
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP1521
(following a hearing held at 1 Eversholt Street, London, on 8 August 2019)

The Panel:

Peter Barber Hearing Chair

Members appointed from the Timetabling Pool

Robert Holder elected representative for Franchised Passenger Class, Band 2
Robin Nelson elected representative for Non-Passenger Class, Band 1
Hannah Linford appointed representative of Network Rail

The Dispute Parties:

For GB Railfreight Ltd ("GBRF")

Darren Pell Access Planning Manager

For Network Rail Infrastructure Ltd ("Network Rail" or "NR")

Sean Hyland Senior Programme Manager
Andrew Briggs Head of Planning – LNW Route
Gary Fitton Acting Access Planning Manager – LNW Route
Claire Rawson Project Sponsor
Maria Lee Head of National Access Planning (identified as 'Observer')

Interested parties:

For Arriva Rail North Ltd ("ARN")

Nicola Eyre Track Access Manager
Andy Ward Special Traffic Planning Manager

In attendance:

Tony Skilton ADC Secretary ("Secretary")
Tamzin Cloke ADC Secretary designate

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1 Introduction: Substance of Dispute, Jurisdiction and Interpretation

1. Dispute TTP1521 was raised by GBRf by service of a Notice of Dispute on 27 June 2019 in respect of Network Rail's decision notified by email to affected persons including GBRf on 26 June 2019 (the "Decision") regarding a particular possession numbered P2019/2640755 required to be taken in the Liverpool area (the "Possession") in planning Week 32 of 2019. The purpose of the engineering access required by the Possession was to undertake a change of signalling control at Edge Hill, previously planned for Week 39; Network Rail explained the reason for the change of date as being anticipated non-availability of signalling tester resources for Week 39. GBRf maintained that there had been insufficient consultation concerning the Possession and that no information had been received regarding the application of the Decision Criteria in the making of the Decision.
2. I was appointed as Hearing Chair on 28 June 2019 and I satisfied myself that the matters in dispute included grounds of appeal which may be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.
3. In its consideration of the Parties' submissions and its hearing of the Disputes, the Panel was mindful that, as provided for in ADR Rule A5, it should 'reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.
4. The abbreviations and other short form terms used in this Determination are set out in the list of Parties above, below in this paragraph 4 and as otherwise specifically defined in this Determination. References in this Determination to a numbered "Condition" are to that Condition of Part D of the applicable version of the Network Code. Capitalised terms used in this Determination which are defined in the Network Code have the meanings there given.

"ADC" means the Access Disputes Committee

"ADR Rules" or "ADRR" means the Access Disputes Resolution Rules

"Decision Criteria" means the Objective and the Considerations defined and set out in Condition D4.6

"Chapter H" means Chapter H of the ADR Rules

"EAS" means the Engineering Access Statement (version 4.3 dated 29 March 2019, unless the context otherwise requires)

"Parties" means the Dispute Parties and the interested party

"Record" means the Record of evidence given and arguments presented during the Hearing as set out at Annex B to this Determination

"Timetable" or "WTT" means the New Working Timetable publication for introduction in May or December of the relevant year as the context may require

"TPR" means the Timetable Planning Rules

"TTP" means Timetabling Panel

2 History of this Dispute process and documents submitted

5. At my request, as permitted by ADR Rule H21, the Dispute Parties were required to provide Sole Reference Documents (each an "SRD"). The proposed Panel Hearing was duly notified by the Secretary direct to other parties which might wish to become involved in the dispute proceedings and also generally, by means of the ADC's website.
6. On 19 July 2019 GBRf served its SRD in accordance with the dispute timetable as issued by the Secretary. GBRf's SRD is published on the ADC website.

7. Network Rail served its SRD on the morning of 1 August 2019 whereas the dispute timetable required it by 16.00 on 30 July. NR's SRD is published on the ADC website
8. On 29 July 2019 ARN declared itself to be an interested party, and was later represented at the Hearing.
9. In accordance with Rule H18(c), following receipt of the Dispute Parties' submissions I reviewed them to identify any relevant issues of law raised by the dispute. On 3 August 2019 I confirmed to the other members of the Panel that I did not consider there to be any overarching issues of law arising out of the submissions; I noted that there were some issues of contract interpretation relating to the application of the rules in Condition D4.4 governing decisions concerning Network Rail Variations and particularly the appropriate procedures for applying the Decision Criteria, but these were issues of mixed fact and law which constituted the substance of the dispute to be determined. This was copied to the Dispute Parties on 5 August 2019.
10. The Hearing took place on 8 August 2019. I 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 interested party was invited to make opening comments. I then explained the structure and objectives that the Panel's Q&A would pursue, and the Parties were accordingly questioned by me and the other members of the Panel. Following and in the light of the Q&A session the Parties were invited to make closing statements but declined to do so. The Dispute Parties' opening statements as given orally are included in the Record.
11. 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 discussed with the Dispute Parties the practicality of various apparent options for remedies, and received their submissions as to Costs.
12. I confirm that the Panel has read all the material submitted by the Dispute Parties. I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of the dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarised in the course of this Determination.

3 Relevant provisions of the Network Code and other documents

13. The versions of the Network Code Part D and the ADR Rules dated 12 July 2017 were applicable to these dispute proceedings.
14. The provisions of the Network Code in issue in this dispute are, principally, the following Conditions, which are appended at Annex A:
 - D3.4 Network Rail Variations with at least 12 Weeks' Notice
 - D4.4 Decisions concerning Network Rail Variations
 - D4.6 The Decision Criteria

4 Submissions made and Outcomes sought by the Dispute Parties

15. As previously noted, the full text of GBR's and Network Rail's submissions in their respective SRDs (including all Appendices) to the Hearing are published on the ADC website. A full note of each of GBR's and NR's oral opening statements to the Hearing is

set out in the Record at Annex B and these were in substance summaries of their respective prior written submissions.

16. In summary, GBRf's submissions to the Hearing were that this dispute concerned the adverse impact on GBRf, particularly, of the Possession as notified by NR to GBRf and others by the Decision (included as Appendix 4.2 to GBRf's SRD), which Decision GBRf referred to in its submissions as a "late notice possession" and NR in its submissions referred to as a "disruptive possession". It was common ground that the Possession notified by the Decision was required to be taken for planning Week 32 of 2019 and involved a 52 hour block of all lines in the Liverpool area from 2nd to 4th November 2019.
17. GBRf noted that a possession such as the Possession, whenever taken, would prevent any access to Liverpool Bulk Terminal and that this would disrupt the operation of GBRf's contracted biomass traffic for its primary customer Drax Power; and that the Possession would also prevent access to Tuebrook Sidings which GBRf used as a facility for short term stabling of wagon sets and locomotives.
18. GBRf said that various options for the timing of this particular Possession had previously been canvassed by Network Rail (though not formally proposed) and discussed with several operators including GBRf over a period starting with conference calls in early January and culminating with the decision notified on 26th June. During this period, first Week 13 was put forward and discussed and agreed as preferable in principle by most operators including GBRf, and then Week 39 likewise. However, GBRf contended, NR had had no discussion with GBRf regarding the reasons for or impact of the eventual decision to move the Possession to Week 32, of which GBRf had no warning prior to the formal 'Request' for the Possession in Week 32 notified by NR by email dated 11 June 2019 (included as Appendix 4.1 to GBRf's SRD).
19. GBRf explained that the degree of disruption to its biomass traffic for Drax Power would be materially affected by the timing of the Possession, due to the seasonality of requirements for power and therefore of fuel to generate it. GBRf had advised NR of this on the first conference call to discuss the required Possession in January 2019. Summer months held the least requirement for power and therefore biomass traffic, hence GBRf's initial preference for Week 13 as the least disadvantageous. Winter months were to be avoided; because of the higher seasonal demand there was no opportunity to recover lost traffic. Week 39 was less of a problem because it was the Christmas 'no booked trains' period, when the power station would be less contractually demanding anyway; but there would still be stabling requirements to be accommodated. Week 32, by contrast, was in November, in the period of peak requirement.
20. GBRf noted that Network Rail had made no initiative to apply GBRf's known requirements in discussions concerning the earlier canvassed timings of the Possession, or to reduce the disruption to its services caused by the eventual timing notified on 26th June by the Week 32 Decision, as NR had for other affected operators. Although GBRf had been on a conference call in March 2019 with NR and other operators concerning the change from Week 13 to Week 39, and NR had contacted GBRf from time to time after that to discuss stabling requirements, GBRf had heard nothing from NR concerning the possible move from Week 39 or the consequent effect on its biomass traffic prior to receiving the Request for the Week 32 Possession. GBRf maintained accordingly that there had been no consultation by NR directly with GBRf leading up to the Week 32 Request.
21. GBRf maintained further that Network Rail could not have applied the Decision Criteria as it should have, at the time of making the Decision in dispute, that is, at the point of publishing the Week 32 Decision on 26 June, because NR did not at that time know the options open to

it as far as GBRf was concerned, having not previously discussed that particular possible decision with GBRf. GBRf noted that it did not see NR's explanation of how it had applied the Decision Criteria until it was submitted with NR's SRD (as Appendix A).

22. GBRf also maintained that NR's asserted application of the Decision Criteria as eventually presented in that document was in itself substantially flawed, because it failed to provide or evaluate relevant information as to alternative options available, anticipated delivery of improved performance and reliability, or the relative impact of the Possession on all affected operators including GBRf in particular. GBRf described a number of specific examples of this flawed treatment in both its SRD and its opening statement to the Hearing.

23. In its SRD, GBRf asked the Panel to determine:

- (i) that under Condition D3.4.4(a), Network Rail has failed to consult adequately;
- (ii) that under Condition D3.4.4(b), Network Rail has failed to comply, has not applied the Decision Criteria for the possession reasonably and has not justified its reasons for its decisions; and
- (iii) that under Condition D5.3.1(a), the 52 hour possession is withdrawn and [Network Rail is to] reconsider, with appropriate industry involvement, an alternative time of year or a new plan that can be delivered in accordance with due process, contractual obligation and commercial sensibility.

24. In summary, Network Rail's submissions to the Hearing confirmed that this dispute concerned its Decision regarding the Possession, and NR's SRD stated its intention to set out evidence that in relation to this Decision it had consulted properly and had both interpreted the Decision Criteria appropriately and applied them correctly. NR's key document cited to this effect was what it described as the "Decision Criteria Table" included as Appendix A to its SRD, entitled 'NETWORK RAIL APPLICATION OF THE DECISION CRITERIA IN RESPECT OF EDGE HILL RECONTROL WEEK 32 2019'.

25. Most of NR's evidence in its SRD regarding alleged lack of consultation and lack of application or actual misapplication of the Decision Criteria took the form of a paragraph by paragraph rebuttal, in somewhat formulaic terms, of Sections 4 and 5 of GBRf's SRD dealing with the subject matter of the dispute and the Dispute Parties' respective explanations and arguments regarding the issues in dispute. NR's repeated grounds of rebuttal each consisted of a combination of statements drawn from a set group of assertions, as relevant to each paragraph being rebutted. The complete group of assertions thus presented as NR's evidence were that:

- NR refutes that it did not consult the Possession properly or that the correct consultation process was not applied;
- The consultation of this Possession was in accordance [with] Conditions D3.4.1, 3.4.3 and 3.4.4;
- NR refutes that the Decision was already made and that the Decision Criteria were not applied as per the Network Code;
- Part D does not specify that NR should notify Timetable Participants how it has used the Decision Criteria when notifying decisions;
- The Network Code does not oblige NR to accommodate all comments or requests from Timetable Participants;
- NR is obliged to apply the Decision Criteria in its considerations in accordance with Condition D4.3; and

- NR confirms it interpreted the Decision Criteria correctly and applied the Decision Criteria appropriately and without prejudice, citing the document produced as Appendix A to NR's SRD referred to above.

26. Network Rail's SRD also included the following:

- Appendix B, a spreadsheet sent to all affected operators including GBRf detailing all possessions including the Possession to be discussed on a conference call with NR on 27 June 2019, the day after the Decision was notified by NR, as evidencing that all operators were informed equally about the 'late change' effected by the Week 32 Decision.
- Appendix C, a series of emails and messages between 11 June and 24 June 2019, as evidencing consultation by NR with GBRf; and
- Appendix D (not referenced in the text of the SRD), which later questioning revealed to be a presentation by NR's Project Sponsor to the TransPennine Express Alliance Board on 1 July 2019, explaining the rationale for the eventual choice of Week 32 for the Possession in order to accommodate various impacts on Network Rail.
- As further evidencing consultation with all operators, and "continuous and correct consultation" specifically with GBRf, regarding the Week 32 Possession, NR's SRD also cited GBRf's Appendix 4.1 and 4.2, respectively NR's Request email of 11 June and Decision email of 24 June regarding the Possession.

27. The written version of Network Rail's opening statement delivered to the Hearing, as supplied to the Panel, was entitled 'EDGE HILL RECONTROL'. It described the project so entitled (the "Project") as the introduction of a new signalling control and transmission system to enable the 'recontrol' of Edge Hill Signal Box to Manchester ROC, as part of the wider £150M project known as Liverpool Lime St Resignalling and Remodelling which was intended to increase capacity in the Lime St and Edge Hill railway footprints while renewing and modernising signalling infrastructure. NR's opening statement listed the benefits of the Project; described the history of the Project's planning as part of the greater Liverpool area project; noted the need, and the reasons for it, for a disruptive possession of 52 hours in order to complete the Project; and noted the present status of the Project and historical reasons why Week 32 had come to be identified by NR as the most suitable week in 2019 for the Possession.

