

ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA49

(following a hearing held at 1 Eversholt Street, London, on 26 February 2020)

Present:

The appointed Adjudication Panel (the “Panel”):

Hearing Chair: Andrew Long

Industry Advisor: John Boon

Dispute Parties:

South Western Railway Ltd. (“SWR”)

David Rourke Regulatory Access Manager
Cara Stimson Head of Industry Partnerships
Dave Waldron Current Performance Manager

Network Rail Infrastructure Ltd (“Network Rail”)

Chris A’Barrow Head of Franchise Management
Alex Kenney Performance Process & Controls Manager
Malcolm Gunnyeon External counsel (Dentons)

Interested parties:

None

In attendance:

Tamzin Cloke, Committee Secretary

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Abbreviations

1. These abbreviations are used in this determination:

"ADA"	means Access Dispute Adjudication.
"DAB"	means Delay Attribution Board.
"DAPR"	means the Delay Attribution Principles and Rules.
"Rule"	refers to the Access Dispute Resolution Rules.
"Secretary"	is the Committee Secretary of the Access Disputes Committee.
"TAC"	means the Track Access Contract/Agreement between the parties to this dispute.

Summary of the dispute

2. On three occasions in 2018 - 22 June, 12 July, 29 October - a Train Operator responsibility incident had occurred at Wimbledon station, blocking platform 8 and the Down Slow line. Whilst services were able to divert around the blockade further up the line at Vauxhall, several trains already trapped by the original incident incurred delay whilst the incident in Wimbledon station was resolved.
3. In all three incidents a set of points, 722 points, which could have enabled the trapped services to divert around the blockade in platform 8, were plain lined and out of use. The points were taken out of use following the discovery of a serious fault (cracked rail) on 14 February 2018 and were brought back in use nine months later on 19 November 2018. No Network Change documentation was issued to cover this duration.
4. All three incidents were attributed to SWR under TIN references 132414, 188908 and 508238, respectively. In each case, and within the seven day contractual deadline, SWR accepted the bulk of the incidents but disputed the element related to trains trapped between Wimbledon platform 8 and Vauxhall (those which could have used 722 points), and the reactionary delay associated with those services.
5. SWR's submission to the DAB was that these delays should be attributed to Network Rail as a new Prime Cause as, had 722 points been operational, the additional delay would not have occurred. On submission to this ADA SWR further argued that these delays could be considered a failure to mitigate by Network Rail, as the points should have been operational during the incidents in question. In this ADA SWR also sought to rely on alleged breaches of contract by Network Rail.
6. On 21 October 2019 the parties submitted to the DAB a joint Request for Guidance on this attribution, which guidance (Guidance No: DAB-50) was ratified at a meeting of DAB on 19 November 2019 and issued to the parties on 17 December 2019. The DAB unanimously agreed with Network Rail's attribution to SWR. Guidance No: DAB-50 is reproduced at Appendix "A" to this determination.

Procedural history of this ADA

7. SWR served Notice of Dispute on 31 December 2019 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 ADA49. I was appointed as Hearing Chair on 08 January 2020 and, after liaison with the parties, the hearing date was set for Wednesday 26 February 2020.
8. On my behalf, under Rule G16 the Secretary required SWR to serve its Statement of Case by 16 00 on Wednesday 22 January 2020, Network Rail to serve a Statement of Defence by 1600 on Wednesday 05 February 2020; SWR to serve any response statement by 16 00 on Wednesday 12 February 2020 and, by 16 00 on Wednesday 19 February 2020, SWR and Network Rail to serve any written legal submissions not already put forward.
9. SWR requested, and received, an extension to 21 00 on Wednesday 22 January 2020, at which point SWR served its Statement of Case. Network Rail then served its Statement of Defence in accordance with the timetable laid out by the Secretary, as did SWR with its Statement of Response. On 19 February 2020 Network Rail served its legal submissions; SWR had nothing further to add.
10. On 21 February 2020 the Secretary submitted to the parties a list of questions which the Panel might wish to ask the parties at the hearing. These included questions of interpretation of the relevant Rules; there were no other issues of pure law as referred to in Rule G9(c).
11. I agreed with the Secretary that she would take a hearing record during the day. I regard the record 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 nor for eventual publication.

Evidence and submissions

12. The hearing took place on Wednesday 26 February 2020. Each party made opening statements, responded to questions from myself and the Industry Advisor, and had the 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. Some documents of which the Panel would wish to have sight were helpfully provided during the hearing.

Preliminaries

13. 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.
14. 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.
15. 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.

Jurisdiction

16. It is clear, and now agreed by the parties, that this ADA is brought under Condition B2.4.4 of the Network Code (incorporated into the TAC by clause 2.1 of the TAC) by which parties who cannot agree on the attribution guidance of the DAB must refer the matter for determination in accordance with the Rules.
17. 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.
18. There was some dispute as to whether some of the arguments advanced by SWR were within the scope of Condition B2.4.4., i.e. whether they had been validly referred to this ADA. That condition provides that if the parties cannot agree on the attribution within ten working days of DAB Guidance being received *'they shall refer the matter (emphasis added) for determination in accordance with the ADRR'*.
19. An objection was made at the start of the hearing to Mr Kenney being present at the hearing as part of the Network Rail team. The basis for the objection was that Mr Kenney is a member of the DAB and was one of the members who determined and issued DAB 50. It was said that this constituted a 'conflict of interest' such that Mr Kenney should not be present; and that his presence might call into question the validity of the DAB decision. The Panel rejected that objection. Mr Kenney's role was there to assist on technical matters. He was not there in an adjudicatory role. As to the suggestion that there might be a breach of duty of the confidentiality of DAB (unpublished) deliberations we concluded that that could be more than adequately policed by the conduct of the hearing not trespassing upon unpublished deliberations, by Mr Gunnyeon's undertaking not to explore such issues and by Mr Kenney's professionalism, which was not in question.

