
An ACCESS DISPUTE PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference ADP31

(following a Hearing held at Central House, Euston on 1st February 2008)

The Panel

John Czyrko (London & Birmingham) : elected representative for Franchised Passenger Class, Band 2

Nick Gibbons (EWS) : elected representative for Non-Passenger Class, Band 1

Bil McGregor (First ScotRail) : elected representative for Franchised Passenger Class, Band 1

John Salmon : appointed representative of Network Rail

Panel Chairman: **George Renwick**

The Parties

for First Greater Western Limited ("FGW")

Russell Evans Head of Performance & Network Strategy

Robert Holder Network Access Manager

for Network Rail Infrastructure Limited ("Network Rail")

Richard Cole Customer Relationship Executive (FGW)

Mark Burstow Vehicle/Track Interface Engineer

Neil Roberts Network Code Policy Specialist

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked, in a joint reference from FGW and Network Rail to determine, under the provisions of Network Code Part F, whether or not
 - 1.1. the addition to the "Specified Equipment" in the FGW Track Access Contract, of Class 142 trains, for the purpose of operating services in the Exeter area, qualified as a Vehicle Change; and if that were the case whether
 - 1.2. FGW would be liable to Network Rail for the payment of compensation in accordance with the provisions of Condition F2.3; and specifically
 - 1.3. Network Rail's proposal to fit new flange lubricators on the routes to be used
 - 1.3.1. should be counted as a necessary consequence of the re-introduction of the Class 142s; and that
 - 1.3.2. the costs of installing such flange lubricators should be paid for by the Train Operator to Network Rail; and, if so
 - 1.4. there are off-setting benefits that should be taken into account in any calculation of compensation sums.

2. Within the terms of the general provisions of Network Code Part F, the prescribed method of Dispute Resolution is by reference to *"the relevant ADRR Panel"*. In the current case, which relates to a very short notice change to the type of rolling stock to be operated on services incorporated into the Timetable commencing in December 2007:
 - 2.1. A Vehicle Change notice was sent out by Network Rail on behalf of FGW to all interested parties on 21st September 2007.
 - 2.2. Network Rail gave FGW a preliminary response, in accordance with Condition F2.4, in a letter of 22nd October which contains two conditions relevant to this dispute, namely that FGW be liable for
 - *"One –off costs for the fitment and maintenance of lubricators on sections of track susceptible to sidewear as a result of the operation of these units..."* and
 - *"Inspection costs – the frequency of track patrolling to be increased, at specific locations, to monitor the level of sidewear caused by these fixed wheel based units".*
 - 2.3. In a letter of 22nd November Network Rail formally accepted the Vehicle Change, but subject to the previously stated conditions, and amplified and quantified the compensation it considered it should be paid in respect of flange lubricators and inspections.
 - 2.4. In a reply, also dated 22nd November FGW announced that it would *"implement the Vehicle Change forthwith"*, but also that it *"disputes the costs and payments method shown and is referring to Access Disputes resolution as per Condition 5.1 (b) of Part F of the Network Code"*. This Condition applies *"If any Access Party is dissatisfied as to: ... (b) the contents of any notice given by Network Rail under Condition F3.1 (and, in particular, the amount of any compensation referred to in that Condition); ..."*.
3. The Panel acknowledges its jurisdiction in such cases. However, in addition to the specific requests for rulings detailed below, the Panel was asked to consider a number of arguments calling into question the very use of the Vehicle Change procedure in this case. The Panel considers it appropriate therefore to confirm the principle, based on oft repeated precedent, that Parts F and G of the Network Code should be used in any circumstances where one party (Network Rail or Train Operator) asks that it be so used, because their procedures facilitate the reaching of clear understandings. That principle would be undermined if the Panel were then to concur with one argument put forward in this case, namely that merely because one party invokes those procedures the change in question becomes, by definition, a "Vehicle Change" within the terms of the Track Access Contract.
4. Specifically the Panel notes that
 - 4.1. FGW asks the Panel to determine
 - (a) *"whether or not the operation of Class 142 vehicles on routes which are route cleared for Class 142s constitutes a Vehicle Change;*
 - (b) *if the operation of Class 142 vehicles on routes for which they are already route cleared does constitute Vehicle Change, whether and if so the extent to which NR should be entitled to compensation for fitting and inspecting lubricators, having regard to the existing NR Line Standard (NR/SP/TRK/8006) and the grants and track charges paid and payable to NR; and*
 - (c) *if the operation of the Class 142 vehicles does constitute Vehicle Change for which compensation is payable, the level of benefits which should be offset against the costs claimed."*

