


## 1 DETAILS OF PARTIES

1.1 The names and addresses of the parties to the reference are as follows:-

- (a) GB Railfreight Ltd ("GBRF") whose Registered Office is at 3<sup>rd</sup> Floor, 55 Old Broad Street, London EC2M 1RX; and
- (b) Network Rail Infrastructure Limited ("Network Rail") whose Registered Office is at 1 Eversholt Street, London NW1 2DN.
- (c) Correspondence with Network Rail on this matter is via Tony Worgan who should be contacted via 

1.2 It is noted within the GBRf submission that the following are listed as potential Third Parties; "Freightliner Group Ltd, DB Cargo, DRS, Colas Rail, Devon & Cornwall". The potential precedent which may be established by a ruling in this case means that every organisation with rights to operate on Network Rail infrastructure may be affected.

## 2 CONTENTS OF THIS DOCUMENT

This Response to the Claimant's Sole Reference includes:-

- (a) Confirmation, or qualification, that the subject matter of the dispute is as set out by the Claimant in its Sole Reference, in the form of a summary schedule cross-referenced to the issues raised by the Claimant in the Sole Reference, identifying which the Defendant agrees with and which it disagrees with.
- (b) 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.
- (c) Any further related issues not raised by the Claimant but which the Defendant considers fall to be determined as part of the dispute;
- (d) The decisions of principle sought from the Panel in respect of
  - (i) legal entitlement, and
  - (ii) remedies;
- (e) Appendices and other supporting material.

### **3 SUBJECT MATTER OF DISPUTE**

- 3.1 Network Rail does not dispute the Claimant's right to raise this dispute. It does however wish to clarify that the subject matter of this dispute is a late notice possession only and not any possessions decisioned or actioned under the preceding Engineering Access Statement (EAS). For clarity, it is understood that the late notice possession being disputed relates to a possession between Acton East and Acton Wells from 07:15 Mon to 08:25 Mon in each of Weeks 10 to 36 in the 2021 timetable year and Weeks 37 to 44 in the 2022 timetable year.
- 3.2 The manner in which the GBRf SRD is written makes the subject matter slightly ambiguous when read by Network Rail. The SRD submitted could be read as a dispute being raised against the late change, or as all Section 4 access requests. As detailed above, Network Rail believe that the dispute is solely in relation to the late change but would ask GBRf to provide clarity on the matter as if the intention is to raise a dispute regarding all Section 4 access requests, then it is submitted this is not the argument presented by GBRf.
- 3.3 This dispute has arisen over Network Rail's actions with regard to the Network Code condition D3.4 and D3.5 respectively in relation to Network Rail Variations as well as the application of the Decision Criteria under D4.6.

### **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 Network Rail accepts GBRf are disputing the Section 4 amendments from the late change Decision notice W21-424-TV (GBRf Appendices 3.1 and 3.2).
- 4.1.2 Network Rail accepts the GBRf position under their SRD Section 4.2 that the subject matter comprises a mixture of additional Restrictions of Use as governed by both D3.4 and D3.5. To aid in understanding this matter, Network Rail have provided a detailed timeline of events as measured against Network Code Part D (Annex D).
- 4.1.3 In relation to the GBRF Appendix 3.2, Network Rail have noted that the 'sign off' on the email only mentions D3.5 in error. This should have read D3.4 and 3.5. This error is being addressed and Network Rail apologise for the error. To clarify, both D3.4 and D3.5 have been utilised regarding this possession. Due to the nature of when these fall some were afforded less than 12 weeks' notice and some had 12 weeks or more. It is submitted that Network Rail has correctly applied the Conditions under D3.4 and D3.5. Network Rail submit that many of the provisions within D3.4 are not applicable on the basis that the possession utilises white space on the graph and as such there was no requirement to request a revised Access Proposal (D3.4.9 and D3.4.10). The decisions made under both D3.4 and D3.5 respectively were issued as one on the basis that they reflected the same possession/ details. In respect of D3.5, Network Rail prescribed time for the relevant steps as were reasonably practicable (D3.5.2) and issued a decision accordingly (Annex G). In respect of the application of D3.4, because the decision was issued at the same time, Network Rail submit that they have also complied with the requirements under D3.4.13