Accepted facts

20. There is no disagreement between the parties as to the principal facts; most relevant facts also having been agreed in the Joint Submission to the DAB of 21 October 2019.
21. The incidents forming the Request for Guidance to the DAB were as follows. On 22 June 2018 132414 2G23 Unit Failure Wimbledon. On 12 July 2018 188908 1D45 (unavailable) Driver at Wimbledon. On 29 October 2018 508283 2H59 Ill Passenger Wimbledon.
22. The effect of each incident was that the original (prime) train was standing in Wimbledon Station in Platform 8 blocking the Down Main Slow Line. Considerable delay resulted. All three stationary train incidents (relating to unit failure, a sick driver and a passenger taken ill) are Train Operator Responsibility Incidents within the TAC and the DAPR. Accordingly, the (extensive) delays resulting from the incidents were initially attributed to SWR as Train Operator.
23. A method of mitigating the problem of the Down Main Slow Line being blocked at Wimbledon is for trains on the Down Main Slow line to cross at Vauxhall to the Down Main Fast and cross back on the country end after Wimbledon.
24. 722 points at Wimbledon were, throughout the period covered by these incidents, unavailable, being non operational from 14 February 2018 until 19 November 2019. That was because 722 points were taken out of use following the discovery of a serious fault, a cracked rail, resulting in the points being plain lined. No Network Change was applied for in relation to 722 points unavailability. Network Rail said that the rectification and reinstatement of the points took many months due to the lead time for ordering a new set of points and the associated planning and installation possession requirements. Hence, prior to

the completion of the work it would not have been feasible on any of the three incident days to make 722 points operational so as to make any difference to delays on the day.

25. 722 points were not due to be in use (i.e. were non-operational) on any of the days in question. Use of 722 points was not required for any timetabled service even before they became operationally unavailable.
26. If available 722 points would have enabled a train on the Down Main Slow to cross over at Wimbledon to the Down Main Fast, on the line which passes through Platform 7, and then cross back to the Down Main Slow at Wimbledon West Junction on the country end of Wimbledon.
27. The principal consequence therefore of the unavailability of 722 points is to 'trap' trains that have already passed Vauxhall on the Down Main Slow. Those trains cannot pass through Wimbledon when Platform 8 is blocked, as it was on the three days in question. It is this aspect which is the subject matter of SWR's claim and in particular that the unavailability of 722 points (on SWR's case) constitutes a new Prime Cause in respect of the delays resulting from trains being 'trapped' by the unavailability of 722 points.
28. For the purposes of the reference to the DAB an amount of delay had to be extracted from the SWR responsibility incidents. New TRUST incidents were created with delay minutes attributed of 388,1069 and 45 minutes respectively. The Panel's understanding is that the parties before us (eventually) agreed that the totality of delays for the 'trapped' trains had been lifted out and made (for DAB and attribution arguments) into new Incidents resulting from a disputed new Prime Cause.
29. A different calculation would have been of the difference on the delay between having 722 points respectively available and not available. If 722 points had been available there may have still been some resulting delay to the otherwise trapped trains – they would have to await an appropriate opportunity to cross over on to the fast line and back, which might have taken some time, and also could have delayed trains on the fast line. The parties accepted that the Delay Minutes agreed for DAB purposes was not calculated on this basis (which would have been complex). The calculation actually used was consistent with the principal focus before the DAB, namely whether the unavailability of 722 points constituted a new Prime Cause. NR told us at the hearing that subsequent analysis had shown the availability of 722 points would have made (in the greater scheme of things) comparatively little difference. However this NR subsequent analysis had not been shared with, or known to, SWR.
30. There is some disagreement as to the comparative merits of using respectively Vauxhall and 722 points for crossing to the Down Main Fast. SWR point to the facts that using Vauxhall involves 14 signal sections from Vauxhall to Wimbledon, passing through two heavily used commuter stations (where trains will not therefore stop, resulting in passengers having to change to go back) and that at Vauxhall there is (unlike at 722 points) a move conflicting with the Up Main. Conversely NR points to the complications in crossing over at 722 points, near a station.
31. The Panel does not consider it needs, for the purposes of this ADA, to resolve the issues set out in the previous two paragraphs.

Relevant provisions

32. The principal relevant provisions are contained in the TAC, especially Schedule 8 Paragraph 5, the main terms of which are included as Appendix B to this Notice.