4.2. Network Rail asks the Panel to determine

- (d) *"That the operation of Class 142 vehicles in this case constitutes a Vehicle Change*
- (e) *The extent of compensation which NR is entitled to for the lubricators and temporary additional track inspections or that the establishment of the Vehicle Change be rejected.*
- (f) *If the Panel determines that this does constitute a Vehicle Change, but that NR is not entitled to be compensated for such change, [NR seeks an explanation as to] the appropriate application of the compensation mechanism provided for by Part F of the Network Code".*

5. The Panel notes that, with the agreement of both parties, Class 142 trains took up their diagrammed duties at the commencement of the December 2007 Timetable. The Panel therefore considers that the Vehicle Change has been implemented in accordance with the derogation given in Condition F5.3.2, namely that

"The Sponsor may implement a Vehicle Change which, but for this Condition F5.3.2, would not be an established Vehicle Change if:

- (a) *the amount of any compensation referred to in Condition F3.2 has not been agreed;*
- (b) *...*
- (c) *... and*
- (d) *there is no other dispute (whether under this Condition F5 or otherwise) as regards the proposed change between the Sponsor and any other Access Party."*

6. The Panel notes that neither party is representing that the other has incorrectly carried out any of the procedural provisions of Part F.

Some preliminary issues of definition; the relevant contractual provisions

7. In relation to the provisions of the Track Access Contract and the operation of Part F, the parties drew the Panel's attention to the following definitions as relevant to its determination:

7.1. Network Code Part F definitions :

"Specified Equipment" means, in respect of an Access Agreement, any railway vehicle the use of which is permitted on the track pursuant to that agreement;

"Sponsor" means, in relation to a proposal for a Vehicle Change under Condition F2.1, the Train Operator which has made the proposal;

"Vehicle Change" means, in respect of a Train Operator, any change to the Specified Equipment including by way of:

- (a) *...*
- (b) *... or*
- (c) *the inclusion in Specified Equipment of any railway vehicle which is not so included*

which, in any case, is likely materially to affect the maintenance or operation of the Network or operation of trains on the Network, but excluding any authorized variation".

7.2. Network Code: other definitions

"Railway Group Standards" means technical standards and operating procedures authorised pursuant to the Railway Group Standards Code and issued by Rail Safety and Standards Board Limited and approved by the Office of Rail Regulation" (Network Code Part A)

7.3. Other definitions/expressions:

Business Process Documents; these are internal Network Rail management control documents, also defined as "Level 2 standards". In Network Rail's document "Level 2 Network Rail standards management-process requirements: (NR/L2/STP/001)" such documents are described thus: *"Standards at Level 2 shall specify business processes, assurance systems and controls. They shall provide the minimum requirements against which Level 3 processes can deliver. All Level 2 standards are mandatory and shall be monitored for compliance on the Network Rail compliance database. Examples of Level 2 Standards are specifications, standard procedures and technical instructions"*. In lay terms the Panel understood that such documents prescribe the thinking and evaluation processes that Network Rail requires its staff and agents to follow when assessing a specific problem; they do not pre-dispose that evaluation process to coming up with particular solutions or outcomes.

Network Rail Standards are NOT Railway Group Standards, and are not enforceable other than in the context of Network Rail enforcing compliance on its own staff and agents.

"Sectional Appendix"

This document, full title *"the Sectional Appendix to the Working Timetables and Books of Rules and Regulations"* is NOT defined in the standard Passenger Track Access Agreement but it is incorporated by reference to its short title in connection with the obligation on Network Rail to produce (under Part D) a *"Working Timetable"*. The Panel was familiar with the operational use made of the Sectional Appendix; its attention was drawn to a statement by the ORR in March 2006 (order against Network Rail for contravention of Condition 7 of its Licence), which states *"the capability of the infrastructure is described in the sectional appendix for a particular part of the network (including such matters as gauge, line speed, and route availability). The sectional appendices are incorporated in the industry network code and are used in access contracts between Network Rail and freight [emphasis added] train operators to describe the network covered by the contract. It is therefore important that these documents are accurate"*.