28. Network Rail's opening statement also described in detail the unacceptable impacts on NR of failing to complete the Project by Week 39 - that is, in effect, within 2019 - if the Possession could not be taken in 2019. Such impacts included lack of signaller resources and associated trade union engagement; financial considerations due mainly to having to renegotiate delivery of the Project with NR's main contractor; and loss of funding for the Project if it could not be completed within the budgeted financial year. This summary of the impacts on NR mirrored those described in the presentation included as Appendix D to NR's SRD referred to above.

29. In its SRD, Network Rail asked the Panel to determine:

- (i) that under Condition D3.4.4(a), by its Request email of 11 June (GBRf SRD Appendix 4.1), Network Rail consulted the possession in Week 32 correctly;

- (ii) that under Condition D3.4.4(b), by its Decision email of 24 June (GBRf SRD Appendix 4.2) and NR's Decision Criteria table (NR SRD Appendix A), Network Rail interpreted the Decision Criteria correctly and applied the Decision Criteria appropriately; and
- (iii) that under Condition D5.3.1(b), the decision of Network Rail for the Possession in Week 32 shall stand.

5 Oral exchanges at the Hearing: evidence and arguments submitted

30. After considering the written submissions of the Dispute Parties as listed in section 2 above, and having heard their further oral submissions in their opening statements as summarised in section 4 above, I and the other members of the Panel questioned the Dispute Parties' representatives to clarify a number of points arising. In line with the practice adopted at previous Timetabling Panel Hearings, because there is no procedure for individuals' answers to questions to be taken as sworn evidence (in common with the Dispute Parties' written submissions), I consider that we ought and are entitled to accept answers and submissions regarding matters of fact as true and accurate statements unless we find any indication to the contrary. I have taken them into account accordingly in reaching this Determination.
31. The Record at Annex B includes a full account of the Q&A during the Hearing, including incidental observations by the Panel and the Parties, and constitutes an integral part of this determination. The following, therefore, is a digest of the main evidential themes established and arguments advanced in the discussion during the Q&A sessions.
32. The discussion followed a sequence which I outlined at the outset. I explained the Panel's intended method for questioning the Dispute Parties, by going through the main sections of both submissions paragraph by paragraph, as this was the way in which NR's reply had addressed GBRf's statement of case. This would effectively cover in substance the main four background issues in the case, which I described as follows:
- first, identifying the rules and provisions of the Network Code and other documents to which this dispute actually related;
 - second, given those rules etc, what was the variation procedure that should have been adopted and was actually adopted by NR, and in the course of that procedure what was the history of consultation and communication by the parties with each other;
 - third, what were the facts and history (including the timing) of the process of NR's application of the Decision Criteria; and
 - fourth, the sufficiency and reasonableness of NR's actual method of application of the Decision Criteria, as evidenced by the content of the Decision Criteria table eventually produced with NR's SRD, which was a distinct issue regardless of the facts etc of the process of application.
33. On the first, procedural, issue, notwithstanding contrary cross-references in the Dispute Parties' SRDs, we established that the relevant provision of the Network Code under which the Decision was notified was Condition D3.4, 'Network Rail Variations with at least 12 weeks' notice'; and that the relevant provision under which the appeal constituted by this dispute TTP1521 was sanctioned, was paragraph D3.4.16. I confirmed that the Dispute Parties' mistaken cross-references did not affect the validity of the dispute.
34. We also noted that Conditions D3.4.3 and D3.4.4 taken together say that NR shall include a 'procedure' in the 'Rules' – in this context, the EAS and the TPR - and that it is that particular

procedure which must require consultation and application of the Decision Criteria to Network Rail Variations, rather than the Network Code itself directly prescribing the procedure to be followed. The Dispute Parties had brought, and responded to, the dispute on the basis that overall it related to a requirement of the Network Code itself and had not referred to or cited any requirement of the EAS or TPR as constituting the relevant procedure pursuant to the Network Code. We established agreement between the Dispute Parties nonetheless that, for the purposes of dealing with this dispute, it could be taken as being the Network Code that, whether directly or indirectly, prescribes the actions and procedures that are the subject of the dispute, including the specific requirements of Condition D3.4.4. During an adjournment the Panel reviewed the relevant section of the EAS (Section 1.5, 'Change Procedure', EAS version 4.3 dated 29 March 2019) and concluded that this (rather than the equivalent procedure contained in the TPR at Sections 2.4 and 2.5) did in substance constitute the 'procedure' meeting the requirements of Condition D3.4.4; I confirmed this to the Parties when the Hearing reconvened, and we explored these provisions further at a later stage in the Q&A.

35. On the second issue, consultation, Network Rail was adamant that it had consulted all affected operators regarding the Decision and that its consultation had been 'adequate', if this was indeed required by the Network Code, which NR contended it was not. We took some time to check that we had correctly understood the chronology of events and communications between NR and GBRf in the various stages of NR's planning for the Possession, from the first conference call on 9 January 2019 (in which GBRf participated) to the post-Decision conference call on 27 June 2019, the day after the Decision, (in which GBRf did not participate).
36. The questioning established that, whilst GBRf was invited to and participated in conference calls on 9 and 16 January and 4 February 2019, it was not invited to two conference calls or meetings with operators convened by NR in June between the Request for the Week 32 Possession and the Decision to take it, NR acknowledging that these calls or meetings were deliberately intended to concentrate on passenger handling only. We established that during that period in June GBRf was contacted a few times by NR but that the purpose of these communications was only to discuss mitigation of GBRf's stabling needs rather than to take account of the impact of the requested Week 32 Possession on GBRf's commercial services.
37. NR considered that it already had enough information to assess broadly the impact on GBRf from the discussions earlier in the year in which GBRf had been involved; that in any case there was unfortunately no way of resolving that impact if the Possession was critical to achieving completion of the Project in 2019; and that the more difficult and important considerations by now were ensuring that passenger operators could meet 'Informed Traveller' deadlines for notifying the disruption to be caused by the Possession, and addressing the political sensitivities of the Project with 'stakeholders' in the Liverpool City Region.
38. Later in the Q&A, following a discussion (noted further below) as to whether NR was obliged to supply some exposition of its application of the Decision Criteria at the time of notifying each decision it made, we considered whether the provision of such information in its own right also formed part of the obligation to consult. I noted that, to be meaningful, any consultation by NR prior to a decision should include at least something showing how, for the purposes of consultation, NR had complied in substance with what the contract required it to do, namely to make each decision "by application" of the Decision Criteria; otherwise the consultees could not have a complete picture of what they were being consulted about or the issues they needed to take into account.

39. NR maintained its assertion that the wording of Condition D3.4.4(a) did not require it to consult 'adequately' and that GBRf's use of this word in its submission implied that NR had not consulted at all. NR took equal issue with the suggestion of an obligation to consult "sufficiently". I noted that any form of consultation, to make sense, must involve some range of activity and not just a single act, such as the sending of one email; and it would be quite possible to make a determination in terms that NR had simply 'not consulted' something it was required to, if it were felt that this was really necessary in order to follow the precise wording of the Network Code. Whatever the precise form of such a determination it could in substance embrace a situation where NR's actions showed that it had consulted 'inadequately or 'insufficiently', as was alleged here regarding its consultation with GBRf regarding the impact of the Possession on GBRf's services.
40. The third main issue covered by the Q&A going through the Parties' SRDs, concerned the process and timing of NR's alleged application of the Decision Criteria to the Decision in question. In this context we debated NR's view, as repeated several times in its SRD, that there is nothing in Part D of the Network Code that expressly specifies that NR should "notify Timetable Participants how it has used the Decision Criteria when notifying decisions", nor therefore publish any specific form of 'Decision Criteria document' at any particular time during or after the decision process.
41. Asked by whom, and when, the 'Decision Criteria table' at NR's Appendix A had been prepared, NR identified as the authors three of the NR representatives present at the Hearing, including the signatory to NR's SRD, but not NR's lead spokesperson at the Hearing. The three authors could not remember exactly when it had been prepared; they knew it was after the Decision (26 June 2019) but thought it might have been before the Notice of Dispute (27 June 2019), following an email from GBRf stating they were disappointed they had not received the information about application of the Decision Criteria (which was not included in either Party's SRD). In fact the first indication from GBRf concerning lack of reference by NR to the Decision Criteria appears to have been in the Notice of Dispute itself. NR's representatives then confirmed that the Decision Criteria document was not in fact issued before they had seen GBRf's SRD, whereupon NR put the document in its own SRD (as Appendix A).
42. The ensuing debate concerned how, when and even whether, on a proper interpretation of the Network Code and the EAS, Network Rail was required to give some explanation of its application of the Decision Criteria. GBRf maintained that for big decisions such as a blockade, raising contentious issues that would cause a lot of disruption, there should be a conscious effort to apply the Decision Criteria leading up to the decision and the explanation should be notified with the decision. In such cases the Decision Criteria should have been applied at some stage leading up to the request and the explanation should therefore be available as soon as the decision is issued.
43. NR accepted that GBRf's interpretation would be good practice. In this instance, NR said, their access planning function internally challenged the request for the Possession and asked a number of questions that led them to believe this was the best outcome for the benefit of the railway. NR believed they had the Decision Criteria in mind when doing this.
44. I then reverted to the detail of Condition D3.4.4(b), which says that a 'procedure' to be included (in effect) in the EAS must require that all decisions of NR be made "by application of the Decision Criteria in accordance with Condition D4.6". I referred to the EAS for the current timetable, which deals in paragraph 1.5.3 with 'Changes initiated by Network Rail' to the EAS or TPR. Sub-paragraph 1.5.3.2 states that NR "shall notify to all Train Operators affected details of the proposed change including a concise explanation of its reasons".

Then, under Paragraph 1.5.5 headed "Decision by Network Rail", sub-paragraph 1.5.5.1 states "Network Rail shall give due consideration to responses received from Train Operators", and sub-paragraph 1.5.5.2 states "In reaching its decision, Network Rail shall have due regard to the Decision Criteria...". So I noted that Conditions D3.4.3 and D3.4.4, taken together with the EAS, effectively require that the reasons for NR's decision, which both by definition and as a specific requirement must include application of the Decision Criteria, should be notified to all Train Operators affected.

45. In considering therefore whether NR could be said, as a fact, to have made the Decision "by application of the Decision Criteria" at the time and in the process of making the Decision, as distinct from drawing up a rationale retrospectively at a later stage, I noted that nothing said about NR's considerations in any of its communications prior to its SRD had been directly related to any of the Decision Criteria, even if some could be brought in by inference. I suggested it appeared from NR's submissions so far that putting the Decision within the framework of the Decision Criteria was not in anyone's mind when going through this process.
46. Network Rail's lead spokesperson (though apparently not an author of the Decision Criteria table at NR's SRD Appendix A) explained that he could see that every meeting, every point of consideration and every element of the process NR undertook had manifested itself in the Decision Criteria document, and he believed that NR had these points in its (collective) mind when arriving at the Week 32 Decision. This Decision Criteria document reflected nearly perfectly why NR decided Week 32 was the perfect week (for the Project). It was correct, he maintained, to fit the matters actually taken into account by NR into the framework of the Decision Criteria after the Decision had been made. He made it clear that the main point for NR in this case, was a real operational risk of the current Edge Hill Signal Box not being able to be staffed if the Week 32 Possession could not be taken.
47. I noted that the way Network Rail appeared to have addressed the issue was to apply the Decision Criteria retrospectively, to explain why the Project had to be delivered by a certain date, rather than to explain why that specific Possession needed to happen in a particular Week. NR said it could not see what other consideration should have been included. I proposed that this might be seen in itself as demonstrating that Network Rail had not made the Decision 'by application' of the Decision Criteria as required by the Network Code; and that the content of NR's Decision Criteria document as eventually delivered with its SRD bore this out. Even the first sentence of the document made no reference to the Decision Criteria being considered before the Decision regarding the Possession was made, it just said NR had now "offered the following narrative" in determining, in effect, the timing of the Possession in order to deliver the Project ("in determining a dating for the re-control of Edge Hill Signal Box"). This was more than merely a technical wording issue, as suggested by NR; the document simply did not evidence that NR had done what the contract required it to, with regard to applying the Decision Criteria. The document stated why the Week 32 Possession was needed almost entirely in the context of NR's commercial and operational position regarding delivery of the Project.
48. NR did not understand why the access (required by the Week 32 Possession) should not be driven as a result of the Project needing to be delivered. I said the document did not address the eventual choice of Week 32 over other Weeks, evaluating the relative effects this particular Week would have on different affected parties. NR said this was because, by the time the Decision Criteria document was produced, that Week had already been chosen. I explained that this was precisely the point we were trying to get at; that the Week should not have been "chosen", i.e. the Decision made, without application of the Decision Criteria.

