

ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA57

(following a hearing held at Mimet House, London, on 23 November 2023)

Present:

The appointed Adjudication Panel (the “Panel”):

Hearing Chair: Alexander Rozycki

Industry Advisors: John Beer; Mark Leving

Dispute Parties:

Grand Central Railway Company Ltd. (“GC”)

Chris Brandon Head of Business Development & Programmes

Sean English Chief Operating Officer

Network Rail Infrastructure Ltd (“NR”)

Tim Wright Head of Commercial & Contracts, Eastern Region

Mark Garner Customer Manager

Richard Wall Contract Services Manager

Clare Dwyer Addleshaw Goddard LLP

Involved Parties:

Abellio East Anglia Ltd. *(unable to attend)*

East Coast Trains Ltd. Andy Wylie

East Midlands Railway Ltd. *(unable to attend)*

Freightliner Group *(unrepresented)*

GB Railfreight Ltd. *(unable to attend)*

Govia Thameslink Railway Ltd. *(unrepresented)*

Hull Trains Company Ltd. Andy Wylie

London North Eastern Railway Ltd. *(unrepresented)*

XC Trains Ltd. *(unrepresented)*

Observing for professional development

Alex Seabridge (Addleshaw Goddard LLP)

In attendance:

Tamzin Cloke, Committee Secretary

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Abbreviations

These abbreviations are used in this determination:

“ACS” means Access Charge Supplement

"ADA" means Access Dispute Adjudication

“ECDP” means the East Coast Digital Programme

“ORR” means the Office of Rail and Road

“Part D” and “Part G” mean Parts D and G of the Network Code, respectively

“PR08” means Periodic Review 2008

“RoU” or “RoUs” mean Restriction(s) of Use

"Rule" refers to the Access Dispute Resolution Rules

“Schedule 4” means Schedule 4 of the TAC

"Secretary" is the Committee Secretary of the Access Disputes Committee

“SPD” means Sustained Planned Disruption, as defined in the TAC

"TAC" means the Track Access Contract/Agreement between the Parties to this dispute

A Introduction and procedural history of the dispute

1. This dispute arises out of a Network Change proposal issued by NR under Condition G1.1 in its “Notification of proposed G7 Network Change” dated 13 April 2022 and under reference NC/G5/2020/EAST/001/G7/003 (“the Network Change”), as part of a wider plan to upgrade signalling systems on the East Coast Mainline. The Network Change specifically relates to upgrades in the Peterborough area. The dispute concerns the type of compensation GC is entitled to under Part G of the Network Code, as well as the entitlement of NR pursuant to Part G of the Network Code to establish and implement the Network Change.
2. GC served Notice of Dispute on 15 September 2023 alleging that NR had failed to comply with four aspects of the process listed in Part G: failure to respond to an objection raised under clause G2.1.1(a); continued to implement a Network Change whilst there were outstanding objections (in breach of G10); not proposed suitable compensation terms within the Network Change proposal so as to prevent GC’s objection under G2.1.1(a)(iii) being raised; not provided sufficient information to GC as to why NR believed GC’s objection raised under G2.1.1(a)(iii) was not an acceptable objection to a Network Change proposal.
3. GC indicated a preference for the dispute to be referred to an ADA. The Secretary tentatively registered the dispute as ADA57 on 19 September 2023 and asked the Parties to agree and sign a Procedure Agreement. A valid Procedure Agreement was sent back to the Secretary on 03 October 2023. It confirmed that the dispute would be resolved by an ADA in the first instance, with any appeal to be made and determined by arbitration in accordance with Chapter F of the Rules.
4. I was appointed as Hearing Chair on 04 October 2023 and, on the same date, the hearing date was set for Thursday 23 November 2023.

5. On my behalf, under Rule G16, the Secretary requested GC to serve its Statement of Case by 16:00 on Thursday 19 October 2023, NR to serve a Statement of Defence by 16:00 on Thursday 02 November and GC to serve any response statement by 16:00 on Thursday 09 November. Both Parties served their documents in accordance with the timetable laid out by the Secretary.
6. In response to a query from NR on 14 November 2023, I decided that both Parties having submitted thorough papers so far, and I having (in any case) to summarise the issues of law in this dispute in accordance with ADR Rule G9(c), and in accordance with my powers to vary the process outlined in the ADRR using Rule G15, neither Party was required to make submissions under ADR Rule G16(g) but that they could do so if they wished. I directed that any submission should be made by way of exchange, so neither Party would be disadvantaged. I reminded both Parties that they would have the opportunity to make any further legal submissions on the hearing day. In the end neither Party chose to make a submission under ADR Rule G16(g).
7. On 20 November 2023 NR submitted an unsolicited statement of factual points arising from GC's 09 November submission, which I accepted on the basis that the document was likely to assist me in resolving the issues in dispute, and that it had been copied to GC who would have the opportunity to address anything arising from it at the hearing.
8. On 21 November 2023 the Secretary submitted to the Parties a list of questions which the Panel might wish to ask the Parties at the hearing, in addition to my identification of issues of law as required under Rule G9(c). The latter is discussed fully in Section D.
9. 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.
10. The hearing took place on Thursday 23 November 2023. Each Party provided written copies of their opening statements, and NR provided written legal submissions which it supplemented in oral submissions. Each Party read out their opening statements, responded to questions from myself and the Industry Advisors, and both Parties made 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.
11. 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.
12. 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.

13. 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.