The tabulations and format of the various volumes of the Sectional Appendix are then governed by a Railway Group Standard (formerly GE/RT/8004; to be superseded by GO/RT/3215), but the route specific content and detail are the responsibility of the respective management areas within Network Rail.

The Panel's findings in respect of facts

8. In the course of 2007, FGW had found that, unless it agreed to take on a fleet of Class 142 trains, it would have insufficient stock with which to discharge its franchise responsibilities. It had elected to use 8 diagrams of class 142, to replace 5 diagrams of Class 15x stock on nominated services in the Exeter area.
9. Class 142 trains had previously (for a brief period in the late 1980s) been used on the routes in question. Problems deriving from the long fixed wheelbase of the two axle vehicles resulted in BR redeploying the vehicles on other parts of the network deemed more suitable to the vehicles' characteristics.
10. The ORR document *"Criteria and Procedures for the approval of passenger track access contracts: fourth edition May 2006"* states (at page 23) that Schedule 5 *"lists all classes of usual and alternative types of rolling stock used by the train operator to ensure compatibility with the network"* [emphasis added]. Neither at Privatisation, nor at any time since before 2007, had Class 142 trains been used on the routes in question, nor had they been included as either Standard Specified Equipment, or as Additional Specified Equipment in any Track Access Contract. On this basis Network Rail had no reasonable expectation that it would need to equip the routes with equipment specifically to make the network compatible with the operation of Class 142s.
11. On the other hand, the Sectional Appendix conveys a contrary impression. The Panel was offered evidence that
 - 11.1. Table 3.1.1 of the GW Region Sectional Appendix (Dec 2003) **Class 142-332 Multiple Unit trains** sets out route clearance in a simple yes/no format (*"Trains formed of these units are permitted (Y) or prohibited (N) over routes shown in the following table"*); for each of the routes in question, the Class 142 column is endorsed (Y) without any qualification in the "Other Restrictions" notes column. And
 - 11.2. An ORR Notice dated March 2006 in relation to Network Rail's contravention of Condition 7 of its Network Licence, stated ORR's view that, *"Network Rail needs to understand the capability of its infrastructure to run its business and to plan the future operation, maintenance, renewal and enhancement of the network and inform decisions on future funding and outputs....The capability of the infrastructure is described in the sectional appendix for a particular part of the network (including such matters as gauge, line speed, and route availability)."*
12. Network Rail's processes for discharging its responsibilities in relation to track maintenance are documented in NR/SP/TRK/001 Business Process Document "Inspection and Maintenance of Permanent Way". This document states, at paragraph 23.2 **"Rail/flange Lubrication: Rail lubricators shall be considered for all curves with a radius of 1500m or less, and on any other curves exhibiting significant rates of sidewear"**.
13. This instruction is amplified in NR/SP/TRK/8006 Business Process Document: "Installation and Management of Rail Mounted Lubricators". This document contains a Section 1 **Introduction**, a section 2 **"Location requiring Lubricators"** prescribing that *"Lubricators shall be fitted at all possible locations where high lateral forces between wheel and rail are known or observed to exist (using rail wear pattern as a guide)"*, and detailing criteria that might generate such a pattern of wear, and a section 3 **"Prioritisation of Installations"** setting a hierarchy for new installations, where it has been determined that such installations were needed.

