ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA31
(following a hearing held at 1 Eversholt Street, London, on 13 January 2017)

Present:

The appointed Adjudication Panel (the "Panel"):

Hearing Chair:	Stephen Murfitt
Industry Advisors:	John Boon Niel Wilson

The Dispute Parties:

For Grand Central Railway Company Ltd (GC)

Jonathan Cooper	Head of Contracts Alliance Rail
Mark Robinson	Finance Director
Sean English	Chief Operating Officer

For Network Rail Infrastructure Ltd (NR)

Tim Wright	Route Stakeholder & Commercial Manager (LNE and EM Route)
Mark Garner	Customer Manager (LNE and EM Route)
Richard Wall	Contract Services Manager (Finance)

Interested parties:

None

In attendance:

Tony Skilton	Secretary
Peter Craig	Committee Member and Network Rail's Regulatory Reform Manager (Observer)

Table of Contents

1. Introduction, jurisdiction and procedural history of this dispute

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

"ADA" means Access Dispute Adjudication.
"DAG" means Delay Attribution Guide.
"ORR" means the Office of Road and Rail (formerly Office of Rail Regulation).
"Rule" refers to the Access Dispute Resolution Rules.
"Secretary" is the Committee Secretary of the Access Disputes Committee.
"TAA" or "TAC" means Track Access Agreement/Contract.
"WTT" means Working Timetable.

1.2. This dispute has arisen in relation to a claim by Grand Central (GC) for compensation by Network Rail (NR) in respect of the cancellation of a number of GC's train services which had been scheduled to operate on 27 December 2014. Some compensation has been paid, but GC was of the view that the contractual arrangements set in the Track Access Contract (Non-Franchised Passenger Services) dated 1 August 2014 between the parties (as subsequently amended) gave rise to further entitlement.

1.3. Original plans in connection with major engineering works in the London (Kings Cross) area had provided for GC to operate services after completion of works on 27 December 2014. Following an incident near Finsbury Park on 26 December 2014, the possession between Holloway and Kings Cross overran with the result that all services into and out of Kings Cross were withdrawn for 27 December 2014. On 26 December 2014, an emergency timetable was agreed between GC and NR which resulted in the part cancellation of six GC trains.

1.4. Following service by GC of an undated Notice of Dispute with Network Rail on 1 November 2016 pursuant to Clause 13 of the TAC, the parties completed a Procedure Agreement on 11 November 2016 in which they agreed to refer the dispute in the first instance to an ADA. In view of the Procedure Agreement being silent regarding right of appeal against the ADA determination, either Party has a right of appeal to arbitration (Rule G67).

1.5. In the knowledge that the parties intended to proceed to an ADA, I was appointed as Hearing Chair on 10 November 2016 and I endorsed the timescales which the Secretary had indicated to the parties on 9 November 2016 regarding the dates by which various documents were to be served. After consultation between the Secretary and the parties, 13 January 2017 was subsequently set as a convenient hearing date.

1.6. GC served its Statement of Claim on 25 November 2016. NR served its Statement of Defence on 9 December 2016, and GC served its Response Statement on 16 December 2016.

1.7. Having read the material received and liaised with the appointed Industry Advisors, in the interests of effective case management on 19 December 2016 I issued a Directions Letter requesting the provision of certain additional information from both parties together with an agreed chronology of relevant factual events. Both parties complied, and served their legal submissions by the required date of 23 December 2016. A further request for information was made on 9 January ~~2016~~ 2017 and both parties complied.

1.8. From my own review of the material provided to the hearing (as required by Rule G9(c)) it was evident a legal issue had arisen as to the interpretation of the TAC, in particular whether there had been a breach of contract by one party and the calculation and amount of any compensation that might be claimed. I informed the Industry Advisors accordingly and the parties were advised on 9 January 2017.

1.9. In view of the potential complexity of exchanges during the hearing, I directed (as provided in Rule G44) that a full transcript should be taken to assist the Panel's subsequent consideration of the issues.

1.10. The hearing took place on Friday 13 January 2017. Each party made opening statements, responded to questions from myself and the Industry Advisors, and gave closing submissions.

1.11. I confirm I have taken account of all the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarised in the course of this determination.

1.12. In my consideration of the parties' submissions and my hearing of this dispute, I have been mindful that as provided for in Rule A5, I should reach my determination 'on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.

