ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA35
(following a hearing held at 1 Eversholt Street, London, on 17 July 2018)

Present:

The appointed Adjudication Panel (the "Panel"):

Hearing Chair:	Andrew Long
Industry Advisors:	John Boon Martin Shrubsole

Dispute Parties:

The Chiltern Railway Company Ltd ("Chiltern")

Peter Finch	Head of Performance
Gavin Panter	Operations Director

Network Rail Infrastructure Ltd ("Network Rail")

Tamzin Cloke	Route Contracts Manager (LNW)
Nicola Mansell	Route Performance Improvement Manager (LNW)
Mark Southon	Delay Attribution Specialist
Emily Christelow	Legal Counsel
Clare Dwyer	Legal Director, Addleshaw Goddard LLP

Interested parties:

None

In attendance:

Tony Skilton, Committee Secretary
Stenographer from Ubiqus
Sophie Betts (on Work Experience placement with Addleshaw Goddard LLP)

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Abbreviations

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
"DAB"	means Delay Attribution Board
"DAB 45"	means Delay Attribution Board Guidance No: DAB-45
"DAG"	means Delay Attribution Guide effective 1 April 2017
"DAPR"	means the Delay Attribution Principles and Rules
"London Midland"	means London and Birmingham Railway Ltd
"Rule"	refers to the Access Dispute Resolution Rules
"Secretary"	is the Committee Secretary of the Access Disputes Committee
"TAA"	means the Track Access Contract/Agreement between the parties to this dispute
"TIN"	means Trust Incident Number, TRUST being the system used to monitor the running of trains on the Network
"Virgin"	means West Coast Trains Ltd
"WCML"	means the West Coast Main Line

Summary of the dispute

2. On Wednesday 19 April 2017 there was a major lineside cable fire in the South Hampstead area which resulted in severe damage to the signalling equipment on the WCML and a power failure at London Euston station. These circumstances caused significant disruption to services which use Euston, with trains unable to run into or out of Euston station between 13 50 and 22 25 except for a period between 18 45 and 19 59 when some movements were possible, but station lighting issues made it necessary to close the station from approximately 20 00 until 22 25 until adequate lighting was capable of being provided.

3. In accordance with industry arrangements, passengers displaced from WCML services were directed to and from London on other operators' trains, including those provided by Chiltern between Birmingham and London Marylebone. Due to the resulting overcrowding of its trains and at stations along its routes, Chiltern incurred station delays totalling 27 minutes of station overtime resulting in 57 minutes payable under the TAA Schedule 8 provisions.

4. Network Rail initially attributed the incident (TIN number 055019 "Lineside Cable Fire SOH") to itself and included Chiltern's delays with the Delay Minutes recorded as the view was taken in real time that the overcrowding experienced by Chiltern was due to the cable fire.

5. Subsequently, on "Day 2", Network Rail reviewed the occurrence and created new incident TINs and re-attributed delays (and the associated reactionary delays) to new Prime Causes as considered appropriate. Consequently, with the immediate cause of Chiltern's station delays having been passenger overcrowding, specific TINs were set up for each such delay and Chiltern's Delay Minutes placed in them, with Delay Code RB ("Passengers Joining or Alighting").

6. Chiltern contends that its delays should remain attributed to Network Rail under Delay Code YX due to the cable fire being the reason for the overcrowding which delayed its services.

7. On 14 December 2017 the Parties submitted to the DAB a joint Request for Guidance on this attribution, which guidance (Guidance No: DAB-45) was ratified at a meeting of DAB on 13 March 2018 and issued to the parties on 14 March 2018. The DAB agreed with Network Rail's attribution to Chiltern, though the DAB was not unanimous. Guidance No: DAB-45 is reproduced at Appendix "B" to this determination.

Procedural history of this ADA

8. Chiltern served Notice of Dispute on 27 March 2018 indicating appeal against the DAB Guidance pursuant to Condition B2.4.4 and noting that under Rule B6 the dispute would be referred to an ADA. The Secretary registered the dispute as ADA35. I was appointed as Hearing Chair on 29 March 2018 and after liaison with the Parties the hearing date was set for Tuesday 17 July 2018.

9. On my behalf, under Rule G16 the Secretary required Chiltern to serve its Statement of Case by 17 00 on Tuesday 17 May 2018, Network Rail to serve a Statement of Defence by 1700 on Tuesday 12 June 2018; Chiltern to serve any response statement by 17 00 on Tuesday 26 June 2018 and, by 17 00 on Friday 6 July 2018, Chiltern and Network Rail to serve any written legal submissions not already put forward.

10. Chiltern served its Statement of Case to the Secretary on 17 May 2018 but omitted to serve it to Network Rail. When this omission was addressed, Network Rail was given an extension until 17 00 on Friday 15 June 2018 to serve its Statement of Defence, which it did. Chiltern then served its Statement of Response on 26 June. On 6 July Network Rail served its legal submissions; Chiltern had nothing further to add.

11. On 10 July 2018 the Secretary submitted to the parties a list of issues of law which I had identified as arising in this dispute (as required by Rule G9(c)), accompanied by certain points for clarification. This was followed, on 11 July 2018, by a list of questions which I had compiled to enable the Parties to be prepared

for issues which I wished to explore at the hearing. Some documents of which the Panel would wish to have sight were helpfully provided for the hearing.

12. 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. I regard the transcript of the hearing as being an aide memoire for the Panel in its consideration of the issues and not a document for issue to the Parties or for eventual publication.

Evidence and submissions

13. The hearing took place on Tuesday 17 July 2018. Each Party made opening statements, responded to questions from myself and the Industry Advisors, and had opportunity to make a closing submission. The Parties' respective statements of case also recorded matters of evidence and where that evidence was accepted by each Party it has been treated as admitted fact.

Preliminaries

14. I have taken account of all of the submissions, arguments, evidence, answers to questions and information provided over the course of this dispute process, both oral and in writing. This is so even though only certain parts of this material may specifically be referred to or summarised in this determination.

15. I am satisfied that the matter in dispute raises issues which should properly be heard and determined by an ADA duly convened in accordance with Chapter G of the Rules.

16. By Rule A5 I must reach my determination 'on the basis of the legal entitlements of the Dispute Parties and upon no other basis', which I do.

17. I declared at the outset of the hearing that I am a comparatively frequent user of both the Virgin WCML and the Chiltern services between Birmingham and London (approximately thirty times per year). I do not consider that that constitutes any inhibition to my determining this case.

Jurisdiction

18. From the Statements of Case and subsequent material it appears that this ADA was intended to be brought on two bases:

    (a) Under paragraph 16.1, Schedule 8 of the TAA by which (after other procedures have been followed – and the Parties agree that they have been) either party may refer a notified dispute concerning performance sums for resolution in accordance with the Rules; and

    (b) Under Condition B2.4.4 of the Network Code (incorporated into the TAA by Clause 2.1 of the TAA) by which parties who cannot agree on the attribution guidance of the DAB must refer the matter for determination in accordance with the Rules (in the opening paragraph of the Notice of Dispute).

19. Under Rule B6 all disputes referred under Condition B2.4.4 of the Network Code must be referred to an ADA in accordance with Chapter G of the Rules. The dispute referred under paragraph 16.1, Schedule 8 of the TAA has been determined within this same ADA without objection from either Party.

Accepted facts

20. The principal facts are not in dispute. The Parties agreed the summary of facts set out in DAB 45 and provided further material at the hearing. Neither side challenged the principal facts provided by the other.

21. The subject matter of the dispute is the attributable reason for the delay to all five Chiltern services from Birmingham Snow Hill to London Marylebone due to leave Snow Hill between 17 52 and 20 15 on Wednesday 19 April 2017. At the hearing a schedule was produced setting out where each affected train incurred its portion of the total 27 minutes total delay as follows:

> The 17 52 three minutes at Birmingham Moor Street.
>
> The 18 12 three minutes at Birmingham Moor Street and two minutes each at Solihull, Dorridge, Warwick Parkway/Warwick and Leamington Spa.
>
> The 18 40 two minutes at Leamington Spa.
>
> The 19 17 two minutes at Birmingham Moor Street and five minutes at Hatton.
>
> The 20 15 four minutes at Birmingham Moor Street.

22. The Schedule 8 minutes (see below) payable and in dispute amount to 57. This differs from station overtime minutes because a) many of the delays identified were 'below threshold' (normally delays of fewer than three minutes are excluded from Schedule 8 calculations), and b) the overtime on the 18 12 and 19 17 resulted in reactionary delays to other services which are therefore attributed to those Chiltern services. The total of 57 Payable Schedule 8 minutes is debited as 3 minutes against the 17 52, 21 minutes against the 18 12 and 33 minutes against the 19 17.

23. There are two main lines between Birmingham and London and three principal services. On the West Coast Main Line, Virgin and London Midland (as was in 2017) services run from Birmingham New Street to London Euston. The Virgin services during the day are three per hour, principally served by 11 and 9 coach Pendolinos, with occasional 5 coach Voyagers. Those are express services to London each with generally only three stops. London Midland (as was) stopping services also run on the WCML between New Street and Euston, operating via Northampton.

24. There are three principal stations in central Birmingham, New Street, Moor Street and Snow Hill. The Chiltern services subject to this dispute start from Birmingham Snow Hill, located in the heart of Birmingham's office district. They run first to Birmingham Moor Street located conveniently for Birmingham's main shopping areas. Moor Street has Platforms 1 and 2 on the Through line; Platform 1 for trains in the direction of London is particularly narrow. Services can start at Moor Street not using those platforms but Platforms 3 and 4 instead. Moor Street has six entry automatic ticket barriers and a small area from the main entrance to the barriers; it is not what would normally be known as a concourse.

25. The station operator for Moor Street is Chiltern. However, far more services are operated at Moor Street by what is now West Midlands Railway. These principally suburban services run in the south easterly direction to more than 20 stations towards Warwick (on the line to London) and towards Stratford-upon-Avon. In the direction of Snow Hill, London Midland services from Moor Street go on to take the Stourbridge line to Stourbridge, Kidderminster and Worcester together with intermediate stops. Generally, six West Midlands services per hour run through Moor Street in each direction (sometimes more at peak times) in addition to the Chiltern services.

26. Birmingham New Street and Birmingham Moor Street stations are close to each other, there being just a couple of hundred yards distance, signposted as it is a regularly used and recommended route for changing trains. The distance from the New Street concourse to the Moor Street platforms is similar to the distance *within* some of Britain's largest stations. For the purpose of passengers changing trains the walking time is shown as eight minutes.

27. On the day in question the practical effect of the lineside fire was to close the WCML from mid-afternoon with no WCML trains able to run from Birmingham to Euston. The last Virgin train to leave Birmingham for

Euston was the 14 30; passengers for the 14 50 and subsequent services arriving at Birmingham New Street would have been advised to travel by Chiltern services from Moor Street (and passengers at Birmingham International on the WCML advised to travel back to New Street and thence onto the Chiltern services at Moor Street).

28. This advice is given in accordance with pre-agreed arrangements for dealing with major disruption, covered by so-called Customer Service Level 2 ("CSL2") protocols between operators. In this instance Virgin and London Midland declared 'CSL2' the effect of which is to place an obligation on Chiltern to accept ALL Virgin and London Midland (as was) tickets. This is in addition to Chiltern's ordinary obligation to accept both its own tickets and those available for "all permitted routes". The only circumstance under which Chiltern could decline to accept such not normally valid tickets is if it too declared 'CSL2'. Although Chiltern was concurrently experiencing some disruption because of signalling problems at Marylebone, it was not, on this date, suffering such major disruption as to permit such a declaration (and therefore to refuse to convey some ticket-holders).

29. The mechanics of what happened to cause the station overtime is straightforward and not seriously in dispute. When the WCML was closed many passengers intending to use the WCML from New Street followed the advice, natural route and right (pursuant to ticket acceptance) to walk to Moor Street and board Chiltern services. The five services attracting Delay were diagrammed for respectively 272, 204, 272, 136 and 408 seats. No evidence was given that any of these services were short-formed, but equally none were in a position to be strengthened. The capacity, and expected loadings, of the thrice hourly Virgin Birmingham to Euston Pendolino services (whether of 9 cars or 11) far exceed the capacity of those contemporaneous Chiltern services. Whilst it is not known how many WCML passengers transferred to Chiltern the straightforward and obvious conclusion is that a considerable number did. Even though Chiltern services coped from mid-afternoon without station overtime delays (save to the limited extent the subject matter of this case), when delays to Chiltern services did occur the reasons were sufficiently obvious that they were directly coded by Network Rail to the lineside fire.

