Neutral citation: [2003] RR 2 Case No: 2003/02

ON APPEAL FROM
THE NETWORK AND VEHICLE CHANGE SUB-COMMITTEE
OF THE ACCESS DISPUTE RESOLUTION COMMITTEE

Office of the Rail Regulator
138-142 Holborn, London EC1N 2TQ

Date: 31 March 2003 & 21 June 2004

Before :

THE RAIL REGULATOR

Between :

Network Rail INFRASTRUCTURE LIMITED **Appellants**

- and -

GREAT NORTH EASTERN RAILWAY LIMITED **Respondents**

Assessor: Mr John Marrin QC

Mr Ian Glick QC and Mr Alain Choo Choy
(instructed by **Simmons & Simmons**) for the appellants

Mr Robin Potts QC and Mr Philip Gillyon
(instructed by **Richards Butler**) for the respondents

Hearing dates : 8 and 9 July 2002; 18 September 2002

JUDGMENT

The Rail Regulator:

INTRODUCTION

1. This is an appeal by Network Rail Infrastructure Limited (formerly Railtrack plc, and referred to in this judgment as "Network Rail") against certain aspects of a decision (No. NV33) of the Network and Vehicle Change Sub-Committee of the Access Dispute Resolution Committee dated 21 December 2001, and a cross-appeal by Great North Eastern Railway Limited ("GNER") against other aspects of that decision. It arises out of the consequences of the derailment of a GNER train just south of Hatfield on 17 October 2000.

2. The appeal raises only questions of law. It concerns the interpretation of a track access contract between Network Rail and GNER. It raises no issues of regulatory policy. The contract in question incorporates by reference the document formerly called the Railtrack Track Access Conditions 1995 (as amended). This is now known as the network code and is referred to as such in this judgment.

3. In the appeal, I sat with an assessor, Mr John Marrin QC. The rules of procedure established for the appeal provided for Mr Marrin to prepare a report for me on the case and a series of recommendations as to how the appeal should be disposed of. They also gave the parties the opportunity to comment in writing on the report.

4. There were two oral hearings in the appeal. The first, lasting two days, took place in July 2002. The assessor prepared a report dated 24 July 2002, upon which the parties had the opportunity to comment. In considering the report and the other material placed before me in the appeal, additional questions relevant to its disposal presented themselves to me. These questions were considered neither by Network Rail nor GNER, and they were therefore not covered by the assessor's report. As they appeared to me to be capable of being material to my decision, I required the parties to make written submissions to me, followed by an oral hearing on 18 September 2002 and a further report from the assessor. As before, the parties had an opportunity to comment on that report.

5. The parties' written submissions and their skeleton arguments, as well as the assessor's two reports and the parties' comments on them, are published with this judgment on the ORR website: www.rail-reg.gov.uk/appeals.

6. The statutory duties of the Regulator are not engaged in this appeal. Although the appeal is taken by virtue of provisions in the network code which itself forms part of the contract in question, it would be contrary to the principles of fairness for the determination of a question of law to be done on any basis other than the proper application of legal principles and rules. A bias in favour of one outcome over another by reference to the wishes or financial position of any person, whether a party to the appeal or not, would be unlawful. In any case, it is not in the interests of users of railway services or of railway industry participants, and would be contrary to the other objectives of section 4 of the Railways Act 1993, for me to take any other approach.

THE BACKGROUND

Network Rail's monopoly position

7. Network Rail is the monopoly provider of an essential service, namely permission to use its infrastructure, comprising the national system of track, signalling and other installations necessary for the support, guidance and operation of trains. Because of that, the Railways Act 1993 imposes two types of regulation on the activities of the company. First, by section 6, it is unlawful for any person to operate such a network without having a licence to do so issued by the Secretary of State or the Regulator, or an exemption from the requirement to be so licensed. Secondly, most material aspects of the consumption of the capacity of the network are under the supervision and control of the Regulator through his functions of approving access contracts and amendments to access contracts (sections 18 and 22) and of requiring third party access to be given (sections 17 and 22A) using compulsory powers.

Access contracts and the access regime

8. Track access contracts are the means by which train operators and others gain access to the network. They provide the legal basis for a complex interface between the infrastructure provider (Network Rail) and infrastructure user (usually but not necessarily

a train operator), and establish the rights and obligations of both parties in a commercial relationship of considerable interdependence.

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.

10. In *Network Rail Infrastructure Limited -v- Eurostar (UK) Limited* [2003] RR 1, I explained:

> "A track access contract is also the means by which track capacity is consumed. In the case of Network Rail's network, it provides for Network Rail to grant to another person (usually but not necessarily the operator of passenger or freight trains) permission to use its network. Under the contract, that person is the access beneficiary. The permission to use Network Rail's network is the principal commodity which the access beneficiary obtains under the contract, and for which it pays track access charges to Network Rail. However, track access contracts are complex commercial contracts and they do much more than that. The conditions under which the access beneficiary is entitled to use Network Rail's network are specified in some detail, as are Network Rail's obligations in delivering the capacity which it has sold."

11. Sections 17 and 22A of the Railways Act 1993 exist for the protection of persons who need access to railway facilities. In prospective users' dealings with a facility owner in attempting to gain access, they are a means of preventing any abuse of the facility owner's monopoly power. They come into play whenever there has been a failure - for any reason - to reach agreement on the terms of access. Usually this will arise in cases where the prospective user considers that the facility owner is demanding unreasonable terms for access or is unreasonably refusing access altogether. It should of course be remembered that what may at first appear to be unreasonable behaviour on the part of the facility owner could subsequently be established to be justifiable. That is a matter to be tested in the section 17 or 22A process.

12. Section 17 provides for a prospective user to apply to the Regulator for him to give directions to the facility owner to enter into a new access contract with the applicant. Section 22A applies where a user with an existing access contract is seeking amendments to that contract which will permit more extensive use of the facility in question, such as running more trains.

13. The essence of the role of the Regulator in matters of access to the network under sections 17-22A is that although the procedural route towards a new or amended access contract is different as between sections 18 and 22 on the one hand and sections 17 and 22A on the other, the substantive decision which the Regulator must make is not. The point was considered by the Court of Appeal in *Winsor -v- Special Railway Administrators of Railtrack PLC* [2002] EWCA Civ 955, [2002] 4 All ER 435, [2002] 1 WLR 3002, when it considered the relationship between sections 17 and 18. Delivering the unanimous decision of the court, Lord Woolf CJ placed emphasis on the Regulator's obligation to consider the public interest as a whole, as defined by his statutory duties in section 4 of the Railways Act 1993, whether or not the parties are agreed (section 18) or not agreed (section 17), and requiring him, if appropriate, to put the public interest above the private commercial interests of the facility owner and the applicant. He said:

> "The reading of section 17 and section 18 together with section 4 demonstrates that the Rail Regulator can have a separate agenda from that of the applicant or the facility owner when performing his section 17 or 18 functions"; "... the Rail Regulator in determining an application has to take into account section 4 considerations which may be of little or no concern to the parties ..."; "Section 17 and section 18 are two different ways of achieving the same purpose, namely, the making of access contracts, the terms of which are subject to the approval and requirements thought necessary by the Rail Regulator"; "[the Rail Regulator is] required to take into account considerations which could not be in the interests of the parties ... but third parties namely rail users".

14. This means that it is the Regulator who must determine what is the fair and efficient allocation of capacity and therefore the terms of the access contract which will give effect to that allocation having regard to, but by no means constrained by, what the parties have or have not agreed. It follows that it matters rather less than facility owners and applicants have perhaps so far supposed whether or not they have been able to reach agreement on all pertinent points. The Regulator can determine the matter under sections

17 or 22A, where the parties have not agreed, or, in the case of an agreed application, require modifications under section 18(7) or reject the application under sections 18 or 22.

15. The nature of the regulation of the relationship between the parties to an access agreement, and the role of the Regulator in determining, under sections 17 - 22A of the Railways Act 1993, what the terms of that contract should be and indeed whether there should be any contract at all, form a significant part of the factual matrix in which access agreements are made and fall to be construed.

The network code

16. Almost every track access contract, including the contract with which this appeal is concerned, incorporates the provisions of the network code. The network code was devised at the time of rail privatisation in 1993 and 1994 as a single code, to be incorporated by reference in all regulated (and some unregulated) track access contracts, so as to provide a common set of rules and procedures for performance monitoring, timetable change, environmental protection, changes to the network and to railway vehicles used or to be used on the network, and the handling of certain aspects of the consequences of operational disruption. It is the central commercial code concerning the consumption of the capacity of Network Rail's network and the development of that network.

17. It was the wish of those who designed the contractual and regulatory matrix for the railway industry at that time that the network code be a code established under the operating licences granted to the network operator (now Network Rail) and passenger and freight train operators, rather than part of individual bilateral access agreements. That wish was frustrated by a legal impediment, arising out of the Railways Act 1993, on including in licences matters which could and should properly be included in access agreements. At that time, the Railways Act 1993 provided for separate regimes for licensing on the one hand and access on the other, and the two did not overlap sufficiently for an access-related code to be established under a licence. This blockage was removed by section 9(3A) of the Railways Act 1993, which was inserted by virtue of section 252 and paragraph 19 of Schedule 27 to the Transport Act 2000. However, the network code remains a code the legal force of which comes from the access contracts of which

it forms part, and no steps have yet been taken to move it from the access contracts to the licences.

18. Because it is part of virtually all track access contracts, and also because of its central importance in the access relationship between the infrastructure provider and infrastructure users, the network code's evolution over time is subject to the jurisdiction of the Regulator. It may be changed either through the democratic change mechanism provided for in Condition C6 of the code, by the elected body known as the Class Representative Committee, or by the Regulator unilaterally under Condition C8.

Network change

19. The network code contains, in Part G, the Network Change regime, the interpretation and application of which is in issue in this appeal.

20. Part G of the network code recognises Network Rail's responsibilities as the steward of the national railway network, responsibilities which are also enshrined in Condition 7 of Network Rail's network licence. It contains a set of procedures and substantive rules to which those who wish to have the network changed in certain specified respects must adhere. Either Network Rail or a train operator may propose a Network Change. The proposer is normally required to give notice of what he proposes, and there then follows a process of consultation to establish whether there are material objections to the proposal and, if there are, what is to be done about them. Those consulted include every train operator which may be affected by the implementation of the change. The information which consultees must be given is that which is reasonably necessary to enable them to assess the likely effect of the change, including the effect on the operation of trains. It follows that, except in very simple or straightforward cases, a Network Change proposal must usually be a detailed document.

21. In the case of Network Rail, there is an exception to the obligation to give advance notice of a proposed change where safety is involved. It arises under Condition G1.9, which is in the following terms:

> "To the extent that a Network Change within the meaning of paragraph (i) of that term's definition is required to be made by [Network Rail] for safety reasons, [Network Rail] shall not be obliged to implement the procedure set out in this Part G in relation to that change

until the change has lasted for three months (or such longer period as may be specified in the relevant Train Operator's Access Agreement). Upon expiry of the relevant period, [Network Rail] shall promptly commence implementing and thereafter comply with the procedure set out in this Part G as if the relevant Network Change were a Network Change proposed by [Network Rail]."

22. In the case of a Network Change proposed by Network Rail, Condition G2.1 obliges a train operator to give notice to Network Rail if it considers either that certain conditions, which may lead to the proposal being blocked altogether, are satisfied (paragraph (a)), or that it should be entitled to financial compensation for the consequences of the change (paragraph (b)). It provides as follows:

"The Train Operator shall give notice to [Network Rail] if it considers that either:

(a) one or more of the following conditions has been satisfied:

(i) the implementation of the proposed change would necessarily result in [Network Rail] breaching an access contract to which that Train Operator is a party;

(ii) [Network Rail] has failed, in respect of the proposed change, to provide sufficient particulars to that Train Operator under Condition G1.1; or

(iii) the implementation of the proposed change would result in a material deterioration in the performance of that Train Operator's trains which cannot adequately be compensated under this Condition G2; or

(b) it should be entitled to compensation from [Network Rail] for the consequences of the implementation of the change."

Any notice of the kind referred to in paragraph (a) above shall include the reasons for the Train Operator's opinion. Any notice of the kind mentioned in paragraph (b) above shall include a statement of the amount of compensation required and the means by which the compensation should be paid, including any security or other assurances of payment which [Network Rail] should provide. Any such statement shall contain such detail as is reasonable to enable [Network Rail] to assess the merits of the Train Operator's decision."

23. Objections of the kind specified in Condition G2.1(a)(i) and (iii) could, if substantiated, lead to a proposed change not proceeding at all. An objection of the kind specified in Condition G2.1(a)(ii) could, conceptually, also lead to that result, if either the information is never provided or, once it is, it then gives rise to an objection under Condition G2.1(a)(i) or (iii). This is apparent because of the terms of Condition G2.4, which reads:

> "If:
>
> (a) a Train Operator shall have given notice to [Network Rail] pursuant to Condition G2.1(a) and [Network Rail] shall have failed to refer the matter for determination pursuant to the Access Dispute Resolution Rules; or
>
> (b) a Train Operator shall have given notice to [Network Rail] pursuant to Condition G2.1(b) and [Network Rail] shall have failed either:
>
> (i) to comply with the terms upon which the compensation in question shall be payable, having been given a reasonable opportunity to remedy that failure; or
>
> (ii) to refer the matter for determination pursuant to the Access Dispute Resolution Rules within 14 days of the date of the notice in question,
>
> the proposed Network Change shall not be implemented. In any other case and subject to the other provisions of [this code], [Network Rail] shall be entitled to implement the Network Change."

24. If there has been a reference to dispute resolution, the progress of the proposed change depends on the outcome of that process. For example, if it is established by a competent tribunal that the implementation of the change would result in a material deterioration in the performance of the train operator's trains which cannot adequately be compensated under Condition G2, it would be expected to order that the change could not proceed. That would be an end to it.

25. If the reference to dispute resolution has been on the adequacy of compensation which is proposed to be paid to a train operator, once the appropriate figure has been established and the tribunal is satisfied with the arrangements as to its payment by

Network Rail, in the absence of other relevant objections the change would be allowed to go ahead.

26. If there are objections but Network Rail has failed to refer the matter to the appropriate tribunal for resolution, Condition G2.4 provides that the proposed change must not be implemented. It goes on to say that in all other cases and subject to compliance with the other provisions of the network code, Network Rail will be entitled to proceed to implement the change.

27. Condition G6 of the network code provides for certain types of dispute between Network Rail and train operators (of which GNER is one) in relation to network change to be referred first to an industry dispute resolution body known as the Network and Vehicle Change Sub-Committee of the Access Dispute Resolution Committee. If either party is dissatisfied with the decision of that body, there is a right of appeal to the Regulator. This appeal is brought under those provisions.

28. As to financial compensation in respect of a Network Change, Condition G2.2 of the network code provides:

> "Subject to Condition G2.3, the amount of compensation referred to in Condition G2.1 shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by the Train Operator as a consequence of the implementation of the proposed change."

29. Condition G2.3 provides:

> "There shall be taken into account in determining the amount of compensation referred to in Condition G2.1:
>
> (a) the benefit (if any) to be obtained or likely in the future to be obtained by the Train Operator as a result of the proposed Network Change; and
>
> (b) the ability or likely future ability of the train operator to recoup any costs, losses and expenses from third parties including passengers and customers."

30. Part G of the network code is an important part of the regime under which Network Rail's stewardship of the network is subject to scrutiny and control and its ability to abuse

its monopoly over that facility is held in check. As I shall explain in greater detail later, its overall purpose is the protection of train operators who rely on the network, who need it to be properly operated, maintained and renewed and who need to have appropriate limitations on Network Rail's freedom to make changes which might affect their operations and so their businesses.

31. One of the principal functions of Part G is ensuring train operators know what is being done with the network so as to enable them to assess the likely effect of that work on their services and so to plan their businesses with a reasonable degree of assurance (one of the statutory objectives of section 4 of the Railways Act 1993). By requiring Network Rail to provide train operators with information about proposed changes before they are carried out (except where safety requires action which must be taken before the normal Part G procedures can be completed), Part G also promotes efficiency and economy in the provision of railway services (another section 4 objective) not only because it requires Network Rail to propose competent and well-developed proposals, but also because it enables affected train operators to propose - and have implemented - synergistic changes to the network. For example, if Network Rail proposes a change to a part of the network which will involve lengthy possessions, an affected train operator may have a proposal for other work in that part of the network which could conveniently and economically be done at the same time. That additional work might not be economic or feasible on its own, but it might well be in the slipstream of the first network change. And carrying out complementary network changes at the same time may well improve the productivity of the possessions which Network Rail has taken.

32. The information rights of train operators are there for still another purpose. They exist so as to enable train operators - passenger and freight - to give information to their passengers and commercial customers. The railway industry exists to provide competent and efficient services to end users. It is they, and public sector funders, who pay for the services, and section 4(1) of the Railways Act 1993 contains several objectives which are there to protect and promote their interests, including the duties of the Regulator to exercise his statutory functions in the way he considers best calculated protect the interests of users of railway services (section 4(1)(a)); to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that he considers economically practicable (section 4(1)(b)); to promote efficiency and economy on the part of persons providing

railway services (section 4(1)(c)); to promote competition in the provision of railway services for the benefit of users of railway services (section 4(1)(d)); to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator (section 4(1)(e)); and to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance (section 4(1)(g)).

33. The intensity of the interdependence of railway industry players - especially in the relationship between infrastructure provider and infrastructure users (Network Rail and train operators) - involves a necessity for a strong degree of mutual co-operation. If that relationship malfunctions, services to end users will suffer. The network code is one of the most significant elements of the contractual and regulatory regime which is designed to facilitate the sound and efficient operation of that joint venture. Information flowing between infrastructure provider and infrastructure users - in both directions - is important to ensure that proper operation. In the context of network change, it is highly important that train operators which may be affected - adversely or beneficially - by changes to the network, by whomsoever proposed, receive timely and adequate information about what might happen. This is apparent from the terms of Condition G1.1(a), which requires Network Rail to include with a notice of a proposed Network Change:

> "particulars of the proposed change which are reasonably necessary to enable [the recipient of the notice] to assess the effect of the proposed change and to enable each Train Operator to assess the effect of the proposed change on the operation of its trains".