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

- 4.2.1 In response to the GBRf SRD Section 4.1, GBRf have alleged that the possessions in dispute will affect their ability to meet their customer demands. Network Rail submit that at no stage have GBRf ever provided notification of or identification of any customer demand which is unable to be met as a direct result of the possession in dispute. The times that are intended to be utilised have been identified by Network Rail as a time when no services are planned, enabling Operators to meet current demand. To be clear, the late change proposed and disputed only impacts upon unused white space on the planning graph. It is also noted that within the GBRf SRD, that they still have not provided any concrete information as to whether they have a customer necessitating a need for this space to be available and would ask that if they do, that they present this information as a matter of urgency. Network Rail submit that in the event that GBRf require a path to run, that Network Code D3.3. provides the mechanism to facilitate the process in which they can submit a Train Operator Variation Request (TOVR).
- 4.2.2 Within Section 4.3 of the GBRf SRD, it noted that as well as alleging inadequate consultation, that GBRf allege inadequate consideration for freight customers. The GBRf Section appears to conflate the two issues when they are in fact separate matters. For clarity, Network Rail will address these matters separately.
- 4.2.3 In response to GBRf's SRD Section 4.3, Network Rail confirm that consultation was undertaken in line with D3.4.4 and D8.6. as identified in the appendices (3.1 and 3.2) supplied by the Claimant. GBRf allege that there has been inadequate consultation but within the same Section also confirm that Network Rail sought the views of GBRf 'but carried on in a rather hurried way'. It is submitted that Network Rail acted within the scope and directions of the Network Code and in reaching a decision within these timescales cannot be said to be in breach of any of these obligations. The process is clear and well known to all parties; a proposal is issued (this begins the consultation), Timetable Participants may then provide comments which Network Rail are to consider before reaching its final decision. Network Rail would also note that whilst preferable, the Network Code does not require agreement or consent on a matter for it to be progressed, indeed that is the function of the dispute mechanism available to Timetable Participants. The existing published times (Annex F) for patrolling affect train services, so amending the times, to non-disruptive times enables Operators to meet that customer demand.
- 4.2.4 Network Rail submit that whilst GBRf allege that there has been inadequate consultation, they have not actually provided any evidence in support of this allegation. As is usual in these matters, and as supported by the Determination in ADA50 (Paragraph 57), there is an obligation on operators "to provide sufficient evidence...in the first instance to substantiate their submission". Whilst this was in relation to a Third Party Notice, Network Rail would expect the same standards to be applied to a Timetable Dispute and submit that GBRf have not provided sufficient information to substantiate their claim. Network Rail would ask GBRf to clearly detail why they believe this to be the case and to provide supporting evidence. Late or a lack of disclosure of information makes it significantly harder for Network Rail to discharge its obligations and makes matters more complicated than they need to be. As detailed in our Annex D (and GBRf appendices 2.1), Network Rail issued an informal email to GBRf consulting the intention regarding this possession on 18<sup>th</sup> May 2021.
- 4.2.5 In response to GBRf's SRD Section 4.5 and 5.11, the Decision Criteria were considered prior to sending the formal request on 21<sup>st</sup> May 2021 (GBRf Appendix 3.1) in line with D4.4.1. The Decision Criteria were

written up and were then issued on Saturday 5<sup>th</sup> June 2021. GBRf claim they are not in receipt of this and Network Rail reference our Annex G in this respect. It is also claimed that Network Rail have not justified the decision by reference to the Network Code. Network Rail refute this and have provided the Decision Criteria utilised at the time the decision was made as evidence of compliance with the terms set out in D4.6.

