**ACCESS DISPUTE ADJUDICATION**

**Determination in respect of dispute reference ADA58**
following a hearing held at Mimet House, London, on 10 January 2024

**Present:**

**The appointed Adjudication Panel (the "Panel"):**

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| **Hearing Chair:** | Peter Barber |
| **Industry Advisors:** | Tony Crabtree<br>Christopher Geldard |

**Dispute Parties:**

DB Cargo (UK) Ltd. ("DB")

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|---|---|
| Quentin Hedderly | Regulatory Specialist |
| Darren Smart | Lead Concepts Manager |

Network Rail Infrastructure Ltd ("NR")

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| Kevin Newman | Senior Customer and Commercial Manager |
| Adam Hodgson | Timetable Policy Manager *(morning only)* |
| Jules Graham | Customer Relationships Executive *(morning only)* |
| Ian Bartlett | Customer Manager |
| Ella Cameron | Observing for professional development |

**Involved Parties:**

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| Anthony Hau | The Chiltern Railway Company Ltd. ("Chiltern") |
| Ian Kapur | GB Railfreight Ltd. ("GBRf") |

**In attendance:**
Tamzin Cloke, Committee Secretary

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## A Introduction: Interpretation, Summary of Dispute and Jurisdiction

1. The acronyms and other short form expressions used in this determination have the meanings set out above in the list of persons present, below in this paragraph 1 and otherwise as specified (by the use of quotation marks and bold type) elsewhere in the text of the determination. Capitalised terms used in this determination which are defined in the Network Code and/or the ADR Rules have the meanings there given.

   "**ADA**" means an Access Dispute Adjudication.
   "**ADC**" means the Access Disputes Committee.
   "**ADR Rules**"or "**ADRR**" means the Access Dispute Resolution Rules (edition dated 13 March 2023) included at Part R of the Network Code, and "**Rule**" refers to a numbered rule of the ADRR.
   **"FCC"** means FCC Recycling (UK) Limited, a waste management company based in the UK.
   "**Network Code**" means the document entitled 'Network Code' maintained by NR as duly amended and applicable from time to time and at any relevant particular time, and "**Condition**" refers to a numbered Condition of the Network Code as so applicable.
   "**MCJ line**" means the existing train line from Marylebone to Claydon Junction.
   "**Parties**" means the Dispute Parties and the Involved Parties.
   "**QARs**" means Quantum Access Rights.
   "**ROUs**" means Restrictions of Use.
   "**Secretary**" means the Committee Secretary of the ADC.
   "**TAA**" means the Track Access Agreement (for freight services) between the Dispute Parties dated 11 December 2016.

2. This dispute arose following the service of a Network Code Condition J4.4 'Failure to Use' Notice dated 01 November 2023 by NR on DB, in respect of various QARs and associated Train Slots contained in DB's TAA. NR's Failure to Use Notice had been prompted by an application to NR made by GBRf under Condition J5.1.1, alleging a Failure to Use certain Train Slots previously secured in the Working Timetable by DB, as the Incumbent Part J Access Beneficiary, in exercise of the related QARs in its TAA. In consequence, NR's Failure to Use Notice required DB to surrender the relevant Train Slots.

3. DB served a Counter Notice on NR under Condition J4.8.1(a) denying that any actual previous non-use by DB of the relevant Train Slots had constituted a Failure to Use them for the purposes of Part J, because such non-use fell to be disregarded under Condition J4.3.1, having been only "temporary" within the meaning of Condition J4.3.1(b). DB contended that this was because use of the relevant Train Slots had been factually prevented only for a limited time by withdrawal of the necessary access, due to HS2 and other major construction works in the vicinity. DB considered that the Failure to Use Notice issued by NR was accordingly invalid, and consequently declined to surrender the relevant Train Slots.

4. NR rejected DB's Counter Notice on the ground that NR did not consider DB's admitted recent non-use of the relevant Train Slots to be "temporary" and that Condition J4.3.1 therefore did not apply in its entirety. Consequently in the letter of rejection NR stated its continued intention to remove from DB the

capacity in respect of the relevant QARs and associated Train Slots. DB thereupon referred the matter to dispute for determination in accordance with the ADR Rules.

5. Having been duly appointed as Hearing Chair I am satisfied that this dispute, as referred for resolution in accordance with the ADR Rules under Network Code Part J, is required pursuant to ADR Rule B7 to be heard by an ADA convened in accordance with Chapter G of the ADR Rules.

6. In my consideration of the Parties' submissions and my hearing of the dispute, I have been mindful that, as provided by ADR Rule A5, I should reach my determination "on the basis of the legal entitlements of the Dispute Parties and upon no other basis".

## B History of this Dispute Process and Documents submitted

7. As stated above, NR's 'Failure to Use' Notice to DB under Condition J4.4 was issued on 01 November 2023. DB's Counter Notice to NR pursuant to Condition J4.8.1(a) was issued on 07 November 2023 and on 21 November 2023, NR notified its rejection of DB's Counter Notice pursuant to Condition J4.11 and stated that NR intended to remove the capacity from DB in respect of the relevant QARs and associated Train Slots from 05 December 2023.

8. Consequently, on 28 November 2023 DB responded to NR pursuant to Condition J4.12.1 refuting NR's decision and confirming its intention to refer the matter for determination in accordance with the ADRR, and concurrently filed a Notice of Dispute with the Secretary.

9. As previously noted, ADR Rule B7 applied, referring the matter to a mandatory ADA. On 29 November 2023 the Secretary accordingly registered the dispute as ADA58 and asked the Parties to confirm their availability. On 05 December 2023 I was appointed as Hearing Chair and, on the same date, the hearing date was set for 10 January 2024.

10. On my behalf, on 05 December 2023 the Secretary wrote to all Parties pursuant to Rule G16 setting out a timetable for the service of Statements of Case (which satisfied the particular shortened timescale requirements of Rule G16(h) for disputes referred under Network Code Part J). This required DB to serve a statement of its claim by 12 December 2023, NR to serve a statement of its defence by 19 December and DB to serve any statement in response to the defence by 28 December. All Parties then had until 04 January 2024 to serve any written further submissions.

11. The Secretary's letter of 05 December also included requests for missing copies of the initial Failure to Use Notice from NR and Counter Notice from DB as referred to in later emails between them and in the Notice of Dispute. That letter also posed further questions to the Dispute Parties, to be answered by 07 December, concerning the possible applicability to the dispute of Condition J4.1.2(a), since it appeared that the actual non-use of Train Slots in issue could possibly have been caused in the first instance by the imposition of Restrictions of Use by NR. On NR's request, at my direction that timescale was subsequently waived, provided the questions were answered later in the Dispute Parties' Statements of Case, which in substance they were by NR; DB provided its answers in a separate email of 06 December.

12. On my behalf and following review of the material submitted with the Notice of Dispute, on 08 December 2023 the Secretary wrote to DB asking for it to include in its statement of claim certain specific additional information regarding the geography of the paths in issue and the services actually operated after those paths became unavailable, which information DB did subsequently include.