2. Jurisdiction

2.1 I am satisfied that the dispute properly falls within the jurisdiction of an Access Dispute Adjudication.

3. Submissions made and outcomes sought by Dispute Parties

3.1. GC's principal submissions in its Statements of Case and opening submissions were as follows:

3.1.1. NR was in breach of Clause 4.2 of the TAC. NR failed to act in good faith in dealing with GC's claim for compensation. Clause 4.2 provides: '*The parties to this contract shall, in exercising their respective obligations under this contract (including when conducting any discussions or negotiations arising out of the application of any provisions of this contract or exercising any discretion under them), at all times act in good faith.*

3.1.2. GC wrote a number of letters in pursuit of its claim for compensation, including on 9 May 2016 a letter before claim under the Civil Procedure Rules (CPR). GC also suggested mediation. GC alleges that NR's refusal to respond to correspondence, refusal to take part in mediation and failure to compensate GC are all evidence of a breach of good faith.

3.1.3. NR was in breach of Schedule 5 of the TAC. GC had a right of access to the Network. On 27 December 2014 NR failed to give GC its permitted access rights to the Network.

3.1.4. NR was in breach of Clause 8.2 of the TAC. Clause 8.2 of the TAC provides: *'In relation to any breach of this contract, the party in breach shall indemnify the innocent party against relevant losses.'* GC submitted that the failure of NR to provide access to the Network on 27 December 2014 was a breach of Clause 8.2 of the TAC.

3.1.5. NR was in error to 'P' code the train services that were cancelled on 27 December 2014 following GC's agreement to an emergency timetable.

3.1.6. GC are entitled to compensation from NR under Schedule 8 of the TAC in the sum of £51,122.

3.2. GC sought the following decisions from this adjudication:

3.2.1. The conduct of NR in dealing with GC's claim for compensation amounted to a breach of good faith under Clause 4.2 of the TAC.

3.2.2. The failure on the part of NR to allow GC to access the Network on 27 December 2014 was a breach of Clause 8.2 and Schedule 5 of the TAC.

3.2.3. NR was in error to 'P' code the train services that were cancelled on 27 December 2014 following the agreement between the parties to an emergency timetable.

3.2.4. NR to compensate GC in the sum of £51,122 as a consequence of the agreement between NR and GC as to an emergency train timetable on 27 December 2014.

3.3. NR's principal submissions in its Statements of Case and opening submissions were as follows:

3.3.1. NR denied that it had committed a breach of contract under Clause 4.2 of the TAC. GC had received from NR a compensation payment for unplanned disruption on 27 December 2014 in accordance with Schedule 8 of the TAC based on the agreed emergency timetable which had been planned in advance.

3.3.2. NR denied that it had failed to provide GC with access to the Network on 27 December 2014 and that it was consequently in breach of Clause 8.2 and Schedule 5 of the TAC. NR and GC had agreed an emergency timetable in advance of 27 December 2014 and GC was permitted to run its services as listed in the emergency timetable.

3.3.3. GC is an open access operator and may choose whether to pay the Access Charge Supplement (ACS), which entitles a claim to be made under Schedule 4 of the TAC for Restrictions of Use. GC chose not to pay the ACS and therefore was only entitled to receive compensation for a Type 3 Restriction of Use (over 120 hours). No compensation was therefore payable under Schedule 4 of TAC.

3.3.4. An extended disruption occurred on 26 December 2014 requiring NR's Controllers to follow the Railway Operational Code (ROC) and the emergency timetabling procedure. The Controller used the TRUST system and applied a 'P' coding. This was standard practice which reflected an emergency timetable agreed before 2200 on 26 December 2014.

3.4. NR sought the following decisions from this adjudication:

3.4.1. GC was compensated in February 2015 in accordance with Schedule 8 of the TAC for the unplanned disruption for services on 27 December 2014.

3.4.2. NR had at all times acted in good faith pursuant to Clause 4.2 of the TAC. The chronology of events demonstrated the regular dialogue and frequent interaction between the parties on the issues since December 2014.

3.4.3. GC was not entitled to compensation under Schedule 4 of the TAC because GC was an open access operator and had not paid the ACS.

3.4.4. NR was entitled to enter a 'P' code in TRUST on 26 December 2014 following the emergency timetable agreed before 2200 on 26 December 2014.

3.4.5. NR are not required to make a payment to GC of £51,122 under the terms of the TAC.

4. Oral exchanges at the hearing

4.1 Having considered the Statements of Cases and after hearing the parties further oral submissions, I and the two Industry Advisers questioned the parties' representatives to clarify a number of points arising from their submissions. The party's representatives verbally provided further evidence and made a number of submissions and observations in the course of various exchanges. The submissions of both parties are set out in summary form in this section.

4.2 **GC**

4.2.1. GC did not form a view on 26 December 2014 as to how, as a matter of contract, the revised timetable was to be implemented and its effect. There was no consideration by GC of 'P' coding at that time, and GC was trying on 26 December 2014 to make the best of a bad job to protect its staff and customers. It was not until January 2015 that GC realised 'P' coding had been entered on to the TRUST system.