49. NR pointed out that the document did actually make reference to the impact of the Possession on freight operators, in section (f); this in fact, however, mentioned potential loss of revenue for both freight and passenger operators, without differentiating between them, and only "if scheme not delivered pre-2020 and the timetable cannot be supported". NR finally explained that its main concern was "operating Liverpool after Christmas", and apologised if its wording did not make that clear.
50. By this point in the discussion we had overlapped to some extent with the fourth issue I had originally outlined as to be addressed in our Q&A - the sufficiency and reasonableness of the actual content of Network Rail's application of the Decision Criteria as evidenced by the Decision Criteria table eventually produced with NR's SRD. This remained a distinct issue, irrespective of our previous discussion and any conclusion reached on the facts, history and timing of the process whereby that document had been generated.
51. In addition to the points previously arising on the content of the Decision Criteria document, I noted that NR had not even mentioned having had regard to the Objective - Condition D4.6.1 - as the most important element of the Decision Criteria, in order to reach a decision which was fair. Nor had NR evaluated how the Objective or any individual Consideration might affect several relevant but conflicting interests, differentiating between operators and other interested persons and particularly in this instance between passenger and freight operators. Consequently the rationale for NR's weighting was unclear. For example, when considering if the spread of services reflected demand (Consideration (b)), that was weighted 'High', but with no comment on how high or with respect to which operator, nor which options were discussed. It could be said that there appeared to have been in reality no attention given as to how the spread of services - as affected by the Possession in issue - reflected freight demand.
52. A further example was the signaller resourcing constraint mentioned in the Decision Criteria document (in the Summary and against Considerations (a), (c), (f) and (j)), which seemed to be stated as a 'given' impact on Network Rail. I noted the implication here that there was nothing NR should, or could, have done about it. NR responded by explaining its general and ongoing operational concerns over signaller resourcing particularly in this location. I noted that the ADR Rules obliged us to decide on the basis of the legal entitlements of the Parties, and the legal obligation of the Parties here was to comply with their contracts. In other industries contracting parties could not excuse non-performance or breach of contracts on the grounds that they had insufficient funds, staff, or funds to employ staff, needed in order to perform their contracts. I recognised the problem when the state sponsor of an industry body declined to fund it to perform its obligations outside 'annualised budget arrangements' (as mentioned in NR's opening statement), but regrettably that was not a legal reason for non-performance of its contracts.
53. There were other examples of general impact of the Possession mentioned in the Decision Criteria document; asked as to its application, NR said this impact applied in effect to three 'parties' - "operators, LNW Route and the Project". This suggested that NR's evaluation of impact of the Decision Criteria, such as it was, had been between all operators, on the one hand, and two parts of Network Rail on the other.
54. We noted also that the Decision Criteria document had not articulated the impact on freight weighed against the impact on passenger traffic. NR had not explained why it had chosen to concentrate on passenger handling considerations. NR accepted that it could only physically accommodate pilot working outside the possession footprint, and could not accommodate freight into the Possession.

55. The Panel concluded that the only company really referred to in the Decision Criteria document, in terms of identifying and evaluating impact, was Network Rail itself. NR noted that it had had more discussions with operators that were not reflected in the documents. NR did not want the Panel to think it was focused on NR interests only.
56. I noted the conclusion being reached by the Panel that, whilst Network Rail clearly had been considering a great deal of matters concerning the Possession, it had not been considering them in the framework or addressing the content required by the Decision Criteria. NR disagreed and believed the Decision was fair, transparent and considered everything. NR agreed with the suggestion that its position effectively required the Panel to take into account not only the Decision Criteria document, but also the possibility of discussion within NR that had not been documented nor otherwise evidenced.
57. Network Rail questioned GBRf about its request that the Hearing find specifically that NR had failed to comply with Condition D3.4.4(b) (application of the Decision Criteria). GBRf noted that when it submitted its SRD it did not yet have NR's Decision Criteria document, so had to assume when it wasn't available that it didn't exist. NR queried if it was fair for GBRf to assert NR's non-compliance with the Network Code before seeing the document. I considered that it was fair, precisely because a major point of the dispute was whether NR should have provided it, or at least something regarding the Decision Criteria, at the point of making the Decision.
58. Finally, asked by ARN if it could confirm when the increased capacity into Liverpool (referred to in NR's submissions) would be released as a result of the Project, NR said it had already been released in October 2018. ARN suggested this compromised NR's claim that taking the Possession in Week 32 was needed to deliver additional capacity because the works would not provide additional paths in the WTT. I commented that this did appear to remove some of the claimed justification for Week 32. NR responded that it was about operational flexibility rather than additional paths.
59. Wrapping up by considering the practicalities of various possible outcomes, I asked what the consequences would be of a determination that Network Rail should reconsider and reconult the Possession properly in accordance with the Decision Criteria. We were informed that this would have a significant impact for the industry as train paths had already been offered and accepted and the T-12 upload of the new Timetable was due on the day following the Hearing (9 August 2019). We then explored in more detail the commercial impact on GBRf of the Possession being maintained with the consequent loss of GBRf biomass services for Drax Power over the period, and any potential implications for power supply. NR enquired if financial compensation to GBRf might be an adequate remedy and we concluded with discussion as to what such compensation might involve and its relation, if any, to possible Track Access Agreement Schedule 4 compensation.

6 Analysis and consideration of issues and submissions

60. I now consider the issues raised by this dispute. I confirm this analysis takes into account, as previously noted, 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 these matters that inform the conclusions of this Determination.
61. In essence I conclude, on the basis of the evidence and arguments presented at the Hearing (as appear from the Record) and my own interpretation of the relevant sections of Part D of the Network Code, that GBRf has made out its case as expressed in the Notice of Dispute, its SRD and subsequent submissions.

62. The analysis of the issues in this dispute mainly follows the structure and content of the propositions discussed and established in the course and at the end of the oral exchanges sequentially during the Hearing. To some extent therefore it repeats what was explained by me in the course of those exchanges.

Applicable Contract Procedures

63. As previously noted, therefore, regarding the first issue as to identifying the contractual procedures applicable to the dispute I conclude that the relevant provisions are Conditions D3.4, Network Rail Variations with at least 12 Weeks' Notice; D4.4, Decisions concerning Network Rail Variations; and D4.6, The Decision Criteria; as well as EAS Section 1.5, 'Change Procedure' (EAS version 4.3 dated 29 March 2019).

Consultation requirement

64. The second issue of the dispute concerned what was the variation procedure that should have been adopted and was actually adopted by Network Rail for notifying the Possession, and particularly as regards the level of consultation required to be undertaken in the course of that procedure. Condition D3.4.4 requires that the procedure referred to in Condition 3.4.3 (to enable amendment of the EAS and TPR) (a) "must require that no amendment to the [EAS and TPR] may be made unless Network Rail has consulted with all Timetable Participants likely to be affected by the amendment".
65. Network Rail maintained strongly, both in its submissions and in discussion on this point during the Q&A, that it had consulted all relevant Timetable Participants including GBRf concerning the Possession and the Decision as required by Condition D3.4.4. NR also, at various points in the discussion, rejected the proposition that the requirement to consult included any degree of more or less consultation, such as 'adequate' or 'sufficient' consultation; NR's contention appeared to be that either there was consultation with a party or there was not; and that a single communication immediately before or at the time of the Decision in question could amount to 'consultation' with the recipient.
66. I reject Network Rail's contentions as to the meaning of 'consult' in Condition D3.4.4 and as to the fact of relevant consultation with GBRf having taken place. In my view, to amount to "consultation" at all there must be communication with all affected parties and a two way discussion on the issue, with both sides to the consultation being sufficiently informed as to the subject matter. It is clear from NR's submissions and its answers given in Q&A during the Hearing that such communication and discussion did not take place with GBRf at least, as regards the impact of the Week 32 Possession whether solely on GBRf or relatively on all affected parties.
67. I am supported in that conclusion both by Section 1.5.3.2 of the EAS (as referred to in paragraph 44 above, regarding the explanation of NR's reasons) and more directly by Condition D8.6.1 headed 'Consultation' (though this was not specifically referred to in submissions or during the Hearing) which provides:
- "Where in this Part D, any party is under an obligation to consult with another, the party obliged to initiate the consultation shall provide the consultee with (a) sufficient information for the consultee to be able to comment on the subject matter of the consultation; and (b) a reasonable time in which to respond to the information provided."
- In my view NR has not demonstrated that it provided sufficient or any relevant information to GBRf to enable it to engage constructively in the consultation process prior to the notification of the Decision on 26 June 2019. The established fact that NR did not provide

any information specifically regarding application of the Decision Criteria, prior to notifying the Decision, supports but is not essential to that conclusion. I find, accordingly, that NR did not 'consult' with GBRf as an affected Timetable Participant regarding the Possession, within the meaning of the requirement in Condition D3.4.3(a). I find also that to all intents and purposes this effectively means the same as saying that NR did not 'adequately' or 'sufficiently' so consult.

Process of Decision Criteria Application

68. On the third issue of the dispute, the correct process and timing for applying the Decision Criteria, NR's submissions, both written and oral, amounted mainly to a series of repeated assertions that there was nothing in Part D of the Network Code that expressly required NR to publish any particular sort of 'Decision Criteria document' (specifically described in NR's SRD as a requirement to "notify Timetable Participants how it has used the Decision Criteria") when notifying a decision.
69. I noted at the Hearing that this issue had been considered before several TTPs, precisely because the Network Code was not as explicit as it could be on this aspect. Various arguments had been made on both sides of the issue and various relevant precedent TTP determinations made as to the correct (or at least, desirable) interpretation of the Network Code. I now refer to some of these:
70. In TTP376/377 (September 2010) paragraph 8.6 of the determination says; "The final general issue is as to the timing of NR's applying and weighting the DC. The question here is what is the effect of (if such be proved to be the case) of Network Rail not having actively applied or evaluated them at the time of making its original decisions, but instead using them retrospectively to justify the position it has taken on issues of conflict. This issue also is touched on in the determination in TTP350." Paragraph 8.6.3 concludes: "my reading of the oral exchanges and the correspondence subsequently produced is that it all does reasonably demonstrate Network Rail as having given consideration to the relevant factors for the DC, at least Criterion (a), at the appropriate times, **in substance if not in form** (my emphasis). Clearly, however, it would have been more helpful if Network Rail's 'workings' could have been clearly explained at each stage by reference to specific contractual Criteria."
71. In TTP350 (August 2010) referred to above, paragraph 7.4.2 says: "I appreciate that neither the Network Code nor the [ADRR] require production in every case of a Decision Criteria table but it seems to me that, **even on an informal basis** (my emphasis), it is desirable as a cross-checking device in the decision-making process that such a table be prepared. Even if the preparation of a Decision Criteria table is, for whatever reason, not thought appropriate in any particular case, it does seem to me desirable, in the interests of open communication and transparency, ...that NR should endeavour to discuss with the relevant TOCs its approach to each of the Decision Criteria. ...such an approach could well be of assistance in minimising the extent of or resolving disputes."
72. In TTP439/40 (October 2011) paragraph 6.11 says: "Network Rail acknowledged that they did not apply the Decision Criteria individually nor document that process prior to making the decision... The lack of documentation is, in itself, not critical. It is **more important that NR applies the substance of the Decision Criteria** (my emphasis) than record it meticulously." That determination, however, proceeded to find that NR had not, in fact, applied the substance of the Decision Criteria.
73. The above three decisions emphasise the sufficiency, as well as the importance, of NR

'having in mind' the substance of the Decision Criteria when making a decision even if their application is not formally documented at the time, notwithstanding that such documentation is at the very least desirable in avoiding or resolving disputes. To the contrary is the more recent TTP1248 (May 2018), paragraphs 62/65 of which say: "Network Rail stated that 'Decision Criteria considerations are normally done as an intuitive exercise'. Formal notation of Decision Criteria considerations is only done for items that are formally disputed. ... There are a number of reasons why such an approach does not accord with the requirements of Condition D4.6 of the Network Code. ... [which] imposes on Network Rail **an obligation to make decisions based on judgements founded on proper reasoning and analysis** (my emphasis). An intuitive exercise does not satisfy the requirements of D4.6 of the Network Code. ... The Decision Criteria place on Network Rail an obligation to obtain relevant factual information, so that in the application of the Decision Criteria Network Rail can make informed decisions."

74. In my view the proper, and essentially pragmatic, interpretation of this issue lies somewhere between the above two positions. As I suggested in the course of the Q&A, it does not matter if a specific 'Decision Criteria document' relative to each and every 'decision' of Network Rail in the course of the timetabling process is not provided at the time of the decision, as long as the right mindset required by application of the Decision Criteria regarding available options for the decision, and the consequent right approach to their evaluation, are in fact adopted by NR at the time and if necessary - for example, because the decision is resisted, challenged or formally disputed - can be shown to have been so adopted in substance by production of some explanation later at a suitable stage and in whatever form.
75. This interpretation recognises that Network Rail makes probably thousands of decisions in the course of timetabling, not just the big difficult ones, and that therefore it is simply impractical always to have to issue a 'Decision Criteria document'. However this interpretation also accepts that the Decision Criteria need to be somehow demonstrably in the minds of the people making the decision at the time the decision is made, in order for the decision to be made as required by the Network Code "by application of" the Decision Criteria. It follows from that, that the Decision Criteria must also be in the minds of the relevant people somewhat in advance of making the decision. That is why my interpretation of the Network Code and the way it is set out (Condition D3.4.4), as previously explained, is therefore also that some regard to the substance of the Decision Criteria must also form part of the required 'consultation' by Network Rail, otherwise operators cannot be consulted on the basis of the issues they need to take into account.
76. Applying this interpretation to the facts of Network Rail's approach to the Decision in this dispute as apparent from its submissions and answers to questions at the Hearing, I am satisfied that NR did not, demonstrably or otherwise, in substance or in form, have the Decision Criteria in mind during the period of consideration and discussion of the Possession and the various alternatives to it. From everything it has said, it is clear that Network Rail has been activated primarily by considerations relating to the delivery of the Project in 2019. In the circumstances that is entirely understandable but unfortunately not within the requirements of the contract to make such decisions "by application" of the Decision Criteria.