- 4.2.6 In response to GBRf's SRD Section 4.5 and 5.3, there are other locations where patrolling takes place on Saturday nights – a number of examples are quoted in the Decision Criteria (Annex G) - which fully exploits the resource which is available to carry out this safety critical task. The national transition away from Red Zone working had mandated that Network Rail make the best use of any white space that may be available. Network Rail do not have many opportunities on this particular route because it already recognises the fact that freight traffic is critical to UK rail and refrains from requesting Section 5 overnight possessions during midweek or Sunday nights.
- 4.2.7 In response to GBRf's Section 4.6, the Up Poplar patrolling requirements on Tuesday mornings have been detailed since EAS 2013 up to 2021 V4.1 (Annex F). It was shown in Version 0 of the 2022 EAS on Pages 2 and 37 (Annex F). EAS 2022 Version 0 is the base document. There has been the addition of the Down Poplar patrolling, however, there is nothing to note a change from as there is nothing formally published for the 2022 year prior to this. Network Rail submit that the publication of Version 0 EAS is the start of the consultation required by the Code (D2.2.2) and as such GBRf's assertion is incorrect. Network Rail would also draw attention to the GBRf SRD Section 5.1 in which they acknowledge that consultation on this matter has occurred.
- 4.2.8 In response to GBRf's Section 4.7 and 4.8, operators fed back comments very quickly (as noted by the Claimant) so there was no requirement to delay the subsequent formal consultation. The Claimant's position is clear and hasn't changed since the first reply, so not expediting the process quickly would not have benefitted participants in the process and Network Rail followed the process under D3.4 and D3.5. GBRf suggest in Section 4.7 that they responded with its 'views and suggestions to look at alternative options...'. Network Rail note that the 'suggestion to look at alternatives' (i.e Saturday night) was the only comment that GBRf provided in this regard and would also submit that this is not really engaging with the process in a meaningful way. Had GBRf responded with something more constructive, Network Rail would of course have engaged and looked into the matter to see if this was viable. Network Rail would reiterate that it is simply not sufficient for an operator to claim that they do not like a particular decision whilst themselves providing no evidence to support why, or engaging in providing meaningful alternatives/ suggestions which they may wish to see. It is also noted within GBRf Appendix 2.1 (email dated 20<sup>th</sup> May 2021 11:07) regarding 'alternatives' that it appeared to be the intention of GBRf to formally dispute this possession regardless of the content of any Decision Criteria/ rationale – an approach which is perhaps indicative that a holistic view is not taken by the Claimant in the same way that it has to be by Network Rail.
- 4.2.9 In response to GBRf's Section 4.9, Network Rail would reference both D3.4 and D3.5 which permit Network Rail to make variations as well as D3.3 which allows operators to request variations as well. It is submitted that these are the processes that have been correctly followed in reaching and implementing this decision.