30. Chiltern's explanation of the delays (not seriously challenged and which I accept) is that this ultimately made services that were already regularly busy full with some standing. This is not just a matter of an increased number of passengers boarding at Moor Street: at this time of the evening there are many regular passengers, including those who had boarded earlier at Snow Hill, who get off at subsequent stations, as well as others joining. At subsequent stations the time needed for the increased numbers of passengers to get on or off a crowded train exceeded the allowed Station Duty time, and therefore resulted in Minutes Delay. Whilst there was less direct evidence of this than might be expected the inferences are clear. For the longest delay, the five minutes overtime at Hatton for the 19 17 from Snow Hill, Chiltern provided CCTV evidence showing the crowding on the train. That train is a booked connection with train 2L77 from Stratford -upon-Avon which terminates at Hatton, where passengers transfer to the 19 17. On this occasion some passengers could not get on the 19 17 train due to it being already full and standing.

Disputed facts

31. In the Statements of Case there was an issue as to what normally happened when there was not displacement of passengers from another route. Chiltern asserted that its services do not suffer from delays with an RB code (passenger loading). Network Rail disputed this.

32. The events of the specific day need to be compared to what usually happens on a weekday at this time. Services will of course be busy both with those heading to London but also those returning to West Midlands areas after work or shopping in central Birmingham. There were three items of evidence about other (equivalent) days. Network Rail, in Appendices to its Statement of Defence, set out the number of instances from 1 January 2014 to 8 June 2017 where (without any disruption to the WCML) delays attributed to passenger loading issues had been accepted by Chiltern within the relevant TRUST section which extends

beyond the specific station. The notes to the table set out the incidents where passenger loading/ overcrowding can be specifically identified to the station. This was done by reference to the Coding RB/R8 for Passenger Overcrowding.

33. The figures are for station specific incidents (with total numbers in brackets) – Birmingham Moor Street 93 (all), Solihull 186 (134), Dorridge 16 (all), Warwick 35 and Warwick Parkway 85 (combined 203), Leamington Spa 81 (all) and Hatton 3 (16). These figures are for a period of almost three and a half years. Network Rail placed some emphasis on this point in its opening statement, focussing on the figure of 93 incidents of overcrowding at Moor Street in the 3.5 years from the start of 2014 (or 4.5 years according to the opening statement). The figures and timescales referred to in the opening statement are slightly different, but not materially, from those in the helpful Appendix "A" to Network Rail's Statement of Defence, an analysis by Nicola Mansell, which is used above. In any event the figures relate to no more than one Chiltern service per fortnight at Moor Street.

34. The two elements of evidence on this from Chiltern were advanced at the hearing. First, Chiltern had carried out a passenger count at Moor Street on Thursday 9 March 2017. The 17 52 had 25 free seats out of 272. The 18 12 had 43 free seats out of 204. The 18 40 had 90 free seats out of 272. The 1917 had 9 people standing with a full seated capacity of 136 (a two-car train). The 20 15 had 229 free seats out of 408. Secondly the Panel asked for a comparison with more closely related days. Helpfully during an interval Chiltern ran a filter for R coded delays for the same services on the four Wednesdays spanning the incident, two before and two after. There were no (above threshold) delays recorded for those services on those equivalent days.

35. The conclusion that the Panel reaches is that there were not normally passenger overcrowding/loading delays on equivalent services; Chiltern's evidence clearly demonstrates this. Network Rail is technically correct that it would be wrong to say that Chiltern never suffers such delays, but even the ones shown by Network Rail are comparatively infrequent, amounting at most to one per station every two or more weeks. Accordingly the Panel concludes that these delays on 19 April 2017 would not have occurred but for the WCML closure.

Delay attribution process

36. Network Rail is obliged to identify responsibility for and the causes of delays both by virtue of the Network Code and the TAA. Part B of the Network Code provides that Network Rail is to operate a Performance Monitoring System, recording information including the times at which trains pass specific points, and the differences between those times and the times published in the Working Timetable. Condition B2.1 of the Network Code provides that Network Rail must ' *in relation to any train delay ...determine and record the persons and causes which are responsible for the delay.....and, where more than one , so far as practicable, the extent to which each person or cause is so responsible*'. This is similar to Clause 5.1(d) of Schedule 8 to the TAA '*So far as ... reasonably able to do so (Network Rail) shall identify whether responsibility for incidents causing Minutes Delay ... is to be allocated to Network Rail or to the Train Operator ...*'.

37. Subsequently if Network Rail and the Operator do not agree on the allocation of responsibility, the matter may be referred to the Delay Attribution Board (Condition B2.4.3) as happened here, resulting in the majority decision set out in DAB 45. Subsequently, again as has happened here, the dispute may be referred to (this) Access Dispute Adjudication.

38. DAB 45 contained a thorough explanation of the dispute, the arguments and of the relevant provisions to be applied. It concluded (by majority vote) a) at 8.1.1 that '*where the actual Responsible Train cannot be clearly identified then the incident should be attributed to Chiltern ... utilising Delay Code RB*' but *b) at 8.1.2* that '*where the actual responsible Train can be identified (through clear and agreed methodology) then the incident should be attributed in line with prescribed Reactionary Delay attribution rules ...*'.

39. However, at 8.2 the DAB also recommended a fundamental review of the attribution of delays relating to passenger displacement, and a review of the application of Delay Code YX and of the Definitions section of the DAPR.

Delay attribution responsibility under the TAA

40. The delay attribution procedure is set out in the Track Access Agreement between the Parties. This contains at Schedule 8, Clauses 5.1 – 5.4. Those provisions are set out in Appendix "A" to this determination.

41. It will be necessary to apply the exact wording of the TAA to the facts. However, there are a number of initial comments. By Clause 5.1(a) Network Rail 'in assessing the cause of any Minutes Delay ... (shall) take... into account all incidents contributing thereto'. By 5.1(d) Network Rail 'shall identify whether responsibility for incidents causing Minutes Delay is to be allocated to Network Rail or to the Train Operator or to them jointly'.

42. Importantly, in terms of causation, the phrase 'incident is wholly or mainly caused by..' is key. This applies both to Network Rail and Train Operator responsibility incidents at respectively 5.2 and 5.3(a). As explained in the determination of dispute ADA33, this means that the emphasis is on 'causal potency' i.e. what was 'wholly or mainly' the cause. Many other descriptions of the same concept could be used; such as 'the real cause' or 'dominant cause', but the analysis must be by reference to the actual words of the TAA.

43. There is an element of fault based attribution within para 5 of Schedule 8. By 5.2(a) and 5.3(a)(i) responsibility is attributed to a party if an incident is caused wholly or mainly by a breach of obligations under the TAA. Those obligations extend to taking reasonable steps to avoid and/or mitigating the effect of incidents and by 5.1(b) 'any failure to take such steps shall be regarded as a separate incident'.

44. But there is also an element of non-fault attribution. In both 5.2(b) and (c) and 5.3(a)(ii) and (iii) responsibility is attributed 'whether or not Network Rail/the Train Operator is at fault'.

45. As an alternative to attributing responsibility specifically to either Network Rail or to the Train Operator it can be allocated to both of them jointly in accordance with the terms of 5.4.

Delay attribution responsibility under the DAG and Prime Cause

46. However, the TAA is only part of the relevant documentation. By 2.1 of the TAA '*The Network Code ..(is).. incorporated in and forms part of this Contract*'. Accordingly, the extensive provisions of the Network Code are incorporated. The Network Code at Condition B1.3 specifically incorporated the Delay Attribution Guide. The DAG was subsequently renamed the Delay Attribution Principles and Rules, but it was the DAG (version of 1 April 2017) that was in force on 19 April 2017. The DAG/DAPR is a document which can evolve and the Network Code contains a process for revision, involving industry consultation and involvement (but ultimately at the discretion of the Office of Rail and Road), as set out in Network Code Conditions B2.5 – B2.7 and was in the DAG at 1.2.3.

47. A stated purpose is set out at the start of the DAG ' *prime importance to enable all parties to whom delay is attributed to identify action plans to improve operational performance'* The DAG '*gives guidance on coding ..so that there is consistency of application and approach...The DAG deals with the process of identifying the causes of delays..*'.

48. The DAG was a detailed document running to 127 pages in the relevant edition. Section 3 of the DAG set out the basis of attribution. By 3.1.1 '*as this document is a Guide and not a contractual document, the guide may not be a perfect reflection of those contractual entitlements'.* (However, it should be noted that this provision was not included subsequently in the DAPR).

49. Importantly at 3.1.4 it was provided that '*attribution will* ***normally*** *(emphasis added) be to the* ***prime cause*** *of delay, which may be the initial reported cause of delay or the symptom by which a more complex prime cause manifests itself'*. By 3.1.6 '*If an operator's service is delayed due to overcrowding as a result of an operator's train being cancelled or delayed, any delay or cancellation is to be attributed to the prime cause of why the initial train was cancelled or delayed. The same applies to a train running late in the path of the following train.'*

50. The DAG then gives a detailed list of Codes with allocated responsibility to each code. Of relevance here is Code R, Station Operation Causes, and in particular RB. R Codes are '*for delays due to station activities. Incidents are attributable to the company running the train, and not the operator of the station'*. Y Codes are for Reactionary Delays – '*these codes relate to the knock-on effects of late running trains. TRUST will ask the staff to identify the incident causing the original delay to the (other) train involved'*. YX code is '*Passenger overcrowding caused by delay or cancellation of another train or its own late running'*.

51. The DAG is supported by further material including the DAB Process and Guidance Documents. DAB PGD 1 set out the Prime Cause Definition and Example Application. PGD 3 dealt with the application of Y Codes, giving examples. In April 2016 the DAB issued a DAG Briefing Document which dealt with the April 2016 DAG changes including advice as to the use of the YX code.

52. The definition of Prime Cause at DAG 2.7.1, as supplemented by DAB PGD1, is 'The immediate cause or event that results in a delay to a Train is known as 'Prime Cause'. Until a Prime Cause has occurred there will be no delay to a train service. For the avoidance of doubt, 'Prime Cause' cannot be a reaction to a previous incident. In addition, where a delay is caused by a human error or oversight then that delay should be considered as a potential new Prime Cause'. 'One of the key considerations to be made when identifying if an event is a new Prime Cause is what reasonable opportunities there were to mitigate the delay event occurring – if there was opportunity to prevent the occurrence then it **could** [emphasis added: implies discretionary option] be considered a new Prime Cause'.

53. Prime Cause in the DAG therefore emphasises the most immediate cause rather than the 'wholly or mainly' causation test in Schedule 8 of the TAA. There is also an emphasis toward the later, or last, opportunities to prevent/mitigate. To that extent there appears to be a tension between the two provisions which, if applied individually, might produce different outcomes. It is to be noted that delay attribution has two principal consequences. First, as a result of the performance regime money changes hands between parties. Secondly, it is said that a principal purpose of the DAG is to improve performance and reduce delays.

54. The emphasis within the DAG that Prime Cause is (necessarily) used so as to improve operational performance rather than any other type of cause is, at first blush, somewhat surprising. The rationale behind the assertion that a Prime Cause analysis is most effective for performance improvement is not stated. There are other industries which adopt a (very) different approach, such as a root cause analysis, much used for example in accountancy. Many would suggest that, in the case of a fire, it is more effective to prevent the fire than to mitigate its effects once it has happened. However, of course, the best practice is both to seek to prevent the preventable root cause, but then mitigate when incidents do occur.

55. In the last twenty or so years the number of train services and passengers have both increased. The network capacity for trains is more stretched, resulting in proportionately more reactionary delay. The industry has worked to reduce the 'tail of the incident' with a variety of methods including contingency plans, service disruption plans and arrangements for accepting displaced passengers.

