

OFFICIAL

***Network Rail Sole Reference Document***

***TTP1746***

***Network Rail's decision to take Restriction of Use in Week 29  
2020 in support of King's Cross Remodelling***

OFFICIAL

**Contents**

	<b>Clause</b>	<b>Page</b>
1	DETAILS OF PARTIES .....	1
2	CONTENTS OF THIS DOCUMENT .....	1
3	SUBJECT MATTER OF DISPUTE.....	1
4	STRAND A.....	2
5	STRAND B.....	9
6	DECISION SOUGHT FROM THE PANEL .....	9
7	APPENDICES .....	9

## 1 DETAILS OF PARTIES

- 1.1 The names and addresses of the parties to the reference are as follows:
- 1.1.1 Grand Central Railway Company Limited whose Registered Office is at 1 Admiral Way, Doxford International Business Park, Sunderland SR3 3XP (“Grand Central”) or (“the Claimant”)
  - 1.1.2 Network Rail Infrastructure Limited, whose Registered Office is at 1 Eversholt Street, London, NW1 2DN (“Network Rail”) or (“the Defendant”)
- 1.2 Third parties to this dispute may include London North Eastern Railway Ltd., Govia Thameslink Railway Ltd., Hull Trains Company Ltd., East Coast Trains Ltd., Freightliner Group Ltd., DB Cargo (UK) Ltd. and GB Railfreight Ltd.

## 2 CONTENTS OF THIS DOCUMENT

- 2.1 This Response to the Claimant’s Sole Reference includes:-
- 2.1.1 Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, scheduled in section 5 below, cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
  - 2.1.2 A detailed explanation of the Defendant’s arguments in support of its position on those issues where it disagrees with the Claimant’s Sole Reference, including references to documents or contractual provisions not dealt with in the Claimant’s Sole Reference.
  - 2.1.3 Any further related issues not raised by the Claimant but which the Defendant considers fall to be determined as part of the dispute;
  - 2.1.4 The decisions of principle sought from the Panel in respect of:
    - (i) legal entitlement, and
    - (ii) remedies.
  - 2.1.5 Appendices and other supporting material including a witness statement of Toby Patrick-Bailey which explains:
    - (i) the background to seeking the disputed access;
    - (ii) the consultation process undertaken with the operators; and
    - (iii) how the Decision Criteria was applied by Network Rail pursuant to D4.6 of the Network Code.
- 2.2 As requested by the Hearing Chair’s directions issued on 7 September 2020 this document answers the points raised in those directions and deals separately with Network Rail’s case on:
- 2.2.1 Strand A – Grand Central’s request for withdrawal of the possession, and
  - 2.2.2 Strand B – Grand Central’s request for compensation.

## 3 SUBJECT MATTER OF DISPUTE

- 3.1 This is a dispute relating to Network Rail’s decision to implement a Restriction of Use (**RoU**) on the East Coast Main Line (**ECML**) in the King’s Cross to Brookman’s Park area in Week 29 (Saturday 17<sup>th</sup> to Monday 19<sup>th</sup> October 2020) in support of the King’s Cross Remodelling project (**KXR**).
- 3.2 The RoU was established following the Conditions set out in Network Code Part D 3.5, and the dispute relates to Network Rail’s application of the decision criteria under Condition D 4.6 in reaching its decision to implement the RoU (**Decision Criteria**).
- 3.3 A summary of the history and context in relation to KXR, including the relationship between the RoU in Week 29 and the overall KXR is provided in the accompanying witness statement from Toby Patrick-Bailey. This sets out the reasons for KXR restrictions of use being proposed later than the timescales described with Part D 2.2 (revision of the Engineering Access Statement) and Part D 3.4 (Network Rail variations with greater than 12 weeks’ notice). In summary:

## OFFICIAL

- 3.3.1 In March 2020 Network Rail took the decision to defer KXR, owing to the issues created by COVID-19. KXR was planned with a series of weekend enabling works in 2020 before a 3 month partial closure, from Christmas 2020 through to March 2021. The deferral moved the partial closure period 1 year later, to Christmas 2021 through to March 2022, with existing restrictions of use to deliver enabling works retained to reduce rework to the timetable, and to continue some elements of KXR, though some critical activities associated with the partial closure were removed from scope.
- 3.3.2 As COVID-19 impacts became clearer (that passenger ridership would reduce; engineering work could be delivered successfully with social distancing; and the delivery of the network timetable would be impacted) Network Rail began industry dialogue with a view to recovering the delivery of KXR as closely as possible to its previous plan, in order to: prevent a 12 month delay for the renewal of a life expired asset; reduce overall passenger disruption owing to present passenger number levels; and enable future ECML timetable changes (currently planned for December 2021).
- 3.3.3 The RoU introduced for Week 29 is to allow the delivery of signalling rehearsal works. These must take place a minimum of 6 months before the middle stage of the partial closure (currently planned to commence in February 2021) in order to provide sufficient opportunity to develop and assure the safety critical signalling data in advance of commissioning. This middle stage critical date is Week 4 - Friday 23rd to Monday 26th April 2021 which is when signalling transfers to York Rail Operating Centre and new infrastructure is commissioned in the east bore of Gasworks Tunnel. The signalling rehearsal was originally planned in Week 23, but was removed from scope following the deferral in March 2020 and could not be reintroduced to Week 23 as part of the recovery plan.
- 3.3.4 Consequently, changes to the restrictions of use published for 2020 and the early stages of 2021 to enable the delivery of KXR are required on shorter notice than prescribed by Condition D 2.2, and for the most part, Condition D 3.4.

### STRAND A

#### **4 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE**

##### **4.1 Issues where the Defendant Accepts the Claimant's Case**

- 4.1.1 The chronology of events relating to the Week 29 possession is set out in the witness statement of Toby Patrick-Bailey filed with this Response and is not repeated here.
- 4.1.2 Network Rail accepts 4.22 of Grand Central's SRD. The dates for the publication of the amended timetable are in line with the network-wide timetable recovery plan (appendix 1), which saw suspension of the process for the delivery of Network Rail variations. The timescales are not specific to the decision to implement the RoU in Week 29.
- 4.1.3 Network Rail accepts the second paragraph of 5.1 of Grand Central's SRD. Grand Central were not in attendance at the Access Oversight Board meeting on 23 July 2020 at which the recovery of KXR into 2021 was discussed. Grand Central received the meeting pack for that meeting on the 22nd July 2020 setting out Network Rail's proposals for the recovery of KXR in 2021. No response to the proposal was received. Richard McClean, Grand Central Managing Director and Grand Central's representative on the AOB was contacted by Ed Akers of Network Rail via 'phone shortly after the AOB meeting to discuss the proposal and position of the AOB, and to invite a response to the proposal. No response was received in relation to the minutes distributed on 20<sup>th</sup> August 2020.
- 4.1.4 Network Rail accepts Grand Central's claim within 5.9 of its SRD that it will not be able to operate train services to/from London King's Cross during the week 29 possession as the operation of services to/from London King's Cross is not feasible during the signalling rehearsal regardless of when the signalling commissioning rehearsal is scheduled to occur. A detailed overview of this activity is included in appendix 2.

#### 4.2 Issues where the Defendant qualifies or refutes the Claimant's Case

- 4.2.1 In response to 4.8 of Grand Central's SRD, Network Rail would qualify that the 'new access plan' referred to was not 'proposed' as a formal RoU. The plan was immature in scope and designed to better cater to the pre-COVID levels of passengers utilising the railway particularly on midweeks. Further, it would have resulted in greater weekend disruption to leisure markets, and required further delay of the renewal of a life expired track and signalling asset.
- 4.2.2 In response to 4.10 and 5.2 of Grand Central's SRD, Network Rail would qualify that the passenger handling/social distancing strategy referred to at item 15 of the minutes of the meeting of the Access Oversight Board held on 23 July 2020 relate to the partial closure planned from February 2021 (as stated in the minutes and in the quotation at 4.10 of Grand Central's SRD), when midweek disruption to the timetable is required. They are not relevant to the Week 29 RoU which is for weekend access affecting King's Cross. This is because weekend access affecting King's Cross has already been delivered throughout 2020, including most recently the weekend of the 5th and 6th of September. Accordingly there are existing passenger handling approaches to provide clear journey opportunities and communications to passengers that have already been implemented for weekend access and will be implemented for Week 29. Indeed a factor in favour of utilising Week 29 is that well-rehearsed plans can be adopted by all parties to support passenger handling during the RoU.
- 4.2.3 Further to Network Rail's qualification of 4.10, 4.11 of Grand Central's SRD is irrelevant to Week 29<sup>1</sup>.
- 4.2.4 In response to 4.16 of Grand Central's SRD, Network Rail would qualify that Grand Central has been offered the option of running trains as far as Peterborough for Week 29 but has indicated it is unlikely to do so in favour of operating Sunderland services to/from York (connecting to LNER for ECML or Cross Country/TransPennine Express services for the diversionary route to/from St Pancras) and with Bradford Interchange services withdrawn (passengers migrating to local services to Leeds and then connections as outlined above). Should Grand Central wish to implement this plan in support of the RoU in Week 29, the provision of train services will enable the transfer of Grand Central passengers as a result of Network Rail having appropriately considered criteria (b), (d) and (e) of Condition D.6.2 in making its decision to implement the RoU in Week 29. This is set out in further detail in the witness statement of Toby Patrick-Bailey filed with this Response. In equivalent weekends (Week 49) Grand Central chose to withdraw all train services with one Monday morning (down) service impacted. In Week 12 (which did not operate owing to Grand Central's COVID-19 related hibernation) some Sunderland services were planned to operate as far as York, with Bradford services withdrawn. Again, one Monday morning (down) service was cancelled. Network Rail refutes that any services on Friday would be affected based on either potential plan.
- 4.2.5 In response to 4.17 and 4.18 of Grand Central's SRD, Network Rail draws attention to equivalent RoU in 2019, and earlier in 2020 when Grand Central has chosen not to operate a train service over the 'alternative options' considered, despite COVID-19 affecting only a small proportion of this period. Nor has Grand Central made approaches to use alternative options during existing restrictions of use in established RoUs for the remainder of 2020 (Week 34 - November 2020 and Week 39/40 December 2020).

