
ACCESS DISPUTE ADJUDICATION

Determination in respect of dispute reference ADA04 *(following a hearing held at 1 Eversholt Street, London on 14 April 2011)*

The appointed Adjudication Panel (“Panel”)

Stephen Murfitt	Hearing Chair
Martin Shrubsole	Industry Advisor
Andy Woodcock	Industry Advisor

The Dispute Parties

For DB Schenker Rail (UK) Ltd (“DBS”)

Nigel Oatway	Access Manager
Paul Gold	Acting Head of Legal

For Network Rail Infrastructure Ltd (“Network Rail” or “NR”)

Doug Thompson	Customer Relationship Executive (DBS)
Dan Kayne	Legal Advisor
Andrew Gilbert	Kennedys, solicitors
Dickon Court	In-house legal team (observing) (part)

In attendance:

Tony Skilton	Committee Secretary
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1. Introduction, Substance of Dispute and Jurisdiction

- 1.1. This matter involves a determination as to the allocation of the delay incident described as "safety on the line – no fault found" (NFF) under the Performance Regime set out in Schedule 8 of the Track Access Agreement in relation to Freight Operators. The issue for determination being whether an NFF should be "Attributable to Network Rail ("ANR"), "Attributable to the Train Operator" ("ATO") or "Attributable to both the Train Operator and Network Rail" ("ATO/NR").
- 1.2. By Notice of Dispute dated 16 December 2010 and through Change of Forum approved by the Office of Rail Regulation ("ORR") on 19 January 2011, DBS referred the dispute for determination in accordance with the Access Dispute Resolution Rules ("the Rules") pursuant to clause 13 of the Track Access Agreement between NR and DBS.
- 1.3. A Procedure Agreement was subsequently entered into between DBS and NR, stating that the determination procedure would be an Access Dispute Adjudication ("ADA") in the first instance. Within the terms of the Rules, Direct Rail Services Ltd, Freightliner Ltd, Freightliner Heavy Haul Ltd and GB Railfreight Ltd declared themselves to be interested parties.
- 1.4. In accordance with Rule G17, DBS and NR filed statements of case setting out their respective positions and submissions. A hearing took place on Thursday 14 April 2011. None of the interested parties had representatives in attendance.
- 1.5. In its consideration of the parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.6. The abbreviations used in this determination are as set out in the list of Parties above, in this section 1 and otherwise as specified in the text below.

2. Background, history of this dispute process and documents submitted

- 2.1. Following receipt of the Dispute Parties' submissions and in accordance with Rule G10(c), I considered whether there were any relevant issues of law raised by the dispute; I concluded that there were matters of law in relation to the interpretation of contracts and the meaning of the word "due regard" and "having regard", and this was conveyed to the Industry Advisors and the Dispute Parties at the commencement of the hearing.
- 2.2. In summary, the written material and evidence provided over the course of this dispute process was as follows:
 - 2.2.1. Statement of Claim by DBS
 - 2.2.2. Statement of Defence by NR
 - 2.2.3. Response statement by DBS
 - 2.2.4. Document setting out skeleton argument by NR concerning earlier determinations
 - 2.2.5. Document setting out submission by NR concerning potential for referral to ORR

- 2.2.6. Opening statements, responses to questions and closing remarks to the hearing on 14 April 2011 by NR and DBS.
- 2.3. The statements listed as items 2.1.1, 2.2.2 and 2.2.3 above were provided in accordance with the arrangements set out in Rule G11. The skeleton argument listed as item 2.2.4 was circulated by NR shortly after close of business on 12 April 2011; with the agreement of DBS, I accepted this document as it was potentially of assistance at the hearing and, not being lengthy, all present had had reasonable opportunity to read it. The submission listed as item 2.2.5 was received from NR during the course of the hearing proceedings; time was taken for all present to read it.
- 2.4. I accordingly confirm that the Panel has taken into account all of the submissions, arguments, evidence and information provided over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material may specifically be referred to or summarized in this Determination.

3. Submissions made and outcomes sought by Dispute Parties

- 3.1. DBS' principal submissions were as follows;
- 3.1.1. NR is required by Condition B1.1 of The Network Code to operate a system for monitoring train performance and to accurately record those matters specified in The Network Code at B1.1.
- 3.1.2. Condition B2.2 of The Network Code requires NR to have due regard to all of the information, which is relevant in the circumstances, including the information set out at paragraphs (a) to (e) of Condition B.2.2 relating to the causes of delay or cancellations.
- 3.1.3. Schedule 8 of the Track Access Agreement between the parties dated 9 February 2006 sets out a Performance Regime. The terms 'Attributable to the Train Operator', 'Attributable to Network Rail', and 'Attributable to both the Train Operator and Network Rail' are defined in the definition section of Schedule 8 .
- 3.1.4. NFF (No fault found) incidents are those where no fault is found following a stopping of the relevant train and the conclusion of an examination. A proper consideration of each of the definitions set out in paragraphs (a) and (b) of the definition of 'Attributable to the Train Operator ' in Schedule 8 could not apply when, on a plain reading to an incident, no fault was found. Therefore the Train Operator could not be liable for NFF incidents.
- 3.1.5. The definition of 'Attributable to Network Rail' in Schedule 8 includes any delay cancellation or other matter, occurring on or off the Network which is not 'Attributable to the Train Operator'. NFF incidents are not attributable to the Train Operator and therefore are attributable to NR.
- 3.1.6. There is a distinction to be drawn between the attribution of delay for the purposes of Part B of the Network Code and the 'downstream' process for determining the

attribution of delay under the Performance Regime set out in Schedule 8. They are separate processes.

