

Annex A to Timetabling Panel determination of reference TTP1174

Dispute Parties' Opening Statements at First and Second Hearings

XC opening statement at First Hearing

This dispute is brought in relation to Network Rail's reconsidered decision to reorder 7 CrossCountry services (3 Monday to Friday, 4 Saturdays) to follow 7 Abellio ScotRail services from Uddingston Jn to Glasgow Central. In today's timetable, the CrossCountry services precede the ScotRail services, arriving at Glasgow Central at xx12, and the ScotRail arrival at xx15. This arrangement was the subject of rolled over bids for the December 2017 timetable, with no changes requested by either operator. During the preparation period, Network Rail made the decision to reorder the trains as previously described. This decision was the subject of TTP1122, which found that whilst the decision was within the power of Network Rail to make, the application of the Decision Criteria was not based upon a complete set of data. The Timetable Panel instructed Network Rail to revisit the decision having obtained a more complete set of data.

CrossCountry are not claiming at this hearing that Network Rail failed to comply with these instructions. CrossCountry believe that Network Rail's reconsidered decision has been based upon a flawed application of the Decision Criteria, taking into account inaccurate data, assumptions regarding aspirations made without evidence and inaccurate comparisons made between different issues. Following this flawed application, CrossCountry also believe that some of the weightings that are applied to individual criteria are also incorrect, and reasoning underpinning these weightings is unclear.

CrossCountry believe that there are several instances of these issues throughout both Network Rail's decision document and Sole Reference Document.

Network Rail's performance analysis (outlined in their Sole Reference Document, and presumably used during their application of the decision criteria) has seemingly taken into account instances where CrossCountry's trains have been significantly late. Using average lateness as a measure is understandable, but this data requires cleansing. Network Rail provided no dataset evidence, but analysis undertaken by CrossCountry suggests that Network Rail's analysis includes trains that would have had no impact on the ScotRail service due to significant lateness.

CrossCountry are also disappointed that whilst Network Rail admit there will be a performance impact to the 1Sxx service group, there has been no attempt to quantify this or understand the full impact of this proposed change. As we have noted there is potential for this change to worsen the performance of the back working of the 2Bxx service group.

Potentially inaccurate data has also been used to evaluate the impact to passenger flows. As outlined in CrossCountry's Sole Reference Document, the SX passenger counts supplied by ASR at the hearing of TTP1122 changed significantly prior to the Network Rail's reconsidering of the decision. At this stage CrossCountry are still unaware why these figures have changed.

Commercial data supplied by ASR also failed to answer Network Rail's question in this area. The figures supplied by ASR took into account a significant number of other factors. We have established that the TPR changes have no impact on this decision, as all Access Proposals could have been complied with if desired, and the change in question only affects 7 trains. ASR took the decision to model all flows in this area, on all SX and SO trains, including the impact of TPR changes in other areas. As stated in

CrossCountry's Sole Reference Document, to assume ASR lose money as a result of reduced journey times on the 7 services in question is not credible.

Network Rail say they are not convinced by some of the modelling, but haven't expanded on how this has then affected their decision making.

CrossCountry note that NR rely upon assumed aspirations that have never been openly discussed or expressed within an Access Proposal. CrossCountry note explicit references to platforming arrangements at Glasgow Central for both operators and timings to allow attach/detach moves for ASR at Glasgow Central. At this stage CrossCountry remain unaware as to where and when these aspirations arose for Network Rail's consideration.

With regards to the weightings applied to the criteria, CrossCountry feel that they do not reflect the reality of the situation. CrossCountry observe that Network Rail do not see journey times and commercial impact as significant as efficient use of assets, yet provide no reasoning for this decision. CrossCountry are also unsure as to what Network Rail mean when they describe increased journey time as the "product of the decision" when weighting the relevant criterion as material. Justification of the weightings applied seem in most cases vague, and in some unexplained.

It is important to note that there have also been statements made within evidence and documentation that imply that reversion to the current timetable's running order from Uddington Junction to Glasgow Central will somehow see connections that currently exist broken, and that current opportunities for attaching and detaching will be lost. CrossCountry reiterate that a reversion of this nature will not have this effect, as none of these opportunities exist in today's timetable. The only lost opportunities will come from the current decision being allowed to stand.

Ultimately, CrossCountry believe that the decision is not the balanced result of an accurate understanding of both sides of the decision. There has been no full recognition that it is CrossCountry's passengers alone who suffer as result of the decision, no full understanding of the potentially negative performance impact resulting from the decision, and no acceptance that the commercial impact to CrossCountry and the industry overall is a significant factor in this decision.

CrossCountry are of the opinion that with the timetable in question commencing in less than two months, and the fact that following the hearing of TTP1122 this is an already reconsidered decision, the matter in hand is subject to exceptional circumstances. We request that the Panel finds that the work carried out by Network Rail does not justify the change that has been made, and that Network Rail should reinstate the xx12 arrival time at Glasgow Central of the 7 services in question.