Content of Decision Criteria Application

77. Turning then to the fourth issue of the dispute, we need to consider the sufficiency of Network Rail's actual analysis of its application of the Decision Criteria to the Possession Decision, as that analysis was recorded after the event in its document attached as

Appendix A to its SRD. Although this dispute is effectively resolved by the finding above on the third issue, of non-application of the Decision Criteria, I think it appropriate to indicate a decision on the actual content of the Decision Criteria document, in the event that I am later found by a higher authority to be wrong on that issue, as to what the position should be if the Decision Criteria are considered to have been properly analysed and applied at least at the time of drawing up the Decision Criteria document.

78. My findings and analysis on this point are largely as appears from the Q&A summary above at paragraphs 51 to 56 and from the Record. In summary, the Decision Criteria document ignores the Objective; it does not evaluate how the Objective or any individual Consideration might affect several relevant but conflicting interests, particularly as between passenger and freight operators; there is no apparent rationale for NR's weighting of the Considerations; there is a perceptible concentration on passenger handling considerations at the expense of freight commercial commitments; and the impacts of timing of the Possession on Network Rail's commitments, resources and finances and on the delivery of the Project are ubiquitously treated as paramount. I maintain the conclusion reached by the Panel in the course of the Hearing that, whilst Network Rail clearly had considered a great deal of matters concerning the Possession, it had not considered them in the framework of, or addressing the content required by, the Decision Criteria.

7 Guidance and Observations

79. Rule H51(j)(iii) contemplates a dispute determination including guidance to the Dispute Parties or other observations not forming part of a decision upon either legal entitlement or upon remedy. I offer some such observations here.
80. In Timetabling Disputes, differences of opinion concerning the procedures for and general adequacy of application of the Decision Criteria by Network Rail seem to be more frequent than any others. There is a serious case for some simple procedure to be developed to identify relevant decisions and to facilitate Network Rail personnel's correct and timely evaluation and documentation of relevant decisions which are required to be made 'by application' of the Decision Criteria. Training is needed in differentiating between the weighting of different relevant Considerations against each other as regards their respective impacts on a particular decision, from weighting the relative impacts of each relevant Consideration on different affected parties or different options for decision.
81. It is appropriate to make comment regarding the slightly late service by Network Rail of its Sole Reference Document. Whilst the delay did not in this instance impact on the Panel's ability nor - presumably - GBRf's to prepare for the hearing, the fact remains that Network Rail was in procedural default as explained in ADR Rule A17(b). The dispute timetable was issued by the Secretary, as is customary, to the Head of National Access Planning (who, though present at part of the Hearing, declared herself an 'observer' only and declined to answer questions). Network Rail's explanation for the lateness of its SRD as provided on 31 July was that "there was miscommunication due to the fact that with devolution the documentation was not received by the Route and this had not been identified until yesterday". In the course of the Hearing the Network Rail signatory to the SRD stated that he had had only two hours to consider it. The Track Access Contract is between GBRf and Network Rail and not with a devolved part of that organisation; it is not the responsibility of any one individual or sub-unit but only of Network Rail as a single and entire organisation to ensure that documentation and tasks are put to the right person or persons within the organisation.

8 Determination

82. Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, I determine as follows:
- 82.1 As a matter of legal entitlement: Network Rail is in breach of contract in having failed to consult with all Timetable Participants likely to be affected by Decision PPS No P2019/2640755 notified on 26 June 2019, as required under Condition D3.4.4(a) and under EAS Section 1.5.
- 82.2 As a matter of legal entitlement: Network Rail is in breach of contract in having failed to make Decision PPS No P2019/2640755 notified on 26 June 2019 by application of the Decision Criteria, as required under Condition D3.4.4(a) and under EAS Section 1.5.
- 82.3 As a matter of legal entitlement: in making Decision PPS No P2019/2640755 notified on 26 June 2019, Network Rail is in breach of contract in having failed to apply the Decision Criteria in accordance with Condition D4.6.
- 82.4 As a matter of remedy: Network Rail shall pay to GBRf compensation in respect of its breaches of contract referred to in paragraphs 82.1, 82.2 and 82.3 above. Such compensation shall be calculated on the basis of the principles of English law governing damages for breach of contract and may include (without limitation) compensation for the actual and anticipated losses to GBRf of the opportunity to operate freight services for any of its customers during or caused by any possessions taken pursuant to Decision PPS No P2019/2640755 notified on 26 June 2019 during the period from Saturday 02 through Monday 04 November 2019. The calculation and payment of such compensation shall be without prejudice and in addition to, and shall therefore take no account of, any separate compensation with regard to the Decision paid or payable under Schedule 4 of GBRf's Track Access Contract.
- 82.5 The amount of compensation payable under paragraph 82.4 is to be assessed if not agreed between Network Rail and GBRf. GBRf shall submit to Network Rail within 21 days from the date of publication of this Determination either its itemised claim for compensation or its written final confirmation that it makes no claim for such compensation. Network Rail may request GBRf to provide within a reasonable time but not less than 14 days, and GBRf shall so provide, any reasonable further information or substantiation of its claim; and in any event within 14 days from the date of such initial submission or further provision Network Rail shall confirm to the Secretary of the ADC that the amount of the claim is either agreed or required to be summarily assessed. If agreed, the full amount of the claim shall be paid by Network Rail within 14 days of such confirmation; if required to be assessed, it shall be remitted to me for summary assessment including any necessary further direction as to the process and timing for assessment and payment.
83. As noted above, GBRf in its SRD asked for a determination that the Decision be withdrawn and that the timing of the Possession be reconsidered by Network Rail in accordance with due contractual process. Notwithstanding my determinations as to NR's breaches of contract in paragraphs 82.1, 82.2 and 82.3, I have concluded that such a remedy if implemented at this relatively late stage of the current Timetable process could be inappropriate and impractical, having regard to the considerations of significant impact

for the industry which we discussed, as mentioned at paragraph 59. In reaching this conclusion I am mindful of Rule 16 which requires as an "overriding objective" that disputes referred to a Timetabling Panel be administered in a way which is proportionate to, among other matters, "the need to ensure that production processes for the railway operational timetable are not disrupted to the potential detriment of third parties". I am also mindful of the potential danger of creating a precedent incentivising Network Rail or any other Timetable Participant to believe it can safely fail to perform its contractual obligations simply by waiting until a sufficiently late stage in the Timetabling process.

84. At the conclusion of the Hearing GBRf was asked if it wished to make an application under ADRR Rule H60 for its Costs on the basis that NR's case was so lacking in merit that the reference should not have been defended. GBRf advised that it would wish to make such an application and outlined its case, that NR's case was lacking detail and consideration of GBRf and that its explanation did not fully justify the decision that NR had made. NR responded that it found it difficult to accept that it had submitted a case so wholly without merit that it would have Costs awarded against it.
85. Having considered the matter further I have concluded that it would not be appropriate to make an order for Costs. Although Network Rail has been determined to be in breach of contract, I am satisfied that it has acted in good faith in defending the claim and that it sincerely believed (albeit mistakenly) that its actions would prove to have been sufficiently justified by the exigencies of the Project.
86. 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.



Peter Barber
Hearing Chair

27 August 2019

ANNEX "A"

EXTRACTS FROM THE NETWORK CODE, PART D

3.4 Network Rail Variations with at least 12 Weeks Notice

- 3.4.1 The procedures described in this Condition D3.4 are designed to facilitate the planning of Network Rail Restrictions of Use at least 12 weeks prior to the start of each Timetable Week.
- 3.4.2 Network Rail shall be entitled to make a variation to the Working Timetable provided that:
- (a) The Network Rail Variation is made only for the purpose of taking Restrictions of Use which are consistent with the Rules, as published following the process set out in Condition D2.2 or as amended in accordance with the procedure established pursuant to Condition D3.4.3; and
 - (b) Network Rail complies with the procedure set out in this Condition D3.4.
- 3.4.3 Network Rail shall include in the Rules a procedure to enable amendment of the Rules, following their finalisation in accordance with Condition D2.2. This amending power is without prejudice to the amending power referred to in Condition D2.2.7, and is to be utilised in order to facilitate changes which Network Rail considers necessary to take Restrictions of Use.
- 3.4.4 The procedure referred to in Condition D3.4.3:
- (a) must require that no amendment to the Rules may be made unless Network Rail has consulted with all Timetable Participants likely to be affected by the amendment;
 - (b) must require that all decisions of Network Rail be made by application of the Decision Criteria in accordance with Condition D4.6;
 - (c) may authorise changes to the procedure.
- 3.4.5 All amendments to the Rules made pursuant to the procedure referred to in Condition D3.4.3 shall be subject to the appeal procedures in Condition D5 as if they were made pursuant to a procedure set out in this Part D.
- 3.4.6 Notwithstanding anything stated elsewhere in this Part D, where any amendment is made to the procedure referred to in Condition D3.4.3 by use of that procedure, the amendment shall not take effect until the determination of any appeal against the same.
- 3.4.7 Where Network Rail proposes to make any variation to the Working Timetable consequent upon an amendment to the Rules made in accordance with this Condition D3.4, Network Rail shall provide to each Timetable Participant, by TW-30, its proposals for Restrictions of Use in respect of the corresponding Timetable Week. All such proposals may be amended or supplemented by Network Rail at any time prior to TW-

26 and such amendments or supplements should also be provided to Timetable Participants prior to TW-26.

- 3.4.8 After TW-30 but by TW-26, Network Rail shall consult with each Timetable Participant affected (directly or indirectly) by the Restrictions of Use proposed pursuant to Condition D3.4.7 and shall seek to agree all Network Rail Variations to be made.
- 3.4.9 To facilitate the planning of any Network Rail Variation, Network Rail may require that any Timetable Participant shall submit a revised Access Proposal in respect of any Train Slot.
- 3.4.10 Where Network Rail requires a revised Access Proposal:
- (a) the requirement must be notified to the affected Timetable Participant no later than TW-22;
 - (b) Network Rail shall specify the aspects of the Access Proposal which need to be revised and its reasons for this;
 - (c) Network Rail shall specify a reasonable period in which the revised Access Proposal must be provided, and in any event the revised Access Proposal shall be submitted no later than TW-18.
- 3.4.11 Network Rail may modify, accept or reject a revised Access Proposal and where it modifies or rejects any revised Access Proposal, it must provide written reasons for its decision.
- 3.4.12 Where a revised Access Proposal has not been submitted by a Timetable Participant as required by Network Rail, Network Rail shall be entitled to make a Network Rail Variation of any Train Slot in respect of which the revised Access Proposal was required and no appeal may be made in respect of Network Rail's decision.
- 3.4.13 Not later than TW-14, Network Rail shall notify all Timetable Participants of its decision in respect of Network Rail Variations to be made pursuant to the procedure in this Condition D3.4.
- 3.4.14 Not later than TW-13, any Timetable Participant affected by Network Rail's decision notified pursuant to Condition D3.4.13 shall inform Network Rail whether it accepts or disputes that decision.
- 3.4.15 At TW-12, Network Rail shall record and provide to all Timetable Participants, in accordance with Condition D3.7.1, the Network Rail Variations to be made pursuant to this Condition D3.4.
- 3.4.16 Subject as provided in Condition D3.4.12, any Timetable Participant which is dissatisfied with any final decision of Network Rail in respect of a Network Rail Variation may appeal against it in accordance with Condition D5.

4.4 Decisions concerning Network Rail Variations

- 4.4.1 In making any decision in the course of implementing the procedures set out in Conditions D3.4 or D3.5, Network Rail:
- (a) is entitled to exercise its Flexing Right when responding to an Access Proposal submitted under Condition D3.4.10;
 - (b) may not effect any Network Rail Variation to the extent that the variation is inconsistent with the Rules;
 - (c) shall, subject to the over-riding principles set out in sub-paragraphs (a) and (b) above, apply the Decision Criteria in accordance with Condition D4.6.

4.6 The Decision Criteria

- 4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services (“the Objective”).
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the “Considerations”) in accordance with Condition D4.6.3 below:
- (a) maintaining, developing and improving the capability of the Network;
 - (b) that the spread of services reflects demand;
 - (c) maintaining and improving train service performance;
 - (d) that journey times are as short as reasonably possible;
 - (e) maintaining and improving an integrated system of transport for passengers and goods;
 - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
 - (g) seeking consistency with any relevant Route Utilisation Strategy;
 - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
 - (i) mitigating the effect on the environment;
 - (j) enabling operators of trains to utilise their assets efficiently;
 - (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates; and
 - (l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.
- 4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in the light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.
- 4.6.4 The Objective and the Considerations together form the Decision Criteria.

ANNEX "B"

RECORD OF THE HEARING

Note: This Record is not designed to be a verbatim account of the proceedings but is intended to be a note of the evidence given and arguments presented to the hearing. It has been compiled from notes taken by the Access Disputes Committee Secretary at the hearing and has been approved by the Hearing Chair and Panel Members as being substantially accurate to the best of their recollection.

The Chair started by recapping the history of the events leading to the hearing, including a disruptive access decision issued on 26th June 2019, followed by a notice of dispute served by GBRf on 27th June 2019. The Chair advised that, having reviewed the submissions, there was some confusion regarding the relevant Network Code provisions as referred to in the parties' submissions, but he hoped to resolve this later in the hearing. The Chair noted that the timetable for the dispute, including submission of documents, had been mostly kept to, apart from a late submission of its response document by Network Rail. A request had also been received from Network Rail to postpone the Hearing, which had been declined. The Chair then outlined the process for the day and invited opening statements.

GBRf gave an opening statement:

This Dispute has been expedited by GBRf as the late notice possession (2640755) progressed by Network Rail due to the unacceptable level of impact to GB Railfreight and our primary customer Drax Power. There has been no initiative by Network Rail to apply our requirements in early discussions and no initiative to reduce disruption as it has for other operators affected by this possession. GBRf put it to Network Rail that there has been no consultation directly with GBRf leading up to the Week 32 Request.