- 3.1.7. The Delay Attribution Guide was incorporated into The Network Code and was a contractual document as between the parties to the dispute. Condition B2.2 required 'due regard' should be had to all of the other sources of information detailed in Condition B2.2 of The Network Code. There was no conflict between the Track Access Agreement and the Delay Attribution Guide and therefore Condition A1.1 (h) of the Network Code was not relevant in this dispute.
- 3.1.8. It was accepted by DBS that NR had correctly attributed an NFF to the Train Operator having regard to the guidance set out in the Delay Attribution Guide. However the performance regime set out in schedule 8 of the Track Access Agreement requires one or more of the circumstances contemplated in paragraphs (a) or (b) of the definition of ATO to be satisfied before an NFF can be attributed to the Train Operator and they were not satisfied.
- 3.1.9. The circumstance 'any acts or omissions of the Train Operators staff' set out as part of the definition of 'attributable to train operator' in Schedule 8 was applicable but this was a dispute concerning reports from third parties and not its own staff. Third party reports do not satisfy the definition of 'attributable to train operator'.
- 3.1.10. The submission by NR that the DAG took primacy over all of the attribution criteria listed within the definition of ATO was plainly wrong.
- 3.2. NR's principal submissions were as follows:
 - 3.2.1. The Delay Attribution Guide forms part of the Network Code. The Network Code forms part of the Track Access Agreement between the parties and dated 9 February 2006. The Delay Attribution Guide therefore had direct contractual effect as between the parties in dispute.
 - 3.2.2. In the event of any conflict as between The Network Code and the Track Access Agreement then Condition A1.1 (h) of The Code provides that the Network Code has precedence over the Track Access Agreement.
 - 3.2.3. Condition B2.2 of the Network Code requires Network Rail when determining and recording the persons and causes which are responsible for train delays and cancellations, to have due regard to all information which is relevant in the circumstances, including the circumstances set out in paragraphs (a) to (e) of Condition B2.2. Paragraph (e) states 'information and guidance set out in the Delay Attribution Guide'.
 - 3.2.4. The Delay Attribution Guide dated 19 September 2010 sets out at section 4.24 guidance in relation to safety problems reported by staff or public. Section 4.24.2 sets out a guide as to likely circumstances and for each incident provides a delay code and incident attribution. At paragraph 1 of the guide at page 58 the

circumstance 'operator's staff unable to find reported train-related safety problem' is attributed to 'operator of train concerned'.

- 3.2.5. In considering the interpretation of contracts the proper approach is to seek to identify the meaning of the words used, adopting an objective and reasonable interpretation of the words used.
- 3.2.6. The Delay Attribution Guide and Track Access Agreement oblige NR to attribute NFF incidents relating to rolling stock to the Train Operator. Where the Delay Attribution Guide provides circumstances which are plainly attributable, NR is obliged to make the attributions to the appropriate party. The underlying logic agreed by industry representatives in the compilation process of the DAG is that an organisation which investigates safety reports in relation to the assets it operates is attributed as the cause when no fault is found.
- 3.2.7. The definition of 'Attributable to the Train Operator' set in schedule 8 of the Track Access Agreement should be interpreted broadly and 'having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide'.
- 3.2.8. Clause (a)(i) of the definition of 'Attributable to the Train Operator' in the Track Access Agreement applies to any 'act or omission of the Train Operator's staff or its agents, contractors or sub contractors'. A safety related report concerning a Train Operator's own employee would be caused by his or her own act. Furthermore the need for the Train Operator's employee to carry out the required inspection is a cause for the delay of the relevant train.
- 3.2.9. Clause (a)(iii) of the definition of 'Attributable to the Train Operator' in the Track Access Agreement means that NFF incidents are properly attributed to the Train Operator.
- 3.3. NR referred to the decision of the Regulator in the appeal of dispute NV 33 as to the approach to be taken with regard to the interpretation of the construction of the agreement. DBS made submissions as to the approach to be taken as to the interpretation of the agreement.
- 3.4. DBS sought a determination that NFF incidents are ANR (or alternatively ATO/NR) for the purposes of the Performance Regime set out in Schedule 8 of the Track Access Agreement.
- 3.5. NR sought a determination that:
 - 3.5.1. the DAG is contractually binding and requires NR to allocate NFF to the Train Operator;
 - 3.5.2. the correct interpretation of paragraph (a)(i) of the definition of ATO in the Track Access Agreement would in any event result in the allocation of NFF to the Train Operator;

- 3.5.3. the correct interpretation of paragraph (a)(iii) of the definition of ATO in the Track Access Agreement would in any event result in the allocation of NFF to the Train Operator; and
- 3.5.4. the claimant's application be dismissed.

4. Oral exchanges at the Hearing

- 4.1. At the hearing both parties made opening submissions and were then questioned by the Panel. At the conclusion of the hearing each party made closing submissions.
- 4.2. DBS's opening submissions are summarised as follows;
 - 4.2.1. The dispute is not about the multilateral process set out in Part B of the Network Code concerning NR's management and operation of the performance monitoring system, including the procedure known as delay attribution, in accordance with the Delay Attribution Guide. It should not be confused with Schedule 8 of the Track Access Agreement which is a bilateral process used to determine the financial responsibility of operational performance as between the parties to the dispute.
 - 4.2.2. DBS accepts that NR was right to attribute 'safety of the line - no fault found' (NFF) to the Train Operator in accordance with the Delay Attribution Guide.
 - 4.2.3. This dispute concerns how information gathered for the multilateral Performance Monitoring System (PMS) concerning delays arising from NFF incidents is then correctly allocated 'downstream' under the provisions of the bilateral scheme set out in Schedule 8 of the Track Access Agreement as templated for freight operations.
 - 4.2.4. It was therefore wrong both in principle and in law to allege (as NR did) that if an NFF incident is attributed to the Train Operator in the PMS then it must follow that the same incident must also be attributed to the Train Operator under the Performance Regime set out in Schedule 8 of the Track Access Agreement.
 - 4.2.5. NR was wrong to argue that the Delay Attribution Guide should take primacy over all of the attribution criteria listed within the definition of 'Attributable to the Train Operator'. The correct approach was in all cases to have 'due regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide'.
 - 4.2.6. It was incorrect to allege (as NR did) that the definition of 'Attributable to the Train Operator' was wide enough to include those circumstances listed at (a)(i) and (a)(iii) of the definition set out in the definition section of the Track Access Agreement.
 - 4.2.7. In relation to previous decisions of Access Dispute Panels, DBS accepts that a number of the decisions quoted in the papers before the Panel concern the passenger performance regime and that the passenger scheme is different from a freight track access agreement with which the Panel is now concerned.

Nevertheless the distinction drawn in some of the previous decisions as between the multilateral process under Part B of the Network Code and the bilateral process under Schedule 8 of the Track Access Agreement remained both relevant and an important distinction to be drawn when considering Schedule 8.

4.2.8. With regard to the written submission made by NR on 12 April 2011 DBS made, in summary, the following submissions:

4.2.8.1. The determination recorded in dispute ADP07 recognises the distinction between the delay attribution process, and allocation under the performance regime.

4.2.8.2. The determination recorded at dispute ADP19 should be considered narrowly and in the context of the circumstances existing in that particular dispute.