- 4.2.10 In response to GBRf's Section 4.9 Network Rail refutes in the strongest possible terms that it is circumventing due process and would again note that no evidence has been supplied to support this serious allegation made by GBRf. In fact, the appendices clearly show the formal request and decision was made in line with that process. The 2<sup>nd</sup> sentence in Section 5.1 of the GBRf SRD directly contradicts this.
- 4.2.11 In response to GBRf's Section 4.9, patrolling is a key activity required for all industry participants and not a "Network Rail need". It is a fundamental requirement (Standard NR/L2/TRK/001 Module 2 – Annex E) in being able to operate a safe and reliable railway and to maintaining it's capability. In accordance with 4.6.1 of the Code, 'the Objective'.
- 4.2.12 In response to GBRf's Section 5.1 and elsewhere, a number of times the Claimant mentions the railway being open to meet demand. Network Rail submit that there is no current demand within this time slot. For clarity the patrol requires 60 minutes of access on one day between Monday morning and Friday evening each week. GBRf also allege within Section 5.1 of their SRD that 'insufficient consideration' has been given to the impact of the proposed possession on GBRf. Network Rail would ask for additional clarity on this matter from GBRf as to how they believe there has been insufficient consideration of the impact when it is demonstrated that the possession in question is non-disruptive on the basis that there are no trains running in this space? It is submitted that it is not always possible for Network Rail to undertake maintenance works in a non-disruptive manner and indeed this has been the subject of many dispute hearings. However, on this occasion, Network Rail have managed to locate a date and time to allow track patrolling to occur and in a manner that is non-disruptive, meets the ORR Improvement notices (Annex C). Regrettably this has still led to a dispute being raised.
- 4.2.13 In response to GBRf's Section 5.3, Network Rail are pleased that GBRf acknowledge the need for maintenance but would once again raise the question as to what 'demand' is being referred to. There is no requirement that mandates Network Rail must work around demand but rather there is the EAS process which provide a consultative process to establish possessions and which has been followed on this occasion.
- 4.1.14 Network Rail acknowledge the point made by GBRF in their Section 5.4 that it cannot know the operational and customer demands of an operator, but would caveat this with 'unless and until an operator discloses such information in support of their position'. Network Rail can only make decisions based on the information it has available to it at the time. Any additional traffic flows an operator may wish to implement must follow the consultative process set out in the Network Code to allow an assessment of rights, impact on capacity and performance etc. If Network Rail are not made aware of such flows through the application of Part D, then it cannot be expected to account for them in reaching a decision.
- 4.2.15 Network Rail are unclear as to what GBRf mean under Section 5.9 and would ask that if this is a matter they wish to pursue in detail that they please clarify this point.
- 4.2.16 In response to GBRf's Section 5.7 and for clarity, the Improvement Notice (Annex C) served by the ORR on Network Rail is about removing unassisted Red Zone working, not just patrolling. This means work activities have to be undertaken when the line is closed to traffic. There is no amendment to existing traffic,

so Network Rail is unclear about how this increases the cost base for the claimant or indeed Network Rail. There was already an existing patrol, this has simply now been moved to the proposed Monday slot where there was sufficient white space to accommodate this. Network Rail would again ask GBRf to clarify what is meant by the 'negative effect' that they reference. Earlier in the GBRf submission there was an argument made for maximum flexibility to allow them to run their business. However, within Section 5.7 they argue that the same flexibility should not be afforded to Network Rail as GBRf require stability of access. White space is available for all to utilise.

- 4.2.17 In response to GBRf's Section 5.10 and Appendix 5.2 (c), patrolling has taken place on midweek Tuesday daytimes on this section of line for many years – albeit with one line closed rather than two and under unassisted Red Zone working which is now under an Improvement Notice .
- 4.2.18 In response to the GBRf Appendix 5.2; Condition (a), it is submitted that GBRf have misunderstood the application of this condition. Capability is solely about engineering and maintenance of the infrastructure and not to be conflated with capacity as a concept. As such, the N/A weighting for this Consideration from GBRf is suggested to be fundamentally incorrect. Without maintaining the network, the network will not be capable of fulfilling its function.
- 4.2.19 In response to the GBRf Appendix 5.2; Condition (b), Network Rail agree with the principle put forward by GBRf but would again note that there needs to be a customer demand for this to be applicable, and GBRf have failed to notify any details of customers that would look to utilise this space. D3.3 would need to be applied providing details of the intended Access Proposal with Network Rail applying D3.3.3 to the request. As such, it is suggested that the weighting applied by GBRf is rather narrow in focus as it appears to be 'high' weighted solely on the possibility of as yet undetermined future traffic/ custom for themselves alone rather than a holistic view of the network.
- 4.2.20 In response to GBRf Appendix 5.2; Condition (c), Network Rail note that it frequently experiences delay to the start of its officially agreed possessions as a result of late running trains (amongst other reasons). In the particular situation suggested by GBRf Network Rail would be required to take an additional unplanned disruptive possession with significant delay, or if the patrol cannot happen, the line would have to be closed in line with safety standards until the patrol is completed.
- 4.2.21 In response to GBRf Appendix 5.2; Condition (d), Network Rail again note that this possession is in white space, there are no trains to work around.
- 4.2.22 In response to GBRf Appendix 5.2; Condition (e), it is submitted that any operator can request a change to the EAS at any time via the same process that Network Rail use. Utilising a non-disruptive space ensures integration is not interrupted.
- 4.2.23 In response to GBRf Appendix 5.2; Condition (f), it is noted that the Claimant does not rely on any commercial interest arguments for themselves, but only for Network Rail. It is therefore assumed that there is no commercial interest (or impact) on GBRf which would back the earlier Network Rail assertion that there is no customer for which GBRf would utilise this space. Given the importance that is usually placed on this Consideration by Timetable Participants, it seems significant to Network Rail that this is in fact not being argued. Network Rail have already noted that from its perspective, there is no impact on costs or