56. This DAG Prime Cause approach does require subsequently affected parties to mitigate, so that, rather than total responsibility remaining with the party responsible for a root cause, there is an on-going responsibility on those parties in a position to initiate mitigation. Part of the logic is that there may be opportunities for mitigation that can be pre-planned or which are sensible long term precautions. For example, the power

source to a main line station may be lost due to a fire or similar cause. But it would be sensible or reasonable for an operator of a major railway station to have an alternative power supply. Prime Cause delay attribution encourages such provision, but by reducing the emphasis and incentives in relation to other causes, such as root causes. It does not, however, support a view that inappropriate, or bad, mitigation, is better than no mitigation.

Disputed issues of law

57. These are the issues which I identified for the parties to address.

Q1. On the facts as found determined, are the relevant station overtime delays to be attributed to Chiltern (under Code RB) or to Network Rail (under Code YX)?

Q2. Is the test for Question 1, the application of the provisions of (a) the TAA, specifically the wording at Schedule 8 Clauses 5.1 – 5.3 *or* (b) the DAG (now DAPR) *or* (c) a combination of the two?

Q3. If there is a conflict between the outcomes produced at Question 2 by respectively the TAA and the DAG, which takes precedence?

Q4. Is the Code YX (Reactionary Delay) in the DAG, as properly understood, limited to instances of delays on the same line – or can/should it be used in some circumstances (such as in this case) of a delay said to result on another line to another Train Operating Company's train?

The Parties' respective cases

58. Unsurprisingly each Party sought for the disputed delays to be attributed to the other, using respectively Codes RB and YX. It is fair to say that how each sought to reach that outcome varied over time but, by the conclusion of the hearing, each had fixed on a definite proposition. Network Rail's principal contentions were first that a) Chiltern had failed to take reasonable steps to mitigate/avoid the delay and so was responsible under both Clause 5.3(a)(i) of TAA Schedule 8 and as a new Prime Cause. Secondly that b) Chiltern was responsible, irrespective of any fault, for station operating causes under 5.3 (a) (iii) of TAA Schedule 8 and that, under the DAG, delay due to "passengers joining/alighting" is the Prime Cause, to be coded RB.

59. Chiltern's case was that a) the delays were wholly or mainly caused by the lineside fire which diverted extraordinary passenger numbers as a result, and b) it had taken the correct reasonable steps, calculated to meet the needs of both extraordinary and regular passengers, to mitigate the delays, and c) the TAA provisions took precedence over the DAG, but that in any event the delays could/should be coded YX as a reactionary delay.

60. The remainder of this ADA decision will be structured as follows. First there will be consideration of Network Rail's principal argument focussed on in its written material pre hearing – namely that Chiltern failed to take reasonable steps to mitigate. Secondly Network Rail's other main argument for coding the delays to station operation causes will be considered. That will involve consideration of the concept of 'cause', whether the wording of either the TAA or the DAG should take precedence over the other and the general approach to interpretation/coding. Thirdly, there will be consideration of Chiltern's contention that reactionary codes, particularly YX, should apply. That will involve consideration of the circumstances in which Code YX can apply and Chiltern's proposed 'walking time' methodology. Finally, the outcome of those three aspects will lead to a conclusion as to how the delays should be attributed.

Failure to mitigate/avoid

61. Network Rail contended that there were actions that Chiltern could/should have taken to avoid/reduce the station overtime delays. This was the contention focussed on in much of Network Rail's written material

before the hearing. As explained in Network Rail's Opening Statement 'As set out in 5.9 of Network Rail's Defence, the Prime Cause of the delay was Chiltern's failure to control the volumes of passengers joining /alighting from trains. This was a failure to mitigate, so leading to a new Prime Cause'.

62. This allegation understandably relied on and was in accordance with the terms of both Clauses 5.1(b) and 5.3(a)(i) of Schedule 8 of the TAA and also the equivalent provisions in the DAG, particularly 4.1.5.1. The effect of those provisions is that if Chiltern had not taken reasonable steps to mitigate/avoid then responsibility for the delays would rest with Chiltern.

63. It is relevant to consider the practical situation that Chiltern faced and in particular the requirements and needs of passengers. Chiltern's regular customers would of course wish for their trains to run on time. Those passengers diverted from the WCML and travelling/returning to London were already in a difficult position. First, their planned journey had been cancelled; they had had to be informed of that, analyse the situation and choose an alternative. Having done so, and having chosen the natural course, those passengers would have to journey to Moor Street; a straightforward journey for most travellers familiar with the route.

64. There will however have also been those with disability or infirmity; and those with heavy luggage. They will probably already be somewhat delayed (and frustrated) by the time they arrive at Moor Street. The Chiltern trains they would hope to catch are less frequent, will take longer than the Virgin service and arrive at a different London station than had been planned/expected. For those passengers time will be ticking on; for many there would be a planned onward journey to somewhere else in Greater London or the Home Counties, or even abroad. Connections to the final destination may be becoming tricky and, in the case of the 1917 and 20 15 trains, a possible fear that passengers may miss the final train home.

65. Network Rail pointed to a number of steps that it said Chiltern could and should have taken (though it is fair to say that not all of these were pursued at the hearing). First, it was said that Chiltern could have declined acceptance of Virgin and London Midland tickets. Chiltern would have been obliged to accept 'all route' tickets in any event. Chiltern was also obliged by arrangements with Virgin and London Midland to accept their tickets. Even if such agreements were entered into voluntarily, as between Train Operators, their standing within the overall matrix of contracts, and the actions they might precipitate, must necessarily be of import to, and impact on, Network Rail.

66. However, the National Conditions of Carriage January 2017 edition also provide at 10-2 that, in circumstances which appear to apply here (though this was not raised at the hearing), Operators must carry such passengers. The Association of Train Operators Code of Practice – Provision of Customer Information states at 7.1 'the declaration of CSL2 allows a wider understanding of the situation throughout the industry, notably among other railway undertakings *and is accepted as the trigger required for additional assistance from industry partners'*. By 8.2 'when it goes wrong' 'railway undertakings should identify the most appropriate/regularly used alternative routes ... and communicate them to passengers ... (and) ... provide details of their pre-agreed Ticket Acceptance policies'.

67. It is overwhelmingly clear that Chiltern had little or no practical ability to refuse ticket acceptance and that these arrangements are much to the benefit of passengers. But even if, either on 19 April 2017 or on some other occasion, Chiltern became entitled to refuse Virgin and London Midland tickets, it is necessary to examine the practical effect of such a course of action. Passengers with the immediate financial ability to do so could buy Chiltern tickets to travel and subsequently claim back the cost of their original ticket. For those passengers the outcome would be the same, but with the added delay and complication of ticket purchase followed, after the journey, by the additional work of claiming back. Conversely declining ticket acceptance may well have been in Chiltern's immediate financial best interests; Chiltern received no financial recompense for accepting WCML tickets and for carrying displaced passengers.

68. For WCML passengers bound for London declined ticket acceptance and without the immediate means to purchase a Chiltern ticket, their position would be invidious, with no straightforward rail service available to use and impractical or unattractive alternatives by road. Whilst there are alternative routings from Birmingham to London without using a Chiltern train (by using 'Cross Country Trains' services and changing at Reading or by travelling via Leicester) those journeys are considerably less straightforward and could also introduce overcrowding on the trains used.

69. If ticket acceptance had been declined by Chiltern the outcome would have been a very bad result for passengers and for the rail system.

70. In both its Statement of Defence and subsequently in written legal submissions prior to the hearing, Network Rail contended that 'declining ticket acceptance was appropriate mitigation in order to control overcrowding'. Sensibly Network Rail did not pursue that argument at the hearing. The Panel strongly rejects the suggestion that in these circumstances Chiltern should have declined ticket acceptance, even if it was legally able to do so.

71. It was also suggested that Chiltern could have closed the ticket barriers at Moor Street and used a queueing system for access to trains. Queueing systems can work well for pre-planned events, but this was very different. In this instance there were the usual peak hour Chiltern and Moor Street London Midland customers, as well as the transferred WCML passengers. Closing the barriers would have resulted in the automatic barriers rejecting tickets not normally valid through Moor Street station. Even with additional staff deployed there would be the usual cycle of customers with rejected tickets holding up others, with consequential delay and inconvenience. As Chiltern pointed out, this 'constant swirl round' by the barriers would result in some other passengers thinking 'that's my Stratford-upon-Avon train and that's not affected' and then trying to push past.

72. Ultimately the problem was principally about the number of passengers who boarded Chiltern services at Moor Street. A queueing system would work by reducing the number of people getting on the train at Moor Street at a time when it still had capacity to take them. The effect can be that the train is then on time but with passengers further delayed by being left behind. Again the suggestion must be tested against the facts of that evening. First any passengers left behind from the first train – the 17 52 – would add to the loading of the second train, the 18 12. And so on for each subsequent train, but with the number of passengers being unable to travel increasing cumulatively (except to the extent that some local commuters might use any intervening London Midland services that were due to call at their specific destination).

73. The two main services subject to most relevant Minutes delay were the 18 12 and the 19 17. The passengers refused access to the 18 12 would have had to wait for a service timed to depart 28 minutes later, the 18 40. Passengers not allowed to board the 19 17 would have had to wait 58 minutes for the 20 15. The next train after the 20 15 was the 21 15 not arriving into London Marylebone until after 23 00.

74. It was also suggested that services might start from Platforms 3 or 4 at Moor Street instead of Snow Hill. This would apparently reduce numbers, but Chiltern passengers at Snow Hill could still either a) walk to Moor Street or b) catch a local London Midland service at Snow Hill and get off at Platform 1 at Moor Street; transferring to the Chiltern service via the footbridge. The effect would be to increase the number of passengers passing through an already much pressed Moor Street station. It is possible that some of Chiltern's Snow Hill passengers might, as a result, use alternative local London Midland services from Snow Hill, if such services were running at a convenient intermediate time and were due to stop at their specific station. But if this were achieved it would be by deliberately delaying those passengers and creating difficult/unusual passenger flows at a third central Birmingham station.

75. Under other circumstances Chiltern would have looked to strengthen the services from Birmingham. It could not do so, possibly due in part to a points failure at London Marylebone; trains ran in their usual formation.

Chiltern ultimately ran one late night additional service from Birmingham to Marylebone when able to do so to sweep up any remaining displaced passengers.

76. Mr Finch of Chiltern said that in these circumstances the normal action is to open the barriers, giving as a principal reason avoiding the effect of ticket rejection at barriers. This Panel, including its experienced Industry Advisors, is of the same view. In such instances the safest and best course will almost invariably be to enable as many displaced passengers as possible to travel as train capacity presents.

77. Chiltern accepted that, on the day, the Customer Action Team call-out list could not be located. That list is of extra people who may (or may not) be available. Chiltern asked Virgin (whose cancelled trains were causing most of the passenger displacement) if it could provide additional staff, but Chiltern says that none were forthcoming. As it happened, Chiltern deployed management staff at Moor Street and Leamington Spa and some British Transport Police staff at Moor Street. Chiltern also deployed additional staff within the control room to look at other options such as strengthening services. The call-out list might (or might not) have led to further staff being available; but it would not have made a serious difference on the ground in circumstances where the Chiltern recommendation was to leave the Moor Street barriers open.

78. It was put to Chiltern that the delays were comparatively small and that with some further improvements/ mitigation there would have been no delays. Chiltern's response, which the Panel accepts, is that it was fortunate to be (only) that amount, and if it had not taken the steps which it did then the delays would probably have been greater.

79. The Panel's conclusion is that the allegation of failure by Chiltern to take reasonable steps to mitigate does not succeed. The delays, in the greater scheme of things, were not large. Chiltern took the appropriate and sensible course of allowing/helping as many WCML passengers to travel as soon as there were trains to carry them. The principal methods that would have avoided delay to trains would have been by preventing already delayed and diverted passengers from travelling; in these particular circumstances, those methods would not have been appropriate; overall such methods would have produced a (much) worse outcome. This is a consequence of the (comparatively rare) incident where the unplanned, short notice closure of the WCML has a significant effect on passenger numbers; in circumstances where common sense indicates that Chiltern should both open the Moor Street barriers *and* try to accommodate as many WCML passengers as soon as it is seriously possible to carry them.

Station Operation Causes and Code RB

80. Network Rail's other main argument does not rely on fault by Chiltern being established. Under TAA Schedule 8 Clause 5.3 (a) (iii) if the delay is caused wholly or mainly (irrespective of fault) from any 'act, omission or circumstance originating in connection with or at any station'. The facts of this case fall within the meaning of those words. In essence Schedule 8 Paragraph 5 provides for a 'responsibility' regime where responsibilities, such as Station Operation Causes, are allocated to parties. Those responsibilities are contractually accepted by the parties under the TAA.