4.2.2. GC did not have a view as to what actions the NR Controller should have taken on 26 December 2014 with regards to the placing of a code in the TRUST system. GC was not expert in the matter of coding.

4.2.3. There was agreement that an emergency timetable was put in place on 26 December 2014, but there was no discussion as to compensation. GC always had an expectation of compensation. The emergency timetable was agreed sometime after 2100 on 26 December 2014, and uploaded onto TRUST around 2227.

4.2.4. There was a formal process for agreeing a new timetable which required the completion and submission of a form to NR by GC before 2100 and that did not happen on 26 December 2014.

4.2.5. GC relied on NR's Performance Management process and in particular the requirement for a signed form to be submitted by the Train Operator to NR in cases of changes to the timetable.

4.2.6. On 5 January 2015, GC realised that the trains cancelled on 27 December 2014 had been removed from the statement for compensation purposes. GC immediately made their complaint known to NR.

4.2.7. GC had previously agreed with NR not to use the Day 2 process and GC was content to rely on TRUST for the relevant information. When GC looked at TRUST, the trains cancelled on 27 December 2014 had been removed from the system.

4.2.8. GC was content to raise the issue of compensation at Level 1 meetings held routinely with NR's senior executives. There was no early intention to raise the issue to a formal dispute level or to appeal earlier decisions of NR through the Schedule 8 procedures.

4.2.9. The GC representatives present at the adjudication were not experts on Schedule 8 of the TAC and if timescales were missed then GC relied on the good faith obligation on the part of NR to find a way to settle the compensation issue.

4.2.10. The agreed Day 42 statement was signed in good faith. The Day 42 statement was agreed for the trains that were visible on the system, but there remained an issue as to compensation for those trains that had been removed from the system.

4.2.11. GC has never claimed to be entitled to compensation under Schedule 4 of the TAC.

4.2.12. GC alleged a breach of good faith on the part of NR because of a failure on the part of NR to reply to correspondence and generally progress the issue of compensation. GC relied on the failure of NR to respond to a letter written under the CPR within the appropriate timescales. GC was entitled to follow the civil proceedings route.

4.2.13. GC considered that the language used by NR at the Level 1 meetings and the representations to the Claims Panel were sympathetic to a compensation payment to GC.

4.2.14. GC agreed that the test of good faith is reasonable commercial standards of fair dealing between the parties. NR's failure to reply to two letters written pursuant to the CPR were examples of a lack of good faith. There was a delay from May to October 2016 and the reply was only made following a formal complaint to the Route Managing Director.

4.2.15. The failure on the part of NR to allow access to permitted paths was a breach of the TAC. The removal of the train paths entitled GC to a payment of compensation under Schedule 8 of the TAC.

4.3. **NR**

4.3.1. The precise detail of the incident at Finsbury Park on 26 December 2014 was not known to the attending NR representatives. Planned engineering work took longer than expected leading to a possession overrun. A Restriction of Use that went on longer than it should have done, causing huge disruption.

4.3.2. An emergency timetable was agreed between GC and NR in a telephone conference on 26 December 2014.

4.3.3. GC agreed to an emergency timetable and by so doing were taken to have agreed to 'P' coding. 'P' Coding is one way to take trains out of a timetable.

4.3.4. NR Controllers followed the NR Performance Manual to agree the emergency timetable and the subsequent 'P' coding.

4.3.5. The effect of 'P' Coding is to remove the timetabled trains from the system. A potential traveller presenting at the station on 27 December 2014 would have discovered that the GC trains had been removed from the train indicator. There was considerable confusion at Finsbury Park on 27 December 2014 owing to large volumes of people trying to travel.

4.3.6. The NR Controllers did not discuss compensation with GC on 26 December 2014, and were not expected to understand the downstream contractual processes.

4.3.7. The two mechanisms under the TAC which provide for compensation, both for franchised operators and open access operators, are Schedule 4 (planned disruption) and Schedule 8 (unplanned disruption). Schedule 4 is for planned disruption against the WTT. GC does not pay an Access Charge Supplement and therefore is only entitled under Schedule 4 for compensation for a Type 3 Restriction of Use, namely one lasting more than 120 hours. This was not a Type 3 Restriction of Use.

4.3.8. The trains subject to 'P' coding would not attract Schedule 8 compensation, but the trains that did run on 27 December 2014 would attract Schedule 8 provisions if appropriate.

4.3.9. The DAG is in place to deal with the developments that happen in the course of the day comparing the timetable that was scheduled with any delays that might take place. The DAG has no relevance because the parties never reached a position of interpretation of delay attribution.