B Outcomes sought by the Dispute Parties

14. In its Sole Reference Document GC requested that I determine the following:

- a) NR failed to formally respond to GC's objections to the Network Change raised under clause G2.1.1(a) and in doing so NR implemented the Network Change proposal without being entitled, due to the unresolved dispute in the form of a notice issued by GC under G2.1.1(a) not being withdrawn, resolved under G11 or agreed not to apply, as set out in G10.3.2;
- b) NR did not propose suitable compensation terms within the Network Change proposal so as to prevent or address the objection under G2.1.1(a)(iii) being raised;
- c) GC is entitled to reject the Network Change on the basis that G2.1.1(a)(iii) is satisfied;
- d) In failing to formally respond to GC's rejection of Network Change and implementing the Network Change, NR has not acted appropriately in relation to the management of the Network Change process;
- e) In not proposing suitable compensation to GC under condition G1, including compensation for Type 1 and Type 2 RoUs, GC has been financially impacted due to the material impact on performance of GC train services during the RoUs associated with the Network Change;
- f) In not dealing sufficiently with GC's objection under G2.1.1(a)(iii), G2.1.1(a)(iii) remains a legitimate objection where Operators do not feel they are adequately compensated in respect of a RoU in connection with the implementation of the change, and that on this basis GC has been financially impacted due to the RoUs associated with the Network Change;
- g) If I determine the dispute in GC's favour, NR should pay GC negotiated compensation for the RoUs associated with the Network Change, the value of such compensation to be determined through the normal negotiated compensation process as used for both Type 3 RoUs and periods of SPD.

15. In its Sole Reference Document NR requested that I determine the following:

- a) GC was not entitled to reject the Network Change because condition G2.1.1(a)(iii) was not satisfied;

- b) NR was not obliged to propose compensation terms within the Network Change proposal when NR could not pay such compensation under the TAC;
- c) NR should not pay GC any compensation for the losses caused by Type 1 and 2 RoUs because there is no contractual basis for NR to do so;
- d) There is no other basis for NR to pay GC any compensation for the losses caused by Type 1 and 2 RoUs implementing the Network Change under Part G or Schedule 4 of the TAC;
- e) NR has addressed GC's purported objections to the Network Change raised under G2.1.1(a)(iii) so far as NR is in a position to do so;
- f) In implementing the Network Change while the dispute was unresolved, NR took the appropriate course in relation to its management of the Network Change process by: i) exhausting its ability to resolve the objection, meaning NR set out in full why it could not do any more, ii) ensuring that the Network Change was implemented at the appropriate time for the relevant rail network users and the rail industry as a whole, and iii) continuing to try to address GC's concerns by regular discussion, participating in ADA57 and reviewing any contractual basis for compensation that may become available.

C Relevant provisions of the Network Code

- 16. The versions of the Network Code Part G and the ADR Rules dated 13 March 2023 were applicable to these dispute proceedings.
- 17. Conditions G1.2(e)(iv), G2.1.1(a)(iii), G2.2, G2.4.1 and G10.1 were particularly relevant and are appended in Annex "A".

D Issues of fact and law

- 18. At its core, this dispute concerns GC's entitlement to compensation under Part G for RoUs identified in the Network Change proposal, and NR's entitlement to implement that Network Change when GC's objection remains unresolved.
- 19. The facts relating to this dispute are broadly uncontroversial.
- 20. By letter dated 13 April 2022, NR issued a notice of proposed G7 Network Change with reference to the ECDP Peterborough Re-control. In particular, within this letter, it stated that "Any direct costs that arise from the consequence of any Restriction of Use associated with the implementation of this proposed Network Change will be compensated under Schedule 4 of your Track Access Contract and will not form any part of any claim that you may make in accordance with Condition G2.2."

21. By letter dated 18 May 2022, GC rejected the proposed Network Change. The basis of the rejection was set out within the letter as being that “Grand Central considers that the proposed Network Change satisfies the condition outlined in Condition G2.1.1(a)(iii) in that the implementation of the proposed change would result in a material deterioration in the performance of our trains which cannot adequately be compensated in respect off [sic] a Restriction of Use in connection with the implementation of the proposed change under our Access Agreement.” It sought that NR propose compensation for those RoUs “under alternative terms for example a method of compensation which compensates for demonstrable losses as a result of Restrictions of Use.”
22. By letter dated 23 March 2023, NR set out its general position in relation to compensation for RoUs being carried out during the process of implementing the Network Change. While it did not respond specifically to GC’s objection of 18 May 2022, it responded to the substance of the objection in significant detail.
23. Following the above letter, discussions continued between GC and NR. There was a meeting between the Parties on 26 July 2023 to discuss the outstanding objection, but no agreement was reached. GC confirmed at this meeting that it was unable to remove its objection.
24. On the weekend of 26 August 2023, which was a Bank Holiday weekend, commissioning works in relation to the Network Change took place, and RoUs were put in place accordingly. As a result of those RoUs, GC was unable to operate its full train service across this weekend with roughly half of the train service cancelled on Saturday 26 August 2023 and a full-service cancellation on Sunday 27 August 2023.
25. I have identified the following as specific issues which I needed to consider in making my determination:
 - a) Firstly, whether, in the circumstances of NR having notified the Network Change on 13 April 2022 and such Network Change necessitating RoUs, GC was obliged to give notice of response to (in other words, ‘object to’) NR’s proposal for Network Change on the basis that it would not be “adequately compensated” pursuant to G2.1.1(a)(iii);
 - b) Secondly, whether, in circumstances where the dispute identified in GC’s rejection of the proposed Network Change by letter dated 18th May 2022 had not been resolved, NR was entitled to implement the Network Change, which it did in August 2023;
 - c) Thirdly, whether GC is entitled to any compensation for the Network Change and, if so, in what amount.
26. The Network Code (and therefore Part G) is incorporated into the TAC. The above issues are, therefore, matters of contractual interpretation.