34. As explained above, a train operator's objections to a proposed change may be so serious that he may be able to establish that it should be stopped altogether, on the grounds that financial compensation would not be adequate (under Condition G2.1(a)(iii)). Of course, if Network Rail believes the train operator's objections are not well-founded and that the restraint is being unjustifiably asserted, it can have the matter resolved by resorting to the established dispute resolution mechanisms, including if necessary appeal. To do so, the train operator would need to have adequate information about the change before he could decide to make and pursue such an objection.

35. Part G also enables train operators to hold Network Rail to carrying out an approved Network Change in accordance with its terms and not, in its implementation, go outside the established boundaries of the work. This is apparent from the terms of Condition

G2.4, which, after setting out the course of action which must be taken if there has been an objection, states:

"In any other case and subject to the other provisions of [this code], [Network Rail] shall be entitled to implement the Network Change."

The Network Change referred to in that provision is the one which has been through the Part G process and has satisfied the conditions for being allowed to proceed. It is no other.

36. It is of course incumbent upon Network Rail (as indeed any proposer of a Network Change) to ensure that the proposal which is made under Part G contains an appropriate degree of flexibility so as to avoid the necessity of having to go back through the Part G procedures when an amendment is required. If Network Rail were not to build in that flexibility, it would have only itself to blame for the difficulties and delays which it would face if something did need to be changed. If the proposal met with opposition under Condition G2.1(a) because, for example, the built-in flexibility was regarded by an affected train operator as too generous to the proposer and the matter could not be resolved by agreement or mediation involving all potentially affected parties, the relevant dispute resolution procedures are there to resolve it for them. But the essence of the point is that, once the proposal has been approved and Network Rail is, under Condition G2.4, entitled to implement the change, affected train operators are able to restrain it from unauthorised deviations.

37. It is important to bear in mind that Network Rail, whilst the legal owner and authorised operator of its network, is not free to do with it as it wishes. (This is a point to which I return later.) The network exists for the benefit of train operators and the people and organisations which depend on them for passenger and freight rail services. Because of the nature of the regulation and contractual obligations which Network Rail faces - through its network licence, the access contracts regime in sections 17-22A of the Railways Act 1993, the network code and the Competition Act 1998 - Network Rail's position in relation to the network can, in economic terms although not legal ones, be regarded as a trustee of the network. The beneficiaries of that trust include Network Rail itself, the train operators and those who rely on them, and the funders of the railway.

The definition of Network Change

Present form

38. The definition of "Network Change" appears in Part G of the network code and, subject to what I have to say about its earlier forms, insofar as relevant to this appeal it is in the following terms:

> '"Network Change" means, in relation to a Train Operator,
>
> (i) any change (including any improvement or enlargement) to
>
> (a) any part of the Network; or
>
> (b) the format of any operational documentation (other than Railway Group Standards) owned or used by [Network Rail] or a Train Operator,
>
> which is likely materially to affect the operation of the Network, or of trains operated by that operator on the Network; or
>
> (ii) ...
>
> (iii) any change (not being a change within paragraph (i) or (ii) above) to the operation of the Network (including a temporary speed restriction) or series of such changes which has lasted for more than six months (or such other period as may be specified in that operator's Access Agreement) and which is likely materially to affect the operation of trains by that operator on the Network; or
>
> (iv) ... .'

39. I shall refer to the definition in paragraph (i)(a) as Case (i)(a) and to the definition in paragraph (iii) as Case (iii).

40. This is the form of the definition as it stood when Network Rail and GNER entered into their track access contract on 1 April 1995.

Previous form

41. On 1 April 1994, when the network code was first established and came into effect in the track access contracts of the first train operators to be vested under the Railways Act 1993, the definition of "Network Change" was materially different to its current form. It read:

> "'Network Change' means, in relation to a Train Operator, any material change (including any improvement) to
>
> (a) any part of the Network; or
>
> (b) any System or System Interface of any System in each case owned or used by [Network Rail] or a Train Operator,
>
> which is likely materially to affect the operation of the Network, or of trains operated by that operator on the Network;".

42. The definition of Network Change remained in that form until 31 March 1995. On 30 January 1995, the Regulator exercised his powers under Condition C8 of the network code and made material modifications to the network code. The 1995 modifications came into effect on 31 March 1995.

43. After the Regulator's 1995 modifications, the definition of "Network Change" read:

> "'Network Change' means, in relation to a Train Operator,
>
> (i) any change (including any improvement or enlargement) to
>
> (a) any part of the Network; or
>
> (b) any System or System Interface of any System or the format of any operational documentation (other than Railway Group Standards) in each case owned or used by [Network Rail] or a Train Operator,
>
> which is likely materially to affect the operation of the Network, or of trains operated by that operator on the Network; or

(ii) any material change to the location of any of the specified points referred to in Condition B1.1(a); or

(iii) any change (not being a change within paragraph (i) or (ii) above) to the operation of the Network (including a temporary speed restriction) or series of such changes which has lasted for more than six months (or such other period as may be specified in that operator's Access Agreement) and which is likely materially to affect the operation of trains by that operator on the Network; or

(iv) any material change to a previously agreed network change (and for the purposes of this definition a previously agreed network change means any change as referred to in paragraph (i), (ii) or (iii) above which has not yet been implemented by [Network Rail] but in respect of which the procedure set out in this Part G has been initiated),

and shall not include a closure;".

44. The differences are few but significant. The 1995 modifications:

(a) brought in a new Case (iii);

(b) in Case (i)(a), added the words "or enlargement" after "improvement"; and

(c) also in Case (i)(a), deleted the word "material" before "change".

45. In the 1995 modifications, the Regulator made other changes to the network code. Insofar as relevant to this appeal, they included:

(a) a new regime for Major Projects in Part D of the network code (first designated Condition D3.5 and subsequently designated Condition D2.3); and

(b) new Conditions G1.8 and G1.9.

Major Projects

46. The Major Projects regime is in Condition D2.3 of the network code. The definition if "Major Project" is:

"any engineering, maintenance or renewal project which requires a possession or series of possessions of one or more sections of track extending over:

(a) a period of more than one year; or

(b) a period which contains two or more Passenger Change Dates [which are dates upon which significant changes may be made to the passenger timetable]".

47. If Network Rail wishes to implement a Major Project, it must first give notice of its proposal to access beneficiaries which are likely to be affected by the project, together with particulars of its proposed programme of possessions or other restrictions on the use of the track which will be required in that respect. There then follows a process of consultation before Network Rail decides what its method of implementation will be. There is a right of appeal against Network Rail's decision.

48. Condition D2.3.6 then provides:

"The provisions of this Condition D2.3 shall be without prejudice to ... the provisions of Part G, if the proposed Major Project, once completed, would constitute a Network Change within the meaning of that Part ...".

49. Condition G1.8, which only applies to Case (iii) changes, is in the following terms:

"In the case of a Network Change within the meaning of paragraph (iii) of that term's definition, [Network Rail] may commence implementing the procedure set out in this Part G and shall, upon notice being given by the relevant Train Operator to [Network Rail] at any time after the expiry of the relevant period, promptly commence implementing and thereafter comply with that procedure as if that change were a Network Change proposed by [Network Rail]."

50. The Regulator set out his reasons for his modifications in a document entitled "Reasons for Modifications", also dated 30 January 1995. General reasons given were that the changes were necessary, either to enhance practicality, or to promote clarity, or to promote the objectives of the Railways Act 1993. Other changes were said to have been made in order to improve the workability of the procedures of the network code and their drafting, and to clarify their intended effects. In respect of the introduction of Case

(iii) to the definition of "Network Change" and of the new Condition G1.8, the Regulator stated:

"[This is] a provision under which [Network Rail] can initiate Part G procedures in respect of a temporary change which has a material affect (sic) on the Network and which lasts for more than six months. … Train operators can require [Network Rail] to do this. The purpose is to prevent the Part G procedures from being circumvented by the introduction of temporary restrictions which in practice last over a long period."

51. The introduction of the Major Projects provisions were explained as being intended:

"… to provide a degree of certainty for [Network Rail] that it will be able to obtain the possessions necessary for major works and also to provide train operators with some assurance as to the likely impact of the project."

52. As explained earlier, Condition G1.9, which only applies to Case (i) changes, is in the following terms:

"To the extent that a Network Change within the meaning of paragraph (i) of that term's definition is required to be made by [Network Rail] for safety reasons, [Network Rail] shall not be obliged to implement the procedure set out in this Part G in relation to that change until the change has lasted for three months (or such longer period as may be specified in the relevant Train Operator's Access Agreement). Upon expiry of the relevant period, [Network Rail] shall promptly commence implementing and thereafter comply with the procedure set out in this Part G as if the relevant Network Change were a Network Change proposed by [Network Rail]."

Sections 16A - 16I, Railways Act 1993

53. Sections 16A to 16I of the Railways Act 1993, which were inserted by virtue of section 223 of the Transport Act 2000, confer on the Regulator the power to give directions to the operator of a railway facility to provide a new railway facility, and to a person who has a specified interest in an existing railway facility to improve or develop that facility. That power may be exercised either on an application to the Regulator by the Strategic Rail Authority, or by another person with the consent of the Strategic Rail Authority. Amongst other things, it is a form of compulsory network change procedure.

54. Section 16I(2) contains a saving provision in relation to Part G of the network code and the corresponding change mechanisms in the codes for stations and light maintenance depots. It provides:

> "Nothing in [sections 16A to 16H] or a direction [of the Regulator] under section 16A ... affects any obligation to provide a new railway facility, or to improve or develop an existing railway facility, arising otherwise than from such a direction."

55. That saving provision - put into the legislation at the Regulator's request - was necessary to guard against the danger that the change mechanisms in the network and other codes might in the future be construed in a way narrower than their pre-Transport Act scope, in the light of a specific statutory scheme which overlaps with them. It is therefore plain that the section 16A-I regime does not affect the pre-existing, separate and parallel network change regime in Part G of the network code which retains its integrity.

The GNER/Network Rail track access contract

56. On 12 December 1994, Network Rail submitted to the Regulator the terms of a track access contract which it had agreed with GNER (then called InterCity East Coast Limited). The access contract was submitted for the Regulator's approval under section 18 of the Railways Act 1993. On 3 March 1995, the Regulator issued directions to Network Rail under that section. Those directions approved the submitted contract subject to modifications specified in the Regulator's directions under section 18(7). They required Network Rail to enter into the approved contract, as modified, with GNER not later than 31 May 1995. By virtue of section 144(1) of the Railways Act 1993, Network Rail then had a statutory duty to comply with and give effect to the Regulator's directions. The directions provided that if GNER failed to enter into the contract by that date, Network Rail was released from that duty. (The directions are published on the register maintained by the Regulator under section 72 of the Railways Act 1993.)

57. On 1 April 1995, Network Rail and GNER entered into the contract in the terms of the Regulator's directions. Before that, on 31 March 1995, modifications to the network code promulgated by the Regulator had entered into force. It follows that it was the network code as modified which was incorporated into the track access contract from the outset. It should however be remembered that the terms agreed by the parties themselves were submitted for the Regulator's approval on 12 December 1994, *i.e.*

before the publication of the Regulator's modifications on 30 January 1995, and that the Regulator's directions in relation to the parties' track access contract were given on 3 March 1995, *i.e.* before the entry into force of the modifications.

58. The track access contract between Network Rail and GNER provides for GNER to have permission to use parts of Network Rail's network - principally on the East Coast main line - for the purpose of operating passenger services.

59. Clause 6.3.2 of the track access contract provides:

"[Network Rail] shall ensure that the Network is maintained and operated to a standard which shall permit the provision of the Services [*] using the Specified Equipment [*] in accordance with the Working Timetable [*] and the making of Ancillary Movements [*]."

60. Clause 8.2 of the track access contract provides:

"[Network Rail] shall indemnify the Train Operator and keep it indemnified (on an after the appellant basis) against all damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses (including costs reasonably incurred in investigating or defending any claim, proceedings, demand or order and any expenses reasonably incurred in preventing, avoiding or mitigating loss, liability or damage) incurred or suffered by the Train Operator:

(a) as a result of a failure by [Network Rail] to comply with its obligations under the Safety Obligations;

(b) as a result of any Environmental Damage to the Network arising directly from the operations of the British Railways Board prior to 1 April 1994 or directly from the operations of [Network Rail]; or

(c) as a result of any damage to the Specified Equipment or other vehicles or things brought onto the Network in accordance with the permission to use granted by this Agreement arising directly from [Network Rail's] negligence or failure to comply with its obligations under this Agreement,

save to the extent that any such damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses result from the Train Operator's negligence or its breach of this Agreement, and provided that this indemnity shall not extend

to loss of revenue or other indirect loss and shall be subject to any limitations provided for in the Claims Allocation and Handling Agreement."

61. Clause 8.3 of the track access contract provides:

"Save as provided in Schedule 4 and Schedule 8, the parties shall not be entitled as between themselves to any compensation in respect of any damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses arising from cancellations, interruptions or delays to trains."

62. Clause 8.5 of the track access contract provides:

"Neither party to this Agreement may recover from the other party any loss of revenue (including fare revenue, subsidy, access charges, Track Charges [*][1] and incentive payments) or other consequential loss in connection with the subject matter of this Agreement caused to it by the other party save to the extent otherwise provided in this Agreement or any other agreement between them."

63. Clauses 8.2 - 8.5 represent a limitation on Network Rail's liability for certain specified forms of loss and damage. In essence, the extent of that liability is defined, so far as the track access contract is concerned (which is to say, leaving any further provision for the payment of compensation in the network code to one side), by Schedules 4 and 8 to the agreement. These make provision in connection with, respectively, the "Possessions Regime" and the "Performance Regime", under which predetermined amounts of compensation are payable in respect of "Possessions" (defined in Schedule 4 at paragraph 1.1), delays to trains (Schedule 8, paragraph 2), cancellations of train services (Schedule 8, paragraph 8.1) and interruptions to train services (Schedule 8, paragraph 8.2). Critically, "loss of revenue (including fare revenue, subsidy, access charges, Track Charges and incentive payments" and "other consequential loss in connection with the subject matter of [the contract]" (Clause 8.5) are not recoverable under Schedule 4 or Schedule 8. These compensation mechanisms are therefore to be distinguished from compensation payable under Part G of the network code, under which the amount of compensation payable to a train operator for the consequences of the implementation of a Network Change shall (subject to the provisions of Condition G2.3) "be an amount

[1] The notation [*] indicates that the relevant term is defined in the network code but it is not necessary for it to be explained for the purposes of this appeal.

equal to the amount of the costs, direct losses and expenses (*including loss of revenue*) which can reasonably be expected to be incurred by the Train Operator as a consequence of the implementation of the proposed change" (Condition G2.2, my emphasis). This distinction explains why it is that, in the context of this appeal, GNER contends that what took place on the network, both before the Hatfield derailment and afterwards, constituted Network Changes engaging the compensation regime provided for by Part G of the network code, and why Network Rail resists that contention.

64. Condition A1.1(c) of the network code provides:

"Terms and expressions defined in the [Railways Act 1993] shall, unless the contrary intention appears, have the same meaning in [the network code]."

65. Condition A1.1(h) of the network code provides:

"In the event of any conflict of interpretation between [the network code] and an Access Agreement [*] (not including [the network code]) the following order of precedence shall apply: (1) [the network code]; and (2) the Access Agreement."

THE HATFIELD DERAILMENT

66. At approximately 12.23 p.m. on Tuesday 17 October 2000, a high-speed passenger train operated by GNER, which had left London Kings Cross for Leeds, was derailed at Welham Curve near Hatfield. Four people lost their lives and many more were injured. The cause of the derailment was admitted by Railtrack at the time to have been a broken rail.

67. Immediately after the Hatfield derailment, Railtrack imposed a large number of speed restrictions on its network. For a long period after that, the integrity of the timetable for the operation of the network was severely compromised and many train operators experienced considerable disruption to their services. Enforcement action was taken by the Regulator under section 55 of the Railways Act 1993 in relation to Railtrack's plans for the recovery of normal network capability, and things returned to some form of normality by 21 May 2001.

68. Train operators made claims against Railtrack for losses arising out of the disruption following the Hatfield derailment. I understand that all of them except GNER settled with Railtrack without resort to litigation, arbitration or any other form of dispute resolution. GNER did not accept the settlement terms proposed by Railtrack, and accordingly commenced the proceedings leading up to this appeal by formal reference to the Network and Vehicle Change Sub-Committee (NVCC) of the Access Dispute Resolution Committee (ADRC) on 11 July 2001.

69. GNER's case is that the derailment itself and the subsequent widespread disruption were the consequences of various Network Changes effected by Railtrack, which changes had brought about a significant deterioration in the condition of the track. GNER maintains that it has incurred substantial losses as a direct result of these Network Changes.

70. For the purposes of this appeal I am asked by both parties to assume that the facts alleged by GNER have been established. In reality they have not.

71. As formulated in paragraph 9 of GNER's formal reference to the NVCC dated 11 July 2001, the alleged Network Changes were as follows:

(1) between 1996 and 17 October 2000, Railtrack made changes to its policies and practices for maintaining, renewing, monitoring and inspecting the infrastructure which gave rise to changes to the network (namely, "serious deterioration in the physical condition of the network") falling within Case (i)(a) of Part G to the network code;

(2) alternatively, those same changes of policy and practice (summarised by GNER as consisting of decisions to "sweat" assets, defer replacement, cease flange lubrication and cut back on rail grinding) were changes to the operation of the network or a series of such changes which had lasted for more than six months and so fell within Case (iii) of Part G;

(3) further or alternatively, the changes introduced by Railtrack after 17 October 2000 (namely, the issue of Permanent Way Special Instructions (PWSIs) relating to ultrasonic testing and inspection of the track and providing for certain specified

remedial work where defects were detected) constituted Network Changes under either or both Case (i)(a) or Case (iii) of Part G;

(4) yet further or alternatively, the introduction of a series of speed restrictions which had been in place for more than six months constituted a Network Change within the meaning of Case (iii) of Part G;

(5) finally, after 17 October 2000, Railtrack implemented a programme of track and other infrastructure renewal which resulted in changes to the network falling within Case (i)(a) of Part G.

