

1 MR GIBBENS: That's one option, yes. The other thing that we don't know yet we genuinely
2 have to do some design on, is the length of switches that would be required to deal with
3 that high speed alignment.

4 MR BOON: There must be lots of other high-speed alignments around the country where you
5 can actually say yes, it looks like one of those switches.

6 MR GIBBENS: And in terms of the length of switch and what have you, yes.

7 MR BOON: You can estimate that because you do it for business planning purposes in
8 everything, so you get to an AIP pretty quickly, I would have thought, not six months.

9 MR GIBBENS: So this is where we – if we have to do what we have to do that's fine. What
10 we want to try and do is we want to try and have a conversation about a few metres here
11 and a few metres there, a few miles an hour here, a few miles an hour here. So, we want
12 to talk that through the industry to find something that gets us the best length of loop, the
13 best line speed we can get that kind of is the best thing for everybody, rather than just
14 simply going no, like-for-like replacement.

15 MR BOON: All right, I suppose my inclination was simply that because we are focussing on
16 the freight sort of usage largely, then we'd probably have a clearer view as to what
17 would be the worst minimum they could tolerate, which would give you that sort of
18 understanding to understand the length of switches you're going to need for high speed
19 turnings. So, I just wonder how many conversations you need to actually get to your
20 AIP option, which you provided six months for.

21 MR GIBBENS: We have set out a timeline that is shorter than our normal timeline for three
22 and four.

23 MR BOON: Three I'm talking about.

24 MR GIBBENS: Yes but we set it out for the whole process that ensure that the standard
25 timescales.

26 MR BOON: But it's pretty reasonable to expect you to push the boat out on this isn't it, and
27 actually really not just do well, but do brilliantly.

28 MR GIBBENS: We are doing that. We are doing that.

29 CHAIR: I think what you have just said is really quite telling. 'If we had to do what we had to
30 do then we could do it. But if we do what we want to do, taking into account everything
31 and everybody, then it's going to take us longer.'

32 MR GIBBENS: We don't want to do this again, sadly.

33 CHAIR: For the reasons I've described before, as a matter of law and contract, it is not the

1 subject of this dispute – the function of this ADA – to try and judge on the merits the
 2 competing interests of everybody concerned in this particular reconfiguration. That was
 3 done exhaustively at the last ADA, on this subject. Do you –

4 MS DWYER: I agree with you the purpose of this dispute is not to redo what was considered
 5 last time. A number of issues were considered last time and we had the benefit of your
 6 helpful – and the time that we spent last time, I believe over two days, I seem to
 7 remember, including quite late the first night. We don't have to go through all of that,
 8 but what we do have to do is to get to a position where Network Rail is required to
 9 reinstate, it has already agreed to reinstate the Loop as quickly as it can do so. It has set
 10 out a timescale, which it believes is the minimum it will need to do the job properly,
 11 taking into account its obligations as a network operator and as a spender of public
 12 money.

13 CHAIR: Well I think we are differing.

14 MS DWYER: If you need more information on any of that timescale you are at a situation
 15 now where you have evidence from Network Rail as to how long it will take, you don't
 16 have evidence from other people as to how long it will take. If you need more evidence
 17 from Network Rail we will get it for you. I don't think you can simply, for example, to
 18 take it to its absurd length, say 'you've got to reinstate the Loop by the end of August
 19 this year.' I know you wouldn't do that, you recognise it's impossible. It's getting to the
 20 right solution.

21 CHAIR: I'm trying to refine what are the absolute minimum proper constraints to take into
 22 account.

23 MS DWYER: I understand.

24 CHAIR: Timewise.

25 MS DWYER: We will give you whatever you need to understand precisely how long it will
 26 take; you simply need to ask us. We have come prepared as much as we could do today.
 27 If you need more, we will go and find it for you, and share it with everyone else. In the
 28 meantime, I'll get on with doing what we're doing. I'm trying to –following the time
 29 we've got here. I think I can say no more than that. I think we all agree where we're
 30 going.

31 CHAIR: Yes, I want to take issue with just a bit of what you just said, that yes, this part of the
 32 dispute is about trying to get to a sensible, practical remedy to do what you are obliged to
 33 do already, as soon as possible. That's not the same thing as doing what you are obliged

1 to do; because by definition you can't do that anymore because the time has passed. And
 2 what we're drilling down to in this part of it is what, 'as quickly as possible' means.

3 MS DWYER: I agree.

4 CHAIR: And what are the considerations to take into account, that's why we've been going
 5 through fairly exhaustively, the fiscal, legal and then the practical constraints. Now the
 6 practical constraints are, as explained by you, being expressed to include, as I read it,
 7 more than the bare minimum. Because they are including other considerations about 'we
 8 want to do what's best', and that's taking into account a whole lot of other considerations
 9 and not purely the situation between Network Rail and the Dispute Parties to this dispute.

10 MS DWYER: I don't think that's what we're being told really. This is about getting to the
 11 fastest practical solution. We're not trying to bolt on nice to haves in an ideal world or
 12 anything like that at all. This is actually about trying to achieve what you want to
 13 achieve which is getting this done as fast possible.

14 MR GIBBENS: I mean, thinking, this definition of practical in a sense is to get to the best
 15 option not the worst option.

16 CHAIR: But taking into account as I understand it from what you said, other considerations
 17 which are not necessarily binding on Network Rail.

18 MS DWYER: Line speed is binding.

19 MR THACKRAY: Can I just quickly jump in? In terms of Network Change precedent, the
 20 *Gotcha* case that Cross Country recently brought when Network Rail made a change to
 21 the Network, they believed didn't fundamentally alter the operation of the railway.
 22 Cross Country then ran a dispute on that, which we were successful in. It's not
 23 necessarily a perfect precedent in this case, but it's an example of where an operator has
 24 taken Network Rail to task over something that they presumed would be simple to
 25 implement but that's then become a much bigger issue.

26 CHAIR: I am sure there are many such instances but that and the other instances I don't think
 27 have ever been in the light of an already issued tribunal decision.

28 MR THACKRAY: I agree.

29 CHAIR: Nor of a soon to be issued tribunal decision.

30 MR THACKRAY: Not having seen the Network Change we've been discussing here that was
 31 issued, was it a Network Change that should never have been issued in its form because
 32 it went against the adjudication from this Panel or was it a Network Change that was
 33 carried out incorrectly, and does that make an impact on how this is looked at?

1 CHAIR: That is an issue that we've just started looking at, isn't it, as to whether
 2 notwithstanding that the ADA17 determination permitted going ahead with the Midland
 3 Main Line general Network Change – notwithstanding carving out the Loop – it was still
 4 subject to compliance with everything else. It may be that that means it should still have
 5 taken account of the fact that the Loop was there.

6 MR BOON: It's probably fair to say that the line speed would never have been like it is now if
 7 they had done it properly.

8 MR OATWAY: That was the implication of what I was saying earlier, Yes.

9 MR GIBBENS: We've made a lot of errors in this and we've apologised for the errors that
 10 we've made and we've said a number of times that what we've got in the situation that
 11 we're facing and we want to try and make the best of it as we now can. I'm not sure that
 12 compounding the mistakes and errors we've made by putting something in place that's
 13 not best overall for the industry is the right thing to do, and I've not rehearsed this with
 14 Clare, I just wondered what the public policy implications of this are if we suddenly take
 15 a bit chunk out of the line speed here without giving it due thought and consideration
 16 because we're trying to work through some definitions of what a practical time scale is.

17 CHAIR: I don't know what the public policy implications are. I do know that this forum, like
 18 all the other Access Dispute forums, is required to determine the dispute on the grounds
 19 of the legal entitlements of the parties, not on grounds of public policy considerations.

20 MS DWYER: But in accordance with the law.

21 CHAIR: But in accordance with the law.

22 MS DWYER: Yes, subject to due process. We would say on this side that if you impose on us
 23 something which says, for example, you issued a determination today that says you don't
 24 have to follow the Network Change procedure, that would not be following due process,
 25 for example. Let me expand on that. I don't think you would do, but if you said today –

26 CHAIR: The Network Change procedure is a matter of contract.

27 MS DWYER: Yes.

28 CHAIR: So is the disputes resolution procedure, and the powers of an ADA or any other
 29 disputes tribunal are given by contract. That includes the power to modify contracts.

30 MS DWYER: I agree.

31 CHAIR: That's where I'm going.

32 MS DWYER: There are third parties involved in this who are not present within this room
 33 who would not have been consulted on the dropping line speed that would then result. I

1 wonder if we –

2 CHAIR: Those third parties are all parties to contracts which include the provisions of the
3 Network Code and of the Access Dispute Resolution Rules.

4 MS DWYER: What would you say if a challenge were to be brought by another train
5 operating company to the reduction in line speed pursuant – and Network Rail's answer
6 was, 'We didn't consult on a reduction in line speed because of an ADA determination
7 of which you were not notified and you were not consulted on as a result of that'?

8 CHAIR: Whoever was determining that particular dispute would have to decide which took
9 precedence.

10 MS DWYER: I think where we'd get to is that Network Rail, in recognising that the line
11 speed is what it is at the moment and wanting to reduce it, if that is in fact required once
12 we've been through all the design process, if it's still required to drop the line speed,
13 Network Rail, I would say, would still have to go through the Network Change
14 procedure. If it didn't, it would end up at ADA and that ADA would then have to look at
15 this decision as well, so you'd end up with two different ADA issues. I couldn't possibly
16 advise Network Rail to ignore this procedure.

17 MR GIBBENS: I just think from a personal point of view we don't want to be sat here again
18 with a dispute again with the chairs changed round, do we? I think that goes back to the
19 point of practical time scale.

20 CHAIR: It's fine to make that observation, but you might have thought of that a few years
21 ago.

22 MR GIBBENS: But this is, we're talking again, we're trying to have a discussion about
23 practical timescales and we're trying to justify some reasonableness in those timescales
24 to not, to not put the parties in difficult positions.

25 MR BOON: I think the difficulty, Spencer, is that you went from eight months a couple of
26 years ago, being a reasonable time to install for the short term Network Change proposal
27 to something that's become blossoming out to massive numbers, and I think the
28 difficulty for people looking at this is just seeing that every time you come up with a
29 timeline, it gets longer and you know, you even delivered one that said September 17,
30 didn't you, and said, 'Oh let's call it for the December Working Timetable,' and now
31 you've come up with one in March 18, so even within the last few weeks, this just goes
32 out every time you look at it, and it doesn't give confidence to people that you are really
33 trying to do your very best.

1 MS DWYER: We pulled it back a little bit from December to, I believe, it's August.

2 MR BOON: Well, you did actually say by September which I read as August anyway.

3 CHAIR: Yes, but the original estimates were December 2014, then September 2015, then out
4 to 2017, then out to 2018 as is said. The timescales have just gone out and the money's
5 increased as a result of what you say were unspecified mistakes and misjudgements.
6 That does not really inspire much confidence in the timeline that's being proposed now,
7 which is why we are trying to test it quite rigorously.

8 MR GIBBENS: I think just to repeat what Clare said, we are happy to provide more
9 information to this and we are more than happy to look at alternatives that are suggested,
10 so we can compare and contrast if somebody's got a better view, because we're saying
11 what we think can be done.

12 CHAIR: Well, I think we need more, we need more information that can be assessed by those
13 who are capable of assessing it as to where the absolute bottom line constraints are,
14 sifting those out from the ones which are, strange as this may sound, just for the greater
15 good or trying to get a good solution all round because that, well, although it might seem
16 ideal is not actually the legal purpose of this dispute, nor the constraints binding on this
17 dispute.

18 MR GIBBENS: So could we perhaps introduce the next bit, which is an external process
19 which is the access that we require to put the – I mean, I've glossed over the fact that we
20 put in there what the lead time is for materials. That's something we can evidence and
21 state as fact. I think the other thing that is external to us is the access that we require to
22 do this work, and we've stated that we would need a number of disruptive possessions –
23 access to the railway – to complete the work.

24 MR BOON: That is the lead time on those switches on the critical path, is it?

25 MR BACON: Yes.

26 MR BOON: It is? Can I just ask a second question. Going back in time, I seem to remember
27 we used a lot of prefabricated crossings to actually get ourselves out of a hole then which
28 we got ordered very quickly. Is that technology no use to us?