33. There are three relevant principal provisions at respectively 5.2(b) (Network Operator responsibility), 5.1 (failure to mitigate) and 5.2(a) (breach of contract).
34. Schedule 8 Paragraph 5.2 (b) deals with Network Rail Responsibility Incidents. By *'5.2. 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 : ... (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'*
35. Schedule 8 Paragraph 5.3(a) deals with Train Operator Responsibility incidents. Much of the wording is the converse of Schedule 8 Paragraph 5.2. The relevant words are *'the Train Operator shall be allocated responsibility for an incident...if that incident (a) is caused wholly or mainly ...(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..'*
36. Schedule 8 Paragraph 5.1 deals with Failure to mitigate. *'Assessment of incidents causing Minutes Delay and Cancelled Stops (a) In assessing the cause of any Minutes Delay or Cancelled Stops 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..... (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'*
37. Schedule 8 Paragraph 5.2 (b) breach of contract. This has the same opening words in 5.2 as set out above for 5.2(b) down to *'if that incident is caused wholly or mainly...(a) by breach by Network Rail of any of its obligations under this contract'*.
38. There are also the provisions of the DAPR. The DAPR was updated during the time period covered by the three incidents, but the provisions cited below are identical in both versions (of 1 April 2018 and 16 September 2018). The parties accept that the version in force at the time of each respective incident is the version to apply. Principal relevant extracts are as follows.
39. B7.1 *'The immediate cause or event that results in delay to a train is known as 'Prime Cause'. Until Prime Cause has occurred there will be no delay to a train service.'*
40. C1.4 *'attribution will normally be to the prime cause of delay..'*
41. C1.5 *'All attribution should be based on, and made against, the agreed 'plan' for the day in question. For Passenger Operators this is referred to as the Applicable Timetable which is the plan as agreed by 22.00 on the day prior to the train's operation'*
42. DAPR D4 is headed 'Failure to Mitigate'. By D4.1 *'When agreeing attribution of 'Minutes Delay' or 'Reliability Events' the contractual responsibility of Network Rail and Train Operators to mitigate the effects of an Incident should be taken into account...A separate incident attributed to the party concerned is to be created for the effects of such failure to mitigate'*. By D4.2 *'In the case of incidents where Network Rail is to be held responsible, if the acts or omissions of the Train Operator were such as to prevent the mitigation of delay then the additional delays should be attributed in accordance with*

paragraph D5.2. The converse also applies to the acts or omissions of Network Rail, its staff or agents, in the case of incidents where a Train Operator is to be held responsible’.

43. *By DAPR D4.3 ‘If Network Rail or Train Operator after discussion, considers the other party has failed to mitigate in line with paragraphs D4.1 and D4.2 above then any subsequent attribution should be made in line with the following...Any perceived failings of either party during an incident shall be highlighted in real time during the incident or event to which that failure is cited....Identification where something reasonable could or should have been done; that wasn’t..... the reason for the failure to mitigate was demonstrated and stated in any incident created...’.*
44. *By Network Code A1.1(h) ‘In the event of any conflict between this code and an Access Agreement (not including this code) the following order of precedence shall apply (1) this Code and (2) the Access Agreement.’ By DAPR A2.1 ‘The DAPR is incorporated into and forms part of the Network Code’. The effect is therefore, as agreed by the parties, that the DAPR takes precedence over the TAC.*
45. *Previous cases. In ADP 11 it was said ‘because delay only occurs once there is an actual incident , it should be attributed, as between the Train Operator and Network Rail, by reference to which body has responsibility for the factor which makes the decisive difference between no Delay Incident and an actual Delay incident’*

The parties’ respective cases

46. *Unsurprisingly each party contended that the other should be allocated responsibility. Network Rail contended to the DAB (5.1 of DAB 50) that ‘attribution should remain with the initial incidents rather than a new Prime Cause for 722 points’.*
47. *The presentation of SWR’s case evolved during the progress of this ADA. At 3.2 of DAB 50 SWR’s view is recorded as ‘this should be considered a new Prime Cause and the attribution should reflect 722 points being out of use and attributed to IB/IQCX’. And at 4.1 of DAB 50 SWR said ‘the delays caused by 722 points being unavailable should be considered a New Prime Cause Incident and attributed to the infrastructure being out of use, in this instance 722 points, as this hindered recovery and exacerbated the impact to the trains trapped between Vauxhall and Wimbledon’. In the SWR Notice of Dispute dated 31 December 2019 SWR contended that attribution should be to Network Rail ‘because the inability of the parties to mitigate the delays arose from the non availability of a Network Rail asset, namely 722 points. As such, SWR’s opinion is that Network Rail was in breach of certain clauses contained within the Track Access Contract between the parties’. The Notice of Dispute then listed clauses where breach by Network Rail was alleged. These arguments were expanded upon in more detail in SWR’s Statement of Case.*
48. *In effect therefore SWR sought to rely on all three principal arguments within the TAC, as applied by the DAPR. These were respectively first Network Rail’s responsibility as Network Operator. Secondly, by reason of Network Rail’s alleged failure to mitigate. Thirdly, due to Network Rail’s alleged breach of contract.*
49. *Network Rail raised questions of the jurisdiction of the Panel in this ADA to consider some of those arguments. This is against the background that Condition B2.4.4 of the Network Code provides SWR’s right to refer the DAB guidance to an ADA is expressed as a right to ‘refer the matter for determination in accordance with the ADRR’ (emphasis added). SWR contended that although the words ‘failure to mitigate’ do not appear in the submission to or guidance from DAB, the implication was there and was clear. The fact that Network Rail did not understand the case at DAB to include failure to mitigate may*

explain the resultant Minutes Delay within the new incidents. (Had Network Rail understood this it might have led to an alternative sum of disputed Minutes Delay; there may be a different calculation depending on whether 722 points constitutes a New Prime Cause or whether there has to be an analysis of the extent of the (more limited) delay that the availability of 722 points would have avoided, after taking into account the consequential delays of using 722 points on those particular days).