72. Network Rail's position is that, even if GNER were able to prove the facts alleged, those facts are not capable, on a true construction of the network code, of amounting to Network Changes for the purposes of Part G. The only qualification to that position is that Network Rail accepts that a temporary speed restriction, or a series of such restrictions, which has lasted for more than six months is capable, after expiry of that six-month period, of amounting to a "change … to the operation of the Network … or a series of such changes" for the purposes of Case (iii) of Part G. In that regard, however, a further issue of principle arose between Network Rail and GNER as to whether the compensation that might be payable by Network Rail in respect of such a Network Change fell to be measured from the beginning of the six-month period (as GNER contends) or only from the expiry of that period (as Network Rail contends).

THE DECISION APPEALED AGAINST

73. In its determination NV33, dated 21 December 2001, the NVCC held as follows:

(1) Up until the derailment at Hatfield on 17 October 2000, whatever changes to the condition of the network might have occurred, as alleged by GNER, they did not have any impact upon the operation of the network or of trains operated by GNER on the network. Accordingly, it was not appropriate to classify such changes as Network Changes within any of the definitions in Part G of the network code. The NVCC did however appear to accept (see paragraphs 16 and 24.1.1) that changes to the condition of the network could constitute Network Changes falling within Case (i)(a).

(2) As to matters following the derailment, the NVCC held that:

(a) GNER had only been able to operate trains to considerably extended schedules, to a consequently reduced frequency and subject to a succession of emergency timetables, so that GNER satisfied the test of materiality in relation to the definitions of Network Change;

(b) The reason for such disruption to services over the routes served by GNER was Railtrack's decision that the condition of parts of the network would no longer permit the safe operation of trains to the speeds and journey times applicable before 17 October 2000 and its issue, accordingly, of PWSIs to deal with the unsafe condition of parts of the network;

(c) "[S]uch a decision … could only signify that there had been a 'change … to … the Network', as compared with the condition of the Network at that previous time when higher speeds had been permitted."

(3) Therefore, "for the duration of the period from immediately after the accident at Hatfield, until the reintroduction by GNER of a service pattern comparable as regards journey times, frequencies and utilisation of rolling stock, to that in force before 17 October 2000, GNER had been subject to Network Change [within the meaning of network code] Condition G Definition (i)(a)."

(4) To the extent that Railtrack had introduced and operated the PWSIs for more than six months and to the extent that those PWSIs did not qualify as "Network Change" in terms of Case (i)(a), "they do come within the scope of 'Network Change' in terms of … [Case] (iii)."

(5) To the extent that Railtrack had imposed temporary speed restrictions for more than six months and to the extent that those restrictions did not qualify as "Network Change" within the meaning of Case (i)(a), "they do come within the scope of 'Network Change' in terms of … [Case] (iii)."

(6) In relation to Network Changes falling within Case (iii), there were no grounds for overturning the NVCC's earlier determination NV1, to the effect that the starting date for the assessment of compensation in respect of such changes was from the expiry of the six-month period during which the relevant change to the operation of the network or series of such changes had lasted. Accordingly, compensation was payable by Railtrack to GNER for disruption to the operation of GNER's trains occasioned by Case (iii) Network Changes only from 18 April 2001.

74. Network Rail appealed against certain aspects of this determination, and GNER cross-appealed against others.

75. On 21 June 2002, directions were issued in the appeal providing, amongst other things, for the determination of certain preliminary issues. The terms of the preliminary issues are agreed. They are as follows:

(1) whether a deterioration in the condition of the Network was capable of qualifying as a "change … to … any part of the Network" within Case (i)(a);

(2) whether any of the alleged changes in Network Rail's policies and/or practices for maintaining, renewing, monitoring and inspecting the infrastructure were individually or in combination capable of amounting to changes "to the operation of the Network ... or a series of such changes" within Case (iii);

(3) whether the issue and/or implementation of the PWSIs were capable of amounting to a "change ... to … any part of the Network" within Case (i)(a);

(4) whether the issue and/or implementation of the PWSIs were capable (without more) of amounting to a "change (not being a change within paragraph (i)…) to the operation of the Network ... or series of such changes which has lasted for more than six months" within Case (iii);

(5) whether Network Rail's programme of track and other infrastructure renewal after the Derailment was capable of amounting to a "change … to … any part of the Network" within Case (i)(a); and

(6) whether compensation in respect of a Network Change within Case (iii) is only payable in respect of the period after the change to the operation of the Network has lasted for more than 6 months.

76. The PWSIs were issued by Network Rail between 7 November 2000 and 27 April 2001.

THE ISSUES

The Supplementary Questions

77. I propose to deal first, however, with the supplementary questions which I raised with the parties following the first hearing in July 2002. These were the subject of the second hearing on 18 September 2002, and of the assessor's subsequent report dated 25 September 2002.

78. The supplementary questions arose against the backdrop of modifications to the network code made by the Regulator in 1995. As first established on 1 April 1994, the network code included within Part G a definition of Network Change in the terms stated in paragraph 41 of this judgment.

79. Under Condition C8 of the network code, the Regulator served notice of modification of certain of its conditions on 30 January 1995. Those modifications took effect on 31 March 1995.

80. Among other changes, the notice of modifications amended the definition of Network Change to read as stated in paragraph 43 of this judgment.

81. Against this background, the parties were invited to make submissions on the following supplementary questions:

1(a) To what extent is it relevant to the issues of construction raised in this appeal that the parties did not negotiate the network code and that the network code was instead established administratively, that is by the Regulator, in 1994, and was subsequently extensively modified by him in 1995, without the agreement of either party?

1(b) If the answer to Issue 1(a) is that it is relevant:

(i) to what extent is it legitimate to inquire as to the intentions of the parties to the contract when the track access contract incorporated provisions which were not negotiated by the parties and over which they had no effective choice; and

(ii) is it more appropriate to ask what was the intention of the Regulator in this respect?

2(a) In this appeal, to what extent is it legitimate to have regard to the modifications to the Network Change regime, the introduction of a new Major Projects regime and the modifications to any other relevant parts of the network code made by the Regulator in his notice of modifications of 30 January 1995?

2(b) If the answer to 2(a) is that it is legitimate, what (if any) conclusions should be drawn from the modifications made by the Regulator on 30 January 1995 and the terms of the network code before the 1995 modifications?

82. In essence, therefore, what was sought were the parties' submissions on the proper approach to the construction of the contract, given its unusual features.

83. On supplementary questions (1)(a) and (1)(b), GNER initially submitted that, given the backdrop of regulatory control over the contents of track access contracts (including the contents of the network code), the intentions of the parties were less relevant to the construction of the contract (if indeed they were relevant at all) than the intentions of the Regulator (*Further Written Submissions on Behalf of GNER*, paragraphs 7 – 9). Network Rail, by contrast, founded on the following statement of principle in paragraph 1-03 of *Lewison on the Interpretation of Contracts* (2nd edition, 1997): "For the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning" (*Railtrack's Submissions on the Supplementary Issues*, paragraph 10). As the parties developed their submissions in the course of oral argument, however, their differences diminished and ultimately it appears to have been accepted that, in construing the track access contract and the network code, the proper approach is to seek to identify the meaning

of the words used, objectively assessed, rather than to seek to identify the intentions of any particular party or parties. Equally, there was common ground between the parties inasmuch as both accepted that regulatory influence over the terms of access contracts, and the statutory duties to which the Regulator is obliged to have regard in exercising that influence, all form part of the factual matrix against which both the track access contract and the network code are to be construed.

84. Accordingly, the assessor recommended that supplementary questions (1)(a) and (1)(b) should be answered as follows:

> (a) In construing the [network code], the fact that the parties did not negotiate those conditions and that they were established administratively in 1994 and extensively modified by the Regulator in 1995 forms part of the factual matrix against which the track access contract and the [network code] fall to be construed; and
>
> (b) In construing the track access contract and the [network code], the proper approach is to seek to identify the meaning of the words used, objectively assessed, rather than to seek to identify the intentions of any particular party or parties.

85. I agree with the opinion of the assessor in this respect. I would add, however, that the arguments advanced by GNER in connection with the ascertainment of the objective intentions of the Regulator as the author of the network code and of modifications made to it go further than this perhaps implies. The pursuit by the Regulator of the statutory objectives laid on him by section 4 of the Railways Act 1993 is part of the factual matrix which may assist in identifying the genesis and the aim of those provisions (as to which, see further below at paragraph 105). GNER relied strongly on this point in challenging the construction of Part G of the network code contended for by Network Rail, inasmuch as it argued that that construction "could not objectively have been the intention of a reasonable Regulator". The core of GNER's argument in this regard was that a "key feature of Network Rail's monopoly position is that it must be fully accountable for its failure to comply with its contractual and statutory obligations" (*Further Written Submissions on Behalf of GNER*, paragraph 13(a)). A reasonable Regulator could not, in GNER's submission, have intended to hold Network Rail to something less than full accountability consistently with his section 4 duties. These arguments, and the assessor's

response to them, come fully into focus in connection with supplementary question (2)(b), and accordingly I shall return to this issue in my consideration of that question.

86. As to the issues raised in supplementary questions (2)(a) and (2)(b), there was again common ground between the parties inasmuch as both accepted that it was permissible to look at the 1995 modifications to the network code for the purpose of ascertaining what light those modifications might shed on the scope of the Case (i)(a) definition of Network Change. Accordingly, the assessor recommended that supplementary question (2)(a) should be answered as follows:

"It is legitimate, in construing the extent of Case (i)(a) in the 1995 version of the [network code], to have regard to the 1995 modifications."

87. In principle, and in the sense that the 1995 modifications form part of the factual matrix against which the contract falls to be construed, I agree and accordingly endorse the assessor's recommendation. In the result, however, the parties drew attention to different aspects of the 1995 modifications in order to derive support for the different constructions for which each contended.

88. In Network Rail's submission, the assistance to be gleaned from the 1995 modifications was limited, although such assistance as there was tended to favour its preferred construction (*Railtrack's Submission on Supplementary Issues*, paragraph 34). In particular, Network Rail argued that the reason given for the introduction of a Case (iii) Network Change (*i.e.* "to prevent the Part G procedures from being circumvented by the introduction of temporary restrictions which in practice last over a long period") indicated that Case (i)(a) was confined in its scope to changes of a permanent nature (not, in Network Rail's submission, being changes merely to the condition of the track). The introduction of new provision for Major Projects was said by Network Rail to point in the same direction. Although the definition of "Major Projects" in Condition D2.3.6 acknowledged the possibility of overlap between a "Network Change" and a "Major Project", the latter concept would be redundant, and its introduction meaningless, if the former were construed so widely as to encompass all Major Projects. Consequently, Network Rail said it should be presumed that a narrower construction was intended.

89. GNER advanced the view that the Regulator's statement of reasons for the 1995 modifications gave little assistance in construing the modified provisions of the network code (*Further Written Submissions on Behalf of GNER*, paragraph 18). GNER did however submit that assistance on construction could be derived from an analysis of the changes actually made.

90. First, the pre-modification Case (i)(a) definition of Network Change, "any … change (including any improvement) to … any part of the Network", was modified in 1995 by the addition of the words "or enlargement" after "improvement". GNER submitted that the addition of "or enlargement" was intended to make it absolutely clear that a Network Change could involve a change in the Network's condition (as shown by the reference to "improvement") *or* in its physical layout ("enlargement"). The inclusion of "enlargement" would make no sense unless it was intended to have a meaning distinct from "improvement". Furthermore, the fact that the opposites of "improvement" and "enlargement" (*i.e.* "deterioration" and "reduction") were not expressly referred to was unsurprising: if "Network Change" comprehended enhancements of the Network such as improvements to its condition or enlargement of its extent, then self-evidently negative changes such as deterioration in condition or reduction in extent must be comprehended too. As to the significance of the introduction of a new Case (iii) definition of "Network Change", GNER submitted that Case (i)(a) was and continued to be the primary provision, and that there was no proper basis for restricting its ambit, as Network Rail sought to do, in favour of a wider application of Case (iii).

91. As to the relationship between the definition of "Network Change" and the new definition of "Major Projects", GNER insisted that, the two provisions being unrelated and appearing in different parts of the network code, there was no warrant for adopting a restrictive construction of Case (i)(a) merely on the strength of the introduction of new Condition D2.3.6: "it is highly implausible that the drafting of the 1995 modifications in Condition D2.3.6(a) involved any detailed analysis of the effect of Part G – it was merely a saving provision" (*Further Written Submissions on Behalf of GNER*, paragraph 21(b)). GNER was similarly dismissive of Network Rail's argument that the introduction of new Condition G1.8 (which relaxes the otherwise mandatory requirement of advance notification of a Network Change, but only in respect of changes within the meaning of Case (iii)) tended to show that Case (i)(a) could only be concerned with the kind of changes in respect of which it was practicable to give advance notice (*i.e.* not changes

in the nature of deterioration). As with the introduction of the Major Projects provision, there was nothing in connection with the insertion of Condition G1.8 to suggest that the draftsman had intended the provision to qualify the meaning of the "primary provision", Case (i)(a). Had that been the intention, it would have been made explicit. Since it was not, there was no warrant for adopting an interpretation of Case (i)(a) Network Change other than that suggested by the natural and ordinary meaning of the words actually used.

92. It is to be noted, first, that in promulgating modifications to the network code, the Regulator is, as the assessor noted at paragraph 24 of his Second Report, required to have regard to the statutory objectives laid on him by section 4 of the Railways Act 1993. As the assessor also observed, some of those statutory objectives compete. For example, it may be that measures adopted in the interests of promoting efficiency and economy on the part of persons providing railway services (see section 4(1)(c)) and promoting competition in the provision of railway services for the benefit of users of those services (see section 4(1)(d)) impact on the certainty with which providers of railway services are able to plan the future of their businesses. The Regulator is also required, however, to exercise his functions in the manner which he considers is best calculated to enable such persons to plan the future of their businesses with a reasonable degree of assurance (section 4(1)(g)). But, provided the Regulator has not unreasonably neglected this objective in adopting the measures in question, his decision cannot be attacked merely because it does not maximise that degree of assurance, or attaches greater importance, in this instance, to the achievement of other objectives (see *R -v- Director General of Telecommunications ex p Cellcom and others*, QB, 26 November 1998, [1999] ECC 314; *R -v- Independent Television Commission ex parte TSW Broadcasting Limited* [1996] JR 185; *London & Continental Stations and Property Limited -v- The Rail Regulator* [2003] EWHC 2607 (Admin)). That being so, the assessor identified the question of construction of Part G in the following terms (*Second Report*, paragraph 23):

> "… whether, consistently with fulfilling the duties imposed upon him, the Regulator could have intended in such circumstances [*i.e.* circumstances in which Network Rail has allowed the physical condition of the track to deteriorate and in which Network Rail has implemented a change to the operation of the Network within the meaning of the Case (iii) definition of Network Change] to deprive train operators of the full remedy under Part G and leave [Network Rail] with the limited accountability represented by Schedules 4 and 8 [to the track access contract]. It is for this reason that Network Rail submits that

GNER's contention depends upon the idea that train operators have some a priori right to the fuller compensation available through Part G."

93. In the assessor's view, it did not follow that the Regulator, in adopting the original network code or promulgating the 1995 modifications, was required or could reasonably be regarded as having intended to impose Part G compensation on Network Rail for every default: "That [Network Rail] should be held financially accountable in full for every shortcoming is … not necessarily to be expected. … [Network Rail] can be, and in some cases is, held accountable for its shortcomings by means other than financial" (*Second Report*, paragraph 24). On the construction of the Case (i)(a) definition of Network Change, therefore, where GNER's argument was that to allow the physical condition of the track to deteriorate represented a fundamental breach by Network Rail of its obligations, the assessor held (*Second Report*, paragraph 25): "Plainly such a shortcoming is one for which the Regulator might well have insisted upon full financial accountability. However, given the background, it is impossible to say that no reasonable Regulator would have done otherwise." On the construction of the Case (iii) definition of Network Change, and in particular on the question of the point in time from which an entitlement to compensation in respect of such a change was to be assessed (Preliminary Issue 6), GNER again founded upon its "full accountability" model to argue that the Regulator must have intended Part G compensation to be payable from the onset of such a change, provided the change persisted for more than six months, rather than from the expiry of that six-month period. Again the assessor was unpersuaded (*Second Report*, paragraph 26):

"Once again … it is impossible to say that no reasonable Regulator would have provided otherwise. If, during the first six months, compensation in accordance with Part G was not available, train operators would still be entitled to compensation in accordance with Schedules 4 and 8 to the track access contract. Given that compensation in accordance with these Schedules would be available, the issue becomes a question of whether the Regulator could reasonably have intended that, for that initial period, train operators should be confined to compensation in accordance with those Schedules. Having regard to the differing interests which the Regulator is obliged to balance, it is very difficult to see why such a restriction would be unreasonable."