4.2.9. In order for there to be delay attributable to the Train Operator under an NFF there must be a determination that one or more of the circumstances listed in the definition of 'Attributable to the Train Operator' in the Track Access Agreement has been made out, irrespective whether or not the contrary is indicated in the Delay Attribution Guide.

4.3. NR's submissions are summarised as follows;

4.3.1. It has been the custom and practice over the 16 years since rail privatization took place, that when a problem is reported as to a piece of equipment for which no fault is found upon examination, then the operator of that piece of equipment against which the report has been made, becomes responsible for any delays that arise. The principle is considered by the industry to be a fair and equitable means of attributing delays which arise from individuals discharging their responsibilities to maintain a safe railway.

4.3.2. The Delay Attribution Guide is a contractual document incorporated into Part B of the Network Code and is a document that is subject to regular review and scrutiny by the railway industry.

4.3.3. The guidance found at paragraph 4.24.2 (I) of the Delay Attribution Guide is plain, namely that delays arising from an NFF should be attributable to The Train Operator. The corollary position is NFF incidents where a fault has been reported with regard to the infrastructure. The Delay Attribution Guide attributes such delay to NR.

4.3.4. There can be no distinction between the allocation of an incident within the Performance Monitoring System and the attribution of delay under the Performance Monitoring System. Where guidance is given in the Delay Attribution Guide then such guidance applies equally to the allocation of minutes in the Performance Monitoring System and to the attribution of minutes for the Performance Regime.

- 4.3.5. The previous decisions of Access Dispute Panels referred to in the papers before the Panel were in relation to passenger service Track Access Agreements which differ from the Freight Services Track Access Agreements in a number of ways. However a consistent theme in the previous determinations had been the primacy of the Delay Attribution Guide over the Track Access Agreement.
- 4.3.6. DBS had argued that the terms of the contract come first and the Delay Attribution Guide second. This was the wrong approach because;
- 4.3.6.1. Condition A1.1(h) of the Network Code states that in the event of any conflict of interpretation between the Network Code and a Track Access Agreement then the Network Code shall take precedence.
- 4.3.6.2. The determination of dispute ADP30 confirmed the primacy of the Network Code.
- 4.3.6.3. The determination of dispute ADP39 stated that the practical function of the Delay Attribution Guide is to provide criteria by which to judge circumstances in which delay has occurred, and to make a pragmatic attribution of responsibility for the purposes of furnishing the data necessary to calculate the sums payable under Schedule 8 of the Track Access Agreement.
- 4.3.7. The dispute in this case as between the parties is, in NR's submission, that the interpretation of the contract requires the attribution to be undertaken in accordance with the Delay Attribution Guide in the submission of DBS, that attribution must only follow if the criteria contained in the definition of 'Attributable to the Train Operator' set out in the Track Access Agreement is satisfied.
- 4.3.8. The guidance in the Delay Attribution Guide has contractual force and exists both for the purposes of the Performance Monitoring System and the Performance Regime.
- 4.3.9. NFF is not a cause of delay but an outcome. The act of examining a train falls within the criteria (a)(i) of the definition of 'Attributable to the Train Operator' in the Track Access Agreement because the examination of the train is an 'act of the Train Operator's staff or its agent'.
- 4.3.10. The previous decision ADP39 determined that although an event may have occurred, the delay incident does not become manifest until the relevant event is reported and action is taken.
- 4.3.11. The Delay Attribution Guide is clear that in the circumstances of this case the delay should be attributed to the Train Operator and NR have a contractual obligation to allocate such delay to the Train Operator.
- 4.3.12. The Regulator's final conclusions on the Model Freight Track Access Agreement (March 2004) makes reference at paragraph 5.28 to the drafting of Schedule 8

with reference to the definitions of Attributable to the Train Operator, Attributable to Network Rail and Attributable to both the Train Operator and Network Rail. In particular, there was a need to ensure that in each case the definition requires the parties to have regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide.

4.4. The following issues were questioned, discussed and clarified by DBS:

- 4.4.1. The Delay Attribution Board was formed to separate the process of the consideration of delay situations and to ensure that factors affecting performance on the network are addressed, but considered independently of the financial consequences under the contractual arrangements.
- 4.4.2. As from April 2009, the freight operators had common delay rates, thereby removing the competitive advantage. The regime change in 2009 gave rise to a need to examine the terms and conditions of the Track Access Agreement.
- 4.4.3. The three log entries provided in DBS' statement of claim were amplified and explained.
- 4.4.4. The fact that previous decisions of Access Dispute Panels relate to the Passenger Track Access Agreement model makes no difference. The Network Code Part B process is multilateral but this dispute is about how the multilateral information is then fed into the bilateral contract arrangements.
- 4.4.5. NR has placed undue reliance on the Delay Attribution Guide and has not considered properly the words "having regard to".
- 4.4.6. In order to be ATO/NR, there would need to be agreement between DBS and NR. There have been about 70 NFF cases since January 2010 and the financial outcome will depend on the determination of this dispute.
- 4.4.7. There are no issues arising in this dispute which justifies a referral to ORR.

4.5. The following were questioned, discussed and clarified by NR:

- 4.5.1. There is a distinction between passenger and freight train Access Agreements and that has an effect on the consideration of previous determinations which are mainly passenger Schedule 8 determinations. However, there is no difference between the two regimes as to the primacy of the DAG. The passenger regime takes into account DAG and so should the freight regime.
- 4.5.2. Having 'due regard' means that if the DAG provides a clear example that allocates the delay to the Train Operator, then NR is obliged to do so.
- 4.5.3. Schedule 8 of the Track Access Agreement requires NR to look at the DAG first.
- 4.5.4. In order for the delay to be jointly attributable as between the Train Operator and NR then there has to be an agreement between the parties.

- 4.5.5. The signaller is the person responsible for stopping the train unless the advice is given direct to the driver, which can happen in some cases.
- 4.5.6. The train signalling regulations are an NR responsibility.
- 4.6. In closing, NR made the following submissions:
- 4.6.1. Causation is important in this dispute. NR acts in accordance with the industry Rule Book when it brings a train to a stand and the delay event that occurs is the examination of the train for the reported defect. As such, the delay incident is caused by the act of examining the train arising from a report of a defect.
- 4.6.2. The Track Access Agreement required NR to attribute "in all cases" having regard to the guidance in the DAG.
- 4.6.3. As to 'due regard', NR was obliged to attribute NFF to ATO in accordance with the DAG.
- 4.6.4. Any change to the interpretation of what is a template contract would not be bilateral, because other freight operators would be entitled to the same interpretation.
- 4.7. DBS made the following closing submissions:
- 4.7.1. The central issue was the interpretation of the wording "having regard" to the guidance and allocation of responsibility for examples set out in the DAG.
- 4.7.2. The words "having regard" could not be read as "subject to".
- 4.7.3. The act of stopping the train by NR was the primary cause of delay in NFF incidents.
- 4.7.4. The Performance Regime was premised on the principle of the fault allocation to the infrastructure controller, unless one or more of the criteria set out in the definition of ATO in the Track Access Agreement were met.