29 MR GIBBENS: I think, you do know this site quite well and again, if it helps, we have got
30 some video of the site.

31 MR BOON: On that specific point, though.

32 MR GIBBENS: This will be a long way from a [bespoke?standard?] piece of equipment. It
33 will be a specifically manufactured set of S & C. There is no reason, I don't think, why

- 1 it can't be modular S & C, but it will be a bespoke.
- 2 MR BOON: It will still take that long?
- 3 MR GIBBENS: It will be a bespoke design.
- 4 MS DWYER: That takes us to August 2018.
- 5 MR OATWAY: Could I ask Network Rail through the Chair a quick question, please, if
6 possible? Is that if it is on GRIP 3?
- 7 CHAIR: Yes, if it's on GRIP 3.
- 8 MR OATWAY: I was just thinking about shortening the timescales. I mean, if the authority
9 for the funding will get 'noddled through' can we start GRIP 3 now? That would take
10 another two or three months off the timeline because under GRIP 3, I think you said
11 Spencer, Network Rail would want to have discussions with operators about possible
12 minor changes such as a few metres less here and a few miles an hour there and so on.
13 Why can't we start those discussions now? Why do we have to wait until the end of
14 September before we can start that process because if we can do things in parallel, well,
15 then, that has to benefit everybody.
- 16 MR GIBBENS: Would you like me to respond? I don't think there is any need to wait for
17 September for discussions to go along. We will carry on discussions outside of this. I
18 think the issue that we've got right now is we're talking through the information we
19 know and we'll talk more as information becomes available through the design process.
- 20 MR OATWAY: Thank you.
- 21 CHAIR: So that's an element of truncation. I wanted to ask the same question in relation to, I
22 suppose, GRIP 5 and GRIP 4. Can you not get on with GRIP 5? Shorten GRIP 4 to six
23 months. Is there any reason why the detailed design could not be got on with?
- 24 MR GIBBENS: It's very difficult to answer that question now until we have been through the
25 design process. If we could actually power on, how long GRIP 5 takes very much
26 depends on the method of construction that we're going to choose.
- 27 MR BACON: And the solution.
- 28 MR GIBBENS: And in fact, we have put it here as a separate phase. It may be possible to
29 combine that phase with the GRIPs we have discussed, but it would be foolish of me to
30 say with the information we've got right here, right now, that we could do that, but that
31 can certainly be an ambition.
- 32 CHAIR: You're aware that anything you say could be an ambition is likely to end up as a
33 binding obligation.

1 MR GIBBENS: Yes. Again, there's nobody around this table got any evidence that we can
2 combine GRIP 5 and 6 phases yet, so we need to do that design work to be able to do
3 that.

4 CHAIR: Combine GRIP 5 and GRIP 6?

5 MR GIBBENS: Yes.

6 CHAIR: I was talking about combining GRIP 5 and GRIP 4.

7 MR GIBBENS: Because quite often we would do a design and construct approach which
8 would pick up the –

9 CHAIR: Oh okay, well, I was going to come on to GRIP 6, which includes the access and I
10 was going to ask why you can't give notice now for whatever possessions you need.

11 MR GIBBENS: So, again, we would need to do an element of the design work and the
12 procurement work to be clear when we can actually request a date that is credible. If we
13 were to speculatively put some dates in, all of the operators would ask us for the detail
14 and we wouldn't be able to give them that and we wouldn't know whether they were too
15 long to do the work.

16 MR BACON: Can I add something as well to that? The design will also be built from the
17 access that we have, and so if we go for a blockade, for instance, it doesn't class as one
18 stage, so you can just build one design stage, lasting four or five weeks for instance,
19 we'd have to build stages into that so it could be carried out in four stages which makes
20 the design longer as well, and so the design and the access have to tie in almost so we'll
21 have to be at least starting the design and know what's happening.

22 CHAIR: So, why can it not be done in the quickest possible way if that's a blockade, which
23 truncates the design period as well?

24 MR GIBBENS: So, that's the bit that is subject to external influences because of concerns I'd
25 be getting to that level of access from the operators.

26 CHAIR: And if agreement isn't reached, ultimately you can impose it anyway and pay
27 compensation?

28 MR GIBBENS: If we dispute it, we pay compensation.

29 CHAIR: So it can be done.

30 MR GIBBENS: We can impose access, yeah.

31 CHAIR: And is there a reason why you shouldn't in these circumstances, in the unusual
32 circumstances you find yourself in?

33 MR GIBBENS: Well, because I don't think it's in everybody's best interests to do that.

1 CHAIR: Everybody's best interests? Can I repeat that we're not here today to adjudicate on
2 the whole world's best interests?

3 MR GIBBENS: Yes, and I think, you know, we've got interested parties but we've got the
4 applicants in here as well and those applicants can speak for themselves. They would,
5 they equally would want to know what Network Rail was doing essentially in terms of
6 asking for a closure of the railway because they would have their own planning to do and
7 the impacts of that that they would have to take into account.

8 CHAIR: The remainder of the GRIP 6 section of your paper is pretty much to do with
9 integrating this with Derby Station works. Same question. Is that mandatory in a legal
10 sense or something which in an ideal world, which we're not in, could need to happen?

11 MR GIBBENS: I think we established that we're trying to do something practical rather than
12 just riding rough shod over the access requirements.

13 CHAIR: So all that lot taken together, your present estimate takes it out to August 2018. As I
14 said earlier, I think realistically one is probably debating between 2017 and 2018 and not
15 any earlier.

16 I want to take an adjournment shortly just to consider some of these issues before
17 we move on and leave the practical remedies side of things, but while we can consider
18 some of those issues, I think I would like you, Network Rail, and you, Claimants, to be
19 considering what additional information you can require, you can provide, to put flesh on
20 the bones of this; and I know this looks like it's quite detailed but actually, as we've been
21 picking through it, there is more to it, to pare down to the bare minimum what can be
22 overlapped, truncated, duplicated in a certain amount of detail with a view to shortening
23 the periods, and in a form which can be assessed and tested by the Claimants. It may
24 assist if you discuss among yourselves during this period to try to establish what that
25 would be, because what I am trying to get to are really the bare minimum unavoidable
26 external constraints and not just the ones which make life easier for everybody. So,
27 Claimants, if you'd like to consider what you would expect to see in that respect and you
28 might like to communicate that to Network Rail.

29 MR OATWAY: Okay. Ian and I will have a discussion between us and then we can let you
30 know our joint thinking.

31 CHAIR: That is not a discussion I am going to invite the interested parties to participate in but
32 no doubt you'll want to have thought amongst yourselves as to where that leaves you and
33 then we'll come back and maybe wind up on that, and then move towards the

1 considerations of remedy and enforcement.

2
3 **Adjournment**
4

5 CHAIR: Right, you have obviously been having a word. You can enlighten us in a sec as to
6 what that's produced. First, I think it's probably helpful in a way if I indicate that I've
7 been considering the issue over the Network Change procedure, which may or may not
8 be occasioned by a particular type of reinstatement of the Loop, one of a number of types
9 of reinstatement. I have concluded – well, I thought to start with - that the tribunal does
10 have the power under the Rules among other things to make a determination that in
11 effect excludes the requirement for going through the Network Change process or
12 otherwise for excluding or exempting from the need to comply with certain procedures
13 of the contract. That is part of the purpose of the dispute resolution procedure.

14 That's a proper interpretation of the Rules and the powers of award under the
15 Rules and for what it's worth that power was exercised in ADA17. In the paragraph
16 after the one you quoted, which actually was the core of the determination – 7.4 – (the
17 subject of paragraph 7.5, which is the one that dealt with timescales) 'Network Rail is
18 required to reinstate and reconnect to the Network the Loop at its full length... in a form
19 at least equivalent to the physical form or layout in which it stood prior to [it being taken
20 out] and otherwise is permitted specifically pursuant to this decision to reinstate the Loop
21 in its modern equivalent form at the time of reinstatement' – so that would include
22 whatever binding Standards, signalling, etc. – 'in either case without being obliged to
23 establish or implement a new Network Change solely in respect of such reinstatement
24 and reconnection'. And that was not appealed. So I give you that for what it's worth.

25 MS DWYER: Do you want any comments on that or can I ask you where you find your
26 authority for the present situation to make that determination if you're so minded to do
27 so?

28 CHAIR: Well obviously I will spell this out in due course, but it's in the Rules – Chapter G of
29 the Rules at Rule 47, which spells out what orders can be made.

30 MS DWYER: Which paragraph?

31 CHAIR: The opening paragraph.

32 MS DWYER: Where do you find your authority for saying effectively that in the context of an
33 individual dispute with certain parties that can actually override the interests of those that

1 are not present in the room?

2 CHAIR: Because they are all party to contracts that include the core of the Access Conditions.

3 MS DWYER: So to take a more extreme example, if you determined as part of this dispute
4 that something – that it required an adjustment to the other end of the Main Line in St
5 Pancras without giving anyone who's not in the room the opportunity to comment on it,
6 you say you'd have the power to do that without involving them at all?

7 CHAIR: No, because it would have to be relevant to the dispute.

8 MS DWYER: I'm struggling.

9 CHAIR: There is an overriding test of relevance.

10 MS DWYER: I'll see how it fits in. I'll see how it fits in, but I actually – I follow what you
11 say about paragraph 7.4 – I follow that – but I don't think that gives you the power to
12 require now, for example, that a presently implemented line speed, which is going to be
13 lowered potentially depending on the design, gives you the power to require Network
14 Rail not to undertake the procedure that is laid down in here for dealing with any
15 Network Change when you effectively have a new Network Change as a result. I don't
16 think the Rules deal with that. I think it requires you to –

17 CHAIR: Yes, but arguably it's not a new Network Change.

18 MS DWYER: We are six years – we are three years further on. I know. I can see the
19 difficulty you're in, but as I say, there is a procedure to be followed. In the case of a
20 Network Change there is a procedure to be followed and I don't think you can ignore
21 that.

22 CHAIR: Arguably that paragraph of that determination still stands in its own right as a
23 binding obligation without further ado. The fact is that a timescale was then set for it to
24 be done by – in other words, the Network Change that set the line speeds was not itself a
25 proper Network Change if it did not take into account that. That's the point that's been
26 raised.

27 MS DWYER: Do you want me to say anything more on that?

28 MR GIBBENS: No.

29 MS DWYER: Okay. We'll move on.

30 CHAIR: Okay. Right. Against that background generally have you – I'd still like to get to - a
31 sensible, proper, legally effective, new time limit to express when to do what should
32 have been done before, which now can't be done by that time limit. That was the object
33 of going through these constraints. Have you managed to come to any conclusions

1 separately or together as to what that time limit might be or at least what the proper
2 constraints are to be taken into account?

3 MS DWYER: We had some discussions and we have agreed to provide some information to
4 Railfreight and DB Cargo to be able to go away and consider the situation. Do we need
5 to add any more to that?

6 CHAIR: Right. I think I would like to know what information you are going to provide.

7 MR OATWAY: Do you want me to respond?

8 MS DWYER: Nigel has it.

9 MR OATWAY: There has been a lot of discussion, which we may go into further detail later,
10 about the line speeds and the Network Change that was or wasn't implemented back in
11 November 2013 in relation to those line speeds. We do not have the detailed information
12 as to what line speeds were implemented and what benefit those line speeds actually had.
13 So in other words, if the line speeds at Clay Cross had say, enabled a 10 second time
14 improvement that would be one order of magnitude whereas if it was a five minute
15 improvement that would be another.

16 So we have requested information about the effect the implemented line speeds
17 actually had on journey times,, particularly of the express passenger trains on the route.,
18 This would enable us to understand whether putting the line speeds back to previous
19 levels would actually have a material effect or not. From the information Network Rail
20 was able to gather immediately, but subject to confirmation, we think that the actual
21 savings that occurred in journey time was about 30 seconds; so in other words if the line
22 speed reverted back from 110 back to 80 there would be around about a 30 second time
23 penalty to the trains affected.