NR opening statement at First Hearing

Background

This dispute has arisen following Network Rail's decision about the running order of seven XC trains and ASR trains between Uddington Junction and Glasgow Central in the Principal 2018 Timetable.

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This subject matter of this dispute was originally heard in TTP1122 on 8 September 2017. The Timetable Panel directed Network Rail to reconsider its decisions in respect of each of the seven XC trains taking into account the information provided at the date of the TTP1122 hearing and any further information provided pursuant to the direction. Network Rail's decision about the running order of the XC and ASR trains has not

changed from that submitted at TTP1122.

Network Rail is aware of the political and economic pressures that Timetable Participants face when delivering a timetable that enables Service Level Commitments to be achieved and the omnipresent and ever-increasing goal of a high performing railway with shortest journey times possible. This aspect has influenced Network Rail's endeavour to make journey times more competitive with other modes of transport, especially as the economic value of transport by rail in Scotland is so important. This is demonstrated by Network Rail considering the opportunity to accelerate the 2Bxx ASR Lanark services through all hours of the day, a service group which conveys high volumes of passengers and with the opportunity to attract more users to the Network by journey times being more competitive with road than they currently are. The opportunity to do something similar with passengers on the Newcastle to Glasgow XC trains did not exist as this journey is still 15-20 minutes slower by rail than road.

Matters of Principle

Network Rail believes that it has correctly considered and applied the Decision Criteria in D4.6. It is clear from the evidence provided that Network Rail is fully aware of the Objective and of the Considerations set out in D4.6, and that it takes its duties to consider these matters seriously. It is Network Rail's obligation to consider the overall interest of all current and prospective users of the network (D4.6.1 – the Objective). It is not Network Rail's job simply to consider whether a particular change to the running order of a train might cause a degree of inconvenience and potentially some loss of income to a particular Timetable Participant. Network Rail's obligation and focus is much wider than that; it must balance a whole series of interests.

Taking that into account, where the application of two or more of the relevant Considerations will lead to a conflicting result, Network Rail must decide which is the most important and apply the appropriate weight to them accordingly. It is worth noting that decisions can also only be based on the information provided, which often is material when weighing the Considerations. Network Rail believes it has weighted the Considerations appropriately in this case. Network Rail has weighted Considerations (c), (e), and (j) as highly important and relevant when informing this decision, and (a), (b), (d), (f), (g), and (i) as material in informing the decision. Considerations (h), (k) and (l) were not believed to be applicable in this decision. XC have responded to Network Rail's weighting and cites that they do not believe it to be correct, but fail to indicate how they think the Considerations should be correctly weighted. XC's argument about Network Rail's weighting of the Considerations is generalised, does not pick out specific examples of perceived incorrect application, and fails to offer an alternative argument.

Furthermore, Network Rail believes that it has acted in accordance with the process set out in D2.6 and D4.2. Network Rail kept timetable participants informed of progress throughout the timetable preparation period, with fortnightly teleconferences, and regular visits organised to their office in Milton Keynes. Network Rail also provides read only access for numerous timetable participants in their own offices (including both XC and ASR).

Network Rail does not believe that exceptional circumstances are present in this particular matter. Exceptional circumstances were not brought before the Panel in TTP1122, and the Panel did not believe any existed. The basic facts of the case have not changed in this submission, and Network Rail has continued to correctly apply the Decision Criteria. The "proximity to the start of the Timetable" does not constitute exceptional circumstances.

As exceptional circumstances do not exist in this case, Network Rail believes the Panel are bound to act in accordance with the powers set out in D5.3.1(a) or (b).

Decision sought from the Panel

- a. That NR has considered and applied the decision criteria in accordance with D4.6.1 and D4.6.2;

- b. That the Panel rejects the claim that the circumstances of this appeal constitute exceptional circumstances;
- c. That the panel uphold the decision of NR to allocate the xx:12 arrival train slot at Glasgow Central to ASR and to allocate the xx:15 arrival train slot to the claimant.

NR opening statement at Second Hearing

For the reasons set out in the communication prior to the hearing that was sent by Matt Allen on 20 October, Network Rail were unable to comply with the verbal determination handed down from the previous hearing for this TTP. Since the original communication sent on 20 October, Network Rail have now done further detailed work which was the information sent last Friday at midday. And, in fact, from doing that piece of work, the position again has changed slightly in that information that was provided on 20 October stated that we wouldn't be able to achieve a TPR-compliant solution without removing a Rolled Over Train Slot from the Timetable. Network Rail have worked with both parties and we've now concluded that in fact, we can accommodate all Train Slots. However, there is a consequential impact and I'll leave it for the Panel to decide how significant that is but there is an impact on nine journey time extensions for ASR, and looking at the detailed work we've done, there's up to 37 consequential re-timings as well.