13. On 15 December 2023 the Secretary wrote to potential other Involved (not Dispute) Parties, asking if they would like to be included in the dispute process. Both GBRf and Chiltern confirmed themselves as other Involved (not Dispute) Parties and both were subsequently represented at the Hearing. Neither of these other Involved Parties served any documentary submissions.

14. Following the various additional requests for information, in the event both Dispute Parties served their respective Statements of Case and associated documents in accordance with the timetable originally set by the Secretary on 05 December. On 04 January 2024 NR submitted a further paper setting out its legal submissions. DB declined to make any further legal or other written submissions following its statement of response to NR's defence.

15. In accordance with Rule G9(c), following receipt of all final further written pre-hearing submissions I reviewed the dispute to identify and itemise in written form for consideration by the ADA all relevant issues of law raised by the dispute. In a note to the other members of the Panel on 08 January 2024, I confirmed that I did not consider there to be any overarching issues of law arising out of the submissions; that there had been raised, as usual, some matters of contract interpretation, relating to the meaning of certain words or expressions in the Network Code in the context of the particular factual matrix in which they might be regarded as relevant; that these matters were all issues of mixed fact and law which largely constituted the substance of the dispute to be determined; and that on the basis of the material received so far, I believed the only such matter of contract interpretation the resolution of which was, by itself, both necessary and sufficient for the determination of the dispute, was the meaning of the expression "temporary in nature" as used in Network Code Condition J4.3.1(b).

16. The Hearing took place on Wednesday 10 January 2024. I had agreed with the Secretary that she should make a full recording of the Hearing during the day, and this was made known to all persons present at the outset of the Hearing. I also clarified then that the resulting record of the Hearing would be treated solely as an aide memoire for the Panel in its consideration of the issues and not as a document for issue to the Parties nor for eventual wider publication. (The Secretary's recording was later transcribed professionally; the transcript was then edited and corrected by the Secretary by reference to her own notes and circulated to the Panel.)

17. I then made opening remarks summarising the history of the procedure leading to, and intended order of proceedings for, the Hearing. The Dispute Parties delivered oral opening statements (written versions of which were provided to the Panel and to each other) and the Involved Parties made brief opening comments. We then proceeded straight to the Q&A Session, and the Parties were accordingly questioned by me and the other members of the Panel. Following and in the light of this the Dispute Parties were invited to make closing statements but declined, as did the Involved Parties.

18. At the end of the Hearing, having conferred with the other members of the Panel, I outlined to the Parties the substance of the Panel's intended determination of the dispute, as later to be confirmed in this written Determination. I also asked the Dispute Parties if they wished to make any representations under the ADRR as to the confidentiality of any material submitted in the course of the dispute, and/or regarding the possible recovery of Costs, no such representations having been included in any of the Statements of Case or in oral submissions during the Hearing. Neither of the Dispute Parties wished to do so.

19. In summary, therefore, the documents and written material, including relevant correspondence, considered by the Panel over the course of this dispute process have been as follows:
    a. Letter dated 01 November 2023 from NR to DB setting out a Failure to Use Notice under Condition J4.4.
    b. Letter dated 07 November 2023 from DB to NR claiming that NR's Failure to Use Notice was invalid and constituting a Counter Notice under Condition J4.8.1(a).
    c. Letter dated 21 November 2023 from NR to DB under Condition J4.11 rejecting DB's Counter Notice and requiring DB to accept NR's decision or refer the matter to dispute.
    d. Email dated 28 November 2023 from DB to the Secretary serving Notice of Dispute and attaching the prior correspondence listed at point c) above.
    e. Email dated 29 November 2023 from the Secretary to the Parties acknowledging service of the Notice of Dispute, confirming the registration of the dispute as ADA 58 and anticipating possible hearing dates.
    f. Email dated 05 December 2023 from the Secretary to the Parties notifying the date set and other arrangements for the Hearing, setting the timetable for service of Statements of Case and further submissions, and on my behalf requesting further documents and information from the Dispute Parties.
    g. Email dated 06 December 2023 from DB to the Secretary enclosing the requested initial correspondence listed at points a) and b) above and responding to the other questions in her email of 05 December.
    h. Email dated 08 December 2023 from the Secretary to DB requesting the inclusion in its statement of claim of certain further geographical and operational information required by the Panel, which was then so included by DB.
    i. Statement of claim served by DB on 12 December 2023, with Appendices (individually numbered as 'Annexes').
    j. Statement of defence served by NR on 19 December 2023, with Appendices (individually lettered).
    k. Statement of response to NR's defence served by DB on 28 December 2023, with Appendices (individually numbered as 'Annexes').
    l. Further written legal submissions pursuant to Rule G16(g), served by Network Rail on 04 January 2024.
    m. Email dated 08 January 2024 from me to the Secretary and the Industry Advisors, for circulation to the Parties, identifying any issues of law arising, as required by Rule G9(c).
    n. Written versions of the opening statements by the Dispute Parties, produced at the Hearing on 10 January 2024.

20. Subject to any timely service by either Dispute Party of a notice in accordance with Rule G58 objecting to publication, all the documents and written material listed in paragraph 19 will in due course be published in full and available on the ADC website together with this determination, all falling within the scope of Rule G59 requiring such publication. None of the Parties at the Hearing or otherwise to date have requested the exclusion or redaction of any such material on the grounds of confidentiality or otherwise under any of the ADR Rules.

21. The versions of the Network Code Part J and the relevant ADR Rules dated 13 March 2023 were applicable to these dispute proceedings. These will be published on the ADC website together with the other documents relevant to ADA58 as listed in paragraph 19, and are also available on NR's website.

22. I confirm that the Panel have read carefully all the material submitted by the Dispute Parties. I further confirm that I have taken into account all of the statements, submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may be specifically referred to or summarised in this determination.

## C Submissions made and Outcomes sought by the Dispute Parties

23. It is in the nature of the Network Code Part J processes that much of the debate, and therefore eventual submissions, on either side of a potential dispute arising out of these processes are required to be substantiated to a degree in the prior correspondence consisting of various formal notices and counter notices required to be exchanged between the parties involved, before the point at which it becomes necessary or appropriate for a party formally to refer the matter to dispute under the ADRR. Hence the reduction in the usual timeframes for service of written Statements of Case applied in Rule G16(h) for disputes referred under Part J.

24. NR's initial Failure to Use Notice to DB on 01 November 2023 thus effectively constituted its opening submission in the matter. This Notice listed the four QARs (labelled by NR only as "Firm Track Access Rights") and four associated Train Slots referenced in GBRf's application to NR (which had prompted NR's Notice), and asserted that these Train Slots satisfied (in effect) all of the three separate sub-paragraph requirements of Condition J5.1.1(b), relating to third party applications for a Failure to Use Notice. In relation to sub-para (b)(iii) of Condition J5.1.1, requiring "a Failure to Use by the Incumbent", the Notice merely stated NR's belief that in respect of the Train Slots in question there had been a "Failure to Use" by DB, as the Incumbent, and that this Failure had occurred as these Train Slots had not been used in the thirteen weeks preceding GBRf's application to NR and were continuing not to be used.