24 CHAIR: And if that were established are you saying that that would make it unacceptable to
25 you, make it not a Network Change that needed subject to what I've just been saying –
26 those processes?

27 MR OATWAY: The definition of a Network Change specifies that there has to be a material
28 effect on the Network or on the operation of trains on the Network.

29 CHAIR: It goes to materiality.

30 MR OATWAY: Yes. Is 30 seconds a material effect?

31 CHAIR: It arguably takes it outside Network Change definition.

32 MR OATWAY: And if the Network Change didn't need to be followed for either that reason
33 or for any other reasons you've alluded to then the GRIP 4 stage may be able to be

1 truncated. We are just looking for areas where the process can be quickened.

2 CHAIR: Okay. And are there any other areas where you actually nailed down that they could
3 provide rather more concrete information that would –?

4 MR GIBBENS: Can I just give a bit more on that because, as I say, it does have to be treated
5 as provisional and always with these things they are a little bit impenetrable in terms of
6 what it actually really means. The section of line from a place called Ambergate to a
7 place called Chesterfield had got – was split at Clay Cross, which is what makes it
8 complicated. So south of Clay Cross there's 53 seconds and north of Clay Cross there's
9 13 seconds saved, but between them – and the seconds don't mean anything because the
10 trains are all timed to what we call Sectional Running Times – SRTs. So for that 53
11 seconds south of there, there was half a minute benefit taken and for that 13 seconds
12 north of there, there was a half a minute benefit taken. So on the basis that –

13 CHAIR: So everything's rounded up to the nearest half minute for the purpose of SRTs?

14 MR GIBBENS: So on the basis of the whole section you've got a half a minute saving.
15 Anything in the Clay Cross area that actually gave a 30 second penalty would mean the
16 trains would arrive late at Chesterfield.

17 MR BOON: Would this move from 110 to 80 affect the whole section between Ambergate
18 and Chesterfield because one assumes it would not necessarily be the whole section?

19 MR GIBBENS: I think this is the complicated bit. It depends on whether a few seconds affect
20 those SRT roundings. That's the test and that's the bit where we can only give this as a
21 provisional answer. On the face of the fact that 13 seconds is given a half a minute
22 benefit – that's quite a rounding. But it does on the face of it work together, so we do
23 need to come back to that. Nigel might argue whether 30 seconds is material or not. I
24 think operators might argue that a 30% to 40% reduction in the line speed is material.

25 MR BOON: The likelihood in most cases, I think. Part G normally refers to a physical change
26 in the Network or a material change effectively to the way the Network operates – I think
27 things like whether it is RA, line speed, any of the measures that are important to
28 operators if they change they are seen as material. But as a general approach – but
29 you're right, it should be technically material, but materiality to I guess the operator – the
30 party that's affected most. It's not just material about Network Rail. It's about which
31 operator has materiality.

32 CHAIR: This is all very interesting, but what I was really after you coming back with was not
33 something that affected the issues of Network Change and other interested but not

1 Dispute Parties, but something that is perceived as materially affecting in a binding way
 2 this particular timeline, on the constraints that we've identified as binding already, in a
 3 form that could be assessed by the Claimants, and an opinion given for our benefit as to
 4 whether that produces the genuinely bottom line minimum, properly reasonable, having
 5 regard to all applicable binding constraints on the timeline to get this done.

6 MS DWYER: There were two more requirements that Nigel asked as well and they all have a
 7 potential impact I understand.

8 MR OATWAY: The second one was about what I mentioned in the last session that we had –
 9 i.e. making the GRIP 3 process run in parallel with the authority funding stage and if that
 10 could happen what would be the potential saving in terms of the timescale for the overall
 11 process.

12 MR KAPUR: Yes, we start that immediately.

13 MR OATWAY: Helpfully, Network Rail is considering giving us written updates periodically
 14 to keep us informed of exactly what's going on and when, so we can closely follow
 15 progress.

16 MR GIBBENS: So if I can just confirm that, we see both affected operators face to face every
 17 eight weeks, but we also said in between that probably either fortnightly or every period
 18 we would provide a written piece that was effectively what we were going to do in the
 19 last two – what we've done in the last two weeks and what we're going to do in the next
 20 two weeks to try to just build this trust item up that we're going to put this thing in and
 21 do what we say we're going to do. At least that would see and show very quickly if
 22 something was not going to happen in the way it was supposed to.

23 CHAIR: And what effect does that have on the end date?

24 MR OATWAY: That is what we've asked Network Rail. If we can start GRIP 3 now rather
 25 than on 1 October, as Network Rail currently proposes; does that result in the process
 26 being shortened? In other words, does the end of August '18 become the end of June or
 27 July '18 for example?. This is what we have asked Network Rail to consider as item
 28 number two.

29 Item number three was about Standards. We understand that if a scheme has
 30 already been started under previous Standards, that scheme can actually be carried out
 31 under those previous Standards. Therefore, any subsequent changes to Standards in
 32 certain circumstances do not have to apply to that scheme. If this is applicable in this
 33 case – and it is by no means certain that it is – but if it is then that may also lead to a

1 shortening of the timescales.

2 MR KAPUR: I can give you the references of those Standards if you need them now or later.

3 It's to use them and say, 'How far down are you in the process? Are you permitted to
4 stick with those old Standards pre-June '14, June '14, June '16?' And actually they need
5 to tell us how far that reduces the timescale. That's not something we could I think go to
6 out there just now there. It's another point to look at to say are you permitted to stick
7 with the previous Standards on this or not. It's a little bit like what we talked about
8 before, but it's a slightly different aspect. We didn't – we've not been able to put a
9 potential reduction in the timescale on that – well I haven't. I don't know whether
10 anybody wishes to hazard a guess.

11 CHAIR: Will you be able to?

12 MR GIBBENS: So just taking those couple of items, I am going to ask my colleagues. We
13 have started and committed internal Network Rail resource to this. Our governance
14 would be required for any external contracts that are let, but the question I've got for
15 Tom and David is in that period between now and the end of September is that
16 effectively writing up your scope documents in any case because there's no point in
17 trying to get some way ahead with the authority if writing scope documents will take that
18 long anyway.

19 MR BACON: We were originally working with Atkins on this project under the previous
20 scheme and that came as a part of our framework designers' work. Between now and
21 then we can start talking to Atkins again and getting them to look at what was done
22 previously and starting dusting that back down again.

23 MR GIBBENS: But would you be able to start any physical design work before the end of
24 September in any case going through that conversation with Atkins, getting them ready,
25 getting them on board ready to press the button?

26 MR MCMAHON: You might be able to start slightly earlier but not a great deal.

27 MR GIBBENS: The reason for that conversation is that front end bit is not going to make a
28 big deal of difference. It might make a week or so difference because we've still got to
29 go through the process of clearly writing the scope out and getting designers on board.

30 MR MCMAHON: I think those – sorry to interrupt. The thing that will determine the duration
31 of that is the scope to us. Obviously if you start looking at option selections that can be a
32 long piece or it can be a short piece. If the spec is extremely tight then that is a relatively
33 short piece of work. If it is the full development then you are looking at a lot more

1 options, so it's getting that scope right.

2 MR KAPUR: It is probably worth just adding on to that we were debating in the room which
3 way would we, the operators, think we would like this project to go. Is it speed – get it
4 done as quickly as possible – or is it go further down the development route and see what
5 you can get, and I think that we both said we would rather go with speed and get it done
6 sooner.

7 MR GIBBENS: So I think in terms of your question, Chair, no, we haven't got any closer
8 because we still feel the timeline we are going for gives the rounded solution and I don't
9 think we were on that same page.

10 MR KAPUR: No.

11 CHAIR: Right. What I'm asking you to give them, whether you agree to or not, is the
12 information relevant to put the flesh on the bones of what you've already provided, not
13 leading to your own, Network Rail's, rounded solution but leading to the solution that
14 you were required to implement by ADA17, which is to reinstate the Loop in its then
15 form or in its modern equivalent form. That decision permitted you to do that. I think
16 what we need to see provided is the critical path, and it might be assisted by having a
17 critical path diagram of some sort as well as the words, that can be assessed in a
18 meaningful way as to whether it does provide what one might objectively regard as the
19 irreducible minimum time for implementing that solution, i.e. implementing the previous
20 decision. Not anything else. Not any alternative.

21 Now, I'm just wondering whether it is worth asking the Claimants to express in
22 writing what they think having talked about it with you, i.e. itemising in writing the
23 things that are necessary in order for that alleged irreducible minimum timeline to be
24 properly assessed. I think that would help rather than us trying to record it now. So
25 perhaps you can express between you in a short time on this, what you think you agree
26 they will produce that relates not to the Network Rail preferred solution in the round, but
27 the legally required solution.

28 MR KAPUR: Yeah, we will do all that.

29 CHAIR: Network Rail could obviously, as it were, respond to that in the sense of saying, 'We
30 don't think this information is necessary to reach that assessment'. But I wouldn't want
31 to see a response couched in terms of, 'Well actually if you look at the real solution it's
32 this', because I think we've been there and done that. And on that subject – you talked
33 about the overlapping of I think GRIP 3 and 4. There was a question on the overlapping

1 of GRIP 5 and indeed GRIP 6 and the possibility of accelerating notice of possessions.

2 The last section in this paper under GRIP 6 I think is not on the critical path,
3 because it begins with, 'Alternatively, a complete closure could be obtained by running it
4 into the Derby Station works', and that, while it might be a solution, is not I think the
5 legally required solution to this particular issue. Presumably fortuitously it comes out at
6 roughly the same time – August 2018 – anyway. Unless you tell me otherwise, working
7 this into the Derby remodelling project is not a relevant constraint.

8 MS DWYER: Unless it gets you there quicker.

9 CHAIR: Unless it gets you there quicker. On the face of it it doesn't get there you quicker.

10 MS DWYER: I see that. Is that a possibility?

11 CHAIR: Right, I don't think we can bring it any further on what I characterised to start with as
12 the practical remedy, i.e. getting at effectively a new date for implementing the decision
13 previously made.

14 MR GIBBENS: May I ask you a question on that? I think we're actually going to provide that
15 for you and I want to be sure that I'm understanding what's being said to us. What's
16 being said to us is we need to find the fastest possible solution. I get that Network Rail's
17 bungling has put us into this position. I'm really saddened and disappointed from this
18 that we are going to make that bungling worse by putting the wrong thing in place.

19 CHAIR: I think the best I can do is to ask the Claimants, as it is their dispute on the basis of a
20 decision previously given, to assist in setting out in black and white the information they
21 require as to the timeline, to enable them to assess it and agree or disagree for our benefit
22 what the irreducible minimum timeline really is. Obviously we will decide that within
23 the light of that across the board. In setting that out, at the same time to indicate if there
24 is any movement in the substance of the claim on admitting, taking into account other
25 things that would otherwise sadden Network Rail, by way of – what's the word – taking
26 some of the corners off their claim. That is a sort of roundabout invitation to have
27 discussions and arrive at some compromise.

28 MR KAPUR: Yup.

29 CHAIR: This procedure of exchanging information will then, in any case, inform us in
30 assessing this particular issue. If, in the course of that exchange of information, which
31 will eventually reach us, you are able to come to an agreement as to a time limit, which
32 takes in some of the strictly speaking, extraneous considerations that Network Rail is,
33 with the best intentions, no doubt, considering, then obviously, you will.

1 MR KAPUR: We had started those conversations, obviously which was taking a bit longer
2 than minutes.

3 CHAIR: Yes, quite.

4 MR KAPUR: Pushed one way or the other.

5 CHAIR: Okay. Well, in effect, what I'm doing is opening the door for that process to
6 continue because that would obviously be the best resolution if you can agree on
7 something, rather than have it dictated. But, let me be clear, what I am ultimately getting
8 at is, in any case, something that will inform us in arriving at a date which will form part
9 of the determination. A date by which, in effect, the original decision must now be
10 implemented. And the only reason for acceding even to setting the new date is back to
11 the considerations, helpfully outlined by Clare earlier on, surrounding the granting of
12 injunctive remedies and mandatory conduct that it is, among other things, something that
13 must be practically do-able. As at, starting from the position where you're making that
14 decision, i.e. rather than going back. So that is taken on board.