As all parties I'm sure will appreciate, and indeed the Panel appreciate, this was a complex situation, and indeed, the whole process of developing a timetable is a complex situation, and we did work with all parties to review the changes that were necessary in order to reach TPR-compliant solutions. So, in terms of what we are looking for from this hearing, Network Rail are looking for clarity on how we should deal with what we feel is probably an unprecedented situation when exceptional circumstances haven't been declared and also we're very mindful that we're close now to the commencement of the December 2017 Timetable, and we want to work in a way that limits the impact on the passengers ultimately.

XC opening statement at Second Hearing

It's fair to say that XC's position hasn't really changed since the previous hearing and the content of our opening statement from that hearing stands. We do note that Network Rail's position has moved on since the original communication and there is now a TPR-compliant solution identified that doesn't remove any train slots from the timetable.

I think that our only final point is that, having looked at some of the journey time extensions, those are journey time extensions that exist against the currently offered December 17 Timetable, some of them will be reverted back to the current May 2017 Timetable and therefore wouldn't be journey time extensions against today's timetable that passengers are using. That's some, but not all, based on our initial work at least.

ASR opening statement at Second Hearing

TTP1174 was heard on 11 October and in effect, reopened TTP1122, and reached a decision which Network Rail were verbally instructed to implement. ASR is awaiting its determination and the offered variation from Network Rail before updating its resource plan and timetables.

Then, on 20 October, Network Rail highlighted that the original reordering of trains looked at on 8 September wasn't achievable without a substandard TPR margin at Newton West junction. As a consequence of the above, on 27 October, Network Rail sent out a re-hearing documentation and the retiming had increased from seven ASR services requiring retiming to 37. This demonstrates how interconnected the suburban services around Glasgow are. It also shows how a small amount of late running on the West Coast Main Line can transmit delay from Uddingston Junction, in this case, to Arrochar on the West Highland Line, a distance of over 50 miles.

The number of passengers possibly affected has increased, and based on the latest passenger counts, are now over 3,000 who could see an extension of journey time. Had these route times been sent to ASR as a normal variation request, we would have declined these retimings as they extend journey time, and ASR would require a further derogation from Transport Scotland against its Franchise Agreement, a further worsening of the journey time metric for Transport Scotland. Amended train crew book on and off times of nine diagrams. Rosters and diagrams have already been consulted with the unions. Reduced turnaround times at Milngavie reduced now to five and a half minutes. Admittedly, this is still above the five minute value but they're now five and a half minutes. Amended services are reserveable – these are for West Highland services where passengers have already purchased tickets based on departure times. Public timetables have been extracted.

ASR has held off printing out public timetables for the Lanark services, pending the outcome of a decision from the original TTP hearing. It was lucky that the North Electric, A2B and West Highland timetables had not been printed and we've now put a hold on these books as well. These books were previously not being held as we expected all retiming to be south of Glasgow Central.

From a train crew point of view, the original hearing amended 14 diagrams; this is now up to 74. It's less than six weeks before the Timetable starts and the staff reps have already gone through these diagrams and rosters have been agreed. These further retimings and book on and off times will need to be re-consulted with the trade unions at a number of depots. Based on all the points, ASR request the Panel do not amend the times of those services as offered by Network Rail, so that ASR does not have to re-extract its public timetables, amend its train crew diagrams, as this Timetable commences operation in less than six weeks.

Annex B to Timetabling Panel determination of reference TTP1174

Record of evidence given and arguments presented in Q&A, Parties' closing statements and Chair's summary of conclusions, at the First Hearing on 11 October 2017

Note: This Record is not designed to be a verbatim account of the proceedings but is intended to be a note of the evidence given and arguments presented to the hearing. It has been compiled from notes taken by the Access Disputes Committee Secretary at the hearing and has been approved by the Hearing Chair and Panel Members as being substantially accurate to the best of their recollection.

Opening Remarks

The Hearing Chair commenced by explaining that the Panel wanted to start the Q&A by addressing two relevant matters of principle concerning contract interpretation, as had been mentioned in his pre-hearing note regarding legal issues copied to the parties. It was important to deal with these at the outset because they were matters on which the Panel's provisional conclusions proposed to depart from the findings of the TTP1122 determination from which this dispute TTP1174 followed. It should be remembered, however, that this hearing was not an appeal from TTP1122 but a fresh consideration of a new dispute based on new facts and evidence (even though partly the same as those in TTP1122), and was therefore required also to consider afresh any issues of principle arising.