27. I remind myself that, under Chapter A, Rule 7(a) and (b) of the ADR Rules, I shall, in reaching my determination (a) take note of relevant published ADA or TTP determinations (and those of any predecessor bodies) and the ORR as persuasive authority, but I need not be bound by them, and (b) be bound by any decision of the ORR on a Regulatory Issue and any relevant decisions of the courts. I also remind myself that, in the event of a conflict when using the ADR Rules between the Act (meaning the Railways Act 1993), the Access Conditions, an Underlying Contract and these Rules, the following order of precedence shall apply: (a) the Act, (b) the Access Conditions, (c) these Rules and (d) the Underlying Contract.
28. Many decisions of the courts have provided guidance on how contracts should be interpreted. I have had regard in particular to a useful distillation of the relevant principles contained in the Judgment of Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* (*'The Ocean Neptune'*) [2018] EWHC 163 (Comm), at Paragraph 8, to which I drew the Parties' attention in my G9(c) Legal Note, as follows:
- a) The objective meaning of the language which the Parties have chosen in which to express their agreement must be ascertained;
 - b) In considering the language used, a court must ascertain what a reasonable person who has all the background knowledge which would reasonably have been available to the Parties in the situation in which they were at the time of the contract would have understood the Parties to have meant;
 - c) The contract must be considered as a whole and, depending on the nature, formality and quality of the drafting, more or less weight can be given to the wider context in ascertaining the objective meaning of the language used;
 - d) If there are two possible constructions, a court is entitled to prefer the construction which is consistent with business common sense and reject the other;
 - e) Interpretation is both a unitary process, which involves striking a balance between the indications given by language and the implications of competing constructions, and an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.
29. GC's primary position, as set out in its Statement of Case, is that RoUs in NR's Network Change proposal of 13 April 2022 would lead to a material deterioration in the performance of its trains "whilst the RoUs were in place," in the sense that it would, as a result of such RoUs, be subject to heavy cancellations and would not be adequately compensated under Schedule 4. In this respect, GC are inviting me to accept that, the 'performance' of its trains can be said to include the running of a certain number of trains on a planned basis. It in any event invites me to conclude that the wording of G2.1.1(a)(iii), in particular the words "cannot adequately be compensated ... in respect of a Restriction of Use in connection with the implementation of the proposed change under that Train Operator's Access Agreement" can be construed so as to

include the impact of RoUs which were necessary to enable the implementation of the Network Change, as well as the impact of the Network Change once implemented.

30. In its Additional Submission, and in support of the above proposed interpretation, GC refers to proposed draft changes to Part G, in particular to G2.1.1(a)(iii), which were made during a consultation process entitled PR08. It refers to the introduction of the terms 'Train Operator's Access Agreement' and 'Restrictions of Use' into the provision, as well as a rejection of proposed wording "as a consequence of the proposed change once implemented" in favour of "as a consequence of the implementation of the proposed change." It submits that the rejection of the proposed draft wording is demonstrative of the provision as finally drafted covering the impact of RoUs which had occurred during the implementation of the Network Change.
31. However, it is established principle that, in interpreting the terms of a contract, while the factual background can be taken into consideration, 'pre-contractual negotiations' cannot. This principle was confirmed in the decision of the House of Lords in *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38, which I had drawn to the Parties' attention within my G9(c) Legal Note and to which I have had regard. I am satisfied that any drafts which had been put forward for consideration during PR08, but which were not subsequently adopted in the final wording of the provision, amount to pre-contractual negotiations and that I must therefore exclude them from consideration. GC accepted that I must do so during the hearing in light of *Chartbrook*.
32. GC further argues that the purpose of the express exclusion of compensation for RoUs under G2.4.1 might be taken to be the prevention of double recovery in the event that an operator has already claimed such compensation under Schedule 4. In that regard, it submits that, if it had been the intention to make Schedule 4 the only mechanism for compensating a train operator for revenue loss, Part G would expressly have so stated (and does not). It refers in particular to the reference in G2.2, which is the provision which provides for the entitlement to compensation under Part G, to "revenue loss" as a distinct head of loss. It therefore asserts an entitlement to compensation for "actual revenue loss for an enhancement, which ECDP is identified as in NR's enhancement delivery plan," as opposed to compensation for all Type 1 and Type 2 RoUs (Additional Submission, Para 4.1).
33. In its written legal submissions provided at the hearing, NR drew my attention to TACs being regulated contracts pursuant to section 18 of the Railways Act 1993. The effect of this is that NR, as the "facility owner," cannot enter into a TAC unless the ORR has approved its terms. NR can only grant access to train operators, such as GC, to use the network once the relevant ORR approval has been obtained. Accordingly, the provisions of Part G in so far as they provide an entitlement to compensation, including any express exclusions from that entitlement, have been approved by the ORR. I consider that this is suggestive of the need for caution when seeking to interpret the relevant provisions of the TAC (including Part G) so as to incorporate a meaning which is not expressly provided for within the relevant provisions.

34. NR has referred in its Defence Statement to a document produced by ORR entitled '*Determination of Network Rail's outputs and funding for 2009 – 14,*' which forms part of PR08. Chapter 26 of this document is headed 'Schedule 4 – possessions regime.' The document makes clear that, at the time of its creation, compensation for possessions (a term used interchangeably with 'Restrictions of Use') was paid through Schedule 4 of TACs as well as through Part G, but that discussions with NR and train operators suggested that "the current compensation regimes for possessions were not working as effectively as they should" (Para 26.2).
35. The above consultation process led the ORR to set out its conclusions in a document entitled *Periodic Review 2008: Final Conclusions – Compensation for Possessions*, dated August 2008. These conclusions make clear that changes were made to Part G under Condition C8 of the Network Code on the basis that "nearly all compensation for possessions will now be made through Schedule 4." By way of further clarification, the ORR stated that "These changes remove the ability for compensation to be paid for possessions taken in relation to Network Change, except in association with a Competent Authority change" (Para 10, Executive Summary). The ORR went on to describe "the main effect of the changes" as being "to exclude Part G compensation being payable by NR to Train Operators in respect of any costs, direct losses or expenses incurred by Train Operators as a consequence of any Restriction of Use in connection with the implementation of a proposed Network Change" (Para 4.5). In the ORR's *Final Determination PR08*, dated 31 October 2008, it confirmed that "as a consequence of other PR08 changes to Schedule 4, Part G compensation for possessions will be withdrawn."
36. I have also been referred by NR to a document by the ORR entitled '*Schedule 4 Possessions Regime Factsheet*' dated 30 September 2021. This provides an overview of the compensation regime for RoUs in Schedule 4 to the TAC and in particular contains a description and a table setting out the consequences if a train operator does not pay an ACS.
37. I am invited to take the above ORR documents into account. I am satisfied that I am able to do so on the basis that, unlike pre-contractual negotiations, they form part of the relevant factual background available to the Parties pursuant to the principles distilled in *Lukoil*, above. This is because the ORR's final conclusions and determinations, as evidenced in the above documents, are what led directly to the wording of the provision as it was finally adopted and has since remained unchanged. It is material to any interpretation of the relevant provisions of Part G that the result of PR08 was for the ORR to exclude compensation for RoUs from Part G altogether, and to render Schedule 4 alone as the primary mechanism by dint of which such compensation could be obtained. I also consider that they are in any event binding on me as decisions of the ORR on a Regulatory Issue, which is defined broadly as a "principle, issue or processes connected with the rail industry." The decisions are connected with the rail industry and are matters in respect of which the ORR has regulatory oversight, namely the operation of Part G. Accordingly, these decisions are binding on me pursuant to Chapter A, Rule 7(b) of the ADR Rules.