4.3.10. Once the trains had been removed from the timetable in accordance with an emergency timetable agreed with GC then it would not be appropriate to consider that part of the DAG that issues advice for possession overrun. If there was a possession overrun in relation to the emergency timetable, then the DAG advice would be applicable.

4.3.11. Clause 4.8.5 of the DAG had no effect on an agreed timetable, but only as advice for delay that occurs on the day. In the present case, there was no overrun because the timetable had been agreed the night before.

4.3.12. The agreement as to an emergency timetable and the decision to 'P' code the withdrawn trains meant that there was no need for NR to have any further discussions with GC.

4.3.13. NR considered that the variation of timetable that had taken place was pursuant to Condition D3 of the Network Code.

4.3.14. Agreeing an amended timetable at 2100 the night before with GC is no different to having agreed an amended contract six or twelve months previously. An agreement at 2100 may mean that the timings are very short notice, but in terms of compensation there is no difference.

4.3.15. Section 8.1 of the ROC does state that the agreement as to an emergency timetable is without prejudice to other rights. Those rights must be considered by reference to the normal entitlements in the TAC and GC was not entitled to compensation.

4.3.16. NR's position is that once an emergency timetable is agreed, then the removal of train services in accordance with that plan is at the expense of the train operator, and not NR. Had GC agreed to pay the ACS then GC would have received compensation.

4.3.17. NR agreed the emergency timetable. There is no written evidence of the consent of GC as specified in Condition D3.

4.3.18. 'P' in 'P' code is short for 'planned'. It is possible to cancel a train (in the following day's timetable) either before or after 2200 and include something other than a 'P' code.

4.3.19. It would have been possible to cancel GC trains and place some overrun code against them for 27 December 2014. This would have had the effect of showing on passenger screens that the relevant trains had been cancelled and GC would have been entitled to compensation under Schedule 8.

4.3.20. The root cause for the need to agree an amended timetable was the possession overrun at Finsbury Park on 26 December 2014. However, there was no overrun for the purposes of coding because an amended timetable had been agreed.

4.3.21. Section 8 of the ROC dealing with the need to act without prejudice to GC rights only applies to trains that run the following day and not to trains where there is an agreement to remove them from the timetable.

4.3.22. NR has acted in good faith at all times in its dealings with GC.

4.3.23. There was a willingness from everybody concerned to try and find any opportunity to provide GC with compensation that was allowed under the contract. There was an investigation whether an ex gratia payment could be supported.

4.3.24. The civil proceedings notice was not relevant because the contract provided for a dispute framework to be followed.

4.3.25. GC signed the Day 42 agreement in February 2015 but there is no suggestion on the part of NR that this amounted to a waiver of right.

5. Analysis and consideration of issues and submissions

5.1. The facts underlying this dispute are straightforward. In accordance with one of my directions, the parties were able substantially to agree a chronology of agreed facts.

5.2. On 26 December 2014 when it was realised there was going to be a possession overrun at Finsbury Park that would reduce the available Network capacity on 27 December 2014, a number of telephone conferences took place between the relevant industry parties. At 2100 an NR telephone conference call took place when an emergency timetable was agreed between NR and GC. There is an issue between the parties as to whether the emergency timetable was loaded onto the TRUST system prior to 2200, or sometime later.

5.3. The timing of 2200 has significance because the definition of 'Applicable Timetable' in Schedule 8 of the TAC states, *'Applicable Timetable means in respect of a day, that part of the Working Timetable in respect of that day which is required to be drawn up in accordance with Condition D2.1.1 of the Network Code as at 2200 hours on the day prior to that day, and which is applicable to the trains.'*

5.4. Upon agreeing the emergency timetable, NR's Controllers applied the 'PD' cancellation code to reflect the timetable amendments. NR considered that this was standard practice which reflected the agreement as to an emergency timetable reached between the parties before 2200 on 26 December 2014. It is common ground between the parties that 'P' coding disentitles GC to claim compensation under Schedule 8 of the TAC. GC did not appreciate until 5 January 2015, that the part cancelled trains had been 'P' coded.

5.5. GC is an open access operator. Model-Clause Schedule 4 was adjusted by the ORR during the TAC approval process. The Periodic Review 2013 (PR 2013) states that the Schedule 4 regime is designed to compensate train operators for the financial impact of planned possessions where operators are given restricted access to the Network principally as a result of NR undertaking engineering work. Schedule 4 payments are funded through an access charge supplement (ACS) paid to NR by franchised passenger train operators in return for full Schedule 4 compensation. The ACS total reflects the amount NR is expected to pay out in Schedule 4 possession compensation over the control period.