15 MR OATWAY: Yes, that is something that we will need to take into account, bearing in mind
16 that as train operators, we are not responsible for undertaking re-signalling schemes and
17 other works on the network. Therefore, we have to take a lot of the information in terms
18 of the timescales for doing things (e.g. like getting the design houses in order) on face
19 value from Network Rail.

20 CHAIR: Exactly. On this issue, clearly all we're all trying to do is narrow down what looks
21 like, at first blush, 'Oh, it's going to take forever because we've got to do this', and on
22 the other side, 'Well, you can't possibly take that long over that', and trying to narrow
23 that down and meet in the middle somewhere. I think that's all we need to say at this
24 stage on the practical remedy.

25 MR BACON: Can I just say, probably a statement – it's in the notes, but I think it might be
26 worth mentioning just for the minutes, and that's one of our other external dependencies
27 that we do have –

28 CHAIR: Sorry, I didn't hear that?

29 MR BACON: One of our other external dependencies that we do have with delivering the
30 scheme is Siemens' resource availability. They are the only company that can do some
31 of the signalling things for us, and so we'll be heavily reliant on them as well. So, that is
32 part of what we have to do and what we have to deliver, and we have to sort that with –.

1 CHAIR: Actually, yes, thank you for bringing that to my attention. Is that – I was going to
2 ask about – or raise the issue of - the relevance of contractor dependence, because again,
3 normally if a tribunal or a court orders something to be done, the availability of sub-
4 contractors, or whatever, is not usually a factor in whether it can be done, and that would
5 have been my – that point, as I read it, has only, in any case, been raised in the context of
6 the alternate way of doing it, which is including it in the Derby project, is that right?

7 MR MCMAHON: I think it's the fact that they are actually the signalling contractor for
8 Derby. The issue here is the fact that the operating systems are WESTCAD which is a
9 Westinghouse piece of kit, which is what Siemens were previously, they're the only ones
10 with the licence to actually be able do the work on it.

11 MR GIBBENS: We have a single supplier for – it's a reasonably small piece of kit, but vital.

12 MR MCMAHON: It's the control end.

13 CHAIR: And does that apply then – would that apply then to the signalling works at Clay
14 Cross, taken in isolation?

15 MR MCMAHON: Not fully, because they would – we could –

16 CHAIR: Because that's what I thought you were talking about, having to go out separately to
17 –

18 MR MCMAHON: No. We can take that element out. If it's a WESTLOCK, which I'm
19 assuming it is – I am guessing because it was 2008, that's again a Siemens piece of kit,
20 ex-Westinghouse, so they would have to do the upgrades to that, make the changes to the
21 interlocking, they would have to make the changes to the WESTCAD. The front end
22 physical design can be done by numerous signalling contractors, and the installation can
23 be done by numerous signalling contractors. It's just that physical piece of work that we
24 need to make sure that we get their systems staff and their interlocking designers to
25 actually be able to do those works.

26 MR BOON: Is that not a good reason to do it before the Derby remodelling?

27 MR MCMAHON: I think the issue is, it's very much dependent on where their resource
28 currently sits because they're – it's just availability of an extremely limited resource.
29 I've started those conversations with Siemens already, so they're at least aware.

30 CHAIR: Is it naïve to think that if they are paid enough, the resources will be available for that
31 project as opposed to something else?

32 MR GIBBENS: We normally pay enough to Siemens as it is.

1 MR MCMAHON: Spencer is not going to love me for saying this, but ultimately, somebody
2 could turn round and cancel another signalling job to take the resource off it, if it was
3 determined that that had to be done.

4 MR GIBBENS: We'll try to avoid that.

5 MR MCMAHON: Yes, but all I'm saying is that's – you know, if somebody turned round and
6 said, 'You will do it then', then –

7 MR BOON: Because they work for you, basically.

8 MR MCMAHON: Yes. So, we would – somebody will tell them, 'That has to go on hold
9 while you sort this out'.

10 CHAIR: Okay. So, what I'm hearing is that that is not actually an irreducible minimum
11 binding constraint, contractor availability. Would anybody like to add anything on that
12 score? And I'm looking at the interested parties now. I've, to some extent ridden
13 roughshod over the whole line speed issue, but I hope you've heard what I've said,
14 including as to the possibility of ordering that something takes place and be done without
15 a Network Change.

16 MR THACKRAY: I think the only thing I heard is that if any conversations were to happen
17 about a compromise solution between these guys and Network Rail, if they're interested
18 in our input as to what we'd accept without any complaint, and what we might want to
19 look at in more detail, then we'd helpfully give that input.

20 MS MASI: Although we know what the dispute is between the Network Rail and freight
21 operators but hearing that, you know, it's the failure of Network Rail, not implementing
22 another change in the two or three years ago...

23 CHAIR: Sorry, I didn't get that?

24 MS MASI: It is about the failing of the Network Rail not implementing what they should have
25 implemented. And these are the consequences, like in the line speed, and reduction. So,
26 one thing I have to say, you know, if the Network Change process is not followed, that's
27 one of my main concerns, how can the affected parties be consulted on that
28 consequential impact?

29 CHAIR: I think the answer to that is partly that, in the particular circumstances which have
30 arisen, it could be that the affected parties are not entitled to be consulted. One amongst
31 many reasons, might be that the Network Change which instituted the present line
32 speeds, which is in their interests to maintain, was in fact not properly constituted in the

1 first place for the reasons that we have been exploring.

2 Another reason is simply that that's the way it is as a result of this sort of dispute,
3 and that's why the rules for these disputes provide for interested and potentially affected
4 parties to, in effect, be consulted, as part of this hearing. And that is why you are here.

5 MS MASI: Yeah. I am here today though as an interested party, and I understand that, but is
6 this a consequence coming out of ADA17, almost like leaving me to become, you know,
7 an affected party, but knowing that the Network Change is not to be followed, because
8 we just talked about, that, you know, is the bit that I'm not quite sure, because the
9 benefits of line speed improvement must be important to the industry. Often, in the last
10 three years, and to rule that out – well it depends on what the final determination is going
11 to be. I think any affected parties need to be consulted one way or the other.

12 CHAIR: Well, one way or the other, what I've just said to you, is that, in effect, to some
13 extent, you are being consulted by being here now, by having been invited to be here.
14 You did also have the opportunity to declare yourselves Dispute Parties, up to a certain
15 point. And if you'd chosen to exercise that right, as being potentially affected parties,
16 you would then have had additional rights, including the right to appeal any
17 determination. That's precisely what those provisions are there for, to give you, as
18 potentially interested, or affected parties, the opportunity to make good your interest, as
19 it were.

20 MS MASI: Probably the same as CrossCountry, you know, we need to understand what
21 freight operators know and what Network Rail's discussion – or the further discussion
22 was going to be, to understand what the impact will be.

23 CHAIR: I think we can properly say that any written information which is produced between
24 the Dispute Parties shall be shared with, copied to the interested parties. I don't think,
25 unless you represent to the contrary, that there are any confidentiality considerations on
26 that? Do you have any confidentiality reservations as to that?

27 MR OATWAY: No, none at all.

28 CHAIR: No, okay, thank you. Right, I think then on the practical remedy issue the only thing
29 to do is set a timescale for this exchange of information because we can't really get any
30 further on that issue without that, and at the same time the other thing that we've
31 mentioned, which we will go back over and itemise at the end. What's – what is a –
32 given the – we don't want to take up all the available time in further exchange of

1 information, so obviously, we want to make it fairly quick. What's reasonable? A
2 fortnight?

3 MR KAPUR: By next Wednesday?

4 CHAIR: Oh, a week?

5 MR KAPUR: We are all together. Well, I'm certainly – I'll probably see you next
6 Wednesday, won't I, all day, in Derby?

7 MR GIBBENS: So make some time next Wednesday?

8 MR KAPUR: So, I'm thinking by close of play Wednesday, so perhaps by – I don't know,
9 Friday? By close of play next Friday?

10 CHAIR: I'm not talking about when you can get together, I'm talking about when you can –

11 MR KAPUR: I will start this tomorrow.

12 CHAIR: Clarify in writing – when you can produce a written document stating what is the
13 information either you think they have already agreed to provide you with, or what else
14 you want, as to the timeline, leading to the irreducible minimum date that you need to
15 provide to supplement what's already been provided and what's been discussed, to
16 enable you to assess it, and give an opinion as to whether you're satisfied as to that date,
17 or not, or whether you still maintain that an earlier date would – so, we need a date for
18 providing that request because that's what it is, a list of what you want in writing, and
19 then we'll need a date for them to respond by.

20 MR OATWAY: We had a brief discussion before we started this latest exchange and we
21 believe that we can put our heads together tomorrow so that we can get our request to
22 Network Rail by close of play this Friday. Would that be sufficient for us to meet next
23 Friday to finalise everything Taking account of your meeting with Spencer in the
24 meantime?

25 MR KAPUR: Have you got time? Sorry, that's probably not the right question is it? Does
26 that –

27 CHAIR: I am obviously more than happy that you should meet but the required outcome is not
28 the minutes of a meeting but Network Rail's response to that request. If it's agreed to
29 meet, so much the better.

30 MR KAPUR: No, it's merely that we all happen to be in the same building next Wednesday,
31 so it may give – certainly me some opportunity perhaps, just to run over everything
32 perhaps before we send it. That was all. Because I'm there all day.

1 MS DWYER: You ought to just have a quick –

2 MR GIBBENS: Yes.

3 MS DWYER: Can we just nip outside?

4 CHAIR: Yes, of course.

5

6 **Adjournment**

7

8 MS DWYER: The quickest date we can produce all the information we anticipate that they're
9 going to require to produce – to enable everyone to then go away and analyse it, and to
10 assist you, is four weeks from Friday, so 12 August. And that's because a lot of the
11 information is not contained with the people within these rooms, but it's third parties that
12 we have to ask, to make sure that they're available and to provide information, and that's
13 taken into account absolutely everything. What we don't want to do is to say we can do
14 it in a week and then fail. We want to make it right.

15 CHAIR: I'm not going to dispute that for a minute in the way you're thinking. I suppose I
16 would just ask the Claimants whether given that time lapse that's – I don't know – are
17 we shooting ourselves in the foot in terms of getting a quick resolution?

18 MS DWYER: Well, in the meantime, obviously, we're going to be proceeding down the
19 timeline. So you're not actually going to lose time.

20 CHAIR: Okay, so taking account of proceedings –

21 MS DWYER: Don't worry, we're not – we're not going to lose from this.

22 CHAIR: Yes, well I hear that and thank you for saying that. That's a material factor in –

23 MS DWYER: I thought it might be.

24 CHAIR: In acceding to that.

25 MR OATWAY: Yes, that is definitely comforting because that would have been a concern of
26 mine, i.e. whether we would lose another month before things start, but if it is carried out
27 in parallel with starting along the timeline that we have already discussed, then that is
28 fine with DB Cargo.

29 MR BOON: So what date was that?

30 MS DWYER: 12 August.

31 MR BOON: Twelfth?

32 CHAIR: So you will produce the written request, whether or not after discussing with them,

1 by the end of this week, you were saying.

2 MR KAPUR: Yes. Do you want us purely, sorry, to send it to Network Rail, or do we need to
3 copy –?

4 SECRETARY: Copy us in because we need to be able to monitor progression.

5 CHAIR: You need to copy us in.

6 SECRETARY: And the interested parties.

7 CHAIR: And the interested parties.

8 MR KAPUR: And the interested parties.

9 SECRETARY: It's the same button we've been pressing for everything that's been going
10 round already.

11 CHAIR: Do we have a list of as it were of one person for each entity?

12 SECRETARY: Yes, there is.

13 CHAIR: So it doesn't have to necessarily go to everybody who's in the room.

14 SECRETARY: Nick is co-ordinating for Network Rail. Everyone else is a one man band.

15 CHAIR: Right. We're all happy with that. Yes, and send it to Tony who will send it to us.
16 Good. Well thank you for that. That hopefully will get us somewhere, on the practical
17 side of things. And now we come to the easy bit – the legal issues!