25. NR's Notice to DB then requested a surrender date of 29 November 2023 for something simply called the "Rights Subject to Surrender", presumably relying on the general definition of that term in Condition J1.2.1 to make an oblique connection with the "Firm Track Access Rights" (i.e. QARs) and "Associated Train Slots (May 23 Working Timetable" previously listed in the Notice. More significantly, however, the Notice made no reference to any previous discussions concerning the Train Slots or related QARs in issue, the geographical or other practical circumstances surrounding their non-use, or the paths or services potentially affected by the impliedly required surrenders.

26. As an aside, it has to be acknowledged that the drafting of the Network Code in this area is somewhat contorted and difficult to follow. This is because it seems to conflate the provisions (and therefore the concepts behind them) applying to, on the one hand, a Condition J4.1.1 Failure to Use Notice served by NR of its own motion on any Part J Access Beneficiary with, on the other hand, a Condition J5.1.1 Failure to Use Notice served by NR at the instigation of a Third Party Applicant on an "Incumbent" who has secured Train Slots in respect of which the Applicant can demonstrate a reasonable commercial need.

27. The problem here is that the expression "Failure to Use" is defined generally in Condition J1.2.1 for the purposes of the whole of Part J, by reference to the specific parameters set out in Condition J4.1.1. This, in relation to Condition J4.1.1 Failures of Use asserted by NR of its own motion, in turn refers to and/or is qualified by several other important provisions of Condition J4, including in particular Condition J4.3.1 which requires certain types of actual "non-use" to be "disregarded" for the purpose of determining whether a technical "Failure to Use" has occurred.

28. However, Condition J5.1.1 and particularly Condition J5.1.1(b)(iii), although relating specifically only to third party applications, also confusingly uses the defined term "Failure to Use" generally but without specific reference to the additional details of Condition J4 or any further particular definition. The only exception is that Condition J5.2.1 adds just one point of definition for the purposes of Condition J5.1.1(b)(iii), in effect requiring a set period of at least thirteen consecutive weeks of non-use, which mirrors that required by Condition J4.2.3 for Train Slots included in the WTT in the case of an NR-initiated Notice. NR's Notice to DB therefore unfortunately but understandably placed emphasis only on this specific thirteen week period of factual non-use by DB, which was not actually in issue, rather than addressing any of the other more relevant factors introduced in Condition 4, among them Condition J4.3.1 which subsequently became the focus of the dispute.

29. DB's Counter Notice on 07 November, likewise amounting to its first submission in the dispute, accordingly picked up on NR's omissions from its Failure to Use Notice of reference to both the practical background context and circumstances and the other relevant but uncited provisions of Condition J4. The Counter Notice relisted (albeit under the correct headings) the QARs and Train Slots involved, then declined the requirement to accept their surrender, emphasising and explaining the relevance of Condition J4.3.1 in disregarding certain periods of actual non-use for the purpose of determining whether a Failure to Use has occurred under Condition J4.1.1.

30. Thus in its Counter Notice DB disagreed that the alleged or any Failure to Use the relevant Train Slots had occurred within the meaning given in Condition J4.1.1, principally on the ground that under Condition J4.3.1 any period of actual non-use was required to be disregarded if and to the extent that it was (a) attributable to non-economic reasons beyond the Access Beneficiary's control and (b) temporary in nature. The Train Slots and QARs in issue all related to freight paths formerly used by DB for services to and from an FCC waste disposal facility adjacent to the MCJ line at Calvert, in Buckinghamshire.

31. DB's Counter Notice confirmed that these paths had ceased to be used or usable by DB since late 2021. It stated, however, that this was because, due to nearby EastWest Rail and HS2 major construction works taking place in the area of Claydon Junction, the FCC facility (and the linked NR rail access infrastructure) had been closed during that time, pending their apparently intended (but as yet not definitively scheduled) relocation to another site approximately one mile further up the MCJ line. DB had previously stated in discussions with NR and other parties, and now repeated, that it intended to recommence using its relevant Train Slots once these major works had been completed and the network reopened, this then being expected to take place during 2025.

32. As evidence in support of the contentions in its Counter Notice (as required by Condition J4.8.1), DB attached a paper prepared, signed and circulated by NR dated 26 August 2021 (the "2021 NR Paper"), entitled "How, as an industry collective, can we collaborate to find efficiencies in Chiltern Railways' timetabling whilst protecting non-utilised freight paths to/from Calvert?" The 2021 NR Paper commenced by stating as "Background", among other issues, the following:

> "Between late 2021 and mid-2025, freight paths to/from the FCC terminal at Calvert will cease operation due to HS2 construction (i.e.there will be no commercial freight traffic to/from Calvert). *In mid 2025, the FCC terminal will be restored and freight services will re-commence*. It is important that freight paths to/from Calvert are protected during the interim period – there are circa 20 WTT paths to/from Calvert, all owned and operated by DB Cargo. *Any attempts to remove the freight paths in the interim period through the Part J "use it or lose it" mechanism will be disregarded under Network Code Part J4.3*" (my emphases).

33. The 2021 NR Paper went on to cite Condition J4.3.1 in full, before listing four Options for dealing with the issues raised, then concluded by recommending that Option 3 be undertaken on a trial basis for the December 2021 timetable period, which would among other things

> "*give DB Cargo the peace of mind that their capacity is not being lost indefinitely*".

Option 3 in the paper was as follows:

> "*FOC paths to/from Calvert remain in the timetable but train planners are instructed to ignore them* (like they would ignore a Class 3 RHTT path outside of Autumn)" (again my emphases).

34. NR's rejection of DB's Counter Notice on 21 November 2023, pursuant to Condition J4.11, asserted that the matters set out in Condition J4.8.1 (a) and (b) had not been substantiated. Whilst agreeing that DB's non-use of the relevant Train Slots was non-economic and therefore that it met Condition J4.3.1(a), NR's rejection decision letter stated solely that it considered that the non-use was "not temporary in nature" and therefore failed to satisfy Condition J4.3.1(b), without offering further reasons nor addressing the points in DB's Counter Notice or the content of the attached 2021 NR Paper.

35. DB's Notice of Dispute and both Dispute Parties' subsequent Statements of Case in substance summarised or repeated the arguments and submissions previously expressed in the formal correspondence between them. The Notice of Dispute in particular pinpointed the dispute as centering on the interpretation and application of Condition J4.3.1.

36. DB's statement of claim in the dispute therefore reflected its previous Counter Notice to NR, in placing principal emphasis on the submissions that Condition J4.3.1 applied, for the same factual reasons as

set out in the Counter Notice. In addition to a further copy of the 2021 NR Paper (quoted in paragraph 32 above), DB attached to its statement of claim some of the surrounding emails from NR, including one in which the NR signatory had described the agreement reached between members of "the group" to "enact" Option 3 on a trial basis (see paragraph 33 above) as "great collaboration". "The group" included, it appears from the circulation list for the emails, representatives from NR, DB, GBRf, Chiltern and even one from ORR.