5.6. An open access operator may opt to pay ACS in order to receive Schedule 4 compensation for all types of Restriction of Use. GC chose not to pay ACS and therefore is only entitled under Schedule 4 to compensation for Type 3 Restrictions of Use, namely single possessions of over 120 hours which was not the case on 27 December 2014. GC suggested that it had tried to join the ACS regime, but for the purposes of this dispute the parties were agreed that Schedule 4 compensation did not apply to GC. If GC were to be compensated under the TAC, then Schedule 8 was the operative schedule.

5.7. If a Restriction of Use of similar duration to the overrun of possession on 27 December 2014 had been notified under Schedule 4, franchise operators would have been entitled to compensation for a Type 1 Restriction of Use (as defined in their TACs), whereas GC (not being an ACS payer) would not have been so entitled.

5.8. The central issue in this dispute is therefore the interpretation of the TAC in circumstances where an open access operator had been notified in accordance with Schedule 4, and agreed with NR an amended timetable for 27 December 2014, and on 26 December 2014 agreed to further changes contained in the emergency timetable, and whether NR is obliged to pay compensation under Schedule 8 of the TAC for the changes made on 26 December 2014 and included in the emergency timetable. The interpretation involves a careful and detailed consideration of the TAC provisions in relation to timetabling change and their consequent effect. GC did not adopt such an approach at the hearing, and it is necessary to deal firstly with each of GC's arguments.

5.9. GC argued that the failure on the part of NR to pay compensation was a breach of Clause 4.2 of the TAC, namely a breach of good faith on the part of NR. GC and NR agreed that the test for good faith is set out in the case of *CPC Group Ltd v Quan Diar Real Estate Company (2010) EWHC 1536.* Good faith in that case was defined as meaning adherence *'to the spirit of the contract, to observe reasonable commercial standards of fair dealing, to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the other party'*. I agree that the case provides a helpful test.

5.10. The thrust of GC's argument was that having fully cooperated with NR in developing the emergency timetable, in the absence of discussion or agreement regarding compensation, then the subsequent actions of NR evidenced a lack of good faith. GC argued that the failure on the part of NR to engage in the process of resolving the dispute amounted to a breach of good faith under Clause 4.2 of the TAC. GC relied on a number of letters that were written to NR, but not acknowledged. NR only replied following a formal complaint by GC to the Route

Managing Director. GC relied on a letter before action written on 9 May 2016 under the CPR and made complaint that NR failed to comply with the CPR timescales.

5.11. NR denied lack of good faith in their dealings with GC. NR relied on a continuing dialogue between the parties and their stringent efforts to find a compensatory contract route for GC. On 11 May 2015, 8 June 2015, 25 August 2015 and 1 June 2016, NR took the issue to NR's Commercial Claims Panel, but to no avail. My interpretation of the papers presented to the Claims Panel is one of some support for GC's position and NR's suggestion of an extra contractual payment be made to GC. The chronology agreed between the parties demonstrates continuing dialogue and numerous meetings. Whilst a satisfactory answer was not achieved by GC, nevertheless the chronology establishes engagement on the part of NR with regard to the matter of compensation for GC.

5.12. I am therefore satisfied that there was no breach of good faith on the part of NR pursuant to Clause 4.2 of the TAC. I express some surprise as to the reliance placed by GC on its letter before action pursuant to the CPR. Clause 13 of the TAC provides a structure for dispute resolution, that disputes shall be referred for resolution in accordance with the Access Dispute Resolution Rules. As presently advised (although not an issue I am required to determine), it is difficult to understand GC's entitlement to resort to the civil courts. GC may have been better advised to consider commencing the present ADA somewhat earlier.

5.13. GC argued that pursuant to Schedule 5 of the TAC, GC had a contractual right to access the Network and that the events of 27 December 2014 prevented GC from exercising such a right. GC further argued that such a prevention of access was a breach of the TAC entitling GC to compensation for relevant losses under the provisions of Clause 8.2 of the TAC.

5.14. Permission to use the Network is subject to the terms of the TAC, which incorporates the Network Code, and it is common ground between the parties that pursuant to the terms of the TAC an emergency timetable had been agreed. In September 2014, in anticipation of the Christmas blockade, GC had agreed to an amended timetable, a reduced timetable compared to GC's standard timetable. I am satisfied that NR was not in breach of either Schedule 5 or Clause 8.2 of the TAC. GC and NR agreed an emergency timetable in accordance with the terms of the TAC. However, interpretation of the contract as to whether any compensation flowed as a result of the timetable change agreed on 26 December 2014 to operate on 27 December 2014, remains to be considered.