94. I entirely agree that, while the provision of full compensation is one aspect (where it applies) of Part G and the model of accountability it enshrines, that is not the whole point or purpose of that Part. But to the extent that the provision of full compensation, or at

least fuller compensation than that provided for by Schedules 4 and 8, is an aspect of the Part G regime for Network Change, I have difficulty in understanding why GNER's construction of its provisions, premised on a concept of full accountability, should be acceptable only if it is shown that no reasonable Regulator could have intended to do other than impose such accountability on Network Rail. In the first place, such an approach seems to me to come close to attempting to divine the subjective intentions of the Regulator in promulgating the network code and modifications to it. That is not, however, the object of the exercise; indeed, as I discuss at paragraphs 97 *et seq* below, it is neither here nor there. The intentions of the Regulator objectively and reasonably ascertained from the wording he chose to use and in light of the factual matrix surrounding that choice (of which his section 4 duties form part) are what is relevant. The fact that a reasonable Regulator might have intended to impose on Network Rail something less than "full accountability" for its shortcomings is no warrant for rejecting out of hand a construction premised on a model of full accountability provided that construction is itself consistent with what a reasonable Regulator might have intended. The test of the reasonableness of this or that possible interpretation is not a *Wednesbury*-type test. Certainly, one may reject a construction, or an approach to construction, which *is* unreasonable in the *Wednesbury* sense inasmuch as no reasonable Regulator could have intended to adopt it. But it has not been shown that the construction contended for by GNER is unreasonable in that sense, and, as I have said, GNER's approach cannot be dismissed merely because there might be other reasonable interpretations of what it is that the Regulator intended to ordain in providing a regime for Network Change in the terms that he did. I am accordingly unpersuaded of the validity of the assessor's conclusions in this respect (which is not, however, to say that I am therefore persuaded on this basis alone of the validity of the approach for which GNER contends).

95. I turn now to the assessor's findings on the remaining arguments of the parties as to the correct construction of the network code and the track access contract. The assessor did not accept Network Rail's argument that the introduction of Case (iii) Network Change, and the reasons for it, shed any light on the content of Case (i)(a) Network Change. In particular, he was not persuaded that the latter must be confined to changes of a permanent nature, and therefore excluded changes in the condition of the Network. In every other respect, however, the assessor preferred the submissions of Network Rail to those of GNER. Accordingly, he did not consider that the 1995 addition of the words "or enlargement" to the definition of Case (i)(a) Network Change made clear that

"improvement" therefore related to the condition rather than physical layout and extent of the track, or that the definition must include the obverse of the expressed terms, namely deterioration and reduction: "improvements in condition are likely to be both deliberate and planned. Changes in the nature of deterioration may be intentional (in the sense of being permitted) but they will not be planned" (*Second Report*, paragraph 33). The assessor also rejected GNER's arguments in relation to the introduction of new provision for Major Projects and Condition G1.8. The assessor agreed with Network Rail that the introduction of both provisions was significant, and did shed light on the correct construction of Case (i)(a) Network Change. The effect of both was to indicate that a narrower construction of Case (i)(a) Network Change had been intended and was to be preferred.

96. It is important to bear in mind that the parties and the assessor were required to consider these supplementary questions *after* the hearing and report on the principal preliminary issues. As will become apparent, the assessor's conclusions on the supplementary questions served to confirm his recommendations in relation to the preliminary issues. As will also become apparent, however, although I accept and endorse certain of those recommendations, I do not accept them all. Having considered the arguments of the parties on the preliminary issues and the submissions on the supplementary questions, and the assessor's reports and recommendations on both, I have taken a different view from the assessor on the construction of the network code and the track access contract in a number of respects. Mindful of the care with which the assessor stated his reasoning, I consider it imperative that I explain at this stage in my judgment my view of the proper approach to the construction of the documents in question. The application of this approach to the specific questions raised by the preliminary issues will be set out in full in my judgment on each.

97. The construction of a contract involves the ascertainment of the words used by the parties and the determination of the legal effect of those words. The object is to identify what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which such obligations were expressed: see for example *Lewison on the Interpretation of Contracts* (2nd edition, 1997), paragraph 1-02. This is not to say that the actual, subjective intentions of the parties have any relevance to the inquiry. On the contrary, even in the context of ordinary commercial contracts having none of the unusual features of track access contracts,

"… when one speaks of the intention of the parties to the contract, one speaks objectively … and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."

(*Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989, *per* Lord Wilberforce).

98. I did not understand either of the parties, or the assessor, to dissent from this proposition. Its force is all the greater in the context of a contract such as the present, which is not the product of the parties' freely-conducted negotiations but an instrument subject to a significant degree of regulatory oversight and control and incorporating an administratively-established code the terms of which take precedence, in the event of any conflict between the two, over the terms of the negotiated part of the contract. Given this, it is not inappropriate to depict an access contract as a package of rights and obligations upon which the parties must take a view before deciding whether or not to subscribe. In forming that view, the parties can only act on an objective and reasonable interpretation of the terms in which the package is cast.

99. The proper construction of a contract is a question of law. The process of arriving at the correct interpretation of a contract involves having regard to the whole contract, together with its factual matrix which includes its commercial purpose. The intentions of the parties to the contract are to be ascertained in this way, objectively, and without regard to what the parties might say they thought they were doing when they made the contract. The decisions of the courts contain plentiful affirmations of this rule and examples of how it is applied.

100. In *"The Raphael"* [1982] 2 Lloyd's Law reports 42, Stephenson LJ said, at p 50:

" ... [W]ith all written contracts, the court starts by trying to discover the intention of the parties from the language they have used in the particular clause, considered not in isolation but in the context of the whole contract."

101. In *Inland Revenue Commissioners -v- Raphael* [1935] AC 96, Lord Wright said:

> "The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them; such facts may be proved by extrinsic evidence or appear in recitals; again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonize as far as possible all the parts ... the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of the intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property."

102. In *President of India -v- Jebsens (UK) Ltd* [1991] 1 Lloyd's Rep 1 (HL), Lord Goff of Chieveley said:

> "I must confess I am reluctant to speculate on the motives of a party for adopting a clause in any particular form. For once the clause is embodied in a commercial contract, it has simply to be construed in its context, from the objective point of view of reasonable persons in the shoes of the contracting parties. Of course it has to be construed sensibly, and regard has to be had to its practical effect. But the objective interpretation is of paramount importance in commercial affairs; commercial men have frequently to take important decisions with some speed, and it is of great importance that they know that they can rely on Courts and arbitrators, if any dispute should later arise, to adopt the same objective approach as they themselves have to adopt in the daily administration of their contracts."

103. Most recently, in *Bank of Credit and Commerce International SA -v- Ali* [2001] 2 WLR 735, Lord Bingham of Cornhill said:

> "In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. 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' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."

104. How then is an objective and reasonable interpretation arrived at? In my judgment, 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 – 4-02; *Chitty on Contracts, Vol 1* (28th edition), paragraphs 12-049 – 12-050. The second factor relates to the factual matrix in which the contract was made and in 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 2-10). Accordingly, the commercial purpose intended to be served by a contract may illuminate the meaning of particular terms where 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 his 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 the contract where the words alone are insufficiently clear. In my opinion, the approaches contended for by the parties and adopted by the assessor to the correct construction of the network code and track access contract in this case at times lost sight of these fundamental principles.

105. In my judgment, the crucial point to emerge from the 1995 modifications to the network code appears in the second paragraph of the introduction to the Regulator's Reasons for Modifications document. This states that the modifications are the consequence of a wide-ranging review which identified a number of areas where change was necessary, "either from the point of view of practicality, clarity *or to promote the objectives of the Railways Act 1993* as illustrated in section 4 of that Act". As will be seen later in this judgment, I do not believe that the 1995 modifications necessarily achieved their stated aim, certainly so far as improving clarity was concerned. However, in attempting, on the basis of the wording actually used and mindful of the fact that a critical element of the factual matrix informing the modifications was the promotion of the Regulator's section 4 objectives, to identify the aim and genesis of the modifications, I am of the opinion that the basic purpose of those modifications was to strengthen the protective regime

applicable to Network Changes, not merely in the sense of widening entitlement to compensation but equally in the sense of clarifying the extent of Network Rail's obligations in terms of notification and dialogue with the industry and conferring upon affected operators the right, in certain specified circumstances, to block proposed Network Changes. I find this to be wholly consistent with a reasonable interpretation of the Regulator's section 4 duties, with the wider picture of Network Rail's licence obligations in connection with the management and stewardship of the network, and also with the language actually used.

106. With that in mind, I turn now to the principal preliminary issues in this dispute.

Issue 1: Whether a deterioration in the condition of the Network was capable of qualifying as a "change … to … any part of the Network" within Case (i)(a).

The submissions of the parties

107. It was common ground between the parties that the expression "change … to … any part of the Network" covers physical alterations to the Network. Network Rail contended that the phrase is *confined* to such alterations, in the sense of alterations to the physical layout or configuration of the Network, and further submitted that the reference to "the Network" must be understood as a reference to the whole system of track and other network installations used for the support, guidance and operation of trains. Accordingly, a deterioration in the condition of the track alone could not constitute a Network Change for the purposes of Case (i)(a), because it does not involve addition to or subtraction from the physical configuration of the network and because it is not a change to the "system" of track and associated installations which together constitute the network (*Network Rail Skeleton Argument*, paragraphs 14 - 16). GNER, on the other hand, contended that the phrase "change … to … any part of the Network" bears a wider meaning, including changes to the state or quality of the infrastructure.

108. In support of its submissions on Issue 1, Network Rail advanced a number of arguments. I outline each of those arguments, coupled with GNER's responses to them, in the following paragraphs.

109. The first argument advanced by Network Rail turns on the fact that the network is defined in terms of a system by section 83(1) of the Railways Act 1993. Section 83(1) provides:

> '"network" means—
>
> (a) any railway line, or combination of two or more railway lines, and
>
> (b) any installations associated with any of the track comprised in that line or those lines,
>
> together constituting a system of track and other installations which is used for and in connection with the support, guidance and operation of trains'.

110. It is contended that the equation of the network with the whole system of track and associated infrastructure reflects the dictionary definition of a network as "an arrangement of intersecting horizontal and vertical lines, *like the structure of a net*" (Network Rail's emphasis) (*Concise Oxford Dictionary*, 1990, at page 797) or "a collection, arrangement or structure with intersecting lines and interstices resembling those of a net" (*New Shorter Oxford English Dictionary*, Vol. 2, at page 1909) (*Network Rail Skeleton Argument*, paragraph 8).

111. GNER did not dispute that the network is defined in terms of a system, including but not limited to the track. What GNER did question was the relevance of this point to the question here in issue, namely whether a deterioration in the condition of the track is capable of constituting a "change … to … *any part* of the Network" (my emphasis). More broadly, GNER refuted the arguments advanced by Network Rail for the adoption of a narrow construction of the expression "any change". In GNER's submission, there is no warrant for restricting the generality of the language used in Case (i)(a). The words "any change … to … any part of the Network" are entirely without limitation, and to construe them otherwise would be to depart from the general principle of construction whereby the meaning to be attributed to a contractual definition is the natural and ordinary meaning of the words used. If the parties had intended Case (i)(a) to bear a meaning so much at variance with the literal meaning of the language used, one would have expected the draftsman to have provided for it explicitly. Further, the specific inclusion within the definition of "any change" of "any improvement or enlargement" was plainly intended,

according to GNER, to confirm that positive as well as negative changes to the Network fall within the scope of Case (i)(a) (lest there be any question as to the ability of enhancements to the Network to trigger a right of compensation and it being obvious that there should be protections for train operators (financial and obstructional) if Network Rail were to make the network worse). Condition A1.1 of the network code makes clear that "the words 'include' and 'including' are to be construed without limitation." Accordingly, the reference to improvement and enlargement is not exhaustive. By the same token, the failure specifically to mention deterioration (the obverse of improvement) does not exclude it (*GNER Skeleton Argument*, paragraph 9).

112. Secondly, Network Rail relied on a distinction between "operation" of the Network and "maintenance" of the Network as showing that the "operation" of the Network (which any change falling within Case (i)(a) must be "likely materially to affect") was not intended to be equated with the maintenance of the Network (*Network Rail Skeleton Argument*, paragraphs 10 - 11).

113. GNER questioned the relevance of this distinction. Whereas Case (iii) is defined in terms of a "change … to the operation of the Network", Case (i)(a) is not. A Case (i)(a) change must be one which is "likely materially to affect the operation of the Network, or of trains operated by that operator on the Network", but this reference to the operation of the Network falls within what the parties agree is the "consequential component" or "materiality component" of the Case (i)(a) definition of Network Change, not the "substantive component" (*i.e.* "any change … to … any part of the Network"). GNER added that the fact that "the carrying out (or failure to carry out) of maintenance work may well affect the physical condition of the Network and thus attract definition (i)(a) as well as definition (iii) is expressly contemplated by definition (iii), which by its specific terms assigns cases which involve *both* a change to any part of the Network *and* to the operation of the Network to definition (i)(a)." (*GNER Skeleton Argument*, paragraph 12).

114. Thirdly, Network Rail contended that the wider interpretation advanced by GNER would impose an unwarranted administrative burden on Network Rail. Part G of the network code provides a mandatory procedure to be followed where a Network Change is anticipated. Implementation of a proposed change may only commence upon completion of that procedure. The only exceptions to this are as set out in Condition G1.8, which

provides, in relation to a Network Change falling within Case (iii), that Network Rail *may* commence implementation of the procedure set out in Conditions G1 - G4 and *shall* do so upon notice being served on it by the relevant train operator at any time after the expiry of the relevant period. The other exception is in Condition G1.9, which provides that Network Rail is not obliged to implement the procedure in relation to a Network Change falling within Case (i) to the extent that the change requires to be made for safety reasons. Accordingly, in Network Rail's submission, Part G envisages that every Network Change must be amenable to the application of the Part G procedure. Since, on Network Rail's analysis, it cannot intelligibly be supposed that the parties "ever contemplated that [Network Rail] would give notice of a proposal to allow the condition of the Network to deteriorate", it must follow that a deterioration in the condition of Network falls outside the definition of "Network Change" for the purposes of Part G (*Network Rail Skeleton Argument*, paragraphs 22 - 23).

115. GNER disputed Network Rail's argument that in order to come within the definition of "Network Change", a change must be amenable to the application of the procedure prescribed by Conditions G1 - G4. GNER argued that this "seeks to elevate the usual machinery for a Network Change into part of the definition of a Network Change and ignores the purpose of the Network Change provisions, which are self-evidently designed to protect and compensate the adversely affected party."

116. In addition, GNER pointed to Condition 7 of Network Rail's network licence, headed "Stewardship of the Licence Holder's Network". At the material time, paragraph 1 of Condition 7 was in the following terms:

"The purpose is to secure:

(a) the maintenance of the network;

(b) the renewal and replacement of the network; and

(c) the improvement, enhancement and development of the network,

in each case in accordance with best practice and in a timely, economic and efficient manner so as to satisfy the reasonable requirements of persons providing services for the carriage of passengers or goods by railway and funders in respect of the quality and capability of the network."

117. Paragraph 2 of Condition 7 provides:

> "The licence holder shall carry out its licensed activities to achieve the purpose to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities."

118. From this, in GNER's submission, it follows that Network Rail should as a matter of compliance with Condition 7 be monitoring the condition of the track closely in any event (*GNER Skeleton Argument*, paragraph 49). Accordingly, there is no basis for the contention that it would be impracticable to the point of absurdity to identify, let alone give notice of, deterioration in the condition of the track, as Network Rail allege. GNER asserted that proper and competent management of the network, with which Network Rail is charged by Condition 7 of its network licence, requires Network Rail to know the state of its assets, including the condition of the track. The procedure in Condition G1.1 of the network code for notification of proposed changes presupposes that Network Rail has that knowledge. The fact that Network Rail may have been, or be, unaware of the true state of the network or any part of it, or of a deterioration in its condition, because it has failed properly to discharge its functions, cannot, in GNER's submission, be used as an aid to the true construction of Case (i)(a) or to exclude from that definition deterioration in the condition of the track. To hold otherwise would be to neglect entirely the duties of Network Rail as the steward of the network and the protective purpose and provisions of Part G. Those duties and the purpose and protections of Part G form part of the factual matrix against which the track access contract and the network code were made, which factual matrix is on ordinary principles of contractual interpretation relevant to ascertaining the aim of the contract and the true construction of its terms.

119. Fourthly, Network Rail pointed to the "commercial absurdity" said to afflict the construction contended for by GNER: "if correct, it would mean that [Network Rail's] business plans and decisions in relation to all significant matters relating to the maintenance of the Network would have to be made the subject of the time-consuming procedures under Part G. This would effectively bring [Network Rail's] performance of its maintenance obligation to a halt, whilst the affected Train Operators and other interested industry third parties engaged in protracted debate and consultation as to a whole range of questions. … [The] logic of GNER's construction dictates that [Network Rail] (and presumably Train Operators generally) would have to be engaged in the continuous assessment of the likely materiality of almost every change in the condition of

the Network, in order to determine whether the extensive notification and consultation procedures prescribed under Part G should be followed. … [These] consequences flout business common sense." (*Network Rail Skeleton Argument*, paragraphs 30 - 32).

120. In answer to this, GNER again founded on the duties of Network Rail as the body charged by virtue of statute with the management of the network and by Condition 7 of its network licence with the stewardship of the network. Proper and competent management and stewardship imply knowledge of the condition of the infrastructure. That in turn implies continuing vigilance and foresight on the part of Network Rail. GNER also contended that Network Rail's arguments as to the commercial absurdity of its construction of Case (i)(a) exaggerate the practical consequences of holding that a change in the condition of the network or any part of it is capable in principle of constituting a Network Change. The change must also be one which is "likely materially to affect the operation of the Network, or of trains operated by the Train Operator on the Network." When the materiality component is factored into the definition of Network Change for the purposes of Case (i)(a), Network Rail's contention that GNER's construction flouts business common sense collapses. In any event, the narrow construction contended for by Network Rail was itself, in GNER's submission, productive of absurdity: for example, "removal of a rail could qualify as Network Change, whereas allowing that same rail to deteriorate to such an extent that it is unusable could not."

121. Fifthly, Network Rail submitted that the literal construction of Case (i)(a) contended for by GNER (which Network Rail accepted would cover any alteration in the state or quality of any part of the network, including a deterioration in condition) would have the effect of restricting the application of Case (iii), which relates to "any change (not being a change within paragraph (i) or (ii) above) to the operation of the Network". In Network Rail's submission, there is no warrant for the view that the parties intended Case (iii) to have such a limited area of application (*Network Rail Skeleton Argument*, paragraph 28).