37. DB also attached to its statement of claim a copy of a later proforma letter dated 30 August 2022, again prepared and circulated by NR, for recording an agreement between NR, Chiltern and DB entitled "Chiltern *temporary* usage of Calvert freight paths 2021-2025" (my emphasis). I say 'proforma' because, although in the form of a finalised letter agreement and actually signed on behalf of all three parties by representatives professing to have the requisite authority, the letter is clearly marked "Confidential Draft Subject to Contract". Without needing to quote too extensively from this document, suffice it to say here that the title accurately encapsulates its content and intent. To give just two examples:

> "Due to HS2 construction, freight services operated by DB Cargo using the Train Slots will temporarily cease on a date to be agreed… On a date anticipated to be in mid-2025, the FCC terminal at Calvert will be restored and freight services may re-commence using the Train Slots… (use of the Train Slots [during this time]… by Chiltern being the "**Temporary Arrangement**")."(not my emphasis)
>
> And: "…it is a reasonable endeavour to assist Chiltern in finding efficiencies in its timetabling in the absence of freight traffic during this time, on the understanding and subject strictly to the condition that the Temporary Arrangement comes to an end… following service by DB Cargo of written notice… that it is ready and able to resume the provision of freight services using the Train Slots."

38. I should acknowledge that in its statement of claim DB related and relied on what it appeared to regard as several known and uncontroverted matters of fact described in the above proforma letter agreement and the other documents attached, in support of its submission that its admitted non-use of the Train Slots in question was unquestionably "temporary in nature" within the natural meaning of that phrase as used in Condition J4.3.1(b), no other specific meaning having been attributed to it by NR or by any relevant precedent or other definition. These matters of fact concerned mainly the extent and likely duration of works being carried out in the vicinity of the former and intended FCC facilities and the announced plans by NR and others for eventual reinstatement of related access to and from the Network. As noted more generally later in this determination, in the absence of contradiction from any other Party either in its various written submissions or in the oral exchanges at the Hearing as summarised below, I treat such matters as admitted facts.

39. In an email of 06 December 2023 and then in its statement of claim DB additionally responded to the issue of ROUs and the possible applicability of Condition J4.1.2(a) raised in the Secretary's email on my behalf of 05 December 2023. It became apparent later in the dispute process that this Condition technically would not be determinative of the dispute and could be disregarded, because it applies only to a Failure to Use constituted by an inability to secure in the WTT the quantum of Train Slots permitted by a particular QAR, rather than constituted by an actual non-use of Train Slots once so secured. Nevertheless, as pointed out by DB in its statement of claim, because NR's original Failure to Use

Notice had not clarified whether it was issued under Condition J4.1.1(a) [failure to secure quantum of Train Slots permitted by a QAR in the WTT] or (b) [failure to use a Train Slot already secured in the WTT], it actually had been unclear whether Condition J4.1.2 might apply as well as Condition J4.3.1. DB therefore included submissions in its statement of claim regarding the causative effect of what it appears to have regarded as de facto ROUs (the relevant route sections being merely designated as "Blocked Until Dec 2024" in the current Engineering Access Statement, rather than removed altogether) on its admitted actual non-use of theTrain Slots in question. These submissions eventually proved to be strictly unnecessary, though they did in effect prompt the later provision by NR of pertinent information concerning plans and possible revised timing for reinstatement.

40. In its statement of defence, NR confirmed its acceptance that DB's admitted non-use of the Train Slots in issue satisfied Condition J 4.3.1(a) in being for economic reasons beyond DB's control, so that the validity of NR's Failure to Use Notice depended entirely on whether the non-use was "temporary in nature" under Condition J 4.3.1(b), as asserted by DB (and explained in my note to all parties of 08 January identifying relevant legal issues).

41. NR argued strongly that DB's non-use should <u>not</u> be regarded as temporary for a variety of reasons, most of which it either withdrew or acknowledged to be unsound in the course of the oral exchanges during the Hearing, as summarised below. In particular, NR emphasised:
    a. that the new FCC Calvert terminal, when it eventually replaced the previous terminal that had been closed due to the nearby HS2 etc works, though not far away would actually be at a different location with different access and connection from the running line when that also was replaced;
    b. that all this would require a new Network Change process which had yet to be gone through;
    c. that it would also require DB to obtain some element of new access rights rather than relying entirely on its existing rights;
    d. that some clearer definition might be afforded to the loose term "temporary" in Condition J4.3.1(b) by an analogy with the two year limit of validity provided by Condition J2.3.1(f) in relation to requests by Part J Access Beneficiaries to NR for information enabling them to evaluate the commercial consequences of possible "temporary" voluntary surrenders or adjustments of their Access Rights; and
    e. that the cooperative arrangements previously cited by DB (e.g. the 2021 NR Paper) as indicative of NR's previous intentions regarding protecting DB's and other parties' rights were simply informal attempts to make best use of available capacity and not binding on NR, which was in any case under some pressure from no less than the ADC not to fetter itself by entering into such informal arrangements.

42. NR also addressed the ROU issues with enthusiasm in its statement of defence, despite having confirmed that its Failure to Use Notice had been specifically "referencing" Condition J4.1.1(b) [failure to use a Train Slot already secured in the WTT], therefore strictly engaging only Condition J4.3.1(b), the 'temporary' issue. NR's eventually unnecessary arguments as to the non-existence of ROUs on a section of line which has technically been removed from "the Network" did at least have the merit of prompting it to produce, as an Appendix to the statement of defence, the allegedly agreed Network Change proposal letter dated 23 July 2021 pursuant to which the removal had been effected. This

Document proved even more illuminating as to NR's actual collective view of the meaning of "temporary" than the 2021 NR paper and the 2022 proforma letter agreement. The Network Change proposal letter was headed "Temporary removal from the Network of the [MCJ Line etc.]" and then proceeded to use the word "Temporarily" five times in relation to various aspects of the proposed changes, their consequences and the works required to effect them.

43. DB's statement of response to NR's statement of defence refuted strongly and in detail the various arguments put forward by NR in support of the 'non-temporary' nature of DB's admitted non-use of its Train Slots. In particular DB refuted the entirety of paragraph 5.3.2 of NR's defence which summed up all the threads of its case on the 'non-temporary' issue. (The refutation of these arguments was debated likewise in the oral exchanges summarised below and, again, most of NR's arguments on this issue were eventually either withdrawn or accepted to be questionable.) With regard to the Network Change issue introduced by NR's statement of defence, DB pointed out that the Network Change proposal already consulted on and implemented was valid only from 2021 to 2025, not 2027 as NR had suggested was likely to be necessary, and that such an extension could not be taken for granted but would have to be reconsulted – it should not be treated as a fait accompli.

44. DB confirmed that it was entirely willing to make its presently unused relevant Train Slots available for any ongoing temporary use, and indeed was already doing so. However, its statement of response finally summed up DB's position as being that it objected to the removal of its QARs subject to NR's Failure to Use notice because it would definitely need them in due course to service its customer's (FCC) waste traffic to Calvert once the terminal reopened (even at a different but nearby site), and therefore in principle it was entitled to have precisely the protection from the consequences of a genuine 'Failure to Use' that the Network Code intended to be afforded for temporary non-use beyond an operator's control, by disregarding it under Condition J4.3.

