by definition, you now
 16 cannot.

17 MR GIBBENS: Agreed, and we apologise for our tardiness on that.

18 CHAIR: Yes, thank you for the apology, but – (*Pause*) Let me perhaps explain more in case
 19 it's not obvious where I am going with this, which is to try and sift out, for the purposes
 20 of coming up with a practically implementable remedy, what is genuinely practically
 21 implementable having regard to applicable constraints. On the face of it, unless I'm told
 22 otherwise, the applicable constraints are those which are imposed externally for legal or
 23 practical reasons and anything which is imposed internally is Network Rail talking to
 24 itself; one part of Network Rail saying, 'We can't do this because another part says we
 25 can't.'

26 MR GIBBENS: I'm merely saying that to take some money away from something else, which
 27 we have to do, needs some due consideration. It just needs due consideration to make
 28 sure that we don't do something rash and tie in one problem with another.

29 CHAIR: At the moment, unless you can make any representation to the contrary, I regard that
 30 as the equivalent of an individual subject to a court order to pay a sum of money saying,
 31 'Well, I've got to get the money from somewhere. I may have to get permission from
 32 somebody who is going to provide me with the money', I don't know. That is not
 33 usually regarded as an applicable constraint on complying with the order.

1 MS DWYER: The distinction to be made here, and it's one I'm sure you'll appreciate, is that
2 this is public money and in September 2014, after the last determination was made, the
3 money was reclassified as being that of a public body. So I would say that Network Rail
4 has to follow all the relevant and applicable procedures in order to make sure that public
5 money is spent in an appropriate manner. I take your point on board about internal
6 procedures but to the extent there are any external constraints or any previously laid
7 down well-established procedures in the same way as you're obliged to follow fair
8 process in taking a decision as a public body, for the purpose of a judicial review
9 otherwise, you are obliged to follow the procedures you have laid down to make sure
10 that public money is spent in an appropriate way. So you can't, the distinction can be
11 made between Network Rail as a body funded by taxpayers' money and an ordinary
12 company - an ordinary company not publically funded can be do what it wants with
13 money and yes, obviously, in that case, the internal procedure. This is different, I think
14 that Network Rail would be at risk if it did not follow the appropriate procedures it has
15 laid down to make sure that public money is spent in the most applicable way. Now of
16 course when you have a....

17 CHAIR:Sorry, can I just ask about the appropriate procedures it has laid down or that have
18 been laid down for it?

19 MS DWYER: There's two things. There's the procedures that you have laid down externally
20 and that may include dealing with a Memorandum of Understanding, of which we can
21 give more detail. I also would say that there's actually a fair point to be made here that
22 when you have laid down procedures internally and always followed them, that you
23 should follow those again to make sure that the money is spent in the best way for the
24 public purse. You can't simply find several million pounds, it has to come from
25 somewhere, it has to be allocated against a specific project. Also, the funding stage is
26 the shortest part of this process.

27 CHAIR: Sorry, are you saying that that is a matter of behaving in a proper and responsible
28 way as a public body?

29 MS DWYER: Yes, I am.

30 CHAIR: And the obligation to behave in that way is an external obligation as a matter of
31 public law?

32 MS DWYER: Yes. If you take the decisions of Network Rail, insofar as they concern matters
33 of a public nature, which public funding does, they have acted in a certain way, they are

1 consulting certain people, they are following due process. I think they have to do that.
 2 They can't simply pull the money out of a bag, it's not there. They have to follow due
 3 process to get it in place. I'm also looking at the timeline and actually the timeline
 4 currently provides that the money is available by the end of September and we're nearly
 5 at the end of July. It's the shortest stage in the process and I have a feeling from what
 6 Spencer has just described here, that if we looked at any other way of getting the money,
 7 it would take far longer. Is that correct?

8 MR GIBBENS: Yes, it probably would.

9 MS DWYER: So this is the quickest way that Network Rail has looked at of getting the
 10 money to follow the processes it has followed on previous occasions to get funding in
 11 place.

12 CHAIR: Right. This is splitting itself into three issues, in my mind, and I'll ask you to talk to
 13 me about all three in due course.

14 The first is, is it right to regard fiscal constraints of being a public body as falling
 15 into the category of external legal constraints, and therefore potentially applicable here,
 16 i.e. that being a public body in this respect does actually produce a different result than if
 17 it were a private body or private individual complying with an order?

18 Second, if so, again what are the genuinely external constraints, process
 19 constraints applying to it as a public body as distinct from internally imposed restraints?

20 Third, somewhat down the line, if, by virtue of having changed status some
 21 considerable time after the original determination was made, it has become subject to
 22 constraints in this way to which it would not have been subject had it complied in a
 23 timely fashion with the original determination? Does that of itself have any
 24 consequences in terms of remedy?

25 So first, just develop, if you would for me, this argument that it is in a different
 26 position and therefore subject to different and unavoidable fiscal constraints by virtue of
 27 whatever status it acquired in 2014 and becoming a public body.

28 MS DWYER: If I can take the third issue first because I think the answer to that is simplest?

29 CHAIR: I'd rather come on to that later when we get on to that.

30 MS DWYER: Okay, that's fine, I'll take the first one. Public bodies are constrained by the
 31 requirements of the law, there are three - Let me put it another way, there are three
 32 grounds. —

33 CHAIR: Actually first of all let's go back to basics. What kind of public body is it?

1 MS DWYER: I would submit Network Rail is a public funded body and therefore it is subject
 2 to the constraints which apply to any body taking actions of a public nature. So when it
 3 is taking actions of a public nature, for the basics of judicial review, you have to have a
 4 judicially reviewable body undertaking functions of a public nature. I would say that the
 5 spending of taxpayers' money in order to support the Network is taking actions of a
 6 public nature.

7 CHAIR: The derivation of this status is what, for the benefit of my ignorance?

8 MS DWYER: You are spending taxpayers' money, it is funded by taxpayers' money.

9 CHAIR: No, no, what actually constitutes it? What was the enactment that constituted
 10 Network Rail, which changed Network Rail's status?

11 MS DWYER: Okay. A body becomes judicially reviewable when it carries out functions of a
 12 public nature. There is no decided case which determines the public and private nature
 13 of Network Rail but when the nature of the funding changed in September 2014,
 14 something that we looked into in detail was the fact the Network Rail was now almost
 15 certainly a judicially reviewable body. That goes back to a case called *Datafin*. The
 16 case of *Datafin* set out the test for when a body was going to be classified as judicially
 17 reviewable and the test is whether it has carried out functions of a public nature. It is
 18 quite a complex test but basically you look at things like, is it subject to legislation?
 19 Would it have been created by statute had it not already existed and so on? It is pretty
 20 clear from all of that that what Network Rail now does, in relation to its dealings with the
 21 Network, is the actions of a public body. So that therefore distinguishes it from the
 22 position enjoyed, for example, by a completely private company. So to that extent, in the
 23 exercise of its public functions, it has to follow the requirements to take fair decisions.

24 CHAIR: That's very helpful. Just take me through the actual mechanism, the enactment, that
 25 changed its status. It didn't change its legal status and become a different type of
 26 company.

27 MS DWYER: Just bear with me a second. There was actually.....

28 CHAIR: There was a change in funding.

29 MS DWYER: I may need to come back to you with chapter and verse on exactly what
 30 happened but it was basically reclassification, it's very well reported. Spencer, if you
 31 can help me on that?

32 MR GIBBENS: Yes, and again I don't want to fall into the trap of knowing what I know, it
 33 would be better if perhaps I just say that it was a reclassification in September 2014.

1 CHAIR: Yes. Expressions like “on and off balance sheet” have floated around in connection
2 with that change in Network Rail’s financial status as opposed to corporate status.

3 MS DWYER: The technical term is, “Reclassification of Network Rail as a public sector
4 company for accounting purposes”. That’s the actual technical term.

5 CHAIR: Right. That reclassification term was effected by whom and by what?

6 MS DWYER: Department for Transport, I recollect. So by the government.

7 CHAIR: By secondary legislation?

8 MS DWYER: That’s something we’d have to come back to you on.

9 CHAIR: Right. I would like please full information as to the means of constitution of that
10 change in status of Network Rail. Right, thank you, that’s very helpful, I’ll need to
11 consider that.

12 On the working hypothesis that that change in funding status, if not corporate or
13 legal status, was duly enacted, or whatever, and on the working hypothesis that the effect
14 of that is that in obtaining funding for anything, not making a distinction here between
15 the order of reinstatements, anything is subject to different externally binding constraints
16 than those for a company or a private company or an individual, can we pick out the
17 stages of this process that do genuinely or are alleged to constitute genuinely externally
18 imposed parts of the process?

19 MS DWYER: I don’t think you can distinguish in that way between external and internal
20 constraints. A body that is potentially subject to judicial review of its decisions must act
21 lawfully, must act with due process and must not act irrationally. Now in determining
22 that, what you have to do is to follow the procedures that you have laid down to make
23 sure that decisions are taken fairly and appropriately.

24 CHAIR: Right, sorry. Are you saying then that all the stages in this fall within the general
25 rubric of a public body having to conduct itself properly and fund itself properly and
26 therefore....

27 MS DWYER: Yes, I would submit that is almost certainly the case.

28 CHAIR: Right. They are not specifically externally and internally, they all come under the
29 general umbrella of proper conduct which, if not gone through properly, would be
30 judicially reviewable?

31 MS DWYER: Yes, that’s what I would say. If you don’t think of it in terms of Network Rail
32 but you think of it as the Department for Transport or Inland Revenue determining how
33 money should be spent, this is about how government money is spent. You must follow

1 procedures in order to spend that money appropriately, you can't simply determine that
 2 money should be spent without following due process. That's the danger you get into if
 3 you suddenly say, 'You must produce the money by 1 August'. You've not followed the
 4 processes, therefore the internal decision and external decision making process may be
 5 subject to challenge. That's the risk you run if you try and truncate this process, which is
 6 fairly short in terms of the overall timescale.

7 CHAIR: So looking at the specific that applies to the Programme Board and the Investment
 8 Panel. Does it also apply, looking at the fiscal constraints only as opposed to design and
 9 practicality, does it also apply that principle, in your submission, to GRIP 3 and GRIP 4
 10 stages?

11 MS DWYER: Those procedures are a question I have to ask of Spencer. The GRIP 3 and
 12 GRIP 4 procedures - the procedures, I understand as it is set out there, are those that are
 13 always followed?

14 MR GIBBENS: That's correct, yes.

15 MS DWYER: That's correct.

16 CHAIR: You may not be able to answer this but are you saying that if it – That the fiscal
 17 aspect, getting funding, is dependent on compliance with, among other things, GRIP 3
 18 and GRIP 4 stages because not to follow those would it be improper conduct by a public
 19 body and therefore potentially judicially reviewable?

20 MS DWYER: I would say so.

21 MR GIBBENS: I would say that, I would also say we've distinguished those stages for
 22 reasons of getting to the right solution. We might want to discuss that a bit further later
 23 on.

24 CHAIR: I'm trying to, I hope you will have deduced that I am trying to discuss this in the
 25 abstract in principle rather than in the context of what you regard as a right practical
 26 solution, if you can distinguish those things in your head.

27 MR GIBBENS: The reason that I use the phrase "right solution" is because through this we
 28 already know if we were to go and immediately put it back in a like-for-like situation, I
 29 think this is the point that Clare just wanted to make at the start, we could not do that
 30 without lowering the mainline line speed.

31 CHAIR: I'm coming to that, I'm coming to that.

32 MR GIBBENS: Which would put some Network Change.

33 CHAIR: That's a little further down the list of issues in logical sequence.

1 MR GIBBENS: So we see those GRIP stages as important, as part of the rational governance
2 that we would go through. We actually see it's important to get the right answer for
3 everybody in this room.