81. However, that is, pursuant to the TAA, only applicable to delays 'wholly or mainly' caused by station operating causes. The principal issue is what is (for these purposes) the **cause** of the Minutes Delay, how it should be coded and to whom it should be attributed. The facts make it clear that in some senses both the lineside fire closing the WCML and the overcrowding of the five Chiltern services could be considered causes; the issue is the application of the relevant provisions to the facts. And there are the different TAA and DAG wordings to apply.

82. First, a few words about causes and causation. There are many ways of thinking about causes and numerous different types of causes – causes described as necessary, sufficient, 'but for', underlying, immediate, root, contributory, fundamental and so on. There may be many possible individual causes; and

also that there is not just one cause, but two or more. There may be joint causes, with responsibility to be apportioned between them.

83. The position on the railway network is, of course, complex. The performance regime aims to capture a complex series of events and causal links by attributing responsibility to just one cause or party, with some limited provision for joint responsibility. Simplifying the complex is necessary to prevent the performance management regime from becoming entirely unmanageable. It is therefore unsurprising that it generates disputes such as this or that reasonable people disagree on how to attribute the cause of an outcome. Determining that one simple cause applies to the exception of all others has an element of artificiality. Different views are likely even when all the facts are known; it is commonplace to see disagreement as to the cause of, say, an outbreak of war or the outcome of a sporting event even when all the facts are known.

84. There are also some ways of viewing causation that must be guarded against, especially those where a marginal difference is said, with the combination of other marginally balanced considerations, to cause a much larger effect. An example used in the modern world is 'a butterfly flaps its wings ... and on the other side of the world a tsunami results'. The equivalent in the long ago past was 'for the want of a nail, a shoe was lost and for the want of a shoe ... the kingdom was lost'. These are neither 'immediate' nor 'wholly and mainly' causes, because they only apply if a whole series of other factors all apply, in a somewhat improbable way.

85. It is also the case that there may not be a delay attribution code that is uniquely appropriate, notwithstanding the proliferation of codes. Nor is the process of coding simply a mechanical or straightforward one. Consequently, the system allows for a series of escalations by way of review of the initial coding at the time of the delay. The system requires the exercise of a judgment as to cause. The most important issue to be addressed in any such code is that whilst, to be practical, it may have to include distinctions that can appear arbitrary, it should not generate outcomes that are capricious, or at odds with the commercial or regulatory context within which it operates.

86. A difficulty in interpreting the DAG is the natural tension between the language of 'immediate' cause and the concept of a reactionary delay. The practical effect of reactionary codes is to militate against the apparent strictness (perhaps more apparent than real) of the Prime Cause focus on the immediate (in time) cause. It is therefore entirely unsurprising that, as set out in DAG 45, 'the appropriate use of the YX Code is not properly understood, with Operators and Network Rail inconsistently applying this code'.

The test – TAA, DAG or both?

87. The Parties had differing contentions as to which wording, TAA or DAG, takes priority. As set out above, the TAA incorporates the Network Code so that the DAG is also incorporated. By Network Code Condition A1.1(h) 'in any conflict of interpretation' the provisions of the Network Code take precedence'. However, also as set out above, at the time the DAG provided that it '*reflects the principles of the Track Access Contract in Schedule 8 and in the Network Code as set out in the TAC in Schedule 8 and in the Network Code, Part B. As this document is a guide and not a contractual document, the guide may not be a perfectly accurate reflection of those contractual entitlements* (emphasis added)'. In Appendix D to the determination of dispute ADA33 it was suggested that this 'left no doubt that ... the TAA, specifically Schedule 8 must prevail'.

88. However, those key words underlined above were removed when the DAG became the DAPR on 1 June 2017. The conclusion in Appendix D to ADA33 was that the change 'seems to tilt the balance decisively toward the primacy of the DAG over Schedule 8'. However, the argument does not stop there; there is a contention that the changes on 1 June 2017 were not intended to amount to substantive alteration of contractual rights.

89. These provisions are not straightforward. The conclusion that I reach is that the documents are intended to be read together; this Panel should seek to apply the wordings of both the TAA and DAG together, where possible without direct conflict.

90. As set out in the Rail Regulator's appeal determination of dispute NV33 at paragraph 99 'The proper construction of a contract is a question of law. The process of arriving at the correct interpretation involves having regard to the whole contract, together with its factual matrix which includes its commercial purpose'. In paragraph 100, citing case law, it was said 'the court starts by trying to discover the intention of the parties from the language they have used in the particular clause, considered not in isolation but in the context of the whole contract'. In paragraph 232 it is made plain that the principles of construction still apply to cases such as this, where the contract is not freely negotiated, but effectively imposed by virtue of the regulatory structure.

91. In reading the whole document, including both the TAA and DAG provisions together, it may be necessary to take into account the different tone and language of some of the provisions. In the TAA the main provisions are mandatory ('**shall** be allocated'). Contrast where in the Network Code at Condition B2.2 'due regard' has to be paid to DAG guidance as one of five specific listed sources of information. In the DAG, attribution is 'normally' to Prime Cause, rather than a mandatory phrase such as 'must be', 'shall be' or 'will be'.

92. The outcomes will not always be to what might be what first appears. In fact on the day in question Network Rail created not just TIN 55019 for the lineside fire, resulting in loss of signalling, but six further TIN incidents. These incidents related to three consequential events of loss of power/station evacuation and inadequate station lighting. Of those six TINs originally allocated to Virgin Trains, London Midland and Caledonian Sleeper, we were told that, on re-attribution subsequently, two were accepted as Network Rail, three as 50-50 joint responsibility and one (relating to just one train) remained with Virgin. This helps to demonstrate that what might appear to be the most immediate event in time is not the cause to which the delay is properly attributed. It also demonstrates that the consequences of the lineside fire may be properly attributed to some subsequent events.

93. Some of the other Codes in the DAG constituted a further indication that Coding outcomes are not straightforwardly produced and do not constitute a mirror image of the complex reality of events on the railway network (because they cannot do so). Such codes are PL ('exclusion agreed between Network Rail and the Train Operator'), QT ('delay accepted by Network Rail as part of a commercial agreement where no substantive delay reason is identified') and the Passenger Charter exclusion codes V and X (where causes normally attributed to either Train Operators or Network Rail are excluded).

94. The Panel's approach should also involve the taking into account of all relevant factors, which will include not only both wordings but also the overall objectives, including performance improvement.

95. **So, what is the effect of applying both sets of wordings to the contention that Code RB should be used?** Using the wording of 'wholly or mainly' in applying the provisions of TAA Schedule 8 para 5 leads naturally to the conclusion that the cause was the lineside fire closing the WCML. This is what most ordinary people are likely to conclude; it is the way that the issue would be reported to the wider public. It is the way that the delays were initially coded by Network Rail.

96. There is a close, direct and obvious connection between the WCML closure and delays on Chiltern trains from Birmingham to London. There does not need to be any additional cause or special factor intervening to result in such delays. Importantly some of the intervening actions that could be taken to prevent delays would have made things worse for passengers not better.

97. In terms of the DAG, conversely attribution is 'normally be to the prime cause of the delay'. This is supported by the guidance and examples in the DAG PGDs. Unsurprisingly this a major part of Network

Rail's case for applying station operation codes. In deciding whether the Prime Cause of the delay was the lineside fire or the management of passengers at stations by Chiltern it is necessary to apply the specific wording of the DAG, to see whether it is compatible with the conclusion from the TAA wording.

98. 'The immediate cause or event that results in delay to a train'. Although the word 'immediate' has connotations of close connection in time, and thereby cautions against excessive searching backwards along lengthy perceived chains of causation, an alternative reading of 'immediate' in this context may be a close direct connection (described as 'proximate' in ADA33). This follows the reasoning of the determination of dispute ADP39 'delay should be attributed by reference to which body has the responsibility for the factor which makes the decisive difference (emphasis added) between no Delay Incident and an actual Delay Incident'.

99. 'Until the Prime Cause Event has occurred there will be no delay and without that event, delays would not have occurred'. This part of the definition is clearly met – both the lineside fire and the station operation causes occurred before the delay.

100. 'Prime cause is not a reaction to a previous incident'. Neither Party suggests that the lineside fire is a reaction to a previous incident.

101. 'Where a delay that would not have ordinarily occurred is caused by human error or oversight then that delay should be considered as a potential new prime cause.' The Panel concludes that there was no error or oversight by Chiltern.

102. 'One of the key considerations to be made when identifying if an event is a new Prime Cause is what reasonable opportunities there were to mitigate the delay event occurring – if there was opportunity to prevent the occurrence then it could be considered a new Prime Cause'. The Panel concluded that Chiltern had not failed to mitigate. More importantly, there were no 'reasonable opportunities' to mitigate because the only effective methods of mitigation would have been detrimental both to passengers and also to 'performance' more widely considered to include passenger experience. Even if the language of Prime Cause resulted in focus on 'last opportunity to mitigate/avoid', here there was no such opportunity. In this context Chiltern's actions were not, in the view of the Panel, a "failure to mitigate" but a "refusal to aggravate": To deem any such action as at odds with the interests of the industry would be entirely wrong.

103. The facts of this case are unusual in certain respects. A contrast is to be drawn with those cases where, even though nothing could be done on the day, there were wider opportunities to structure operations generally. For example, as mentioned above, loss of power/lighting to a main line station might be attributed as a station operation cause on the basis that although the cause on the day was say a fire, there should have been plans for alternative sources of power and lighting.

104. The distinctive difference is the lack of opportunity for Chiltern to achieve a better result without counter-productive damaging effects on passenger experience. Accordingly the Panel concludes that, applying both the TAA and DAG provisions, Station Operating Causes in general and Code RB in particular are not appropriate and do not result from application of the combined provisions of the TAA and the DAG.

Chiltern's case and Reactionary Code YX

105. Chiltern's case was that a reactionary coding was appropriate. Chiltern relied on 3.1.6 of the DAG. 'If an operator's service is delayed due to overcrowding as a result of an operator's train being cancelled or delayed, any delay or cancellation is to be attributed to the prime cause of why the initial train was delayed or cancelled. This also applies to a train running late in the path of the following train'.

106. There are however also serious issues with applying Code YX. Chiltern indicated that it asked for this coding having been told that it was, in these circumstances, the only way to re-code so as not to result in attribution of responsibility to Chiltern. There are however a number of potential difficulties with/objections to the application of the YX Code here.

107. The legal issue raised was whether the YX Code was limited to delays on the same line as a preceding train. The essence of the competing arguments on this legal issue were respectively that a) Network Rail – all the examples given in DAB PGD relate to trains on the same line and that is the intention behind the wording but b) Chiltern – that is not what the words say - there is no such restriction in the wording. When this was discussed at the hearing, Network Rail's position was that it did not necessarily have to be on the same line provided there was a physical linkage – via the rails. In practice there are no two locations on Network Rail that are not linked by rails.

108. The Panel concludes that in fact the proper test is whether there is sufficient direct linkage. Restriction to connection of line or rails may well be a rule of thumb or useful starting point, but the test for reactionary codes generally is whether there is sufficient direct linkage. In these circumstances the absence of a physical linkage should not, in itself, prevent the use of such codes – there being a direct connection between the fire and the delays on the Chiltern Line.

109. Another difficulty is that in practice YX reactionary codes are applied so as to be attached to a specific train delay. In this case none of the 3 Virgin services (departures at xx:10, xx:30 and xx:50) nor the London Midland services were running to London from New Street on that afternoon/early evening. As a consequence, the volume of passengers being redirected from New Street to Moor Street was spread through the hour, and determined as much by the mobility and confidence of individual passengers as by the departure time of the train they had intended to catch. Thus the extra (diverted) passengers arriving in time to catch the 17 52 from Snow Hill (17 55 at Moor Street) may have come from a combination of the 16 50, the 17 10 and 17 30 Virgin trains and from a similar variety of London Midland trains.

110. Chiltern devised a 'walking time' method to determine which train the delay to specific Chiltern trains should be coded back to. The Panel concluded that, although there is some instinctive attraction to such a method, in its current form it has too many practical difficulties for this case. As the DAB concluded in DAG 45, any such methodology would need to be agreed in advance.