---

<sup>1</sup> Grand Central continues to be involved in ongoing industry workshops and the Access Oversight Board of which an update to these work streams for Access in February 2021 has been provided at the last 2 meetings, and will continue for the foreseeable future.

## OFFICIAL

- 4.2.6 In response to 4.19 of Grand Central's SRD, the witness statement of Toby Patrick-Bailey filed with this Response demonstrates that Grand Central's position was considered as part of the decision making process.
- 4.2.7 In response to 4.20 of Grand Central's SRD, the Network Change is not the subject of this dispute as accepted by 4.4 of Grand Central's SRD. Network Rail has (a) explained in writing on 27 August 2020 why Grand Central has not made a valid objection to the Network Change, (b) responded to Grand Central's objection and (c) invited Grand Central to withdraw its 'objection'.
- 4.2.8 In response to 5.1 and 5.3 of Grand Central's SRD, Network Rail would qualify that Grand Central took part in (and continue to take part in) a number of ongoing consultation meetings to discuss the development of the ECML access plan as adjusted for KXR, including the progression of formal consultation as required by Part D. A meeting occurred on 23 July 2020 at which Network Rail explained the rationale in respect of its proposal for Week 29, as set out in the witness statement of Toby Patrick-Bailey. This was then followed by the formal proposal of the RoU on 24 July 2020, following which Grand Central's written response was received on 29 July 2020, and considered by Network Rail (as set out in the witness statement of Toby Patrick-Bailey) as part of Network Rail's application of the Decision Criteria.
- 4.2.9 In response to 5.6 of Grand Central's SRD, Network Rail would draw attention to the incompatibility of the signalling rehearsal with other works between King's Cross and Wood Green South Junction. The signalling rehearsal is not deliverable within partial closures (Weeks 33 and 35), owing to the "wheels free" requirement associated with the signalling rehearsal. It should be noted that Week 35 was originally intended to be an all line block, but was amended by Network Rail to a partial closure owing to restrictions elsewhere on the network (restrictions of use affecting the Herne Hill area) preventing a reasonable train service being delivered through the Thameslink core via St Pancras from the Midland Main Line which would be utilised to carry passengers migrating from the ECML. This further demonstrates the consistent interpretation and weighting of criteria (b), (d) and (e) of Condition D.6.2 in respect of KXR RoU, and was a factor in informing Network Rail's decision not to implement the signalling commissioning in Week 35
- 4.2.10 Although an all line block does exist in Week 34, the signalling rehearsal is again not compatible with other works to be delivered, specifically the planned renewals of 2 S&C units at Finsbury Park. This is the full renewal of 2097 points (A and B ends) positioned between the Down Slow No.1 and Down Fast north of Finsbury Park station. This infrastructure has been identified as requiring renewal owing to asset condition, and is positioned in a location that has (without the context of KXR) typically driven closures to be scheduled over Christmas periods. This renewal was originally planned over two weekends (Weeks 34 and 35) but was re-phased into one weekend following the changes necessary to Week 35 outlined in 4.2.9 to provide a route to/from King's Cross. The use of engineering trains and removal of track infrastructure is not compatible with the access requirements of the signalling commissioning rehearsal which required "wheels free" between King's Cross and Wood Green South Jn as detailed in appendix 2. Further, Week 34 also sees other works delivered at King's Cross making the most effective use of planned disruptive access. Namely in Week 34, the moving of location cabinets at King's Cross and the associated impact upon signalling and telecoms equipment is not compatible with the signalling commissioning. Consideration of all opportunities for the possession did take place and there were not considered to be any viable alternatives.
- 4.2.11 Network Rail further submits with regard to 5.6 of Grand Central's SRD the narrow interpretation of criterion (a) of Condition D4.6.2 fails to give consideration to the condition of the existing track and signalling assets, or the associated impact that the asset condition has in respect of maintaining and improving train service performance (criterion c) of Condition D4.6.2.