4 CHAIR: Right. So those GRIP stages, you are telling me, are a matter of the practicality and
5 rightness in an operational type sense of the solution rather than as a matter of the
6 appropriate way of getting money for it as a public body?

7 MS DWYER: Yes. The funding is already in place at that stage, so what you are doing then is
8 determining how best to spend that money.

9 CHAIR: Right, okay.

10 MS DWYER: Does that help?

11 CHAIR: Yes. So I take the answer to be it's not part of the funding equation as a public body,
12 whereas the Programme Board and Investment Panel are?

13 MS DWYER: Yes.

14 CHAIR: Resulting, as you say, in the money being received and available for expenditure
15 after those stages have been gone through. *(Pause)* Are there any other stages in funding
16 and therefore fiscal constraints that we need to consider before going on to the practical
17 and operational matters?

18 MR GIBBENS: So you will note that we have said that we are going for the funding in that
19 period through September. Again, we are doing that in an accelerated fashion because it
20 would be, if I can use the word, 'normal' to come back and to authorise simply design
21 money and then to come back and authorise implementation money later. So we've
22 accelerated that element so there's not a further gap whilst we get implementation. So
23 we've done it in one go, which is outside of the norm.

24 CHAIR: Right, okay, thank you. In that case I will ask for the first time, and I will probably
25 repeat this question a number of times on different aspects, why didn't you do it earlier?
26 If you were able to accelerate those particular bits, if you have a discretion as to when to
27 instigate these processes, why didn't you do it earlier and at least within the timescale
28 envisaged and indeed mandated by ADA17?

29 MS DWYER: ADA17 actually envisaged a stage within which further consideration of the
30 matter would be undertaken. Looking back at the original decision, it allowed Network
31 Rail until December 2014 to actually implement the decision. Thereafter Network Rail
32 didn't implement it, that's a matter for which it's apologised and will continue to
33 apologise. It's unfortunate it didn't happen.

1 CHAIR: I've heard the apology but I am asking the question why.

2 MS DWYER: I don't know, that's not something that I think is appropriate for the Panel to
3 go into today.

4 MR GIBBENS: We want to find a way here to get this decision implemented.

5 MS DWYER: We want it to work.

6 CHAIR: Well I'm sorry, I take the view it is something that is appropriate for the Panel to go
7 into today. It's part of the dispute, it's actually the core of the dispute.

8 MS DWYER: I understand. Where I am having difficulty is seeing where it would actually
9 get the Panel. If you can provide help on that we can go away and we can come back
10 with a detailed explanation.

11 CHAIR: Among other things, it will inform the position we take on remedies.

12 MS DWYER: Can we come back to that matter later because I don't want to keep adjourning
13 the Panel. I would probably want to talk that through with Spencer and the rest of the
14 team. But I don't want to, as I say if there's other matters we want to go on to, we can
15 always come back to it.

16 CHAIR: Yes. Okay. Well let's come back to it in a general way but it is specifically
17 potentially relevant to this time issue and the practicality of when things can now be
18 done having regard to genuinely applicable constraints. I suppose in asking why it
19 couldn't have been done earlier, I am really asking if, as you said, there's a particular bit
20 of the process you've accelerated here or have done a couple of bits of it in tandem, or
21 whatever, why could you not have done that before? Why can you not accelerate it more
22 now?

23 MS DWYER: What we've done is, as Angela was just explaining, this is as tight as we can
24 push it to follow due process where we are now. What we are looking at here is what is
25 practical, we want to make this, we want to implement this decision, we want to make it
26 happen. We want to do it as appropriately as possible in the interests of the whole
27 industry to make it work.

28 CHAIR: Okay, fair enough. So we are where we are for the best result.

29 MS DWYER: It is, I'm afraid. There's nothing much more we can say.

30 CHAIR: Yes, I take that. Fine.

31 I want to come onto the practicalities of the subsequent stages and the GRIP
32 stages and design and everything. But first, anything else on the applicability of these
33 fiscal constraints and the assertion that in some way they apply, as a matter of general

- 1 law really rather than specific provisions, by virtue of this change in status?
- 2 MR BOON: Yes, I'd just like to ask a question of Spencer. If we just think again in the
3 abstract rather than in the specific here. If there was a renewal to be undertaken and it
4 proved to be something that customers got very upset about and it needed to be done
5 very quickly and urgently, how quickly could you get that done if it was a simple Loop
6 that needed reconnecting?
- 7 MR GIBBENS: I think I'm in danger of kind of repeating myself, because in terms of getting
8 to a place with the status that we now find ourselves in that what we are showing here is
9 as quick in terms of that early stage.
- 10 MR BOON: No, if, for example, it was a renewal authority or a maintenance authority.
11 Backlog maintenance, call it that if you like, because it's a bit like it, isn't it? It hasn't
12 been maintained to the point that it fell apart. Now if you are doing that you wouldn't be
13 going through all of these processes, would you?
- 14 MS GIBBENS: So we would still need to, for the reasons we've said, go through the
15 Investment Panel cycle, we wouldn't need to go through the Programme Board.
- 16 MR BOON: Is that to allocate renewal funding or maintenance funding? You would still go
17 to an Investment Panel for maintenance or renewal funding?
- 18 MR GIBBENS: We'd still need to go to an Investment Panel for maintenance and renewal
19 funding.
- 20 MR BOON: Would you use the GRIP process for maintenance or renewal?
- 21 MR GIBBENS: We would for a job of this size, but we wouldn't for everything.
- 22 MR BOON: You wouldn't for everything.
- 23 MR GIBBENS: There's a proportionality to that but for applicability of the size and
24 complexity of the job, but for a typical job like this we would go through the process.
- 25 MR BOON: Is that because of redesign?
- 26 MR GIBBENS: Yeah.
- 27 MR BOON: So if you weren't redesigning or re-signalling, it would be different?
- 28 MR GIBBENS: This is one of the areas we want to come on to, where the like-for-like
29 situations change. We simply can't put a like-for-like reinstatement.
- 30 MR BOON: We'll come back to that.
- 31 CHAIR: We'll come back to that in just a sec.
- 32 MR BOON: We do want to hear about that. But what I was really trying to find out and I
33 know you said you've got to find the money, but we do know that this was funded in

1 CP5 because it's part of the infrastructure that was in place and recorded in the Sectional
2 Appendix of 1 April 2014 because it hasn't been Network Changed so it can't have been
3 removed. Is that a correct statement? Would it still be in the Sectional Appendix?

4 MR GIBBENS: Again, all of what you say about the Sectional Appendix is correct. I would
5 say that the reason it was removed though was for the enhancement project.

6 MR BOON: No, I understand. We understand the history. The interesting thing to me is the
7 enhancement project was subject to the GRIP processes which require Network Change
8 to be established and implemented to get through GRIP 4, but clearly it wasn't done for
9 the Clay Cross Loop, was it?

10 MR GIBBENS: No, it was never envisaged in the preparing of funds for CP5 that switches
11 and crossings and signalling works would be required to be done at Clay Cross. That is
12 not to, following your line, that is not to say that renewals funding was the right option;
13 that would mean that something else somewhere else would have to be given up that was
14 envisaged in terms of that.

15 MR BOON: Is it a convenience to call it an enhancement because it is easier to get funds? In
16 fact you're actually going through technically a stronger governance roll with the DfT
17 than just keeping it internal just because you want to take the DfT funds rather than use
18 internal Network Rail renewal and maintenance funds.

19 MR GIBBENS: I agree with that, but I think the distinction is if we go and simply look to the
20 renewals funding then we are going to put some kind of performance or safety
21 implication into the thing. If you look at the enhancement side of the funding, then there
22 will be some business-led problems but there won't be a performance and safety
23 problem.

24 MR BOON: I understand you'd have to reprioritise but I don't think you'd implicate safety,
25 would you? You wouldn't do that, you wouldn't.

26 MR GIBBENS: No, you wouldn't but let's say performance. Somewhere else, a piece of
27 switches and crossings, the renewal wouldn't get done and a PSR would go on because
28 we wouldn't. So safety in the round.

29 MR BOON: That's right. In the round. That performance is not necessarily at the level that
30 you would want it to be but it would be within the internal side of this governance as
31 opposed to the external. That's all I wanted to hear.

32 MR GIBBENS: Sorry, I'm going back, nothing in the Clay Cross area was envisaged when
33 the CP5 renewals plan was put together. So to use that money, something from

1 somewhere else would have to....

2 MR BOON: .When you say it wasn't envisaged, that's because it technically was still in place
3 in the plans, it was never taken out of the plans. So the plans didn't really reflect reality,
4 that's the fact, isn't it? They couldn't do it because according to the plan, it didn't need
5 to be done.

6 MR GIBBENS: I think in fairness it was always assumed that the enhancement project would
7 put back what it had taken away. So it was funded to that extent as part of the
8 enhancement project, so there would be no need to consider it as part of the renewals
9 because it would have been considered to be after the adjudication.

10 MR BOON: It was like a staging works, yes?

11 MR GIBBENS: Yeah.

12 MR BOON: Yeah?

13 MR GIBBENS: Yeah. Well we don't need to go through the history of the original hearing,
14 we took it out and we shouldn't have, that's a matter of record now. I think I was just
15 distinguishing there was no fault with it in terms of renewals because there would be
16 enough anticipation that the enhancement project would have put that back.

17 MR BOON: I understand that because the engineers would have said, 'We wouldn't have done
18 that, that's the enhancement people, they'll sort it out.' I can understand the behaviours
19 and the dynamics there. I just wanted to clarify that if it was done as a renewal, what
20 that would mean. It doesn't say it can't be done but you've made a preferred route to
21 enhancement.

22 MR GIBBENS: Yeah.

23 MR BOON: Okay, that's all I wanted on that.

24 CHAIR: Anything else on the applicable fiscal constraints and funding mechanisms?

25 MR KAPUR: Before Spencer's last comment there, I was going to say I'm strongly of the
26 view that I don't understand why it should come out of enhancement support and that
27 enhancement support was set to suffer because of what hadn't been done in the first
28 place. But if you just said it had been taken into account in the enhancement pot already,
29 why are we going for any authority?

30 MR GIBBENS: The answer to that is, and we are not here to debate the efficiencies or
31 otherwise of Network Rail's Control Period 5 spending, but that enhancement pot, like
32 many others, has overspent. So the anticipated final cost of the line speed project is in
33 excess of the budget that was allocated.

1 MR KAPUR: Okay. So back to my first point then. My view is that this piece of
 2 infrastructure is more, let's say, more deserving of the enhancement pot because it
 3 should have been part of the Network in the first place. But I'm concerned that other
 4 enhancements would suffer because of the money being diverted to this when in fact my
 5 initial view is that it should be out of, let's call it, maintenance and renewals. You've
 6 elaborated on that in the last five minutes, I'm still not comfortable. I think that's
 7 probably the best way to put it.