45. The final submission was NR's Legal Submissions document served on 04 January 2024. After providing final and welcome confirmation as to which Condition J4.1.1 provisions were intended to be applicable to NR's original Failure to Use Notice, this addressed the three main areas of possible legal doubt now in the dispute, namely the meaning of 'temporary' in Condition J4.3.1(b); the need for a present part of 'the Network' to be the subject of a genuine Restriction of Use; and the legal status, if any, of working document types of cooperation agreement which clearly do not have the basic ingredients of offer and acceptance etc. to form a legally binding contract.

46. Finally as regards submissions, both DB's and NR's opening statements at the Hearing were in substance digests of all the submissions that had preceded them in this dispute process. The written versions are included in the documents listed above for eventual publication, so I do not attempt here to summarise them further.

47. As regards Outcomes, in its statement of claim (as reinforced by its opening statement at the Hearing) DB asked me to determine that NR's Failure to Use notice should have no effect, as a result of the application of Condition J4.3.1, which requires both Conditions J4.3.1(a) and J4.3.1(b) to be satisfied. As noted above, NR had now agreed that Condition J4.3.1(a) applied (i.e. that DB's non-use of the relevant Train Slots was attributable to non-economic reasons beyond its control). Consequently, DB

asked me to determine that the HS2 etc works causing loss of access to the FCC facility (this being the factual reason for DB's non-use of the relevant Train Slots) were temporary in nature (that is, not intended to be permanent) and therefore that Condition J4.3.1(b) also applied.

48. DB further asked that if it were found that NR's Failure to Use Notice had actually been issued (contrary to NR's recent clarification) pursuant to Condition J4.1.1(a) [failure to secure quantum of Train Slots permitted by a QAR in the WTT], then, irrespective of any finding regarding the HS2 etc works and resulting non-use of Train Slots being temporary in nature, I should also find that Condition J4.1.2(a) applied, precluding the assertion of a Failure to Use where the alleged non-use consists of an inability to secure the necessary quantum of Train Slots permitted by a QAR because of Restrictions of Use.

49. In its Statement of Defence (likewise reinforced by its opening statement) NR requested a determination that "the works" (presumed to mean the HS2 works previously referred to) are not "temporary in nature", so that Condition J4.3.1(b) does not apply. This seems to me to be slightly off the mark, because the application of J4.3.1(b) requires only the relevant non-use to be temporary rather than whatever is understood (or assumed) to be its cause. The latter could be as much a matter of the intention or capacity of the operator as it could be an external event such as the HS2 works. Indeed such an external event could well prove more relevant to the application of Condition J4.3.1(a) as potentially constituting a non-economic reason beyond the operator's control. In the case of this ADA58, however, that anomaly is unlikely to be relevant.

50. NR also asked me to determine that Condition J4.1.2(a) does not apply because, although DB had pointed in its statement of claim to Restrictions of Use published in the relevant Engineering Access Statement, the relevant section of line had actually been removed from the Network by means of an established Network Change and therefore could not be said to be subject to a Restriction of Use. There is a further anomaly here, in that it is unclear how there can have been both a Network Change, so that the the relevant stretch of line is not part of the Network (as stated by NR), and ROUs placed on that stretch of line, as appears from the EAS,which implies that the line is still part of the Network. As in paragraph 49, however, that anomaly is unlikely to be relevant to the disposal of this ADA58.

## D Oral Exchanges at the Hearing

51. In the summary which follows, I omit those parts of the Q&A session at the Hearing which eventually proved not germane to the outcome, conclusions or decisions reached, except in respect of those which I believe may have a wider application or interest than the determination of this particular dispute. Notwithstanding any such omissions, I confirm that I have revisited, considered carefully and digested everything that was said at the Hearing, as well as all the documents and submissions of the Parties, with the aid of the comprehensive record prepared by the Secretary to which I have referred in paragraph 16.

52. I started the Q&A session with a series of questions to NR regarding assertions in its opening statement that for DB to retain QARs for unused DB Train Slots would be somehow contrary to the 'spirit' of the Network Code. This included: whether NR believed that being contrary to the 'spirit' of the Code should legally influence the interpretation of 'temporary in nature' in Condition J4.3.1; what <u>is</u> the

'spirit' of the Code; and who determines what is the 'spirit' of the Code. NR stated that one should look at the overall picture of what both NR and the Network Code were trying to achieve and try to avoid absurd or contradictory outcomes. NR conceded that the "first port of call" would be a literal, legal interpretation of the Code, but felt that there was scope within the Code to examine any conflicting outcomes arising from Code compliance. In response to questioning, however, NR agreed that, although it had raised the subject now, it had not done so in any of its previous submissions and had not been able to define what it meant by the 'spirit' of the Code in any way that was sufficient to override the legal interpretation of the relevant Network Code Conditions.

53. At this stage, DB having nothing it wished to add, I confirmed that - having originally intended to go meticulously through the points raised in the Statements of Case - in light of the fact that both Dispute Parties appeared to agree (both in their previous submissions and in their opening statements today) upon the sole determinative legal issue in this dispute to be worked out, namely the meaning of the phrase 'temporary in nature', that was where the day's questions would now mainly focus. Accordingly I briefly advised the Parties of my initial view of the other main issues raised; first, that since NR had confirmed that its Failure to Use Notice related only to a Condition J4.1.1(b) situation, the Condition J4.1.2(a) issue as argued by NR in its statement of defence and later written legal submissions (i.e. whether you could have Restrictions of Use on infrastructure that apparently had been removed from the Network by a duly constituted Network Change) was technically irrelevant to the dispute at hand, though still of theoretical interest.

54. As for the Network Change proposal, the 2022 NR proforma letter agreement, the 2021 NR paper and related correspondence submitted with various of the Statements of Case (collectively the "**Cooperation Documents**"), I suggested that these could not seriously be asserted as contractually or otherwise legally binding, as seemed to have been previously proposed to but refuted by NR, but rather that they provided useful insight into - in fact the best available evidence of - the minds of the parties to these documents at the time, particularly NR, and consequently should be viewed as being of critical assistance to the central issue of the legal interpretation of the expression 'temporary in nature'.

55. I then asked NR if, having submitted a dictionary definition of 'temporary' in its legal submissions ("lasting only for a limited period of time, not permanent") which coincided with DB's interpretation of the phrase, it still stood by that definition and agreed with DB. NR initially demurred, saying that there were lots of different definitions of temporary within various sections of the Network Code and it would like to discuss the issue further. Following a short exchange, however, NR conceded that the dictionary definition it had submitted was the appropriate one to use in this instance, which aligned with DB's view.

56. Following further questioning, NR also confirmed that, in light of the exchanges outlined in the previous paragraph, it now withdrew its previous submissions suggesting that the possible reference to a two year time period attributed to 'temporary' in another unrelated section of Part J might assist in the interpretation of 'temporary' here in the completely different context of Condition J4.3.1(b). NR also withdrew its previous assertion regarding the 'spirit' of the Code overriding the legal interpretation of the Code.