38. I have also had regard to the decision of the ORR in NV58, which considered in particular the operation and effect of G2.1.1(a)(iii). At Paragraph 42 of that decision, the ORR concludes that “The wording of Condition G2.1(a)(iii) is quite clear in referring to a proposed change which, if implemented, would result in a material deterioration of the Train Operator’s trains that could not adequately be compensated under Condition G2.” While I am not bound by it, I have had regard as persuasive authority to the Determination of the ADA in ADA16 of 21 October 2013. I take note of the fact that, in considering the effect of G2.1.1(a)(iii), the ADA in that case looked at the consequences of the implementation of the proposed change.
39. As I explain above, the primary mechanism for a train operator to obtain compensation for RoUs is Schedule 4. The relevant provisions are contained in Part 3, which is entitled “Compensation for Restrictions of Use.” Clause 7 of Part 3 provides for specific compensation arrangements for Type 3 RoUs, and Clause 8 provides for payment arrangements in respect of SPD. The ORR’s *Schedule 4 possessions regime Factsheet* confirms that passenger operators which choose not to pay an ACS can claim cost and revenue loss compensation for ‘Type 3 possessions’ and for a period of SPD only, whereas those which pay an ACS are eligible for compensation for possessions of any length.
40. I note that Part G does not contain a definition of the term “Restriction of Use.” This is provided in the Definitions section of Part 3 of Schedule 4 as meaning “in respect of any day, any difference from the normal capability of all or any part of the Routes (where the normal capability of the Routes is expressed in the Applicable Timetable Planning Rules relevant to that day notified to each Timetable Participant on or before D-26) which results in:
- a) A difference between the Applicable Timetable on that day as compared with the New Working Timetable in respect of that day; and/or
 - b) A difference between the New Working Timetable on that day as compared with the Corresponding Day Timetable in respect of the Corresponding Day.
41. Part 3 of Schedule 4 also defines the term “RoU Liability” as meaning “any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator (including any increase in RoU Variable Costs but net of any benefit arising from the taking of a Restriction of Use including any decrease in RoU Variable Costs) as a consequence of a Type 3 Restriction of Use or any Restriction(s) of Use covered by an SPD claim.”
42. For completeness, I note that any reference to the term ‘possession’, whether on its own or in composite, should be construed as ‘Restriction of Use’ as defined in Part 3 of Schedule 4 (clause 1.3). As such, for present purposes, the terms are interchangeable.

E Accepted facts

43. It was common ground between the Parties that the primary mechanism for compensating an Access Beneficiary (in this case, GC) for RoUs is Schedule 4 and that this follows progressive changes which had been made to Part G during the PR08 consultation process which I have referred to above. In respect of 'performance,' the primary mechanism for compensation is Schedule 8 to the TAC.
44. It was also common ground that, because GC had elected not to pay the ACS, it cannot be compensated for Type 1 and Type 2 RoUs under Schedule 4. Without paying the ACS, it can only be compensated under Schedule 4 for Type 3 RoUs and for SPD.
45. In this context, an RoU was put in place by NR between Saturday 26 August 2023 and Monday 28 August 2023 to enable the Network Change proposal. It led to all lines between Biggleswade and Peterborough on the East Coast Mainline being blocked for 48 hours, preventing GC's services from accessing King's Cross in that period. It is agreed that, because this RoU lasted for less than 60 hours, it was a Type 1 RoU for which GC can receive no compensation under Schedule 4.

F Oral exchanges at the hearing

46. At the hearing, the Parties made opening statements, NR made some oral legal submissions to supplement the written submissions that it had handed up, and both Parties were then questioned by the Panel. At the conclusion of the hearing, each Party made closing statements.
47. GC's opening submissions can be summarised as follows:
 - a) Along with other open access operators carrying their own revenue risks and with no protection under a franchise agreement from the Department for Transport, the impacts of any RoU associated with ECDP are felt far greater than with franchised operators.
 - b) The dispute is brought in view of achieving a fair position in relation to the compensation to which GC is entitled for the ECDP.
 - c) Two 'key areas' were referred to, as follows:
 - i. Firstly, NR did not adequately deal with GC's objection and was therefore not entitled to implement the Network Change as an outstanding dispute remains outstanding;
 - ii. Secondly, NR has not proposed suitable compensation terms within the Network Change proposal so as to address GC's objection.

- d) In order for NR to have been entitled to implement the Network Change, it should have referred the matter via the ADRR enabling the dispute to be resolved under G11.
- e) GC believes that G2.1.1(a)(iii) had been satisfied, in that the implementation of the proposed Network Change would result in a material deterioration in performance of its trains, which would result in GC not being adequately compensated in respect of RoUs associated with its implementation, which was the case with the RoU of 26 August 2023.
- f) When issuing Network Change notices, NR does not take into account the specifics of a project, the particular circumstances of train operators and whether compensation under Schedule 4 would be adequate.
- g) While GC accepts that there was an intention to move most RoU compensation from Part G to Schedule 4, it does not agree that such intention was to move all such compensation to Schedule 4, which is why the reference to revenue loss under G2.2 has not been removed.
- h) The aim of G2.4.1 appears to be to prevent double recovery, in the sense that an operator receiving compensation automatically under Schedule 4, hence adequately compensated under the TAC, cannot then claim the same revenue loss under G2.2.
- i) If GC were to be paid compensation for revenue loss associated with RoUs, this would not discriminate against train operators who pay the ACS and therefore receive compensation under Schedule 4, because GC is not seeking formulaic compensation for Type 1 RoUs, or indeed all RoUs, but for revenue loss impact associated with the implementation of the Network Change, which those operators could also claim.
- j) GC's position is entirely in keeping with the spirit of Part G, as G2.1.1(a)(iii) provides a level of protection for all operators when the compensation available under their TACs is not adequate.