8 CHAIR: Nigel, do you want to say something?

9 MR OATWAY: Yes, a couple of observations. Firstly, bits of the Network get taken away for
 10 all sorts of reasons that are not expected. For example, during last winter Lamington
 11 Viaduct was swept away. I do not recall its replacement going to the Programme Board
 12 or going through the GRIP process before the Viaduct was rebuilt. With Clay Cross
 13 Loop, as we heard just now, that was also removed, this time by Network Rail itself,
 14 outwith the [Network Change] process, rather than by the weather. So the money for
 15 rebuilding Lamington Viaduct, that must also have come from somewhere in order for it
 16 to be put back in place within the six or seven weeks it took to reconstruct it. That is just
 17 one example but there are lots of similar examples where parts of the Network succumb
 18 to weather or a whole host of other reasons and Network Rail do their best to restore
 19 them as quickly as possible. Obviously, restoring its assets in such circumstances must
 20 have a cost implication and require a reallocation of funds within the Control Period. So,
 21 I do not therefore see much difference between Clay Cross Loop and Lamington Viaduct
 22 in that sense because they both constitute two bits of infrastructure that have been taken
 23 away unexpectedly, either by Network Rail not following due process or by the weather.
 24 In both cases, Network Rail will be required to ascertain where the funding is going to
 25 come to reinstate these assets as I believe Network Rail is required under its Network
 26 Licence to restore the Network to its proper state as quickly as possible.

27 Now for my second observation. Network Rail has stated that the authority for
 28 the reinstatement and its funding needs to go to the Programme Board, then to the
 29 Investment Panel, and in doing so appears to give the impression that the work will all
 30 just be 'rubber stamped'. However, I do not have any confidence at the moment that it
 31 will just be 'rubber stamped'. What happens if the Programme Board says no on 9
 32 September? Are we then left with no funding or prospect of the Loop being reinstated
 33 (i.e. in exactly the same position that we are in today and have been for the last few

1 years).

2 So, as I said in my opening remarks, we remain sceptical. We do hope, however,
3 that our scepticism is misplaced because obviously we want to see the Loop reinstated.
4 However, with all of these hurdles there seems to be plenty of opportunity for things to
5 go wrong and for people to say 'no'.

6 CHAIR: Right. Thank you.

7 MR GIBBENS: Could I respond please?

8 CHAIR: Yes, would you like to respond to that first?

9 MR GIBBENS: Yeah. I want to just distinguish a couple of issues there and again, I want to
10 distinguish between budget and authority. The example that was given at Lamington
11 was an out and out emergency so I'm talking about the authority element there. I think
12 there is quite a contrast between that and Clay Cross. I don't think we can describe it as
13 an emergency that we could at Lamington. I don't know the full details behind
14 Lamington but if the cost was such then there would have been a reprioritisation of work
15 so something else somewhere else would not have been done. If it was substantial like,
16 and please help me with the name of the colliery landslip we had

17 MR KAPUR:Harbury.

18 MR GIBBENS: Not Harbury.

19 MR OATWAY: Hatfield.

20 MR GIBBENS: Hatfield, that was subject to an insurance claim. So if it's big enough there
21 would have been an insurance claim, like Hatfield. That may be true of Lamington. If
22 it's not then there would have been a reprioritisation of resources, so something
23 somewhere else would not have happened.

24 MS DWYER: Could you just respond on the second point as well about Nigel's concern about
25 whether it's going to go through or not?

26 MR GIBBENS: Ah yes. I would expect that when I go to Investment Panel with a document
27 that has got an Adjudication attached to it, I'm not expecting to have a problem.

28 MR KAPUR: Neither were we last time!

29 CHAIR: Okay. First, can I say just a as a matter of process here, not for every topic we go
30 through am I necessarily going to specifically ask all the interest parties to chip in. But if
31 there is a question you want to ask at a particular stage, do let me know and we'll put it
32 in.

33 So I'd just like to wind up on this fiscal constraint aspect by taking up what the

1 Claimants have said. First, regarding that last point about what is proposed in terms of
 2 complying with constraints you say are applicable of going to these various organs. I
 3 was going to ask would it make a difference if you had another Adjudication
 4 determination in your hands saying it must be done? Does it give more certainty?

5 MR GIBBENS: The purpose of going through governance is for something to have due rigour
 6 and I have to use the phrase. I just don't see how the company, with an Adjudication,
 7 could turn down the funding.

8 CHAIR: Okay, that's very helpful to hear. That leaves the obvious question hanging in the
 9 air: why wasn't that the case with the previous one? The previous determination was
 10 intended in part to, among other things, circumvent, to be the authority needed.

11 MR GIBBENS: I don't think that particular issue was something that has caused us to be in
 12 the position that we're in today. There was no Investment Panel that said, 'Thou shalt
 13 not reinstate this Loop'.

14 CHAIR: Okay, so that's back to circumstances, i.e. your status, the Network Rail status
 15 having changed.

16 Then finally, I'd just like, because it leads onto what will be the next topic, I just
 17 want to be clear then, you are saying in effect that now, never mind then, but now by
 18 virtue of your status and the process you have to adopt, these stages and constraints have
 19 to be observed because what has now become the reinstatement, the proposed
 20 reinstatement, of the Loop, has been elected by Network Rail to be treated as part of the
 21 enhancement programme; rather than elected by Network Rail to be treated in any other
 22 way, for example, as a straight reinstatement, even an emergency reinstatement, because
 23 they were previously ordered to do it.

24 MR GIBBENS: So elected to because it was always envisaged.

25 CHAIR: Elected to because in a matter of railway operational terms, in Network Rail's view,
 26 it makes sense.

27 MR GIBBENS: Yeah. As I say, we're not putting – We're putting financial issues at stake
 28 rather than performance issues at stake because if we go down the renewals road and
 29 we've explained why the renewals were not envisaged as part of this Control Period. If
 30 we take money from that, there will be a performance impact somewhere.

31 CHAIR: Okay.

32 MR GIBBENS: If we elect, to use your phrase, to go through the enhancements process, which
 33 is where the cause or root cause is, then we won't instigate those performance issues but

1 there will still need to be a choice.

2 CHAIR: So it is an election by Network Rail but you're really saying that actually the fiscally
3 imposed constraints are sort of inextricably linked in a circular way with the operational
4 constraints of treating it as an enhancement because of all the other things that impact on
5 it?

6 MS DWYER: The most responsible way to do it is probably the way we put it.

7 CHAIR: You would probably put it that it is the most responsible way as a public body?

8 MS DWYER: Yes.

9 CHAIR: Would you put it as high as saying that not doing it in that way that would be so
10 irresponsible or unreasonable as to be JR-able?

11 MS DWYER: Yes, it runs that risk because you are not following the appropriate due process.

12 CHAIR: As well as not getting the funding but actually not – Notwithstanding that they're
13 under some sort of legal duty to do it as a result of a previous decision, still treating it not
14 in its own right but as part of an enhancement project, which brings its own delays, the
15 only reasonable way of treating it....

16 MS DWYER:I think that's the way to put it. It's the only reasonable way of doing it and it
17 gets. –

18 CHAIR: – to do otherwise would be so unreasonable that no reasonable body could possibly
19 do it?

20 MS DWYER: As I would put it, yes.

21 CHAIR: Right.

22 MR THACKRAY: Just on behalf of Cross Country, whilst we do agree that the Loop should
23 be reinstated, as previously determined, there is probably an element to say that it should
24 only be done so if it doesn't cause significant detriment to the industry as a whole.

25 CHAIR: Right, can I stop you there because we are going to come on to that issue.

26 MR THACKRAY: I think this is financially about other enhancements that will be affected as
27 a result of this. So we'd expect the Programme Board in September to have a clear
28 instruction from Network Rail as to which projects will be affected - projects that
29 previously have been discussed and have been, not to the extent, committed to, but we
30 had been led to believe would be delivered on similar timescales but now won't be.

31 CHAIR: Right.

32 MR THACKRAY: Certainly in terms of finance but also resources to deliver. The Access
33 plan for 2018 has been negotiated already and been looked at. We want to know what

1 will be affected by this being delivered prior to December 2018.

2 CHAIR: Right.

3 MR THACKRAY: I think it's come back to the point of whether or not it will be a formality
4 at the Programme Board and everybody will sit down and rubber stamp it, as we've
5 heard.

6 CHAIR: This, to my mind, is actually coming into more the question of the practical
7 constraints than getting into competing interests, which I think we're going to come onto
8 next. I think that's all on the fiscal constraints for now and I think that's probably a good
9 time to call an adjournment for lunch.

10

11 **Adjournment**

12

13 CHAIR: Welcome back. I said we would move on to the practical and the legal constraints,
14 but there is just one other aspect of fiscal constraints I want to dispose of, which has
15 occurred to us. And that is to just quickly go back to this question of Network Rail's
16 status as a public body in terms of its funding, for which you are going to provide us with
17 some more information anyway. I am going to ask the question, is it the case that this
18 status as a publicly funded body, whatever it is, applies to all its funding and all its
19 operations? Or is there in fact an area of operations and an area of funding that is still
20 privately funded, for example, through the Track Access charges?

21 MS DWYER: That would depend on the nature of the functions you're looking at, and in this
22 case what we would say is that it's actually this is money being spent, public money,
23 being spent in order to enhance a Network, which Network Rail is obliged to enhance.
24 We would say that in spending that money, it is doing so as part of its public functions,
25 and it is the public functions of a body which make it vulnerable to judicial review. Can
26 I draw a distinction for you? There would be a distinction drawn between the money
27 paid, for example, to buy staples and paperclips and things like that, to run the office,
28 which obviously is not an exercise of its public functions. And the money that it has to
29 spend in order to maintain and enhance and deal with the network itself, which I would
30 say very firmly falls within those functions that it carries out publicly.

31 CHAIR: Right, is there a distinction between money used to maintain the Network and money
32 used to enhance the Network?

33 MS DWYER: No, I would say it is all part of the same money; it is public money being spent

- 1 to maintain and enhance the Network.
- 2 CHAIR: That doesn't come out of the Track Access charges?
- 3 MS DWYER: No, I don't think so. I don't think so.
- 4 CHAIR: What are the Track Access charges spent on then, the staples?
- 5 MS DWYER: No, the Track Access charges is money that comes in, but it's still public
- 6 money.
- 7 MR GIBBENS: Certainly, any procurement activity we have to do, including the staples, is to
- 8 the high standards of public procurement. And under that public scrutiny, if we go
- 9 outside of those, we have to get written permission from the Department for Transport.
- 10 CHAIR: Sorry, that is a different issue as to whether you're subject to public procurement.
- 11 MR GIBBENS: I'm just giving an example.
- 12 MS DWYER: Often, you find that a body that is subject to the public procurement policy is
- 13 also judicially reviewable. So slightly different tests but they are all the same thing.
- 14 CHAIR: But again, I am sorry, but procurement is a bit of a red herring. What I am asking is
- 15 whether all Network Rail's funding is to be regarded as public because of its public body
- 16 status?
- 17 MS DWYER: I don't think you approach it in that way. The spending of that money to
- 18 enhance and operate and maintain and keep the Network safe is a public function. So
- 19 you can't say "I can artificially find the money from somewhere else, because that is
- 20 'private' ". It's not how it works. When it's determining how it spends money on the
- 21 Network; that is a public function I would say.
- 22 CHAIR: Whereas buying office equipment isn't?
- 23 MS DWYER: Potentially, but I don't think you can solve the problem by saying you get the
- 24 money from a different –
- 25 CHAIR: I mean, that's a distinction I would have thought you could have got –
- 26 MS DWYER: I don't think you can do that; you can't just get the money from a different pot
- 27 that's somehow private. You are maintaining the Network. Network Rail's primary
- 28 function is to maintain the Network. That is a public function, you're spending public
- 29 money. You have to follow the rules to determine how that money is spent. If not,
- 30 you're subject to judicial review.
- 31 MR BOON: But maintenance runs through the Programme Board. The Programme Board
- 32 doesn't get involved in the maintenance.
- 33 MS DWYER: The money that would be used for this Loop would go through the Programme

1 Board.

2 CHAIR: Because it's been elected to be treated as enhancement and therefore -

3 MS DWYER: But you're not suddenly electing to become judicially reviewable. This is all
4 part of its function as it's moving out as a public body. I think you are getting slightly
5 hung up on the process, when actually, what you need to look at is what they are doing,
6 and they are spending money to enhance the Network, to maintain the Network, to keep
7 the Network safe; that is a public function. So the spending of money on that is
8 judicially reviewable. You can't get round that by looking at a different process. You
9 have to follow the processes that are set down to do that.