18 So I just want to go through, as briefly as possible, the helpful paper produced
19 this morning. First – and actually I am going to take remedies first and general
20 enforceability second. We've talked about constraints on making an order that
21 somebody does something, that has the effect of a mandatory injunction, and that's really
22 where we have been directing our efforts so far, including all practical and fiscal
23 constraints as applicable.

24 This leaves us still with the position that the dispute is brought under the
25 provisions of the Access Dispute Resolution Rules, which say that if a decision is not
26 implemented, that failure shall be 'dealt with' – large words – by a new dispute. And the
27 Claimants have in their submissions, at least, asked for this to be taken into
28 consideration. They haven't asked for specific remedies other than costs, which has been
29 accepted – we'll come to that later to tie it up.

30 What I will want to consider is, in the first place, some sort of monetary
31 remedies, which (to Network Rail) your representations assert are limited to damages,
32 and compensatory damages at that. So, first, as to whether they are limited to damages.

1 I will be considering this more, but I shall explore it very briefly now.

2 I go back to the Rules and the powers of a tribunal conducting an ADA, and Rule
3 47, Rule G47, which states:

4 ‘Subject to any other provision of the Access Conditions and Underlying
5 Contract, the Hearing Chair may make such orders in his determination as he considers
6 necessary to resolve the dispute’ – that, in my mind, would include dealing with a failure
7 to implement a previous dispute as per Rule 51 – ‘including, without limitation, that:

8 ‘a) one Dispute Party shall pay an amount of money (including damages) to
9 another Dispute Party, whether that amount is specified in the determination or
10 calculated in accordance with such procedure as the Hearing Chair shall specify’.

11 On the face of it, that says to me that the power to make an award that one party
12 shall pay an amount of money is not limited to damages, because it is an amount of
13 money “including” damages. I don’t take that, on normal principles of interpretation, as
14 meaning including only damages, exhaustively damages.

15 MS DWYER: You already have my comments on this in the paper. You are constrained by
16 the provisions that are written within the Rules. The Rules don’t provide for anything
17 other than the payment of damages. You are also constrained by the powers –

18 CHAIR: Sorry, the Rules don’t provide for anything other than the – I’m – ?

19 MS DWYER: They don’t.

20 CHAIR: What I’m suggesting is that this Rule here does expressly provide for an award
21 specifying something other than the payment of damages.

22 MS DWYER: What would you say that would be? I think it would be better if you say to me,
23 because I can read the words on the page; if you say to me, ‘It’s something beyond
24 damages’.

25 CHAIR: I want to get there in stages.

26 MS DWYER: Yes. Okay. You tell me, I’m not going to add to my submissions at the
27 moment.

28 CHAIR: My first stage is that – is that that provision expressly contemplates something, a
29 monetary award, other than damages.

30 MS DWYER: Then I would say, you have to take that in the context of the provisions of the
31 ADRR as a whole, and of the provisions of law generally, English law generally.
32 Beyond that, I listen to what you say.

1 CHAIR: Okay. And what provisions of the ADRR, first, do you say circumscribe that
2 apparently fairly broad —?

3 MS DWYER: The ADRR as a whole, and we've read them end to end doubly again, to make
4 sure, don't provide for anything other than the payment of compensation/damages. I can
5 read the words on the page, 'An amount of money, including damages', but there is no
6 reference anywhere else, to any other payment of any kind.

7 CHAIR: No, because it's here.

8 MS DWYER: Yes, it's here, and it says, 'including damages', but there is nothing — you need
9 to tell me what you think there is beyond damages which may be payable. Bearing in
10 mind that you can't look at the intention behind the Rules, you can simply read the words
11 on the page in the context that they have been set.

12 CHAIR: What it says is, 'an amount of money, including damages.' Are you saying that that
13 means only damages?

14 MS DWYER: It means damages, because there is nothing else to indicate anything beyond it
15 is payable. That's what it means in the context here. I'll listen to what you say, but
16 that's my — that's my submission on that point. It says, 'including damages', to make it
17 clear that damages are included, but it doesn't contemplate anything beyond it. Do
18 continue, continue, but that's my submission.

19 CHAIR: What I say is that the word 'including' does not normally mean 'including only' or
20 'including exhaustively', because, if it had meant that, it would have said, 'shall pay
21 damages'.

22 MS DWYER: Yes. It's compensation. Compensation includes damages. But — and that's all
23 you've got here, you don't have anything beyond it. Take the argument further on, and
24 I'll see where I get to, but there is nothing contemplated here beyond payment of money
25 which includes damages. So you need to tell me what beyond that, you think you have
26 the power to order. Because I've thought round this and my thoughts are set out in the
27 paper, and I don't think there is anything that, in English law, beyond the payment of
28 damages and beyond the other things that I say you cannot award, which are
29 contemplated here by the construction of the words on the page.

30 CHAIR: Right. Well, one possibility, an amount of money, because it is not specifically
31 excluded, is a deterrent or even penal award.

32 MS DWYER: My submissions on that are set out in the paper. You —

1 CHAIR: Whether that is characterised as damages, or just an award.

2 MS DWYER: I don't think you have the power to do it. It doesn't – penalties are
3 unenforceable as a matter of English law, they remain so. Punitive law, exemplary
4 damages –

5 CHAIR: Not all penalties.

6 MS DWYER: Penalties are unenforceable – they remain unenforceable as a matter of English
7 law, unless they have been clearly provided for in the contract, and set out – and they're
8 not there.

9 CHAIR: This would not be a contractual penalty.

10 MS DWYER: It is a contract – you're dealing with a contract, there's nothing else that's
11 payable.

12 CHAIR: Penalties – the penalties that you refer to as being unenforceable in English law - are
13 penalties asserted to be agreed in the contract itself.

14 MS DWYER: Penalties are – they are amounts of money paid *in terrorem* of a breach.

15 CHAIR: Yes, but imposed by one party, or sought to be imposed by one party on another, *in*
16 *terrorem* of a breach.

17 MS DWYER: We are looking at a contract here. You cannot impose penalties which are not
18 provided for within this contract. You cannot do it. On what basis would you assess the
19 penalty?

20 CHAIR: It's provided for by the language of the contract which includes the dispute
21 provisions – which includes the Rules, which includes Rule 47, which says, 'make such
22 orders... including, without limitation, that one Dispute Party shall pay an amount of
23 money...'.
24

MS DWYER: Penalties – that does not include penalties. I cannot repeat myself more often.
25 It does not include penalties. You don't have power to make a deterrent award, you do
26 not have power to make penalties, you do not have power to award punitive or
27 exemplary damages. If you persist in this line of argument and determine in that favour,
28 we will appeal you.

29 CHAIR: I'm sure you will.

30 MS DWYER: I can tell you that now.

31 CHAIR: So be it. I just wanted to hear your view on the interpretation of that provision of the
32 Rules.

1 MS DWYER: Yes, and that provision of the Rules has to be construed in the light of all the
 2 rest of what is said within the Rules, and the Rules, nowhere else, contemplate the
 3 payment of penalties, punitive or exemplary damages. They talk about a payment of an
 4 amount of money, including damages, and you construe that by reference to what you're
 5 trying to do. Damages, you're trying to put the people in the – the parties in the position
 6 they would have been, had the contract been performed. Had the contract been
 7 performed, they suffered loss, they can be compensated for it. They've not made a claim
 8 for such compensation.

9 CHAIR: Where in the Rules does that – you would say – sort of supervening principle of
 10 compensation appear from?

11 MS DWYER: It doesn't provide for anything beyond the payment of damages.

12 CHAIR: But where – yes, but – but damages, the word 'damages' can be in this and other
 13 jurisdictions, interpreted to include damages other than compensatory damages, which
 14 are not the same as penalties in a contract between parties.

15 MS DWYER: Not as a matter of English law. Not as a matter of English law. If they are
 16 characterised as penalties, then they are struck out, they are unenforceable.

17 CHAIR: Yes, in the provisions of a contract between the parties, but that's not what we are
 18 talking about here, we're talking about provisions –

19 MS DWYER: It's a contract, you've agreed it's a contract.

20 CHAIR: We're talking about the provisions of award – an award. And in any case, there are
 21 the clear words, 'shall pay an amount of money, including damages'.

22 MS DWYER: Where does that say you can provide anything beyond compensatory damages?

23 CHAIR: 'Shall pay an amount of money'.

24 MS DWYER: On what basis? Anything beyond compensatory damages is a penalty.

25 CHAIR: On the basis that it is an order as – is considered necessary to resolve the dispute.
 26 Now the dispute here is not just as to getting the Loop reinstated at all, or by a particular
 27 date, but it is also relating to the failure to comply with a previous decision.

28 MS DWYER: On what basis?

29 CHAIR: And that's a very relevant issue, not just because it is a failure, but because, among
 30 other things, that practical remedy we are coming to, is to set another date to do the same
 31 thing; and one thing which informs our thinking on that, is what happens on that date – is,
 32 'Well what happens if that date isn't met?'

1 MS DWYER: We're not there. We're not there yet.

2 CHAIR: And we are back here in another two and a half years' time with an apology and
3 trying to set another date.

4 MS DWYER: Let me put it this way. If it is not compensatory damages, the only other thing
5 you could be looking at, is a penalty or exemplary damages, neither of which are
6 permitted under English law. On what other basis could you be ordering any payment, if
7 it is not characterised as either a penalty or punitive or exemplary damages, which have
8 been very closely defined by what was then the House of Lords in *Rookes v Barnard*?

9 CHAIR: *Rookes v Barnard* concerned the tort of intimidation, as I recall, something rather
10 different.

11 MS DWYER: It did, it did, but it is the leading case on the award of punitive or exemplary
12 damages.

13 CHAIR: Yes, but we're not considering tort here.

14 MS DWYER: You still have to take into account, it is the leading case on punitive and
15 exemplary damages in whatever –

16 CHAIR: I'm not considering the failure to – the admitted failure - to implement a
17 determination as an economic tort. I'm considering it as a breach of contract.

18 MS DWYER: And the contract doesn't – I'll come back to this, the contract does not permit
19 you to award punitive or exemplary damages. Or penalties.

20 CHAIR: No, it has larger words than that. It says, 'such orders... as he considers necessary to
21 resolve the dispute including, without limitation, that one

22
23 Dispute Party shall pay an amount of money (including damages)...'.
24

25 MS DWYER: And that, as I've explained in the paper, that 'without limitation', does not
26 mean you can do what you like. It means that you are constrained by the provisions of
27 English law, on the law of damages, on the law of penalties, and on the law of punitive
28 and exemplary damages.

29 CHAIR: Right. Well, I don't think we're going to get any further on that. I'm interested to
30 have heard your observations on that, and I will take your paper and consider that in
31 detail. I invited you to identify any other part of the Rules which circumscribe the
32 apparently broad words of Rule 47, and I think you said there aren't any.

MS DWYER: We checked through, and there is nothing which contemplates penalties,

1 punitive, exemplary damages, there is nothing beyond the words here which say, 'An
2 amount of money, (including damages)'. You argue – and you argue – you construe the
3 words in the context in which they appear. So, the amount of money should be damages
4 – it should be compensatory damages. I come back to the same thing.

5 CHAIR: I don't – well, I'm afraid, I just don't get that interpretation from those words, the
6 word, 'including'.

7 MS DWYER: I'm not with you on that.

8 CHAIR: And I wouldn't – what I invited you to point out was any provision, not which
9 expressly permits any other sort of monetary award, or any other sort of damages and
10 compensatory payment, but anything which specifically, expressly, or impliedly,
11 excludes it. And I don't think you have pointed to such provision.

12 MS DWYER: There isn't an express contract that says that.

13 CHAIR: I.e. that would limit the apparently broad words of the preamble to Rule 47 and
14 Chapter A.

15 MS DWYER: And I say again, the words are limited by the constraints put upon you by the
16 provisions of English law.

17 CHAIR: Right. I was coming to law. I'm first trying to bottom out whether there was
18 anything in the Rules, which limits, limits those words. Other than there's nowhere else
19 in the words which says it expressly.

20 MS DWYER: Yes, there is the words on the page. It is a matter of construction. You look at
21 the words on the page. The words on the page do not contemplate anything broader than
22 damages. If they'd meant to say including, but not limited to, damages they would have
23 said it.