14. The Panel was asked by FGW to consider that the prefatory comment to this document (*"This Network Rail Specification is mandatory and must be complied with by Network Rail/Contractors."*), and particular words in the pre-amble to section 2 of NR/SP/TRK/8006 (*"Such sites would meet the criteria below:"*) created an obligation on Network Rail to fit flange lubricators on all such sites, in particular all sites where there was curvature tighter than 1500m radius. The Panel acknowledged that this wording could be interpreted that way; however such an interpretation would be at odds with the function of the document, which the Panel was satisfied was an internal Network Rail instruction relating to a process for evaluating the need for flange lubricators, and then for determining the priority for their fitment, dependent upon the results of observations of the *"rail wear pattern"*. The Panel rejected as incorrect the suggestion that this document had the status of a Railway Group Standard.
15. The Panel noted and accepted Network Rail's statement in the Joint Submission (page 7) that *"The Business Process Document referred to by FGW applies in circumstances where sidewear of the track is known or observed to exist. At present (i.e. before the introduction of the 142s) the track system is correctly configured for the traffic that uses the Specified Routes. The small number of existing lubricators deployed on the branch routes are considered sufficient to meet the current business requirements and comply with company standards. The list of circumstances identified in the Business Standard Document are the type of locations that would meet the criteria for consideration for lubricators, but it is not intended that all these locations will necessarily require a lubricator, as traffic tonnage, speed and vehicle types all play a part in determining the engineering need. Where Class 150 vehicles operate on the Specified Routes there has been no known or observed sidewear damage which would cause them to be caught by the criteria outlined in the relevant Business Standard Document"*. The locations at which additional flange lubricators might now be warranted had been identified and advised to FGW as part of Network Rail's Part F compensation claim, and arrangements put in hand to purchase new flange lubricators.
16. As at the time of the hearing, no new flange lubricators had been installed, notwithstanding the statement by Network Rail in the joint submission that *"They [Class 142s] can now only operate on the Specified Routes if mitigating measures are put in place requiring the fitting of 30 lubricators..."*.
17. The Panel was not told whether any inspections had revealed any *"significant rates of sidewear"* since the Class 142s had taken over the services.
18. When it was mooted that Class 142s would be re-deployed to the routes in question, Network Rail had protested that, on the basis of experience two decades ago, there would be an adverse impact upon the track, and track maintenance costs; no evidence had however been presented that Network Rail had specifically opposed FGW's initiative to obtain ORR approval for the necessary amendment to its Track Access Contract.

The Contentions of the Parties

19. The Panel was presented with a significant weight of documentation, but found that the contrasting assertions of the parties could be summarised as follows:
20. For FGW:
 - 20.1. Class 142s were still shown as "route-cleared" for the routes in question in the Sectional Appendix;
 - 20.2. if a certain class of train is route-cleared then the implication should be that the route is ready and of a standard to accept such trains as and when a Train Operator might choose to use them; and therefore

- 20.3. whilst the introduction of Class 142s into the "Specified Equipment" in the FGW Track Access Contract would appear to satisfy one aspect of the definition of Vehicle Change, it would not "*materially ... affect the maintenance or operation of the Network*"; and therefore
 - 20.4. there was no Vehicle Change, and therefore no payment due in respect of compensation; alternatively, if it were determined that the criteria for a Vehicle Change had been fulfilled, no compensation would be payable because, FGW maintained, the two Business Process documents implied an obligation on Network Rail to equip all the possibly affected lines with flange lubricators, even without the introduction of Class 142s; and therefore
 - 20.5. Network Rail should be faced with little or no new expenditure to accommodate the Class 142s, because it should reasonably have incurred it already. If there was any justifiable amount of new expenditure, any claim against the Train Operator should be off-set against a supposed saving to Network Rail from no longer having to support Class 142s elsewhere on the Network.
21. For Network Rail:
- 21.1. the Class 142s are unwelcome returnees to the routes in question, and, based on their record two decades ago, and information from areas where they have operated more recently, will impose new (in the post Privatisation era) demands on the track, and will "*materially ... affect the maintenance or operation of the Network*". Furthermore
 - 21.2. Class 142s have never had the contractual standing of "Specified Equipment" in any Track Access Contract relating to the routes in question; and
 - 21.3. the fact of inclusion in the Sectional Appendix of a route clearance for Class 142s does not, in a Passenger context, require Network Rail to concede rights of access on an unconditional basis; and therefore
 - 21.4. the introduction of Class 142s should be counted as a Vehicle Change;
 - 21.5. compensation calculated by reference to the probable cost of installing a reasonable number of new flange lubricators was due, and should be paid by FGW; and
 - 21.6. there was no case for off-setting costs when the stock in question had otherwise been intended to go into store, and would not be deployed on GW Region beyond 2010; whereafter
 - 21.7. Network Rail might reasonably anticipate that other stock would be (re)introduced, that would revert to levels of rail wear comparable to that experienced prior to December 2007.
22. Other arguments presented to the Panel made varying assertions about whether or not the settlement at CP3 had provided Network Rail with funds that should reasonably be spent on flange lubricators, and/or whether CP4 would be different, and/or whether that had any bearing on the Panel's determination.
23. Finally a question was raised as to whether Network Rail, if it did not wish to contemplate the re-introduction of the Class 142s, should have amended the relevant tables in the Sectional Appendix to delete or qualify the route-clearance given.