10 CHAIR: You keep on using 'maintain' and 'enhance' in the same breath.

11 MS DWYER: It's the same thing. It's the same thing. All public functions.

12 CHAIR: Including to maintain the Network, which you are obliged contractually to provide to
13 people you've contracted with, and are being paid for under those contracts.

14 MS DWYER: The contracts are part of the public function though if you didn't have Network
15 Rail you would create it by statute, that's one of the tests to determine whether a body is
16 judicially reviewable or not. The fact that it has contracts with some of the train
17 operating and freight operating companies to actually fulfil those public functions does
18 not mean they are not public functions.

19 CHAIR: So, was it the same before this change of status of Network Rail?

20 MS DWYER: Arguably, some commentators have said that but there was a fundamental
21 change, at that stage, to basically make express that which a number of people had
22 recognised as implicit for some time, am I right?

23 MR GIBBENS: Yeah.

24 MS DWYER: You know, there is - it has always been the case that Network Rail has -

25 CHAIR: Do you mean on the balance sheet?

26 MS DWYER: Exactly.

27 MR GIBBENS: We would have simply borrowed our way out of this in the past.

28 CHAIR: But according to the point you're making, the same considerations would have
29 applied before that. You would have said it was carrying out a public function in
30 maintaining the network.

31 MS DWYER: Almost certainly, but that was something which was never tested in a court.
32 What you now have is a whole - you have official reclassification as public money being
33 used to carry out public functions. It's all been written down. No one can now contest

1 that this is not public money being spent in a public way, to carry out public functions.
2 The reclassification does make a difference.

3 CHAIR: It may have made explicit what was only implicit before, as regards public money.
4 But the question I'm asking is, under the new status as under the old status, is all the
5 money Network Rail receives public money?

6 MS DWYER: That's not the question. The question you should be asking yourself, I submit,
7 is that you're looking at how the money was spent, not how it's received. What you're
8 determining is how the money should be spent or making a decision to get funding for
9 spending it. Where it comes from – you know, ultimately pretty much all of it comes
10 from the Department for Transport anyway. You're looking at spending of money. The
11 spending of money on the Network is a public function. That has to be determined
12 through appropriate processes and is ultimately subject and vulnerable to judicial review
13 if you don't follow due process.

14 CHAIR: An appropriate process would be abiding by the contracts you have submitted to,
15 which include a Network Change process and going through with that and not making a
16 Network Change unless you have gone through the process.

17 MS DWYER: That would ride roughshod over the established procedures, which we would
18 provide you with details of, further documentary support to show those procedures. But
19 those procedures have been laid down over a period of time. There is a legitimate
20 expectation that those procedures will be followed. If you put Network Rail in a position
21 where it cannot follow those procedures, that makes it prima facie vulnerable to judicial
22 review.

23 CHAIR: Well, if that's the case, why didn't Network Rail appeal the decision in ADA17,
24 saying 'we're constrained by other public body considerations' because of the –

25 MS DWYER: There were many things Network Rail would have done differently. Spencer
26 do you want to –

27 CHAIR: Because the governing principle is the function of spending the money, not where the
28 money comes from or anything else?

29 MR GIBBENS: I think Clare's kind of answered that, because the situation before
30 classification was never really tested. So, we acted in the way we acted and it became
31 clear in September 2014, so it probably should have been a situation before September
32 2014, but it wasn't.

33 MS DWYER: You will be provided with documents to actually explain to you precisely what

1 this classification is and how it came about, and it followed as to what it's put in place so
2 you will all appreciate the constraints we're under.

3 CHAIR: We will have to consider that. But for now, then, your position is that primarily it's a
4 question of exercising a public function, but that also to the extent, if any, that it depends
5 on the source of the money i.e. whether it's public or private, it's all to be regarded as
6 public anyway.

7 MS DWYER: That's not what I said. You have to start with the function. When you're
8 looking at judicial review, you look at the functions that are being carried out. The
9 function here is the spending of money by a body that is publicly funded. In determining
10 that – in looking at that function, you have to follow the principles, due decision-making
11 principles – and don't get side-tracked into wondering where the money has come from.

12 CHAIR: Well, let me take that further; it seems to me as if a necessary corollary of that is that
13 certainly now - since Network Rail's status has been, as it were, clarified above the
14 surface - and you would say arguably then, when it was that as a matter of law anyway,
15 but just had not been seen to be so - Network Rail, because of the function it was
16 exercising, could have been judicially reviewed for implementing the decision of an
17 Access Disputes tribunal of any sort?

18 MS DWYER: Provided it had followed the due process, then that wouldn't be the case. We
19 are where we are now, we have procedures that have been established following the
20 reclassification in September 2014; you have to look at the position now. You can't put
21 yourself, and there are a number – this might bring us on to the practical constraints. The
22 fact remains that way back in 2013 it would have been easier to do all of this from a
23 practical point of view so that it would have cost less, so you would not have needed to
24 go through –. Obviously, if you want to spend 50 pence the procedures are lower than if
25 you want to spend millions of pounds. I don't think you can simply say you don't have
26 to follow those procedures. It runs a risk.

27 MR GIBBENS: I think back in 2013 if we had -done what we should have done, we would
28 have solved this problem by borrowing some more money.

29 MS DWYER: You couldn't do that now.

30 MR GIBBENS: Whereas now, and what we wouldn't have done, is we wouldn't have looked
31 at the enhancement portfolio or the renewals portfolio, and made a choice of what we're
32 going to have to do now. So, it's that element of public scrutiny that we make sure that
33 we are quite clear that we have made that choice in the right way. Putting ourselves back

1 in 2013, we would have just got the credit card out and borrowed some more money, put
2 this back and –

3 CHAIR: But you simply can't do that now?

4 MS DWYER: No, you can't do that.

5 MR GIBBENS: You simply cannot do that. Our credit card has been replaced with a debit
6 card in effect.

7 CHAIR: So if I understand your argument correctly, you are saying that, in substance, that
8 irrespective of the tangible reclassification, the position is the same.

9 MS DWYER: No, I'm not saying that. The position was altered. What I'm saying is there
10 was an argument before that it was public money, but no one actually discussed it and
11 they never debated it, they never got into it, so that gave Network Rail a little bit more
12 freedom. What the reclassification did was to make the position absolutely crystal clear
13 so that Network Rail cannot now simply go out and borrow money; and the fact of the
14 matter is that it would have cost far less to reinstate then. We are where we are. That
15 reclassification actually occurred right in the middle of a period during which the Loop
16 was supposed to have been reinstated. So actually, arguably there would have been an
17 issue at any time from September 2014 onwards anyway. We are where we are.

18 CHAIR: What they should have done then, by September 2014 they would have been well
19 through any internal approval processes and money raising processes would have been
20 there in order for September 2014.

21 MS DWYER: Don't look too hard at what was in place for getting the approvals for spending
22 money and finding the necessary money before September 2014. Post-September 2014
23 is a very different regime. It's all laid down in black and white as to what Network Rail
24 can and cannot do. And what it can't do is simply borrow money, or find the money
25 from somewhere else, or ignore the procedures it's supposed to go through.

26 CHAIR: Right. Do we want to pursue anything else about the public or private funding?
27 Okay. Thank you for that. We will have to consider that in the light of what you
28 produce as to Network Rail's status. So, let's move on to what I regard as the next
29 category of constraints, which come out of your statements about the latest, which I
30 would call the legal constraints, as opposed to the fiscal constraints. That is, constraints
31 that are required to comply with absolutely applicable external legal or regulatory,
32 typically health and safety. The – out of what I've seen so far - the main, and possibly
33 the only thing, which falls into this category arguably, is the need now to comply with

1 different Signalling Standards. Maybe I haven't read this properly but are there other
2 physical design standards and safety standards?

3 What I'm trying to get at is the extent to which the need to comply with these
4 sorts of Standards, signalling or otherwise, is applicable and I am going to take the
5 minimum timetable that is set out here. I mean, in a sense, do you – Network Rail – want
6 to add on that, anything beyond what you've said in, principally, the remarks on GRIP 4?

7 MS DWYER: I think you have something to say on the legal standards, sets the Standards.

8 You talk about the principles, if we have nothing to add on that it may be helpful.

9 CHAIR: We don't have any detail on that. (*Reads*) "The original scheme would not comply
10 with today's Standards and rules and regulations, which govern them, including safety
11 standards, the Signalling Standards have changed; it will have to be reinstalled to modern
12 standards. The Signalling Principles handbook was updated on 14 June and you won't
13 know the full effects until detailed designs are undertaken." I don't necessarily want to
14 go into the details of that assertion; I am prepared to take that on its face, subject to
15 whatever the operators might want to say in relation to that.

16 MR KAPUR: Yes, there is one thing, in particular point 3.3, which I did mention in general
17 terms in my opening statement. That is a matter of Network Rail internal Standards, we
18 don't believe any Railway Group Standards have changed in the period we're talking
19 about here. That is a Network Rail Standard, brought together for reasons I don't know
20 enough of and in my view, Group Standards are those which we should be working to,
21 are the absolute. Network Rail's own Standards, be it in signalling or elsewhere, are
22 brought together by themselves for a number of reasons internally, but not necessarily all
23 guided by Group Standards. I don't believe Railway Group Standards have changed in
24 signalling in the period of time we are talking about. So there's definitely a distinction
25 between the two and again, are we putting in any false, you know, false barriers that
26 perhaps need not be there?

27 CHAIR: That's precisely why I'm asking the question.

28 MS DWYER: Yes.

29 MR GIBBENS: I don't think we have an answer here. The Network Rail Standards are made
30 up out of Group Standards and I think we would need to just go back and look at where
31 the genesis of this is and supply some more information. I think it's just we don't know
32 enough about – the people here, about this particular standard.

33 CHAIR: Just help me on the genesis of Group Standards.

1 MR GIBBENS: The Group Standards are industry-wide standards.

2 CHAIR: And their source is?

3 MR GIBBENS: They are RSSB; they are maintained and owned, if you like, by RSSB.

4 MR KAPUR: Railway Safety and Standards Board.

5 CHAIR: Which has a statutory function?

6 MR KAPUR: Yes. I think the point I'm making is that Network Rail Standards do not
7 necessarily change because Group Standards change. When Group Standards change
8 and they probably would change, I'm sure, but just because a Network Rail Standard has
9 changed, that doesn't mean that it has been enacted by a Group Standard. It may or it
10 may not. We don't believe there has been a material change, but as you say, you would
11 need to –.

12 MR GIBBENS: Yes because frequently Group Standards are vague and they need an
13 alternative interpretation. I don't know whether that's happened here, we would have to
14 come back with that information.

15 MR BOON: Yes, equally without knowing that, you don't really know whether November
16 2017 is easier or hard.

17 MR GIBBENS: I think we do. We do, and I think we can explain that as we go through. I
18 don't think it's that that's driving necessarily the timeline as much as making sure we get
19 to an option that everybody can work with.

20 MR BOON: Can I ask on the option? In this GRIP 3, you talk about option selection. In this
21 case, you know, the options seem pretty limited, don't they?

22 MR GIBBENS: Not at all.

23 MR BOON: Can you explain?

24 MR GIBBENS: So this was – and I think we're going to go back here for something that
25 Clare wanted to raise in response to Ian's opening statement. What we have now is a
26 situation where the line speed has increased.