GBRf was not furnished with Network Rail's Decision Criteria after requesting it during GBRf's period of completing dispute papers, which is why GBRf are under the impression the decision regarding this possession was already made regarding week 32 before the decision was made. GBRf do not agree with the Decision Criteria submitted by Network Rail with the dispute response; it is worth noting this was the first time we had the opportunity to assess the document.

Nowhere on the Decision Criteria is there any recognition of the impact to GBRf loaded and unloaded services nor is there mention of what the impact is to its primary customer Drax Power. If Network Rail bothered to include GBRf in these discussions regarding week 32 then maybe they would have factored this in as well.

Timeline Summary.

16th January to 08th March GBRf was believing the possession to be in Week 13 – GBRf was fairly comfortable that we could manage our customer's demand in June and no need to push for pilot working, GBRf believed we could put together an outstabling plan with NR.

08th March to 11th June GBRf was believing the possession to be in Week 39 during the no booked trains period after Christmas. Comfortable there would be no demand in the proposed period and that we could put together an outstabling plan although we did have concerns that we would need access to locomotives for winter preparation.

What has driven the change from Week 13 to Week 39?

On 11th June a Request came out for Week 32. If Network Rail advised much earlier in the process GBRf would have pushed for pilot working and would have known exactly which trains were going to be affected as well as all the real risks to our customer of not being able to operate.

When did these discussions take place about Week 32 and with who?

GBRf recognises Network Rail have applied the correct procedures in accordance with the Network Code and whilst there is no condition in Network Code that a Decision Criteria has to be shared with affected operators; we feel this would have been common courtesy to do so as Network Rail were well aware of GBRf's concerns in the early discussions.

It is clear that our concerns regarding discussions taking place documented in the GBRf papers have in fact been supported by the Decision Criteria supplied by Network Rail (even though they document that they disagree with GBRf in their response). In total GBRf have been invited and attended two conference calls involving the affected operators and Network Rail/Project Team (industrywide). Following this GBRf have only been invited to a further meeting to cover outstabling of sets to support Network Rail's request for Week 32, which is not agreed due to the aforementioned reasons. GBRf find it difficult to comprehend the only industrywide discussions taken place were two conference calls on the 09th and 16th January to decide that week 32 was the best option and that it took so long to do so.

GBRf challenge Network Rail to provide evidence that GBRf have been invited to a series of meetings/conferences to discuss Week 32. GBRf also challenge Network Rail to advise why a decision was made to deviate from a majority agreeable week to look at an unrealistic Week 39 whilst during this period critical time was being lost and as a result missed the option of going back to Week 13.

GBRf believe the consultation process leading up to the Week 32 request has been inconsistent and inadequate. Had GBRf been involved in industry discussion and consultation throughout we would have had the opportunity to explore the option of degraded working and we would have had a clearer understanding of how Network Rail got to Week 32. GB Railfreight believe had this consultation happened there would be no need for this hearing today.

Q1 (to NR) Would anyone from NR like to add anything in response to that?

A1 (NR) No

Network Rail gave an opening statement:

I'll start with the history of the project. Liverpool Lime St Resignalling and Remodelling is a £150m, complex project to increase capacity in the Lime St & Edge Hill railway footprints while renewing and modernising signalling infrastructure – additionally the project included the recontrol of both the Liverpool Lime St and Edge Hill Signal Boxes.

The project introduced a new signalling control & transmission system in the form of Westrace Trackside System (WTS). This was first application of a distributed WTS system and attracted several difficulties during the design stage. Owing to these complexities the project had to separate the recontrol of the respective boxes and create a second workstation (within which Edge Hill would sit) and defer the works associated with the Recontrol at Edge Hill.

Due to the works being deferred from 2018, a disruptive possession of 52 hours is required to complete the Edge Hill Signal Box Re-Control to Manchester ROC.

Following consultation with stakeholders, it was decided that as Week 13 was not available, the project would be delivered in Week 39 (Christmas 2019), this was deemed the least disruptive to most stakeholders, importantly including the Liverpool City Region, a key player in the Liverpool footprint.

Unfortunately, once Edge Hill (and other projects) have been introduced to the national critical signalling resource diary for Week 39, the recommended maximum testing resource threshold is breached, meaning Week 39 is not available as a delivery opportunity. For clarity - the Edge Hill works require systems testers and not signal testers as has been mentioned previously. This type of tester is specialised and not available in the same numbers as traditional signalling testers.

Degraded working is not a possibility for GBRF due to the footprint of the possession.

Where we are today. Alternative delivery dates have been presented and support for any dates have been discussed. Week 32 has been identified as the most suitable time taking into consideration that there have been two blockades Sept 17 and July/August 2018 within the Liverpool footprint. Week 32 falls outside the summer holidays and prior to Christmas

Liverpool City Region stakeholders support Week 32, working closely with their events diary and city centre roadworks involving potential road closures causing issues with rail replacement vehicles.

During discussions on the proposed stabling plan for previous weeks, it was identified that the Track Panel sidings had been signed out of use previously, so the project brought them back into use to facilitate stabling for future possessions – this was at the project's cost and was an additional support/mitigation for delivery of Edge Hill works noting the need to accommodate GBRf.

A bit around the impact now. Network Rail Operations are unable to support any deferral of works past Week 39. This is due to the resource issue this would attract – union engagement completed based on

Week 32 completion of works, and there are concerns over redeployment that may mean that Edge Hill, or surrounding signal boxes, cannot be fully resourced.

Main contractors programme indicates earliest delivery at Week 32 due to resourcing works for the Kings Cross project in August, design modifications for Weaver Wavertree (Ditton recontrol) and providing the data prior to the Edge Hill works, which is key to sequencing of delivery.

Network Rail have financial considerations to consider, primarily (but not limited to) having to re-negotiate a delivery contract with the main Signalling contractor, whose existing contract expires Dec 19. Indicative costs would be £0.500m - £1.2m based on an Easter 2020 re-date however this figure is subject to final calculation, confirmation of access and availability of resources.

Two final points. The scheme could be compromised further by the loss of funding, if the work is not delivered in this financial year owing to Network Rail's annualised budget arrangements these funds could be lost that now exist.

It should be noted that the Edge Hill Recontrol is intrinsically linked to another recontrol project within the area, namely Ditton Recontrol that forms part of the Weaver Wavertree project. Due to the nature of data production for modern signalling systems, and Fringe control areas, the sequence of delivery must remain, with Edge Hill prior to Ditton. Currently Ditton is planned for Easter 2020 – should Edge Hill have to move there is a very real risk that this will impact Ditton and create a scope, cost and programme issue for the project and the industry. Without further detail it is difficult to understand and calculate the exact impact.

Q2 (to ARN) Would ARN (as an Interested Party) like to make a statement or add any comments at this stage?

A2 (ARN) Nothing as such, just interesting listening to GBRf's comments as I was at a couple of meetings organised by NR for train operators and was surprised GBRf wasn't there but this will come out in the wash. As far as ARN are concerned consultation on the possession took place.

An adjournment took place for the Panel to consider the statements.

Upon resuming, the Chair outlined the Panel's intended method for questioning the parties, by going through the main sections of both submissions paragraph by paragraph, as this was the way in which NR's reply had addressed GBRf's statement of case. This would have the effect of covering in substance the main four background issues in the case, which were: first, identifying the procedure, rules and provisions of the Network Code to which this dispute actually related; second, given that, what was the variation procedure that should have been adopted and was actually adopted by NR, and in the course of that procedure what was the history of consultation and communication by the parties with each other; third, what were the facts and history (including the timing) of the process of NR's application of the Decision Criteria; and fourth, the correctness and reasonableness of the actual method of application of the Decision Criteria, which was a distinct issue, regardless of the facts of the process.

The Chair noted that the parties might have questions they wished to ask each other and requested that, as much as possible, questions be put through the Chair, with the parties responding through their respective leads.

Q3 (to GBRf) In paragraph 4.1 of GBRf's submission and 3.1 of NR's I want to check which bits of the Contract and Code we are talking about. GBRf paragraph 4.1 says it's brought under D3.4.12. My July 2017 version of the Code suggests D3.1.16? It's a technical point but I want us to be correct; I'm not being picky for sake of it, but want to ensure I'm not missing anything.

A3 (GBRf) I would agree with that, apologies.

NR asked whether this would affect the validity of the dispute. The Chair confirmed it did not affect validity, and he would expect to find small corrections to cross references necessary as we went along.

Q4 (to GBRf & NR) In GBRf submission paragraph 4.2 the term "disruptive possession" is used. NR response uses "late notice possession" despite publication on June 26th 2019. Various terminologies regarding lateness of notice are used in both submissions. However as far as I can make out, the relevant provision of the Network Code under which the possession in question was notified is Condition D3.4, 'Network Rail Variations with at least 12 weeks' notice'.

A4 (GBRf & NR) Agreed.

Q5 (to GBRf & NR) A procedural question arising from GBRf submission paragraph 4.2. Network Code Conditions 3.4.3 and 3.4.4 taken together say that NR shall include a 'procedure' in the Rules and that procedure must require application of the Decision Criteria, rather than the Network Code itself prescribing the procedure to be followed. As far as I can see you have brought, and responded to, the dispute on the basis that overall it relates to a requirement of the Network Code itself and not a requirement of a procedure pursuant to

the Network Code, because as far as I can see no one has produced or referred to a separate procedure under the Rules that hasn't been followed. Can you confirm it's a technicality that need not trouble us, and that for the purposes of getting on with this dispute it is agreed that it is the Network Code that, directly or indirectly, prescribes the actions and procedures that are the subject of the dispute. I want to check you're all happy with that.

A5 (GBRf & NR) Agreed

Q6 (to NR) Does NR have anything else on GBRf submission para 4.2?

A6 (NR) I want to object to the phrase 'adequate' consultation. I'm not aware it's defined anywhere in the Network Code. I want to be clear on our position on that, NR would raise a slight concern over the wording included.

Q7 (to NR) I see the point you're making. D3.4.4 says simply "unless NR has consulted". But consultation may not be a black and white issue. What actually amounts to consultation? What is 'adequate' consultation? You could say that the word adequate in there is redundant; but that would then be the same as if GBRf had simply said 'without consultation'.

A7 (NR) I feel that 'without consultation' takes us into a different place. We believe we have consulted and that there has been adequate consultation. A definition would support what is adequate, therefore we believe we have adequately consulted in the absence of any [Network Code] definition.

Q8 (to NR) You believe you consulted by sending out the consultation document on June 11th. How did that by itself amount to 'consultation', and therefore adequate consultation, such that the decision could be issued on June 26th?

A8 (NR) I believe this is standard as far as NR is concerned; maybe GBRf can add something?

(GBRf) The documents are standard and the request is standard but it's the consultation leading up to that that we have an issue with.

(NR) The consultation went out and the project backed it up with a couple of conference calls with stakeholders. GBRf weren't included but the project had already said they would engage with GBRf separately to discuss stabling arrangements. The project tried to contact GBRf on a couple of occasions to discuss this with them.

Q9 (to NR) This prompts another question. The meetings/conference calls that took place - there were two in January 2019 that GBRf were invited to; but the sole contact between you included as evidence for consultation in June 2019 only mentions outstabling.

A9 (NR) The contact in June only mentioned outstabling as there was no way we could operate degraded working.

Q10 (to NR) So this was a proposed mitigation meeting rather than a consultation meeting

A10 (NR) Yes, absolutely.

Q11 (to NR) What meetings and calls took place to which GBRf weren't invited?

A11 (NR) We can provide you with details, but our appendices demonstrate the level of engagement we were trying to achieve with GBRf. We had members of the project team and the Route Freight Manager; we struggled to get traction

Q12 (to NR) What do you mean by traction?

A12 (NR) We struggled to get attendance at meetings

Q13 (to NR) Were GBRf invited to meetings?

A13 (NR) In January, yes.

Q14 (to NR) What about June?

A14 (NR) In June the planner deliberately wanted to concentrate on passenger handling only. He wanted a separate conversation with GBRf because the discussions were so different and we wanted to run the conversations differently. We were moving along trying to find the best weekend for the access, whilst trying to understand the best passenger handling plan, and whilst struggling to get engagement from GBRf about a stabling plan. I think it's misleading to think we discounted GBRf.

Q15 (to NR) So the separate consultation with GBRf was only about stabling requirements? It wasn't relating to their views on other reasons, e.g. not wanting the access to be taken at all in Week 32?

A15 (NR) It wouldn't just have been about stabling, it would have been around mitigation. For example peripheral issues such as welfare facilities.

Q16 (to NR) Was the other workstream, which you say was solely related to passenger handling, also just focused on mitigating issues with Week 32, or was it also about whether to undertake the work at all in Week 32?

A16 (NR) The latter. This is a fairly complicated bit of railway. We focused on train operators, the City Region and other key non-industry partners. That helped us to filter the issues, so the process of arriving at a decision was lengthy. There were a series of meetings before we could arrive at a proposal. GBRf refer to the decision having been made before the consultation went out. I dispute that. It got to the stage that we felt we had the agreement of the industry, bar GBRf. We then had a proposal to be issued having taken cognisance of all issues from the industry who had started developing a plan to deliver Week 32.

Q17 (to NR) Was all that discussion genuinely in the context of proposing Week 32 and being willing to change your mind, or was it 'Week 32 is the only option, what is the impact and how can we mitigate it'??

A17 (NR) The latter. Behind the scenes the programme had looked at other weeks but we were constrained by the Manchester and Liverpool Christmas markets and Premier League fixtures. We had arrived at a position where we felt we had consulted and got the best option for the industry. GBRf couldn't accept it, but we wanted to use the consultation period to work on mitigations for GBRf.