These two matters of principle were: first, the extent, if any, to which NR is entitled, in compiling the New WTT, to make a decision on its own initiative rejecting or changing (by exercising a Flexing Right) some aspect of an Access Proposal generally by reference to the Decision Criteria, when no 'decision' as such strictly needs to be made because there is no conflict with another Access Proposal or other specific overriding obstacle; and secondly, the question whether there is actually a need for finding "exceptional circumstances" under Condition D5.3.1(c) if the Panel's direction avoids substituting its own alternative decision for that of NR by directing NR to grant certain specific times as bid for by an operator whilst leaving NR to sort out any conflict arising by reason of that grant.

Following consideration of these points of principle, the Hearing Chair said the Panel's questioning would turn to an examination of Network Rail's reconsidered decisions in respect of the seven trains the subject of TTP1122 by reference to NR's revised Decision Criteria document (included as Appendix E to XC's Sole Reference Document for this Hearing). The Panel would try to consider each train separately, so far as that Decision Criteria document permitted, in accordance with the TTP1122 Panel's advice to the Dispute Parties expressed in its preliminary note of determination issued on 11 September 2017.

- Q1 (to NR) On the first point of principle, therefore, the Panel's provisional conclusion is that the contract, in the form of the Network Code, does not seem to provide authority for NR to make what it considers to be improvements to the timetable on its own initiative when compiling the New WTT, by reference to the Decision Criteria whether generally in the abstract or specifically through the use of its Flexing Right. We can see that the Objective in Condition D4.6 might be construed as introducing a notion that this is a possibility but it does not say on what basis NR might actually be entitled to use it in the abstract – and there is no other express indication of NR having a unilateral right to make changes to the timetable other than through the variations process in Condition D3, which is a different process altogether.

We need to afford NR the opportunity to address this provisional conclusion, as it rejects NR's submission on the point in TTP1122, which was accepted by the Panel in that case. Please therefore tell us how you have arrived at your position – and do say if you have not got the right people here to discuss the point.

A1 (NR) We feel that we have got the right people here.

We are not in agreement with your provisional conclusion on this point of principle. Our start point is D4.2.1, then we return to D2.6, then to D2.6.3, then back to D4.2, then to D4.6, where it says "when required to decide any matter". We say that this entitles NR to use the Decision Criteria for deciding any matter.

Q2 (to NR) So you say this entitlement is available where you have to make any decision which affects timetabling?

A2 (NR) Yes.

Q3 (to NR) Our provisional view would say that in circumstances where you have to compile the New WTT, you start with D2.6, where D2.6.3 takes you to D4.2, where D4.2.1 requires NR in compiling a New WTT both to apply the Decision Criteria in D4.6 and to conduct itself as set out in D4.2. This takes you to the preamble to D4.2.2, which your submissions now and in TTP1122 seem to have ignored, whereby NR is required to endeavour wherever possible to comply with all (or rather, in effect, all valid) Access Proposals and accommodate all Rolled Over Access Proposals, subject to, among other things, being entitled to exercise its Flexing Right under D4.2.2(c). We suggest to you this sequence means that the requirement in D2.6.3 leads to the overriding duty expressed in the D4.2.2 preamble for NR to accommodate a Rolled Over Access Proposal wherever possible, subject to using its Flexing Right under D4.2.2(c) only if necessary to enable it to perform that duty, that is to say, to make possible what would otherwise be impossible. We suggest the effect is that the duty, and power, under D4.6 to apply the Decision Criteria (where NR "is required to decide any matter in this Part D") arises only when a decision is actually needed, in order to resolve a conflict between Access Proposals or between an Access Proposal and some other overriding matter such as the TPRs, because without such resolution NR would otherwise be unable to comply with the duty laid down in the D4.2.2 preamble.

A3 (NR) That makes it sound very transactional. There is a lot of change on this line of route following amendment of the TPRs for December 2017. Your provisional conclusion could be taken to say that NR cannot make an intervention to improve the Timetable unless it is arising out of an Access Proposal from an operator. We say that the contract should be interpreted differently and that we can work through the Decision Criteria to change the WTT on our own initiative – but the operators still have protection in this arrangement because of the appeal mechanism. We make thousands of timetabling decisions every year and very few are challenged.

Q4 (to NR) In TTP1122 you cited timetabling improvements which you had made on your own initiative into Edinburgh Waverley for December 2017, where XC had simply said "thank you very much". Clearly the difficulty with acting on your own initiative, even if in breach of contract, will arise only if it is challenged by anyone?

A4 (NR) True, but if you follow our logic, we can do it in these circumstances other than in connection with a conflicting Access Proposal.

Q5 (to NR) You seem to be viewing the decision to do something for the greater good of the industry – such as to make rail more competitive with other modes of transport in Scotland – as being in your gift. However laudable an objective that might be, it appears that it is not a decision that the contract (in the form of the Track Access Agreement and Network Code) actually requires you to make. Our provisional view of the proper interpretation of the contract suggests that NR is required and entitled to apply the Decision Criteria only when it is otherwise unable to accept an Access Proposal as submitted without making a decision between that Proposal and something else conflicting with it – usually another Access Proposal.