27 CHAIR: Right, hang on. I am coming on to that in a minute, but I do want to distinguish that
28 that's what I regard as the operational or practical constraints. And we will get to that,
29 but having dealt with the fiscal constraints, I just want to deal with separately any legal
30 constraints. What I think I just heard you say was actually the legal, technical constraints
31 of the Signalling Standards and other Standards here, are not determinative of this
32 timescale; that it is actually, you said, something like 'doing the best thing' that is
33 driving that. So, as far as legal, technical constraints are concerned can we take it then

- 1 that they are not driving this timescale, i.e. complying with the Standards.
- 2 MR GIBBENS: If the practical constraints were taken away then it would.
- 3 CHAIR: Sorry, if the practical constraints – ?
- 4 MR GIBBENS: So we then talk about practical constraints later, and we think they are an
- 5 issue that are driving timescales.
- 6 CHAIR: Oh, right, okay.
- 7 MR GIBBENS: If they were not an issue, then this would drive the timescale.
- 8 CHAIR: Then this would drive the timescale?
- 9 MR GIBBONS: Because they would be dealt with in parallel in effect.
- 10 MR BOON: What you're really saying is the practical constraints are the CriticalPath?
- 11 MR GIBBENS: Yes.
- 12 CHAIR: Are the CriticalPath?
- 13 MR BOON: They are the CriticalPath. Well we did, you know, think the practical constraints
- 14 were the Critical Path, if they are all in red (in Network Rail's document 'Reinstatement
- 15 and Reconnection of the Loop').
- 16 CHAIR: What I am really trying to get to is probably, in real terms, whether sensibly we are
- 17 looking at 2017 or 2018 as being the two dates contended for on either side as the
- 18 practical remedy; not the other things, but as the practical remedy. And so, looking at
- 19 this timeline and talking about the fiscal processes, I was trying to get a handle on what
- 20 absolutely mandatory fiscal processes are driving it to 2018 rather than 2017. Ditto now
- 21 the legal ones, and I think what I've heard you say is they are not critical to it.
- 22 MR GIBBENS: So, if you don't believe what we say to you in terms of the practical
- 23 considerations, then this Standard change would be critical.
- 24 CHAIR: Ah, right, okay, well in that case let's deal with the practical considerations then.
- 25 MR GIBBENS: Because the two would be dealt with in parallel.
- 26 CHAIR: Right okay. So the practical considerations, the practical constraints are –.
- 27 MR KAPUR: Sorry, I might just want to add there, we don't actually know what that Standard
- 28 – didn't you just say you weren't quite sure what that change of Standard actually was, if
- 29 it was a Group Standard driving it that might legally stop you, or hinder you? If it's a
- 30 Network Rail Standard driving it, not pushed by the Group Standard, it may or may not,
- 31 you may choose to do it that way but it may not actually be a legal hindrance. It may or
- 32 may not, I don't think we know.
- 33 CHAIR: So we do need that information actually.

1 MS DWYER: If you spell out precisely what information you need we will provide it. How
2 would you formulate?

3 CHAIR: On that issue, as to whether the Standards you're saying must be complied with as a
4 matter of external imposition are Group Standards or Network Rail Standards. Is that
5 right?

6 MS DWYER: Or are the Network Rail Standards based on Group Standards, in which case it
7 is exactly the same thing?

8 CHAIR: The line standards within that –

9 MR KAPUR: No, Network Rail Standards do not necessarily for the –

10 CHAIR: In which case it's Group Standards.

11 MS DWYER: Yes.

12 MR OATWAY: Similarly, DB Cargo like many other train operators has its own internal
13 Standards e.g. a professional driving policy, which specifies how drivers should react in
14 certain circumstances. They are consistent with Group Standards but they tend to go
15 further than them. So, in other words, they are not mandatory, but they represent
16 optional procedures that have been introduced by the train operator concerned as good
17 practice.

18 MR BOON: We are moving a bit now to procedural, in a sense. Is the Standard you have to
19 deliver by is 'do it' in a sense?

20 CHAIR: Yes, so what I am trying to get at is whether it is the strictly external, i.e. it appears
21 Group Standards, that drive a particular timeline?

22 MR GIBBENS: We need to supply more because this is based on driving timeline because it
23 will be – if the Group Standard has a lack of clarity to it that might have been the reason
24 for the change in this. So, we don't want to come here saying we can do something
25 that's unsafe basically if Network Rail –

26 CHAIR: Well yes, indeed, if it's a question of determining whether a Network Rail Standard
27 implementing a Group Standard is essential, well then you are in for an issue which you
28 come across, is it gold plating the Group Standard or is it merely filling in the necessary
29 – ?

30 MR GIBBENS: That's the issue we need to confirm.

31 MR BOON: But earlier you said March 2017 to November 2017 was about practical
32 considerations, so presumably your assumption on that particular point, 3.3, was less
33 than the time between March and November, do you remember what that assumption

1 was?

2 MR GIBBENS: I think I understand that.

3 MR BOON: If it wasn't on the critical path it must mean that they will not take up until
4 November 2017 because they are not on a critical path.

5 MR GIBBENS: So, let me just test I understood you. So what we're saying here is because of
6 the practical constraints, we have to put some new signalling scheme plans in place.

7 MR BOON: Indeed.

8 MR GIBBENS: If that argument is not agreed, then we still have got to put a signalling plan in
9 place to deal with this. So that takes that same amount of time.

10 MR BOON: The point I was making really is you've got a number of sub-paragraphs here,
11 some of which are sequential, some of which are in parallel, and the ones which are on
12 the critical path are the ones which sometimes carry the parallel activities. And what we
13 are hoping to understand was what those critical items were. And earlier, it sounded to
14 me that the Signalling Standards issue, whatever it was, subject to checking, wasn't
15 actually the thing driving November 2017. That was something else, the practical stuff
16 that was driving November 2017. So, if we then look into the practical things, and say
17 what if you did this, and does that need to be done; suddenly you could end up with an
18 October 2017 possibly, or I'm not – I'm just speculating here because of the nature of
19 our conversation.

20 MR GIBBENS: Yes, okay, I don't – would you like to comment Tom, I don't think we know
21 enough information.

22 MR BACON: The main thing that would be driving GRIP 4 at this stage for us on the
23 signalling side, because again, the signalling scheme plan is signed off by our internal
24 governance procedure, major signals so that's MSRP, which I think is quoted in here, at
25 the top there. So that's where the Signalling Standards will form part of that so it's a
26 resume developing through that at that stage, so we will be developing a signalling
27 design, and the initial designs were going along but we'll be getting that approved by the
28 MSRP board as it were.

29 MR BOON: So, 3.1 would be the red one, the critical path on it?

30 MR BACON: Yes, to get that standard approved or that scheme approved. Now at that stage
31 they could come back and say they are not happy with the scheme plan and we would
32 have to go away and do some work. And that's what pushes GRIP 4 further and further
33 on, so that will be the critical item in that section.

- 1 MR BOON: Would you normally assume at least one re-cycle?
- 2 MR BACON: You could assume that.
- 3 MR MCMAHON: To be fair though, they can actually resolve the issues at MSRP if they're
- 4 minor items. It's just a proving comment.
- 5 MR BOON: They meet every month?
- 6 MR MCMAHON: Yes. Yes and they're normally booked up and work significantly in
- 7 advance but obviously, something like this I'm sure we could get a slot.
- 8 CHAIR: MSRP is Network Rail?
- 9 MR MCMAHON: It is, yes.
- 10 MR BOON: Entirely Network Rail?
- 11 MR MCMAHON: Yes.
- 12 MR BOON: Right.
- 13 MR MCMAHON: However, you do have representation from the TOCs and FOCs at the
- 14 actual panel meetings, but the approval is Network Rail.
- 15 CHAIR: Is there any reason why they, like any other internal Network Rail panel, Network
- 16 Rail being a single entity, couldn't be told 'we are the subject of a tribunal determination,
- 17 please give us your views on this tomorrow, next week'?
- 18 MR BACON: We are already in touch with the main members on the MSRP panel; we're
- 19 already in contact with them about the scheme, so they are fully aware of that at the
- 20 minute and we've factored that into our GRIP 4.
- 21 MR GIBBENS: The answer to your question is yes. The answer to your question is yes.
- 22 MR BOON: You have a special?
- 23 MR GIBBENS: We have a special.
- 24 CHAIR: You can have a special?
- 25 MS DWYER: That's been factored in then, I'm told, is that right?
- 26 CHAIR: Right, so even with that factored in, GRIP 4 still takes from March 2017 to
- 27 November 2017.
- 28 MR BOON: So that's about six months to me.
- 29 MS DWYER: That's correct.
- 30 MR GIBBENS: And what we've done for this is we've assumed some things like we've just
- 31 described and we've come down from the standard phased signalling GRIP timescales.
- 32 MR BOON: Does that panel – is it MSRP that reviews the AIP stuff?
- 33 MR MCMAHON: It's there basically to ensure the safety of what you're putting into it, it's

1 compliance with standards.

2 MR BOON: Yes, is it the AIP standards that?

3 MR MCMAHON: Yes.

4 MR BOON: Yes.

5 MR MCMAHON: So you'll have MSRP sign-off with AIP. You'll then update to the
6 comments and you get final sign off.

7 MR BOON: Yes, so if you were – if you had the Lamington thing, with lots of passenger
8 trains not being able to travel anywhere – you could probably turn all that round in about
9 a month couldn't you, without any trouble, AIP and that?

10 MR MCMAHON: The only trouble with that is you're putting it back like-for-like.

11 MR BOON: Yes okay, right.

12 MR MCMAHON: And the difficulty here is because of certain other changes, which
13 obviously, we'll go onto later, we can't put it back like for like.

14 MR BOON: Because the option development will come to a proposed AIP, which has
15 different in –

16 MR GIBBENS: We are talking about an assurance panel here and that assurance could be
17 called up to meet at any time, but they are effectively a point in time. It's the preparation
18 work to get there that's the key, not the panel, but they are also a very critical, important
19 cog in the machine for safety and assurance.

20 MR BOON: You reckon six months, or seven months is really needed?

21 MR GIBBENS: Yes.

22 MS DWYER: It's condensed, I'm told.

23 MR GIBBENS: It's actually exempt from the standard, the standard process.

24 MR BOON: Honestly, I understand what you're saying, you know, I take what you say,
25 obviously. Now we're onto the practical considerations, Chairman.