- 4.2.12 In response to 5.7 of Grand Central's SRD, Network Rail submits that the same timetable and passenger handling plan was successfully enacted on 20<sup>th</sup> and 21<sup>st</sup> June 2020, and with largely similar implications for LDHS services on 5<sup>th</sup> and 6<sup>th</sup> September 2020. The RoU for Week 29 has been implemented with specific awareness of these successful plans, having identified the only viable week that the alternative routes for passengers are both able to operate at the required capacity to meet demand, and without obstruction to achieve the lowest journey time demonstrating appropriate consideration of criteria (b), (d) and (e) of Condition D4.6.2. Network Rail also submits that the industry context with regard to the recovery of timetabling activity and provision of passenger information has not been considered by Grand Central. Further there are significantly reduced passenger numbers. At Appendix 3 Network Rail provides passenger numbers entering King's Cross station comparing a weekend in August 2019 with a weekend in August 2020, and this shows a reduction in passenger volumes of about 73%.
- 4.2.13 In response to 5.8 of Grand Central's SRD, Network Rail submits that a thorough consideration of criterion (f) of Condition D4.6.2 and the commercial implications of introducing a RoU in Week 29 has been undertaken. As outlined within the witness statement of Toby Patrick-Bailey, Network Rail considered that the existing lower passenger numbers currently experienced by industry, and further the suppression of demand created by the industry position with respect to Informed Traveller and passenger information means a reduced level of exposure for operators in week 29 compared with implementing an RoU when passenger numbers have returned. Further, Network Rail submits that Grand Central's narrow interpretation of the criterion does not consider the Objective, in respect of the overall interest of current and prospective users and providers of railway services.
- 4.2.14 Network Rail refutes 5.10 of Grand Central's SRD. The short notice that has been given to Grand Central of the possession has not increased Grand Central's loss. It has chosen to continue to advertise and sell tickets for Week 29 even after the possession was announced (as shown in Appendix 4). Indeed Grand Central is selling tickets for travel on dates when it cannot operate services due to agreed possessions, for example during the possession in Week 34 which was established through the bi-annual process of revising the Engineering Access Statement. So Grand Central cannot be too concerned that refunds would damage its reputation or customer confidence otherwise it would not sell tickets for agreed possessions. Network Rail is therefore unclear why Week 29 is any different to say Week 34 for Grand Central's customers.

4.3 **Issues not addressed by the Claimant that the Defendant considers should be taken into account as material to the determination**

- 4.3.1 The current infrastructure assets at King's Cross were last renewed in the 1970's and are reaching the end of their designed life and require replacing. The renewal of these assets has previously been deferred by 12 months taking the total position of the recovered KXR plan to 14 months from the original planned renewal. Whilst the assets at King's Cross are continually maintained to allow safe operation of train services, continued deferral of the asset renewal will proliferate the number of service affecting failures. The track and drainage condition in both the platforms and the throat is poor. The poor geometry in the throat is a result of the challenging original design and the current asset condition of both track components and ballast. Holding this geometry at tolerable engineering and performance levels is now a challenge and further faults and incidents are anticipated. Improvements in asset condition can only now be achieved by renewal activity, and because of the layout of the throat, this is complex and extensive. The underlying track asset condition is already affecting the performance and serviceability of the Signalling equipment, which

## OFFICIAL

is similarly at the end of its asset life including cabling, interlockings, signalling panels, remote interlocking controls, power and point operating equipment.