The Panel's findings in respect of entitlements

24. In relation to the arguments regarding the components of the funding settlements in either CP3 or CP4, the Panel considered the following points:

- 24.1. Payment for track access by a Train Operator to Network Rail is made, currently, in two stages, namely a fixed charge, and a number of variable charges of which, in this case, the Variable Track Usage Charge (VTU) is the most substantial. In general terms, and in the absence of any other bespoke (and regulated) arrangements, these payments form the main part of the income that Network Rail receives to fund its duties to each Train Operator.
- 24.2. The VTU, in simple terms, represents Network Rail's total "wear and tear" costs that arise from the variable incidence of train mileage, and which are apportioned by vehicle type:
 - 24.2.1. within current (CP3) access charges, the VTU allocation takes account of the dynamics in relation to only the vertical movements of rail vehicles;
 - 24.2.2. moves are afoot to incorporate a number of other factors relating to lateral dynamics (e.g. curving performance and rail wear) into the calculation of the VTU allocation in CP4;
- 24.3. In each case (CP3 or CP4), the definition of the element of income derived from VTU, as opposed to that derived from the fixed charge, has not made any difference to either the scope of Network Rail's obligations to the Train Operators, or the Train Operators' rights in relation to the standard of the Network provided. Such rights and obligations are as stated on the face of the Track Access Contract.
25. In relation to the operation of the Vehicle Change procedure, the Panel re-affirmed that establishing whether or not a change qualifies as a Vehicle Change, is a process discrete from that which may establish that compensation is payable. If there is no Vehicle Change, then there can be no compensation, but even where Vehicle Change is proven, compensation may not be payable.
26. In considering therefore the question of whether or not the introduction of the Class 142 trains to the list of "Specified Equipment" within the FGW Track Access Contract constituted a Vehicle Change,
 - 26.1. the Panel found that:
 - 26.1.1 before FGW could commence regular operation of regular Passenger services over these routes using Class 142s, it had needed to seek an amendment to its Track Access Contract to include these trains as Specified Equipment;
 - 26.1.2 inclusion of Class 142 trains within the clearance tables in the Sectional Appendix confirms that the stock will fit physically onto the route in question, "*for interim or full service operation*" (General Notes to Section 3 of Sectional Appendix);
 - 26.1.3 the Sectional Appendix is one of the key documents of reference for Train Operators and there must be an expectation that, where a class of rolling stock is classified Y in the relevant Table 3, an application for rights to use that class of vehicle will not be contested on grounds of physical "fit";
 - 26.1.4 except where Network Rail specifically agrees an amendment to the Track Access Contract, inclusion of a type of passenger rolling stock in the Sectional Appendix, does not confer upon a Passenger Train Operator any right to include such stock in the Specified Equipment, or to use such stock to operate services for which it otherwise has access rights. (For the avoidance of doubt this finding relates specifically to the Passenger Track Access Contract only; the Panel acknowledges that within the Freight Track Access Contract, the

Sectional Appendix has a more specific standing in relation to the "Operating Constraints").