50. There are potentially issues about what constitutes '*the matter*' in B2.4.4. The principal issue is whether '*the matter*' within B2.4.4 is limited to arguments that were considered by the DAB or whether it extends to all possible methods/outcomes of the attribution, whether raised and considered at DAB or not. There are arguments both ways; there are clear advantages to parties bringing all arguments to the DAB for guidance and also giving Network Rail the opportunity to prepare for the case it actually faces at the ADA; conversely there may be advantages in the ADA (subject to procedural safeguards) being able to consider important arguments that were not considered at DAB.

Prime Cause/ Train Operator or Network Rail responsibility Incident - Discussion

51. Each of the three incidents on 22 June, 12 July and 29 October were initially classified as Train Operator Responsibility incidents. This was because each of the incidents of unit failure, unavailable driver and ill passenger are all Train Operator responsibility incidents within TAC 5.3(a)(ii). Those incidents were the Prime Cause. As such there was considerable delay, extending (far) beyond the delays which are now the subject matter of this ADA. Those delays were accepted by SWR with all the attendant consequences.
52. For the purposes of this ADA (and similarly before the DAB) an amount of delay has been identified for which there are two competing causes, namely the respective Train Operator incidents and the unavailability of 722 points. By itself, failure of points that were planned to be used for a service would constitute a Network Rail responsibility incident. It is important to note therefore that the delays happened when two potential causes were in play at the same time, namely the stationary train **and** unavailable points. (There may be discussion about the calculation of the amount of delay involved but this was notionally agreed for the purposes of the DAB).
53. The questions therefore are a) within the TAC which incident is wholly or mainly responsible for the delay? And b) within the DAPR, the Train Operator responsibility incident having been the Prime Cause of **all** of the delays, should the delays of trains 'trapped' between Vauxhall and Wimbledon be allocated to a new Prime Cause relating to 722 points?
54. Both parties, within their submissions, advanced an argument that would be characterised by lawyers as the 'but for' test for causation. Network Rail contend that, without the stationary train then the delays would not have occurred. SWR contend that, if 722 points had been available, then the delays would not have occurred. Both are, by definition, correct in their assertion. That is because the very issue raised for DAB Guidance included the issue of attribution when there are two 'necessary' causes ie the stationary train and unavailable 722 points, both of which have to have occurred for the delay in dispute to have happened.
55. Accordingly, the 'but for' test for causation cannot by itself provide the answer to attribution in this case. However, it is also the case that the Train Operator responsibility incidents resulted in considerable other delay (for which SWR have accepted responsibility) whereas the unavailability of 722 points did not result in any other delay either on the days in question or, it would appear, on any other day during the

period when those points were not operational. That is one factor that weighs in favour of Network Rail's case about causal potency.

56. Network Rail submit that there are three (related) stages to the test for determining whether the delays are to be attributed respectively as a Train Operator or Network Rail responsibility incident. These are respectively what 'incident' caused the delay in question, whether that 'incident' was planned or unplanned and then whether that 'incident' was caused wholly or mainly by factors within respectively Paragraphs 5.2 and 5.3 of the TAC.
57. By the provisions of the DAPR set out above, attribution is normally to the Prime Cause, which is the immediate cause of the delay, and that attribution is to be by reference to the plan for the day. There was considerable discussion and debate at the hearing as to the implications of this. The parties both accepted that the plan for the day did not include any intended use of 722 points (and had not done so for a long time). The Applicable Timetable was not changed. The timetable as planned at 22.00 hours the night before each incident did not involve availability of 722 points, which were known to be out of use, and there was no change to Network Operations.
58. There was some exploration of the extent to which SWR had been notified of the unavailability of 722 points. This had been left '*unconfirmed*' by the DAB. At this hearing Network Rail produced an email of 5 February 2018 headed '*Wimbledon cracked crossing 722A*' and stating '*All – W722 points have been plain lined last night as below...*'. This was sent to five people, two of whom were at SWR (members of SWR's Engineering Access Team, who work within its Train Planning department). There was also produced an email of 5 April 2018 from SWR to Network Rail asking '*..are these points still plain lined?*'. It is clear therefore that some SWR staff were aware of the non operational status of 722 points well before the first delay incident in June 2018.
59. The Panel therefore concludes that the unavailability/non operational status of 722 points should be considered as 'planned'. As 722 points were not operational they could not have been planned for use on the day nor to be part of the plan for the day.
60. It could not be established at the hearing that the unavailability of 722 points had been reflected as a temporary restriction in the relevant Weekly Operating Notices of the Sectional Appendix. SWR noted at the hearing that a permanent update to the Sectional Appendix - which is also formally notifiable to operators - would have required a Network Change, which did not take place, the inference being that nothing was published in the relevant Periodic Operating Notices. However, the Panel agrees with the DAB conclusion at 7.2.5 of DAB 50 that '*regardless of whether the appropriate notification had been provided to SWR in relation to 722 points being out of use..., the delays that occurred on the days in question would still have been of the same magnitude (ie any notification would not have changed what happened on the day)*'
61. Therefore the causal potency of the two competing incidents is between a) the incidents of stationary train (caused by respectively unit failure, unavailable driver and ill passenger), all of which occurred on the day in question and which were the immediate cause of much delay and a necessary cause of the (lesser) delay in dispute and b) the non availability of 722 points which had commenced months earlier rather than on the day of the delays and had not affected the plan for the day nor changed Network Operations.