5. Consideration of issues and submissions

- 5.1. I need to deal with a number of matters helpfully drawn to my attention by the parties. They are:

- Approach;
- Precedent;
- Contract interpretation;
- The meaning of the words "due regard" and "having regard";
- A consideration of whether this case should be referred to the ORR.

I will deal with each of these matters in turn which will then inform my determination as to the issues between the parties.

Approach

- 5.2. My primary approach and principal obligation is to reach a determination on the basis of the legal entitlements of the parties and upon no other basis. The principal is set out in A5 of the Rules and provides as follows:

"Each and every Forum shall reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis. Each and every Forum shall act in accordance with the law; and all its decisions, including determinations and decisions on procedure, shall be in accordance with the law."

Precedent

- 5.3. In this dispute, both parties made reference to a number of previous decisions made under the Access Dispute Resolution Rules and by the ORR. At my invitation both parties have helpfully provided me with a list of cases relied upon. In order that there should be no doubt, the list of relevant cases provided to me was as follows:

- ADP07;
- ADP19;
- ADP11;
- ADP30;
- ADP39;
- NV33.

- 5.4. I remind myself as to the approach to be taken with regard to previous determinations which is set out at A7 of the Rules:

"In reaching its determination, each and every Forum shall:

- (a) take note of relevant published ADA or TTP determinations (and those of any previous predecessor bodies) and of any other relevant Tribunal excluding (to the extent referred to in (b) below) the ORR, as persuasive authority but need not be bound by them;*
- (b) be bound by any relevant decision of the ORR on a Regulatory Issue and any relevant decisions of the Courts."*

ADP07

- 5.5. Both parties made submissions as to this previous determination. Accepting NR's submission that this dispute arose in special circumstances as a consequence of franchise re-mapping, I am assisted by the following matters mentioned in the decision:

17 *Taking account of all of the preceding factors, the Panel determined that:*

- 17.1 *there is a separation between the delay attribution process, and the contractual process by which, under Schedule 8 of the Track Access Agreement, responsibility is allocated as between the Train Operator and Network Rail;*

- 17.2 *the delay attribution process may inform the process of allocation of responsibility, but, in circumstances where the delay attribution process (as in DAG paragraphs 4.17, or 4.38) recognises finer matters of causality that are not specifically recognised in the contract, it would not be reasonable to expect to re-interpret the contract to accommodate those nuances;*
- 17.3 *in any one Track Access Agreement, the allocation of responsibility for delay can only be as between Network Rail, and the Train Operator that hold the access rights applicable to the delayed train.*
- 5.5.1. In this case, NR argued (at paragraph 7.1.1) that the delay attribution process served as a diagnostic process, which, whilst it might inform the contractual allocation process, did not determine it.

ADP19

- 5.6. This case related to the out-of-leaf fall season attribution of delay caused by leaf fall. NR drew to my attention to the clear distinction between the mandatory provisions of the Network Code and the DAG and this was expressed in the determination as follows:
9. *The Panel considered that, in respect of all the detail of this dispute, there was a need to bear in mind the clear distinction between the provisions of the Network Code, which are incorporated within and form a mandatory element of every Network Rail Track Access Contract approved by the Office of Rail Regulation, and the specific, and sometimes bespoke, provisions of the individual Track Access Contract with the individual Train Operator. In particular, the Panel differentiated;*
- 9.1 *the multi-lateral process set out in the DAG, and enforced by the contractual obligations set out in paragraphs 5 and 6 of Schedule 8 of the Track Access Agreement (TAA) by which the nature of an incident is determined, coded and, along with any resulting delay minutes, is attributed to a responsible organisation ("the Trust DA process"); from*
- 9.2 *the bi-lateral contractual mechanism which the relevant information from the Trust DA process is converted, through the intermediary of Pears system, and subject to any other agreements between the parties, into payments due under the terms of the individual Train Operator's performance regime ("the money process"). In the case of FSR these were contained in Schedule 8 of the Passenger Track Access Agreement / Track Access Contract (paragraphs 7, 8, 9 and 10 of Schedule 8).*

ADP11

- 5.7. This determination concerned attribution of delay caused by the overnight identification that Class 377 units had been exposed to an instance of 200 Hz frequency in service requiring their Line Interference Monitoring ("LIM") units to be reset.
- 5.7.1. In this case, there was no reference to the DAG. I was assisted by the following extract of this determination:

- 16.1 *that delay attribution is about achieving a proportionate accountability for delay as between the Train Operator, Network Rail or the parties jointly; it is not a forensic tracking down of the reasons why a specific delay might have occurred. "The Committee considered that AD27 had established a distinction that was of direct relevance to this case, namely that the (largely mechanistic) process that, in accordance with the terms of the Track Access Agreement, attributes an incident that causes delay to one or other of the contracting parties, is something totally different in kind from the discovery in attribution of the causes of that incident. Attribution to the right contracting party is a function of the operation of Schedule 8 in relation to quantified delays that have occurred, and as such is the proper province of the TRUST Delay Attribution Guide. Establishing possible chains of causality, relates, speculatively, to matters which may or may not have led to delay, and which are not therefore themselves delay incidents; and as such they have no part in the operation of Schedule 8.*

ADP30

- 5.8. This dispute concerned allocation of delay caused by a train's brake system venting when part of the braking system either fell off or was knocked off by debris on the track. At paragraph 24, the Panel held:

24. *All that said, the delay attribution process does not require any suspension of the due processes of common sense, nor can it discount the laws of physics, or ignore sound engineering analysis of observed evidence.*

ADP39

- 5.9. This dispute concerned the attribution of delay arising out of a train being delayed by fog and one of my Industry Advisers suggested to the parties via the Committee Secretary that the determination should be included in a consideration of previous cases.