122. GNER denied that its interpretation of Case (i)(a) is such as to deprive Case (iii) of effect, referring to changes such as the imposition of temporary speed restrictions which "do not themselves involve any change to the physical layout or state or condition of the network and do not fall within definition (i)(a) but fall exclusively within definition (iii)."

123. Sixthly, Network Rail relied on the interrelationship between the provisions of Part G and Clauses 6.3.2, 8.2, 8.3 and 8.5 of the track access contract. I have already quoted these provisions (above, at paragraphs 59-62). To recapitulate, Clause 6.3.2 contains Network Rail's fundamental obligation to "ensure that the Network is maintained and operated to a standard which shall permit the provision of the Services [*i.e.* the railway passenger services specified in Schedule 5 to the contract] using the Specified Equipment in accordance with the Working Timetable." Any failure by Network Rail to comply with this maintenance obligation would ordinarily engage Network Rail's liability in damages. However, the extent of that liability is restricted by the provisions of Clauses 8.2, 8.3 and 8.5. Clause 8.2 entitles GNER to an indemnity in respect of loss and damage resulting from "a failure by [Network Rail] to comply with its obligations under the Safety Obligations" (as defined in Clause 1.1 of the contract) or from "any damage to the Specified Equipment … arising directly from [Network Rail's] negligence or failure to comply with its obligations under [the contract]", but this indemnity "shall not extend to loss of revenue or other indirect loss." Clause 8.3 provides that, save as provided in Schedule 4 and Schedule 8 to the contract, "the parties shall not be entitled as between themselves to any compensation in respect of any damage, losses, … and out of pocket expenses arising from cancellations, interruptions or delays to trains." Schedules 4 and 8 in turn provide for the payment of predetermined amounts of compensation in respect of "Possessions" (as defined in Schedule 4 at paragraph 1.1), delays to trains (Schedule 8, paragraph 2), interruptions to train services (Schedule 8, paragraph 8.2) and cancellations of train services (Schedule 8, paragraph 8.1). The amounts payable under Schedule 8 are capped by reference to the Fixed Track Charges (as defined in Schedule 7 to the contract at paragraph 2 of Part 2) payable by GNER to Network Rail. Clause 8.5 then provides that "[n]either party to [the contract] may recover from the other party any loss of revenue (including fare revenue, subsidy, access charges, Track Charges and incentive payments) or other consequential loss in connection with the subject matter of [the contract] caused to it by the other party, save to the extent otherwise provided in [the contract] or any other Agreement between them." Network Rail submitted that the width of the construction of Case (i)(a) contended for by GNER is such as effectively to deprive the limitations and exclusions of liability contained in Clauses 8.2, 8.3 and 8.5 of any substance.

124. GNER submitted that there is no warrant for restricting the scope of the compensation regime contained in Part G of the network code by reference to the provisions of the

track access contract on compensation for breaches of Network Rail's maintenance obligation. GNER pointed out that Clause 8.5 of the contract expressly provides that the limitation on recovery for loss of revenue does not apply to consequential losses the recovery of which is provided for by the contract or any other contract between the parties. Clause 5.1 of the contract expressly provides that the network code, including Part G, is incorporated into and forms part of the contract. Part G expressly provides for the recovery of revenue losses sustained as a result of Network Changes. GNER noted further that Network Rail positively accepted (at paragraph 42 of its Skeleton Argument) that consequential losses are recoverable under Case (iii), but "seeks to deny recovery under definition (i)(a) for the … reason that definition (i)(a) does not adopt the six month requirement adopted by definition (iii)" (*GNER Skeleton Argument*, paragraph 17). GNER denied that there is any basis for permitting recovery of consequential losses under one head of the definition of Network Change but not under another, not least since "definition (iii) expressly concedes primacy to definition (i)(a) in cases falling within both definitions." In GNER's submission, the effect of Network Rail's argument on this point is to give primacy to Case (iii) in a manner contrary to the express provisions of the definitions.

125. Seventh, Network Rail submitted that to interpret the definition of "Network Change" in Case (i)(a) as including a change in the condition of the network would be inconsistent with Condition D2.3.6(a) of the network code. This provides that the provisions of Condition D2.3, which relate to "Major Projects", "shall be without prejudice to … the provisions of Part G, *if* the proposed Major Project, *once completed*, would constitute a Network Change within the meaning of that Part" (Network Rail's emphases; *Skeleton Argument*, paragraph 43). In Network Rail's submission, were a change in the condition of the network to fall within the definition of Network Change, the word "if" as it appears in Condition D2.3.6(a) would be redundant, for every Major Project would involve a Network Change.

126. GNER disputed the assertion that its construction of Case (i)(a) is incompatible with the provisions of Condition D2.3.6(a). GNER agreed that the word "if" as it appears in that Condition indicates that a Major Project may or may not constitute a Network Change. It disagreed that its definition of Network Change for the purposes of Case (i)(a) effectively brings every Major Project within the meaning of a Network Change. At paragraph 46 of its Skeleton Argument, GNER contended, rather, that a maintenance or

renewals programme requiring possessions only overnight or at weekends (*i.e.* during "white periods" in terms of the Rules of the Route) would not qualify as a Network Change because it would not have the necessary material effect on the operation of trains on the network.

The assessor's recommendation

127. Having considered these arguments, the assessor preferred the submissions of Network Rail. His reasons for doing so were essentially threefold. First, the assessor accepted Network Rail's "fundamental" point to the effect that the network is defined in terms of a system: "The network is not the same thing as the track and it is not the same thing as the associated installations. It is the system formed by the track and any associated installations in combination" (*Assessor's Report on Preliminary Issues*, paragraph 18). Secondly, the assessor considered that the structure of the network code, in particular Part D and the definition there given to the term "Major Project", was hostile to the wider construction of Case (i)(a) for which GNER contended. The assessor took the view that GNER's construction of Case (i)(a) network change was so wide as to render meaningless Condition D2.3.6(a) of the network code, which plainly envisages that, while some Major Projects might amount to network changes, this will not necessarily be the case (*Report*, paragraph 30). Thirdly, the assessor accepted Network Rail's argument that the mandatory requirement of prior notice in connection with changes falling within Case (i)(a) (a requirement unmodified by a provision comparable to Condition G1.8 of the network code, which refers only to Case (iii) changes) was such as to render it "most unlikely that changes in the nature of a deterioration in quality", changes which were apt to be unforeseen and/or unintended, were ever intended to constitute Network Changes within the meaning of Case (i)(a) (*Report*, paragraph 34). Accordingly, the assessor answered Issue 1 in the negative.

The Regulator's conclusions on Issue 1

128. I regret to say that I disagree with the assessor's reasoning and conclusion in relation to Issue 1. I have come to the clear conclusion that the submissions of GNER on this Issue are to be preferred. My reasons for so holding are as follows.

129. Network Rail's argument that a Network Change must be a change to the system of track and associated installations which together constitute the network wholly overlooks the fact that, on the plain language of Case (i)(a), a Network Change consists of "*any change* … to … *any part* of the network" (my emphasis). I entirely accept - as does GNER - that the network is defined in terms of a system. It is however contrary to the natural and ordinary meaning of the wording of Case (i)(a) to suggest that a qualifying change must be a change to the system as a whole, as distinct from a part of that system, whether a part in the sense of a geographical portion of whole system or in the sense of one of the component elements of the system.

130. In any event, the fact that the network is defined in terms of a system tells one nothing about whether a change to the system or any part of it includes a deterioration in its condition, as well as the improvements or enlargements to which Case (i)(a) makes specific reference. In answering this question, I take guidance from what has been described as "the golden rule" of contractual interpretation, namely that "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the contract, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further" (*Grey* v *Pearson* (1857) 6 HL Cas 61 at 106, *per* Lord Wensleydale). Put shortly, the words used in Case (i)(a), "being ordinary words of the English language, must be construed in their ordinary and natural meaning unless the context otherwise requires" (*Tophams Ltd* v *Earl of Sefton* [1967] AC 50 at 73, *per* Lord Upjohn).

131. Network Rail relied on two dictionary definitions, as well as the statutory definition, of the term "network" in support of its argument that what is required for the purposes of Case (i)(a) is a change to the *system*, that is the physical layout or configuration of the combination of track and infrastructure together used for the support, guidance and operation of trains. On this view, a change to a constituent part of that system would not suffice. Nor, for that matter, would mere replacement or renewal of existing track because this would make no difference to the overall configuration of the system thus conceived.

132. I cannot accept this reasoning. I note, first, that the Second Edition of the *Oxford English Dictionary* (in 20 volumes) defines the term "system" somewhat differently:

"A set or assemblage of things connected, associated, or interdependent, so as to form a complex unity; a whole composed of parts in orderly arrangement according to some scheme or plan."

133. In my judgment, this better - and more authoritatively - emphasises the interconnectedness and interdependency that is necessary to constitute a network out of a number of constituent parts. As long as the tracks and associated installations are interconnected and interdependent and so make up a single entity which is used for and in connection with the support, guidance and operation of trains, they are parts of a network and together constitute a network. Viewed from this perspective, the character of a system of railway lines and associated installations is not be determined (for the purposes of identifying a change to the system or any part of it) exclusively by their physical arrangement or configuration. What is relevant is the fact that the constituent parts are so organised as to be joined together and capable of working together so as to serve the purpose of the support, guidance and operation of trains. Accordingly, Network Rail's contention that only changes which physically alter, by addition or subtraction, the overall net-like structure can qualify as Network Changes must be rejected.

134. In any event, the key words in Case (i)(a), for the purposes of Issue 1, are in my opinion the words "any change". These are ordinary words of the English language. They are not technical terms, or legal terms of art. Moreover, though their meaning is plainly broad, it is not imprecise. Indeed, it may be said that their meaning was rendered more precise by the deletion, in the 1995 amendments to the network code, of the word "material" as it appeared before the word "change". Bearing in mind that the express reference to "improvement or enlargement" in no sense exhausts the meaning of "any changes" (as to which, see Condition A1.1 of the network code), there is, *prima facie*, no reason for departing from the natural and ordinary meaning of the words "any change".

135. Network Rail accepted that the ordinary and natural, or literal, meaning of the words "any change" is apt to include a deterioration in the condition of the network or any part of it. Network Rail contended, however, that this literal meaning cannot be accepted as a true construction of Case (i)(a) when placed in context and in the sense that that meaning results in absurdity.

136. I disagree. Turning first to the context in which Case (i)(a) falls to be construed, it is said that the literal construction contended for by GNER unjustifiably erodes the scope of Case (iii). It is also said that it is inconsistent with the compensation regimes contained in Schedules 4 and 8 of the track access contract and with the limitations and exclusions on recovery contained in Clause 8 of the contract; and that it is incompatible with the provisions of Part D of the network code relating to Major Projects.

137. As to the first of these objections, it is necessary to bear in mind that overlap between the definitions of Network Change in Cases (i)(a) and (iii) is expressly contemplated by the wording of Case (iii), which refers to "any change (not being a change within paragraph (i) … above)". From this it follows that, where a change is one which is capable of falling not only within Case (i)(a) but also within Case (iii), it is clearly allocated to and dealt with in accordance with Case (i)(a). Network Rail insisted that GNER's construction of Case (i)(a) would have the effect of restricting Case (iii) to matters wholly unconnected with any physical changes to the network. In answer to this, GNER pointed out that there would still remain plenty of circumstances in which Case (iii) would apply. It offered, by way of example, temporary speed restrictions and changes to signalling practice. In these circumstances, therefore, the better view is that Network Rail's arguments relating to the ambit of Case (iii) offer little or no assistance to its case for departing from the natural and ordinary meaning of the language of Case (i)(a).

138. As has been seen, Case (iii) was introduced into Part G by the 1995 modifications. According to the Regulator's statement of reasons for modification (30 January 1995, at page 13), this was done in order to provide for the initiation of the Part G procedure (subject to the relaxation in the normal requirement of advance notification provided for by the new Condition G1.8) in respect of "any temporary change which has a material effect on the Network and which lasts for more than six months. … The purpose is to prevent the Part G procedures from being circumvented by the introduction of temporary restrictions which in practice last over a long period." At the second hearing in September 2002, Network Rail founded on the Regulator's reasons for the introduction of Case (iii) to argue that, since Case (iii) must be confined to changes of a temporary nature (which on Network Rail's account would include changes in the nature of deterioration), Case (i)(a) can relate only to changes of a permanent nature. Leaving aside for the present the issue whether change in the nature of deterioration is properly identified as merely temporary (a matter to which I return in connection with Issue 6

below), the wording actually adopted in the definition of Case (iii) does not support this argument. Case (iii) is *not* in terms confined to changes of a temporary nature. Even if it were, it would not follow that Case (i)(a) therefore excludes such changes. On the contrary, as noted above, the terms of the definition of Case (iii) expressly recognise the potential for overlap between Case (i)(a) and Case (iii). For this reason also (and I should add that in this respect, I am in agreement with the conclusions of the assessor, who also rejected Network Rail's argument from the relationship between Case (i)(a) and Case (iii)), I hold that the introduction and the scope of Case (iii) does not of itself shed any light on the correct construction of Case (i)(a), or provide any reason which justifies a departure from the ordinary and natural meaning of that provision.

139. As to the second objection deriving from the context in which Case (i)(a) falls to be construed, Network Rail contended that, if Network Change under Case (i)(a) were held to include deterioration in the condition of the track, there would be few cases in which the exclusion of liability for indirect losses contained in Clause 8.5 of the track access contract could be operative.

140. Even if this were correct, it would still fail to meet the point that Clause 8.5 explicitly provides that the exclusion of liability for loss of revenue or other consequential loss is applicable "save to the extent otherwise provided in [the contract] or any other Agreement" between the parties. The provisions of the network code, including Part G, form part of the contract between the parties. Accordingly, there is nothing in Clause 8 which qualifies the plain wording of Condition G2.2 to the effect that the amount of compensation payable in respect of a Network Change shall (subject to the provisions of Condition G2.3) be an amount "equal to the amount of the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by the Train Operator as a consequence of the implementation of the proposed change." (Although not a factor which has weighed with me in this judgment, it may also be observed that Clause 8.5 of the track access contract applies only to consequential (*i.e.* indirect) losses, whereas Condition G2.2 expressly applies to both direct and indirect losses.)

141. In any event, there are any number of potential breaches of the track access contract which, while triggering the liquidated damages regimes in Schedules 4 and 8, would not constitute Network Changes (even on the literal construction of Case (i)(a)) and so

would not qualify for compensation under Part G. For example, delays and cancellations of trains arising from signalling errors or overrunning possessions which would engage Schedule 4 or 8 but not usually amount to Network Changes. Moreover, as GNER rightly pointed out, compensation under Case (i)(a) is dependent upon satisfaction not only of the "substantive component" of that definition of Network Change (*i.e.* proof of "any change … to … any part of the Network") but also of the "materiality component" (*i.e.* proof of the likelihood that that change will materially affect the operation of the network or of trains operated by the train operator on the network). Where a change fails to satisfy the materiality condition, the operator will be limited to such recovery as is contemplated by Schedules 4 and 8. Accordingly, Network Rail's arguments based on Clause 8.5 of the track access contract offer no material support to its preferred construction of Case (i)(a).

142. As to the third objection, Network Rail contended that if GNER's construction of Case (i)(a) were adopted, Condition D3.2.6 of the network code would be rendered meaningless, for a Major Project would always constitute a Network Change. Condition D2.3.6 is relied on as demonstrating that, on the contrary, a Major Project *may or may not*, once completed, also amount to a Network Change. So too it does. It is Network Rail's first premise which is unfounded. A Case (i)(a) change must also, in order to qualify for compensation under Part G, be likely *materially* to affect the operation of the network or of trains operated by the train operator on the network. As GNER pointed out, there is no necessary reason why every Major Project should have such an effect. The impact of a Major Project on the operation of the network may be minimised or reduced by, for example, taking possessions only at night or at weekends when the network is quiet. Again, therefore, I am unpersuaded that the provisions of Part D provide any contextual basis for departing from the construction of Case (i)(a) founded upon the natural and ordinary meaning of the words in terms of which it is defined.

143. I turn now to Network Rail's objections to the literal construction contended for by GNER which rest on the allegedly absurd consequences of adopting that construction. In essence, it is said that the literal meaning would involve the imposition on Network Rail of an unwarranted administrative burden and that, insofar as Network Changes falling within Case (i)(a) attract the mandatory application of the Part G procedure, Network Rail would be obliged to engage in extensive notification and consultation on changes in

the nature of deterioration, unforeseen and unforeseeable, in a manner which flouts business common sense.

144. I regard these objections as fundamentally misconceived, and indeed as inconsistent with the wider contractual context of the track access contract and network code, the protective purpose of Part G and the factual matrix against which these were made. On this issue, I believe the assessor placed too little weight on the protective purposes of Part G and too much on its compensation regime.

145. There is nothing in Case (i)(a) which suggests that "any change … to … any part of the Network" must, in order to satisfy the substantive component of the definition, have been foreseen or planned by Network Rail. Accordingly, the fact that Network Rail had no knowledge of, or failed to foresee, a deterioration in the condition of the track is no warrant in itself for excluding deterioration from the scope of Case (i)(a). The wider point, however, is that Network Rail *should* have such knowledge. As the holder of a network licence, it is charged with the management of the national rail network. Clause 6 of the track access contract imposes important stewardship obligations on Network Rail. These are supplemented and reinforced at a national level by Condition 7 of the company's network licence which imports a strong positive obligation of stewardship of that national asset. That stewardship cannot be fulfilled in accordance with its purpose, as defined in paragraph 1 of Condition 7, in the absence of knowledge of the condition of the network. In this respect, I would refer to my own enforcement order, issued against Railtrack on 19 March 2001, which identified lack of knowledge of the condition of its infrastructure assets as a stewardship failure and a breach of Condition 7. Accordingly, there is no basis for Network Rail's contention that the literal construction of Case (i)(a) would impose on it an intolerable administrative burden in terms of constant monitoring of the state of the network. A burden of constant vigilance exists, and would exist with or without Case (i)(a). Nor is it an intolerable one. The company's network licence and its contracts, and the provisions of the Railways Act 1993 which establish a regulatory regime to ensure that the holder of a network licence and facility owner in respect of a network does not abuse its monopoly position, all clearly demonstrate that the company is not free to neglect the essential facility of which it is steward. This is because its competent and efficient stewardship of those assets is a matter of considerable significance to its train operator customers and, in turn, their customers, and to the public interest.