Q18 (to NR) So you'd already noted GBRf couldn't accept it and therefore only asked about mitigation, including asking for details of what could be mitigated, or not, and why, from their customer?

A18 (NR) I think GBRf are slightly frustrated that Week 13 is not an option. It's a misrepresentation of the project team that we had already made a decision on Week 32. It wasn't like that and not that easy.

Q19 (to NR) This being at a time when the available alternatives were...?

A19 (NR) Weeks 32 to 39 were the earliest the contractor could deliver. Week 39 wasn't possible due to signal tester resource. We'd also like to point out that we'd already had two blockades in 2018. I realise we are here for GBRf, but previously we'd had the ability to turn passenger trains back at Liverpool South Parkway and transfer them onto the Merseyrail network. That's why we focused on calls about passenger handling; we no longer had suitable access into Liverpool South Parkway.

Q20 (to NR) Would that fall under the heading of stakeholder requirements?

A20 (NR) Yes.

Q21 (to NR) NR's response in paragraph 3.3 says it 'qualifies' GBRf's paragraph 4.3. What do you mean by that; do you mean to agree or disagree with that paragraph, which is about what GBRf is losing due to the possession?

A21 (NR) We're not sure. Can GBRf qualify what they think they are losing?

(GBRf) We're losing all our traffic that is running through to Drax power station from Liverpool.

Q22 (to NR) So NR agrees it prevents access but doesn't agree it prevents stabling?

A22 (NR) Yes.

Q23 (to GBRf) GBRf are saying it does prevent stabling?

A23 (GBRf) Yes. It clearly says we can't use Tuebrook Sidings, which is our regular sidings and we'd have to seek outstabling and look at alternatives.

(NR) I'd caution against that answer because we haven't had time to work out a plan with GBRf. It's premature to commit to such a statement. Part of our conversation with GBRf is to enable a mitigation plan to be developed and agreed.

(GBRf) My prime concern is running services to and from Drax, not outstabling.

Q24 (to GBRf) If you're not running services, why do you need stabling?

A24 (GBRf) Our plan is designed so we don't need to stable. When we aren't running then we need to find places to stable and stand trains down.

Q25 (to GBRf & NR) Is it roughly agreed that there is the possibility of stabling issues being resolved?

A25 (GBRf & NR) Yes.

Q26 (to GBRf) So GBRf agree NR is right to 'qualify' the statement (in GBRf submission para4.3), but that puts us back to the main issue being running to Drax.

A26 (GBRf) Yes.

(NR) It does show a level of consultation,

(Chair) For Week 13?

(NR) It would mirror Week 32.

Q27 (to NR) Which returns to NR's point as regards 'adequate' consultation. You would say, in effect, any consultation is adequate?

A27 (NR) Yes

Q28 (to NR) Referring to GBRf's second paragraph 4.1. The conference call in January is what put the possession into Week 13? NR and GBRf papers don't agree.

A28 (NR) The decision around not using Week 13 was taken at the end of February.

There was some discussion here about incorrect PPS references being used in both submissions, as a result of an error in the GBRf submission, copied and pasted into the NR submission. Both parties agreed which words could be disregarded.

Q29 (to GBRf) But the point GBRf make about NR squeezing the possession in at short notice stands?

A29 (GBRf) Yes

Q30 (to GBRf) What about NR's point in their paragraph 3.4 about the January meeting and looking at other weeks? I'm trying to understand how we get to Week 32 when Weeks 13 and 39, both in 2018 and 2019 are mentioned.

A30 (GBRf) We were led to believe that Edge Hill should have been delivered in 2018.

(NR) The original Edge Hill was to go into an eight week summer blockade in 2018, from 2016. For various reasons we realised we couldn't deliver it. Then it was meant to go to October, which couldn't be delivered. Then we looked at Christmas 2018. We lost that due to various constraints including resource in the industry. Then we fell into 2019 and started looking at other options including Week 13 2019.

Q31 (to NR) Why wasn't Week 13 chosen?

A31 (NR) A number of reasons. Liverpool City Region didn't support it, we had signalling resource constraints and contractor constraints. Before we even considered financial issues it was agreed that Week 13 didn't pose a viable option.

Q32 (to GBRf & NR) So what should GBRf's second para 4.1 say, and what should NR's para 3.4 response say?

A32 (NR) GBRf is just trying to highlight that the work is overdue.

(GBRf) No.

Further discussion then established that there were some errors in the Appendices to the submissions, which referred to incorrect possessions. GBRf agreed they were stating that in January NR had proposed Week 13, making reference to meeting minutes (GBRf Appendix 3.4 and 3.5) which suggested that the proposed possession had been proposed and confirmed as in Week 13.

Q33 (to NR) Why does Appendix 3.4 state the work is proposed and confirmed for Week 13?

A33 (NR) The sponsor wrote the minutes and didn't appreciate the implications of the technical access planning language around proposed / confirmed. To GBRf it meant we were definitely having a possession in Week 13. Our access planners didn't formally propose under Part D, but put the footprint out for everyone to look at, with the expectation of proposing, but we never formally proposed.

Q34 (to NR) How long was there between the meeting minutes being issued in January and NR deciding not to go for Week 13?

A34 (NR) Access planning knew around 8th March but the project made the decision in February.

Q35 (to NR) Why didn't access planning propose it?

A35 (NR) Procedurally we need to have the paperwork, the DAF (Disruptive Access Form), and anecdotally we heard there was resistance to Week 13 so we didn't send it out and awaited clarification.

Q36 (to NR) Was it the 9th January conference call that resulted in the suggestion of Week 13?

A36 (NR) Yes, that and 16th January conference call.

Q37 (to NR) And at some point between then and the 8th March it moved to Week 39?

A37 (NR) Yes.

Q38 (to NR) Returning to GBRf submission, second para 4.2 and second para 4.3. NR response para 3.5 confirms it understood GBRf's preference for summer weeks, but by saying 'qualifies', appears to indicate in their response an element of disagreement (that 'statements in these sections have captured the timeline of events concerning consultation proposals of this Restriction of Use'), so what in GBRf's para 4.2 does NR not agree with?

A38 (NR) I think our statement was just understanding GBRf position that preference was for the summer months.

Q39 (to NR) So broadly you agree with all of GBRf paras 4.2 and 4.3?

A39 (NR) Broadly, yes.

Q40 (to NR) Similarly, when you respond (NR para 3.6) that you 'qualify' GBRf's paragraph 4.4 what does this mean? Do you agree with it or don't you? Does it mean you don't agree with the language or just that you don't know?

A40 (NR) To a certain extent it's just recognising the detail contained in the statement.

Q41 (to NR) So is there anything in GBRf's para 4.4 with which you disagree?

A41 (NR) We acknowledge the statement. I don't think it's for us to agree, it's for GBRf to state what their business is. It's not for me to say what is valid or accurate

Q42 (to NR) So you're saying you don't dispute it?

A42 (NR) Yes

Q43 (to NR) You say (NR submission para 3.10) you don't agree GBRf's assertion (GBRf submission para 4.8) that no discussion took place with GBRf prior to NR's communication on 8th March regarding the change of dating from Week 13 to the Christmas period, week 32. We know GBRf attended a call on 9 January, which did not appear to discuss Week 32(GBRf Appendix 3.2). NR submission (para 3.10) responds that the possession had already been published in EAS Versions 2.0 and 3.0 as being in Week 39.

A43 (NR) We withdraw that last statement, it is incorrect. However the reason we didn't consult about the change from Week 13 to Week 39 was because it was going to be non-disruptive.

Q44 (to NR) So you assumed Christmas as non-disruptive was going to be okay?

A44 (NR) Yes. I don't know why GBRf assumes that the Christmas shutdown wasn't going to be okay.

(GBRf) It was based on the 16 January conference call (GBRf Appendix 3.4), where it was discussed that Christmas would never have been okay for NR owing to lack of resources over the shutdown period and higher priority projects like Kings Cross.

(NR) I find that hard to believe. As a senior project manager I didn't know the access couldn't work in Week 39 until May.

(GBRf) Christmas is extremely busy. I struggle to understand how it took NR so long to work out you couldn't do it.

(NR) That timeline is quite short.

(GBRf) Not to my knowledge, as I wasn't involved.

Q45 (all) Some further discussion between the Chair, Panel members and both parties concluded by noting that the minutes of the 16 January conference call confirmed there were concerns raised by NR about Christmas resources.

A45 (NR) There was concern about Christmas, but using the language of it never being a realistic proposition, is something different. There is language in the GBRf submission that needs to be cautioned against. We already had access booked at Christmas for Ditton that has now gone to Easter 2020, but back then there was an opportunity to look at using Ditton resource at Christmas.

Q46 (to NR) So anyway we are now in March considering Christmas, Week 32 (GBRf submission para 4.8), and Week 13 apparently isn't an option. Why was Week 13 cancelled? The only reference to this in NR's submission is Appendix D, which is a presentation by the Edge Hill Re-Control Project Sponsor that is not referred to or cross-referenced in the body of NR's actual response document, but only in the list of Appendices. We are not sure if this was an

internal presentation within NR, or part of the external consultation, and not sure when the presentation was made. It refers to 'a large event in Liverpool' as the reason why week 13 was 'not available'. Can you tell us about that presentation and when it happened.

A46 (NR) It was a presentation to TPE directors in June, we are not sure of the exact date but it was after the decision regarding Week 32. Week 13 was cancelled due to events in the City Region and issues with contractors.

Q47 (to NR) Can you clarify?

A47 (NR) We'd come out of January having not been able to secure access for Dec 2018, into 2019, looking at various options. The decision about Week 13 was taken in a relatively short period in full consultation with industry and stakeholders via conference calls in January and February that included GBRf. We were talking to contractors, Liverpool City Region, the supply chain and TOCs and FOCs. That led to the March 8th communication from access planning, effectively removing week 13 as a viable option.

Q48 (to NR) But generally all operators had agreed Week 13?

A48 (NR) All apart from Virgin, but I can't remember why. I think for passenger handling concerns. We weren't sure if that was a company, or personal, position. I think it was a football match; I would need to check that.

Q49 (to NR) Why didn't your list of major events (updated as necessary by late fixtures information) flag that?

A49 (NR) The list of major events is not exhaustive, sometimes local events aren't on there. But otherwise Week 13 seemed like a viable option for a number of reasons. But then Virgin's initial objections added into a number of other issues that we had. We also had senior level concern within the stakeholder community.

Q50 (to NR) What precisely within the stakeholder community?

A50 (NR) I'm not sure; it was anecdotal.

Q51 (to NR) No, we need to know. It's relevant to the whole basis on which you make these decisions. Although we eventually ended up with a decision on 26th June for Week 32, all these stages were part of that process and they link into the application of the Decision Criteria. I'm interested in the role of the 'stakeholders'.

A51 (NR) Edge Hill had been a frequent topic of conversation. It was well known we'd had issues dating the access. Very much a widely understood issue. For the project this created a level of focus and scrutiny that not every project is subject to. This was becoming politically sensitive.

Q52 (to NR) Do you mean generally politically sensitive within NR, or politically sensitive within the Liverpool community, i.e. Politically with a capital P?

A52 (NR) The latter. Every time we have works we have to go to the Mayor's office. But also internally within Network Rail.

Q53 (to NR) So 'political' with both a small and large p?

A53 (NR) Yes. We had agreed, for a previous block, a comprehensive transport strategy involving panels of stakeholders, including emergency services, Liverpool City Region. By virtue of its own success everyone was very interested when Edge Hill was deferred and people were conscious of the fact that there additional access was required. Then it became capital P Political. That kind of pressure was palpable.

Q54 (to NR) Coming back to the presentation in NR Appendix D, when was it?

A54 (NR) Not sure, I'd need to look at my diary

Q55 (to NR) Before or after the Week 32 possession was published?

A55 Not sure, can I confirm over lunch?

Q56 (to NR) Can you also consider over lunch what point is the presentation in support of, what was it, when was it done and why was it included in your submission?

Hearing adjourned for lunch

Q57 (to NR) We are now at GBRf submission para 4.9, which is responded to by NR submission para 3.11. Both parties disagree on what discussions were had between 8th March and the eventual Week 32 decision on 26th June. We know there were some emails - such as June 11th – and we know there were a couple more conference calls on the passenger side not involving freight. As NR disagree with this, what actions or discussions did take place with GBRf or any other freight operator in that period?

A57 (NR) This comes back to the possession footprint. When we change between various weeks the profile of that possession changes in terms of passenger handling, but when we moved the possession from one week to another there was very little impact on GBRf, aside from their commercial point of view.

Q58 (to NR) We are taking about moving from Week 39 to Week 32?

A58 (NR) My point is that regardless of where the possession sat the same conversations would have been had. During that time we were trying to get GBRf to understand...

Q59 (to NR) Is this what we've touched on, which is mitigation, as distinct from the real issue of running services to serve customers?

A59 (NR) Yes, but any time we take access outside NBS gives GBRf a problem. GBRf, do you agree?

(GBRf) Yes we've suffered a lot over the years.

(NR) Access planning at NR became aware in early June that the project were engaging with passenger operators and separately with GBRf. At this point the access planners asked the NR Route Freight Manager to contact GBRf. We thought Week 32 had already been raised, but now we are not sure it was.

(GBRf) I was contacted by the Route Freight Manager. My response was that I couldn't give an answer until I had an answer from Drax.

(NR) We also sent an email on 5th June asking the Route Freight Manager to contact GBRf. This isn't in the NR submission because of the short deadline we had to submit.