resource as the patroller already patrols midweek days and is therefore an efficient use of resource. Undertaking this on the suggested Saturdays would increase Network Rail's cost base and is not an efficient use of public money.

4.2.24 In response to GBRf Appendix 5.2; Condition (l), notes that road haulage may be required in the event that rail becomes untenable. Whilst Network Rail does not disagree with this, it does appear that the argument presented is that possible, yet unknown future traffic (that may or may not come to fruition) may or may not be able to use the network and if they cannot may need to use road haulage. GBRf have assigned a 'high' weighting to this argument and whilst Network Rail agree with the principle, it cannot be said to be applicable to this specific scenario. If Network Rail were to apply this logic, we could look to take a possession of every track in case there was a rail defect or fault.

4.2.25 In response to GBRf Appendix 5.2; Condition (k), the access does not affect any service in the WTT and therefore it does not affect any Strategic Train Slot that Network Rail.

#### **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 In utilising the Decision Criteria, Network Rail consider all of the Conditions and then apply any that are relevant. In this scenario, Conditions D.4.6.2 (a) and (f) in the Network Code are key factors for Network Rail (Annex G). Network Rail would also draw reference to Part A, Condition 1.1 and Part D Condition 4.6.1 to the effect that 'safety' is the paramount objective of the railway industry. Reducing the risk to trackworkers who have to go on or near the line is the subject of two legally enforceable Improvement notices issued by the ORR (Annex C). Where possible, mechanised patrolling is now being undertaken and where the condition of the infrastructure allows it, engineers will permit patrolling to be undertaken at night in order to minimise the effect on train services. This is demonstrated by the change in patrolling locations between the EAS in 2013 and the EAS in 2021 (Annex F). Neither of these options are available to Network Rail for this possession as the technology required is not implemented on this section of the line, and there are no non-disruptive spaces available overnight (Annex F) for the proposed patrolling.

4.3.2 There is a Standard for Patrolling (Annex E). Patrols must be undertaken every seven days, a period that can only be extended by one day. If Network Rail are non-compliant with the Standard Network Rail have no choice but to close the line to all traffic until the patrol is undertaken and thereafter every time it is due. This has happened on previous occasions (Annex K) and is highly disruptive and something Network Rail wish to avoid. In the event that Network Rail cannot utilise the possession as suggested, it is submitted that there would be a breach of the patrolling standard resulting in a closure of the lines on safety grounds (until such time the patrol was completed). Network Rail would immediately seek a date and time to undertake the patrol and would identify the existing white space as an opportunity for non-disruptive possession to ensure that standard was complied with as quickly as possible, for example the white space on a Monday between 07:15 – 08:25.

4.3.3 Staff available to work at weekends already do so. The Saturday night gap in the train service is the longest gap in the week (and on the lines in question is the only access to allow any work other than patrolling) and provides the biggest work output and hence the most efficient work slot. The proposed

possessions allow for the maximum amount of work to be undertaken in a manner that causes the least disruption whilst utilising the assets available to Network Rail to their maximum (Annex M).