A5 (XC) We should point out that the Edinburgh Waverley outcome was actually Timetable Changes by Consent under Condition D3.6.

(NR) We still say that NR does have the power to make changes, it is in Condition D2.3.4(b) (identify opportunities to develop strategic initiatives and to promote network benefits etc) but it should be done before D-40 and we accept that we did not do that. But the principle here is that we say NR's entitlement to use its Flexing Right is not only in connection with D4.2.

The Panel noted that use of the Flexing Right is also mentioned in connection with variations.

(NR) This corridor into Glasgow Central was affected by the use of the new SRTs, etc. At D-40 there we held many conflicting bids using old and new TPRs. We cannot say what actually happened here with the XC trains but NR had to unravel the situation with the goal from introduction of the newly established TPRs being to improve the performance of the Timetable.

Q6 (to NR) Regarding your goal in introducing the new TPRs, we suggest that the way to enable NR to achieve this overarching purpose of improving the Timetable as it believes appropriate is both, just as you have done, through modifying the TPRs (following the required consultation process) so as to set out or revise such matters as the order of trains, and/or by taking the Timetable Participants with you by encouraging Access Proposals which could enable or facilitate your desired result by being properly (i.e. contractually) awarded precedence over Access Proposals or Rolled Over Proposals which you think in some way obstruct that result. Otherwise, we see no route to NR achieving the improvement it seeks unilaterally just by purporting to apply the Decision Criteria to a revision of the Timetable in a vacuum.

A6 (NR) The new TPRs were established through the agreed process and we expect to deliver the benefit.

Q7 (to NR) Are we right to understand that the introduction of the new TPRs gave rise to all sorts of issues with operators not bidding compliantly with those new TPRs?

A7 (NR) They have to bid in accordance with D2.5.1 and D2.5.2 but they are not obliged to bid compliantly with the TPRs or to avoid conflicts. That is NR's responsibility at D-40. But the new TPRs have perhaps caused more difficulty in handling the bids for compiling the New WTT.

Q8 (to NR) Were any conflicts caused in Scotland by XC's bid, which was a Rolled Over Access Proposal in its own right?

A8 (NR) The XC trains would present later at Uddingston Junction because of amended TPRs to the south and there were then new headways to the north of Uddingston Junction.

(XC) The new SRTs had not been put into the national planning system at the time operators were required to bid.

(NR) There is an industry anomaly; no operator has opportunity to bid compliantly with forthcoming TPRs unless it puts in any new SRTs manually. There is no industry process for putting new geography such as revised SRTs into the system at D-40.

Q9 (to NR) Was there something about XC's Rolled Over Access Proposal which caused subsequent conflict?

A9 (NR) we are unable to say regarding the seven trains listed specifically but when Access Proposals were imported there were thousands of conflicts in this area of Scotland at D-40. The Access Proposal received from XC was not conflicting within itself but we did need to deconflict long distance trains into Glasgow Central.

Q10 (to NR) So are you saying that it was necessary to deconflict these seven trains in XC's Rolled Over Access Proposal and these were particular decisions that you were obliged to make in order to deconflict Access Proposals for this area?

A10 (NR) Yes, in order to comply with D4.2.2(a).

Q11 (to NR) That is not what was stated in the decision document.

A11 (NR) All re-ordering of trains came about through the new TPRs. The only reference to TPR-compliance in our decision document is at the top of page 3; the matter is not spelt out because everything has to be TPR-compliant.

(XC) We are not replaying dispute TTP1122 but we would like to refer to paragraph 5.1(c) of our Sole Reference Document to that Panel: on 22 May 2017 Network Rail's timetabling work was completed and, whilst possibly subject to change, no extension to XC's journey times was envisaged. So we were fairly confident that the new TPRs would not have an effect on our journeys. As now currently published the Timetable will have XC and ASR trains arriving at Uddingston Junction at the same time so notwithstanding the TPRs and pathing time which is already there in our timings, NR has decided that the ASR train is to go into Glasgow Central first and so has changed the current order.

(NR) That decision was prompted by current performance and our quest for resilience.

(XC) That is not the explanation that was given at the time; we were told it was to get a patterned Timetable.

Q12 (to NR) So you are saying that there was a decision of a sort to be made but it was to do with the new TPRs, not a conflicting Access Proposal; and it was not referenced in NR's Sole Reference Document to this Panel.

A12 (NR) Yes.

Q13 (to NR) What drove the change in the order of the trains? It seems that XC's view is that NR may have had a decision of some sort to make because the TPRs had changed, but that NR did not need to decide to change the order of trains from Uddingston Junction.

A13 (NR) Conflicts between XC trains and ASR trains at Uddingston Junction required a fresh decision. Apart from one XC train, we could now reverse the order and still be TPR-compliant.