57. Returning to the Cooperation Documents I proposed again that these, even if not binding, should be regarded at least as solid supporting evidence of the intentions of the parties as to the meaning of the terms used in them, and noted again that these documents contained multiple uses of the word 'temporary' without qualification. I suggested that from reading these documents as a whole the word 'temporary' appeared to be used to mean simply 'not permanent', i.e. 'not forever'. I asked the NR representatives what they believed the NR signatories to the documents - none of whom were present at the Hearing – had meant by the relatively extensive use of the words 'temporary' or 'temporarily' in these documents. NR initially declined to comment but, having been invited to speculate, then submitted that the word 'temporary' might be intended to mean, in that context, that the Network would change from one state to another. I suggested this matched the dictionary definition of temporary ('not permanent', meaning 'not forever'). NR responded that most physical things could be said to be ultimately 'not permanent' to some extent and the Network should either be considered to be in a permanent unchanging state, or - and this was NR's contention - always in some form of temporary state.

58. In particular in this context I asked NR whether they thought the many references in the 2022 NR letter agreement to 'temporary' non-use of the Network etc indicated that the word temporary could be taken as being applied in relation to DB's future non-use of the Train Slot. NR's lead speaker was not sure but guessed that the documents were really talking about moving from one state of permanence to another. Asked to elaborate on the concept it had introduced in its legal submissions of 'temporary permanence', NR then stated that this arose when you had a "state of permanence" that "could change", making the permanent state "temporary only". We did not pursue this concept further.

59. I then took NR page by page through the Network Change proposal letter that had led to the removal of access to the FCC facility at Calvert (by removing NR's infrastructure that led to it), which included the use of the word 'temporary' or 'temporarily' several times. It also included statements that the infrastructure would be reinstated and that "current freight paths to/from Calvert will remain in the timetable with the incumbent freight operators, in accordance with Network Code Part J4.3.1". NR was asked whether it could be said that the Network Change proposal letter confirmed NR's corporate intent for the site, and that NR therefore, corporately and practically, viewed the non-use of the relevant Train Slots as 'temporary in nature'. NR responded that the reinstatement of the infrastructure would not necessarily be a like-for-like replacement on the same alignment. NR further stated that the Network would go from one state of permanence (the infrastructure before removal), to nothing, then to a new state of permanence (new infrastructure). Following some further questioning I reminded NR that the Code refers to the non-use of Train Slots (and therefore the Network) being temporary, not the state of the Network itself being temporary. I asked NR whether it had ever had any doubt, at any stage, that DB would resume services, and therefore use of the Train Slots. NR said the only doubt might have been which FOC would be operating the services, i.e. perhaps not DB but another operator.

60. I put it to NR that the purpose of Condition J4.3.1(b) was precisely to deal with the situation DB now found itself in, where the present incumbent has overriding rights at a time of change which causes a period of non-use expected to last for some time but not forever, and it will wish to maintain those rights for use at some time in the future. I suggested that whilst 'temporary in nature' probably did not mean changing only after thousands of years, it could arguably encompass no change during the length of

time covered in this situation, particularly given how long railway construction projects often took. NR contended that the circumstances relating to the Calvert access were highly unusual and it did not think the Condition J4 mechanism (triggered by a Condition J5 application by GBRf in this case) was appropriate in this instance. It was NR's opinion that DB should have voluntarily surrendered its QARs (under Condition J7) given the length of time that the Network would be out of use.

61. This prompted a series of questions to all Parties regarding the theoretical possibilities that could be, and practical mechanisms that were being, used to cover the period of non-use of the QARs. DB stated that the related Train Slots in the WTT were in two groups: those with associated QARs and those without. Train Slots without QARs had already been released and were no longer in the WTT. DB was happy to release the Train Slots with associated QARs but did not want to lose its QARs and did not want to trigger the Condition J7 mechanism. DB further confirmed that it wished to protect its customer's (FCC) future business and this was why it both had not triggered Condition J7 and had requested that the Network Change paperwork include a paragraph confirming that NR would utilise the Condition J4.3.1 process. Both DB and NR were in agreement that the Network Change documentation did not "override" the Condition J7 mechanism and that the Network Change documentation had used the word "incumbent" rather than DB by name, in recognition that the traffic flow might be operated by another FOC by the time the infrastructure was reinstated. All this was notwithstanding that DB wished to continue to operate the flow in the future and, if it did not lose the FCC contract, would have an expectation of being the incumbent.

62. NR was invited to agree that the Network Change documents implied that DB, as the incumbent operator, would recommence operating the FCC traffic flow after the Network was reinstated. After some discussion NR agreed this to be the correct interpretation of the documents. NR further agreed with DB Cargo's broad statement that it would have an expectation, or a reasonable expectation, of continuing to hold the QARs, or resuming use of the QARs.

63. At this stage I advised NR that it was probably clear to NR how I was currently minded to interpret the phrase 'temporary in nature' and invited it to make any submissions about the way I was approaching this interpretation, since the Panel and the Dispute Parties appeared to have agreed that this was the sole legal issue to be determined.

64. NR reiterated its view as follows. Within the geographical area under discussion, elements of the Network had been removed, via the Network Change. The QARs in dispute include that stretch of the line. The replacement for the line that had been removed was not going to be a like-for-like replacement, and would serve a facility one mile further south, with a different name (Calvert Great Moor Sidings). The new infrastructure might not sit on the same alignment as the removed infrastructure. It was NR's view that, as the geographical location of the facility was changing, the QARs as expressed in the contract were no longer properly in use and would need to be replaced with new QARs to, and from, the new facility.

65. At this stage DB asked to respond. It stated that, although there might be discussions about technical timing data (including STANOX and TIPLOCs), the way the QARs were expressed in the contract would not necessarily need to change. DB stated that the purpose of the rights and the flow of traffic would be

to serve the same facility and the same customer. In response to questions it stated that it expected the new facility connection to the Network to look different, but NR's infrastructure leading to the facility to be either like for like or very similar.

66. I asked NR to confirm whether its view was that - despite the clear intention that the reinstated main line would be, effectively, the same and should be capable of being used by the QAR incumbent (DB) and, notwithstanding the statement in the Cooperation Documents including in the Network Change itself, that the overall use by the present incumbent should not be disrupted - the fact that the connection to NR's Network was going to change (from one site of the existing customer to another) constituted a sufficient change to make the non-use of the QARs permanent. NR confirmed this was its view as a "specific bit of the Network" was not being reinstated.

67. DB strongly disagreed with this and submitted that the QARs in dispute were expressed, contractually, as to and from "Calvert". The services ran - until the infrastructure was removed - to and from "Calvert Green", and in the future they would go to and from "Calvert Great Moor Sidings", both of which could be described as "Calvert".

68. NR then confirmed, in response to my further questions, that the off-Network facility at Calvert was a third party facility, linked to NR via a Connection Agreement, with the connection and signalling operated by NR. It was confirmed that in the future it would be possible to access the main line from the north, as well as the south, due to works associated with East West Rail, and there was some discussion about the future operating capability, although the Parties were told that this evidence did not have a bearing on the legal issue to be determined.