(ADC Secretary) The ADR Rules say seven days, we gave NR nine.

(NR) Owing to an internal communication issue I only had two hours to write the paper. The point we are trying to make is that at the time we tried in good faith to contact GBRf. We were conscious of May 2018 and ensuring passenger operators could meet Informed Traveller. We were told Week 39 wasn't viable at the beginning of June. We accept it would have been the best fit and we tried to get resource, but because of how long it took the project to agree a week, we couldn't get the system testers for Week 39. Therefore Week 39 became undesirable from the project point of view.

Q60 (to NR) And that was at the beginning of June?

A60 (NR) Yes.

Q61 (to NR) Is it fair to say there wasn't any additional consultation or discussion with GBRf between 8th March and those emails going out in June?

A61 (GBRf) There was nothing between March and June

(NR) That's fair comment. We thought once it had been decided to go to Week 39 then there weren't any issues, only when it wasn't Week 39 then it became an issue needing discussion.

Q62 (to NR) Then in June there are a couple of emails, a text, some of which were responded to and some of which weren't. That ends with the NR email asking what information GBRf had from their customer, which GBRf then provided.

A62 (GBRf) I furnished NR with that information. What was done with that information I don't know.

(NR) I can answer that. We were looking at whether there was a way of working the possession to get the trains to run. But it's twelve trains in and twelve out, so 24 paths.

(GBRf) That was quite late to be looking at it.

(NR) I wouldn't disagree. We knew GBRf were the problem we hadn't quite solved. We had resolved the issues with the other train operators. We had been working a mitigation plan for the stabling, noting that there is no way we could offer 24 paths through that possession regardless of when it is taken.

Q63 (to GBRf) How many trains do you run in the summer?

A63 (GBRf) Not as many, 25 per week so we could have made the flow up with trains before and after the block.

(NR) What would you do over Christmas? Or in an emergency?

(GBRf) In Christmas the demand isn't there from Drax, so we don't need to run for two days. In an emergency it puts the National Grid at risk of not being fully supplied, which costs GBRf's customer money.

(Chair) It's not relevant yet to go into the impact on GBRf's customer.

(NR) It is relevant because the customer is the one applying the pressure.

(Chair) In saying we don't go further into it at this stage, I don't believe the impact on the customer is the prime consideration for the purpose of determining whether NR has fulfilled its contractual obligations.

(NR) Do you accept it's one of the principal arguments GBRf is putting forward?

(Chair) No, I think GBRf are saying it's the impact on GBRf of not being able to fulfill their contract. Just as for passenger operators it's the impact of not meeting the requirements of passengers.

Q64 (to NR) It seems to be accepted that there was no consultation during that period as you believed you had nothing different to talk about?

A64 (NR) We tried to contact them but it did not transpire. We asked one of our reps to get in touch with them by 5th June.

Q65 (to NR) Why didn't you contact GBRf directly?

A65 (NR) We thought we had an appropriate link in. We brought the Route Freight Manager in to open a door that we thought was closed.

(GBRf) The door was not closed. At that time we were looking at Week 39; we didn't know Week 32 was under consideration.

(NR) Why didn't you engage with the stabling plan?

(GBRf) We're not so concerned about the stabling plan because the real issue is that we need to run trains.

(NR) On the June call it was minuted that NR acknowledged GBRf was impacted but we didn't include those minutes in our paper or appendices.

Q66 (to NR) I'm going by what is supplied in NR's statement. I've got an email from Steve Higgins, with one from Chris King on 11th June. Then an email from David Hunter 20th June. Also a text on 20th June from Sean.

A66 (NR) Appendix 3.9 of GBRf's submission (internal GBRf email) indicates that GBRf are aware via the Route Freight Manager. It's difficult to demonstrate as there were some phone calls.

(GBRf) Which were to discuss outstabling arrangements.

(NR) Part of this centres on the period between 8th March to June. Because we were going to Week 39 there wasn't a conversation with anyone until Week 39 was no longer happening. There were no conversations with anyone, then two calls with passenger operators.

Q67 (to NR) When did meetings with passenger TOCs happen?

A67 (NR) The first two weeks in June.

Q68 (to NR) Chronologically this is in line with the freight operators.

A68 (NR) The involvement with the passengers was more onerous than required with GBRf.

Q69 (to NR) I'm not going to prolong this by asking you to go away now and provide extra evidence. Just tell us now what would you have provided if you'd had more time to evidence why you changed from Week 13 to Week 39?

A69 (NR) A couple of internal conversations with Director of Route Sponsorship to say what were the alternatives that we knew about, when we knew Week 39 wasn't available. Plus emails. We had discussions with passenger operators about which weeks, but this happened at the same time as the conversations with GBRf.

Q70 (to NR) So the main conversation about not using Week 39 was internal within NR only?

A70 (NR) Yes, and with our supply chain. When Week 32 became a possibility we then faced significant pressure from passenger operators and Milton Keynes came under pressure to issue a decision in time to hit Informed Traveller.

Q71 (to NR) This is T-12?

A71 (NR) Yes. Not meeting T-12 causes difficulties for long distance operators in particular, for example TPE are currently planning to terminate at Manchester Victoria and they need journey information to be accurate.

Q72 (to NR) And compensation to train operators would be more if you missed T-12?

A72 (NR) Yes. We've only just got over the headlines from May 2018 and we didn't want to compromise that.

Q73 (to NR) There was a further late change conference call, after the decision was published, on 28th June. What was the point of that call? Would anything said in that call have changed the decision?

A73 (NR) I don't think so. The call was aimed at organising timetable responses for planners and Milton Keynes. LNW Route had already taken into account all the engineering considerations. At first we were going to say no to the late request, but when the project took us through it was agreed to support the request.

Q74 (to NR) So it's more to do with implementing the decision?

A74 (NR) Late change is a harsh phrasing.

Q75 (to NR) So was there an opportunity to change Week 32 on the late change conference call?

A75 (NR) Yes.

Q76 (to NR) Why were you going to a late change conference call with industry after the access was published?

A76 (NR) To meet Informed Traveller.

Q77 (to NR) The call is biweekly. If you had time to do a request and decision there was time to put it on the call before a decision was issued?

A77 (NR) I don't know why it wasn't on the call. But regardless, GBRf didn't attend the call.

Q78 (to NR) Yes but seeing access on the late change call sheet as a decision, not a request, may influence attendance?

A78 (NR) That was because of the time pressure and short window we were under. If I was GBRf I'd have dialled in.

(GBRf) I had already raised my concerns through responding to the late notice request.

Q79 (to NR) Coming back to the submissions, what do you mean at the end of NR submission para 3.12 where you 'qualify' the opinion stated in GBRf submission para 4.10 (regarding the apparently rushed timing and effect of NR's Week 32 request and decision) by saying that the late change call and spreadsheet informs all operators equally about late change. By using the expression "qualifies that" here, are you saying that that spreadsheet did or did not inform them?

A79 (NR) Yes, it did.

Q80 (to NR) So was the point of that sentence to say that GBRf were informed sufficiently by the late change conference spreadsheet? Because it appears that actually they were not so informed, because it was issued after the decision had been made?

A80 (NR) Yes. To clarify, the decision was the 26th June but our first comms with GBRf were prior to that.

Q81 (to NR) So it is accepted that the request was on 11th June, the decision on 26th, and the call on 28th. Is there anything else before we move to the Decision Criteria?

A81 (NR) Yes, we made the presentation [NR Appendix D] to TPE's Alliance Board on 1st July. It was included in the submission to provide more detail. It was part of our consultation.

Q82 (to NR) It can't have been part of the consultation if it was delivered after the decision was issued? Were there any other presentations made to other operators?

A82 (NR) No, TPE were the only ones that requested a presentation.

Q83 (to NR) Are TPE in an Alliance with LNW?

A83 (NR) Yes.

Q84 (to NR) So why is the presentation included in the (NR) pack (as Appendix D)?

A84 (NR) For information only, something we offered as additional information regarding discussions that had been taking place over the access.

Q85 (to NR) Well it's certainly quite instructive in that respect. Now, moving to the issues regarding the Decision Criteria (which are addressed in the remaining paragraphs of GBRf's and NR's

respective submissions). Before we go into the details of how they were applied, the actual method, I have some general questions as to the process of their application. When were the Decision Criteria applied in this process and how were the Network Code process requirements satisfied? In the first place, who drew up this document (NR submission Appendix A, headed 'Network Rail Application of the Decision Criteria in respect of Edge Hill Recontrol Week 32 2019') ?

A85 (NR) Andy Briggs, Gary Fitton and Claire Rawson [all present at the Hearing], with information from the project team.

Q86 (to NR) When did you draft it?

A86 (NR) After the decision, after an email from GBRf stating they were disappointed they had not received the information about application of the Decision Criteria.

Q87 (to NR) Before the notice of dispute?

A87 (NR) We believe so but would have to check.

Q88 (to NR) Who was the Decision Criteria document issued to, and when?

A88 (NR) It wasn't issued until we saw the dispute paperwork, then we put it in our response.

Q89 (to NR): So the first time we see it is as Appendix A to NR's submission on 1st August?

A89 (NR) Yes.

At this point the Chair discussed NR's view, as stated several times in their submission and in Q&A today, that there is nothing in Part D of the Network Code that expressly requires NR to publish any particular sort of 'Decision Criteria document' (specifically repeated in the submission as a requirement to "notify Timetable Participants how it has used the Decision Criteria") alongside a 'decision'. The Chair noted that this issue had been considered before several TTPs, precisely because the Network Code was not as explicit as it could be on this aspect. Various arguments had been made on both sides of the issue and various relevant precedent TTP determinations made as to the correct interpretation of the Network Code, which would be referred to in the eventual Determination of this dispute.

The Chair noted his view, based on these precedents, of the best interpretation of the Network Code on this issue. Generally, he considered, it does not matter if a specific 'Decision Criteria document' relative to each and every 'decision' of Network Rail in the course of the timetabling process is not provided at the time of the decision, as long as the right mindset required by application of the Decision Criteria regarding available options for the decision, and the consequent right approach to their evaluation, are in fact adopted by NR at the time and if necessary – for example, because the decision is resisted, challenged or formally disputed - can be shown to have been so adopted in substance by production of some explanation later at a suitable stage and in whatever form.

The Chair noted that this view of the right interpretation had long been held, because it was essentially pragmatic; it recognised that NR makes thousands of decisions in the course of timetabling, not just the big difficult ones, therefore it was simply impractical always to have to issue a 'Decision Criteria document'. However this interpretation also accepted that the Decision Criteria needed to be demonstrably in the minds of the people making the decision at the time the decision was made, in order for the decision to be made "by application of" the Decision Criteria. It followed from that, that the Decision Criteria needed also to be in the minds of people somewhat in advance

of making the decision, and the Chair's interpretation of the Network Code and the way it is set out (Condition D3.4.4) was therefore also that some regard to the substance of the Decision Criteria must also form part of the required 'consultation', otherwise people could not be consulted on the basis of the issues they needed to take into account.

Q90 (to GBRf & NR) [With regard to the issue of interpretation as discussed above] I'm putting this to you as a suggestion as to how the Network Code operates and is to be interpreted; do you have anything you'd like to say?

A90 (GBRf) For the big blocks, contentious issues, that will cause a lot of disruption, there should be a conscious effort to apply the Decision Criteria leading up to the decision. GBRf would expect the Decision Criteria to be issued with the decision. At some stage they should have applied at least some of it leading up to the request and it should be available as soon as the decision is out.

(NR) We accept GBRf's explanation is good practice. When is it part of a discussion and when is it a formal document? In this instance, when the request came into access planning we internally challenged and asked a number of questions that led us to believe this was the best outcome for the benefit of the railway. We had the Decision Criteria in mind when doing this.

Q91 (to NR) We come back to whether you met the procedure referred to in Condition D3.4.4 (b), which says that a procedure to be included in the Engineering Access Statement (EAS) must require that all decisions of NR be made "by application of the Decision Criteria in accordance with Condition D4.6". You have said you believe NR don't have to produce evidence of how the Decision Criteria were applied. However, the 'procedure' referred to in Condition D3.4.4 is contained in the EAS for the current timetable, which deals in paragraph 1.5.3 with 'Changes initiated by Network Rail' to the EAS or Timetable Planning Rules (TPR). Sub-paragraph 1.5.3.2 states that NR "shall notify to all Train Operators affected details of the proposed change including a concise explanation of its reasons". So the procedure referred to in D3.4.4 required to an extent that the reasons for NR's decision, which by definition must include application of the Decision Criteria, should be notified to all Train Operators affected.

I'm considering therefore whether NR, as a fact, made the decision "by application of the Decision Criteria" at the time and in the process of making the decision, as distinct from drawing up a rationale later on. Nothing you've said about NR's considerations so far is directly related to the Decision Criteria, albeit that some can be brought in by inference. But it appears from what you say that putting this decision within the framework of the Decision Criteria was not in anyone's mind when going through this process?

A91 (NR) I would dispute that. I look at this Decision Criteria document (NR Appendix A) and I see that every meeting, every point of consideration and every element of the process we undertook has manifested itself in this Decision Criteria document. I would dispute that we didn't have these points in our mind when arriving at this for Week 32. This Decision Criteria document reflects nearly perfectly why NR decided Week 32 was the perfect week.

Q92 (to NR) But you're not meant to take into account a whole load of points and then put them into the framework of the Decision Criteria and otherwise as required by the contract, but rather this should operate the other way around?

A92 (NR) I would dispute that. Moreover there is a real operational risk of the current Edge Hill SB not being able to be staffed if Week 32 doesn't happen.