26 CHAIR: We are still on the legal considerations.

27 MR BOON: Well that's a legal one isn't it, yes.

28 CHAIR: And because there's another one to come before we get onto the –

29 MR BOON: Yes, I was going to mention it, but I'll let you mention your next thing,
30 Chairman.

31 CHAIR: Yes, well just on this then; so for GRIP 4, the Signalling and other legal standards, is
32 that part of GRIP 4? You're saying, as I see it, as a rather bare assertion without any
33 substantiation, that the maximum truncation you can get for that, as a special, even with

- 1 the benefit of a tribunal order, is down to six months because that's the time it takes to
2 prepare. I really find that difficult to accept.
- 3 MR GIBBENS: Yes and we are assuming again, please help me gentlemen here, but we can
4 use framework contracts to do this, that we don't have to go out for full tender, we've not
5 assumed full tender in this have we?
- 6 MR MCMAHON: No, no, we haven't.
- 7 MR GIBBENS: So we've assumed that we can use frameworks and the like for this.
- 8 CHAIR: Because you don't have the people in house?
- 9 MR GIBBENS: Yeah, that's right. So we –
- 10 CHAIR: To do the necessary technical assessment of –
- 11 MR GIBBENS: All of the aspects.
- 12 CHAIR: This, this signalling for these two junctions?
- 13 MR GIBBENS: The assurance body is in-house, but for the preparation of the signalling plans
14 we are assuming that we can either use in-house resources or a framework contract and
15 we haven't got to procure it.
- 16 MR BOON: This is designing the signalling; they've got the AIP, which is the approval in
17 principle, which is a sketch.
- 18 MR MCMAHON: Yeah, the scheme sketch, to start with.
- 19 MR BOON: The scheme sketch; they get the sketch, they get the designers in on the
20 framework contract and they put all the detail in, everything.
- 21 CHAIR: How many designers do you need to design the signalling, even to modern standards,
22 at two ends of a Loop?
- 23 MR GIBBENS: I don't know.
- 24 MR BACON: It's not just the signalling that's taken into account, it's all the other disciplines
25 that go with that as well, so you've got your signalling, you've got your power, you've
26 got your track, you've got any issues that's also in the area as well, so everything will
27 need to be designed. That's why we'll go out to a design house that will do – give that
28 service to us, do our frameworks that we've already got settled with them.
- 29 MR BOON: They would physically go and survey the track wouldn't they, you know?
- 30 MR BACON: Yes, they'd do all the surveying.
- 31 MR BOON: Do boreholes and they'd do all manner of things. It's a bit like building a house.
32 Would it be useful if there were a note explaining their activities in the area or not?
- 33 CHAIR: Do the operators have a view as to the –

- 1 MR KAPUR: I have a view. It was my view that that signalling as it was in, say, well January
2 2014, when the determination was made, is still intact. It seems that the interlocking is
3 still intact, is that not the case?
- 4 MR MCMAHON: The interlocking is there, the signalling is not.
- 5 MR KAPUR: The signalling is not, the signal was taken –
- 6 MR MCMAHON: The feather's off, so you've got no access into the Loop. And the exit
7 signal has been removed. The signal structure is still in position, but there is no heading.
- 8 MR KAPUR: But the interlocking is –
- 9 MR MCMAHON: The interlocking is there.
- 10 MR KAPUR: The interlocking as was, is currently intact?
- 11 MR MCMAHON: The interlocking has had the alterations done to take these items out of
12 them so they would need putting back in.
- 13 MR KAPUR: So actually, everything has been – the interlocking parts have actually been – it
14 wasn't just a case of the pointwork being removed, it was the interlocking has been
15 removed as well.
- 16 MR MCMAHON: I believe, yeah.
- 17 MR GIBBENS: The software has been rewritten.
- 18 MR KAPUR: That wasn't – that wasn't clear.
- 19 CHAIR: Sorry, you're saying the software needs to be rewritten for this particular piece of
20 signalling?
- 21 MR GIBBENS: Yeah, the software that controls the signalling, that's when we talk about the
22 interlocking, we're talking about an interlocking from a traditional railway point of view,
23 which was either levers or a relay, we're talking about.
- 24 CHAIR: But whoever writes the software isn't going to be starting from scratch.
- 25 MR MCMAHON: No, it's alterations to the interlocking. It's alterations to the interlocking.
- 26 CHAIR: Right.
- 27 MR KAPUR: I don't think it was made clear in any Network Change proposal that anything
28 other than the points was being taken out. There was nothing, I don't recall anything
29 about signalling being interfered with in terms of interlocking.
- 30 MR MCMAHON: I'm only aware of what I saw on Monday.
- 31 MR KAPUR: So I think there's more going on here than we see from the original scheme.
- 32 CHAIR: I'm frankly struggling to understand, even if that is the case, why in principle,
33 particularly if under an order to do something, Network Rail cannot equip itself with the

- 1 necessary design capability if it's not in-house, to get it done within a week, a fortnight.
- 2 MS DWYER: I understand that is simply not possible. It's too complicated.
- 3 CHAIR: Is this a more complicated pair of junctions at either end of the Loop than anywhere
- 4 else on the Network?
- 5 MR GIBBENS: No.
- 6 CHAIR: We're just looking at it in principle and it looks to be like Network Rail bread and
- 7 butter.
- 8 MR OATWAY: Are you saying that Network Rail is going to have to start again from
- 9 scratch?
- 10 MR MCMAHON: No, no. It's all still there. It's just those facilities have been removed.
- 11 MR BACON: It's going to have to tie into that.
- 12 MR OATWAY: Is it the case that further works have been undertaken since 2014 that have
- 13 made it harder to put the Loop back?
- 14 MR MCMAHON: No.
- 15 MR GIBBENS: The stuff that they did in what we were told had been done in 2014; that
- 16 forms a good base for them to start from.
- 17 MR MCMAHON: Yeah, it's all still there. It's just those facilities have been removed and it
- 18 would mean putting those facilities back in.
- 19 MR OATWAY: There are some additional facilities in the area that were not there previously
- 20 (e.g. GSMR) so the design will need to take account of that. There are also new train
- 21 describers as well. I'm not a signalling engineer by any stretch of the imagination; but
- 22 these are factors that have been relayed to me. So Network Rail will have to take
- 23 account of all of these other subsequent changes in its actual signalling design as well.
- 24 MR GIBBENS: So, things have been done since 2014 then that's actually made it harder for
- 25 the Loop to be put back.
- 26 MR MCMAHON: This would all have had to have come out at the same time as the signals
- 27 were taken out. So whenever that occurred, whenever the points were taken out and
- 28 whenever the signals were taken out, the interlocking and WESTCAD alterations would
- 29 have been made at the same time.
- 30 MR GIBBENS: Well you simply can't leave it in the interlock.
- 31 MR OATWAY: In principle, we accept Network Rail has to undertake proper design for the
- 32 signalling be reinstated as DB Cargo does not want its trains using facilities that are not
- 33 inherently safe. So, whilst we accept that this design needs to be done; it is just a

1 question of how long it takes.

2 CHAIR: I'm not disputing that the design needs to be done and you're in a position to —. The
3 question is how long it takes to recover, doesn't it, because if Network Rail says it must,
4 then it must, the question is how long it takes.

5 MR OATWAY: We were informed by Network Rail that contracts had already been let for
6 the design back in October 2014. So does the work that was carried out back then
7 actually enable things to be speeded up because they are starting further along the
8 process than they would be if starting from scratch?

9 MR BACON: We got to the stage that - you're correct where we did have contracts in place
10 with our designers and they were working on that, and they got to the stage of a draft
11 scheme plan, which was taken to MSRP. So, the first thing that — well one of the things
12 that we would have to do once we started with GRIP 3, whilst looking at the options, to
13 look if that information is still relevant and can be used and that will be part of our GRIP
14 3 study that's going to form that. So there might be some parts of that that can be used to
15 speed up the process, but it —

16 CHAIR: Why was that process stopped?

17 MR BACON: Sorry?

18 CHAIR: Why was that process stopped, why was it not just continued?

19 MR GIBBENS: It got to the end of that phase, and for various reasons that we kind of talked
20 about earlier on — mistakes, errors — it wasn't then progressed, which is why we find
21 ourselves where we are today.

22 CHAIR: Sorry, I am not aware that we did talk about that, mistakes and errors?

23 MS DWYER: Just explain what we agreed.

24 MR GIBBENS: So I mean, I think that at the time, we need to explain that there's nothing
25 happened blatantly here to ignore, in any way shape or form, the adjudication that was
26 made before. But there was a series of errors, mistakes, there were some misjudgements
27 in terms of what the adjudication meant and that's why we got ourselves into here, sitting
28 here today. And this is the thing that started the piece I'm apologising for and simply we
29 want to now find the best way for the industry to put this facility back.

30 CHAIR: Were these the points that you wanted to make to start with, can we elaborate on that
31 then? What misjudgements were made, particularly on the basis of —

32 MS DWYER: The point I was going to make was separate but —

33 CHAIR: — of not understanding what the obligation was under —

1 MR GIBBENS: I really don't see how that's going to take us forward in getting the right
2 answer.

3 CHAIR: It will assist us considerably, I can assure you.

4 MR GIBBENS: Just simply, mistakes were made, things were not progressed in the way that
5 they should have been.

6 CHAIR: Well what mistakes?

7 MR GIBBENS: So, work following the scheme plan that we just mentioned was just not
8 progressed and it was not progressed simply because it was –

9 CHAIR: On whose authority?

10 MR GIBBENS: – Within a – nobody's authority, just within a morass of work that was
11 ongoing.

12 CHAIR: I'm really trying to understand what goes on inside Network Rail that leads to this
13 situation.

14 MR GIBBENS: There were simply mistakes made. What more can I say?

15 CHAIR: Well, you can say what part of Network Rail and what the mistake was. Are you
16 saying that the mistake was simply a decision not to do something, which should have
17 been done by – ?

18 MR GIBBENS: There was a definite attempt to reinstate this Loop and we have a timeline of
19 activities, there were conversations with the train operators. One of the misjudgements
20 that was made is that we felt that there was perhaps a better option for the freight
21 operators and we tried to progress that rather than just simply complying with the
22 adjudication. We said that we could enhance the Loop and do something later. That, in
23 my mind, was an error of judgement if you will. And there was, as in any big
24 organisation, with major programmes like electrification pausing them and starting
25 again, there was a lot of activity and something got lost here, and it shouldn't have done
26 so the focus went away from it.

27 CHAIR: What got lost?

28 MR GIBBENS: The focus on this project.

29 MS DWYER: I don't think there was – there was no deliberate attempt to – absolutely none,
30 it's one of those things.

31 CHAIR: Sorry, 'losing focus' and 'no deliberate attempt' is all very intangible.

32 MS DWYER: Yes, and it is intangible I believe, from what I've been told. No one sat down
33 and said 'We're not going to obey that'. No one ever did that. It just didn't happen.

1 CHAIR: It sounds to me as if the problem is not that no one sat down and said 'We're not
2 going to obey it' but that no one sat down and said to whoever it needed to be said to,
3 'We are going to obey that'. Is that a fair conclusion?

4 MS DWYER: That's what we're putting right now.

5 MR GIBBENS: That's what we're trying to put right now.

6 MS DWYER: Absolutely, to make sure that it absolutely happens.

7 CHAIR: Right. Just a minute. On the legal and technical constraints standards issue, I think I
8 would like some more information on exactly how complying with those drives the
9 particular timeline that is being set out. And in particular, what we're looking at now,
10 which is the six months between March 2017 and November 2017, in a form, which can
11 be assessed by the people who are on the other end of this. And commented on as to
12 whether that is reasonable or not, including the fact that contracts need to be let to get
13 external design help and so on. I am not in a position to assess the merits of that. But
14 this is all towards the end of arriving at what is a sensible minimum timescale to require
15 this to be done by.

16 MR GIBBENS: I think, Chair, there is a similar comment here to what we've made on the
17 fiscal element in as much as – and you've made me think here, through the
18 conversations; yes, we could go into one of the design offices and we could say, 'Do this
19 now'. But there then will be a consequence of that in the same way as we've talked
20 about the consequence of the money. Now, we haven't given that thought and that is
21 entirely possible but that means something somewhere else, where that has not
22 happened. And again, if that's the right thing to do then that's what we must do.

23 CHAIR: That's saying something somewhere else will not happen is a very different
24 consideration than the one we were considering in relation to the fiscal constraints,
25 which is saying that something is so unreasonable that no reasonable body could decide
26 it.