111. However, in these circumstances where there is a common understanding of what caused the service cancellations and stations in close proximity to each other, the need for a connection back to a specific train is an artificial and mechanistic step. It would be wrong to reject Chiltern delays which definitely all result from cancelled WCML trains caused by the fire closing the WCML simply on the basis that a specific train cannot be identified in circumstances where, whichever train or trains were chosen, the result would be the same.

Conclusion on attribution

112. The overall conclusion that the Panel reaches is that, in this specific incident, the initial coding to the lineside fire was correct. Applying both the TAA and DAG together leads to the conclusion that attribution to the lineside fire is the better fit with the combined wording. This decision is reached on somewhat specific facts, the most important of which is that there was no reasonable opportunity to prevent the delays without damaging passenger experience and performance (widely viewed) on the railway network.

113. A reactionary code should be used to achieve that outcome where necessary. The YX code is not an identikit fit to this case, but that is because the multitude of codes has not yet (and probably cannot ever) achieve that objective; development of codes is a work in progress. Mr Southon, in his role as DAB Secretary, indicated at the hearing that there was a proposal ready for consultation in relation to (amongst

other events) passenger displacement. This Panel considers that there may well be merit in any new codes capturing the situation where passenger displacement during CSL2 causes delays avoidable only by methods counter-productive to passenger experience. Exactly to whom responsibility should be attributed in those circumstances is a matter for the Delay Attribution Board. Any changes to the DAPR needing to be authorised elsewhere should take into account the needs of passengers when displaced and should seek to incentivise behaviours beneficial to passengers rather than the reverse.

114. Objections. Network Rail also asked the Panel to consider the potential implications of a decision against it. The first was the difficulty in front line, first level coding if chains of causation have to be considered. The simple answer to this is that it was not a problem in this case; the first level attribution was to the lineside fire. And in similar circumstances there is no real difficulty in first level attribution; the events at Moor Street are easy to relate back to what will be the widely known WCML closure. Furthermore, there is a process for subsequent attribution at second and further levels.

115. Secondly the wider implications, sometimes characterised as a floodgates argument (a phrase sensibly not used by Network Rail) and also as a departure from the strict application of the most closely connected in time cause. Network Rail understandably fears that this decision will be used as a justification for a widespread search for root causes in other cases.

116. This decision would not justify such a search. This decision is very much limited to its own facts. The key relevant set of deciding facts are that a) the delays resulted from unplanned immediate closure of an alternative main line route, CSL2 was invoked (because of significant disruption and a recognition that support from other operators was needed), and where passengers transferred through a short, immediate, direct, recommended and easily recognised route to services with a much lower capacity and b) where the acceptance of higher than normal numbers of passengers, resulting in limited delay, could only be avoided by steps that would be against the interests of passengers and the performance of the wider railway network. If either of these two main factors is missing then the principles in this decision would not be applicable. Any such case would have to be determined on its own facts.

117. Other decisions. By Rule A7 there is an obligation in making the decision to take note of previous relevant published ADA and TTP decisions (and those of predecessor bodies) as persuasive authority, but without being bound by them. I confirm that I have taken into account all the relevant decisions whether ADA, AD, ADP or TTP including to all those referred to at any stage of this ADA. Many of the decisions were of some assistance, but the extent was often limited both because such decisions are persuasive only and many were decisions on different facts and/or different wordings to this case.

118. It is also the case that both Parties to some degree relied on some previous occasions when the other had accepted responsibility in circumstances similar to this. The Panel does not consider that even if a party has perhaps been unduly generous on one (or more) occasions previously that that should mean that it always has to do so. Accordingly the Panel did not find this factor to be of significance.

119. Finally, the Parties are commended for their conduct of this ADA. They approached it in exactly the right spirit, complied with all procedural deadlines and worked hard to assist the Panel. The presentation of solely legal issues was of high quality, thorough and helpful. The Panel is grateful for all the assistance it received from those attending and in particular to the principal presenters on the day.

Summary and conclusions

120. The conclusions reached on the four legal questions posed are as follows. First, that attribution of the delays to the Chiltern services should be to the lineside fire. Secondly, the test to be applied is the wording both of the TAA and the DAG together. As a result, it is not necessary in this ADA to decide the third question of priority as between the TAA and DAG provisions. Fourthly, for Code YX there has to be

sufficient direct connection or linkage between the cause and the delay; that will often, but not always, be by virtue of a delay on the same line.

121. The Panel also concludes that Network Rail's contentions as to a) failure to mitigate and b) station operation causes do not succeed and coding RB is not appropriate. Whilst there are difficulties with Chiltern's proposed coding of YX, the most appropriate outcome, in accordance with the TAA and the DAG, is that the relevant delays are coded to the lineside fire, as per the original coding on the day, which should be reinstated.

Determination

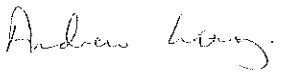
122. Having carefully considered all submissions and evidence and based on my analysis of the issues and submissions, I determine as follows:

a. The Minutes Delay on the five Chiltern services from Birmingham Snow Hill to London Marylebone on Wednesday 19 April 2017 timed to depart between 17 52 and 20 15 should be attributed to the TIN 055019 Lineside Cable Fire and thus to Network Rail.

b. As no circumstances of the kind referred to in Rule G54 exist in this ADA, I make no order as to costs.

Declaration by Hearing Chair

123. This determination is legally sound and appropriate in form.



Andrew Long
Hearing Chair

31 August 2018

APPENDIX "A"

Paragraph 5, Schedule 8 of the TAA

5 Allocation of responsibility for Minutes Delay and Cancelled Stops

5.1 Assessment of incidents causing Minutes Delay and Cancelled Stops

(a) In assessing the cause of any Minutes Delay or Cancelled Stop, there shall be taken into account all incidents contributing thereto including:

(i) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents; and

(ii) where a Restriction of Use overruns due to the start of such Restriction of Use being delayed by a late running Train, the incident(s) giving rise to that late running;

(b) The parties shall take reasonable steps to avoid and mitigate the effects of any incidents upon the Trains and any failure to take such steps shall be regarded as a separate incident;

(c) Network Rail shall identify:

(i) in respect of each incident recorded under paragraph 4.1(e)(i) as causing Minutes Delay, the extent to which that incident caused each of the Minutes Delay; and

(ii) in respect of each incident recorded under paragraph 4.1(b), the extent to which that incident caused the Cancelled Stop;

(d) So far as Network Rail is reasonably able to do so, it shall identify whether responsibility for incidents causing Minutes Delay or Cancelled Stops is to be allocated to Network Rail or to the Train Operator or to them jointly in accordance with the following provisions of this paragraph 5.

5.2 Network Rail responsibility incidents

Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which Network Rail is allocated responsibility pursuant to this paragraph 5.2 shall be allocated to Network Rail. Unless and to the extent otherwise agreed, Network Rail shall be allocated responsibility for an incident other than a planned incident (as defined in paragraph 5.7), if that incident is caused wholly or mainly:

(a) by breach by Network Rail of any of its obligations under this contract; or

(b) (whether or not Network Rail is at fault) by circumstances within the control of Network Rail in its capacity as operator of the Network; or

(c) (whether or not Network Rail is at fault) by any act, omission or circumstance originating from or affecting the Network (including its operation), including, subject to paragraph 5.3(b)(i), any incident in connection with rolling stock on the Network for which any train operator other than the Train Operator would be allocated responsibility if it were the Train Operator under this contract.

5.3 Train Operator responsibility incidents

Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which the Train Operator is allocated responsibility pursuant to this paragraph 5.3 shall be allocated to the Train Operator. Unless and to the extent otherwise agreed, the Train Operator shall be allocated responsibility for an incident other than a planned incident (as defined in paragraph 5.7) if that incident:

(a) is caused wholly or mainly:

(i) by breach by the Train Operator of any of its obligations under this contract; or

(ii) (whether or not the Train Operator is at fault) by circumstances within the control of the Train Operator in its capacity as an operator of trains; or

(iii) (whether or not the Train Operator is at fault) by any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of the Train Operator (including its operation), including any such act, omission or circumstance originating in connection with or at any station (other than in connection with signalling under the control of Network Rail at that station or physical works undertaken by Network Rail at that station), any light maintenance depot or any network other than the Network; or

(b) causes delay to:

(i) rolling stock operated by or on behalf of another train operator which is delayed in entering or leaving the Network due to any act, omission or circumstance originating in connection with a light maintenance depot or network other than the Network and, as a result of that delay, rolling stock operated by or on behalf of the Train Operator which is scheduled to leave or enter the Network at the connection with that light maintenance depot or other network is then delayed behind the first mentioned rolling stock; or

(ii) the commencement of a Train's journey, which is caused by the late running for any reason whatever of any rolling stock included in that Train when that rolling stock is operated by or on behalf of another train operator.

5.4 Joint responsibility incidents

(a) Network Rail and the Train Operator shall be allocated joint responsibility for:

(i) any incident which is not a planned incident (as defined in paragraph 5.7), caused by an act, omission or circumstance originating in connection with or at a station which:

(1) is an act, omission or circumstance which affects the Network, or its operation, and prevents a Train entering or passing through a station at the time it is scheduled to do so; and

(2) prevents the access of passengers through the station to or from the Train;

and paragraphs 5.2 and 5.3 shall not apply to any such incident; or

(ii) any identified incident in respect of which Network Rail and the Train Operator are equally responsible and for which neither Network Rail nor the Train Operator is allocated responsibility under paragraph 5.2 or 5.3.

(b) Unless and to the extent otherwise agreed, Minutes Delay or Cancelled Stops caused by incidents for which Network Rail and the Train Operator are allocated joint responsibility pursuant to paragraph 5.4(a) shall be allocated 50% to Network Rail and 50% to the Train Operator.

APPENDIX "B"

Delay Attribution Board Guidance No: DAB-45

Delay Attribution Board
Floor 8
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Guidance No: DAB-45

Attribution of Responsibility for delays caused by overcrowding due to displaced passengers and the use of Delay Code YX

1. Introduction

The Delay Attribution Board (the Board) received a Request for Guidance in connection with the attribution of various TRUST incidents involving delays caused by overcrowding due to displaced passengers from trains affected by incidents that blocked a different line of route.

1.1. The Board received the joint Request for Guidance from Chiltern Railway Company Limited (Chiltern) and Network Rail Infrastructure Ltd (Network Rail) on the 14th December 2017.

1.2. Summary of the submission:

1.2.1. Guidance from the Board is sought for the resolution of an issue which despite discussion at the required levels of escalation a solution has not been agreed.

1.2.2. To provide guidance regarding the responsibility of incidents where passenger overcrowding is occurring as a result of displaced passengers due to an incident on a different line of route.

1.2.3. Whether, in these circumstances, attribution should be to the Operator responsibility in respect of the passenger overcrowding or to the incident causing the displacement of passengers onto a different line of route.

2. Information Received

2.1. The Parties have discussed the issues relevant to this matter, in accordance with the agreed procedures for obtaining agreement in relation to disputed attribution as set out in Part B of the Network Code. However, they have been unable to reach a common position. The Parties are therefore both agreed that the issues raised should be referred to the Board for guidance and have prepared a joint submission accordingly, incorporating their respective interpretations.

2.2 The Delay Attribution Board is asked to provide guidance on:

- Whether attribution should be to the root cause incident or whether these incidents are considered a new prime cause.
- Whether the use of YX code is appropriate to link these delays back to root cause.

2.3 The appropriate use of the YX code is not well understood, with Operators and Network Rail inconsistently applying this reactionary code. The parties would therefore like the Board to provide clear guidance on the appropriate use of this code.

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3. Factual Background to the incident (Various Incidents on 19th April 2017)

3.1. On 19th April 2017, there was a major lineside cable fire in the South Hampstead area (TIN 055019 LINESIDE CABLE FIRE) which resulted in severe damage to the signalling equipment on the West Coast Main Line and a power failure at Euston Station. This caused significant disruption to London Midland, Virgin Trains and London Overground services with trains unable to run in or out of London Euston from 13:50 until 22:25. There was a period of time between 18:45 and 19:59 when some trains did run but lighting issues at the station meant that it was closed from approximately 20:00 until 22:25 until adequate lighting was found.