- 4.3.4 In making the decisions in question, Network Rail must do so via application of the Network Code, specifically Part D and D4.6 (the Decision Criteria) in 'the most efficient and economical manner in the overall interest of current and prospective users...'. It is submitted that the GBRf SRD only reflects the effect on their business and not the impact on the network from a holistic viewpoint.
- 4.3.5 Network Rail would also draw reference to the fact that ORR Improvement Notices were served on Network Rail in August 2019 following fatalities at Margam (Annex C). Network Rail has a legal duty to comply - failure to do so will result in prosecution. The effect of these notices is that unprotected Red Zone working is no longer permitted and a commentary on the same can be found in Annex B.
- 4.4 Why the arguments raised in 4.1 to 4.3 taken together favour the position of the Defendant**
- 4.4.1 Network Rail is legally obliged to act on the ORR Safety Improvement Notices. There is no ability for Network Rail to derogate from legislation, Licence Conditions etc.
- 4.4.2 All industry participants have a responsibility to be aware of and understand the implications of recommendations in any RAIB Reports. There is an expectation that such recommendations are implemented where practicable.
- 4.4.3 With the option chosen by Network Rail there is no increased cost base as the patroller already works midweeks. There is no impact on rosters or union involvement. The patroller would be safe as there are no trains running at this location and at the time. Network Rail's cost base would be increased by any requirement to undertake these patrolling activities at weekends. All available staff are already rostered at weekends – undertaking numerous work activities which cannot be done at other times. Staff in these roles have a limited number of weekends off for family and leisure activities (the same applies to traincrew and operational staff) so forcing them to work more weekends than they do now is not possible nor is it allowed under National Union Rostering Agreements. Additional competent Network Rail staff will be required to undertake this work. Patrollers have to work in a specified area. Utilising this 'no booked service' time at this location negates any cost to Network Rail including any payment of compensation to Operators as there are no trains running. If the argument being presented by GBRf is purely that there is an acceptable alternative time for the possession which costs Network Rail more, we should point out that Network Rail have (for the last two control periods), operated under a Framework Agreement (publicly available document) which stipulates under Section 6.18 that "Network Rail will manage its treasury and financing arrangements efficiently to provide value for money, in accordance with Managing Public Money, this Framework Agreement and Accounting Officer letters." All decisions taken must consider our Framework Agreement obligations as well as the Licence Conditions and are implemented through the lens of the Network Code.
- 4.4.4 Network Rail has made every reasonable effort to plan the work in a way which does not affect train services (Annex H) There is no additional resource available to undertake this patrol on a Saturday night. This is why Network Rail sought and proposed the possession at a non-disruptive time. This mitigates the



cost as much as possible and ensures we are efficiently managing public money. It is Network Rails responsibility to maintain and operate the railway and to do so in a safe and efficient way.

- 4.4.5 If a TOVR was submitted under condition D3.3, Network Rail would apply the Network Code with a view to accepting, modifying or rejecting accordingly. Currently no such request has been made and GBRf have not provided any evidence of such a request within their SRD.
- 4.4.6 Network Rail has changed how it monitors the infrastructure where it is possible to do so, but there is still a requirement to use people to undertake this work, and they must be on or near the line to do so.
- 4.4.7 In order to comply with the Improvement Notices issued by the ORR, Network Rail has reviewed many types of work undertaken using unassisted Red Zone working. Whilst it is accepted that GBRf has an unfettered right under the Network Code to raise a dispute with any decision they disagree with, the arguments presented to this Panel by Network Rail are that Network Rail followed/applied Network Code D3.4/3.5 correctly when requesting this additional access to ensure that our patrollers are not put at serious risk whilst undertaking inspections of the line. Network Rail reviewed the Timetable and at the time of the decision there were no train services, nor had any TOVR's been received from any Timetable Participants under D3.3 to run a service. As such, it is submitted that there is no impact on any services. Network Rail are able to patrol the line safely and in line with the legal obligations placed on it by the ORR and if at future point a Timetable Participant were to require use of the Network this can be applied for under D2.4 or D3.3 and under the EAS Introduction Section 1.5.2 (Annex I). Network Rail would also reference 1.5.4.1 and 1.5.4.2 and note that as GBRf did not respond formally (within 10 days or otherwise) they are deemed to have accepted the proposed change and forfeit any right of Appeal.
- 4.4.8 GBRf allege within Section 5.1 of their SRD that 'insufficient consideration' has been given to the impact of the proposed possession on GBRf. Network Rail would ask for additional clarity on this matter from GBRf as to how they believe there has been insufficient consideration of the impact when it is demonstrated that the possession in question is non-disruptive?