- 4.3.2 With regard to criterion (c) of Condition D4.6.2 linked to the considerations detailed in Condition 4.3.1 Network Rail draws attention to the current train service performance as affected by track and signalling faults. As indicated in Appendix 5 there is a rising trend of delay incidents associated with defective track and points, with just over 20 incidents occurring in 2014/15 and 40 incidents occurring in 2019/20. Although delay associated directly in the King's Cross area is proportionally lower in 2019/20 when compared to 2018/19 (driven by one significant failure in 2018/19) the spread of that delay (reactionary) across the network grew in 2019/20. Further, delays associated with the signalling system in the King's Cross area has accounted for 20 incidents in 2019/20.
- 4.3.3 With regard to the Objective and considerations (b), (d), and (e) of Condition D4.6.2, any RoU (and associated amended timetable) in the King's Cross area must be decided on with both a knowledge of the complex rail geography, train services and an understanding of the needs of current and prospective rail users. This includes giving adequate consideration to the availability of alternative diversionary routes; the train service that is intended to operate on diversionary routes; and the capability of train operators to utilise their assets effectively in the delivery of that train service. At King's Cross, this includes considering the migration of passengers to the West Coast Main Line to/from Scotland, to the Midland Main Line to/from south and west Yorkshire, and to rail replacement provisions particularly south of Doncaster. Further, following the introduction of Thameslink services between Peterborough/Cambridge and locations south of London via St Pancras, proper consideration incorporates the ability to operate a train service through London with sufficient passenger carrying capacity to handle migration of passengers via road to alternative locations on the Midland Main Line. Network Rail notes that Grand Central's SRD does not appear to give consideration to these factors. The witness statement of Toby Patrick-Bailey contains an explanation of how, as part of the decision making process, these factors were properly taken into account.
- 4.3.4 A full and detailed overview of the work activity within the RoU for Week 29, and other KXR RoU is provided at Appendix 6. This highlights Network Rail's full consideration of the compatibility of works and efforts to ensure efficiency within the delivery strategy with a view to making the most effective use of restrictions and reducing overall disruption to rail users. As described earlier, the signalling commissioning rehearsal requires a lead time prior to the partial closure to be able to respond with confidence to design changes to safety critical signalling data identified during the rehearsal (i.e. where a Test Log has been generated during the rehearsal) in advance of the commissioning activity occurring in 2021. The rehearsal scope is: (1) rehearsal of Wood Green interlocking back to York ROC; (2) rehearsal of Finsbury Park North SSI and South SSI back to York ROC; (3) thorough testing of Holloway interlocking back to York ROC, and (4) rehearsal of the Moorgate lines back to York ROC.
- 4.3.5 Following Network Rail's decision provided to timetable participants on the 14<sup>th</sup> August 2020, timetable participants have commenced the implementation of plans to introduce an amended timetable in support of the RoU in Week 29. If the possession were now to be withdrawn that would be exceptionally disruptive to the other timetable participants and the operation of the railway and would have severe consequences for the network and KXR.
- 4.3.6 As demonstrated by the witness statement of a Toby Patrick-Bailey and exhibits the level of industry consultation undertaken by Network Rail in respect of the East Coast Upgrade, of which KXR is a feature, is significant. Whilst in no way intended to replace or supersede the requirements of the Network Code, Network Rail utilises these forums to inform its proposals and considerations when



making decisions. Network Rail considers the transparent and consultative manner by which operators have been engaged throughout the planning and delivery of KXR is an example of good practice and a relevant source of information to help inform its considerations when applying the decision criteria in accordance with the provisions of D4.6.