27 MR GIBBENS: It's the same.

28 MS DWYER: I think the point that Spencer is making; we have due processes we have to go
29 through. And those due processes are the steps you have to take, Programme Board and
30 so on. But – and those decisions will be made and those procedures will be followed.
31 That is important, not to follow those due steps and those due processes would, I think
32 put Network Rail at risk of judicial review. What Spencer is talking about is that as a
33 consequence of those decisions, other projects get affected. But that's just something we

1 have to address.

2 CHAIR: That is a view I would take, that is something you have to address.

3 MS DWYER: Yes, but that doesn't mean that you have to go through the steps. So, what we
4 would provide you with is a detailed description of what is done within the six months
5 still allowed and why that is necessary and why that time is necessary so that it can be
6 assessed by those in a position to assess it.

7 CHAIR: Yes, exactly.

8 MS DWYER: So in other words, if I can just try and explain, what you want is an even more
9 –

10 CHAIR: Why you can't hire 100 people instead of 10 people.

11 MS DWYER: Exactly, why it takes March 2017 to November 2017 is really what you're
12 looking at, isn't it?

13 CHAIR: Exactly.

14 MR BOON: If I could just ask, about stage GRIP 3, because that's another six months and we
15 just heard you've already got a scheme way up front.

16 MR GIBBENS: We'll come to that.

17 MR BOON: Well it is, it's an issue that needs answering because if you've already done part
18 of the work but it's lost its way but it's already been designed, there must be a reason
19 why that design can't be used.

20 CHAIR: Well that's absolutely right. Sorry, I missed that, that is exactly the same question
21 for the period from 30 September to –

22 MR BOON: Because you actually got to that stage and so it's almost like you've done GRIP 3
23 but you've got to do it again; is that right?

24 MR BACON: That scheme plan took account of just a like-for-like reinstatement of the Loop
25 in the position that it is now. We since know that that's not possible in order to maintain
26 the line speeds, maintain the length of the Loop, which we will come onto in due course.
27 So, that scheme kind of will needs looking at again, with the different options we've got
28 in the option selection to see if it's still relevant and can be applied, but at this stage it
29 possibly can't be because of that new information that we have.

30 MR BOON: Can I ask one question on that very specific? If you did follow through on that,
31 and you did this in two stages, put the Loop back and then did a – left a TSR on for a
32 while, and did the line speeds a bit later. Would that just be completely ridiculous?

33 MR GIBBENS: I think in that situation the TSR would inevitably become a PSR and would

1 inevitably need Network Change.

2 MR BOON: But you need Network Change one way or another and all that stuff.

3 CHAIR: We'll come to that in two secs. There's just one other point; I think we've made
4 clear what we want on the legal constraints, but there is one other, well, sort of legal
5 constraint before we get to the line speeds and practical constraints, which is 3.5 of GRIP
6 4. Another procedure for Network Change for this element of it. Now, is the Network
7 Change going to be established or cause us another dispute and then may it need to be
8 resolved in the courts within the Access Dispute Resolution Rules. Well, it has not
9 already been done under ADA17, and to the extent that it hasn't, will it not be under
10 this?

11 MR GIBBENS: Right now if we put the Loop back like-for-like, as it – this is the only factor
12 we know, if we put the Loop back, in a like-for-like form, as it was before, the line speed
13 will have to reduce and the line speed will be subject to Network Change. Network
14 Change is a GRIP 4 output.

15 MR BOON: So is the line speed part of the Sectional Appendix now, as it were?

16 MR GIBBENS: Yes. Yes and I think –

17 MR BOON: So is it in the Train Planning Rules?

18 MR GIBBENS: Yes, absolutely. And I think the point that we just wanted to make earlier on
19 in response to Ian's was that Ian had suggested that the Network Change for the line
20 speed was never implemented and it was.

21 MS DWYER: It was. If I take you back, I've actually got some copies of paragraph 7.3 of
22 ADA17. I'll read it out to you and I can hand the copies round. It says, 'Network Rail is
23 required, and is permitted specifically, pursuant to this decision, to withdraw completely
24 and exclude from the MML Network Change, the removal of the Loop from the
25 Network. Such withdrawal and exclusion shall not prejudice or affect Network Rail's
26 entitlement, subject to and in accordance with the procedures prescribed in Network
27 Code Part G, to maintain the rest of the MML Network Change proposal apart from the
28 removal of the Loop and at any time to establish and implement the whole or any part of
29 the rest of the MML Network Change.' In other words, what Network Rail could do is
30 to take the Loop bit out of it, implement the rest of the change, which is exactly what it's
31 done, so the line speed –

32 MR BOON: No, but it didn't take it out, did it, what is contained there is putting it back in in
33 this case.

1 MS DWYER: What I'm saying –

2 MR BOON: The only way you can Network Change without the Loop being taken away is to
3 have the Loop actually operational; that's what that meant.

4 MS DWYER: What I'm saying is that the line speed was established, raised, pursuant to that
5 authority and implemented and in order to reduce it again as a result of re-designing the
6 Loop you need another Network Change.

7 MR BOON: I think you need to read that more carefully because by actually taking the Loop
8 out of the issue i.e. not closing the Loop, because it was already found that it had been
9 disconnected incorrectly, it was to say you're not going to Network Change that out, you
10 have to leave it as it is because it was part of the Network Change to remove it, not to
11 keep it in that sense wasn't it? That's what was being disputed.

12 MR GIBBENS: So the Network Change that referred to the removal of the Loop was dis-
13 allowed in effect. The Network Change to the line speed was agreed.

14 MR BOON: The determination says, notwithstanding whatever you do in the future, you can
15 get on with this Network Change without effecting the Network Change to the Loop, i.e.
16 not taking it out. So, your design for the line speed should have taken the Loop into
17 account and then, only subsequently if you had then agreed to remove the Loop, would
18 you have implemented that change and would you have –

19 MS DWYER: I understand that. If we look at the situation on the ground now, we have
20 increased line speed; those increased line speeds are going to need to be reduced in order
21 to re-introduce them. I understand what you're saying. We need a Network Change to
22 reduce the line speed.

23 MR BOON: What you've said is the Network Change was implemented in a way that wasn't
24 intended.

25 MS DWYER: Yes.

26 MR GIBBENS: Do you think we can lower the line speed without a Network Change?

27 MS DWYER: Without a Network Change.

28 MR BOON: I think you've actually established a Network Change and implemented it,
29 you've established it and implemented it, haven't you?

30 MR GIBBENS: Yes.

31 MR BOON: All I'm saying is that the determination suggested you didn't do it that way, and
32 you've done it in a way that wasn't suggested. So yes, you are now there in that place,
33 but that was contrary to what was –

1 CHAIR: The purpose of that part of the determination was simply to enable you to deal with
 2 the reinstatement of the Loop without, at that time, without prejudicing the rest of the
 3 Midland Main Line Network Change because the Loop Network Change had been
 4 bundled in with it. And it had not been treated as a complex project so it wasn't divisible
 5 from it. So that was just to facilitate the going ahead with the rest of the Midland Main
 6 Line Change whilst dealing with the reinstatement of the Loop needed because the
 7 Network Change taking it out had not been established.

8 MS DWYER: Or to allow – I think it had another point, because there were three possible
 9 options weren't there?

10 CHAIR: Well, or to allow a separate self-standing Network Change.

11 MS DWYER: Or to issue a further separate Network Change.

12 CHAIR: Self-standing Network Change.

13 MS DWYER: So we all know where we're going with this.

14 CHAIR: So that deals with the argument on that. But, so that's what that was about. As to
 15 now, about reducing line speeds, you should not need a Network Change procedure if
 16 it's pursuant to a determination of an ADA or a resolution process under the ADRR.

17 MS DWYER: That's right, but where would we get that from?

18 CHAIR: If necessary, from a determination of this ADA.

19 MS DWYER: Yes, so that's what we're saying, we have to allow time for that to take place.

20 CHAIR: Even pursuant to a determination of the ADA?

21 MR GIBBENS: I think the –

22 MS DWYER: Are you actually offering to facilitate it now?

23 MR GIBBENS: The Chair is saying don't go through the Network Change on the line speed.

24 MS DWYER: That can't be right.

25 MR GIBBENS: It doesn't feel right.

26 MS DWYER: No, if the line speed is –

27 MS MASI: Surely the interested parties –

28 MS DWYER: Yes, exactly.

29 MR THACKRAY: Yes, I think from an operator point of view, we'd find it pretty difficult to
 30 walk out of this room with that being the case without it being consulted more widely.

31 MS DWYER: Exactly, the line speed is one.

32 CHAIR: I am afraid you might not have the option.

33 MR THACKRAY: We might not but it would be a difficult message to take back into the

1 wider world and I'm not aware of what remedies we'd have coming back, but from a
2 Cross Country perspective we'd be looking into it.

3 CHAIR: I don't think you elected to be a Dispute Party.

4 MR THACKRAY: We weren't disputing the issue currently being discussed, and weren't
5 aware that it was going to be a likely outcome that line speed would be changed
6 effectively leaving this room onwards.

7 MS DWYER: Would it help to understand why the line speeds are going to – it's a practical –
8 why the line speeds are going to be changed?

9 CHAIR: Well yes, do help us on that. I think we all understand this is the final practical
10 constraint, so let's get onto that.

11 MR GIBBENS: I'll start and I'll ask the guys to come in. Again, I'd like to just address a
12 couple of the remarks that Ian made in his opening statement about the two things about
13 the actual physical being of the Loop and Ian referred to it as a goods loop, and that may
14 just be common language rather than anything specific. But we need to make clear it's a
15 passenger loop, also its usable length is 649 metres, not the trailing length of the train.
16 So, a train, whether it's a locomotive or wagons or carriages or whatever it happens to
17 be, can be up to 649 metres but the train can't be 649 metres because it has to have a low
18 axle counter on it.

19 CHAIR: Sorry I did say a train –

20 MR KAPUR: Sorry, say that again?

21 MR GIBBENS: I said a train with a length of 649 metres.

22 MR KAPUR: But the practical length of the Loop is 649 metres, not the train.

23 MR BOON: No, the Appendix length is 649, which is always trailing.

24 MR KAPUR: Useful clarification.

25 CHAIR: Sorry, should have been, is, whether it has been –

26 MR KAPUR: Clearly meaning wagons excluding loco.

27 MR BOON: Yes, minus locomotive and brake van.

28 MR KAPUR: That's okay, in terms of parlance; the usual length is what you'd expect it to be.

29 MR GIBBENS: Yes, so just then, to be clear on this so that it is in the drawing, the actual –
30 and this has not changed, Ian, the actual length from the point at the back of the Loop,
31 where the last wagon is found, to the signal, is 649 metres. So that is the fact as it is
32 today.