24 CHAIR: That's what it –

25 MS DWYER: And it doesn't say that.

26 CHAIR: That's what it means.

27 MS DWYER: It doesn't. It says, 'including damages'. That means it is construed as meaning
28 damages. I don't think we are going to get any further on this.

29 CHAIR: Okay, thanks, I've heard your observation on that. I'm obviously – I take a different
30 view on the interpretation of 'including'. As regards the general law, we've discussed
31 the penalties point, thank you for that, but I take the view that the invalidity of penalties
32 concerns penalties sought to be imposed as a matter of contract, rather than as a matter of

1 determination of dispute resolution.

2 MS DWYER: And that's exactly what you'll be doing. As we've discussed, and I know you
3 agree, this is one contract. You are construing what you can order within the confines of
4 the contract. As a matter of contract, you cannot award a penalty. There's no provision
5 for it, you cannot do it. And if it is a penalty, it's not a genuine pre-estimate of loss. If
6 it's designed to deter people from breaching, then that falls squarely within the provision
7 as confirmed by the Court of Appeal last year. Penalties cannot be paid. You don't have
8 power to do it.

9 CHAIR: Well, we'll have to differ on that as well. As to what penalties mean in that context.
10 Let me narrow this one down to such element of it as is compensatory damages. I don't
11 want to go through all the possible heads of damage, but I do want your thoughts on
12 what might be a relevant head of damage here, which is loss of opportunity.

13 MS DWYER: Loss of opportunity to use the Loop, that is what you're saying?

14 CHAIR: Yes.

15 MS DWYER: If I take you back to ADA17, your determination was – and I re-read the
16 submissions last night and everything that was said in relation to that - and you
17 concluded that there was no material deterioration in the current performance of the
18 trains as at November 2013. So what you are looking at, is the possibility that, had the
19 Loop been in place as at the latest it should have been implemented, December 2014, and
20 now. So I would say that in terms of loss of opportunity, if you're looking at
21 compensatory damages, you are looking at a loss, which arises from the inability to use
22 the Loop between December 2014 and now, possibly looking forward to when it actually
23 is implemented, and that would have to be set out, approved, subject to the usual
24 principles of mitigation of loss in monetary terms.

25 CHAIR: So on your analysis that would be the loss of the opportunity to use the Loop
26 between December 2014 and, as it stands at present on your submissions, December
27 2018.

28 MS DWYER: It's the quickest we can do it. Presently August 2018.

29 CHAIR: Are you saying that August 2018 in your timeline paper supersedes what you said in
30 your submissions? That – which I think was the timetable date in 2018.

31 MS DWYER: What we were trying to do was to make sure that it was in place in time for the
32 December 2018 Timetable. Obviously, if it's in place earlier, so from August 2018,

1 presumably, it will be available for use?

2 MR GIBBENS: Yeah, when it's operational.

3 MS DWYER: Exactly, thank you. Yes. Which means that your losses are then cut off at that
4 point.

5 MR GIBBENS: I would bow to the knowledge of – the better knowledge of my colleagues
6 here, but I do not believe that we have refused a train on this section of line because of
7 the unavailability of the Loop. I don't believe that to be the case.

8 MR KAPUR: The only thing I'd say there is that we wouldn't, at the minute, be planning to
9 put things in there that we knew we couldn't put in there.

10 MS DWYER: You're very sensibly mitigating your losses.

11 MR KAPUR: So anything we have done, we would have had to put a different way, which
12 may well have had an effect on the cycle of train sets and the cycle of assets. I could
13 have put it in there and left it in there and watched the whole thing go wrong, but I
14 didn't.

15 MS DWYER: But you mitigated your loss, I think is the way we would put it.

16 MR KAPUR: Tempted as I was. So, it's not quite as simple as, there's nothing timed that way
17 which might have used it, because we wouldn't have put it near there, because it may not
18 have been able to get through there.

19 CHAIR: Modifying their plans may or may not have mitigated their loss. As a matter of fact.
20 The first issue is whether it was necessary to modify plans for using it which would
21 otherwise have been instigated.

22 MR KAPUR: Yes. I can't give you chapter and verse on that right now, I have to say,
23 personally.

24 CHAIR: I think I'm asking the question first, would that be contested as a head of loss in
25 principle?

26 MS DWYER: I don't – in principle, I can conceive that, subject to all the usual principles that
27 you apply when – as a head of loss, if they could properly prove it, they have mitigated
28 the losses appropriately, it was caused by the ability to have the Loop, then I can in
29 principle I – and that it wasn't too remote, I can conceive it as a head of loss.

30 CHAIR: Right. If I make a determination in that respect, I think rather than prolong things
31 further by asking for information as to that, I would make a determination in principle on
32 the issue of compensatory damages to be assessed, subject to the appropriate information

1 being provided and subject to all the usual protocols.

2 So moving on from precise monetary remedies as to the rather larger question of
3 enforcement and enforceability of, in particular, ADA decisions, but it probably applies
4 to other forms and forums of dispute resolution under the ADRR. Your paper addresses
5 this in terms of speculating that enforcement as a matter of breach of contract direct is
6 available. Would you like to elaborate on that? And not in terms of the specific interim
7 remedy, which you've referred to and which I take on board.

8 MS DWYER: We've dealt with that. As a general matter, you have a determination. The
9 nearest analogy I can take is Expert Determination, because it's very similar. What
10 happens under the ADRR, which are incorporated, as we know, into the Network Code,
11 and into the Track Access contract, is that that's the means of dispute resolution to which
12 all of the parties have submitted themselves.

13 Accordingly, if one of the parties – so ultimately, we have a decision, issued by –
14 pursuant to an Adjudication. You have an appeals procedure available in respect of
15 every single ADA, but ultimately if you are unsuccessful on appeal, or you chose not to
16 appeal and you don't abide by it, then as a matter of contract, that is a breach of contract.
17 And that means it can be taken to the Court for enforcement. The same would apply in
18 the case of Expert Determination. I've also given you the example of Arbitration,
19 though that's slightly different because it's enforced through the provisions of the
20 Arbitration Act. But the remedy is to take it to the Courts.

21 Another analogy I can take is if, for example, you go into Mediation and you end
22 up with a concluded settlement, following the conclusion of a mediation, that in turn is a
23 contract. The remedy is right of access to the Court to enforce that. So, in other words,
24 it provides a clear enforcement mechanism. And that's actually set out in the little
25 diagram that you see at the beginning of the ADRR.

26 So, if you like, all roads ultimately can lead to Court proceedings in order to
27 enforce, subject of course, to any matters which are referred to the ORR under your
28 jurisdiction to do so, pursuant to a dispute.

29 CHAIR: In order to enforce it, then you would say it is not necessary to appeal it, for example,
30 to Arbitration, then enforce under the provisions of the Arbitration Act?

31 MS DWYER: The contract says that you have the ability to appeal. If you choose not to
32 appeal, you can then take it straight to the Court; that would be my analysis. You have –

1 if you like, you have not taken the opportunity to take it to Arbitration.

2 CHAIR: Right. So, is it your opinion then, that the parties here could, if they wished, have –
3 have short circuited this process?

4 MS DWYER: Now that's an interesting question.

5 CHAIR: By going straight to Court, and saying, 'Here is the determination of a competent
6 tribunal which is not being complied with, please give us an injunction and damages', or
7 is that circumscribed by Rule 51?

8 MS DWYER: Otherwise, what you're saying is that ultimately you might end up with a loop.
9 What Rule 51 says, is 'If a dispute party fails to comply with the terms of a
10 determination, that failure will be dealt with by way of a new dispute through the
11 appropriate mechanism.' Will be dealt with. So you come back here. Obviously, you
12 can't keep going round and round in circles.

13 CHAIR: One would think so obviously, but how would you get out of that loop?

14 MS DWYER: What you do is you take it to the Court and you ask the Court to enforce it. That
15 would be my ultimate answer. We've never been here before; they have done what the
16 Rules say you should do which is to bring it back here before.

17 CHAIR: That's precisely what I'm –

18 MS DWYER: But my ultimate – my ultimate answer is to say that you can ultimately – if you
19 chose not to appeal it, then you can take it to the Courts. If not you can never get to –

20 CHAIR: Are there any limits on that? Do you have to at least have one go at abiding by Rule
21 51? Once you've done it and that hasn't worked, then –?

22 MS DWYER: You and we are in uncharted territory, and maybe – I mean, this is not the point
23 to rewrite the Rules, but this is maybe something that the industry as a whole takes away
24 and grapples with.

25 CHAIR: That's why I'm asking the question.

26 MS DWYER. My analysis was that this is a contract, failure to abide by it is a breach of
27 contract, ultimately, that can be taken to a Court if it's not taken to Arbitration, and
28 obviously, if you go through Arbitration, then ultimately, you are enforcing, through the
29 courts, by the Arbitration Act, but you have chosen not to do that. They are coming back
30 to do it this way. The Rules have got themselves into a bit of a loop. I say, if you took it
31 to the Court, a Court would say, 'No, you don't have to keep going round and round in
32 circles'.

1 CHAIR: But on what principle would it say at what point that circle is broken? After the first
2 iteration, after the second iteration?

3 MS DWYER: It doesn't work, does it? I still – yes –

4 MR OATWAY: This is something that DB Cargo considered when we looked at this and we
5 came to the view that the actual wording of Rule 47 says, basically – sorry, I mean Rule
6 51, that this should be dealt with by way of a new dispute, through the appropriate
7 mechanism, not through another ADA. If it had just meant another ADA, then
8 presumably it would have said that but instead it says, 'the appropriate mechanism'. So
9 we did consider whether we ought to take this dispute straight to the Court. However,
10 we decided not to do that for a number of reasons.

11 Firstly, we did not fully conclude our thinking because there was already a
12 Procedure Agreement in place between GBRf and Network Rail to take the dispute to
13 another ADA but we remained of the view that you could probably break that circle
14 straight away by going directly to Court under a breach of contract allegation.

15 MS DWYER: And, can I take you through the analysis to do that? 'New dispute through the
16 appropriate mechanism'. Nigel follows that Rule, quite rightly, serves a new Notice.
17 Goes back into the dispute mechanism. Goes to allocation stage. At allocation stage,
18 there is a route straight out to Court litigation. So you could get out of it that way. What
19 the parties have agreed to do is to go through the Procedural Agreement. They even
20 investigated the possibility of the thing being appealed to the ORR. Didn't – and the
21 ORR declined but the Procedure Agreement means that the parties have submitted
22 themselves to a further ADA. You make a determination pursuant to that ADA. If, in
23 relation to the issues before this specific ADA we don't agree, we appeal it. If we breach
24 it again, we go back to the dispute mechanism, but that stage, the allocation stage, would
25 probably mean you go straight to Court litigation, or if the parties don't agree, it can go
26 through Arbitration, ultimately, to enforce the –

27 CHAIR: Yes. So there is a potential exit.

28 MS DWYER: It's not particularly helpful, but there's a potential exit.

29 CHAIR: My problem with the words of 51 is that it says 'through the appropriate mechanism'
30 and that, to my mind is open to the interpretation that 'appropriate' means, as required by
31 the contract, and the contract requires that disputes be submitted to resolution in
32 accordance with ADRR. That's what creates the circle.

1 MS DWYER: You can actually get – you can actually get out of that though, by following that
2 through.

3 CHAIR: But you're saying the ADRR mechanism itself can refer it to litigation, among other
4 things. This is getting somewhat theoretical, but I am just trying to understand the merits
5 and demerits of this. If it were allocated to that, would a Court have to hear the dispute
6 as a new dispute? Or could it be submitted to Court, purely in order to instigate
7 enforcement provisions?

8 MS DWYER: I think it would be – you wouldn't go straight, if you like, to judgement, you
9 probably would have a summary judgement procedure, would be my analysis of it. But
10 it would be similar. For example, if you got a foreign judgement and you wanted to
11 enforce it, not – I'm not talking about within the EU, but generally – you'd actually have
12 to have a short hearing to check things like jurisdiction and so on.