48. NR's opening submissions can be summarised as follows:

- a) GC's compensation request results from RoUs, which were expressly excluded from Part G by the ORR following PR08 by adding G2.4.1 to Part G.
- b) Accordingly, all RoU compensation falls within Schedule 4, and NR must adhere to this regulatory regime to avoid discriminating between train operators.
- c) GC, along with other open access operators, can choose whether to be compensated fully under Schedule 4 in exchange for payment of the ACS, which NR submitted is a 'quid pro quo' arrangement, in that it can both over and under-compensate.

- d) GC has chosen not to join the full compensation regime under Schedule 4 and is therefore only entitled to receive compensation for RoUs which exceed 120 hours or for SPD.
 - e) NR has compensated GC for the RoU of August 2023 and does not believe that any additional entitlement exists.
49. Some brief legal submissions were made orally on behalf of NR in addition to the written submissions which it had provided me with, which can be summarised as follows:
- a) It reminded me that, under G20, I can make a reference to the ORR either on the application of either Party or of my own motion. However, it submitted that the ORR's position is very clear, namely that compensation should not be paid under Part G for RoUs and that I should therefore be able to make my determination without reference to the ORR.
 - b) It took me through the significance of s.18 of the Railways Act 1993 which is in summary that NR cannot enter into a TAC unless the ORR has approved the terms of the contract. It told me that, in practice, ORR adopts a standard form model TAC which is then adopted by the rail industry. Accordingly, any changes to that standard form wording must go through a process of consultation with the rail industry followed by final determinations on the revised form of the TAC.
 - c) It agreed with my proposed summary of the principles applicable to the interpretation of contracts and their applicability to this dispute. It submitted, therefore, that, considering the contract as a whole, the meaning of G2.1.1(a)(iii) is clear, namely that it does not entitle GC to compensation for RoUs which are used to implement a Network Change.
 - d) It drew my attention to Part D, which deals with the timetabling of possessions, and that any objections to the actual timing of possessions can be brought under that Part.
 - e) It reminded me, in line with my own proposed summary of the principles relating to contractual interpretation, that previous drafts of a contract are not relevant to the interpretation of a contract and should therefore be disregarded.
 - f) It submitted that the ORR documents referred to in its Defence Statement are 'decisions' for the purposes of Chapter G Rule 7(b) of the ADR Rules and that, in the absence of a definition of 'decision' for these purposes, I should adopt a common-sense approach.
 - g) It submitted that the above decisions are connected with the ORR's duties, functions or powers as a regulator. In any event, it submitted that I should take them into account as relevant published decisions under Rule 7(a). These decisions show that the intention was to remove compensation for RoUs from Part G.

h) It submitted that I need not consider the performance of trains for the purposes of G2.1.1(a)(iii), because the provision provides a train operator with the right to give a notice objecting to Network Change where the Change, once implemented, causes a material deterioration in the performance of the train operator's trains which cannot adequately be compensated financially. To this end, it referred me to ADA16 and the ORR's determination in NV58 to which I have referred above.

50. I questioned the Parties about the following matters:

51. Firstly, in light of RoU-related compensation being expressly excluded from Part G pursuant to G2.4.1, what the effect of the words "cannot adequately be compensated ... in respect of a Restriction of Use" in G2.1.1(a)(iii) are said to mean.

52. NR explained that G2.1.1(a)(iii) gives a train operator the right to give notice objecting to a change where the change, once implemented, causes a material deterioration in the performance of trains which cannot adequately be compensated financially, its purpose being to decide whether the impact of the change alone is so great that it cannot be dealt with by paying money alone. It likened the provision to the test for an injunction, namely 'Are damages an adequate remedy?'

53. NR gave examples of issues which would attract compensation once a Network Change is implemented, such as drivers having to learn a new route if the route layout has changed, or the cost of installation of new systems and training on how to use them.

54. GC did not agree that G2.1.1(a)(iii) relates only to adequate compensation post-implementation of the Network Change. It said that the provision entitles GC to object to a Network Change and NR is not entitled to implement that change unless the objection has been effectively dealt with under G10. The only adequate way for NR to deal with that objection would be to adequately compensate GC. It stated that the reference to "revenue loss" in G2.2 suggested that such loss should be compensated for notwithstanding the exclusion.

55. GC further submitted that the purpose of G2.1.1(a)(iii) is unclear if compensation for RoUs is excluded notwithstanding the apparent contradiction between that and G2.4.1. If that were the case, G2.2 would have referred explicitly to Schedule 4.

56. I further asked GC why it did not rely on G2.1.1(c)(i) and (ii) given that it relates specifically to the adequacy of compensation.

57. GC explained that it felt that G2.1.1(a)(iii) was satisfied as it would not be adequately compensated and felt that it was entitled to compensation on that basis.

58. I asked GC to clarify whether, if it is not opposing the implementation of the EDCP in principle, and therefore that the RoUs would have occurred in any event, what losses it is in fact claiming.