5.15. The starting point for any such consideration is Part D of the Network Code which deals with timetable change. The Network Code is incorporated in and forms part of the TAC (Clause 2.1). It is the responsibility of NR to establish a timetable for the Network and a WTT is re-issued in a revised form twice a year. Condition 1.1.8 of Part D states it is the responsibility of NR and all Timetable Participants to collaborate with each other so that the implementation of the procedures of Part D are carried out. In similar vein section 3 of The Timetabling Planning Rules (December 2014) provides at Clause 3.1.3 that '*where a need arises to amend the Engineering Access Statement / Timetable Planning Rules to cater for urgent safety requirements or other emergency situations, all parties concerned will co-operate in accelerating the normal timescales in this Procedure commensurate with the urgency of circumstances*'.

5.16. Condition D3 of the Network Code deals with variations to the WTT, but does not deal *per se* with the procedures and consequences of an emergency timetable being agreed between NR and a Timetable Participant. Condition D3.6.1 states, '*Notwithstanding anything stated in this Condition D3, where Network Rail and all affected Timetable Participants have so consented in writing, a Timetable Variation may be made without the need for compliance*

with such of the requirements of this Condition D3 as are specified in the consent. Such a variation is referred to as a 'Timetable Variation by Consent'.'

5.17. There was no issue between the dispute parties that the emergency timetable had been agreed between them. GC fairly made the point that access to Kings Cross was not available and therefore GC had little option other than to agree an emergency timetable, a process with which GC fully cooperated. However, there was no evidence presented at the hearing as to written consent having been provided in accordance with Condition D3.6.1. GC attached to its Opening Statement a sample form in respect of alterations to the train plan that it submitted to NR and was required to be completed and submitted prior to 2100 the previous day, 26 December 2014. GC argued that the form had not been completed. GC subcontracts its control arrangements to XC Trains who were closed for the Christmas period and it was not possible, therefore, to submit the form. Whilst the status of this form is not entirely clear to me, nevertheless I am satisfied that there was no evidence of written consent on the part of GC presented to the hearing that would satisfy Condition D3.6.1.

5.18. Condition D3.8.1 provides as follows, *'In addition to any variation to the New Working Timetable or Working Timetable arising pursuant to the procedures set out in this Condition D3, variations may also arise from time to time by reason of the operation of the Railway Operational Code (ROC) and this Condition D3 is subject to the operation of that Code'*. The ROC has several common elements including:

5.18.1. A procedure for notification of and communication in relation to Disruptive Events or reasonably foreseeable Disruptive Events

5.18.2. Emergency timetable procedures in the event of an Extended Disruption.

5.19. The objective of the ROC is to sustain and where necessary restore expeditiously the operation of services in accordance with the WTT and in a manner consistent with the ORR's ROC criteria. NR and each Train Operator is required to comply with the ROC.

5.20. A matter of some importance is the stated relationship of the ROC with the performance regime of the TAC. Clause 8.1 of the ROC states *'The provisions of the ROC shall have effect without prejudice to any regime established between Network Rail and a Train Operator in or pursuant to their Access Agreements in relation to any incentives and payments associated with the performance of their respective obligations under that agreement'*.

5.21. NR argued that an event of extended disruption occurred on 26 December 2014 and NR's Controllers followed the ROC and the emergency timetabling procedure. NR's Controllers followed NR's Standard National Control Instructions. NR was very clear that once the emergency timetable had been agreed with GC, then GC *'in effect agreed to Network Rail P coding services so that the real-time industry train running system TRUST could be updated to reflect the timetable agreed'*. NR confirmed that Route Control Managers did not discuss compensation arrangements and there was no requirement to do so. It was their responsibility to make sure that the railway Network could operate as effectively as possible. GC had agreed to an emergency timetable and NR submitted, therefore, that insofar as 27 December 2014 was concerned, there were no cancellations and the DAG had no relevance or application.

5.22. The difficulty with NR's approach is that it placed too much reliance on the sophisticated mechanical practices that operate on the railway Network, in particular the TRUST system. The NR approach did not in my view give proper consideration or due weight to the

interpretation of the contractual matrix that exists between the parties. Clause 8.1 of the ROC states that it shall have effect without prejudice to the performance regimes. NR did not in my view proceed to a consideration of whether the agreement as to an emergency timetable had any effect on *'any incentives and payments associated with the performance'* as is required by the ROC. NR was clear that it was the Route Control Managers who took the decisions and they were not in any way concerned with compensation.

5.23. The difficulty for NR is that once the decision had been reached by the Network Control Managers, no evidence was produced to show whether anyone in NR considered what was required by Clause 8.1 of the ROC. By the time the matter reached NR's Claims Panel the only real option being discussed was an extra contractual payment. The difficulty with an extra contractual payment is that it would have apparently required government approval. It would have needed to demonstrate value for money and that it would not unduly discriminate in favour of GC. I have seen no evidence of any consideration by NR of what was required under Clause 8.1. In other words, once the 'mechanical decision' had been taken there was no further proper consideration of the contractual matrix.