- 26.2. the Panel considered whether therefore Network Rail could have pre-empted the need to grant new rights for the use of Class 142s by amending the Sectional Appendix, and concluded that
 - 26.2.1. it is difficult to envisage grounds on which Network Rail might be entitled to withdraw the entries relating to Class 142 from the Sectional Appendix, given the limited range of parameters to which clearance relates, and the fact that the Class 142s are "smaller" than the other classes cleared;
 - 26.2.2. such a move by Network Rail might also be challengeable on grounds of reduction of capability. However
 - 26.2.3. there did not appear to be any constraint on Network Rail introducing, under the "Other Restrictions" heading, specific conditions relating to particularly sinuous routes, and the necessity to mitigate the problems using 142s would bring;
 - 26.2.4. no such notes had been included in the Sectional Appendix.
- 26.3. Network Rail is required to make its own professional judgements as to the standards and detailed arrangements for maintaining its track to cater for the rolling stock in use, or cleared for use, on the routes in question. In the light of the experience of operating Class 142 rolling stock on the routes in question in the 1980s, and the fact that until now no Operator had required to seek or assert any form of access right to operate Class 142 trains over the routes in dispute, Network Rail might very reasonably have planned in the expectation that such stock would never re-appear on these routes.
- 26.4. By the same logic, Network Rail cannot reasonably be deemed to have failed to fulfil an obligation to have provided or maintained any infrastructure equipment (including, but not limited to flange lubricators) that might assist the operation of Class 142 trains, given the low expectation that such trains would be re-introduced, if such equipment was otherwise not necessary for the operation over the routes of other classes of trains.
- 26.5. The introduction of Class 142 trains onto the routes in question at very least requires Network Rail to reassess in detail, and very probably to change, the maintenance regime necessary to maintain the track (in particular in respect of track inspection and rail wear), as compared with the regime that has operated since before Privatisation. There can be no question but that this change to the "Specified Equipment" in the FGW Track Access Contract will *also "materially affect the maintenance ...of the Network"*.
- 26.6. Accordingly, the inclusion of the Class 142s into the Specified Equipment of the FGW Track Access Contract IS a Vehicle Change, rendering FGW potentially liable to pay compensation under Part F of the Network Code.**
- 27. In relation to the (not strenuously pursued) suggestion from Network Rail that the Vehicle Change might not be established, the Panel concluded that, given that, at the time of the hearing, the stock in question was already being used on the routes in question, and that the reference to the Panel was therefore being conducted under the circumstances contemplated in Condition F5.3, Network Rail had acquiesced in principle to the proposed Vehicle Change, and had forgone any right to plead that it should not be established. The Panel is not concluding that Network Rail never had the right to oppose the establishment of the Vehicle Change, merely that the opportunity to do so has passed.
- 28. In relation to the questions of possible compensation payable by one party to another (and the consideration of any off-setting benefits), the Panel considered that this required it to take

account of the role of FGW in selecting which stock is used, and that of Network Rail in deciding which is the appropriate maintenance regime for the traffic likely to pass at any time and to determine whether FGW, by introducing the Class 142s is causing Network Rail to do maintenance that is distinctively different, or merely to do a different quantity of what it has done previously.

29. Network Rail, to assist in the discharge of its responsibilities in respect of track maintenance, has codified the procedures and thought processes it mandates should be applied, in order to achieve appropriate standards and outcomes, in Business Process Documents. These Business Process Documents

29.1. are not Railway Group Standards; and

29.2. do not impose on Network Rail any contractual obligations to Train Operators in relation to specific outputs, in respect of the use of one particular track maintenance technique as opposed to another, beyond the general obligation to enable each Train Operator to fulfil the terms of its Track Access Contract.

30. In relation, therefore, to the application of NR/SP/TRK/8006 Business Process Document: "Installation and Management of Rail Mounted Lubricators", the Panel

30.1. considers that this document, through which Network Rail gives directions to its employees and contractors, is evidence that best practice requires Network Rail to consider the need, or otherwise, for flange lubricators by reference to observed rail wear, and that the criteria both for assessment and for priorities for installation of flange lubricators are predicated upon establishing that increased rail wear is happening in fact;

30.2. notes that some of the routes already have some flange lubricators, installed at Network Rail's initiative; but

30.3. does NOT accept the contrary contention from FGW that Network Rail is required slavishly to fit flange lubricators to any location fitting the criteria in NR/SP/TRK/8006, without the exercise of any assessment of need by reference to observed Rail wear; and in consequence

30.4. **finds that NR/SP/TRK/006 is no more than a statement of Network Rail's internal policy for mitigating observed rail wear caused by traffic actually passing:**

30.4.1. **it does not impose any obligation on Network Rail to have installed a number of flange lubricators sufficient to cope with Class 142s at a time when the latter were not in use on the routes; by contrast**

30.4.2. **given that Class 142s are now once again in use on the routes it does direct NR's employees and contractors to install such additional flange lubricators as may currently be observed to be necessary, and is thus evidence of best practice; that said**

30.4.3. **it does not involve Network Rail in any engineering duties that are different in kind from those already undertaken.**

31. The Panel considered whether, in order to allocate responsibility for paying for additional flange lubricators, it could, or needed to, make any judgement as to the assumptions that went into the CP3 VTU funding settlement, and specifically whether Network Rail's total "wear and tear" costs for CP3 could be assumed to be sufficient for the mix of rolling stock consistent with