62. The Panel concludes that the Prime Cause, 'decisive difference' and the cause 'wholly or mainly' is in each case attributable to the stationary train Train Operator responsibility incident and not to Network Rail.

Failure to mitigate

63. SWR's Statement of Case at 4.13 contended that *'the inability of the parties to mitigate the impact of each incident arises from Network Rail being in breach of Schedule 8 para 5(2)(b) of the (Track Access) Agreement. Therefore this issue falls under the aegis of the DAPR Section D4 'Failure to Mitigate'*. SWR contended that the submission to DAB had brought an implied, if not express, argument of failure to mitigate. Network Rail submitted that failure to mitigate was not part of the DAB guidance and so should not be considered by this ADA.
64. It is clear from the terms of both the TAC and the DAPR that failure to take reasonable steps to mitigate delay can result in the creation of a new incident, attributable to the party who has unreasonably failed to mitigate, and consisting of the delay that could otherwise have been avoided. (Although in this case it appeared that the delay agreed for DAB purposes had not been calculated on the basis of a detailed analysis of how much delay could have been reduced by availability of operational 722 points).
65. However, there was a factual dispute whether the provisions of DAPR D4.3 had been complied with. DAPR D4.3 states that *'any subsequent attribution should be in line with any perceived failings of either party during an incident shall be highlighted in real time during the incident or event to which that failure is citedidentification where something reasonable should have been done; that wasn't'*. Network Rail alleged that SWR had not complied with that provision in that SWR had not highlighted perceived failings during the incidents.
66. At the hearing SWR produced extracts from the Control Log. The relevant log for Incident 1849349 on 29 October 2018 records an (NR) entry about the train being delayed at Wimbledon due to an ill passenger and *'Due to a points issue the only place trains can be turned onto the Down Fast is back at Vauxhall Station'*. SWR contended that this fulfilled the requirements of D4.3. In further discussion it became apparent that SWR were not contending that Network Rail could or should have sought to reinstate the points (or taken any other specific action) during the incident(s) and on the day(s), principally because that was of course not practicable. What SWR was alleging was that Network Rail should have previously made the points available, which would have given the parties the opportunity to mitigate on the day by using 722 points.
67. The Panel does not accept that the control log shows compliance with D4.3. There was no identification of what Network Rail should then do (on the day) to mitigate. There was no other evidence from SWR to show compliance with D4.3. The control log was insufficient evidence to demonstrate compliance with DAPR 4.3 for the incident 1849349 and there was no evidence whatsoever in relation to the other two incidents.
68. Network Rail contended that the effect of non compliance for D4.3 of DAPR should be that SWR is debarred from bringing a failure to mitigate argument. The Panel considers that non compliance with D4.3 is highly relevant.
69. But there is a further significance. D4.3 relates to *'perceived failings of either party **during an incident** shall be highlighted in real time during the incident..'* (emphasis added). The Panel's reading of this provision, and in the context of the other TAC and DAPR provisions, is that it relates to failure to mitigate on the day during the incident, not failure to have taken action on days before the incident has occurred.

This is reinforced by DAPR B7.1 and C1.4 and C1.5. and is not detracted from by DAPR C2.2. This reading is consistent also with the language of the rest of DAPR D4, with TAC Sch 8 Para 5.1, and an ordinary reading of the word 'mitigate'. The consequence is that the concept of 'failure to mitigate' applies to actions that can be taken during an incident on the day. Failure to mitigate does not apply to actions/events that precede the day and incident in question (even if they reduce the ability to mitigate on the day).

70. Accordingly the Panel concludes that any failure by Network Rail in relation to 722 points prior to the day and incident(s) in question does not constitute a 'failure to mitigate' within the TAC and DAPR. Any remedy that SWR might have in relation to perceived Network Rail failures falls outside delay attribution (and see below).

Breach of contract

71. SWR contended at this ADA that the delays were caused by Network Rail responsibility incidents within 5.2(a) of Sch 8 to the TAC (breach of contract) as well as under 5.2(b) (Network Operator responsibility). In its Statement of Case at paragraph 4.15 SWR set out a contention that Network Rail was in breach of contract of eight different specific provisions. These included alleged breaches of Conditions 1.1 - 1.2 and 1.19 of its Network Licence, paragraph 9.1.3(b) of the Railway Operational Code, clauses 4 (Standard of Performance) 5.1 and 5.2 (Permission to Use) and 6.1(b) (Operation of the Network) and Schedule 2 (permission to divert) of the Track Access Contract. Breaches were also alleged of 5(1)(b) failure to mitigate (see above) and Network Code Part G Network Change provisions.
72. SWR's case was that the relevant incident, unavailability of 722 points, constituted a breach of contract. The evidence in support supplied was a) the fact of the unavailability of 722 points and b) extracts from the Holden Report of August 2018 'South Western Railway – Performance Review'. That review reported (amongst other conclusions) that there had been a significant increase in the impact of infrastructure failures over time, which had the effect of worsening operational performance (see the Executive summary at 1.1.)
73. SWR therefore contended that the relevant delays were caused by Network Rail responsibility incidents within 5.2(a) of the TAC – breach of contract arising from non availability of 722 points. However, the Panel has concluded above that 722 points were not the 'decisive difference' whole or main cause, nor the Prime Cause. That is because the Panel concludes that the relevant operative cause was the stationary train resulting from each of the unit failure, unavailable driver and ill passenger.
74. Accordingly SWR's claim under 5.2 (a) fails for exactly the same reasons as the claim under 5.2(b) as set out above in the section headed 'Prime Cause/Train Operator or Network Rail Responsibility Incident – Discussion'.
75. It is therefore not necessary for this ADA to determine whether there was a breach of contract, nor whether the Panel had jurisdiction to consider that argument. However, it may be helpful to add a few comments. First, any breach of contract allegation would have had to be tested by the evidence of breach against the specific wording of the relevant contractual provisions, some of which were qualified (such as 'reasonably practicable' in the general duty within the Network Licence).
76. Secondly breach of the Network Change provisions. The definition of Network Change within Part G of the Network includes at (b)(ii) '*any change to the operation of the Network...which...has lasted or is likely to last for more than six months.*' (It is to be noted however that for this part of the definition (b)(i) also has to be satisfied). 722 points were unavailable for longer than six months. The third incident,