3.2. Route 'Any Permitted' tickets are between London and West Midlands/North Wales/North West/Scotland and are valid for travel via the Chiltern route.

3.3. As per the LNW South Contingency Plans which are authorised by Network Rail through the requirements of Approved Code of Practice for Customer Information in Disruption, CSL-2, arrangements were made for passengers to use other operators' services and Chiltern accepted 'London Midland Only' and 'Virgin Trains Only' tickets for travel between London and Birmingham (and vice versa). Chiltern Railways receive no financial recompense for this arrangement.

3.4. There were a number of delays due to overcrowding at stations on the Chiltern route as result of passengers opting to use this line of route to travel (these details were provided to the Board but are not included within this Guidance Note). The services affected under normal circumstances do not have delays associated with passengers.

3.5. These delays were initially put into TIN 055019 LINESIDE CABLE FIRE SOH at Level 1 as the Train Delay Attributor was advised by NR Control that the overcrowding was due to the cable fire.

3.6. On Day 2, Network Rail created new incidents and reattributed these delays (and the associated reactionary delays) as a new Prime Cause and therefore attributable to the immediate cause of the delay which was passenger overcrowding.

3.7. Chiltern Railways have disputed these delays stating they should have remained in TIN 0550149 LINESIDE CABLE FIRE SOH due to this being the reason for the overcrowding.

3.8. The attribution of these incidents has been discussed at Level 3 and Level 4 within the Delay Attribution and Resolution hierarchy of both organisations but agreement could not be reached. Both parties however agreed that guidance should be sought from the Delay Attribution Board in order to gain a clear view on (a) whether these overcrowding delays are new prime cause and (b) on the use of the YX code.

3.9. During these discussions and since, there have been several more examples of these types of incidents. (Again these details were provided to the Board but are not included in this Guidance Note).

3.10. The Parties submitted the agreed factual background and their respective views on how the incident should be attributed:

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4. Operator's View

4.1 It is Chiltern's view that these incidents should be coded TIN 055019 LINESIDE CABLE FIRE SOH.

4.2 It is Chiltern's belief that the following clause of the DAPR applies
C1.6 "If an operator's service is delayed due to overcrowding as a result of an operator's train either being cancelled, or delayed, any delay or cancellation is to be attributed to the prime cause of why the initial train was delayed, or cancelled. This also applies to a train running late in the path of the following train."

4.3 There is no reference in the DAPR to this clause applying to the same line where the disruption originated which is Network Rail's view.

4.4 The prime cause of the delays in dispute is TIN 055019. This is not a previous incident as the delays occurred whilst TIN 055019 was on going.

4.5 During major incidents such as TIN 055019 it is clear that the increase in passenger volume is resulting from the disruption from the West Coast Main Line. The acceptance of these displaced passengers is required by the Network Rail LNW Contingency plan.

4.6 Network Rail is required through their license from the ORR to apply the Approved Code of Practice for 'Passenger Information During Disruption' (PIDD). As part of PIDD it is not permissible to issue a do not to travel warning as Chiltern services are seen as a valid alternative route. PIDD didn't exist at the time of the ruling of DAB 25.

4.7 Network Rail are misunderstanding the application YX code, as when it was created it was not the intention for it to be used during mass disruption. Under the historical incidents noted in 4.8 Network Rail allocated the delays arising as prime cause code.

4.8 Delay attribution is based upon the balance of probability rather than beyond reasonable doubt. If the YX coding is to be used, the flow of passengers for each service will be related to the transit time between the Euston/Marylebone and New Street/Moor Street. For the former 26 minutes, and the latter 8 minutes. So the YX coding could be applied to the nearest departure for the service suffering delay.

4.9 The example of LUL or tram system incidents are not relevant, since the Prime Cause of these delays would be off network. DAPR D3 defines off network as incidents 'arising on infrastructure not operated by Network Rail'
TIN 055019 occurred on infrastructure operated by Network Rail

4.10 Network Rail LNW Route stance on TIN 055019 is at odds with that of Network Rail Western Route , who attribute delays in line with Chiltern Railways position. In TIN 231136 (06/07/17) HTRWAJN PANEL FLR where delays arising from station over time on Chiltern Railways 1U54 were allocated to the incident on the Great Western Main Line.

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4.11 It is also different to historical incidents on LNW Route, TIN 768143 (04/01/09) Ole Failure Watford Junction, TIN 803599 (16/01/09) 1F24 Fatality Stoke Hammond, TIN 25602 (10/04/09) 4M13 Fatality, TIN 156717 (04/06/09) Loss of Signalling Milton Keynes, TIN 776963 (08/02/10) Berkhamstead Dewirement, TIN 900996 (23/03/10) Power Failure, TIN 877046 OLE Dropper Failure Northchurch, TIN 989895 (10/06/11) Fatality Kenton, TIN 498718 (01/03/13) Dewirement XHN, TIN 371227 (27/02/14) Fatality Kings Langley, TIN 117064 (11/01/15) 1A20 Automatic Dropping Device, TIN 154121 (27/01/15) Power Loss Euston. Where delays arising from station over time on Chiltern Railways, or cancellations to facilitate the passenger volume were allocated to the incidents on the West Coast Main Line.

4.12 A number of the incidents in dispute relate to stations where there are no barriers. Chiltern deployed additional staff, changes to formations of services where possible to mitigate the additional passenger flow from the WCML.

4.13 It is directly in Network Rail's gift to mitigate the incidents that occur on the West Coast Main Line through having a supportive suite of plans that are embedded within their Performance Strategy. Network Rail is not achieving the required Performance outputs.

4.14 In DAB -25 ruling;
6.2.3 That the parties confirmed that at other times during the period of disruption on the day the guidance given in DAG 3.1.5 had been applied to services delayed as a direct result of overcrowding, i.e. Late starts. This indicated to the Board that there were specific circumstances where DAG
Section 3.1.5 was agreed as applicable guidance in circumstances where delay is caused by passengers boarding and alighting.

(DAG clause 3.1.5 has now been renumbered as DAPR clause C1.6)

"If an operator's service is delayed due to overcrowding as a result of an operator's train either being cancelled, or delayed, any delay or cancellation is to be attributed to the prime cause of why the initial train was delayed, or cancelled. This also applies to a train running late in the path of the following train."

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5. Network Rail's View

5.1. It is Network Rail's view that these incidents should be coded RB (Passenger joining/alighting). Whilst accepting that the cable fire was the root cause reason for additional passengers using the Chiltern line of route, the NR view is that these are all new prime cause incidents.

5.2 The complexities of the cable fire which in turn caused a power failure at Euston resulted in the creation of several TRUST incidents during the incident itself due to the joint responsibility element of the power failure at a station. Chiltern's disputes request that the overcrowding delays be merged into TIN 055019 but Network Rail would question how Chiltern have reasoned that the overcrowding delays were due to TIN 055019 and are not as a result of the power failure. Network Rail believes that the overcrowding delays are new prime cause but if the Board does not agree, the fact remains that neither Chiltern nor Network Rail are in a position to distinguish between the incidents and determine which one is the cause of the overcrowding.

5.3 This is further demonstrated in some of the additional incidents. The fatality incident at Milton Keynes Central on 5th November for example resulted in three incidents being created, TIN 542217 coded XC/XQRA (100% Network Rail) and TIN 542213 (VC/DHFA) and TIN 542215 (VC/DEJ6) – incidents attributed to Virgin Trains and London Midland respectively and both split 50/50 as per joint responsibility guidance. Chiltern have requested merges into TIN 542217 – the NR XC incident. Network Rail believes that for the YX reactionary code to be used, the operator must identify the cancelled or delayed train which resulted in the overcrowding. How can Chiltern (or indeed any party) determine which delayed or cancelled train was the definitive reason for each of their affected services to be overcrowded in this situation?

5.4 Network Rail would add that simply adding delay to any incident is not in line with the DAPR Good Statement Practice "(i) accepting that the prime objective of delay attribution is to identify the prime cause of delay to train services for improvement purposes." Network Rail would argue that improvements through a reduction in delay cannot and are not being made if the delay is not attributed to the party best placed to mitigate the delay.

5.5 The definition of prime cause (as per PGD1) states: "Prime Cause is the immediate cause or event that results in delay to a train. Until the Prime Cause event occurs there will be no delay. Without that event, delays would not have occurred. Prime cause is NOT a reaction to a previous incident." It is the NR view that delays due to holding trains to allow additional passengers to board or any other delays as a result of loading/unloading at stations are new prime cause incidents.

5.6 This new prime cause argument is further substantiated by the fact that these delays cannot be directly linked back to a particular train affected by the cable fire. If they are not direct reactionary delays then they must be a new prime cause.

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5.7 NR believes that that YX code was introduced for a specific use where the cancelled or late train could be specifically identified and attributed as reactionary delay. This is not the case when there is major disruption and the delays occur on a different line of route. The suggestion by Chiltern Railways that these delays could be attributed to root cause using the YX reactionary code and linking it to the head code of any train on WCML or as now suggested in section 4.7, the nearest service based on the transit time between stations (Euston/Marylebone or New St/Moor St) Network Rail believes is an inappropriate use of the YX code and wasn't the intention when the YX code was introduced in September 2012 and is not in line with the April 2016 DAG Briefing Note which was issued to try and help clarify the DAG paragraph 3.1.6

5.8 In considering whether attribution to prime cause is correct, Network Rail asked Chiltern Railways to consider what they believed the appropriate attribution would be if the additional passengers were as a result of external transport modes such as a tram system being closed or an incident on the LUL. Where would the Operator expect these passenger loading delays to be attributed if there was no other incident in TRUST for them to be linked to? If the Operator were to agree that that they would have to accept these delays, then NR LNW does not see how this situation is any different.

5.9 NR acknowledge that there were two station overtime delays at Birmingham Moor Street on the day in question that were inadvertently left in TIN 055019 LINESIDE CABLE FIRE SOH and were not removed before Day 7. A 2 minute delay on 1G52 was attributed directly to the incident and another 2 minute delay on 1K45 was attributed to the incident with the reactionary text "YX 1K45" which is clearly incorrect. NR does not believe that this sets any precedent, simply demonstrates that the use of the YX reactionary code is a complex issue that is not well understood.

5.10 Paragraph 4.9 of this paper refers to a difference in the attribution stance between Network Rail LNW and Western Routes. Network Rail would contend that this is not the case. The initial attribution into TIN 231136 was carried out by NR LNW route as it was a station overtime delay on a Chiltern service at High Wycombe. CRCL then requested the merge into the Western Route incident on the basis that passengers used 1U54 to get to Oxford due to the cancellation of 1D34 at Paddington. It is unclear how Chiltern came to the conclusion that it was the cancelled or delayed 1D34 Paddington – Oxford train that caused 1U54's overcrowding. It is unfortunate that the NR Delay Resolution Co-ordinator merged this into the Western incident at Level 2 and that this was not spotted and removed (see point 5.8 above re the use of YX not being well understood) but it does not demonstrate a different stance on the Western Route. TIN 231766 1T52 OVERTIME HWY on the same day which also had a dispute request to be merged to TIN 231136 (06/07/17) HTRWAJN PANEL FLR remains in dispute.

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5.11 NR does not believe that DAPR 1.6 is relevant in this situation:

"If an operator's service is delayed due to overcrowding as a result of an operator's train either being cancelled, or delayed, any delay or cancellation is to be attributed to the prime cause of why the initial train was delayed, or cancelled. This also applies to a train running late in the path of the following train."

NR believes that this refers to trains operating on the same line of route and requires the cancelled or delayed train to be identified and justified whether this be the preceding train or the train itself being delayed as per the guidance given by DAB in Process and Guidance Document 3: Y Code Application which outlines on Page 12 the description and examples for the use of the YX code e.g. Train A calls at station X but is 20 minutes late. Train B calls at station X and arrives before A. Train B has overtime at station X loading Train A and Train B Passengers. This becomes particularly significant if delay was to be attributed to another operator's incident as they would expect a full justification for the use of YX and/or any subsequent merge request.

Network Rail does apply DAPR 1.6 (previously DAG 3.1.5) where there is disruption on a specific line of route directly affecting passengers on that line of route and where delays can be linked to specific trains on that line of route. Where attribution may have differed in the past and where trains have apparently been attributed incorrectly or erroneously does not make it right going forward.