- 5.9.1. At paragraph 20 of the determination, the Panel determined as follows:

20. *The Panel reminded itself that the practical function of the DAG is to provide criteria by which to judge circumstances in which delay has occurred, and to make pragmatic attribution of responsibility, for the purposes of furnishing the data necessary to calculate the sums payable, in this case, under the Passenger Schedule 8 Performance Regime. On the other hand, however useful the guidance given, where the DAG does not contemplate the circumstances of the case then the correct attribution has to be based upon an assessment of how the specific circumstances in question align with the three different categories of defined, contractual responsibility in Schedule 8:*

- 20.1 *Network Rail responsibility incidents*
- 20.2 *Train Operator responsibility incidents*
- 20.3 *Joint responsibility incidents.*

- 5.10. NR submitted that the decisions referred to above concern passenger train operator Track Access Agreements and therefore are "so different that it is not appropriate simply to apply determinations relating to passenger Track Access Agreement Schedule 8 disputes to Freight Schedule 8 disputes". In answer to my question, DBS submitted that there was no difference as between passenger and freight in relation to the principles that they advanced for consideration by the Panel.
- 5.11. The appeal entitled NV33 determined by the Regulator is best considered under the next heading.

Contract Interpretation

- 5.12. In considering the approach to interpreting a Track Access Agreement, it is important to remind myself as to the nature of Track Access Agreements and the access regime. In the case of Network Rail Infrastructure Limited v Great North Eastern Railway Limited 2003/4, the Rail Regulator expressed the nature of agreements and the regime as follows:

8. *Track Access Contracts are the means by which train operators and other gain access to the network. They provide the legal basis for a complex interface between the infra-structure provider (Network Rail) and infra-structure user (usually, but not necessarily, a train operator) and establish the rights and obligations of both parties in a commercial relationship of considerable inter-dependence.*
9. *Access contracts established under the Railways Act 1993, of the kind which is in issue in this appeal, are unusual creatures. They are not contracts over which either party – infrastructure provider or infrastructure user – has the last word. The nature of the regulation of the relationship between these two parties, and the role of the regulator in determining – under Sections 17-22A of the Railways Act 1993 – what the terms of the contract should be and indeed, whether there should be any contract at all, is a significant factor in the factual matrix of this case.*

- 5.13. In considering the interpretation of a contract, regard may be had to the canons of construction, but these are no more than pointers to ascertaining the meaning of a written contract. They are not to be applied slavishly, and where they point in different directions, a Court must select those which will produce a reasonable and just result.¹

- 5.14. The first canon of construction suggested by Lewison is that in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document.² This approach is sometimes labelled as "holistic interpretation".³ In the very old case of Barton v Fitzgerald 1812, the Judge stated:

"It is a true rule of construction that the sense and meaning of the parties in every particular part of an instrument may be collected ex antecedentibus et consequentibus; every part of it

¹ Lewison.K. The Interpretation of Contracts at page 241.

² Lewison.K. The Interpretation of Contracts at page 243.

³ The Hutton-Shaw (2007) 1F.L.R.1839 (per Arden L.J)

may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done".

- 5.15. Such a canon of construction is helpful when in this case, as in many access disputes, the contract is evidenced by an array of documents, some of them creating more confusion than assisting as to a clear statement of the parties' intention.
- 5.16. The Rail Regulator in *Network Rail Infrastructure Limited v Great Northern Eastern Railway Limited* 2003/4 suggested the following approach as to the construction of regulated contracts:

104 *How then is an objective and reasonable interpretation arrived at? In my judgement, there are two factors of overarching weight or importance. The starting point is the language used set in the context of the contract read as a whole. In that regard, the words of a contract should be construed in their natural, ordinary and grammatical sense, except to the extent that some modification might be required to avoid absurdity, inconsistency or repugnancy, or unless it is apparent that particular terms bear or were intended to bear a special or technical meaning: Lewison paragraphs 4-01 and 4-02; Chitty on contracts volume 1 (28th edition) paragraphs 12-049 and 12-050. The second factor relates to the factual matrix in which the contract was made and which it falls to be construed:" the Court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract including evidence of the "genesis" and objectively the "aim" of the transaction (Lewison, paragraph 2-12). Accordingly, the commercial purpose intended to be served by a contract may illuminate the meaning of particular terms when on a reading of the language alone there might be doubt. Similarly, in the context of a contract such as a Track Access Contract, the regulatory objectives pursued by the Regulator in adopting and modifying the Network Code, and in agreeing (or not) to the inclusion of particular terms when this approval is sought, form a significant part of the factual matrix of the contract, which matrix may play a decisive role in resolving disputes as to the correct construction of a contract where the words alone are insufficiently clear.*

- 5.17. Finally, under this section, it would be helpful to consider what was said by Lord Bingham in the case of *BCCI v Ally* (2001) 1A.C.251 when he summarised the principles of interpretation of contracts as follows:

"To ascertain the intention of the parties, the Court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intention, the Court does not of course enquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."

Due regard and having regard

- 5.18. The meaning and interpretation of the words "due regard" and "having regard" have some importance in this dispute. The words appear by way of example in B2.2 of the Network Code and in Schedule 8 of the Track Access Agreement and both parties have made submissions as to the meaning of these words.
- 5.19. The words "due regard" and "having regard" have been considered in a number of cases before the High Court.⁴ In the case of *R (Baker) v Secretary of State for Communities and Local Government*, Lord Justice Dyson asked the question "What is due regard?" In answering the question that he posed, he suggested "In my view, it is the regard that is appropriate in all the circumstances". In the case of *R (Meany) v Harlow District Council*, the Judge decided that "due regard" depended on what was appropriate in the circumstances of the case.
- 5.20. In the case of the First ScotRail appeal in respect of determination TTP242⁵ concerning what was meant by "due regard" and its application to the Decision Criteria, the ORR stated "an obligation to have "due regard" requires Network Rail to consider each of the Decision Criteria and to give them appropriate weight in all the circumstances of the particular case".