508283, took place more than six months after 722 points first became non operational (albeit that only 45 minutes delay is in dispute in relation to that incident). It is therefore seriously possible that there was a breach by Network Rail of the Network Change provisions; having said that, Network Rail denied breach of the Network Change provisions and contended that their approach to fixing 722 points appropriately took into account availability of possessions.

77. One of SWR's arguments was that if the Panel rejected the request to attribute these delays to Network Rail then that would have the effect of negating the Network Change provisions. SWR strongly submitted that they had 'taken their medicine' for their own (SWR) failures and that Network Rail should do the same for their own (Network Rail) failures. However, the provisions of Network Change continue to apply and parties have been free to pursue remedies pursuant to those provisions. The Panel's conclusion does not negate the Network Change provisions; instead it is (merely) to the effect that any breach of the Network Change provisions does not affect, in these circumstances, the delay attribution.

Further DAB Guidance

78. As set out in DAB 50, one of the purposes of the matter being referred to DAB was a request for guidance which may be applicable more generally. At paragraph 8 of DAB 50 the Board noted that it needed to consider providing further guidance in the DAPR, or its supporting Process Guides, on two issues arising from these, or similar facts. The Panel can see the sense in that view and further guidance, produced through the DAB process, may be of assistance to the industry.
79. The second of those two issues was the attribution where two unplanned events occur simultaneously, each potentially impacting recovery of the other by preventing the implementation of viable diversions. That will be a matter for DAB. The Panel notes, in passing, that there was a relevant Network Rail submission in this case. The submission was that adopting a general principle that an incident blocking a diversionary line after the main line had become blocked should be allocated responsibility for that element of delay resulting from simultaneous blocking of both the main line and diversionary line might well have unforeseen and adverse conclusions. It seemed to the Panel that that submission, although not necessary to decide this case, had some force. However new guidance will of course be for the DAB not this Panel.

Conclusion

80. The Panel concludes that none of three principal grounds on which SWR rely succeed. In the circumstances it is not necessary for the Panel to decide the jurisdiction issues raised by Network Rail. Accordingly all three incidents should remain attributed to SWR as Train Operator responsibility incidents.

Determination

81. Having carefully considered all submissions and evidence and based on my analysis of the issues and submissions, I determine as follows:
 - a. The delays arising from Trust incidents 132414, 188908 and 508283 should be/remain attributed to SWR as Train Operator responsibility incidents
 - 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

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

A handwritten signature in cursive script that reads "Andrew Long".

Andrew Long
Hearing Chair

06 April 2020

APPENDIX "A"
Delay Attribution Board Guidance No. DAB-45

Guidance No: DAB50

Attribution of Responsibility for Service Recovery affected by points being out of use.

1. Introduction

The Delay Attribution Board (the Board) received a Request for Guidance in connection with the attribution of various TRUST incidents involving additional delays caused by a set of points being out of use and hindering service recovery

- 1.1. The Board received the Joint Request for Guidance from First MTR South Western Railway (South Western Railway) and Network Rail; Wessex Route on the 21st October 2019.
- 1.2. Summary of the submission:
 - 1.2.1. Guidance from the Board is sought for the resolution of an issue which has been progressed through the relevant process but for which no resolution has been achieved.
 - 1.2.2 To provide guidance from the Board in relation to additional delays caused by a set of points being out of use that hindered service recovery.
 - 1.2.3 For the Board to provide guidance on whether the responsibility for the incidents should be allocated to Network Rail or to South Western Railway.

2 Factual Background to the Incidents

2.1 Incidents that form this Request for Guidance are: -

- 132414 2G23 Unit Failure Wimbledon on 22nd June 2018
- 188908 1D45 Driver Wimbledon on 12th July 2018
- 508283 2H59 Ill Passenger Wimbledon on 29th October 2018

2.1 The above 3 incidents are 'duplicate incidents' and contain ONLY the disputed reactionary delays from the original Prime Cause incidents (which have been accepted by SWR).

2.2 The disputes relate to the unavailability of 722 points at the London end of Wimbledon station due to the points being plain-lined and out of use.