Q14 (to NR) Are you saying that if you can find a hook to requiring a decision where you could use your Flexing Right to resolve a conflict, you can then apply the Decision Criteria to a different decision or otherwise in some more general way?

A14 (NR) Yes. When the former WTT is looked at, there is opportunity to improve things. We do not think there is anything in the Track Access Contracts or the Network Code which says that a Rolled Over Access Proposal must be accepted. Having done a review of the TPRs, the consequence of the WTT going up in the air gives opportunity to improve performance and the resilience of the plan, otherwise there are no opportunities for getting improvement.

Q15 (to NR) But surely you could always work the system to take Timetable Participants with you to bring about improvements, such as saying to ASR that there is an opportunity to make a revised Access Proposal?

A15 (NR) We have been inclusive and talking to the industry during the drafting period and in the post-drafting period.

(ASR) We are happy with where we are.

Q16 (to NR) But are we right to understand that the change to the order of the trains was never discussed with anyone, including ASR?

A16 (NR) Not until 25 May 2017.

Q17 (to NR) What prompted the decision to change over the trains?

A17 (NR) To improve resilience in the plan, including turnround times at Glasgow Central. Also, for the local services, ordering of trains into a pattern makes it easier for signallers whilst a pattern of station times is easier to understand for passengers and operators' staff.

Q18 (to NR) So it seems that the change over was only decided upon between 22 May and 25 May 2017?

A18 (NR) It certainly seems that somebody in NR sat down and realised that the timing of the trains could be done better.

(XC) There was not a specific issue being raised at the Performance Group regarding delays to Lanark to Glasgow Central trains being caused by XC services. It cannot have been important to ASR as there was no dedicated ASR representative attending the meetings.

(NR) Performance problems on that corridor were being noted at every quarterly meeting. Just to be clear, as at 22 May we had no firm view regarding these trains but by 25 May we had arrived at a firm decision, having looked at the timings.

The Hearing Chair explained that having heard NR, the Panel was still minded to conclude that as a matter of principle there was no entitlement for NR to use its Flexing Right or apply the Decision Criteria in a vacuum, which was to say, without there being a decision required upon which to hook such entitlement. The Panel had noted the view of NR as seeming to be that as long as there was a 'decision' of some sort involved, which could include just a general desire to do the best for the Network in compiling the timetable, it did not matter whether that decision was strictly relevant or necessary to enable NR to act in accordance with the D4.2.2 duty to comply with all Access Proposals etc "wherever possible". It was still the Panel's provisional view that a proper interpretation of D4.2 was that NR could use its Flexing Right and apply the Decision Criteria only when a 'decision' was necessary specifically in order to resolve something, e.g. conflicting Access Proposals or in any other situation where there was something specific (such as new TPRs) which would otherwise make impossible the timetabling of a train as requested by an unconflicted valid Access Proposal.

Q19 (to NR) So could it be said that you were trying to make two decisions into one, being how to handle the trains arriving at Uddingston Junction at the same time and the re-ordering of the trains?

A19 (NR) As we have worked through the requirements of the determination of Dispute TTP1122 and pulled more information together, it is only one decision.

Q20 (to NR) But surely the preamble to Condition D4.2.2, which says "endeavour wherever possible", gave NR the duty to leave the Rolled Over Access Proposals as they were and the keep the trains in the existing order?

A20 (NR) It is difficult to accept that we could not change it.

Q21 (to NR) But do you agree that it was possible to keep the trains in the existing order? You could have made the decision to retain the previous Timetable and leave the trains in the present order.

A21 (NR) But we did need to make a decision as the trains arrive at Uddingston Junction at the same time.

(XC) The content of an Access Proposal does not include the passing time at a junction, only the arrival time at destination. We asked for arrival at Glasgow Central at xx12 and ASR asked to arrive at xx15 so there was no decision to be made by NR regarding the order of the trains.

(NR) Our concern is that no operator could bid with certainty in the situation of the new TPRs; it would be an unreasonable complexity for any train planner in any part of the industry.

Q22 (to NR) Is it the case that the New WTT could have included the XC and ASR trains arriving at Glasgow Central at xx12 and xx15 in the same order as today, whilst still complying with the new TPRs with the exception of the one hour 14:00-15:00?

A22 (NR) Yes.

The Hearing Chair then reminded the Dispute Parties that the second point of principle which the Panel needed to enable them to address was the question whether there was actually a need for finding "exceptional circumstances" under Condition D5.3.1(c), if the Panel's direction here could avoid actually "substituting" its own alternative decision for that of NR, by simply directing NR to grant certain specific times as bid for by an operator whilst leaving NR to sort out any conflict arising by reason of that grant.