Referral to ORR

- 5.21. At the outset of the hearing, NR tabled a document entitled Network Rail Submissions concerning referral to ORR. Mr Gilbert, when asked, confirmed that he was not making an application for the dispute to be referred to the ORR. However, in the event that I was minded to prefer the claimant's interpretation of the Network Code and Track Access Agreement, then I should refer the whole matter to the ORR.
- 5.22. NR advanced a number of reasons including that any determination made by me would be binding only between the parties to the dispute despite the fact that the provisions of all freight operator Track Access Agreements are the same. It therefore followed that if the matters to be determined concerned a material part of the regulated structure of the industry, and/or the Regulator's Regulatory oversight of the same, as well as arising out of the ORR's function in relation to regulated agreements, the dispute should be referred to the ORR.
- 5.23. Under ADR Rules C1 and C3, a referring party can refer to the ORR at any stage of the determination process. "Any discrete issue or matter which is connected to or forms part of a dispute and:
- (a) concerns information to which the ORR has access and which is not readily available from another source or;

⁴ *R (on the application of Meany, Glynn and Sanders) v Harlow District Council* (2009) EWHC 559(Admin); *R (on the application of Baker and others) v Secretary of State for Communities and Local Government and London Borough of Bromley and Equality and Human Rights Commission* (2008) EWCA CIV 141; *R (on the application of Judy Brown) v the Secretary of State for Work and Pensions and Royal Mail Group Ltd and Equality and Human Rights Commission* (2008) EWHC 3158 (Admin)

⁵ Letter ORR 11 December 2008

- (b) is or concerns a Regulatory Issue or;
 - (c) is an issue or matter of wider railway industry relevance which would benefit from ORR's industry-specific experience and/or knowledge."
- 5.24. "Regulatory Issue" is defined as "a principle, issue or process connected with the railway industry (and any inter-reaction between such principles, issues and processes) which:
- (a) concerns the regulated structure of the industry as a whole or a material part of it, or;
 - (b) relates to or is closely aligned with a matter on which the ORR has regulatory oversight (from time to time); or
 - (c) is connected with the ORR's duties, functions or powers as a regulator including without limitation under the Railway Act 1933 Section 4".
- 5.25. In relation to the contract, both parties agree:
- 5.25.1. The set of Rules called the Network Code is incorporated by reference into Track Access Agreements and therefore forms part of the contract between the parties to this dispute.
 - 5.25.2. Condition A1.1(h) of the Network Code states that in the event of any conflict between the Network Code and a Track Access Agreement, the Network Code should take precedence over the Track Access Agreement. Both parties agree there is no conflict in this dispute.
 - 5.25.3. Condition B1.3 of the Network Code states that the Delay Attribution Guide is incorporated into and shall form part of the Network Code.
- 5.26. Schedule 8 of the Track Access Agreement sets out relevant definitions of "Attributable to both the Train Operator and Network Rail"; "Attributable to Network Rail" and "Attributable to the Train Operator" (set out in Annex A).
- 5.27. NR is required by Condition B1.1 of the Network Code to operate a system for monitoring train performance which accurately records a number of matters set out in B1.1, including the cause of train delays and cancellations.
- 5.27.1. In order to carry out its specific obligations under B1.1(d) of the Network Code, ie, to accurately record the cause of train delays and cancellations, NR shall have due regard to all information which is relevant in the circumstances including those matters set out at Condition B2.2 of the Network Code (see Annex B).
- 5.28. DBS does not dispute how NNF incidents are recorded and allocated by NR in the Performance Monitoring System for the purposes of Part B of the Network Code and in accordance with the Delay Attribution Guide. Therefore, DBS accepts that within the Performance Monitoring System, NR is entitled to attribute NNF incidents to the Train Operator. The parties are then in dispute in terms of what has been called the "downstream process", namely the process that determines the allocation of delay under Schedule 8 of the Performance Regime set out in the Track Access Agreement.

- 5.29. I accept that previous determinations under the Rules concern passenger train operators and not, as in this case, a freight operator. NR submitted that Schedule 8 disputes are "so different that it is not appropriate simply to apply determinations" relating to passenger Schedule 8 disputes. My approach is "take note of relevant ADA determinations" and I am persuaded as to the importance of drawing a clear distinction between:
- (a) the attribution of incidents, delays and cancellations under the Performance Monitoring System that NR operates under Part B of the Network Code and to which the Delay Attribution Guide has a role to play and;
 - (b) the allocation of delays and cancellations for the purpose of the Performance Regime set out in Schedule 8 of the Track Access Agreement.
- 5.30. I am also persuaded by a consideration of previous determinations under the Rules that there is a need to draw a distinction between the
- (a) multilateral process set out in Part B of the Network Code concerning NR's management and operation of the Performance Monitoring System; and
 - (b) bilateral process set out in Schedule 8 of the Track Access Agreement.
- 5.31. It will be clear from the parties' submissions that a significant issue in this dispute is how the information derived from the multilateral process concerning NFF incidents is then allocated and interpreted as part of the Performance Regime set out in Schedule 8 of the Track Access Agreement.
- 5.32. Condition B.2.2 of the Network Code (see Annex B) provides that NR when determining and recording the persons and causes which are responsible for train delays and cancellations, has due regard (my underlining) to all information which is relevant in the circumstances, including that which is relevant in the circumstances, including matters listed at (a) to (e) of Condition B2.2. Paragraph (e) of Condition B2.2 states:
- (e) information and guidance set out in the Delay Attribution Guide.
- 5.33. NR submits, in summary, that where the Delay Attribution Guide is plainly applicable (as in NFF cases) then NR is obliged to attribute NFF in relation to rolling stock to the Train Operator for the purposes of the Schedule 8 Performance Regime.
- 5.34. The question that has to be addressed is what does "due regard" mean. In relation to Condition B2.2 of the Network Code, I adopt the test suggested by Lord Justice Dyson in *R (Baker) v Secretary of State for Communities and Local Government* namely that it means "it is the regard that is appropriate in all the circumstances of the case".
- 5.35. In considering the words "due regard", I adopt Lord Bingham's test of "giving the words used their natural and ordinary meaning in the context of the agreement and the parties' relationship and all the relevant facts surrounding the transaction so far as is known to the parties".
- 5.36. My task is to make a determination based on legal entitlements. I have concluded that in carrying out that task, I do not accept that NR is obliged, as a matter of contract

interpretation, to attribute NFFs in relation to rolling stock to the Train Operator for the purpose of the Schedule 8 Performance Regime. I say so for the following reasons:

- 5.36.1. I have set out at paragraph 5.29 my reasons as to the importance of recognising the two systems under consideration in this dispute. Applying Lord Bingham's test (paragraph 5.17) I conclude that clear words would need to be used to establish that NR has the obligation they maintain. DBS suggests⁶ that the draftsman could have stated that ATO means any delay or cancellation arising out of any incident that had been attributed to the Train Operator in accordance with the Guide. I do not go that far (although such a suggestion would have removed all doubt in this dispute), but I do conclude that clear words are needed to create the obligation maintained and advanced by NR. I do not find such language sufficient to support an obligation on the part of NR to attribute NFFs to the Train Operator for the purposes of Schedule 8.
 - 5.36.2. "Due regard" means having regard to all the circumstances. That means not only those listed in Condition B2.2 of the Network Code but all relevant circumstances. As found by the ORR, due regard means considering all relevant information, and then giving weight to that information, in the particular circumstances of the case. Paragraph (e) of Condition B2.2 is only one matter of information for NR to consider and then weigh as to its importance.
 - 5.36.3. The Delay Attribution Guide itself assists with the weighing process that has to be undertaken by NR. In the introduction, the Guide states: "While the statement is not intended to create contractual rights or obligations..." In my judgement, that is an indicator as to the weight to be given to the DAG.
 - 5.36.4. Taking all these matters into account, I conclude that no contractual obligation is created as advanced by NR and that, in all the circumstances, little weight should be given to the DAG for the purpose of the Schedule 8 Performance regime.
- 5.37. In my judgement, Condition B2.2 of the Network Code does not create an obligation on the part of NR, by reference to the Delay Attribution Guide, that requires NR to allocate NFF incidents to the Train Operator for the purposes of the Schedule 8 Performance Regime.
- 5.38. I now need to consider the definitions set out in Schedule 8 of the Track Access Agreement in relation to the attribution of delay (see Annex A).
- 5.39. I have considered all three of the definitions in detail and consider for this determination the following aspects of the definition of "Attributable to the Train Operator":
- 5.39.1. The definition applies to any delay or cancellation arising as a result of: "any act of omission of the Train Operator's staff or its agents, contractors or sub-contractors (a(i)).

⁶ Paragraph 2 of the Claimant's Response

- 5.39.2. The definition must be applied "having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide".
- 5.40. In considering 5.39.1, an analysis has to be undertaken as to the modus operandi of an NFF and the part played by the Train Operator and NR.
- 5.41. In consideration previous decisions of Access Dispute Panels referred to me by the parties, I am assisted by the suggestion that a consideration of the facts at the moment in time when there is a transition from no delay to delay is of some importance. The determination of ADP11 stated:
11. *"Delay only occurs once there is an actual incident, it should be attributed, as between the Train Operator and Network Rail, by reference to which body has the responsibility for the factor which makes the decisive difference between a no delay incident and an actual delay incident".*
- 5.42. The Panel heard considerable argument from both parties on this aspect and the Panel asked a number of questions in relation to this analysis. I do not find this to be a straightforward matter, and I am not assisted by any clear intentions expressed in all the documents that constitute the contract. In answer to questions, NR stated that all persons about the railway have a duty to report to the Signaller if they think there is a problem with a train. The Signaller has a duty in the Rule Book to be the operator of the Rule Book applications. NR referred me to both Rule Book Module G1 and Module TSI.
- 5.43. I therefore conclude, considering the helpful determination of ADP11 at paragraph 11, that it is the decisive act of the Signaller in bringing a train to stop which is subsequently found to be NFF, that causes the situation to move from a non-delay to a delay situation. The Signaller is an employee of NR and is the reason whose actions commence the delay period.
- 5.44. I am therefore satisfied that having regard to the above analysis, an NFF cannot be regarded as the act or omission of the Train Operator, its staff, agents, contractors or sub-contractors.
- 5.45. I now turn to consider the words in the definition of "Attributable to the Train Operator" of "having regard to the guidance on allocation of responsibilities for incidents set out in the Delay Attribution Guide". It is of interest to note that unlike the Network Code the word "due" is not used in the Track Access Agreement.
- 5.46. I refer to the earlier analysis at paragraphs 5.34 to 5.35. The word "due" does have to be considered, but in my judgement, the words "having regard" must be interpreted as having regard to all the circumstances, and then carrying out a weighing exercise to determine what weight, in this case, should be attributed to the Delay Attribution Guide.
- 5.47. In one High Court case⁷ the Judge commented that "due" must "add something". That was a case where the Court was considering the words "due" and "due regard". Considering

⁷ R (on the application of Meany Glynn and Sanders v Harlow District Council 2009 (EWHC) 559 Admin

the agreement as a whole and considering the factual matrix I cannot find that any notion of "due regard" creates a different qualitative obligation than "having regard".

5.48. I have concluded that in determining the parties' legal entitlements, I do not accept the NR submission that the words "having regard" in Schedule 8 of the Track Access Agreement require NR to comply with those parts of the Guide which are clearly and directly applicable to particular events and therefore attribute NFFs to the Train Operator. I say so for the following reasons:

- (1) Having regard to all of the circumstances and then undertaking a weighing exercise cannot create such an obligation unless there are clear words to support such an intention on the part of the parties. In my judgement, no such clear words are evident.
- (2) The Delay Attribution Guide is designed for a different process, namely the multilateral Performance Monitoring System, required to be operated by NR for the purposes of Part B of The Network Code.
- (3) The Delay Attribution Guide itself assists with the weighing process when it states "while the statement is not intended to create contractual rights or obligations..."

5.49. I have carefully considered the definition of "Attributable to the Train Operator" set out in the definition section of Schedule 8 of the Track Access Agreement. I am satisfied that by reference to what I have said above, none of the circumstances listed at (a) or (b) attribute delay to the Train Operator in respect of an NFF relating to rolling stock.

5.50. The question then arises that although I have concluded that the words "having regard" used in Schedule 8 do not create an obligation on the part of NR, there is still a need to consider whether as a result of the weighing exercise sufficient weight should be given to these words to attribute NFFs incidents to the Train Operator.

5.51. I have to read the definition as a whole. I am entitled to consider the "genesis" and objectively the "aim". I can consider the commercial purpose intended to be served by the contract, which may illuminate the meaning of particular terms when on a reading of the language alone there may be some doubt.

5.52. I am satisfied that the definition set out at (a) and (b) of the definition "Attributable to the Train Operator" in the Track Access Agreement is detailed and clearly sets out the parties' intentions in detail. The Delay Attribution Guide is designed primarily, but not exclusively, for the multilateral process set out in Part B of the Network Code. For that reason, I have concluded that in reading the definition as a whole and having regard to the purpose of the Delay Attribution Guide, little weight should be given to the Delay Attribution Guide. Put another way, in my judgement, sufficient weight cannot be given to paragraph (aa) of the definition such as to override the parties' clear intentions set out at paragraphs (a) to (b) of the definition.