59. GC explained that its losses are confined to the revenue loss resulting from the August 2023 RoU. It confirmed that it was not seeking any specific compensation in respect of any breach of G10.
60. I asked GC to articulate essentially the basis upon which it asserts that the express exclusion in G2.4.1 should not apply to the compensation it is seeking.
61. GC submitted that the reference to revenue loss in G2.2, and in the absence of any explicit reference to Schedule 4, leaves open the interpretation that G2.2 may provide compensation for revenue loss relating to RoUs particularly in light of the wording of G2.1.1(a)(iii).
62. I asked GC to explain in more detail to explain what it asserts is the relevance of the calculation of the ACS and how this inter-relates with the provisions of Part G.
63. In essence, GC submitted that RoUs which enable Network Changes, which in turn amount to enhancements of the railway and are funded differently to what is envisaged in Schedule 4, should be compensated under G2.2. This is because, GC argued, such enhancements bear no relation to the payment of the ACS. GC confirmed that, essentially, this is what enables the exclusion in G2.4.1 to be disapplied in this specific context.
64. NR submitted, in response, that the interpretation proposed by GC does not make commercial sense, because G2.1.1(a)(iii) cannot be read in isolation to create an entitlement simply on the basis that the operator does not like a particular outcome. Further, it submitted that the term 'Restriction of Use' is a regulated term and is blind to what the RoU is for, namely whether it is for maintenance renewals or enhancements.
65. The Panel asked NR if it could explain how other train operators dealt with this particular RoU.
66. NR explained that there was an agreement as part of the timetabling process for the RoU to take place in August 2023 and that there are no outstanding objections to the Network Change. The representative for Hull Trains, an Involved Party in attendance, interjected to explain that, in response to the RoU, it exercised a diversionary policy to run its services via Doncaster to St Pancras on the basis that it would not receive compensation for Type 1 and Type 2 RoUs as, like GC, it does not pay an ACS. For completeness, it explained that its usual mechanism for dealing with possessions south of Doncaster is either to divert via the joint line to either Newark or Peterborough going via Lincoln or to come off the East Coast Mainline and go from Doncaster across and down to St Pancras. This diversionary strategy was put in place because of the absence of compensation due to non-payment of the ACS.
67. I asked NR to explain its position in respect of G10 and whether or not the dispute had been resolved.

68. NR submitted that GC's objection was not a valid one referring me to the history of the dispute. It submitted further that it had done all it could to resolve the dispute by way of continuous dialogue and correspondence, including the lengthy letter of 23 March 2023. Because the notice was not valid, there was no other unresolved dispute under Part G.
69. In response, GC submitted that an appropriate resolution would have been an earlier referral to ADA under G11.
70. The Parties agreed that, if I were to determine the dispute in favour of GC, and in the absence of any specific claim for compensation for a breach of G10, they could agree the amount of compensation between themselves.
71. In closing, NR made the following submissions:
- a) It had provided a clear explanation of how Part G and the Network Code work in conjunction to provide a clear framework when dealing with Network Change compensation and compensation under Schedule 4;
 - b) It had explained why the ORR, with the agreement of the rail industry, made changes to Part G and Schedule 4 during PR08, which had removed RoU compensation from Part G, thereby simplifying its approach to compensation for all RoUs irrespective of their reason;
 - c) Payment of the ACS provides for full compensation under Schedule 4, but GC has chosen not to pay it;
 - d) It continues to compensate GC under Schedule 4 where there is an existing entitlement;
 - e) It remains grateful for GC's continued support for the ECDP.
72. In closing, GC made the following submissions:
- a) It had brought the dispute on the basis that it does not believe that NR was entitled to implement the change because the dispute had not been resolved;
 - b) It does not believe that its objection under G2.1.1(a) has been adequately addressed;
 - c) It maintains that G2.1.1(a)(iii) provides a mechanism for a train operator to object to a Network Change on the basis that it would not be adequately compensated;
 - d) G2.1.1(a)(iii) provides a level of protection to ensure that NR, as a monopoly supplier, cannot unilaterally decide to implement a Network Change to the significant financial detriment of a train operator which carries its own revenue risk and relies purely on its farebox revenue.

G Analysis and consideration of issues and submissions

73. The first issue that I should properly determine is what G2.1.1(a)(iii) provides for in the circumstances relating to this dispute.
74. It is clear to me that G2.1.1(a)(iii) does not provide any entitlement to compensation. Rather, its purpose is to function as one of the conditions under G2.1(a) obliging a train operator to object to a Network Change proposal. In the case of G2.1.1(a)(iii) specifically, such an objection can be based upon the implementation of the change resulting in a material deterioration in the performance of trains which cannot adequately be compensated under either G2 or the TAC.
75. In GC's objection of 18 May 2022, it referred to the nature of the works being carried out to implement the Network Change, in particular to the fact that the works are predominantly made up of Type 1 and Type 2 RoUs, stipulating that "it is unclear if any of the mechanisms within GC's Schedule 4 will be triggered." It went on, in the objection, to propose that "compensation associated with RoUs in connection with the implementation of the proposed change is made under alternative terms..." The tenor of the objection was, therefore, that GC was seeking to utilise the objection mechanism provided by G2.1.1(a)(iii) in order to obtain compensation for RoUs which were to be carried out in the process of implementing the Network Change.
76. I take into account the fact that, when read on its own, G2.1.1(a)(iii), in particular the words "the implementation of the proposed change," could be construed as being wide enough to cover not only a material deterioration post-implementation, but one which arose during the process of implementation, and that this might therefore include a material deterioration in the performance of trains resulting from RoUs put in place during that process. I also accept that, when read in isolation, and in the absence of any fixed definition, the term "performance" can be wide enough to cover the scheduling and running of trains within particular time slots, including cancellations resulting from RoUs, for instance. To this end, I accept that the 48-hour blockage of trains imposed on GC during the August 2023 RoU had likely caused it to suffer revenue loss, which was significant given the nature of its operations as a small commercial operator, carrying its own revenue risk and receiving no protection under any franchise agreement from the DfT, by impacting on the operation of its trains and that, by not paying the ACS, GC is in effect uncompensated for that revenue loss.
77. However, when interpreting this provision with reference to the principles set out in *Lukoil*, above, I must consider, in particular, the contract as a whole and the background information available to a reasonable person with the knowledge available to the Parties at the time of contracting, which, in this case, I take to be a reasonable "rail" person. In doing so, I take note of the wealth of background information which would have been available to such a reasonable person, in particular the ORR's final conclusions and determinations in the documents which I reference within the 'Issues and Fact and Law' above. These make it abundantly clear that, as a result of that consultation, the ORR chose to exclude compensation for RoUs from Part G, the only exception being those resulting from a Competent Authority Change. These decisions are binding on me and in any event highly material to a proper interpretation of this provision.

They inform me that, notwithstanding the reference within the provision to RoUs, it cannot be interpreted as providing a basis for NR to propose compensation for RoUs which need to be put in place in order to implement the Network Change.