**4.4 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant**

- 4.4.1 Grand Central accepts that these works need to be undertaken, so the dispute is really about when those works should be undertaken and the length of notice that should be given of the possession. Network Rail's evidence demonstrates that these works cannot be accommodated within an existing possession so there must be an additional possession for those works at some time.
- 4.4.2 A key consideration for Network Rail in deciding to recover KXR was minimising the impact of the programme on passengers and in turn Access Participants such as Grand Central. It is undisputed that there has been a sustained substantial reduction in passenger numbers due to COVID-19 and that reduction continues. It has also long been anticipated that with the onset of winter 2020 there will be increased infection rates and a second wave which will result in new restrictions which will continue to depress passenger demand and numbers. Less passengers are travelling and both franchise and open access operators are incurring additional costs operating services due to social distancing whilst receiving less passenger revenue. Therefore a period when passenger numbers are substantially reduced represents an excellent opportunity to undertake major works that require a number of possessions. This is an important reason why Network Rail, at the behest of members of the AOB, has undertaken extensive work to recover the KXR now it is clear that the engineering works can be done safely with social distancing measures in place.
- 4.4.3 In normal circumstances Network Rail gives operators as much notice as possible of possessions. However Network Rail is not operating under in normal circumstances. The pandemic and the full panoply of consequences has been, and continues to be, fast developing and it has not been possible for anyone to predict accurately the impact. It has therefore been necessary for Network Rail to respond quickly to developing events so as to achieve the best outcome for passengers, operators and the network as a whole. Indeed the AOB has demanded this of Network Rail. If Network Rail were unable to seek possessions other than through the bi annual timetable, changes in the current environment it would lose the opportunity to undertake the works when passenger numbers are very significantly reduced for the benefit of all stakeholders. Throughout Network Rail has engaged and consulted with all relevant stakeholders and they are supportive of KXR being recovered. The disadvantage of short notice is outweighed by the very substantial advantages of getting the works completed sooner and during a period of significantly reduced passenger demand. Indeed all stakeholders could be legitimately challenged if they did not go the extra mile to seize this current unique opportunity to undertake the works and avoid the need for the works to be deferred and undertaken when passenger demand has recovered to post COVID-19 levels. Disruption during a period of higher passenger demand would result in higher lost passenger revenue and risk more damage to reputation. Inevitably passengers would ask why the works were not done when demand for travel was at an unprecedented low level.
- 4.4.4 It is accepted that (a) Grand Central is an open access operator and so the way in which it is funded is different to that of the franchise operators and (b) Grand Central chose to suspend services during the lockdown. It is not unique though, as Hull Trains is also an open access operator and is affected by the Week 29 possession. Hull Trains has not appealed Network Rail's decision.
- 4.4.5 The short notice that has been given to Grand Central of the possession has not increased its loss. It has chosen to continue to sell tickets for week 29 even after the possession was announced. Indeed Grand Central is selling tickets for travel on dates when it cannot operate services due to

## OFFICIAL

agreed possessions, for example in week 34<sup>2</sup>. So Grand Central is not concerned that refunds would damage either its reputation or customer confidence otherwise it would not sell tickets for agreed possessions. Grand Central's willingness to sell tickets for services in Week 34 also undermines its argument that its passengers will be unacceptably disadvantaged by the introduction of the possession in week 29.

- 4.4.6 Longer notice of the possession for Week 29 would have meant that KXR could not be recovered as operators wanted and resulted in KXR being delayed for a year at a very significant cost to Network Rail (and the tax payer), contrary to the wishes of the other operators and to the detriment of passengers, operators and the Network.
- 4.4.7 Longer notice would have meant that Grand Central would have suffered more losses not less as the works would have been undertaken in a period when passenger demand is expected to be much higher than in October 2020.
- 4.4.8 Grand Central's objection to the possession in week 29 or its reasons given for that objection are not good reasons to defer the signalling rehearsal with the result that KXR is in turn deferred for a year. If Network Rail had acted in such a way it would have not have decided the issue in accordance with the objective at Condition D4.6.1 and been in breach of Conditions D4.6.2, D4.6.3 and D4.5.1 and that decision would have been open to a valid challenge by other operators. Essentially the commercial interests of Grand Central would have wrongly and unfairly trumped the other considerations. The ORR's determination in TTP 1064 confirmed that a TTP had "*correctly held*" that the commercial interests of a party "*was just one of a number of factors set out in Condition D4.6.2 that Network Rail had to take into account*", and that it did not follow that the application of the Decision Criteria was incorrect "*simply because the commercial interests of a party has not been the overriding consideration in whether to implement a specific change*"<sup>3</sup>.
- 4.4.9 Grand Central's real reason for objecting to the possession is an attempt to seek compensation, to which it is not entitled, for the loss of revenue it claims it will lose due to the possession. Its notice of objection states 'Grand Central cannot accept such a RoU without an agreed compensation mechanism from Network rail for the loss of revenue (its franchised competitors will be receiving compensation for loss of revenue via schedule 4 and thus Grand Central is again disadvantaged against its competitors'. It has not been disadvantaged by Network Rail's decision to seek possession in week 29. Grand Central's ability to claim compensation is a direct result of its own decision not to pay the Access Service Charge which means it does not have a right to Type 1 or Type 2 compensation. But that is neither a valid nor bona fide reason for Grand Central's objection. Grand Central cannot justifiably argue that as open access operator it will not receive Type 1 and Type 2 compensation so its preferences or objections effectively trump other considerations in favour of a possession<sup>4</sup>. If Network Rail were to apply the considerations with the result that Grand Central's objection's thwarted the recovery of KXR it would not be an appropriate decision and it would be unduly discriminatory against the interests of the other operators (that are responsible for the safe carriage of the majority of passengers) in favour of Grand Central and in contravention of Condition D4.6.3.
- 4.4.10 Accordingly Network Rail submits that the decision to implement a RoU in Week 29 was undertaken with appropriate consideration and weighting of the decision criteria and the possession should be upheld.