5.12 Paragraph 4.11 above refers to DAB 25 and the guidance given to the parties following an ill passenger on an overcrowded train. Network Rail believes that point 6.2.3 of that paper should be taken in context with the previous statement 6.2.2 which states:

That CRCL had offered to accommodate the displaced passengers if London Midland and Virgin on its services to Birmingham and remained in control of the passenger flows. The Board considered this indicated that CRCL had the opportunity to avoid undue overcrowding on its services.

5.13 As part of the other incident examples there is an incident which whilst similar in that the use of the YX code and a merge has been requested, it is slightly different to the others as the delay has occurred off network.

TIN 434018 (2B44 4 LOST HOH AMR) occurred on 29th September. The Chiltern dispute states that the delay was due to passenger overcrowding as a result of CRCL cancelling their 2G43 service which would have run from Marylebone to Gerrards Cross (on Chiltern mainline) but was cancelled as a result of 6Z56 failing at Denham Golf Club. The merge request has been requested on the basis that passengers who would have travelled on 2G43 used 2B44 (Marylebone to Aylesbury via the Met) to get to "similar geographical locations."

Network Rail has declined to do this as the LUL Met Line is off network and the train was on a different line of route when the delays occurred. DAB guidance on this particular incident is requested also.

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This particular merge request was into a Freight Operator incident. Network Rail would ask the Board to consider how a FOC could be held responsible for a delay that does not appear to be adequately explained through the use of the YX code but also whether they should be held responsible for a delay which will have a financial impact on them but which that they had no involvement in and cannot mitigate.

5.14 Network Rail would like to understand how, when the ORR is looking to make Network Rail more responsible for reactionary delays/codes, how Network Rail could have mitigated these incidents. London Marylebone and Birmingham Moor Street and Snow Hill Stations are all barrier operated so there was an opportunity for CRCL to mitigate any overcrowding by controlling the number of passengers boarding their trains at these stations. Network Rail has no involvement in this or any control on how many passengers are allowed to board train services.

5.15 In addition, Network Rail would like the Board to give consideration to the use of YL and YM reactionary codes which can only be used when a specific train serving that station/running on that line of route is identified as causal and agreement is made between TOC and NR Controls. If this agreement is not gained, then these delays are attributed to RI/RJ/RK/RL as per DAPR Section R (Station Operating Causes). Whilst general agreement of passengers using different lines of route is generally agreed, the specific causal trains cannot be identified in these cases. Why should passenger delays allocated under the YX code be any different as all are linked to service recovery and the provision of services for passengers? Network Rail believes YX should be applied with the same two requirements being met as with YL and YM.

5.16 Chiltern state in Paragraph 4.5 above that "the acceptance of these displaced passengers is required by the Network Rail LNW Contingency plan." Network Rail would point out that the contingency plan is not a Network Rail plan but an "industry plan" which is agreed with operators. Network Rail has no jurisdiction over operators and cannot force them to take other operators passengers. Throughout the contingency plan it states that "rail replacement services are to be provided" in certain scenarios. As with ticket acceptance, Network Rail is not responsible for organising these services nor is Network Rail responsible for any costs incurred by operators for the provision of these services.

5.17 In Paragraph 4.6 Chiltern refer to Network Rail's requirement to apply the Approved Code of Practice for 'Passenger Information During Disruption' (PIDD). Network Rail would like to point out that they follow the requirement to advise passengers of the alternative travel arrangements but are not responsible for their delivery.

5.18 In response to Chiltern's statement in Paragraph 4.13 which refers to Network Rail's ability to mitigate incidents, Network Rail would state that while it may be in Network Rail's gift to manage and mitigate the operation of the network and train services, it is not their role to manage passenger numbers and/or passenger flows and Network Rail believes that this mitigation rests with the Operators. It is the old ATOC directive that stipulates the carriage of other TOC passengers in times of disruption. Network Rail does not necessarily 'agree' that policy, just advises of it through the PIDD process.

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6. Locus of the Board

6.1 The Board reviewed its locus in respect of providing guidance on this issue. The Board's locus to provide guidance is set out in the Network Code Conditions B2.4.3 and B6.1.3.

6.2 The Board noted that while it could offer guidance to the Parties regarding how incidents of this nature should be attributed, this guidance was not binding on either Party. If either of the Access Parties were dissatisfied with the guidance provided they could refer the matter to Access Dispute Adjudication (ADA).

6.3 If the issue was referred to ADA, then an Access Dispute Adjudication Panel (ADA Panel) would be formed to consider the dispute. In doing so, the ADA Panel would take account of the guidance provided by the Board but would not be bound by it. The ADA Panel would then make a determination that was binding on the Parties concerned. This document is therefore being prepared as the vehicle for providing the guidance and the reasons for how the Board arrived at its position both to the Parties and, if necessary, to the relevant ADA Panel.

6.4 The Board agreed that it should seek to provide guidance that meets with the delay attribution vision:

"For all parties to work together to achieve the prime objective of delay attribution – to accurately identify the prime cause of delay to train services for improvement purposes".

6.5 The Board would need to consider if, in providing guidance, an amendment to the Delay Attribution Guide should be proposed, to improve clarity.

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7 Consideration of the Issues

7.1 The Board at its meeting on 16th January 2018 and subsequently on the 13th February 2018, considered the Request for Guidance and took account of the following:

7.1.1 The facts provided by both Chiltern and Network Rail in connection with the incidents disputed between the Parties and their Request for Guidance.

7.1.2 The information provided by the Parties in response to questions raised by the Board prior to the Hearing (Set out in Appendix A).

7.1.3 Additional information provided by the representatives of Chiltern and Network Rail at the Board Meeting (Set out in Appendix B).

7.1.4 The guidance provided within the Delay Attribution Guide (that was in place at the time of the incidents occurring, prior to the name change in this case) and any prior related DAB Guidance.

7.2 The Board regarded the following points as particularly relevant during discussion of the incidents:

7.2.1 The wording in DAG 3.1.5 (now DAPR C1.6), intention and interpretation thereof.

7.2.2 The wording in Section 2.7 Definitions (now DAPR B7.3) and interpretation thereof

7.2.3 DAG Section 3.1.1 (now DAPR C1.1) contractual responsibility.

7.2.4 Delay Code YX description and intended application.

7.2.5 Reactionary Y* attribution principles (Responsible Train identification) - does the ACTUAL Responsible Train have to be identified?

7.2.6 The suggested methodology of Chiltern to ascertain the Responsible Train (which proposes a set 'walking time' between London Euston and Marylebone stations) was not agreed with Network Rail.

7.2.7 The additional passengers on any given Chiltern train could therefore have come from one or more Virgin WC or London Midland trains depending on the transit time of each relevant passenger between stations and therefore only a Likely Responsible Train could be identified using the proposed methodology.

7.2.8 The requirements on Parties in relation to PIDD arrangements

7.2.9 The requirements on Parties through Commercial Agreements in place in relation to carriage of passengers in times of severe perturbation

7.2.10 Mitigation opportunities taken and available to the Parties

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8 Guidance of the Board

8.1 The Board was divided at the Board Meeting on 16th January 2018 and was therefore unable to provide the Parties with the requested guidance at that time. However the Board reconvened on the 13th February 2018 and, following further debate, and then by a majority vote (9 in favour, 2 against) concluded the following:-

8.1.1 Where the actual Responsible Train cannot be clearly identified then the incident should be attributed to Chiltern Railways utilising Delay Code RB

8.1.2 Where the actual Responsible Train can be identified (through clear and agreed methodology) then the incident should be attributed in line with prescribed Reactionary Delay attribution rules (accepting that allocation to an Operator cannot now occur due to Contractual Timescales being passed).

8.2 In reaching its conclusion the Board noted the following:

8.2.1 That attribution of delays relating to displacement of passengers needs a fundamental review in line with the base principles and rules of attribution.

8.2.2 That DAPR C1.6 (DAG 3.1.5) and subsequent application of Delay Code YX requires reviewing by the Board to improve clarity and understanding as to application in line with the aforementioned review.

8.2.3 That DAPR Section B7, Definitions, also needs to be considered for further review and clarification.

This guidance was approved by the Delay Attribution Board on 13th March 2018	Richard Morris (Chairman)
Signature:	

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APPENDIX A

Questions submitted by Board members and the respective responses from CRCL and Network Rail in advance of the meeting.

FOR CHILTERN ONLY

Question 1

In DAB25 (which is referred to in the submission) Section 6.2.5 the guidance stated: -
That, certainly with regards to TDI 575635, the passenger fainting had been alleged as being due to overcrowding as a consequence of the WCML closure but that this could not be verified and that CRCL had confirmed that at no point were DfT 'capacity standards' exceeded on the train services.

Can Chiltern confirm that in the new cases submitted that the capacity standards had not been exceeded, and also what evidence exists that the overcrowding was purely down to the WCML incident and that no other factors where in play.

Chiltern Response: Chiltern can confirm that the capacity standards (Pixi) were not breached.

There were no special events occurring on the dates in question (for example Wembley Stadium usage), that would have generated additional traffic flow. The services remained overcrowded throughout their journeys' between London and Birmingham (and vice versa) would indicate the passenger flow relates to the closure of the WCML.

Of the services (in appendix 1) only one was not the specified length (1K54 on 07/11), which was one vehicle shorter than normal.

Question 2

Chiltern quote Section 6.2.2 of DAB25 that states: -
That CRCLhad offered to accommodate the displaced passengers of London Midland and Virgin on its services to Birmingham and remained in control of the passenger flows. The Board considered this indicated that CRCL had the opportunity to avoid undue overcrowding on its services.

Do Chiltern still agree with the concept that they had the opportunity to avoid overcrowding on its services?

Chiltern Response: When DAB 25 ruling was made there concept of PIDD did not exist, as detailed in the offer statement section 6.2.2 of DAB25. It is no longer possible to refuse carriage of those holding route or TOC specific tickets which previously was the case. In some of the instances (listed in appendix 1) services were lengthened to accommodate the additional passenger volume.

FOR NR ONLY

No questions were submitted solely directed to Network Rail.

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QUESTIONS FOR **BOTH** PARTIES

Question 3

In DAB25 ruling section 6.2.7 it states: -
"The assertion that the West Coast incident contributed directly to the disputed incidents was speculative and attempted to identify a 'root cause' that was somewhat removed from the delay itself".

Can the parties confirm that they still agree with the DAB statements above (the original DAB ruling was un-challenged by the parties) in that linking the delays was attempting to attribute to root cause events that where occurring in an area removed from the original incident.
If the parties do not agree with the statement can they state why they do not believe that it is attribution to root cause?

Chiltern Response: Chiltern did not agree with the ruling. The ruling was not challenged further due to a desire not to damage the relationship with Network Rail, and the expense of taking a claim further. The impact of the decision was relatively minor at that point in time, due to the lower passenger numbers on both routes, available capacity, the fewer instances of route closure, and related to delays arising from fainting on an overcrowded service. Further to this Network Rail attributed overcrowding delays (where there was no fainting passenger) to the instances on other lines of route as detailed in the paper section 4.11. This attribution consistent with DAPR and DAB25

6.2.3 That the parties confirmed that at other times during the period of disruption on the day the guidance given in DAG 3.1.5 had been applied to services delayed as a direct result of overcrowding, i.e. Late starts. This indicated to the Board that there were specific circumstances where DAG
Section 3.1.5 was agreed as applicable guidance in circumstances where delay is caused by passengers boarding and alighting.

Section 3.1.5 (now being renumbered as C1.6)

"If an operator's service is delayed due to overcrowding as a result of an operator's train either being cancelled, or delayed, any delay or cancellation is to be attributed to the prime cause of why the initial train was delayed, or cancelled. This also applies to a train running late in the path of the following train."

NR Response: Network Rail agrees with the statement.

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Question 4

Section 4.13 of the Chiltern submission states: -

> *"4.13 It is directly in Network Rail's gift to mitigate the incidents that occur on the West Coast Main Line through having a supportive suite of plans that are embedded within their Performance Strategy. Network Rail are not achieving the required Performance outputs".*

Do the parties believe that it is directly in NR's gift to mitigate all aspects of all incidents that occur? Who do the parties believe can directly mitigate the impact of overcrowding?

Chiltern Response: Network Rail are required to provide the contracted access to the network. It is unfortunate that there an instances such as fatalities, fires arising beyond the boundary fence, are hard to mitigate, but remain the responsibility of Network Rail.