5.24. Mr Wall of NR was very clear in his answers to me, namely that once an emergency timetable was agreed then it was that timetable for the day that became subject to the provisions of the Schedule 8 performance regime, and there was no need to look any further. As mentioned in 5.22 this approach does reflect a reliance on process, without proper consideration of the requirements of the contract. I do not know the extent to which an open access operator was properly considered by the authors of the process manuals, but my task is to provide an interpretation of the contract between the dispute parties.

5.25. I do not accept that in considering the without prejudice provisions of ROC, NR is entitled to ignore the trains that are cancelled, and only apply the performance regime to those trains that remain in the emergency timetable. That very narrow interpretation of events seems to me to ignore the consequences of an engineering overrun caused by NR. In the case of GC, an open access operator, the cancellation of a number of trains was then ignored for the purposes of compensation. There may have been an agreed emergency timetable in place at 2100 the day before, but for GC the problems were just beginning. There is considerable work to be undertaken as to the rearrangement of staff rosters, stock movements and the putting in place of detailed arrangements for GC customers many of whom would have booked seats on cancelled trains. Such an approach also fails to allow proper consideration of the performance regime insofar as NR is concerned and the attribution of responsibility for the overrun.

5.26. In the House of Lords reported case of *Investors Compensation Scheme v West Bromwich Building Society (1988) 1 WLR 896,* Lord Hoffman set out what are now regarded as the six established principles of contract interpretation. The first two relevant principles being:

5.26.1. Interpretation is the ascertainment of the meaning which the documents would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

5.26.2. Background knowledge includes absolutely everything which would have affected the way in which the language of the document would have been understood by a reasonable person.

5.27. The railway industry seeks accurately to identify and attribute the cause of delay on the system as a matter of prime importance to improve operational performance. Delay

attribution is a core element of daily railway practice. The Delay Attribution Board issues the DAG, which is regularly updated following consultation and then ORR approval. The DAG is incorporated into and forms part of the Network Code: it is therefore part of the matrix of contractual Track Access documentation.

5.28. The Christmas blockade in 2014 at Kings Cross has been the subject of much public comment. The material fact for the purposes of this decision is that owing to an incident at Finsbury Park on 26 December 2014, NR was unable to reopen the infrastructure at Kings Cross to permit the previously agreed timetable to operate on 27 December 2014. There was a possession overrun and delayed hand back. Since NR was fully in control of the work, it must follow that if there is to be a consideration of attribution of both cancellations and delays and associated financial loss, then it would be attributed to NR and not to a Train Operator. GC has been consistent in its view that the overrun of the possession on 27 December 2014 was caused by NR and the resulting financial loss caused to GC should be attributed to NR.

5.29. I am satisfied that applying Lord Hoffman's test set out above, section 8.1 of the ROC would convey to a reasonable person having a background knowledge of both the railway industry and the possession overrun on 27 December 2014, that GC was entitled to be compensated for their losses under Schedule 8 of the TAC. The possession overrun was the responsibility of NR and a reasonable person with the necessary background knowledge would determine that GC should be compensated. GC did agree an emergency timetable with NR, but the ROC establishes that it was without prejudice to a consideration of the performance regime. I find that NR was in error to regard the agreement of an emergency timetable before 2200 on 26 December 2014 to be justification not to consider the performance regime in respect of the cancelled GC trains. I find GC was correct in their expectation that, following the agreement of an emergency timetable, Schedule 8 of the TAC should have been applied in terms of compensation for their cancelled trains.

5.30. The question of quantum of losses was argued at the hearing and the parties agreed that if I determined that GC was entitled to be compensated, then the parties would agree the appropriate figure. I therefore direct that the quantum figure be agreed within the next 28 days and notified in writing to the Secretary. In the unlikely event that the parties cannot agree a figure, then I will give further directions to enable the quantum figure to be determined.

5.31. This case concerns a consideration of Clause 8.1 of the ROC for the specific disruption event (possession overrun) that took place on 27 December 2014, but there may be other disruptive events when Clause 8.1 should be carefully considered, namely, for example, flooding and terrorist threats. If the provisions of Clause 8.1 of the ROC are not relevant, then the Part D Procedures of the Network Code would be applicable, allowing the appeal and dispute options to be available to the dispute parties.

5.32. It is necessary for me to mention the DAG which does provide guidance as to the attribution of a delay code in circumstances of a possession overrun. The DAG (effective 13 October 2014) is issued by the Delay Attribution Board to industry parties who are expected to give due regard to the Statement of Good Practice. I consider two sections to be helpful.