Q93 (to NR) The way you seem to look at it is applying the Decision Criteria retrospectively to explain why Edge Hill must be delivered by a certain date, not to explain why that particular possession needs to happen in a particular week. Do you understand the distinction?

A93 (NR) I do but I'm struggling to understand what other consideration, noting the wider industry, we would include. We have considered more than the project being delivered.

Q94 (to NR) I'm sure you have done, but it appears you haven't made the decision 'by application' of the Decision Criteria. The first sentence of your Decision Criteria document doesn't say the Criteria were considered before the decision regarding the possession was made, it says we have now "offered the following narrative" in determining, in effect, the possession ("in determining a dating for the re-control of Edge Hill Signal Box").

A94 (NR) That's a technical wording issue.

Q95 (to NR) No, let me be clear. The wording in this document does not appear to indicate that you've done what the contract requires you to do. It states why this possession is needed with reference to NR's commercial position.

A95 (NR) I don't understand why the access isn't driven as a result of the project needing to be delivered.

Q96 (to NR) The document does not go into the eventual choice of this particular week with the effects this particular week will have on affected parties.

A96 (NR) Because that week had already been chosen.

Q97 (to NR) Exactly, and it shouldn't have been without application of the Decision Criteria.

A97 (NR) But we were asked what the impact was.

Q98 (to NR) The document does not include impact on both passenger and freight operators.

A98 (NR) It does, in Section (f); it refers to potential loss of revenue for freight. If the accusation is that if we failed to include that, we dispute this. Our main concern is operating Liverpool after Christmas. If we've worded it badly then we're sorry but that's our main concern.

The Chair confirmed again that it was not just a question of wording. It appeared that NR had not done what the contract required. The underlying problem might be that the contract – the requirement to apply particular criteria in a particular way - did not reflect what NR needed it to, but this was not something a TTP Hearing could change.

He noted the summary appeared clearly retrospective and did not address the choice of Week 32 over other weeks. NR had also not mentioned having had regard to the Objective - D4.6.1 - as the most important part of the Decision Criteria, in order to reach a decision which was fair. Nor had NR evaluated how the Objective or any individual consideration affected several conflicting interests, in this instance between passenger and freight. Consequently the rationale for the weighting was unclear. For example, when considering if the spread of services reflected demand (consideration (b)), that was weighted 'High' but with no comment on how high or on which operator, or which options were discussed. It could be said that there wasn't any consideration as to how the spread of services reflected freight demand.

Q99 (to NR) The resourcing constraint mentioned in the Decision Criteria document is stated as a given. The implication is that there is nothing you should, or could, have done about it.

A99 (NR) Week 32 was felt to be a reasonable opportunity. We were in a constrained environment and time was not on our side. We have explored every avenue possible to ensure we can't do Week 39. We have to do the best with what we've got, which has led us to where we are today. We also have an operational resource constraint in terms of signallers at Edge Hill existing SB. NR operations are concerned they cannot operate the area.

Q100 (to NR) I'm not sure I follow?

A100 (NR) The existing staff who signal Edge Hill have knowledge of existing location and signalling. Seven signallers are involved. There are a number of vacancies elsewhere they have been appointed to that they can't go to. NR (LNW) Head of Operations is not sure he can continue to cover the overtime that is being used to cover the posts they have been appointed to. This has also been challenged by the Union. Local Operations Managers are covering some shifts. Once Edge Hill box closes the area will be signalled from Manchester Route Operations Centre which requires fewer staff overall than the sum of those required in the signal boxes it replaces.

Q101 (to NR) I'm troubled by this. The Rules oblige me to be legalistic – to consider what are the legal obligations of the parties? The legal obligation of the parties is to comply with their contracts. In other industries you can't say you don't have enough money, enough staff, or enough money to get enough staff to perform your contracts. Certainly it's a problem when the state sponsor of an industry body says they won't fund it to perform its obligations, but that doesn't entitle you not to comply with the contract.

A101 (NR) Sorry if we've overstepped the mark.

Q102 (to NR) Don't apologise, no need. I'm sorry I find myself asking you to come up with arguments and reasons you're not equipped to come up with.

A102 (NR) We firmly believe we have applied the Decision Criteria.

Q103 (to NR) Would it be fair to say your position is, in substance, if not in form, that you have 'sort of' applied the Decision Criteria when the decision was made?

A103 (NR) I think if we had Part D on the table at the time of the decision it might have been written differently but the decision would have been the same. What would have happened if we hadn't supplied a Decision Criteria document?

There was some discussion at this point with NR reps talking over each other about whether refusing to supply the Decision Criteria would have been a sensible move at a dispute hearing.

Q104 (to NR) What it comes down to in practice is spotting the ones that might be contentious or obviously big and difficult. More legalistically, though, the consultation prior to the decision ought preferably to include something showing, for the purposes of consultation, how you have complied with what the contract requires you to do. You are required to consult in a meaningful way.

A104 (NR) I would draw the Panel's attention to GBRf's wording in their requested decision sought from the Panel (GBRf submission para 6.1(a)). I believe GBRf are implying NR has not consulted at all by use of the word 'adequately'.

(GBRf) NR have consulted, but not sufficiently.

(NR) The Network Code doesn't use the word sufficiently

Q105 (to NR) The obligation to consult doesn't make sense if you take it as a binary decision, ie did we send one email or nothing at all. Consultation is a spectrum of activity. Some degree of activity along that spectrum is required in order to satisfy an obligation to 'consult'

A105 (NR) Does this apply also to the Decision Criteria?

Q106 (to NR) Yes and the word often used there is not 'adequately' but 'correctly' or 'appropriately' or 'reasonably'.

A106 (NR) I believe the words adequately and reasonably aren't written in the Code, therefore it's not fair to be held to that standard.

Q107 (to NR) When it comes to framing the words of the determination it's fair to say one wouldn't necessarily use the word 'adequately'. If there is a determination that NR had simply failed to consult then that will reflect the meaning of the wording of the Code, which in substance - if not in precise wording - means insufficiently consulted. Now, moving on, when you talk about impact in the Decision Criteria document, which parties are you saying it applies to?

A107 (NR) Threefold: operators, LNW Route and the project.

Q108 (to NR) You have included the 2009 RUS as still relevant, is this correct?

A108 (NR) Yes.

Q109 (to NR) Will the project deliver new services?

A109 (NR) Yes, three trains into Liverpool in Dec 2019.

Q110 (to NR) Are those trains in the timetable? The Industry PMO has supported a service requiring a possession not delivered and not yet secure?

A110 (NR) Yes.

Q111 (to NR) I would have expected that to be written in the Decision Criteria document more specifically, in relation to the RUS.

A111 (NR) Sorry we should have spelt it out

Q112 (to NR) You haven't articulated the impact on freight weighed against the impact on passenger traffic. You haven't said why you have chosen to go down the passenger route

A112 (NR) We could only physically accommodate pilot working outside the possession footprint. We couldn't accommodate freight into the possession.

Q113 (to NR) Was there a choice between summer and winter?

A113 (NR) Not within the constraints we already had.

Q114 (to NR) These are all examples of where, despite the information behind it, it is poorly articulated or not at all. Moving on, the only company really referred to in this document is NR.

A114 (NR) We have had more discussions with operators that aren't reflected in the documents. I'd hate for you to think we were focused on NR interests only.

Q115 (to NR) It's not that, but I'm coming to the conclusion that while you were considering a great deal of things you weren't considering them in the mould required by, nor all of the things required by, the Decision Criteria. This is not a criticism but a fact.

A115 (NR) I would dispute that. We believe the decision was fair, transparent and considered everything.

Q116 (to NR) So what you're saying is don't go just on this document, but also go on the discussion within NR.

A116 (NR) Yes. Can we ask GBRf a question about their request that the Hearing find that NR has failed to comply with Condition D3.4.4(b)?

(GBRf) When I submitted the sole reference document I didn't have NR's Decision Criteria document, so had to assume when it wasn't available that it didn't exist.

(NR) You're saying we hadn't complied with the Code before you'd seen the document. Is that fair?

(Chair) Yes possibly, because it gets to the point as to whether you should have provided it, or something regarding the Decision Criteria, at the point of making the decision. This comes back to the point that, although the Code doesn't say you have to provide specific documents, there does need to be meaningful consultation. GBRf were perfectly entitled to think that NR hadn't complied.

Q117 (to NR) There is one more area I would like your honest view on. If part of the Determination would be to require you to go through the disruptive access process again and reconsider the dating of the possession, would you actually be able to reconsult it, given the criticality you believe exists for this possession?

A117 (NR) I'd start by saying we think we've done that but we could look at it.

Q118 (to NR) What I'm asking is, is it practical now to determine that you reconsider and reconsult. Have the train paths already now been offered?

A118 (NR) They have.

Q119 (to GBRf) What happened to your trains, GBRf?

A119 (GBRf) They've been rejected as falling foul of a possession and been cancelled. Reinstating them would be relatively straightforward

It was then clarified that the T-12 upload of the new timetable was the following day (Friday 9th August).

Q120 (to NR) Is there a possible Plan B?

A120 (NR) That has a significant impact on multiple areas of our business. We can negotiate and propose any access. It's the reality of what's happening with the ops team. Potentially there's an impact on finances, although that's not as important nor GBRf's problem. The real concern is running trains after Christmas.

Q121 (to NR) Doesn't that criticality make your project a higher national priority to obtain a Christmas delivery slot?

A121 (NR) No; it's still not deemed as nationally important as other blocks like Kings Cross. We're not sure we understand the commercial impact on GBRf.

Q122 (to GBRf) So, what is the commercial impact to GBRf under its contract? Would you lose the contract or pay penalties?

A122 (GBRf) For not delivering the contractual tonnage we will be penalised by the customer. The operational cost of the train is about £5,000 per train, minus track access savings.

(NR): Could GBRf use another port to pick up the cargo?

(GBRf) We only have rights to the Port of Tyne and Liverpool. Potentially another operator would profit from that.

Q123 (to GBRf) What is the high level estimate of the consequence of this block?

A123 (GBRf) A damaged reputation and financial loss

Q124 (to GBRf) Would you forfeit the contract?

A124 (GBRf) Not necessarily based on this one instance but it could be factored in when it comes up for renewal.

(NR) What about the big overall number?

(GBRf) This is not about money but about reputation, this is about delivering a service to the customer.

Q125 (to GBRf) Are there any fixed penalties in your contract?

A125 (GBRf) Yes.

(NR) We could find you extra paths across the month or year to make up that tonnage.

(GBRf) Practically that won't be possible.

Q126 (to GBRf) When does your winter circuit start? Is there any way of stockpiling biomass?

A126 (GBRf) There is storage at Drax, but Drax should be on full power at that period of time and there is a risk of that product being run down to a risky level. We don't want to put our customer through that.

Q127 (to GBRf) When we're talking about not running trains for 52 hours - will the lights go out?

A127 (GBRf) The customer has said they will be on low power. I don't know if that means the lights go out; I think it's more about them not being able to sell to the National Grid. Schedule 4 won't compensate for the loss we will incur.

(NR) Can we make a payment to GBRf to compensate for this?

Q128 (to ARN) Moving on. Does ARN have anything it wishes to ask or add at this stage?

A128 (ARN) Yes, can NR confirm when the capacity into Liverpool will be released as a result of this project?

(NR) It has already been released - in October 2018.

(ARN) Then NR haven't been consistent in stating that Week 32 is needed to deliver additional capacity if the capacity has already been delivered by an earlier project phase.

(NR) Is this relevant?

(Chair) Yes, as some of the justification for Week 32 falls away

(ARN) The point is that these works won't provide additional paths in the WTT.

(NR) It's about operational flexibility rather than additional paths in the WTT.

Q129 (to ARN) What is ARN's interest in this Hearing?

A129 (ARN) We have an interest in general. The consultation was different; no freight operators in the room, we now understand why but it seemed strange at the time. Having worked on a plan that's getting published tomorrow night, there's quite a logistical change that would need to take place...

(NR) If Week 32 was cancelled, could you undo it?

(ARN) Yes. We've not completed fleet diagramming. I got the impression that the passenger handling plan isn't as coherent as last year as it's been shoehorned in. It's frustrating to be put in that position as we could do better. The tone of the meetings was that industry cooperation wasn't there as it was being shoehorned in.

(NR) We apologise, we do try to do as much as we can. Sometimes we have to put the NR position first. I have to have confidence that the project can be delivered before I can make an access request. I apologise for the frustration.

(ARN) Week 32 isn't something we're in favour of; it's just the least worst option of those offered to us, viz weeks 32 to 38. There is no evidence in the Decision Criteria as to how we were considered.

(NR) We did consult ARN.

Q130 (to NR) Would NR train planning be able to respond if the possession got pulled now?

A130 (NR) Probably not. If this is pulled there's a whole host of options to take into account, and that's one of them.

There was an adjournment for parties to consider closing statements

Neither party wished to make a closing statement. The Panel asked GBRf to clarify whether, in light of the evidence heard, GBRf was still seeking that the possession be withdrawn and dated in a different week subject to the provisions in Part D. GBRf confirmed this was the case.

Following a further adjournment, the Chair outlined to the parties a summary of his decision which would be issued in due course. At this stage GBRf were asked if they wished to make an application under ADR Rule H60 for their costs on the basis that NR's case was so lacking in merit that the reference should not have been defended.

GBRf advised that they would wish to make such an application and outlined their case, that NR's case was lacking detail, consideration of GBRf and that their explanation did not fully justify the decision that NR had made.

NR responded that they found it difficult to accept that they had submitted a case so wholly without merit that they would have costs awarded against them.