13 CHAIR: To establish the validity and jurisdiction of the judgement.

14 MS DWYER: You know, there's a jurisdiction – subject to that. It's the same as when you're
15 enforcing an arbitral award, you basically have a truncated summary procedure that says,
16 'Right, yes you're in breach, we can enforce it', and then you're into the usual Court
17 remedies.

18 CHAIR: Right. Okay, so that may be an answer to my question. If there is no clear route to
19 Court enforcement procedures and sanctions of some sort, what are to be the
20 consequences if the party just repeatedly – or even once – refuses to implement a
21 decision? Should there not be some consequences? This is why I start looking at other
22 forms of monetary value, that being the only practical sanction that's available.

23 MS DWYER: I think there's a further mechanism, as we've just elaborated between ourselves.
24 You can take it to Court. There is a way through there.

25 CHAIR: Right, well, I will contemplate on that. I'm not going to indicate a final opinion on
26 that now, but I will try to indicate some sort of an opinion – not least because of, in
27 effect, ORR's declining to do so in its response to the invitation for it to consider these as
28 exceptional circumstances and accept jurisdiction as the appellate body for this.

29 Right, I think that's all I need deal with then on the enforcement and
30 enforceability issue, unless there's anything else you would like to add, in the light of
31 what we've been talking about, to your submissions – or that anybody else would like to
32 add on that.

1 MS DWYER: No.

2 CHAIR: There is one other matter I would like to touch on, and that is the issue raised by one
3 or both – I can't remember which – of the Claimants' submissions, that the failure to
4 implement the original decision might be construed as a breach of Network Rail's
5 licence.

6 Fairly cogent reasons were set out in whoever's submission it was, both of them,
7 including the fact that in the Short Term Network Change Notice it was in effect listed as
8 one reason for the Short Term Network Change by Network Rail. I don't think it is – it
9 probably is within the power of the ADA to comment, but it does not necessarily have a
10 power to determine conclusively whether there has been a breach of the licence, but I
11 think the ADA is entitled to express an opinion on that.

12 On the basis of the submission, I'm minded to express the opinion that there has
13 been a breach of the licence, but I don't think it's within the prerogative of the ADA to
14 attach any consequence to that. That is clearly a matter for ORR. But it is likely that I
15 will express that opinion as part of the determination.

16 Would you, in the first place, like to say anything in that respect?

17 MS DWYER: Obviously, a potential breach of Network Rail's licence is entirely a matter for
18 the ORR, and I don't think it would be appropriate for Network Rail in the context of
19 these proceedings to make submissions on it or not.

20 Obviously, you are minded to write your determination in that way, but I don't
21 think there is anything, really, we can say on that subject.

22 MR GIBBENS: I agree.

23 CHAIR: You don't want, in effect, to say anything in response to the submissions by the
24 Claimants in that respect. There is absolutely nothing in any of your submissions –

25 MS DWYER: It's just not the appropriate forum. It is not. If you like, whether or not
26 Network Rail has breached its licence is a matter for ORR; it's not a matter for this
27 forum. This forum is to determine disputes between the parties.

28 CHAIR: Right, so the answer is –

29 MS DWYER: We don't make submissions in respect of it.

30 CHAIR: I wanted to give you the opportunity to respond to the submissions by the Claimants,
31 which are likely to prompt something in the determination – some, at least, expression of
32 opinion. I wouldn't like you not to have had the opportunity to say something on that.

33 MS DWYER: We understand the opportunity, but it's not the appropriate forum to deal with a

1 breach of the Network Rail licence. Obviously, you can express an opinion, but we are
 2 not making submissions on it. We are not accepting you have jurisdiction, if you like, to
 3 determine whether there has been a breach or not.

4 CHAIR: Let alone what the consequences might be.

5 MS DWYER: Exactly.

6 CHAIR: Right, okay. Thank you for that. At least I've heard that.

7 I think it is within my competence to invite comment from anybody else on that
 8 issue if they wish, it having been raised in the Claimants' submissions.

9 MR OATWAY: Yes, we raised it as an issue in our submission by suggesting that it may
 10 constitute a breach of Network Rail's licence, but we certainly understand that the route
 11 for dealing with any such breach would be, in effect, in a letter of complaint to ORR and
 12 for ORR to then take that forward to conclusion through its own mechanisms.

13 Therefore, whilst we raised this as an issue, it was more as a general principle
 14 rather than something we were expecting to be determined.

15 CHAIR: No, right, okay. Would any of the interested parties like to comment on that?

16 Right, we will come back to logistics and timings in a minute. I think the only
 17 other issue to be dealt with is costs.

18 The Claimants have both asked for costs unspecified. Network Rail has
 19 accepted, I think, in its submissions to submit to an order for costs, again, unspecified or
 20 to be determined summarily by the Chair.

21 MS DWYER: Yes, appropriately vouched, as –

22 CHAIR: Yes, appropriately vouched, indeed. So, I don't think I need to invite submissions on
 23 the principles under the Rules as to whether the Rules criteria for an award of costs are
 24 met. Can I take it that that is accepted by your concession?

25 MS DWYER: We've conceded costs.

26 CHAIR: Thank you. I'm not going to try now to elucidate principles for costs, i.e. heads of
 27 costs. I think I will ask the Claimants to provide, within a certain time, their analysis of
 28 what costs have been incurred and are sought.

29 MR KAPUR: Just to say, of course, these costs are still ongoing as this hearing is still
 30 continuing and we are providing information beyond today.

31 CHAIR: I think... Well, to make things practicable we ought to have an interim cut-off date
 32 of today. Provide your claim and analysis of the costs and heads of cost up to and
 33 including today. We may at a later date extend that.

1 And then Network Rail will of course have the opportunity to respond to that
2 both as to principles and heads of cost and as to amounts. If I find I need some expert
3 assistance, then I will appoint it – but otherwise I will do my best to determine it.

4 That's the matter of the Claimants' costs. I'm not sure about the interested
5 parties' costs. I have not heard any submissions on that. I'm not entirely sure I have
6 jurisdiction to make an award of costs for interested parties. I'm prepared to hear any
7 views on that. I don't hear anything.

8 Then there are the costs of ADC. I'm not sure whether there has been an award
9 of ADC's costs before.

10 SECRETARY: It's never been awarded costs.

11 CHAIR: It's never been awarded costs. Golly, we're pushing the envelope in every respect.
12 I'm minded to ask the secretariat of the ADC to provide an analysis of costs incurred and
13 make an order for the payment of the ADC's costs. Do you want to say anything about
14 that in principle?

15 MS DWYER: We have – Just to make it clear, if it's of assistance, if you look at G53, 'The
16 Hearing Chair has power to order one or more Dispute Party to meet part or all of the
17 costs or expenses of the ADA.' You have power to do it; we'll concede that.

18 CHAIR: And do you regard the Principles as the rules?

19 MS DWYER: Exactly, yes.

20 CHAIR: In particular, A16(d), which I did look at but I've forgotten, which is procedural
21 default? Yes, that's right. I did start to wonder whether failure to implement a decision
22 is a procedural default. But I think that probably only arises where it's contested, so
23 there's no need to bottom that one out – including adverse behaviour.

24 Right, now, so, it's accepted, then, that there'll be an order for the costs of the
25 Claimant parties and the ADA, with the information to be provided.

26 MS DWYER: Yes.

27 CHAIR: What will be an appropriate timescale for providing that information? In the sense
28 that, the other information is going to take four weeks to provide.

29 Yes, yes, thank you. I am obliged to Tony for reminding us that there is actually
30 a definition of Costs. And the definition is précised in Part A, so that should be stuck to,
31 and that's 'professional and other costs and expenses, which would be recoverable
32 following a judgment in court proceedings in England'.

33 MS DWYER: So, legal costs – legal costs and expenses.

1 CHAIR: Legal costs and expenses, but – So, I think you'll know better than me if that
2 includes expenses of, for example, travel and, actually, disbursements and producing
3 paper and stuff – but probably not management time.

4 MS DWYER: Absolutely – and, as we say, appropriately vouched. I suggest you make an
5 order for the provision of the information in relation to costs within a certain time. We
6 can then look at that and respond, but you assess it. The usual order in court is to be
7 assessed if not agreed.

8 What we could do is look at the costs, talk to them about it, talk to Tony about it,
9 say we will pay x – and if we can't reach agreement within a certain time, it comes back
10 to you for summary assessment.

11 CHAIR: That sounds like an expeditious way of dealing with it.

12 MS DWYER: Yes, it is. It pretty much always works; you almost never have to go back to
13 Court for assessment.

14 MR OATWAY: And this is for the interim costs, i.e. the costs up until today?

15 CHAIR: Yes, that is – I suppose it's fair to say that will be an interim award.

16 MS DWYER: There may be nothing more.

17 MR OATWAY: There may be nothing more.

18 CHAIR: There may be nothing more. And it may be that by the time the determination is
19 written it will be known there will be no further costs, so it will be a final order.

20 But in giving the direction for the purposes of today, the information being
21 exchanged and assessed if not agreed, that is up to today, necessarily. And it may be that
22 in the final determination that is extended up to that date – but there may be no more
23 costs of a recoverable nature, anyway.

24 MR OATWAY: Well, would it be reasonable, if there are any other costs following today,
25 from assessing whatever information arrives or subsequently, that we would inform
26 Network Rail before we incurred those costs, just so they know what we are doing.

27 CHAIR: I don't think I'm going to order that, no. No. I'll probably, in the determination, say
28 that the interim direction be extended up to the date of the determination.

29 MS DWYER: And then you'd go through another process to deal with any. So, again:
30 provision of vouchers, attempt at agreement, revert to the Hearing Chair for assessment
31 if not agreed.

32 MR OATWAY: Yes.

33 CHAIR: There will certainly be additional costs to the ADC between now and the end of the

1 matter.

2 MS DWYER: Yes.

3 CHAIR: Right.

4 MR KAPUR: Sorry, Chair, just one further thing on that. Talking about management time
5 just there, the Network Change in Part G allows you to claim back a proportion of that
6 time, does it not?

7 MS DWYER: We're not within that procedure. We're within the – if you don't mind me
8 dealing with that directly, what you're dealing with here is the costs that can be
9 recovered under the ADRR. I know what you mean about the costs –

10 MR KAPUR: Yes, sorry, what we're probably getting to is that there are Network Change
11 costs, given that it hasn't been accepted in places yet, or hasn't actually been referred,
12 that might come along and go through the Network Change route.

13 CHAIR: They will be dealt with through the Network Change route. They're not –

14 MR KAPUR: We're talking separate –

15 CHAIR: Absolutely. They're not part of this process.

16 MS DWYER: I agree.

17 CHAIR: Right, I think that, in effect, concludes the questions and answers and results from
18 that.

19 I will therefore invite closing statements. Would any of the Dispute Parties like
20 an adjournment before that to consider?

21 MS DWYER: I'm in the hands of my opponents.

22 MR OATWAY: No, we're happy with that. I can give some closing comments sort of ad lib
23 as it were.

24 CHAIR: You will or you won't.

25 MR OATWAY: I will.

26 CHAIR: Right, and –

27 MR KAPUR: And I'll just make it up as well.

28 CHAIR: Right, okay. In that case, we'll take the same order: GB Railfreight, DB Cargo and
29 then Network Rail.

30 MR KAPUR: In GB Railfreight's closing statement, there is one point I would like to
31 reinforce, which I would like the Panel to be clear on in its determination.

32 Given the conversations we have had about finding money for the reinstatement
33 of Clay Cross Loop, I would like the Panel to determine clearly whether it believes

1 finding additional money for this reinstatement should come from an enhancements or a
2 renewals pot of money, because I don't believe we have discussed that to its logical
3 conclusion.

4 And GB Railfreight believes it should come from a renewals portfolio pot, not
5 the enhancements, and the CP5 enhancements programme should not be hindered or
6 discriminated – or unduly targeted for this project, given that Clay Cross was part of the
7 national Network.

8 CHAIR: Thank you. Anything else?

9 MR KAPUR: No, that's all. Thank you.

10 CHAIR: Thank you.

11 MR OATWAY: Right, thank you. I'd just like to say on behalf of DB Cargo that we are
12 encouraged that Network Rail has admitted its mistakes of the past and is now seemingly
13 on a course to reinstate and reconnect the Loop to the Network. As to the timescale, that
14 is obviously a matter that is still being discussed.