Q23 (to NR) Regarding this issue of "exceptional circumstances", again departing from NR's submissions and the Panel's apparent finding in TTP1122, the Panel here has provisionally concluded that, because limb (a) of Condition D5.3.1 allows the Panel to give directions to NR specifying a particular result to be achieved but without specifying the means of achieving it, this actually does allow the Panel to direct NR to do something specific with regard to accepting an Access Proposal but not to stipulate how NR is to deal with the knock-on effects of such acceptance; and that, therefore, contrary to the apparent conclusion of TTP1122, the Panel is not in effect wholly precluded from allowing an appeal in any way from an NR timetabling decision without engaging the notion of exceptional circumstances. We shall in any case, however, go on to consider what might constitute exceptional circumstances for the purposes of Condition D5.3.1(c) and whether they can be found in this case – partly because XC have raised this in their submission and partly in case we are found to be wrong on the principle. Would you like to comment, therefore, first on the point of principle?

A23 (NR) If we have done something outside of the contract such as incorrect application of process then we would accept that there are exceptional circumstances but if we have correctly followed process then we do not consider that exceptional circumstances can exist.

Q24 (NR) Suppose you were directed to accept an Access Proposal but not how to do it – would you consider that to be acceptable without engaging exceptional circumstances?

A24 (NR) We are not sure as it would over-ride NR's decision. We would probably accept it if there was a flaw in how the existing decision was made.

(XC) By seeking to invoke exceptional circumstances we were looking for a firm outcome – we did not want another determination which says go away and try again.

(NR) We do not accept that where we are on timescales constitutes exceptional circumstances although we would accept that it is unusual to come back before a Panel so soon after a previous hearing about the same matter. Various Timetabling Panels have sat close to the effective date of the Timetable. The idea of exceptional circumstances perhaps only comes into play because this is the second hearing on the same subject.

(ASR) We would probably appeal if the decision went against the present position.

(NR) We are clear that this is not exceptional circumstances because it is not exceptional to be so close to the start of the New WTT. There are still unresolved dispute registrations relating to the December 2017 WTT.

Q25 (to NR) If you have done everything previously asked of you, would holding a second hearing be exceptional?

A25 (NR) Perhaps.

(XC) Tickets for trains in the December 2017 Timetable are already available to purchase so if a decision is not forthcoming, people could be making decisions with incorrect information. Just adding 3 minutes to our arrival time at Glasgow leads Journey Planner to offer alternative journeys such as York to Glasgow becoming travel from York to Edinburgh and then forward on an ASR service. People thinking they need to make connections may choose to travel by car instead of by rail.

Q26 (to XC) Why are such passenger problems exceptional or different here compared to when you are up against the wire because of a late Panel hearing or an appeal before the ORR?

A26 (XC) We are not aware of any previous discussions regarding the matter; we do not think such a timetabling issue has arisen previously.

Q27 (to XC) So are you saying that anything which arises after train times have been published is an exceptional problem?

A27 (XC) In any industry, if you are already advertising a product you would want to be able to correct the advertisement as quickly as possible. A substantive decision from TTP1122 would have been in time.

Q28 (to NR) Can you say what you think would constitute exceptional circumstances?

A28 (NR) If the New WTT was not operable or it was found that NR had been discriminatory it would be reasonable for the Panel to substitute a decision; perhaps also if NR was found not have carried out its duties properly.

(ASR) It would be exceptional circumstances if there was an appeal to be heard after the start of the WTT.

The Hearing Chair said the Panel's questioning would now, as previously indicated, turn to an examination of Network Rail's reconsidered decisions in respect of the seven specific XC services in contention under TTP1122, trying to look at each one separately so far as possible by reference to NR's revised Decision Criteria document (usually referred to by NR simply as the "decision document").

Q29 Turning to the individual trains in contention, will XC say why it disagrees with NR's application of the Decision Criteria to 1S31, as expressed in the decision document?

A29 (XC) Regarding Consideration (a), capability of the Network, the decision document deals with it only on a general basis not with reference to each service separately. NR has made assumptions here without evidence. We are unable to find anyone in XC who has said we wish to use platform 1/2 at Glasgow Central because there is no ticket gate line; we have only asked for it at Manchester Piccadilly. As for introduction of a regular pattern of train services, Automatic Route Setting is in place at Uddingston Junction, and Glasgow Central is manually signalled; we have no knowledge or evidence of signaller's error occurring. We do not necessarily disagree with NR's weighting of this Consideration but why they have changed it (from 'high' in the previous Decision Criteria document considered in TTP1122) to become 'material' here is not understood.

Regarding Consideration (b), spread of services reflecting demand, again the decision document does not deal with it for each service separately. It weights (b) 'material' generally, but there is no evidence stated as to what has been weighted.

Q30 (to XC) What do you understand to be meant when NR says in the Evidence column against Consideration (b) "NR's decision is not being challenged"?

A30 (XC) That we did not challenge the decision regarding Consideration (b) in the TTP1122 hearing.