146. This point was reinforced in the decision of the Court of Appeal in *Winsor -v- Special Railway Administrators of Railtrack PLC* [2002] EWCA Civ 955, [2002] 4 All ER 435, [2002] 1 WLR 3002, in which Lord Woolf CJ emphasised the supervisory role of the Regulator and his powers, under sections 17-22A of the Railways Act 1993, to override the commercial interests of the facility owner and prospective access beneficiary in determining the fair and efficient allocation of capacity of railway facilities if he considers the public interest, as set out in section 4 of the Railways Act 1993, so requires. Network Rail's contention that it should not be required to adhere to standards or requirements of constant vigilance of the network and its likely effect on the operation of that network and the operation of trains on that network is plainly inconsistent with these superior considerations. Moreover, the purpose and scheme of Part G also militate against Network Rail's point in this respect. Not only can train operators prevent Network Rail carrying out a Network Change in the circumstances specified in Condition G2.1(a), but they can compel Network Rail to carry out a Network Change if they have successfully put the proposal through the requirements of Conditions G3 and G4 and not had it blocked by Network Rail under Condition G4.1. There is no requirement in Conditions G3 and G4 for there to be a separate contract between the train operator and Network Rail, although it is incumbent on the train operator proposing the change to put forward a properly developed proposal under Condition G3.1. As long as that is done and it clears the hurdles of Conditions G3 and G4, Condition G4.4 provides that "... the sponsor of the Network Change shall be entitled to have it implemented by [Network Rail]".

147. As I have said, this regime clearly demonstrates that Network Rail is not free to do with its network as it wishes. It may be the legal owner of its assets, but as the monopoly provider of an essential service the legislative, regulatory and contractual scheme which applies to it plainly show that it is not at liberty to jeopardise those assets by either a deliberate or a negligent omission.

148. The fact that Network Rail's most significant stewardship obligations are contained in its network licence and not in bilateral access agreements is nothing to the point. It is of course true that a breach by Network Rail of a condition of its network licence, including Condition 7, is apt to attract regulatory enforcement action under sections 55 - 57 of the Railways Act 1993. But in no sense does that militate against the construction of Case (i)(a) contended for by GNER. The enforcement of the obligations of rail industry

participants, and accordingly their accountability, may be secured at a number of levels. Those levels are not mutually exclusive. Plainly, the acts or omissions of Network Rail in its management and stewardship of the network may attract regulatory enforcement action *as well as* triggering an entitlement to compensation, whether under one or more of Schedule 4 or 8 of the track access contract or Part G of the network code. The need to hold Network Rail accountable (financially or otherwise) for its acts and omissions in the stewardship of the network forms part of the factual matrix against which the provisions of the track access contract and the network code fall to be construed, and that factual matrix militates strongly, in my judgment, in favour of the construction of Case (i)(a) contended for by GNER. Certainly, it provides no warrant for departing from the plain language in which that provision is cast.

149. For the same reasons, I reject Network Rail's argument that the literal construction of Case (i)(a) would flout business common sense. It is said that it would rarely be practicable even to identify, let alone give advance notice of, changes in the nature of deterioration. In fact, however, given proper and competent stewardship of the network, which implies knowledge of the condition of the network, it is eminently practicable. Still further, it is always possible that, because of financial or operational pressures, Network Rail could plan to allow part of its network to deteriorate, and that *may* be consistent with its obligations under Condition 7 of its network licence. But a planned or deliberate deterioration of the network is every bit as much something in relation to which train operators are given protection by Part G. I would add that the mandatory application of the Part G procedure is engaged only where the change in question also satisfies the materiality component of the Case (i)(a) definition. Accordingly, the change must be one which crosses a threshold of significance. Put simply, it is a fundamental part of Network Rail's job to know where and when deterioration is taking place and, if it passes the relevant tests, the company must invoke Part G. That being so, there is nothing offensive to business common sense, and nothing absurd, about requiring Network Rail to engage in the Part G processes of notification and consultation once such a change is identified. As I have already explained (above, at paragraph 105), the successful operation of the national rail network is crucially dependent upon dialogue between industry participants. A construction of Case (i)(a) which facilitates such dialogue, far from being commercially absurd, is, rather, wholly consistent with the factual matrix informing the construction of the track access contract and the network code to which I have already referred, and with the accountability of Network Rail as an aspect of that matrix. In short, far from

militating against the natural and ordinary construction of Case (i)(a) contended for by GNER, these considerations, in my judgment, positively support that construction.

150. Accordingly, Issue 1 is answered as follows:

A deterioration in the condition of the network is capable of qualifying as a change to any part of the network within the meaning of Case (i)(a).

Issue 2: Whether any of the alleged changes in Network Rail's policies and/or practices for maintaining, renewing, monitoring and inspecting the infrastructure were individually or in combination capable of amounting to changes "to the operation of the Network … or a series of such changes" within the meaning of Case (iii).

151. By paragraph 10 of its written reference to the NVCC dated 11 July 2001, GNER alleged that Network Rail (then Railtrack) implemented a series of changes between 1996 and the Hatfield derailment on 17 October 2000. In summary, the alleged changes involved:

(1) prolonging the life of the track, *i.e.* deferring wholesale renewal and adopting a combination of partial renewal and heavy maintenance instead; this approach has been referred to as "sweating" the assets;

(2) failing to carry out sufficient rail grinding; in particular, GNER allege that whilst the policy of sweating assets called for more timely grinding than previously undertaken, Railtrack failed to ensure that this occurred;

(3) virtually abandoning flange lubrication; and

(4) failing to maintain adequate inspection procedures.

The submissions of the parties

152. It is GNER's case that these changes amounted to changes to the operation of the network which were likely materially to affect the running of trains on the network by

GNER. Accordingly, GNER contended that these changes constituted Network Changes falling within Case (iii).

153. In answer to this, Network Rail argued that, in the context of the network code, the expression "operation", where used in connection with the network (as it is in Case (iii)), falls to be contrasted with and distinguished from the expression "maintenance". On the basis of this distinction, Network Rail said that the changes alleged, if they occurred, were not changes to the operation of the network but changes to its maintenance. That being so, Network Rail contended that, even if the alleged changes were implemented, they did not and could not amount to Network Changes.

154. In support of the distinction it relies on between "operation" and "maintenance" of the network, Network Rail founded on a number of provisions in the track access contract and network code (*Network Rail Amended Statement of Claim on Appeal to the Regulator*, paragraph 32). In what follows, the emphases are Network Rail's. It is said that, whereas the definitions of Network Change in both Case (i)(a) and Case (iii) contain the expression "operation of the Network", neither refers to the "maintenance of the Network". By contrast, Condition G4.1(a)(iii) of the network code - which describes a situation in which the implementation of a Network Change proposed by a Train Operator "would result in a material adverse effect on the *maintenance or operation* of the Network or the operation of any train on the Network which in any such case cannot adequately be compensated under this Condition G4" - is said to treat the "maintenance" and "operation" of the network as distinct concepts. Likewise, the definition of "Vehicle Change" in Part F of the network code refers to "any change to the Specified Equipment … which, in any case, is likely materially to affect the *maintenance or operation* of the Network or operation of trains on the Network", while in Condition F3.1(a)(iii) reference is made to the implementation of a Vehicle Change which "would result in a material adverse effect on the *maintenance or operation* of the Network or operation of trains on the Network, which in any such case cannot adequately be compensated under this Condition F3." Clause 6.3.1 of the track access contract provides that "[Network Rail] shall ensure that adequate and suitably qualified personnel are engaged in the *operation and maintenance* of that part of the Network comprising the Routes." Clause 6.3.2 provides that "[Network Rail] shall ensure that the Network is *maintained and operated* to a standard which shall permit the provision of the

Services using the Specified Equipment in accordance with the Working Timetable and the making of Ancillary Movements."

155. Accordingly, in Network Rail's submission, the expression "operation of the Network" as it appears in Case (iii) was not intended to be equated with, and should not be construed so as to include, the "maintenance of the Network". Had that been the intention, then the separate terms "operation" and "maintenance" would have been used in Case (iii) as they were used in the provisions already cited. Were it otherwise, the distinct references to "maintenance" and "maintained" in those provisions would be tautologous. Reference was made to *SA Maritime et Commerciale of Geneva* v *Anglo-Iranian Oil Co Ltd* [1954] 1 WLR 492 at 495 as authority for the proposition that the words employed in a commercial contract must, so far as possible, be regarded and construed as adding something to the text rather than as mere surplusage. Network Rail added that the contractual distinction said to be drawn between "operation" and "maintenance" is unsurprising for, as a matter of ordinary language, the "operation of the Network" (*i.e.* the working of the network as a whole) is not the same as its "maintenance" (*i.e.* putting it or keeping it in a proper condition for use as a network).

156. In answer to this, GNER referred to its First Notice to the NVCC, paragraphs 10 and 11 of its Reference to the NVCC and the section entitled "Pre-Hatfield G(iii)" of its written *Summary of GNER's Position*, and held to the arguments set out therein (*GNER Amended Defence and Counterclaim on Appeal to the Regulator*, paragraph 58). In essence, GNER asserted that the deliberate decisions said to have been taken by Railtrack to sweat assets, virtually abandon flange lubrication and reduce rail grinding were decisions taken in order to reduce the expenditure that Railtrack incurred in operating the network. The claimed distinction between "operation" and "maintenance" was dismissed by GNER as a distinction without a difference. Railtrack's function was (and Network Rail's is) to operate the network. Issues of maintenance, inspection and renewal were and are inextricably linked to the operation of the network, and reference was made in this regard to paragraph 1 of Condition 7 of Network Rail's network licence, Clause 6.3 of the track access contract and the definition of the Rules of the Route in the network code (*Summary of GNER's Position*, paragraph 9). In GNER's submission, if the intention had been to exclude so significant an aspect of what Railtrack did in operating the network as its maintenance from the definition of "operation of the Network" in Case (iii), then clear and explicit words to that effect would have been used.

157. GNER further contended that, in the absence of a specific definition in the network code of the term "operation", it is necessary to have regard to Condition A1.1(c). This provides that statutory definitions found in the Railways Act 1993 are to govern the meaning of expressions used in the network code unless a contrary intention is shown. In that regard, GNER relied on the definition of the expression "operator" (there being no statutory definition on the expression "operation") in section 6(2) of the 1993 Act, as follows:

> "Operator", in relation to any railway asset [which is defined to include "any network"], means the person having the management of that railway asset for the time being.

158. On this basis, GNER argued that the expression "operation", when used in connection with the network, must be read and given effect in the wide sense of relating to the management of the network, unless (as Network Rail contended) a contrary intention can be shown.

The assessor's recommendation

159. On this issue, the assessor preferred the submissions of GNER. In his view, the network code did not draw the clear distinction contended for by Network Rail between "operation" and "maintenance" of the network. Consequently, "the better view is that the [network code] cannot be said to indicate an intention to use the expression 'operation' in a sense which is different from the wide sense suggested by the statutory definition. The expression is used in the wide sense of management of the network." (*Assessor's Report on Preliminary Issues*, paragraph 42). Accordingly, in the assessor's opinion, the alleged changes of policy and practice would, if proven and if material, constitute network changes within the meaning of Case (iii).

The Regulator's conclusions on Issue 2

160. I agree with the assessor that the submissions of GNER on this issue are to be preferred. My reasons for doing so are as follows.

161. I quite accept that, as Network Rail submitted, in construing a contract all parts of it should as a general rule be given effect where possible and no part of it should be treated as inoperative or as mere surplusage. Nevertheless, like all canons of construction, this

principle establishes a presumption only, and the presumption against surplusage has often been said be of limited value in the construction of commercial contracts (*Chandris* v *Isbrandtsen-Moller Inc* [1951] 1 KB 385 at 392; *Total Transport Corporation* v *Arcadia Petroleum Ltd* [1998] 1 Lloyd's Rep 351 at 351; *Chitty on Contracts* (28th edition), Vol. 1, paragraph 12-075). In the present circumstances, even in the absence of the further considerations I refer to below, I would incline to the view that the variable use made of such expressions as "operation of the Network", "operation and maintenance of the Network" and "operation or maintenance of the Network" is indicative not of an intention to differentiate between operation and maintenance but of (at best) amplification for the avoidance of doubt (where both terms are used) or (at worst) inattention to the terminology employed elsewhere in the track access contract or network code. Similarly, the maxim *expressio unius est exclusio alterius* would suggest at first blush that, the terms "operation" and "maintenance" having been used in tandem in certain parts of the documents, the use of the term "operation" alone in Case (iii) is indicative of an intention to exclude "maintenance" in that case. Again, however, the maxim is only a guide, and falls to be weighed against considerations militating to the contrary. The principle carries "little, if any, weight where it is possible to account for the *expressio unius* on grounds other than an intention to effect the *exclusio alterius*" (*Dean* v *Wiesengrund* [1955] 2 QB 120 at 130 - 131, *per* Jenkins LJ). So, for example, failure to complete the *expressio* may be the consequence of inadvertence or oversight (*Colquhoun* v *Brooks* (1888) 21 QBD 52; *Chitty*, Vol. 1, paragraph 12-089). Moreover, rigid application of the maxim may produce a result inconsistent with the purpose of the instrument and the factual matrix against which it was made. For both of these reasons, I take the view that the *expressio unius* principle too is displaced in the present circumstances. I might add that it is within my own knowledge that in 1993 and 1994 the standard track access contract to be used by train operators and the network code were drafted and developed at separate times during that period and by different draftsmen. Perfect consistency was certainly not achieved in the establishment of these and many other parts of the contractual and regulatory matrix for the railway industry. This knowledge supports the conclusions I have reached on this point.

162. That notwithstanding, I accept, as did the assessor, that, had the words used in the network code disclosed a clear demarcation between those matters comprehended by the term "operation" and those comprehended by the term "maintenance", there would have been a compelling case for holding that the omission of any express reference to

"maintenance" in Case (iii) evinces the contrary intention necessary to displace the definition of "operation" derived from the statutory definition of "operator" in section 6(2) of the Railways Act 1993. But no such demarcation is disclosed. On the contrary, there is a marked want of clarity. It is, for example, quite unclear from the express terms of the network code whether renewals or repairs fall within the scope of maintenance or of operation, although they certainly fall within at least one of them and are essential elements of Network Rail's stewardship obligations. Accordingly, I am not persuaded that the wording of the network code indicates an intention to use the expression "operation" in a sense other than the wide sense of management of the network, including maintenance, suggested by the statutory definition.

163. The lack of certainty with respect to whether particular aspects of Network Rail's management of the network constitute "operation" or "maintenance" (assuming, for the purposes of the present discussion, that the distinction is material) provides a further reason for rejecting the narrow construction of "operation" contended for by Network Rail. If that construction were correct, there would be little to prevent the instrumental application of the operation/maintenance distinction by Network Rail for the purposes of limiting the scope of Case (iii). By this I mean that the availability of protection for train operators which Part G affords (including but not limited to the right to compensation) could be avoided by classification of the change in question as a maintenance matter rather than an operational matter. In my judgment, this consideration provides compelling support for the wider construction contended for by GNER. The right of a party to be protected in respect of a Network Change cannot depend upon the classification of a change by the entity against whose acts or omissions protection is required and provided for. To hold otherwise would be to open the way to endless disputes over whether Network Rail was entitled to classify a given change as a maintenance matter rather than an operational matter. That would not be a reasonable result, and as a matter of general principle "the fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it, the more necessary it is that they shall make that intention abundantly clear" (*Schuler (L) AG* v *Wickman Machine Tool Sales Ltd* [1974] AC 235 at 251, *per* Lord Reid; see also *The Antaios* [1985] AC 191, *per* Lord Diplock; *Lewison on the Interpretation of Contracts* (2nd edition), paragraph 6-13).

164. From this it follows that the alleged changes of policy and/or practice, if they occurred and provided they satisfied the requirement of materiality, constituted Network Changes within the meaning of Case (iii).

165. Accordingly, Issue 2 is answered as follows:

The alleged changes in Railtrack's policies and/or practices for maintaining, renewing, monitoring and inspecting the infrastructure were both individually and in combination capable of amounting to "changes to the operation of the Network … or a series of such changes" within the meaning of Case (iii).

Issue 3: Whether the issue and/or implementation of the PWSIs were capable of amounting to a "change … to … any part of the Network" within the meaning of Case (i)(a).

166. GNER alleges that, following the Hatfield derailment on 17 October 2000, Railtrack issued 4 PWSIs (dated respectively 7 November 2000, 17 November 2000, 28 November 2000 and 28 April 2001). PWSI No. 4 superseded Nos. 1 to 3. The PWSIs were concerned with various types of fatigue cracking starting at the running surface of the rail, including the form of cracking known as "gauge corner cracking" or "rolling contact fatigue". The term "head checking" was used to describe such types of cracking collectively. The PWSIs required rail inspection and testing and stipulated certain minimum actions to be taken in respect of such cracking or fatigue where detected. According to the degree of severity of the deterioration, the stipulated actions included rail grinding, rail renewal and the imposition of speed restrictions. For the purposes only of this appeal and any further proceedings relating to the dispute between GNER and Network Rail, Network Rail accepts that such PWSIs were issued and implemented.

Submissions of the parties

167. GNER submitted that the implementation of the PWSIs, at least, had a direct impact on the physical condition of the track, insofar as the PWSIs contained instructions relating to rail grinding, replacement and renewal. Insofar as Case (i)(a) relates to "any change … to … any part of the Network", GNER relied on its arguments in connection with

Issue 1 to the effect that such changes include changes to the condition of the track as part of the network. Since the purpose and intended effect of the PWSIs was to cause physical changes to be made to the track, it follows, in GNER's submission, that the implementation of the PWSIs constituted a Network Change within the meaning of Case (i)(a) (*GNER Amended Defence and Counterclaim*, paragraphs 56 - 57).