15 I listened with particular interest at the start of the hearing when we had the
16 discussion about Network Rail's new status as a public body and consequently having to
17 be very careful with public money. In this respect, I therefore, find it disappointing that
18 had Network Rail put the Loop back in 2013 it would have only cost £2 million and now
19 it will cost £10 million. There might be an issue there about care of public money.

20 However, be that as it may, as far as DB Cargo is concerned, we want to see the
21 Loop reinstated as part of the Network so that it can be used. We hope the outcome of
22 this hearing combined with Network Rail's cooperation and good intent will enable that
23 to happen.

24 CHAIR: Thank you. Spencer, I think.

25 MR GIBBENS: I wasn't going to be saying anything. I think perhaps in response to Ian I
26 perhaps feel I now need to, if I may – although I'm not going to repeat the comments
27 about renewals and enhancements earlier on. I've said my piece, I think. The renewals
28 side of the business never contemplated having to do this.

29 The problem, the issue here, was caused by a poorly executed enhancement
30 scheme. That enhancement scheme has now looked to put this right. I'm not sure how
31 we fund this is necessarily particularly relevant – other than we know we have to do it,
32 and we will do it.

33 CHAIR: Alright, thank you. Clare, as the legal representative, do you want to add anything

1 by way of closing?

2 MS DWYER: Just to reinforce that. We know we have to do it; we will do it. We want to
3 end on a positive note. It will happen.

4 CHAIR: Thank you. It's my custom, also, to invite comments from the interested parties in
5 closing, if they wish.

6 MR THACKRAY: I think just to note that although some of my comments have been largely
7 more been in line with Network Rail specifically in terms of Network Change and line
8 speed, Cross Country do note that had Network Rail complied with ADA17 in a timely
9 manner we'd not have reached this situation where we're effectively robbing Peter to pay
10 Paul, to the detriment of what are our end rail users, be it passengers or freight.

11 I did just want to say that. Although I have been largely aligned with Network
12 Rail in some ways, that is our position.

13 MR BIRD: All I can say is that we largely agree with the views of our other freight colleagues
14 here. And from our perspective, whether we get a plain vanilla reinstatement of the
15 Loop or an enhanced version, we do actually still regard it as, in signalling terms at least,
16 a very important thing to do. But it's not a large thing.

17 MS MASI: I don't want to repeat what's come through in other comments, but, being a
18 passenger operator, I would echo the same comment as Cross Country

19 CHAIR: Right, thank you very much. I said at the outset that, if possible, I'd like to give an
20 indication of the results in principle. For obvious reasons, that's rather difficult to do.

21 What will emerge will be a decision as to what I've characterised as the practical
22 remedy, which will be, in essence, a repeat of the determination to that effect in ADA17,
23 setting a new date, and that date to be arrived at after the exchange of information we've
24 been talking about. I'll recap on all that in a minute.

25 What I may well do, I'm likely to do, as well on that practical remedy is – with a
26 mind to practicality and enforceability, and taking on board the point in particular about
27 the need for certainty in making an award that is in effect a mandatory injunction award
28 – I will possibly invite Network Rail's comments, and therefore also the Claimants'
29 comments, on a draft of that part of the award for the sole purpose of achieving,
30 hopefully, acceptance that it is expressed in as certain terms as are necessary to make it
31 properly implementable and enforceable, and that there are no doubts as to any of the
32 technical or financial or timing or any other aspects of it that would enable anyone to
33 chip away at it.

1 I think that's the most practically sensible thing to do, probably. As to the rest of
 2 the determination, other remedies – I will consider that. And if I need to ask for more
 3 information in order to come to a conclusion either in principle or as to amounts, then I
 4 will.

5 Then, apart from those areas, the determination will probably include some
 6 observations on the issue of breach of licence, some observations on the efficacy in
 7 effect or otherwise of the present provisions in Chapter G, principally concerning
 8 enforcement, i.e. the consequences of failure to implement a decision. And there will be
 9 a final award as to costs, as we've discussed.

10 One of the reasons for usually wanting to give an indication of the bones – the
 11 important bit of these things – is so that people can get on with it quickly in advance of
 12 the written determination, which, with or without the need for further information, can
 13 take some time to produce.

14 Here, I have particularly taken into account Network Rail's assurances that,
 15 pending the exchange of further information and further agreement and eventually the
 16 full written determination, it accepts the need to reinstate the Loop and instigate the
 17 procedures for that as soon as possible and they will be pushed forward as quickly as
 18 possible meanwhile. I've heard those assurances and, in taking this approach to
 19 resolving the matter, I'm relying on those assurances.

20 So, in conclusion I think I'd just like to recap the actions and timings that we
 21 have piled up, if we could – I think probably just going through, in the first place, in the
 22 order in which they cropped up. That's not necessarily the logical order, but –

23 SECRETARY: Some of the earlier items we didn't put a timescale to. The first item I
 24 recorded was to understand the legal status of the Memorandum of Understanding
 25 between Network Rail and the DfT and the associated process for enhancement funding.

26 MR KAPUR: Specifically about the Midland Main Line Programme Board, was it?

27 SECRETARY: No, this is about the general aspects of the DfT now being involved in
 28 expenditure decisions and enhancement-funding decisions.

29 CHAIR: I think, unless you've got another one, it seems –

30 SECRETARY: There was another one, which was information to demonstrate the
 31 reclassification in September 2014, where Network Rail is now being regarded as a
 32 public sector company for accounting purposes. And there you asked for full
 33 information as to the means of constitution of that change of status.

1 CHAIR: Yes.

2 SECRETARY: I'd imagine those two items might be addressed more in a week or a couple of
3 weeks.

4 CHAIR: Would you be content with a couple of weeks?

5 MR GIBBENS: Yes, it's all on the DfT website, isn't it?

6 MS DWYER: To confirm that, two weeks.

7 CHAIR: Two weeks.

8 SECRETARY: Next one was Network Rail said they intend to provide anyway the established
9 fiscal procedures which were in put place in September 2014. I'd imagine it's a similar
10 sort of timescale – two weeks.

11 MS DWYER: That's not separate. That was part of the original thing.

12 CHAIR: Is that part of the constitutional –

13 MS DWYER: It's part of the constitutional, yes – explanation of reclassification in September
14 2014, full information on the nature of reclassification and the means of constitution of
15 that change. So, it's all – It's part two; that's just the second one.

16 CHAIR: So, the second one is both what it was, the legal derivation of that classification, and
17 also the consequences in terms of fiscal procedures becoming binding on it.

18 SECRETARY: The next item. We moved onto Signalling Standards, and the question was –
19 bearing in mind the document being cited is a Network Rail document - is there a
20 relevant Group Standard which is the genesis for this Network Rail document? I think –
21 which will demonstrate whether the actual Network Rail Standard is externally imposed.

22 MR KAPUR: Internally imposed.

23 MS DWYER: No, it's externally imposed.

24 SECRETARY: Whether the Standard is –

25 CHAIR: Whether it amounts to the Standard which is external –

26 SECRETARY: Or Network Rail actually embellished something –

27 CHAIR: Because – whether it just reflects the external Group Standard or whether it
28 embellishes it for some reason.

29 SECRETARY: I imagine that could be two weeks as well, that one.

30 MS DWYER: Could that be two weeks?

31 MR GIBBENS: Yes, I think so.

32 SECRETARY: We moved on to requesting more information on how complying with the
33 legal and technical standards, as set out in the material provided with Network Rail's

1 opening statement, drives a timeline from 17 March to November. And that, to an
2 extent, has been overtaken rather.

3 MS DWYER: I think it has. That's what I'd say. That's been overtaken by what's being done
4 here, provision of information between the two parties.

5 CHAIR: Via the request for information in a particular form and a response and agreement,
6 yes.

7 MS DWYER: Yes. Are you happy with that?

8 MR GIBBENS: Yes.

9 MS DWYER: Okay, we're agreed. That's subsumed in the – Yeah.

10 SECRETARY: So, we then get this larger piece. It was agreed that Network Rail provides
11 GBRf and DB Cargo, first of all, information as to what changes to line speed were
12 actually implemented and their effect on journey times and whether putting line speeds
13 back would have a material effect. It was mentioned 110 back to 80 mph, and suggested
14 it was 30 seconds time penalty.

15 And then that leaves the conclusion. If it is not considered a material effect when
16 the Claimants look at it, then they may suggest that it's not within the Network Change
17 definition.

18 MR GIBBENS: I think we can –

19 MS DWYER: This has all been – I think that's been superseded by – because that was their
20 suggestion to us just now, and my recollection is that the Hearing Chair suggested that,
21 rather than you trying to transcribe it all now, actually that it was provided directly.

22 CHAIR: Yes, that is one of the – that is covered by the request.

23 MR OATWAY: Yes, that would be in our written request.

24 CHAIR: That's right.

25 SECRETARY: Network Rail will seek to make the GRIP 3 process run in parallel with the
26 authority funding process.

27 MR OATWAY: That would be part of the timeline information being given to us.

28 SECRETARY: And then the need for understanding about Standards: new ones concerning
29 signalling may not apply, which may then shorten the timescale.

30 MS DWYER: That's dealt with in the second item.

31 CHAIR: That's the procedures.

32 MR OATWAY: That's our third item.

33 SECRETARY: Next one is Network Rail to give information about the critical path that can

1 be assessed in a meaningful way to achieve an irreducible minimum time for
2 implementing the previous reinstatement solution.

3 MS DWYER: Again, that's the product of that process.

4 CHAIR: That's the response to that. We did add a sort of rider to that response that, if
5 possible, could it include a diagrammatic representation of the critical path, as well as –

6 MS DWYER: In other words, in dealing with the request that comes from here you would like
7 that.

8 CHAIR: Yes.

9 SECRETARY: And then the Claimants to express in writing what they think Network Rail
10 should be producing to them in relation to this required solution.

11 MR OATWAY: Yes, that is correct.

12 MS DWYER: That is it; that is it. That is the procedure.

13 MR OATWAY: And we undertook to do that by close of play Thursday/Friday.

14 CHAIR: That's by the close of play on Friday, and the response to that by –

15 MS DWYER: 12 August.

16 CHAIR: 12 August.

17 SECRETARY: So, all those early items we picked up have been knocked off.

18 CHAIR: They've been subsumed into the procedure, right. Do we need, or would it be
19 helpful, to just record those in a letter to everybody so we're all talking about the same
20 thing?

21 MS DWYER: I agree: I think that would be extremely helpful. We'll start looking at it when
22 we're back at the office, but it would be really helpful.

23 CHAIR: We will stick with those time limits.

24 MS DWYER: Given that all our hands are now tired with writing all day.

25 CHAIR: Yes, actually there are two further procedures. There is the procedure that I
26 mentioned earlier in relation to the transcript, which we will all have a chance to look at
27 and comment on with the purpose only of correcting where necessary – that's to say
28 corrections of form, rather than substance.

29 And then with regard to the determination itself after all, the written
30 determination, after the information has been provided and exchanged and any further
31 questions raised – it may be the case – but the determination itself... Well, as I've said,
32 there may be an interim stage in relation to the injunctive bit to make sure we get that
33 right, but, after that, the entire determination will be provided to the parties in draft

1 before being published for the purpose – how do we express it, Tony? Not only
2 correction of any errors of fact or –

3 SECRETARY: Infelicities.

4 CHAIR: Infelicities of expression.

5 SECRETARY: And, also, if anyone is criticised, it just gives a little warning before it gets
6 published. And we normally try to turn that around – we ask you to turn it around in 24
7 hours, but we might be generous if it's long.

8 And all these documents, the transcript and that draft, are strictly confidential to
9 the people here until final publication.

10 CHAIR: When, as I said at the outset, subject to anything extraordinary arising, it would be
11 my intention for the transcript to be published as well as the determination – and also the
12 written submissions.

13 SECRETARY: The rules require us to publish everything that you put in in writing.

14 CHAIR: They'll be published as well.

15 Okay, thank you all very much. My thanks to everybody for their cooperation in
16 providing documents and for today generally. Thank you all very much.