## **5 DECISION SOUGHT FROM THE PANEL**

- 5.1 There is a fundamental issue of principle on this issue. Both GBRf and Network Rail agree that staff must be safe when working on or near the line. GBRf have alleged "...Network Rail has to change the way it undertakes maintenance and very likely its cost base will increase" (GBRF SRD Section 5.7). Network Rail submit that this imposes unreasonable cost demands on the industry and unnecessary additional expenditure of public money on resource that is not required as with the decision made by Network Rail existing resource is being efficiently used and there will be no requirement for compensation to be paid to operators as there are no trains running at the times and location of this possession.
- 5.2 Network Rail note that GBRf request the Panel find Network Rail are 'remiss' in its implementation of its decision under D3.4.6. Network Rail submit that GBRf have misunderstood the application of D3.4.6 which relates to Network Rails ability to make changes to the procedure for changing the Rules. Network Rail has not made any changes under either D3.4.6 or D3.4.3 and as such request that Panel determine it has not been 'remiss' in this matter (Annex J).

5.3 Network Rail note the Panels Directions request in relation to 'exceptional circumstances' and would argue that they are not applicable in this scenario. Network Rail also note the Panels query raised with GBRf regarding their intended request on the basis that there is no provision allowing the Chair to 'strike down' a decision and would also welcome GBRf's clarification on this matter. Network Rail reserve its position regarding TTP1520 and comments on the same until such time that we have clarity regarding what it is that GBRf are asking on this occasion.

5.4 Network Rail would note that if its submissions are accepted, in conjunction with the Directions issued, that GBRf have asked for two determinations, the first of which Network Rail submit is not applicable and the second of which has been challenged by the Panel.

5.5 The Defendant is requesting that the Panel determine that:

- (a) Network Rail have complied correctly with the process as set out within Part D of the Network Code.
- (b) Network Rail have correctly undertaken consultation of this matter in line with Part D of the Network Code.
- (c) Network Rail have applied the Decision Criteria under Part D of the Network Code in reaching its decision.
- (d) The Access should remain as proposed by Network Rail and the decision associated with this possession is upheld by the Panel.

On the basis that this determination has the potential to have far reaching and very serious access and safety implications, Network Rail would ask that the Chair provide a clear and detailed response with reference to the powers contained within both the Network Code and the ADRR.

## 6 ANNEX

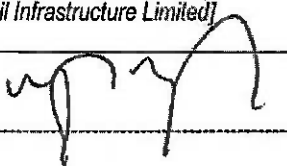
- (a) *Margam RAIB Report Extract*
- (b) *Network Rail Produced Safety Timeline and Additional Commentary*
- (c) *C1. ORR Improvement Notices and C2. Information on ORR Notices.*
- (d) *Network Rail Produced Timeline of Events*
- (e) *Track Patrolling Standards*
- (f) *EAS Extracts*
- (g) *Network Rail Decision Criteria*
- (h) *Copy email communication from Network Rail Train Planning*
- (i) *EAS Section 1.5.2 and 1.5.4*
- (j) *Copy email communication between Network Rail and GBRf*
- (k) *Network Rail Letter from Director for Safety Taskforce*
- (l) *GW130 PPS Data Notification*
- (m) *Network Rail Maintenance Email (Internal)*

## 7 SIGNATURE

For and on behalf of

*[Network Rail Infrastructure Limited]*

Signed



Print Name

Tony Worgan

Position

Access Planning Manager, Western Route