Everything that could be done was carried out. Consideration is given to holding a train to strengthen it, balanced against the risk of delays arising from doing so. Once a service is underway it is not reasonable to enact further mitigation

NR Response: Network Rail does not believe that it is able to directly mitigate *all* aspects of *all* incidents. Network Rail is able to ask Operators to implement recovery and contingency plans but is not able to enforce this. (Note that this is done via a contingency plan in Control and not by a Performance Strategy as suggested above). Whilst responsible for the operation of the infrastructure, Network Rail is not responsible for the rolling stock or train crew or indeed management of passengers at franchised stations so are reliant on the Operators to put the relevant mitigations in place around this.

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Question 5

In the Chiltern submission section 4.7 it states; -

> *"4.7 Network Rail are misunderstanding the application YX code, as when it was created it was not the intention for it to be used during mass disruption".*

Can the parties confirm they agree that the delay code should not be used for mass disruption? And also state what they would categorise as mass disruption?

Chiltern Response: The use of YX is identification of the flow of displaced passengers from one service to another. The original routing of the passengers and level of disruption is not relevant.

NR Response: Network Rail's view is that the YX code should only be used where the cancelled or late train can be specifically identified and attributed as reactionary delay. NR believe that the guidance for its usage states that YX should apply when a cancelled or late running train is either preceding or following the train that is delayed due to overcrowding, and is also running in a similar calling pattern. Network Rail does not believe this is possible to do during mass disruption and certainly not when the delays are occurring on a different line of route.

Mass disruption from a Network Rail perspective might be when an incident occurs at a large station or blocks a main line to and from a large city for a long period, and one consequence could be that passengers seek diversionary routes to continue their journeys. Certainly mass disruption would be when one line of route is closed and passengers are being directed to another line of route – where agreements between the operators allow passengers to use their tickets on another operator's service. As noted in the paper, Network Rail is not responsible for organising these services nor is Network Rail responsible for any costs incurred by operators for the provision of these services.

Question 6

The paper suggests that the responsible train ID can be ascertained from using a basic time calculation to represent the travel time between 2 locations. In the example provided the walking time of 8 minutes is suggested between New Street and Moor St. looking at the basic timetable for trains between Birmingham and London the 2 London services depart 3 minute apart.

If the trains had been cancelled due to separate incidents (as with a fatality) what defined attribution process do the parties believe should be applied to correctly identify which incident should be used?

Chiltern Response: The allocation of reactionary delays due to multiple incidents should not be for Chiltern to decide. The DAPR guidance should be applied, if there is a gap within the guidance then the DAB should provide guidance applicable to the circumstance.

NR Response: This question seems to be asking about the allocation of cancellations as opposed to the attribution of delay minutes. In terms of a fatality where there is more than one incident (a 100% NR and a 50/50 (NR/TOC) incident) the attribution of the cancellation would be based on whether the train was booked to call at the affected platform, whether the platform was available at the booked time and whether the infrastructure was available at the booked time. This is as per guidance issued by the DAB in Process Guide 13.

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In terms of then attributing any delay minutes due to overcrowding, Network Rail would not be looking to link these to either fatality incident so the allocation of the cancellations is irrelevant. Network Rail would attribute to a new prime cause to the operator of the train with the overcrowding delays.

Question 7

In 3.1.8 the parties have asked the board to give guidance on whether the overcrowding is a new prime cause, the parties seem to agree that establishing if the delays are Prime delay or not would resolve the attribution issue.

Using defined /agreed attribution principals: -
Can NR state why they believe the delays are new Prime Causes?
Can Chiltern state why they believe the delays are not new Prime Causes?

Chiltern Response: Chiltern believe that the delays should be attributed to DAPR C1.6 [DAG 3.1.5]:-

"If an operator's service is delayed due to overcrowding as a result of an operator's train either being cancelled, or delayed, any delay or cancellation is to be attributed to the prime cause of why the initial train was delayed, or cancelled. This also applies to a train running late in the path of the following train."

NR Response:- Network Rail believes that these are new Prime Causes on the basis that Prime Cause is defined as the immediate cause or event that results in delay to the train. Until the Prime Cause event occurs there will be no delay. In these cases, the overcrowding of the services has resulted in the delay at stations. Network Rail believes that there was an opportunity to mitigate these delays and therefore they should be considered as a new prime cause.

Question 8

For the purpose of managing passenger numbers being allowed to board train services, who do the parties believe are best placed to mitigate delay?
How would Network Rail mitigate the delay when the incident is caused by a train operator?

Chiltern Response: Not all delays are mitigatable, and therefore are reactionary delays.

NR Response: Network Rail believes that the operator is best placed to manage passengers boarding their trains and is therefore best placed to mitigate delays as a result of overcrowding. This is regardless of whether the incident was caused by a train operator or was an infrastructure issue.

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Some scenario based questions were submitted to ascertain both Parties' respective views on wider application of their attribution stance.

Scenario 1- It is reported that there is an incident causing major disruption at on the Western Route due to all lines being blocked as a result of a freight responsibility incident in the Acton area. Passenger train operators have agreed to direct passengers to London Waterloo for journeys to Reading and the west of England. There is potential for trains to be delayed between London Waterloo and Reading due to overcrowding.

Question 9 (relating to scenario 1)

If trains are delayed due to overcrowding, how do the parties believe the delays between London Waterloo and Reading should be attributed? If it is the freight incident on the Western Route, how would YX be used?

Also, considering the principles of the DAPR, specifically, accepting that the prime objective of delay attribution is to identify the prime cause of delay to train services for improvement purposes" and the fact that the freight operator have not had no part in how the passengers are managed, why do the parties believe the incident should be the responsibility of the freight operator?

Chiltern Response: The delays should be attributed as per DAPR C1.6. The use of YX is identification of the flow of displaced passengers from one service to another. The original routing of the passengers and level of disruption is not relevant.

It is the freight operator who has caused the disruption, which resulted in the closure of the line, and the displacement of passengers. This then sees DAPR C.1.6 applied. The use of YX is identification of the flow of displaced passengers from one service to another. The original routing of the passengers and level of disruption is not relevant.

NR Response: Network Rail does not believe YX should be used but that each overcrowding incident is attributed as a new prime cause. It would be extremely difficult if not impossible to determine which cancelled or late running trains were responsible for causing the overcrowding so how can the YX code be used? A freight operator has no influence or ability to mitigate the overcrowding delays as a result and believe at present they would be disputed as such.

As per the above and the view expressed in the paper, Network Rail does not believe any resulting overcrowding delays should be linked to the original incident but attributed as new prime cause(s) to the operator whose service has the delays as a result of overcrowding.

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Scenario 2 - Following on from the previous scenario, during the time that the Western Route is blocked, an incident occurs on the Waterloo to the Basingstoke and Salisbury line resulting in the train service being suspended. Passengers are advised that their tickets will be valid on any reasonable Route. This results in passengers to for Salisbury also travelling via Reading on the Waterloo to Reading line.

Question 10 (relating to scenario 2)

There are now two incidents causing passengers to be displaced. How would the parties attribute any delay on the Waterloo to Reading line as a result of over-crowding?

Chiltern Response: The delays should be attributed as per DAPR C1.6. The use of YX is identification of the flow of displaced passengers from one service to another. The original routing of the passengers and level of disruption is not relevant.

NR Response: As per previous response and view in the paper, Network Rail would not try and link these delays back to either of the incidents. They should be attributed as new prime cause(s) to the operator whose train suffers the overcrowding. Network Rail believes it would be almost impossible to determine which incident was the cause and determining the "responsible" train ID even more so. Attributing delays due to overcrowding to either of the incidents does not help the industry understand where the passenger management issues occurred and how best to try and mitigate these in the future.

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Scenario 3 - It is reported that that there is major disruption at King's Cross and that all lines are blocked between London and Peterborough due to a derailment. Trains are being cancelled to the single event of the derailment. At the same time London Euston is closed due to a security alert. An incident per operator has been created for each of the operators affected as per the DAPR. In total, four incidents have been created – one for the derailment on the East Coast Mainline and three for the incident on the West Coast Mainline. As a result of both the West Coast Mainline and East Coast Mainline being closed, passengers for the north and midlands are being advised to travel out of St Pancras and there is potential for delays to be incurred due to overcrowding.

Question 11 (relating to scenario 3)

If services are delayed due to overcrowded trains, could the parties advise what event the delay should be attributed to? If the YX code is to be used, how would the responsible event and train be identified? Also, how would the parties expect the Train Delay Attributors to identify the correct cause and train real time?

Chiltern Response: The delays should be attributed as per DAPR C1.6. The use of YX is identification of the flow of displaced passengers from one service to another. The original routing of the passengers and level of disruption is not relevant.

NR Response: Network Rail's view is that these delays (as a result of overcrowding) are new prime cause incidents attributable to the operator of the train on which they occur. As previously stated the use of the YX code requires a responsible train ID and in these cases, we believe it is impossible to determine this. It is unreasonable to expect the Train Delay Attributors to identify the correct cause and responsible train in real time when in reality it is unlikely the train operators themselves will know this real time or even be able to determine this after the event.

The above questions clearly relate to industry incidents. Network Rail believes that delay attribution should be to what is known and not what is assumed. In Scenario 3 above, Leicester could also have been playing Chelsea at home (Leicester v Chelsea football match) and there could have been the aftermath of a hen party travelling back to Wellingborough both causing additional overcrowding. And whilst no incident is likely to have been created for these, they would both have contributed to any late start hence trying to link the overcrowding back to an incident in London using YX is an assumption.

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APPENDIX B

Additional information provided by Network Rail and Chiltern during further questioning by Board members at the meeting.

Q – To both Parties – is the ask of the Board whether attribution should be to Root Cause or Prime Cause or is the question about the most appropriate Prime Cause?

Chiltern and NR – to which is the most appropriate Prime Cause.

Q – PIDD clearly states that conveyance of passengers is for Operators to agree with other Operators and the requirement of NR is only to provide advice to the passengers. Is that Chiltern's understanding?

Chiltern – The Operator can't issue a 'not to travel' and apply the Industry requirements and therefore accept other passengers.

Q – Presumably this issue only applies to specific TOC tickets and not 'opens'?

Chiltern – That is correct, although most will purchase TOC specific tickets as they are generally cheaper.

Q – So you couldn't tell who had what tickets?

Chiltern – No, however, when the passengers turn up to Marylebone the 'open' tickets would go through the ticket barriers whereas the specific TOC tickets would not let them through.

Q – Do Chiltern usually suffer overcrowding on the trains or locations involved in these incidents?

Chiltern - No

Q – Chiltern state that the passenger levels did not breach DfT capacity standards (PIXIE). Therefore, if the trains were under capacity should Chiltern have been able to manage the passenger numbers?

Chiltern – The trains were under the PIXIE loadings but that does not prevent overcrowding delays occurring at one location, such as Marylebone, where all passengers are trying to board the train.

Q – It was stated that delays of similar nature have been historically allocated to the causal incident by Network Rail, so why was this?

Network Rail – Whether historic incidents have or haven't been attributed to the incidents is not relevant as this is about gaining consistency. The fact the DAPR is causing confusion is the reason why some delays are attributed, or not, is as a result of misinterpretation. This is why NR and Chiltern have asked the Board to clarify the correct interpretation.

Q – Does Network Rail agree that the incidents have caused the overcrowding?

Network Rail – The cause of the overcrowding is not in dispute in most cases such as at Birmingham and Marylebone but delays at intermediate stations could be any other cause. Also, the dispute is about identifying Prime Cause of the passenger delays not what incident caused the displaced passengers.

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Q – Can both Parties advise who they believe can mitigate delays occurring at Marylebone, being a gated concourse

Network Rail – Network Rail cannot mitigate overcrowding delays, that is entirely a TOC responsibility

Chiltern – There are many issues in attribution that are unfair where Parties take delays they could consider not being responsible for. All Parties are responsible for mitigation in the prevention of the incidents occurring tin the first place

Q – Should Performance Plans not deal with mitigation and managing recovery of incidents and not just the incident itself?

Chiltern – Chiltern do have mitigation plans and will implement them as best they can in any given circumstance.

Q – So can a TOC prevent overcrowding delays or only minimise?

Chiltern – Can't prevent, only minimise.