69. After I had invited any further comments or questions in advance of moving forward, GBRf stated it wished to note that it was not sure that any technical STANOX data would need to be amended and, more importantly, that the end location was an off-Network terminal, meaning GBRf felt that the QARs could remain the same, did not need to be amended and did not need to go through NR's Sale of Access Rights process, i.e. that the non-use is temporary within the meaning of the relevant provision.

70. Following a lunch break I asked NR whether it wished to reconsider any of its views in light of the statement given by GBRf, which seemed to support DB's claim. I observed that this was particularly material given GBRf's status as a rival operator and the instigator of the original Condition J5 notification, which had started the Condition J4 removal process. NR said it understood the point I was making, but that NR's argument was not based on the substantiality of the Network Change; the extent of the Network Change and whether the infrastructure was reinstated exactly, or with slight modifications, would not alter NR's view about the meaning of temporary and permanent in the context of Condition J4.3.1(b).

71. NR then gave some evidence about directions it had been given from ORR, including in a letter dated 24 November 2023 which had been shared with all Parties during the lunch break, about ensuring that NR appropriately manages spare capacity, particularly in relation to unused QARs and the freight industry. NR said although it had withdrawn its earlier arguments relating to the 'spirit' of the Network Code, it was this context of the wider industry discussion around what the correct use of capacity was

that had informed the position it had taken with regard to DB and its interpretation of Condition J4.3.1(b). NR confirmed, however, when questioned, that it was not saying that ORR policy statements overrode the Network Code and confirmed that it could "only operate within the Code". The policy statement was background information but not, in NR's view, binding. NR wished to point out, nevertheless, that in its view if DB retained its unused QARs then other operators would not be able to serve other customers in the area covered by the unused QARs.

72. At this stage I asked a series of questions to try to understand more about the contractual and practical reality of what was happening with the QARs and Train Slots whilst DB was not using the QARs. NR explained that currently both GBRf and Devon and Cornwall Railways Ltd. (which had not responded to the Secretary's invitation to become an Involved Party) were running services in the gaps left by the unused DB Train Slots associated with the unused QARs. This was being planned on a week-by-week basis through the STP process and NR, through supporting the Condition J4 process, was seeking to assist the FOCs in obtaining greater certainty about whether their services could run. When asked why the week-by-week situation could not continue - given DB's commitment to co-operating with industry partners - NR explained that the level of risk of being unable to operate the services was too high for the other FOCs to accept. NR's preferred option would be for DB to temporarily surrender the QARs using Condition J7. This would be Code-compliant and avoid the need for any side letters.

73. In response, DB said it did not wish to use the Condition J7 mechanism as it was not convinced it would be able to reinstate its QARs. DB did not see a behavioural risk in it suddenly refusing to surrender the Train Slots on a weekly basis; it said it had committed to co-operate. DB felt the real risk to GBRf was not on the line to Calvert, but earlier in the journey. In GBRf's case the Train Slots it was operating originated in the West Country and traversed the Great Western Mainline, interacting with a number of services including the densely-planned Elizabeth line services, before joining up with part of the Train Slots that DB had previously operated. DB felt there were other contractual solutions that could be explored instead, for example letting DB retain its firm QARs and for NR to sell some form of QAR to GBRf separately. DB submitted that there are examples on the Network of QARs which compete and conflict and have to be managed via one-hour windows, or some other contractual flex, by NR as infrastructure manager. DB felt there was no need to remove or suspend the rights to or from Calvert in order for something else to occur in a period when it was known that Calvert could not be served. DB cautioned about confusing QARs and Train Slots, but agreed that it was through the exercise of Train Slots that QARs were used, or not. DB agreed with NR's description of how the process was working on a weekly basis.

74. There followed some discussion with NR about the Part D timetabling process, in particular how 'white space' is identified when building the WTT, and how NR can flex passenger and freight services to accommodate new Train Slots. NR confirmed that, in building the WTT, it would have to give priority to DB's Train Slots with firm QARs over GBRf's Train Slots with no QARs, even knowing that DB's services would not run and GBRf's likely would. Whilst in theory NR could use contractual flexibility to accommodate both proposals, NR stated there was insufficient capacity to accommodate both operators at the location in dispute, and that GBRf was therefore carrying a considerable business risk on a week-by-week basis.

75. In response to a question from a Panel Member about the magnitude of the issue, DB stated that a total of three trains a day to, and three trains a day from, the HS2 construction site at Quainton Road were currently operating.

76. As the Panel had started to ask why it was not possible to accommodate three days per day, each way, in the WTT, GBRf asked to comment. GBRf confirmed earlier comments made by DB that the issue was not just about Calvert, or the Chiltern area, but the end-to-end journey, which was particularly difficult on the GWML. Without QARs for GBRf's services it risked, on a weekly basis, having the Train Slots rejected for a conflict elsewhere in the journey. It wanted to secure QARs for the services so that it could be certain of end-to-end paths in future WTTs. GBRf reminded the Panel that its Track Access Contract required it to secure paths for new traffic flows as soon as it could. In response to a question, GBRf confirmed that its traffic flow was time-bound to the end of HS2 construction in that area, potentially the end of 2026 or into early 2027.

77. At this stage it was confirmed - and was commonly agreed between the Parties - that the DB and GBRf traffic could not operate concurrently; the GBRf traffic will cease when HS2 construction ceases. As the current HS2 terminal (Quainton Road) is situated on the (single) running line, this traffic will not continue to operate once the MCJ line re-opens to traffic, including that serving Calvert.

78. I observed to the Parties that it seemed to me that the way the relevant sections of Part J were constructed was in order to, effectively, allocate risk. In this instance, the risk of not being able to use the Network. And that it seemed to me to say that the risk was allocated to those who did not have QARs. I noted Part J contained mechanisms to remove QARs, but in this case the mechanism depended on whether or not the non-use was temporary. I advised NR that my indicative view was that to agree that the non-use was temporary - which it seemed was where the discussion had gone - but then disregard that because the outcome would put other companies at an unacceptable business risk, was to go outside the intention of the way the Network Code was intended to operate, which is effectively first come, first served. I remained unconvinced by NR's arguments that DB's non-use was permanent, although I noted the pressure being put on NR by the industry - including by ADC disputes Panels - to optimise use of capacity.

79. At this point there was some discussion, building on earlier comments, about whether there was a practical, Network Code-compliant, solution to assist GBRf if it was deemed that there had been no Failure to Use of DB's QARs, without going so far as to constitute a direction from the Hearing Chair. DB suggested that time-limited or contingent QARs for GBRf might assist and reiterated its view that it did not want to surrender its QARs, even temporarily, as it wished to protect the position of its customer, FCC. NR agreed that it should not be forgotten that FCC was also at risk if the QARs were removed. All Parties were given the opportunity to make any further comments on the definition of temporary, and all declined, save for DB which reiterated its understanding of temporary as 'not permanent' and its view that NR had not complied with Part J in this case.