---

<sup>2</sup> An existing RoU established via the bi-annual revision of the Rules,

<sup>3</sup> Para 35 of the ORR determination of appeal against determination of TTP 1064

<sup>4</sup> See above: para 35 of the ORR determination of appeal against determination of TTP1064

**STRAND B****5 EXPLANATION FROM THE DEFENDANT'S PERSPECTIVE OF EACH ISSUE IN DISPUTE****D5.7.1**

- 5.1 Condition D5.7.1 provides that where a decision of Network Rail is overturned on appeal, Network Rail will only be liable to any Timetable Participant in damages in respect of that decision where it was made in bad faith or was unreasonable.
- 5.2 Network Rail submits that there are no grounds to support a finding that the decision under challenge was either made in bad faith or unreasonable. As is evident from the above and the witness statement of Toby Patrick-Bailey, a carefully considered decision was made in respect of week 29 after detailed consultation with the Timetable Participants and members of the Access Oversight Board and by the application of the Decision Criteria pursuant to Condition D4.6.
- 5.3 If contrary to Network Rail's position, on appeal the Panel were to overturn the decision, because it does not agree with the weight that has been attached to the Considerations or how they have been applied, this does not mean that the decision was made in bad faith or was unreasonable. Indeed it has not been suggested by Grand Central that the decision was either unreasonable or made in bad faith, rather that Network Rail has not applied the Decision Criteria in line with Condition D3.4.4(b)<sup>5</sup> and had sufficient regard to Grand Central's position<sup>6</sup>.

**Compensation for Breach of the Track Access Contract**

- 5.4 The TTP does not have the power to make an award of damages in all cases where it determines that Network Rail has acted in breach of the track access contract. The ORR's determination in reference TTP 1520 upheld an award of damages made by the TTP because *'in the ORR's view the [TTP's] findings of breach on the facts of this case indicated that Network Rail made its decision unreasonably (although not in bad faith). The TTP found that Network Rail did not properly exercise its Flexing Right with no acceptable justification for the failure.'*<sup>7</sup> The ORR's determination ref TTP 1520 supports the proposition that for the TTP to make an award of damages the decision which is overturned **must have** been made by Network Rail unreasonably or in bad faith<sup>8</sup>. The ORR's decision does **not** support the proposition that if the TTP determines that Network Rail was in breach of contract it can then make an award of damages. For example the TTP does not have the power to award damages where Network Rail is able to justify its failings, even if they still put it in breach of contract, because it cannot be said that Network Rail has acted unreasonably or in bad faith.
- 5.5 The ORR held in Dispute Reference TTP1520 that it was within the Panel's power to award compensation because it had found that Network Rail had acted in breach of its obligations by failing to apply the prioritisation procedure properly in accordance with Condition D4.2 of the Network Code<sup>9</sup> and by doing so had acted unreasonably. In that case Network Rail conceded *'that in regard to the December 2019 Timetable no contractual conflicts had actually been identified that could not be accommodated within contractually entitled Flex'*. It was this concession which formed the basis of the Determination that Network Rail had failed to apply the prioritisation procedure properly in accordance with Condition 4.2 of the Network Code because it had not exercised the Flexing Right correctly<sup>10</sup>. The facts of that reference are very different to this case. This case concerns how Network Rail exercised its judgement when deciding which considerations are relevant to the Week 29 possession, balancing them against each other and giving them the appropriate weight. In a programme as complex as this, it is difficult exercise of

<sup>5</sup> Paras 4.2 and 5.5 of GRAND CENTRAL's SRD

<sup>6</sup> Para 5.3 and 6.1(a) of GRAND CENTRAL's SRD

<sup>7</sup> Para 67 ORR determination ref TTP1520 dated 30 January 2020

<sup>8</sup> Further it is clear from the ORR's decision that the TTP does not have the power to assess compensation. Any disagreement as to the size of an award should be referred to ADRR in accordance with the provisions of the track access agreement.