2.3 In all three incidents the prime train involved was standing in Wimbledon station in Platform 8 on the Down Main Slow. 722 points would have enabled a train, in rear, at W183 to cross over to the Down Main Fast and pass through Wimbledon on the Down Main Fast line crossing back to the Down Main Slow at Wimbledon West Jn on the country side of Wimbledon station.

2.4 Between London Waterloo and Wimbledon the only other set of points available to cross trains from the Down Main Slow to Down Main Fast is at the London side of Vauxhall station so the impact to the train service is to "trap" trains on the Down Main Slow between Vauxhall and Wimbledon with services having to wait for the primary train to move from Platform 8 at Wimbledon.

2.5 The points are not required to be used for the planned service and no alteration to the plan of the day was required as a result of 722 points being plain lined. The points had been out of use since 14th February 2018 with no impact to the planned train service.

2.6 The parties believe there is no clear guidance in DAPR to aid resolution of these incidents.

3. Requirement of the Board

- 3.1 The Delay Attribution Board was asked to review the specific circumstances relating to these incidents and provide guidance as to which party they believe is responsible for the additional delays caused by a set of points being out of use and hindering service recovery.
- 3.2 SWR believed that this should be considered a new Prime Cause and the attribution should reflect 722 points being out of use and attributed to IB/IQCX
- 3.3 Network Rail Wessex Route believe the current attribution is correct and the incidents should remain code-matched to the original Prime Cause as the 722 points had not failed and their unavailability had been reflected within the Plan of the Day.
- 3.4 Both Parties also request DAB to provide guidance on whether it believes attribution would be different in circumstances where infrastructure is out of use and did require an amendment to the plan of the day (which was actioned) but a new Prime Cause incident would again have the impact mitigated if this infrastructure was available for use.

4. South Western Railway's View

- 4.1 SWR believe that the delays caused by 722 points being unavailable should be considered a new Prime Cause incident and attributed to the infrastructure being out of use, in this instance 722 points, as this hindered recovery and exacerbated the impact to the trains trapped between Vauxhall and Wimbledon.
- 4.2 There is no specific guidance in the DAPR regarding infrastructure being unavailable but having no impact on the Plan of the Day.
- 4.3 If 722 points had failed on the day when being used to cross trains to the Down Main Fast a new prime cause would have been created and attributed to IB/IQCX as per DAPR.
- 4.4 No Network Change had been applied for and the points should be available as per the Sectional Appendix. This impacts incident 508283 on 29th October 2018 as it was over 6 months since 722 points had been taken out of use

5 Network Rail's View

- 5.1 Network Rail believes that the incidents should remain with the initial incidents rather than a new Prime Cause for 722pts. This is due to the fact that the points had been plain lined since the 14th Feb 2018 and require no change to plan of the day (i.e. the plan of the day reflects that 722 points are not planned to be used).
- 5.2 Network Rail therefore believes that the plan of the day reflecting 722 points being out of use constitutes a 'planned' event. Attribution (as governed by Schedule 8 of the Track Access Contracts) is applicable to (and payable for) unplanned events.
- 5.3 Network Rail maintains that without the SWR incidents occurring no delay would have occurred due to the unavailability of 722 points (as above, the plan of the day reflected their non-availability).
- 5.4 In response to SWR 3.4 only the last incident 508283 is over the 6-month timeline for a Network Change to be applied. However, the unavailability of 722 points had no impact on the base timetable and the intention was always to fix 722 points which was completed in Week 34 (November 2018)
- 5.5 Network Rail believe that the Prime Cause of Delay is the SWR incidents / events (train failure, driver issue and passenger ill as set out in Section 2). Without these events no delay would have occurred irrespective of 722 points being out of use.

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 Party regarding how incidents of this nature should be attributed, this guidance was not binding on either Party involved. 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 Principles and Rules should be proposed to improve clarity.

7 Consideration of the Issues

- 7.1 The Board at its meeting on 19th November 2019 considered the Request for Guidance and took account of the following:
- 7.1.1 The facts provided by South Western Railway and Network Rail in connection with the incidents disputed and the Joint Request for Guidance submission paper.
 - 7.1.2 The additional information provided by South Western Railway and Network Rail in response to questions raised by the Board prior to the Hearing (Set out in Appendix A).
 - 7.1.3 The additional information provided by South Western Railway and Network Rail in response to questions raised by the Board at the Hearing (Set out in Appendix B).
 - 7.1.4 The guidance provided within the Delay Attribution Principles and Rules (as was in place at the time of the incident(s) occurring) and any other related DAB Guidance documentation.
- 7.2 The Board regarded the following points as particularly relevant during discussion of the incidents:
- 7.2.1 That Network Change process shouldn't influence attribution although at the same time noting that compensation could still be sought by SWR through the Network Change process outside of attribution.
 - 7.2.2 That whilst Network Rail should be incentivised to repair its infrastructure this can be achieved through other mechanisms (e.g. see Network Change above) and not necessarily attribution and Schedule 8.
 - 7.2.3 That 722 points being out of use should be considered as 'planned' as the points were not planned to be used for any booked movements in the 'Plan of the Day' (no amendments to the plan were required)
 - 7.2.4 That the same principles would apply if the 'Plan of the Day' had been amended to reflect 722 points being out of use (effectively Network Rail would be mitigating the points' impact on services)
 - 7.2.5 That regardless of whether the appropriate notification had been provided to SWR in relation to 722 points being out of use (unconfirmed), the delays that occurred on the days in question would still have been of the same magnitude (i.e. any notification would not have changed what happened on the day)
 - 7.2.6 Whilst 722 points should be an available asset and could be used for contingency reasons, any mitigating crossing moves are ordinarily carried out at Vauxhall.
 - 7.2.7 That 722 points being out of use caused no direct delay on previous days. The delays only occurred as a result of the SWR incidents blocking the Down Slow line at Wimbledon.
 - 7.2.8 That attributing the delay to the 'trapped' trains into a new incident for 722 points would effectively mean the SWR (unplanned) incidents blocking