80. Some minor questions of detail concluded the hearing. NR was asked about the merits of using a Short Term Network Change, as opposed to the method it had chosen, which was a Network Change that would now - due to delays in HS2 construction - require a variation. After some discussion it was noted

that a Short Term Network Change was usually only two years in length, so would perhaps not have been appropriate in this instance.

81. NR was also asked about a statement it had made in earlier submissions, that if I were to find in NR's favour DB would have to go through NR's Sale of Access Rights process to secure new QARs. This led to some discussion about the different options available when applying for QARs, but it was ultimately common ground that an operator could amend its contract without NR's agreement (via a Section 22a application to ORR) and, in any event, the issue was only tangentially relevant as NR had raised it as a risk to DB; it was not material to the issue to be determined. I reminded NR - as I have done in previous disputes I have heard - that I remained very interested in NR's explanation of the legal basis for it refusing to sell Access Rights on the basis of Sale of Access Rights Panel approval.

82. The oral exchanges concluded with all Parties (including the Involved Parties) declining to make any further submissions or give formal closing statements and confirming that none of their documents or oral submissions needed to be treated as commercially confidential, nor did they require any redactions.

## E Issues of Fact and Law considered, Analysis and Conclusions

83. I now consider the issues raised by this dispute. I confirm that this analysis takes into account, as previously noted, all the Dispute Parties' submissions prior to and at the Hearing, including the oral exchanges on particular points of information raised during the Hearing. It is all these matters that inform the conclusions of this Determination.

84. Each of the Dispute Parties' respective Statements of Case and all the Parties' other submissions (both written and oral, the latter being as made during the Hearing and recorded or summarised in Section D above of this determination) included matters of fact submitted in evidence. I do not recall a single instance of any Party (whether a Dispute Party or an Involved Party) challenging or refuting any matter of fact contained or referred to in any written or oral submission of any other Party. Accordingly I find that all such evidence has been accepted by all Parties and is to be treated as admitted facts.

85. In essence I conclude, on the basis of the submissions, evidence and arguments presented at the Hearing and my own interpretation of the relevant Conditions of Part J of the Network Code, that DB has made out its case as expressed in the Notice of Dispute, its Statements of Case and subsequent submissions.

86. The analysis of the issues in this dispute derives mainly from the content of the propositions discussed and established in the course of the oral exchanges during the Hearing. To some extent therefore it repeats what was explained in the course of those exchanges.

87. As identified in my note of 08 January to the Parties, once we had cut through the distractions of connecting up all the opposing sub-clauses of Condition J4, the only really determinative issue turned out to be whether DB's enforced non-use of its access to Calvert could be thought to be genuinely only 'temporary' within the natural meaning of that word in Condition J4.3.1(b), so as to enable that non-use

to be disregarded for the purpose of grounding a valid Failure to Use Notice. Whatever I or anyone else at the Hearing might otherwise previously have thought on that issue, it became absolutely clear to me that the NR representatives involved in discussing and drawing up the Cooperation Documents, including even the formal NR Network Change proposal letter, must have thought the non-use was undoubtedly temporary.

88. As it happens, it would have been persuasive enough for me anyway, to learn that NR's managers responsible for Network Change and the management of overall network capacity, who put together the 'Cooperation Documents' as I have labelled them earlier, clearly thought that DB's non-use of its Train Slots to Calvert was going to be only temporary, simply because that seemed so very obvious to everyone except the few unfortunate NR representatives charged with turning up at the Hearing to make the best case they could in arguing the unarguable.

89. I should perhaps address the arguments against 'temporariness' that were advanced bravely by the NR team at the Hearing. Two of those arguments were eventually, I believe sensibly, withdrawn. These are mentioned in paragraph 56 above; first, that the possible reference to a two year time period attributed to 'temporary' in another unrelated section of Part J might assist in the interpretation of 'temporary' here in the completely different context of 'use it or lose it' under Condition J4.3.1(b); and second, the obviously baseless previous assertion regarding some as yet unidentified 'spirit' of the Network Code overriding the legal interpretation of the Code.

90. Of more concern were the somewhat metaphysical concepts advanced in NR's submissions and further pursued in Q&A at the Hearing (see paragraph 58 above), of some sort of 'temporary permanence'. If I understood NR's argument correctly, this was that nothing could be, literally, ultimately permanent, but that every apparent state of permanence should be regarded as only temporary because necessarily subject to eventual change. However the unfortunate corollary of this theory seems to be that either everything or nothing must be regarded as temporary for the purposes of Condition J4.3.1(b); which means that everything must be considered permanent, otherwise everything would be automatically excluded from a Failure to Use Notice,which would make the whole process pointless and inoperable. That of course leads to a dead end in considering how Condition J4.3.1(b) might ever usefully be applied.

91. Apart from that counter-intuitive conclusion, the principal flaw in NR's argument concerning what amounts to temporary versus permanent non-use, is that it seems to ignore any factor of <u>intent</u> on the part of the parties concerned. Given the need, in any case, under Condition J4.3.1(a) for non-economic reasons beyond the operator's control, it would seem that the 'temporary' requirement of Condition J4.3.1(b) can only be intended to add some element of intent, or will, on the part of the operator to cease non-use and continue operations, once the reasons beyond its control have either become controllable or ceased altogether, i.e.irrespective of the physical state of the system.

92. At all events, notwithstanding NR's arguments to the contrary, I am completely persuaded that DB's non-use of the Train Slots in question at Calvert has been and remains entirely temporary, within the natural meaning of that word, and I so find as a matter of interpretation and application of the Contract (being the TAA incorporating the Network Code) to the known and admitted facts of the matter..

93. NR's other principal argument, concerning Restrictions of Use, eventually proved to be non-determinative, following the acknowledgement in para 5.1.2 of its statement of defence that its Failure to Use Notice specifically referenced Condition J4.11(b) rather than J4.11(a). Nonetheless I should record that I would still be unconvinced by the argument even if still relevant, with it being obscure how ROUs can appear in the Engineering Access Statement applying to a line which is no longer part of the Network.

94. Accordingly I find that the Failure to Use Notice dated 01 November 2023 served on DB by NR under Condition J4.4.1, following a Third Party Application to NR by GBRf under Condition J5.1.1, was invalid because based on an alleged Failure to Use determined by reference to a period of non-use of Train Slots by DB which fell to be disregarded entirely under Condition J4.3.1.

## F Determination

95. Having carefully considered all submissions and evidence and based on my analysis of the issues and submissions, I determine as set out in paragraph 96, as a matter of both legal entitlement and remedy.

96. The Failure to Use Notice dated 01 November 2023 under Condition J4.4 of the Network Code served by NR on DB was invalid under Condition J4.8.1 and has no effect, by reason of the proper application of Condition J4.3.1 in its entirety. Accordingly, DB has no obligation to surrender the Rights Subject to Surrender as listed in that Notice on the date requested in that Notice or at all.

97. No application was made and I make no order for Costs in respect of the Hearing of this ADA58.

98. 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 ADR Rules.

**Peter Barber**
**Hearing Chair**
**21 February 2024**