<sup>9</sup> Para 54 ORR determination ref TTP1520 dated 30 January 2020

<sup>10</sup> Para 54 ORR determination ref TTP1520 dated 30 January 2020

professional judgement rather than an exact science. If Network Rail exercises its judgement to make a decision which is later successfully appealed that does not of itself render Network Rail in breach of its obligations under the track access agreement or make its actions unreasonable. It is submitted that the words 'unreasonable' in this context connote a decision that is so unreasonable that no reasonable body could reach that decision.

- 5.6 Further, if Network Rail were exposed to damages each time it makes a decision which is then challenged by an operator and successfully overturned (absent an allegation of unreasonable conduct and/or bad faith), this runs contrary to D5.7.1 of the Network Code.

**Compensation for Network Change**

- 5.7 In its Sole Reference Document Grand Central seeks:

*'in the alternative if the possession is not to be withdrawn, Grand Central is awarded damages (which is to include the recovery of lost revenue)'*

- 5.8 By email from Maria Lee to Tamzin Cloke dated 2 September 2020, Network Rail stated:

*".....separately Grand Central has objected to a Network Change issued by Network Rail relating to the Programme and GC appears to be proposing that NR is somehow obliged to create a means to provide a proposal for paying GC compensation, when GC has no such right to compensation under Part G for Type 1 and Type 2 RoUs.*

*Accordingly Network Rail submits, pursuant to Chapter H of the ADR Rules, that*

- *it is not appropriate for disputes relating to Grand Central's entitlement, if any, to compensation in respect of this Programme to follow the process prescribed for timetabling disputes or to be determined by the Timetabling Panel of the Access Disputes Committee,*
- *the timetable dispute relating to week 29 should be confined to timetabling matters, and issues relating to compensation, if any, should be reserved for determination by another dispute resolution process."*

- 5.9 Network Rail wanted to make it clear at the earliest opportunity that it did not consider that the Panel was the correct forum if Grand Central's appeal raised issues that were not strictly related to the dispute relating to the week 29 possession, for example whether Grand Central had any right to compensation for the proposed Network Changes under Part G.

- 5.10 At the time of Grand Central's Notice of Dispute, Grand Central confirmed to Network Rail that its appeal would be confined to appealing Network Rail's claim for possession in week 29. However in its Sole Reference, Grand Central is claiming compensation as an alternative remedy in the event that the possession is not overturned. As the Panel Chair stated at paragraph 4 of his directions Grand Central does not explain the basis on which it is claiming damages.

- 5.11 Grand Central's right, if any, to compensation for Network Change is not a Timetabling Dispute relating to the week 29 possession. The appropriate forum for determining that dispute about compensation for Network Change is arbitration (if agreed), or adjudication (in default of agreement of arbitration). It is clear from the ORR's decision in Dispute Reference TTP1331 and TTP 1376 that Condition D2.7.2 provides the TTP with jurisdiction to consider any issue which is necessary for it to consider to properly determine a Timetable Participant's appeal<sup>11</sup> (emphasis added). However the ORR's decision states that the *'TTP's jurisdiction is limited to determining the appeal against the New Working Timetable. The Network Code does not empower the TTP to make binding pronouncements on the interpretation or operation of the Network Code or on the compliance of Network rail with its contractual obligations, to the extent not necessary for it to determine the appeal before it.'*

---

<sup>11</sup> Para 95 ORR determination ref TTP1331 and 1376 dated 13 March 2020

OFFICIAL

5.12 As this appeal concerns whether Network Rail's decision to take possession in Week 29 should be upheld, it is neither necessary nor appropriate for the TTP to make pronouncements on matters such as the wider Network Change or interpretation of Part G.

**6 DECISION SOUGHT FROM THE PANEL**

6.1 Network Rail requests that the Panel uphold its decision to implement the RoU in Week 29 to facilitate signalling rehearsals in readiness for the delivery of King's Cross Remodelling.

**7 APPENDICES**

7.1 The Defendant confirms that it has complied with Access Dispute Resolution Rule H21.

**8 SIGNATURE**

For and on behalf of Network Rail Infrastructure Limited

Signed



-----  
Print Name

Toby Patrick-Bailey

-----  
Position

Head of Planning & Performance

-----

**The Appendices**

Appendix No	Document Description	Para Reference:
1.	TT Recovery Plan	4.1.2
2.	GANTT Chart	4.1.4 & 4.2.10
3.	Kings Cross Passenger Numbers	4.2.12
4.	Sale of Tickets by Grand Central	4.2.14
5.	Performance Analysis	4.3.2
6.	Kings Cross Recovery Enabling	4.3.4