- 5.53. I therefore conclude that delays caused by NFFs in relation to rolling stock are not attributable to the Train Operator for the purposes of Schedule 8 of the Track Access Agreement.
- 5.54. The definition "Attributable to Network Rail" means in respect of any delay or cancellation of a service or any other matter:
- (a) any delay or cancellation or other matter occurring on or off the Network, which is not Attributable to the Train Operator.
- 5.55. I therefore conclude that delays caused by NFFs in relation to rolling stock are attributable to NR for the purposes of Schedule 8 of the Track Access Agreement.
- 5.56. Having reached this conclusion, I am invited by NR to refer this case to the ORR. I consider Rule C3 by reference to the matters set out at 5.23 of this determination, and I find as follows:
- (a) I have concluded that having regard to my primary duty of coming to a determination on the basis of legal entitlements, I am not aware of any information which the ORR has access to, and which is not readily available from another source, which will assist me in that determination.
 - (b) Accepting that this determination will only bind the parties to this dispute, I do not find that to be a sufficient reason to cause this dispute to be a Regulatory Issue. I do recognise, however, that the four freight operators with interested party status in this dispute will have sight of this determination and may each seek to apply this determination to their own bilateral relationship with NR.
 - (c) I am concerned primarily with determining the parties' legal entitlements and I do not find that this is sufficiently connected with the ORR's overall statutory duties to justify a referral.
- 5.57. I therefore conclude that this is not an appropriate case to refer to the ORR and I decline the invitation to do so.

I DETERMINE that:

6. Determination

Having considered carefully the submissions and evidence as set out in sections 2, 3 and 4, and based on the Panel's analysis of the issues and submissions set out in section 5, I determine as follows:

- 6.1. I find that NFF incidents in relation to rolling stock should be attributed to NR for the purposes of the Performance Regime set out in Schedule 8 of the Track Access Agreement for Freight Services.
- 6.2. I find that the Delay Attribution Guide is contractually binding as between the parties to the dispute.

- 6.2.1. The Delay Attribution Guide, whilst contractually binding, does not of itself, create an obligation on the part of NR to allocate NFF's to the Train Operator in the context of the Freight Access Agreement.
- 6.2.2. The right approach is to consider the Agreement as a whole, and having regard to the purpose of the Delay Attribution Guide, little weight should be given to the Guide for the purposes of Schedule 8 of the Freight Track Access Agreement.
- 6.2.3. Accordingly, NFF's should not be attributed to the Train Operator.
- 6.3. I find that the interpretation of paragraph (a)(i) of the definition of ATO in the Freight Track Access Agreement would not result in the allocation of NFF to the Train Operator.
- 6.4. I find that the interpretation of paragraph (a) (iii) of the definition of ATO in the Freight Track Access Agreement would not result in the allocation of NFF to the Train Operator.

I confirm that, so far as I am aware, this Determination and the process by which it has been reached is compliant in form and content with the requirements of the Access Dispute Resolution Rules.

A handwritten signature in black ink, appearing to read 'S.E. Murfitt', with a large, stylized loop at the end.

Stephen Murfitt

Hearing Chair

11th May 2011

ANNEXES

Annex A - Relevant Definitions in Schedule 8 of the Track Access Agreement

Annex B - Condition B2.2 of the Network Code

ANNEX A

Relevant Definitions in Schedule 8 of the Track Access Agreement

"Attributable to both the Train Operator and Network Rail" means, in respect of any delay to or cancellation of a Service of a Third Party Train, a delay or cancellation in relation to which the parties have agreed or it is otherwise determined, having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide, that both the Train Operator and Network Rail are to be jointly responsible (in which case the delay or cancellation shall not fall within the definitions of "Attributable to the Train Operator" or "Attributable to Network Rail");

"Attributable to Network Rail" means, in respect of any delay to or cancellation of a Service or any other matter:

- (a) any delay or cancellation or other matter, occurring on or off the Network, which is not Attributable to the Train Operator;
- (b) any delay to, or cancellation of, a Restriction of Use, which is not Attributable to the Train Operator;
- (c) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree, or is otherwise determined, is Attributable to Network Rail; or
- (d) any delay or cancellation occurring on or off the Network, caused by an Other Train Operator Train on the Network,

and which excludes any such delay to or cancellation of a Service or any other matter arising as a result of a Planned Incident, in all cases having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide;

"Attributable to the Train Operator" means:

- (a) in respect of any delay to or cancellation of a Service, any such delay or cancellation arising as a result of:
 - (i) any acts or omissions of the Train Operator's staff or its agents, contractors or sub-contractors;
 - (ii) any Train Operator Omission;
 - (iii) any failure or defect in the Specified Equipment relating to a Service (including where Network Rail shall have refused to permit the Service to move over the Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);
 - (iv) any improperly loaded railway wagons which form the whole or part of any Service;
 - (v) any service not being promptly accepted off the Network at a Destination or Intermediate Point for reasons not caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator);
 - (vi) any failures or delays arising off the Network, other than those which are caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or
 - (vii) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or is otherwise determined is Attributable to the Train Operator;
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Restriction of Use, any such delay or cancellation arising as a result of:
 - (i) any delay to or cancellation of a Service Attributable to the Train Operator;
 - (ii) any Train Operator Omission; or

- (iii) that portion of any such delay to, or cancellation of, a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator,

in all cases:

- (aa) Having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide; and
- (bb) ignoring any delay or cancellation under paragraph (d) of the definition of "Attributable to Network Rail".

ANNEX B

Condition B2.2 of the Network Code

2.2 Information relation to causes of delays or cancellations

Network Rail shall, when determining and recording the persons and causes which are responsible for train delays and cancellations, have due regard to all information which is relevant in the circumstances, including the following:

- (a) information from any computerised or other recording system which Network Rail may, for the time being, be permitted to use for the purposes of a particular Access Agreement;
- (b) information supplied by signallers and other persons duly authorised to participate in the signalling of trains;
- (c) information supplied by any operator of trains, whether such information is within its knowledge or based on information supplied by other operators of railway assets;
- (d) information supplied by Network Rail, whether such information is within Network Rail's knowledge or based on information supplied by persons engaged or acting on behalf of, or otherwise in accordance with or subject to the instructions of, Network Rail or other operators of railway assets; and
- (e) information and guidance set out in the Delay Attribution Guide.