168. Network Rail bluntly described GNER's contentions as "hopeless" (*Network Rail Skeleton Argument*, paragraph 52): "The PWSIs are in themselves no more than pieces of paper, albeit containing written instructions to those to whom they are directed. Accordingly, the mere fact that they have been issued does not constitute either a 'change … to … any part of the Network' or a 'change … to the operation of the Network' within Cases (i)(a) and (iii) respectively." As to GNER's argument that the implementation of the PWSIs involved a Network Change within the meaning of Case (i)(a), Network Rail founded on the position it adopted in relation to the true construction of Case (i)(a) in the context of Issue 1, namely that changes to the condition of the track do not constitute changes to the physical layout or configuration of the network understood as a system.

The assessor's recommendation

169. For the same reasons that he gave for preferring Network Rail's submissions in relation to Issue 1, the assessor recommended that Issue 3 should be answered in the negative: "[the] implementation of the PWSIs cannot be regarded as giving rise to changes to the Network within Case (i)(a) because they involved no change to the system."

The Regulator's conclusions on Issue 3

170. I was unable to endorse the assessor's reasoning and recommendation in relation to Issue 1, and, for the same reasons, I am unable to do so here. I accept – as I think, implicitly, GNER accepted – that the mere *issue* of PWSIs cannot of itself constitute a Network Change within the meaning of Case (i)(a), even on the construction contended for by GNER and accepted by me in my consideration of Issue 1. The *implementation* of the PWSIs, however, is a different matter. Where, as here, PWSIs provide for intensive inspection and testing of the track, and for corrective action including renewal and replacement where defects are detected, there is in my judgment (and subject to

satisfaction of the materiality component) a "change … to … any part of the Network" within the meaning of Case (i)(a) upon execution of those instructions.

171. I have already held, in connection with Issue 1, that "any change … to … any part of the Network" comprehends changes in the state or condition of the track, whether by way of deterioration or (as Case (i)(a) explicitly envisages) improvement. For the reasons I gave at paragraphs 128-149 of this judgment, the narrow construction of Case (i)(a) contended for by Network Rail must be rejected.

172. Accordingly, Issue 3 is answered as follows:

The implementation of the PWSIs was capable of amounting to a "change … to … any part of the Network" within the meaning of Case (i)(a).

Issue 4: Whether the issue and/or implementation of the PWSIs were capable (without more) of amounting to a "change (not being a change within paragraph (i) … above) to the operation of the Network, or a series of such changes which has lasted for more than six months" within the meaning of Case (iii).

The submissions of the parties

173. GNER contended that the PWSIs were operational instructions which were likely materially to affect the operation of trains and that such instructions should accordingly be regarded as changes to the operation of the network amounting to Network Changes within the meaning of Case (iii).

174. In this connection, Network Rail drew a distinction between the PWSIs and the consequences flowing from them. Network Rail's position was that, if and to the extent that the implementation of the PWSIs actually led to changes to the operation of the network (for example, through the imposition of temporary speed restrictions), such changes or series of changes would, provided that they lasted for more than six months, be capable of amounting to Network Changes within the meaning of Case (iii). Network Rail did not, however, accept that the mere issue of the PWSIs or even the mere implementation of the PWSIs would be enough to amount to Network Change without more.

175. In support of this argument, Network Rail relied once again on the contention that the expression "operation" as it appears in Case (iii) is used in a narrow sense, so as to exclude "maintenance". Thus, for example, if the implementation of a PWSI led to re-railing but no more, that would, in Network Rail's submission, involve only maintenance and not a "change to the *operation* of the Network".

The assessor's recommendation

176. The assessor rejected Network Rail's arguments on this issue, and recommended, for the same reasons as he had given in answering Issue 2, that *both* the issue and the implementation of the PWSIs should be treated as changes to the operation of the network capable of amounting to Network Change within the meaning of Case (iii).

The Regulator's conclusions on Issue 4

177. On this issue, I am in full agreement with the assessor. For the reasons given in connection with Issue 2 above, at paragraphs 160-164 of this judgment, Network Rail's narrow construction of the expression "operation" as it appears in Case (iii) must be rejected. The preferable view is that the PWSIs were indeed, as GNER contended, operational instructions constituting changes to the operation of the network. I would also endorse the assessor's recommendation inasmuch as he holds that both the issue and the implementation of PWSIs are capable of amounting to Case (iii) Network Changes. A Case (i)(a) change requires a change to the network itself (or any part of it). The mere issue of an instruction, as distinct from the implementation of that instruction, cannot have that effect. However, a Case (iii) change requires not a change to the network as such, but a change to the *operation* of the network. Such a change may begin with, and indeed consist in, the issue of PWSIs, although it is plainly unlikely that an unimplemented instruction will meet the test of materiality necessary for a "Network Change".

178. Accordingly, Issue 4 is answered as follows:

Both the issue and the implementation of the PWSIs were changes to the operation of the Network, capable of amounting to Network Change within the meaning of Case (iii).

Issue 5: Whether Railtrack's programme of track and other infrastructure renewal after the derailment was capable of amounting to a "change … to … any part of the Network" within the meaning of Case (i)(a).

179. GNER contended that, immediately after the Hatfield derailment, Railtrack undertook an exceptional amount of emergency re-railing, which was subsequently embodied in the National Recovery Programme under which Railtrack re-railed over 400 miles of track and replaced 710 sets of points. For the purposes of this appeal and of any further proceedings before the NVCC and the Regulator in relation to the current dispute, Network Rail accepts that Railtrack did embark upon a programme of track and other infrastructure renewal after the derailment.

The submissions of the parties

180. Founding on the arguments made in connection with Issues 1 and 3, GNER contended that changes in the condition of the track fall within the definition of Case (i)(a) (*i.e.* "any change … to … any part of the Network"). The post-Hatfield renewal programme undertaken by Railtrack gave rise to changes to the physical fabric of the track as part of the network, and accordingly, in GNER's submission, gave rise to Network Changes within the meaning of Case (i)(a).

181. Network Rail noted that GNER's case on Issue 5 depends upon the construction of Case (i)(a) as covering a change in the condition of the track, a construction which, as rehearsed in connection with Issues 1 and 3, Network Rail refuted. Here, as before, Network Rail insisted that a difference in the condition of the network resulting from Railtrack's programme of track and other infrastructure renewal after Hatfield could not amount to a "change … to … any part of the Network" within the meaning of Case (i)(a) since it was not a change to the physical configuration of the network conceived as a composite system. In the alternative, Network Rail submitted that track or other infrastructure renewal does not change, but restores, the network (*Network Rail Skeleton Argument*, paragraph 66).

The assessor's recommendation

182. For the same reasons he gave in relation to Issues 1 and 3, the assessor preferred Network Rail's submissions on Issue 5 and accordingly recommended that the implementation of the renewal programme should not be regarded as giving rise to changes to the network within the meaning of Case (i)(a) because it involved no change to the system.

The Regulator's conclusions on Issue 5

183. For the reasons given at paragraphs 128-149 of this judgment, the narrow construction of Case (i)(a) contended for by Network Rail and adopted by the assessor cannot be sustained. I would add that I find it frankly counter-intuitive to suggest that a programme of physical renewal of the track on the scale of that undertaken after Hatfield does not involve or constitute a "change … to … any part of the Network."

184. Accordingly, Issue 5 is answered as follows:

Railtrack's programme of track and other infrastructure renewal after the derailment was capable of amounting to a "change … to … any part of the Network" within the meaning of Case (i)(a).

Issue 6: Whether compensation in respect of a Network Change within Case (iii) is only payable in respect of the period after the change to the operation of the Network has lasted for more than six months.

185. To recapitulate, the network code defines Network Change within Case (iii) as follows:

"Any change (not being a change within paragraph (i) or (ii) above) to the operation of the Network (including a temporary speed restriction) or series of such changes which has lasted for more than six months (or such other period as may be specified in that operator's Access Agreement) and which is likely materially to affect the operation of trains by that operator on the Network."

186. As regards the reference to a six-month period, there is, in the case of GNER's track access contract, no provision for any other period.

187. Accordingly, there are three requirements for Network Change within Case (iii). The first is a change to the operation of the network which does not qualify as a Network Change under paragraphs (i) or (ii). The second is that the change must be one which has lasted for more than six months. The third is that the change must be one which is likely materially to affect the operation of trains by a train operator (in this case GNER) on the network.

188. Issue 6 concerns the date from which compensation is payable. The question is whether it is payable from the date on which the change to the operation of the network first begins, or whether it is payable only from the expiry of the six-month period commencing with the beginning of the change.

189. The NVCC, in resolving this question at first instance, referred to its determination NV1. That decision, dated 24 May 1996, concerned the temporary closure of Greenford Loop following an earth slip. The closure lasted seven months. The questions before the NVCC were whether, given the duration of the closure, the train operator fell to be compensated under Part G of the network code, and, if so, which of the possible interpretations of Part G should determine the commencement date for compensation payable to the operator. The NVCC held that the operator was entitled to Part G compensation in respect of the closure with effect from six months after the onset of the change (the disruption only constituting a Network Change from that date) and that, for the intervening six months, the operator's only entitlement to compensation should be that provided for by its performance regime. In this appeal, GNER contended that the approach of the NVCC was flawed on a number of grounds and that compensation in respect of a Case (iii) Network Change fell to be paid in respect of all losses accruing during the currency of that change (*GNER Skeleton Argument*, paragraph 74). Network Rail contended that NV1, and accordingly NV33, were correctly decided and should be followed in disposing of the present appeal.

190. I cannot find in GNER's favour on this issue without holding that determination NV 1 was wrongly decided. I have come to the conclusion that I must do so. I set out my principal reasons for this conclusion below, in my consideration of the parties' submissions and the assessor's recommendation. It may however be helpful if I deal at this stage with what I consider to be the flaws in determination NV1.

191. It will be recalled that, in its submissions on the supplementary questions, Network Rail developed an argument made in connection with Issue 1 of the preliminary issues premised on the relationship between the Case (i)(a) and Case (iii) definitions of the network code (see above, paragraph 88). Network Rail suggested that the Regulator's statement of reasons for the 1995 modifications to the network code, by which the Case (iii) definition was introduced, indicated an intention that Case (iii) Network Changes should encompass only temporary changes to the network (with the corollary that Case (i)(a) should be confined to permanent changes, thus excluding - on Network Rail's analysis - changes in the nature of deterioration). I have already quoted the Regulator's reasons for the adoption of Case (iii) but, for ease of reference, I repeat them here. Under the heading, "material temporary changes to the network which last more than six months", the Regulator said:

> "[Under new Condition G1.8, Network Rail] can initiate Part G procedures in respect of any temporary change which has a material effect on the network and which lasts for more than six months (see the definition of Network Change). Train operators can require [Network Rail] to do this. The purpose is to prevent the Part G procedures from being circumvented by the introduction of temporary restrictions which in practice last over a long period."

192. In his Second Report, the assessor rejected Network Rail's arguments on this point. His view was that, "firstly, looking at the terms in which Case (iii) is defined, it is not, on the face of the words used, confined to changes of a temporary nature. The reasons given for the 1995 modifications may suggest this but the words used in Case (iii) do not. Secondly, even if Case (iii) were confined to changes which are temporary in nature, it does not necessarily follow that Case (i)(a) excludes temporary changes. Indeed the terms of the definition expressly recognise the potential for overlap between Case (i)(a) and Case (iii) … ."

193. I am in full agreement with this conclusion. It is to be noted, however, that it is not merely the Regulator's own statement of reasons for the 1995 modifications which may lend credence to the view that Case (i)(a) concerns permanent changes to the network and Case (iii) merely temporary changes. The same distinction appears in determination NV1. At paragraph 4 of its determination, the NVCC said this:

"The Committee considered that the main purpose of Access Condition G, related to sub-paragraph (i) of Network Change [*i.e.* Case (i)(a) Network Change], namely a mechanism for ensuring that where a permanent Network Change was proposed to the Network, affected access parties had the opportunity for any adverse impact upon their operations to be assessed and the related costs/compensation factored into the project plan and costs."

194. At paragraph 5:

"The Committee considered that the force of Condition G1.8, in association with sub-paragraph (iii) of the definition of Network Change, is that it provides a protection to train operators against the possible introduction, under a temporary banner, of any Network Change that subsequently becomes permanent, by default, without there having been an opportunity for the affected train operators to have had their interests considered by the application of G1.1 and G2."

195. At paragraph 8:

"The Committee considered that the protections for train operators in paragraphs G1.8 and 1.9 were intended to protect train operators against uncompensated permanent Network Change. The Committee considered that: (1) temporary, even protracted, disruptions should be compensated by Performance Regimes, irrespective of whether they ultimately fall under sub-paragraph (iii) of the definition of Network Change; … ."

196. Even so, at paragraph 9.2:

"[The Committee further considered that] a train operator was not precluded from obtaining compensation under Access Condition G merely because they were also beneficiaries of a Performance Regime."

197. It is difficult (to put it mildly) to discern the basis for the NVCC's view that the coverage of Case (i)(a) and Case (iii) Network Changes is related to a distinction between, respectively, permanent and temporary changes. The determination makes no reference to the Regulator's statement of reasons for the 1995 modifications. Indeed it gives no reasons at all for its conclusions. The determination is in effect a bald statement of its findings, without more. Yet it is an elementary principle of law that a body exercising judicial or quasi-judicial functions has a duty to give adequate and intelligible reasons for its decisions. When this duty is discharged, the parties to a dispute are able to see why

it was that they won or lost, and to identify whether they may have grounds for appeal against or review of the decision. It conduces, accordingly, to the careful and considered exercise of the decision making function. In the absence of reasons, it is difficult for the parties or anybody else to have confidence in the integrity and thoroughness of the decision making process.

198. These observations do not of themselves entitle me to hold that determination NV1 was wrongly decided. I do so hold, however, for two reasons. First, as the assessor concisely put it in his Second Report, whatever the Regulator's statement of reasons for the 1995 modifications may suggest, the wording of neither Case (i)(a) nor Case (iii) lends itself to the view that the one is there to deal with permanent changes to the network, the other with temporary changes. As Sir Thomas Bingham MR put it in *Arbuthnott* v *Fagan* (Court of Appeal, 20 July 1993, unreported):

> "To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is, in my view, pedantic, sterile and productive of error."

199. However, as his Lordship continued:

> "That is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he meant."

200. Thus is it not merely that, as determination NV1 implicitly acknowledges, there is no hard and fast line between permanent and temporary changes which might make this distinction a workable guide to the scope of Cases (i)(a) and (iii). It is that the wording of those definitions provides no warrant for drawing such a distinction in the first place - indeed, as the assessor noted, overlap between the two categories is explicitly countenanced - and there is nothing absurd, repugnant or otherwise contrary to business common sense that might require us to rewrite the language in which the definitions are cast.

201. My second reason for holding that determination NV1 was wrongly decided relates to the further distinction drawn by the NVCC between Network Changes made in accordance with Condition G1.8 (*i.e.* Case (iii) changes in respect of which Network Rail is not immediately obliged to invoke the Part G procedures) and those made in

accordance with Condition G1.9 (*i.e.* Case (i)(a) changes made for safety reasons, in respect of which Network Rail is not obliged to implement Part G procedures unless and until the change has lasted for more than three months). At paragraph 7 of its determination, the NVCC held as follows:

> "The Committee considered that the force of the phrase 'as if the relevant Network Change were a Network Change proposed by Railtrack' in paragraphs G1.8 and 1.9 implied that affected parties were entitled to have account taken of all costs and benefits that had accrued since the effective date of the Change, that is those items they would have been entitled to had the Change only been implemented following the due processes of Access Condition G1.1. This consideration has to be understood in the context of the Committee's other views in relation to G2.2 and G2.3. The Committee considered that: (1) in relation to G1.9 this implied that the effective date of the Network Change for compensation purposes is the date on which Railtrack first takes action which affects the use made of the network by the train operator; and (2) in relation to G1.8 this implied that the effective date for compensation purposes is that from which the Network Change automatically becomes subject to Access Condition G in accordance with sub-paragraph (iii) of the definition of Network Change, namely 'more than six months'."

202. The parties' submissions on Issue 6 touched on the question whether determination NV1 was distinguishable from NV33 and accordingly from the present appeal. GNER contended that it was distinguishable, insofar as it held only that where a Network Change was effected in accordance with Condition G1.8 losses sustained as a result of it were compensatable only from the expiry of the six-month period following the onset of the change. Network Rail contended that the two cases were on all fours and that, furthermore, NV1 had been correctly decided. It is apparent, however, from the terms of paragraph 7 of NV1 that the NVCC did consider that the "effective date for compensation purposes" - *i.e.* the date from which compensation for a Case (iii) change fell to be paid, if it was payable - might differ, at least as between changes under Condition G1.8 and changes under Condition G1.9. Why this should be so is unclear from the NVCC's determination. The NVCC refers to compensation being payable only for "costs and benefits that had accrued since the effective date of the change, that is those items they would have been entitled to had the change only been implemented following the due process of Access Condition G1.1." I gather from this that the NVCC takes compensation to be a matter to be negotiated between the parties in the context of Part G consultation following on from the notification of a proposed change (which notification may, by virtue of Conditions G1.8 and G1.9 be postponed, so that in those

circumstances an issue of backdating compensation may arise). I do not take issue with that so far as it goes, although I fail to see why compensation should be backdated in one situation but not the other. In any event, the NVCC fails to address the situation where a Case (iii) change is implemented following consultation in accordance with the normal Part G procedures or where changes are made without invoking the normal procedures at all. In that regard there are, as it seems to me, only two possibilities: either the compensation entitlement relates to the entire period of the change from the date of its inception, albeit that the right to claim only crystallises if the change persists for more than six months (GNER's position); or the entitlement not merely crystallises on, but only relates to losses accruing after, the expiry of the six-month period (Network Rail's position). Which of these possibilities is to apply depends on the proper construction of Case (iii) within the wider scheme of Part G and indeed of the network code and track access contract as a whole. That in turn introduces what I consider to be the most vexed question in this appeal.