31.1. the published capability of the Network (as documented in the Sectional Appendix), or

- 31.2. the contractual status (documented as Specified Equipment within the Track Access Contracts).
32. In practice, the Panel concluded that, in a practical instance where the Sectional Appendix confirms that the route can already accept the stock, the question is academic because
 - 32.1. it is a reasonable presumption that each CP settlement, however first constructed, aims, in its own terms,
 - 32.1.1. to enable Network Rail to recover all costs that have been acknowledged to vary with the type of rolling stock, through the VTU; and otherwise
 - 32.1.2. to provide scope for Network Rail to determine how best, in terms of maintenance practices etc, to discharge its responsibilities economically throughout the Network;
 - 32.2. Network Rail's responsibility to FGW, the Train Operator, to protect the integrity of the track on the routes in question may be changed in detail following the introduction of the class 142s, but is unchanged in principle. In particular, the duty of care is not varied in proportion to the availability of funds; and
 - 32.3. where, by the application of NR/SP/TRK/8006 Business Process Document: "Installation and Management of Rail Mounted Lubricators", Network Rail identifies, **by reference to the incidence of Rail wear**, that flange lubricators should be installed, **this should be done at the cost of Network Rail.**
33. The Panel considers however that
 - 33.1. the discretions implied in NR/SP/TRK/8006 would appear to allow Network Rail responsibly to decide that in view of the likely short time span of the Class 142s' deployment it would accept higher rail wear as a lesser cost than new flange lubricators. ,
 - 33.2. were it to act upon such a decision, Network Rail would be unlikely to be in breach of any contractual obligation to FGW, provided it did not result in any loss of capability in the Network; and, for the avoidance of doubt
 - 33.3. Network Rail would NOT be obliged to fit flange lubricators at its cost other than as mitigation of excessive rail wear. In the event that the Class 142s experience other problems that were not previously a problem for other stock used on these services (e.g. excessive wheel wear), responsibility for assessing and funding any necessary mitigation measures would lie with FGW.
34. The attention of the parties is drawn to the possible applicability of Network Code Part E in relation to issues of rail squeal.
35. In relation to the allegation of FGW that there were potential off-setting cost benefits to Network Rail from the deployment of the Class 142s to FGW services and away from other areas, the Panel finds that, in the circumstances of this case, this argument is not in any way substantiated by any sort of objective measure. The Panel considers that, in the light of its other findings in this case, the eventual need for any consideration of off-setting benefits does not arise.

The Panel's Determination

36. For all the foregoing reasons therefore, the Panel determines that
- 36.1. the inclusion of the Class 142s in the Specified Equipment of the FGW Track Access Contract IS a Vehicle Change, rendering FGW potentially liable to pay compensation under Part F of the Network Code. However
 - 36.2. there is no contractual or other obligation that specifically requires Network Rail to introduce flange lubricators on the routes in question to mitigate the effects of the introduction of Class 142s. Nevertheless,
 - 36.3. the change of rolling stock does not change Network Rail's obligation to discharge its general duties in compliance with identified best practice. In this case, this includes compliance with the procedures in NR/SP/TRK/8006 Business Process Document: "Installation and Management of Rail Mounted Lubricators" in respect of action to counter excessive rail sidewear. Therefore it follows that where Network Rail determines that there is a need to install flange lubricators specifically in order to mitigate excessive rail sidewear, such flange lubricators shall be installed at Network Rail's expense, and the installation costs cannot be reclaimed from FGW as compensation under Network Code Part F;
 - 36.4. for the avoidance of doubt Network Rail shall not, as a consequence of this determination, be required to take responsibility for the costs of any other measures (which may include other flange lubricators not related to increases in rail wear) needed to mitigate the adverse consequences of operating Class 142s, but that were not otherwise needed for the stock previously operated on these routes.
 - 36.5. the Panel does not see that any costs payable in consequence of this determination would be eligible for any level of abatement on the grounds of off-setting benefits; furthermore the Panel does not accept the un-quantified arguments that have been advanced in support of such off-sets.
 - 36.6. The Vehicle Change shall be deemed to be established in the sense that the derogation in Condition F5.3 is, with the formulation of this determination, no longer applicable.
37. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.



27.2.08

George Renwick
Panel Chairman