4.8.5 Possession Overruns
Where a possession is likely to, or has overrun (and a delay is likely to be caused owing to a late hand back), an incident should be created for each such event. The details to be recorded must include the identification of the nature of works being undertaken, the estimated time of overrun, line(s) affected, and details identifying from where the information was received. The incident should then be attributed to Delay Code I5. ...

3.2.8 Categories of TRUST Delay Code and their default attribution
P* Codes may also be used to avoid allocation of particular 'Minutes Delay' and/or Reliability Events [cancellations] to either Track Access Party and hence exclude them totally from the Performance Regime. The Codes PE, PG are to be used when a planned train cancellation does not have its schedule cancelled in the Integrated Train Planning System (ITPS). All ITPS cancellations are automatically coded PD. Staff entering schedules into TRUST/TSI must not use this latter code. ...

In answer to a question raised by one of my Industry Advisors, NR confirmed that the PD code had been used by their Controllers on 26 December 2014 which appears to be contrary to the DAG.

5.33. NR argued that the DAG was not relevant. The agreement as to an emergency timetable on 26 December 2014 meant that there were no cancellations on 27 December 2014. There was a planned timetable in place. The DAG therefore had no application to this determination. I am not required to decide on this issue because I have reached a GC entitlement to compensation by another route. However, it seems to me that this is an important issue, not least because the DAG appears to offer advice in circumstances similar to the factual issues in this case. NR's insistence that an emergency timetable prevents consideration of compensation for the cancelled trains appears to me to ignore the real consequences of a possession overrun. GC cooperated and agreed an emergency timetable, but GC then had consequential expenses caused by the cancellation of its trains. To ignore the cancelled trains seems to me to have been an omission on the part of NR. The reasonable person with background knowledge would I think have come to a different interpretation. Therefore, for future reference I would ask the Secretary to invite the Delay Attribution Board to consider offering further advice in circumstances where an emergency timetable is agreed in advance of a pending possession overrun and the applicability of the DAG.

5.34. There is one final matter which I need to address, namely the process of recording and notifying performance information. Schedule 8 of the TAC provides for a statement (known as a Day 2 statement) to be issued by NR to GC. In answer to a question raised in advance of the hearing, both parties confirmed that several years ago, they had come to an agreement not to use this procedure. Operationally, GC has few delays and cancellations. GC found it easier to check attribution manually in TRUST on Day 2. Schedule 8 also requires a further statement (known as a Day 42 statement) when the Schedule 8 payments are agreed for a specified period. On 27 February 2015, a Day 42 statement for the relevant period (period 5, 2014-2015) was signed by both parties and NR made a payment to GC to reflect the Schedule 8 position for the period. However, in agreeing the statement no account had been taken of the outstanding claim by GC for the cancellation of its trains due to the possession overrun on 27 December 2014. During submissions both parties made clear that these arrangements were adopted as a matter of expediency. There was no suggestion of either party having waived its contractual rights. The detailed chronology, helpfully agreed by the parties, made clear that the matter of GC's claim continued to occupy a substantial amount of meeting and correspondence time. I am satisfied there is no need for me to make a determination in relation to the issue of waiver.

5.35. NR and GC made no application for costs.

6. Determination

6.1. Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues,

I determine

6.1.1. NR was not in breach of Clause 4.2 of the TAC. NR did not fail to act in good faith in dealing with GC's claim for compensation under the TAC.

6.1.2. NR did not fail to provide GC with access to the Network on 27 December 2014 and, therefore, NR was not in breach of Clause 8.2 and Schedule 5 of the TAC.

6.1.3. GC was not entitled to claim compensation under Schedule 4 of the TAC.

6.1.4. NR staff entering schedules into the TRUST / TSI system on 26 December 2014, were not entitled to use 'PD' coding.

6.1.5. In February 2015, GC was not compensated accurately in accordance with the possession overrun on 27 December 2014.

6.1.6. The ROC procedures take effect without prejudice to any regime established between NR and GC in relation to any incentives and payments associated with performance. A reasonable person having background knowledge would regard a correct interpretation of the ROC as providing GC with compensation assessed in accordance with Schedule 8 of the TAC.

6.1.7. GC is entitled to compensation assessed under Schedule 8 of the TAC in relation to the part cancellation of its train services on 27 December 2014. NR and GC are to agree the calculation of compensation within 28 days and the agreed payment is to be made in the next relevant Day 42 statement. The parties are to notify the Secretary of the details of the agreed amount and payment. If the parties are unable to agree as directed, then I will make further directions for the sum to be assessed.

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

S.E.Murfitt

Stephen Murfitt
Hearing Chair

1 February 2017