The submissions of the parties

203. First, GNER founded on the purpose of Part G of the network code as being to protect, by the payment of compensation, a party who is not responsible for a Network Change but who is adversely affected by it. There is no logical reason, in GNER's submission, for construing Case (iii) as entitling the victim of a Network Change to compensation only for such losses as accrue after the expiry of the six-month period. The expiry of that period is a condition of entitlement to claim compensation, but that entitlement, once crystallised, is for the full amount of the losses sustained by the operator during the currency of the relevant Case (iii) change.

204. Network Rail responded to this by asserting that there is a right to compensation from the beginning of the Case (iii) Network Change, but that "the beginning of the Network Change (as opposed to the change to the operation of the network) is … from the expiry of the six-month period" (*Network Rail Skeleton Argument*, paragraph 70). Accordingly, the assessment of compensation in respect of that Network Change is properly calculated from that point and no sooner.

205. GNER's second line of attack on the NVCC's determination was as follows. It was said that the construction contended for by Network Rail would produce absurd results, and

that it is wholly implausible that the parties ever intended such results. By way of example, GNER offered a scenario in which Network Rail imposed PWSIs or temporary speed restrictions on extensive sections of the network, resulting in massive disruption to the Train Operator's services, but revoked those PWSIs or speed restrictions just before the expiry of the six-month period, so avoiding any obligation to pay compensation to the operator. In GNER's submission, "the denial of compensation in such circumstances cannot have been intended."

206. Network Rail, however, insisted that there is nothing illogical or absurd about this outcome. It argued, rather, that it is GNER's construction that would result in absurdity, insofar as a change lasting one day short of six months would attract no compensation at all, whereas a change lasting for six months and one day would attract compensation not only for the extra day but for the whole of the six months as well. It is impossible, in Network Rail's submission, to see why the parties should have intended such starkly different entitlements to obtain.

207. Network Rail added that it is not as though, on its construction, it would be entitled (as GNER contended) to avoid *any* obligation to pay compensation. On the contrary, in the case of PWSIs or temporary speed restrictions imposed for less than six months which cause "damage, losses and … out of pocket expenses arising from cancellations, interruptions or delays to trains", GNER would be entitled to compensation under Schedules 4 and/or Schedule 8 to the track access contract. It would not be left empty-handed.

208. Thirdly, GNER contended that it is necessary to distinguish between the purpose of Case (iii) in general and the purpose of the six-month provision in particular. The purpose of Case (iii) in general is said to be to provide for compensation in accordance with Part G where there is a "change … to the operation of the Network" the effect of which is "likely materially to affect the operation of trains by that operator on the Network." The purpose of the six-month provision (it is said) is to prevent short-term changes from constituting Network Changes. However, where a change to the operation of the network persists beyond the six-month threshold, there is, in GNER's submission, no good reason to limit the compensation payable in respect of the change; rather, compensation should be paid for the full amount of the losses thereby occasioned.

209. Network Rail described this argument as flawed (*Network Rail Skeleton Argument*, paragraph 72), contending that the purpose of Case (iii), whether one describes it as "general" or "particular", cannot be understood without reference to the six-month provision. "That provision is an essential part of the definition. It is wrong therefore to formulate the general purpose of Case (iii) simply in terms of a change to the operation of the network the effect of which is likely materially to affect the operation of trains run on the Network." Given the availability of compensation in terms of Schedules 4 and 8 to the track access contract in respect of shorter-term disruptions to operators' services, Network Rail submitted that the true purpose of Case (iii) is to provide an enhanced regime of compensation under Part G, including compensation for loss of revenue, in respect of disruptions lasting beyond six months, so that Network Rail is incentivised to restore the operation of the network to normal as soon as possible.

210. GNER went on to argue that, on the NVCC's approach, it is open to Network Rail unfairly to manipulate the system in such a way as to cause a lengthy postponement of the date on which a train operator becomes entitled to compensation at the enhanced rate available under Part G. It gave an illustration involving a combination of overlapping changes imposed at different times, some of which would not qualify as Network Changes under Case (iii) because the six-month requirement would not be fulfilled.

211. Network Rail answered this by drawing attention to the reference, within the definition of Case (iii), to a *series* of changes. Network Rail's argument was that any combination of changes such as GNER postulated might or might not constitute a series. Whether or not there was a series would depend on the nature of the changes and the relationship, if any, between them. If such changes did constitute a series, then the six-month period would run from the beginning of the series and there would be no room for manipulation. On the other hand, if the changes involved in the combination did not constitute a series, naturally it would follow that no Network Change could arise until one or other change had persisted for longer than six months. Given that such changes would necessarily be more or less unrelated, it is difficult, in Network Rail's submission, to see why such postponement would be wrong or unfair.

212. As rehearsed above, GNER attempted to distinguish determination NV1 from the circumstances of the present case. It is said that NV1 was concerned with the operation of Condition G1.8 of the network code and the postponement under that Condition of

the implementation of the normal Part G procedures. GNER contended that it does not follow from a postponement of the Network Change procedure that there should be any postponement of the entitlement to compensation, and that NVI, if correct (which GNER denies), only applies in situations where there has been a postponement under Condition G1.8. It does not, in GNER's submission, apply where there has been no such postponement, still less where the change in question is one in respect of which no proposal has been made.

213. Network Rail insisted that NV1 is indistinguishable from the present case, arguing that that determination was not concerned solely with the operation of Condition G1.8 and the postponement under that Condition of the normal Part G procedure. Rather, on Network Rail's analysis, the determination which the NVCC had to make in NV1 was whether a change to the operation of the network which had lasted for seven months had given rise to a Case (iii) change and, if it had, from what point compensation under Part G was payable in respect of that Network Change. According to Network Rail, the NVCC determined that a Case (iii) Network Change only crystallises upon the expiry of the six-month period, which is why the entitlement to compensation only arises from that point. Accordingly, Network Rail says that NV1 and NV33 - so far as upholding the earlier decision - were correct and should be followed in disposing of the present appeal.

214. GNER recognised that there is a temporal element to the definition of a Case (iii) Network Change, but maintained that this begs the question of how compensation is to be measured once the status of a change to the operation of the network as a Network Change has been established. In that regard, GNER made the point that Condition G2.2 of the network code, which defines the amount of compensation payable under Part G, appears to indicate that it is the implementation of a change which triggers the need to pay compensation: "the amount of compensation [payable] … shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by the Train Operator as a consequence of the implementation of the proposed change."

215. Network Rail, however, founded on the tenses adopted in the definition of Case (iii). In describing the six-month requirement, the words used are: "… any change … which *has lasted* for more than six months." Network Rail argued that, had it been the intention to

confer the status of a Network Change on a change from the outset, the natural form of words to have used would have been: "… a change … *which lasts* for more than six months." Network Rail argued further that, given the tenses used in Case (iii), the test of materiality of a change only falls to be applied on the expiry of the six-month period: "any change … which *has lasted* for more than six months … and which *is likely* materially to affect … ."

The assessor's recommendation

216. Having stated the parties' arguments, the assessor found that the wording of Case (iii), and in particular the tenses of the verbs used, "tends to conflict with GNER's suggestion that Case (iii) has the effect of conferring upon a change the particular status of Network Change from the outset. Rather, it supports the NVCC's approach, which assumes that such status is conferred, if at all, only after the six month period has expired." Accordingly, the assessor recommended that compensation in respect of a Case (iii) Network Change should be payable only in respect of the period *after* the change in the operation of the network has lasted for more than six months.

The Regulator's conclusions on Issue 6

217. I have not found the resolution of this issue easy. It is to say the very least unfortunate that a provision incorporated by reference into most if not all bilateral access agreements, which may potentially carry profound financial consequences, has been drafted with such a marked want of clarity. That observation does not, however, greatly assist with the disposal of the present issue. I have considered the submissions of the parties, and the reasoning and recommendation of the assessor, with care and find the matter to be, to say the least, finely balanced. I have however reached the conclusion that, on balance, the submissions of GNER are to be preferred. I recognise that, once again, I am departing from the assessor's recommendation. My reasons for doing so are as follows.

218. Each party argued that the construction contended for by the other would produce absurd results. On the one hand, the "backdating" of compensation under GNER's approach could lead to Network Rail being liable for all losses incurred in consequence of the implementation of a Case (iii) Network Change, even if that change persisted for only a day more than the six-month qualifying period. On the other, Network Rail's

approach would leave GNER empty-handed (subject to any recovery available under Schedules 4 and 8 of the track access contract) if Network Rail were to revoke a Case (iii) change one day short of the expiry of that period, whatever the scale of the losses occasioned to GNER by the change to the operation of the network during that time. With respect to both parties, I see neither outcome as intrinsically absurd or, to put it in slightly different terms, as being more absurd or unreasonable than the other. The essence of the problem is that the language of Case (iii) simply gives no clear indication of which outcome was intended.

219. I turn first to the grammatical points raised by the parties, relating to the tenses of the verbs used in Case (iii). Network Rail founded on the use of the past tense in Case (iii) ("has lasted") as indicating that a change to the operation of the network carries no consequences at all in terms of compensation until after the expiry of the six-month period and only then if the materiality condition, going forward, is satisfied. Considered in isolation, this point is not without force. However, it does not stand alone. GNER pointed to the language of Condition G2.2, which, far from being cast in terms of the past tense, refers to such losses as "can reasonably be expected to be incurred … as a consequence of the implementation of the proposed change." It is forward-looking. It also sits uncomfortably with those situations where there is no proposed change (*i.e.* where the Part G procedure has been postponed in the manner provided for, in relation to Case (iii) changes, by Condition G1.8). But that does not alter the fact that Condition G2.2 envisages losses accruing *from the moment of the implementation of the proposed change* as being compensatable in terms of Part G, all other relevant conditions of entitlement being satisfied (my emphasis).

220. As I have already held, the process of arriving at the correct interpretation of a contract in situations such as the present, where the words used by the parties are not sufficiently clear as to admit of no reasonable doubt as to their objective intentions, involves having regard to the whole contract, together with its commercial purpose and the factual matrix against which it was made and falls to be construed. As Lord Watson held in *Chamber Colliery Ltd* v *Twyerould* [1915] 1 Ch. 268:

> "… a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and … the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible."

221. Again in Inland Revenue Commissioners v Raphael [1935] AC 96, Lord Wright said:

> "… the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonise, so far as possible, all the parts."

222. Accordingly, in ascertaining whether the six-month provision serves merely as a condition precedent for the payment of full compensation for losses falling within the meaning of Condition G2.2 occasioned by a change to the operation of the network from the time that that change was implemented (as GNER contended) or whether it serves to establish a right to compensation for losses attributable to that change from the expiry of the period onwards (as Network Rail contended), I must take guidance from the whole agreement between the parties, its purposes and factual matrix, and from such other provisions of that agreement as are able to shed light on the provision presently in issue.

223. In that regard, it is relevant (as GNER pointed out) to note paragraph 2.6(d) of Schedule 4 to the track access contract. This provides that, where a possession is taken for purposes which involve a Network Change, the compensation payable is payable under the Part G Network Change regime and not under the Schedule 4 regime. In GNER's submission, this indicates that the parties themselves have given primacy to Part G and have agreed that loss of revenue should be recoverable wherever there is a Network Change. Accordingly (it is said) the parties must be taken to have intended that the person adversely affected by a Network Change should be *fully* compensated in respect of that change (my emphasis).

224. I find this submission to be consistent with the wider purposes of Part G. At some risk of repeating myself, the primary purpose of Part G of the network code is protective. The protection it confers on train operators consists partly of a right to be compensated for losses incurred as the result of the implementation of a Network Change, including loss of revenue, provided the effect of that change to the operation of the network is sufficiently material. The obligation to compensate the "victim" of a Network Change is an aspect of the wider accountability of Network Rail established by Part G for its management and stewardship of the network. That accountability is secured not only by provision for the payment of compensation but also by the duties of notification and consultation laid on Network Rail where a Network Change is to be made, and the rights of train operators in certain circumstances to block change.

225. The introduction of the Case (iii) definition of Network Change by way of the 1995 modifications of the network code (imperfectly executed though I consider them to have been) was intended to enhance the accountability of Network Rail, as is apparent from the Regulator's published reason for its adoption: "The purpose is to prevent the Part G procedures from being circumvented by the introduction of temporary restrictions which in practice last over a long period."

226. Network Rail made the point that an obligation to pay compensation for losses accruing after the expiry of the six-month period is consistent with the model of strong accountability that I have described in this judgment, insofar as the crystallisation of the obligation to compensate incentivises Network Rail to bring the relevant change to as speedy a conclusion as possible. But an altogether stronger incentive to bring a change to the operation of the network - in the nature of, for example, a temporary speed restriction - to an end before the expiry of the six-month period is provided by a construction of Case (iii) which treats the six-month provision as a condition precedent for the payment of full compensation in the manner envisaged by Condition G2.2.

227. My choice, in short, is between two renderings of Case (iii), neither of which is inherently incompatible with the wider purposes of Part G as a mechanism for securing the accountability of Network Rail but one of which - that contended for by GNER - is, in my judgment, more closely in harmony with those purposes and the contract read as a whole.

228. For these reasons, the construction advanced by GNER is in my judgment to be preferred. The purpose of the six-month provision in Case (iii) is to provide Network Rail with a period of grace during which it is not to be liable under Part G (whatever may be the position under Schedules 4 and 8) for losses flowing from the implementation of a Case (iii) Network Change. It has a powerful incentive to bring that change to an end within six months of its implementation. If it fails to do so, the change matures into a Network Change in terms of Case (iii) and is deemed to have had that status from the outset. Accordingly, the obligation to pay compensation applies in respect of all relevant losses occasioned by the change (assuming materiality) since the time of its implementation.

229. Accordingly, Issue 6 is answered as follows:

Compensation in respect of a Network Change within Case (iii) is payable, where the change to the operation of the Network has lasted for more than six months, for the full period following the implementation of the change.

DETERMINATION OF THE NVCC

230. The determination (NV33) of the NVCC which has been appealed against in this case is unsatisfactory both as to its outcome and its quality. Although it is a separate sub-committee of the Access Dispute Resolution Committee to the one which heard the *Eurostar* case at first instance (*Network Rail Infrastructure Limited -v- Eurostar (UK) Limited* [2003] RR 1), it has displayed the same degree of confusion about its own jurisdiction and absence of legally relevant and coherent reasoning as did the Timetabling Committee in *Eurostar*. I do not here repeat the criticisms I made in *Eurostar*, except to import them here. In a case as complex and involving such large sums as this one, the parties are entitled to full, legally relevant reasons for the decision of the tribunal where legal issues are involved. Instead, NV33 is superficial in the extreme, and, as with *Eurostar*, I regret I have derived no assistance whatsoever from its determination. It has therefore been necessary for me to hear this case as one at first instance; the proceedings before the NVCC could not be described as more than a dry run for the parties' arguments before they were properly considered by the appellate tribunal according to correct legal principles of contractual construction. The same and more criticisms can be made of the other determinations of the NVCC to which I was referred, namely NV1, NV2, NV4 and NV21.

231. It is to be hoped that the industry will take full account of these criticisms.

SUMMARY AND ANSWERS TO SPECIFIC QUESTIONS

232. This appeal has been about the construction of a contract. Although the contractual provisions that have fallen to be interpreted are unusual, inasmuch they may have been effectively imposed on the parties rather than freely agreed between them, and are in any case subject to regulatory supervision and approval, there is no warrant for departing from well-established and well-understood principles of contractual interpretation in seeking to resolve the points of dispute between the parties. The starting point must be

the language of the contract - the words used to express its intended purpose and effects. Even though much of that language did not represent the free choice of the parties when they came to sign the track access contract in April 1995, in so signing it both subscribed to what they understood to be its contents. In certain respects - as in relation to the construction of the Case (i)(a) definition of Network Change - I have found the wording used to be so clear as to admit of no construction other than that which I have accorded to it. That construction is not absurd, offensive to business common sense or otherwise repugnant and so does not require further elucidation by reference to factors drawn from the factual and regulatory matrix surrounding the agreement, although I have in deference to the parties' submissions and the assessor's consideration of the issues had regard to such factors. In my opinion, the factual matrix goes to fortify the conclusions I was able to reach on a construction of the language of the contract alone. In other respects - as in relation to the provisions for compensation for Case (iii) changes - the contractual language is unfortunately not such as to lend itself to resolution in this way. Here it has been necessary to scrutinise closely the provision in question, its place within the overall scheme of the track access contract, the relationship between the track access contract and network code, and the regulatory objectives underpinning the promulgation of the network code and modifications to it.

233. For the reasons I have given, my answers to the specific preliminary issues which formed the substance of this appeal are therefore as follows:

(1) A deterioration in the condition of the network is capable of qualifying as a change to any part of the network within the meaning of Case (i)(a).

(2) The alleged changes in Railtrack's policies and/or practices for maintaining, renewing, monitoring and inspecting the infrastructure were both individually and in combination capable of amounting to "changes to the operation of the Network … or a series of such changes" within the meaning of Case (iii).

(3) The implementation of the PWSIs was capable of amounting to a "change … to … any part of the Network" within the meaning of Case (i)(a).

(4) Both the issue and the implementation of the PWSIs were changes to the operation of the Network, capable of amounting to Network Change within the meaning of Case (iii).

(5) Railtrack's programme of track and other infrastructure renewal after the derailment was capable of amounting to a "change … to … any part of the Network" within the meaning of Case (i)(a).

(6) Compensation in respect of a Network Change within Case (iii) is payable, where the change to the operation of the network has lasted for more than six months, for the full period following the implementation of the change.

234. Accordingly, I overrule determination NV33 of the Network and Vehicle Change Sub-Committee, hold further that determination NV1 of that Committee was wrongly decided, dismiss Network Rail's appeal and allow GNER's cross-appeal.

Thomas P Winsor
RAIL REGULATOR

21 June 2004