- the Down Slow line would not be allocated any of that delay (when in effect the SWR incidents were the direct cause of that delay)
- 7.2.9 That there would be wider implications if those principles were applied. A delay could then be allocated to the reason a diversion can't be utilised rather than the immediate cause on a train's booked route / line (a reverse situation could occur where delay due to a Network Rail infrastructure incident is then allocated to an Operator incident blocking the diversionary route)
- 7.2.10 In situations such as this (and potentially where two unplanned incidents occur simultaneously) that any direct delay should be allocated to the incident on the affected train's booked line or line of route.

8 Guidance of the Board

- 8.2 Based on the information presented, the Board agreed, unanimously, the following: -
- 8.1.1 That South Western Railway is responsible for the incidents raised as part of this submission.
- 8.1.2 That the Delay Code applied to the incidents in this submission should be matched to the original South Western Railway incidents (from which the delays were removed).
- 8.3 In reaching its conclusion the Board also noted the following points:
- 8.2.1 The Board needs to consider providing further guidance in the DAPR, or its supporting Process Guides, for circumstances to clarify that any parties' planned restrictions or events (factored into the 'Plan of the Day') should not be considered as impacting recovery of any unplanned incident.
- 8.2.2 The Board also needs to consider providing further guidance in the DAPR, or its supporting Process Guides, for circumstances where two unplanned events occur simultaneously, and each could be considered as impacting recovery of the other by preventing the implementation viable diversions.

This guidance was approved by the Delay Attribution Board on 17 th December 2019	Jim Pepper (Deputy Chair)
Signature:	

APPENDIX A

Additional information provided by SWR and Network Rail in response to questions by Board members prior to the 19th November 2019 Hearing.

Question 1 (In relation to Factual Background point 2.1) – It is stated that the incidents in dispute contain the delays that were identified as being as a result of 722 points not being available. Could NR advise if this is the full delay experienced by the train(s) prevented from crossing over at 722 points or a proportion of the delay considered the ‘additional’ impact?

If it is the full delay – was the train not considered as being delayed by the incident ahead?

If it is a proportion of the delay - how was the value ascertained / agreed upon?

Response (NR) – The full delay was removed for the trains delayed behind the prime train that were between Clapham Jn and Wimbledon. It was not possible to identify how much time they would have lost to the prime train only and what time they potentially lost due to not using the points. Historically when an incident occurs at Wimbledon train usually cross to the down fast prior to Vauxhall.

Question 2 – Could the parties advise if they believe 722 points being out of use is a ‘planned’ or ‘unplanned’ event with their rationale provided?

Response (NR) – NR would consider the points being out of use a planned event.

The points were already out of use at 2200 the night before and are not required to operate for the plan of the day as agreed at 2200 the night before.

Response (SWR) – SWR consider it to be unplanned. There was no network change notification made to SWR that the points were out of use. Although no trains are planned to use them in the SX timetable the assumption being they are available for disruption.

APPENDIX B

Additional information provided for clarification purposes by SWR and Network Rail during questioning by Board members at the 19th November Hearing.

Question 1 – Can NR confirm if the delays experienced by the trapped trains has been removed in its entirety or just a proportion?

Response (NR) – All the delay has been removed and is in a separate holding incident that will be recoded as per the DAB Guidance.

Question 2 – So in effect the parties have agreed that if the incident is allocated to NR for the points failure then effectively no delay would have been caused by the SWR incident on the down slow line?

Response (SWR) – The delay in the holding incidents has been agreed so it will all be coded to the responsibility as per the DAB guidance.

Response (NR) – It would be too difficult to ascertain what amount delay would or wouldn't have occurred if 722 points had been available and the trains went onto the down fast line.

Question 3 – Was 722 points listed on the out of use register or similar documentation and how are SWR usually advised of such restrictions?

Response (NR) – Control were unable to confirm where and when it was recorded or advised but highlighted that the points are not used for any WTT services.

Question 4 – So what is the purpose of 722 points?

Response (NR) – They would generally only be used for engineering work and sometimes additional stock moves to from Wimbledon depot.

Question 5 – Are 722 points not used for recovery or mitigation purposes?

Response (NR) – They could be but generally trains are crossed from the slow to the fast at Vauxhall (north of Wimbledon). 722 points are rarely used for mitigation purposes.

Question 6 – Are 722 points in any contingency plans and have they been used in that capacity since repaired?

Response (SWR) - The contingency plan doesn't generally detail specific assets

Response (NR) – Not sure if they have been utilised since as it wouldn't be recorded in the log specifically that they were used.

Question 7 – Why were 722 points being out of use not processed through Network Change?



Delay Attribution Board
Floor 8
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London
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Response (NR) – As they were due to be fixed [November 2018] a few weeks after the stipulated 6 month time period for Network Change.

APPENDIX "B"

Paragraph 5, Schedule 8 of the TAC

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.