78. Furthermore, I have had regard to how this provision, and similar predecessor provisions, have been interpreted. The decision of the ORR in NV58 states that the wording of the condition was “quite clearly” referring to the proposed change “if implemented.” Taking into account the contract as a whole, as I am bound to do following the guidance in *Lukoil*, I note that there is separate provision for objecting to the implementation and timing of RoUs, namely Part D. To this end, I also take into account business common sense and the need to adopt an iterative process when interpreting this provision by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It seems to me that, if the provision were to be interpreted as entitling train operators to object to the actual implementation of a Network Change due to measures taken in the process of its implementation, rather than to the perceived consequences of its implementation, it would enable those operators to block or significantly delay its implementation generating significant satellite litigation. Taking into account the contract as a whole and the way in which it has been interpreted by the ORR, I do not consider that this was the intention behind this provision.
79. To this end, I accept NR’s legal submission that the purpose, and proper reading, of G2.1.1(a)(iii) is to consider the effect of the Network Change once implemented, namely to decide whether the impact of the Network Change is so great that any impact cannot be dealt with by paying money alone. In my determination, therefore, G2.1.1(a)(iii) did not provide GC with a basis for objecting to the Network Change by reason of the impact of the RoUs on the performance of its trains, and the fact that it would not be compensated for that impact under Schedule 4.
80. I go on to consider whether NR was entitled to implement the Network Change in circumstances where GC had issued its objection of 18 May 2022. NR’s entitlement to implement a Network Change is circumscribed by the provisions of G10, which restrict that entitlement to three conditions, namely (a) that it had not received a notice under G2.1, (b) that it had received a notice under G2.1(c) and the amount of compensation in G2.1 has either been resolved or agreed or (c) there is no other unresolved dispute regarding the proposed between NR and the Access Beneficiary. It is clear to me that (a) and (b) do not apply here, but that (c) does. For these purposes, G10.3.1 provides that NR shall not be entitled to implement the Network Change unless it is so entitled under G10.1.1. Under G10.3.2, an “unresolved dispute” includes a notice served under G2.1.1(a) which has neither been withdrawn, resolved under G11 or agreed not to apply.
81. NR had not provided a direct response to GC’s objection, but had in substance responded to the objection in its letter of 23 March 2023. The provisions of G10 do not distinguish in any way between a dispute which is in substance meritorious and one which is not. Such a dispute was unresolved, because a notice had been served under G2.1.1(a) and it had not been withdrawn, resolved under G11 or agreed by GC not to apply. To this end, I note that NR did not consider it

expedient to serve a notice under G10.1.2 confirming that it reasonably believed it was entitled to implement the change. Had such a notice been unchallenged by GC, it may have entitled NR to implement the Network Change pursuant to G10.1.3.

82. I conclude, therefore, that there was an unresolved dispute within the meaning of G10.1.1(c) and that, in such circumstances, NR was not entitled to implement the Network Change until that dispute was resolved by one of the means available under the provisions of G10. However, GC accepts, and I conclude, that NR's breach of G10 in these circumstances does not entitle GC to any compensation or other relief. The only way in which I would be able to award GC any compensation or relief for NR's non-compliance with G10 is if GC were able to demonstrate that it had suffered a loss resulting from the breach. In its submissions at the hearing, GC confirmed that it was fully supportive of the ECDP (and hence the Network Change) and the longer-term benefits that it will bring to the railway. It accepted that the RoU was necessary to enable the implementation of the Network Change and did not seek to argue that, had NR complied with the provisions of G10, the result would have been any different. The RoU which was put in place in August 2023, and the resultant revenue loss to GC, would therefore have occurred in any event irrespective of NR's breach of the provisions of G10.
83. As for GC's entitlement to compensation under the provisions of Part G, I have considered those provisions of Part G which specifically reference compensation. Under G1.2(e)(iv), NR's notice of proposed change shall contain proposals (if any) for the division of costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of that change. This does not in itself provide any entitlement to compensation. Under G2.1.1(c), entitlement to compensation from NR either in accordance with the terms proposed under G1 (which I understand to be a reference to any proposal pursuant to G1.2(e)(iv)) or otherwise can serve as a ground for objecting to a Network Change proposal. I note that GC did not place reliance on this limb of G2.1.1, but rather chose to place reliance on G2.1.1(a)(iii), when objecting to the Network Change. G2.2 provides the basis for calculating the amount of compensation "referred to in condition G2.1." While it does not explicitly state which part of G2.1 it is referring to, I consider that it can only be referring to G2.1.2, as this is the only provision which refers to an "amount of compensation" within limbs (a) and (b). In any event, however, G2.2 is made subject to G2.4.1, which excludes "the amount of costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or by the Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change."
84. I remind myself that G2.4.1 was introduced as a direct result of the PR08 consultation process in the course of which the ORR indicated clearly that any compensation that train operators might be entitled to under Part G must exclude RoU-related compensation. Pursuant to the principles set out *Lukoil*, this background information is highly material to a proper interpretation of this provision, and how it inter-relates to other provisions relating to compensation in Part G. As I explain above, I should take this into account as background information and in any event as relevant decisions of the ORR. I accept, as GC points out, that G2.4.1 does not explicitly state that all RoU-related compensation should be pursued under Schedule 4. However, the

exclusion is in my view sufficiently clear without the need to specify a reference to Schedule 4. I also see no proper basis upon which the provision could be interpreted as preventing double-recovery in respect of those train operators who might already have obtained compensation under Schedule 4. In my view, such an interpretation is not consistent with the background information available to the Parties and GC has not provided me with any material which would enable such an objectively justified interpretation of the provision in the face of its otherwise clear wording.