33 MR KAPUR: You're saying it's a total length?

- 1 MR GIBBENS: Yes.
- 2 MR KAPUR: Right, which is not the understanding of how it was.
- 3 CHAIR: So you're saying the normal terminology is that, where length is expressed, it is the
- 4 trailing length minus loco and brake van?
- 5 MR GIBBENS: Yes.
- 6 MR MCMAHON: And is that from the driver's position?
- 7 MR KAPUR: No, no, no, this is technically what the Loop holds.
- 8 MR MCMAHON: So from the signal to the axle counter?
- 9 MR KAPUR: To the lock joint, yeah, counter or whatever.
- 10 MR MCMAHON: A bit farther, yeah, so that is, to be fair, if you look at the diagrams that
- 11 you've got in the pack, it's 668, so –
- 12 MR KAPUR: It's 668 is it?
- 13 CHAIR: Yes, we saw that, yes.
- 14 MR MCMAHON: That's only obviously it's the terminology with regards to the same usable
- 15 length, that 668 isn't usable because you'd stand back from the signal.
- 16 MR KAPUR: No, no, it can be usable. We can instruct people to draw forward as need be,
- 17 and do. So, let's not get into the driver practices because this is not what it's about.
- 18 MR MCMAHON: Right, well why don't we just say then it's from the signal to the axle
- 19 counter because that's what it is.
- 20 MR KAPUR: And you say it's 668?
- 21 MR MCMAHON: Yes.
- 22 MR KAPUR: Okay and so previously it should have been 649 without loco and brake van.
- 23 And 649 that's a little short, not by much but it is a little short.
- 24 MR BACON: That's taken up –
- 25 MR KAPUR: Because it should be 20 plus 21 and a bit metres, plus the brake van.
- 26 MR BACON: That's taken up with a rail wheel as well, which is plus or minus 10% I think
- 27 over 1,000 metres so there is some play there as well.
- 28 MR OATWAY: Just for the record, when you, Spencer, picked Ian up on the fact that it's not
- 29 a goods loop, you said it was a passenger loop. Well, it's actually a loop that can be used
- 30 by goods and passenger trains.
- 31 CHAIR: So, are we saying that the Sectional Appendix is still wrong in terms of what it
- 32 expresses as the length of this – or the terminology of what it expresses?
- 33 MR KAPUR: As of right this moment in time, it is incorrect I think, isn't it; it says something

1 different, it's 640 isn't it.

2 MR BACON: At the minute the Sectional Appendix says 600 metres in length.

3 MR KAPUR: So that's technically – so even after January 2014 it's still incorrect. That aside,
4 in terms of what we're talking about, we should be what – 649 plus 66, 21 and a bit. 21
5 metres, that is a brake van. So you need about 671 to be technically 649 trailing. So yes,
6 there is some discrepancy between what we believe it should be after the previous
7 determination and before the previous determination and now, which is what you're
8 looking at. It may be that the Appendix was wrong.

9 MR BOON: Quite, so how much did you add for your brake van and loco?

10 MR KAPUR: Loco 21 metres, brake van; you're looking at a couple of –

11 MR BOON: Five metres.

12 MR KAPUR: Six or seven metres, to be fair, unless I'm wrong. 28, 17, so you're looking at
13 seven metres, 21 metres for the loco plus six or seven, did I say seven for the brake van.

14 CHAIR: So it's trailing length is not 649 metres then?

15 MR KAPUR: Trailing length we always believed and we've always said, and I think the
16 previous conversations it was 649 metres.

17 MR BOON: Did that include the brake van?

18 MR OATWAY: No.

19 MR MCMAHON: So that would be about right then, because if it's 678 and you take off the
20 brake van and the loco you get to 649.

21 MR OATWAY: It's 668.

22 MR MCMAHON: Oh, 668 sorry.

23 THE CHAIR: That's what I'm asking. The sums – so 649 is the trailing length.

24 MR KAPUR: Yes.

25 CHAIR: And the trailing length is conventional terminology, what length is taken to mean
26 when it's expressed in the –

27 MR KAPUR: Without the locomotive.

28 MR MCMAHON: Without the locomotive or any nominal brake van.

29 MR KAPUR: It's there, it's close.

30 MR MCMAHON: There are probably bigger issues than that in terms of priority although
31 don't get me wrong, it's – we talked about it a lot last time and we will be talking about
32 again still, I'm sure. But yeah, we are obviously not there but I mean that's probably
33 going to be explained more, I suspect by what we're about to talk about.

1 MR GIBBENS: What I just wanted to bring out is that the fact is that the wheel bit, which is
2 between the axle counter and the signal, is the dimension on the diagram. That has not
3 changed since the Erewash project was implemented. So where we go now kind of has a
4 relevance of the passenger element, taking the point that it is passenger and goods and
5 the line speed and the length of the length of the Loop. And the reason that we've got –
6 and we're talking about timeline here. The timeline has got an option selection element
7 into it and this is why the design has essentially been done fully so that we can come out
8 with potentially the best option we can. We know – the only facts that we know is if we
9 immediately reinstate the Loop on a like-for-like basis the line speed will have to be
10 lowered. That's the only factor we know.

11 What we might be able to do with design is we might be able to maintain the line
12 speed. We have said in the submission that we think there will be between a five and a
13 30 mile an hour reduction one way or another, with all the options. We could do
14 something that removes the passenger status away from the Loop and we could shorten
15 the Loop potentially to maintain the line speed. So, there are a number of things that we
16 could do for all the parties to get to a consensus if you like for all the parties in this room,
17 and it's that that we've built into the timeline. If the adjudication is to put it back like-
18 for-like then the line speed will go down, no doubt about it.

19 CHAIR: Right, well the subject matter of this dispute, as I said at the outset, is not balancing
20 the competing interests of different parties and operators on this line. It is the failure to
21 implement the previous determination of ADA17 and the consequences of that failure
22 and arriving at, among other things, the most sensible, practical remedy for getting it
23 implemented in its own right, and not having regard to all these other external
24 considerations and interests of other parties, which were considered previously. The
25 only constraints applicable, being those that are genuinely external and unavoidable
26 which I have been trying to go through in some order, to sort out the wheat from the
27 chaff. So now, when we come to practical considerations, this I do not believe is the
28 forum to try to take into account balancing all the interests of all the other parties
29 including, to the extent it comes up, maintaining the line speeds.

30 MS DWYER: Just on that point, if we reinstate like-for-like and design for that and don't look
31 at the other option as Spencer said, that involves a reduction in the line speed. That itself
32 would trigger the set Network Change procedure. That's something that Network Rail
33 and the freight operating companies and the passenger operating companies have to go

1 through. I don't think you can get round it by saying you are doing something pursuant
2 to a determination so you don't have to go through that procedure. That procedure
3 would still have to be done. It is –

4 MR BOON: You have to ensure the proposal is issued but you won't have to get all parties'
5 consent, that's what it says.

6 MS DWYER: You have to follow the procedure. You have to follow the procedure. This is a
7 Network Change. It is something, for example, it is a change to the operation of a
8 Network which is likely materially to affect the operation of the trains operated by, or
9 anticipated as being operated in accordance with the terms of any access option by or on
10 behalf of any access beneficiary on the Network. So, as explained by the interested
11 party, if you are going to reduce the line speed and it sounds as if that's going to have to
12 happen, then you have to go through a Network Change procedure. That may be fine,
13 that may be absolutely fine but I don't see a way that the parties, having agreed to deal
14 with Network Change in that way, can get around that unless you tell me there is one, but
15 I can't see it myself.

16 MR OATWAY: Could I just make a point on that? The question I wish to pose is, does
17 implementing, in inverted commas, an invalid Network Change become itself a Network
18 Change? Because at the end of the day, as I understand it, the line speed could not be
19 increased with the Loop in place but 'on paper' the Loop has always been there. So
20 therefore, the implementation, or the establishment of any line speed Network Change
21 must have had to have taken into account the fact that the Loop was there. So, how was
22 the line speed increased if the Loop is there? If Network Rail basically ignored the fact
23 that the Loop was there and increased the line speed anyway, is that a valid Network
24 Change? I would argue that if something is implemented through an invalid Network
25 Change you do not have to go through another Network Change proposal to take
26 something out. Otherwise it would be easy for Network Rail to implement all sorts of
27 changes which become established by default. I do not have the answers to all those
28 issues; I'm merely raising them for consideration.

29 CHAIR: The bit of the ADA17 determination, which you quoted, 7.3, which permitted
30 Network Rail to take the Loop removal out of the general Midland Main Line Change
31 and treat it as self-standing, then it went on to say 'Such withdrawal and exclusion shall
32 not prejudice or affect Network Rail's entitlement to maintain the rest of the Midland
33 Main Line Change, subject to and in accordance with the procedures prescribed in

1 Network Code Part G'. So, I think in effect that's what DB are saying; that the rest of
2 the entire Midland Main Line Change proposal, although not precluded from being
3 implemented by carving out the Loop issue, still would have had to be implemented
4 according to its normal terms.

5 MR GIBBENS: Which we believe it was.

6 CHAIR: And it may be that that should still have taken account of the fact that the Loop was
7 there.

8 MR OATWAY: Yes, and if it did then why can it not be put back without affecting the line
9 speed because it cannot work both ways. I mean, if you can implement the line speed by
10 taking into account the fact the Loop is there then you should be able to put the Loop
11 back whilst leaving the line speed intact. You cannot take one side of the argument and
12 not the other.

13 MR GIBBENS: That's the principle.

14 MR OATWAY: Yes, I know.

15 MS DWYER: That's what I was – that's exactly what I was going to say, that is the principle
16 but I come back to where we are, we are sitting here in July 2016 with the Network
17 Change which Network Rail implemented, you know, did its best to implement. The line
18 speed was increased. We are where we are. The line speed now needs to be decreased,
19 everyone needs to be consulted about that change. It may not affect the overall
20 timescale. It may be absolutely fine but I don't think we can avoid going through it.

21 MR GIBBENS: And I think we are saying that if we are to implement the reinstatement of the
22 Loop with all urgency, then there is inevitable consequence that the line speed will go, be
23 reduced. If we go through some due process or due consultation, there is every
24 possibility that the line speed could be maintained or reduced negatively and/or the
25 passenger status of the Loop taken away, or some other compromise. I think that's all
26 we're trying to say. So, there isn't a design that says the Loop can go in with a lower
27 line speed. But there is a design that says it can go in at a lower line speed. That is all
28 the sense we are making.

29 CHAIR: But you're saying that consultation could overcome that difficulty. There is some
30 form of consultation, which could result in both the reinstatement of the Loop and the
31 maintenance of the increased line speed?

32 MR GIBBENS: If we, and I might need your help here guys, if we agreed that the Loop no
33 longer had a passenger status to it, that couldn't – that could affect the entrance and entry

1 to it, which would mean that we could maintain the length of the Loop and hit the line
2 speed.

3 MR BACON: Not quite, Spencer.

4 MR GIBBENS: Okay.

5 MR BACON: I think regardless of where we come back in on this high cant here, at the north
6 end of the Loop. If we are coming anywhere before this bridge at the end there, we're
7 going to have to affect the line speed on that because we're coming in at such a high cant
8 on the system, in terms of being practical, come back to that word. So regardless of
9 where that is, we're going to be having to affect the line speed on that. The only way to
10 avoid that is to take it away from the curve completely, the exit to the Loop point in that
11 curve.

12 CHAIR: Sorry, are you saying that's with regards freight trains?

13 MR BACON: Any train.

14 CHAIR: But including freight trains, i.e. if—

15 MR BACON: Freight and passenger, yes.

16 CHAIR: If you de-designated it as a passenger loop, it stops that physical problem with cant
17 caused by the speed although still applies to freight trains?

18 MR BACON: Yes, declassifying it as a passenger loop will help the length of the Loop,
19 because we can basically extend down here, which is the run off for the passenger line,
20 so that wouldn't need to be that long. So it could extend the Loop in that sense, so that's
21 what declassifying from passenger to a freight train only line would do, it wouldn't affect
22 the line speed on the main line when we're coming out on that.

23 MR GIBBENS: I think it is fair to say, Tom, that we don't have a high speed design yet.

24 MR BACON: We don't, and that's something that we need to draw up in our selection in AIP
25 as in design.

26 MR BOON: So the option, is it that we've asked a few times, but we keep going back, about
27 what the different real options are; because I know you've got to go through a process,
28 but knowing you guys, you know what your options are, probably down to two I suspect,
29 maybe three even now. So what are the options that are going to take six months to get
30 to any?

31 MR GIBBENS: We take the main line back to what it used to be and we've got to put the
32 switches back exactly as they used to be.

33 MR BOON: Yes but that's not really — that's the baseline.