85. One of the principal arguments advanced by GC is that NR has not proposed suitable compensation terms so as to address its objection under G2.1.1(a)(iii). In my view, it simply could not do so, because the objection related entirely to RoU-related losses, compensation for which is expressly excluded from Part G for the reasons which I set out above. As I have mentioned above, I accept that the term “performance” in G2.1.1(a)(iii) may, in isolation, be interpreted to include the running of trains on a planned basis, which the RoU in question plainly impacted upon. In equal measure, I take into account, by way of background, that this may not have been the intention behind this term as used in G2.1.1(a)(iii) since the TAC provides a mechanism to deal with operational performance matters such as these in Schedule 8. In any event, however, the compensation sought here relates to an RoU and it is therefore excluded from Part G. This is notwithstanding the adverse financial impact on GC’s services which I consider is very likely to have been caused by the RoU which had been put in place in August 2023.
86. In its Additional Submission, and in submissions at the hearing, GC raised the interesting argument that it is (or may be) entitled to compensation for revenue losses resulting from an RoU in so far as such an RoU (and hence the losses resulting from it) enable an enhancement to the railway, which this Network Change, part of the broader ECDP, has been identified as being. It argued that there is no apparent relationship between ACS payments under Schedule 4 and network enhancements and sought to argue that those operators paying the ACS are thereby entitled to enhancement-related Schedule 4 compensation whereas those, like GC, which opt not to pay the ACS, do not, and therefore ought to be compensated for the resultant revenue loss during enhancement-related RoUs. It argued that the compensation regime in Schedule 4 thereby discriminates against it as a non-ACS-paying operator. I understand that the term ‘discrimination’ is being used here in the non-legal sense.
87. While I accept that GC may consider that the present compensation regime is unfair, there is no proper basis, in my view, to read any interpretation into the provisions of Part G which would enable revenue loss to be compensated in the event of an RoU put in place to enable an enhancement to the railway. Looking back at the principles in *Lukoil*, the background information available to the reasonable rail person, as well as taking the contract as a whole, the intention behind the provisions is to remove all RoU-related compensation from Part G. The provisions do not in any way distinguish between the reasons for which an RoU may be put in place, which is in my view entirely consistent with the background information and the ORR’s final decisions. To this end, I note that G2.4.1 specifically excludes compensation for “revenue loss.” Indeed, I note that were the provisions of Part G to be read in the manner sought by GC,

they would likely require a variation of the contract and therefore authorisation from the ORR pursuant to s.17 and 18 of the Railways Act 1993. To this end, my determination can only be based on the Parties' legal entitlements under the contract which I am considering. I am unable to, as GC stated in its Opening Statement at the hearing, seek to "achieve a fair position" if this does not accord with those legal entitlements. I am therefore unable to so interpret those provisions in this determination.

88. I therefore determine that GC is not entitled to compensation, as sought, pursuant to the provisions of Part G.

H Guidance and observations

89. Given the stated impact of RoUs enabling Network Changes which serve to enhance the railway on small commercial operators like GC which carry their own particular revenue risk and may not pay an ACS in order to receive full Schedule 4 compensation, I observe that it may be sensible for GC (and operators in a similar position) to seek to negotiate a more specific compensation mechanism within their TACs, whether this be in Part G or elsewhere, which would fill this particular void. This is because the ADA does not have the power to significantly re-interpret or to vary the provisions of the TAC and the Network Code in order to provide an outcome which is perceived by such operators as 'fair.'

90. Whatever the merits of a particular dispute to which an objection under G2.1.1 gives rise, the current provisions of G10 do not entitle NR to implement a Network Change unless that dispute has been "resolved." NR should therefore seek to ensure full compliance by making sure that it has made full use of the notice provisions in G10.1.1 – G10.1.4 or by making an early reference to ADA for determination, if appropriate.

91. Given that the nature of this dispute relates primarily to an interpretation of the wording of various provisions of Part G, it is recommended that, at the next consultation, the industry gives thought to the drafting of the provisions relating to compensation, as well as to the terms of G2.1.1(a) to ensure that the intention behind these provisions is (a) clear to users on a first reading and (b) that important key terminology, such as "implementation," "material deterioration" and "performance" are properly defined in line with the relevant industry-related background.

I Determination

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

93. NR implemented the Network Change without being entitled to do so on the basis that there was an "unresolved dispute" because GC's notice objection to the Network Change had neither

been withdrawn, resolved under G11 or agreed not to apply. However, GC has not suffered any loss as a result of this breach of Part G by NR and is therefore not awarded any compensation or other relief.

94. NR was not able to propose compensation terms in the manner sought by GC, because compensation relating to RoU-related losses is not available under the provisions of Part G.
95. While GC is likely to have been impacted financially by the RoU which was put in place to implement the Network Change, G2.1.1(a)(iii), whether as a standalone provision or read together with other relevant provisions of Part G, does not entitle GC to be compensated for that loss.
96. No application was made for costs.
97. I confirm that so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Alexander Rozycki
Hearing Chair
15 December 2023

Annex A - Relevant extracts from Network Code, Part G

Condition G1.2(e)(iv)

1.2 Content of notice of proposed Network Change

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

(e) contain: ...

(iv) Network Rail's proposals (if any) for the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of the change;

Condition G2.1.1(a)(iii)

2.1 Obligation to give notice of response

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

(a) one or more of the following conditions has been satisfied: ...

(iii) the implementation of the proposed change would result in a material deterioration in the performance of that Access Beneficiary's trains which cannot adequately be compensated under this Condition G2 or (where that Access Beneficiary is a Train Operator) in respect of a Restriction of Use in connection with the implementation of the proposed change under that Train Operator's Access Agreement; ...

Condition G2.2

2.2 Amount of compensation

Subject to Condition G2.3 and Condition G2.4.1, the amount of the compensation referred to in Condition G2.1 shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Access Beneficiary as a consequence of the implementation of the proposed change.

Condition G2.4.1

2.4 Restrictions of Use

2.4.1 The amount of the compensation referred to in Condition G2.2 shall exclude the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change.

Condition G10.1

10.1 Implementation of a Network Rail proposed Network Change

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

- (a) it has not received a notice from any Access Beneficiary under Condition G2.1 by the relevant response date; or
- (b) it has received notice by the relevant response date from an Access Beneficiary under Condition G2.1(c) and either the amount of any compensation referred to in Condition G2.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; and
- (c) there is no other unresolved dispute under this Part G (whether under this Condition G10 or otherwise) as regards the proposed change between Network Rail and any affected Access Beneficiary.

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

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

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

- (a) refer the matter for determination in accordance with the ADRR and Condition G11 shall apply; or
- (b) withdraw the proposed Network Change.