A31 (XC continuing regarding 1S31) Regarding Consideration (c) – maintaining and improving performance – we believe the data used by NR in the decision document needs to be cleansed. Our calculations using cleansed data show that if a 1Sxx Service Group train is on average 2 minutes late, and ASR's 2Bxx Group will only be one minute late. On occasions where an XC train has followed an ASR train, it has on average impacted 2½ minutes on the XC train. On average, 1S31 actually arrives less than 1 minute late into Glasgow Central.

By way of example of the need for data cleansing, if a train runs right time Monday to Thursday but is one hour late on Friday, averaging leads to overstatement of lateness at Uddingston Junction.

If we in future arrive at xx15 then with a sub-threshold delay of 2 minutes we would arrive at xx17, which would have implications on our back working.

The number of interactions at Uddingston Junction reduces when the new SRTs are introduced.

ASR's 2B93 and other 2Bxx trains tend to suffer delay between Law Junction and Uddingston Junction so their poor performance impacts on XC by receiving a cautionary aspect and this is what results in XC's presenting late at Uddingston Junction.

Q32 (to XC) So in a nutshell, in response to NR's specific comment on Consideration (c) in its Sole Reference Document about "low right time presentation by XC", you are saying that it is correct that it will be mitigated by the new SRTs?

A32 (XC) Yes.

Q33 (to XC) So what do you say about NR's weighting of Consideration (c) for 1S31?

A33 (XC) We agree that performance should be weighted highly but we do not agree with the picture given by NR for the 1Sxx Service Group. We have no evidence of NR reviewing performance on a train-by-train basis. The Considerations are being weighted against each other generally and not by reference to any particular service.

Q34 (to NR) Can we put it to you that the way you have weighted the Considerations is mostly in the abstract?

A34 (NR) The decision document shows on a train-by-train basis how we have moved in our thinking.

Q35 (to NR) You have said in the decision document what weight you have given for each Consideration, e.g. "high", material or "not applicable", but you have not given any explanation of the methodology of the weighting. You have then gone on to say what Consideration favours what result and who it favours. Can you comment?

A35 (NR) We have looked at the Considerations and said consistently where we have considered them to be 'high' or 'material' in principle in relation to this case.

Q36 (to NR) Are you saying that the weightings applied now are the same as they were for Dispute TTP1122, when you have downgraded Consideration (a) – capability of the Network – from 'high' to 'material'?

A36 (NR) That change reflects evidence which came in to us following the TTP1122 hearing, including such information as XC's preferred use of platform 1/2 at Glasgow Central.

(XC) The issue of platform 1/2 only came up upon our reading of NR's recent decision document.

(NR) We have not got the Access Proposals here to see if they covered platforming, but in any case that aspect of Consideration (a) has only been given low importance in its weighting. Experience from the TTP1122 hearing suggested that creating a patterned Timetable is not a strong enough argument for the weighting then being given. Signallers do not make that many mistakes but instinctively and professionally we would say that a standard patterned Timetable is desirable.

Q37 (to NR) Would you say that a standard patterned Timetable does not of itself improve the capability of the Network?

A37 (NR) Standard patterned Timetables throughout the world tend to perform highly.

Q38 (to NR) This line of questioning is suggesting that Consideration (a) is not relevant to this case.

A38 (NR) It is right to have something there but it is not one we have relied upon. For 1S31, Considerations (c) and (e) are most applicable.

Q39 (to NR) So for Consideration (c) in relation to 1S31, how do you respond to what XC is saying about your weighting?

A39 (NR) We have weighted it 'high'. We could look again at the data but we expect a 9% improvement in the ASR Lanark train return working so increasing its turnaround time by 3 minutes is worthwhile.

Q40 (to NR) It sounds as if you are applying the weighting by reference to the result you are trying to get to?

A40 (NR) The Lanark service gets a better expectation of right time departures for its return services from Glasgow Central but also better performing arrivals.

(XC) The 9% improvement being quoted is only about days when the XC train is late.

(NR) A potential increase of 9% in right time departures from Glasgow Central for the Lanark service is more likely.

(XC) Looking at average lateness from 9 January 2017 to 29 July 2017, lateness of the back working of the Lanark trains has been due to XC trains on only 11 occasions. When outliers – those with more than 15 minutes of lateness – are removed, that average lateness is only 2 minutes.

Q41 What performance change is being expected from the new TPRs in December 2017?

A41 (XC) There will be fewer interactions for the XC trains so there is less likelihood of materially affecting ASR services. We expect perhaps half a minute of lateness presenting at Uddingston Junction.

(NR) We have extended the SRTs affecting Lanark services too, so the real question becomes what effect will there be on performance? We have not modelled it but we are expecting that there will be improvement.

- Q42 (to NR) Is there a train regulation policy at Uddingston Junction?
- A42 (NR) No. The signaller will look at approaching trains and regulate them on the basis of giving preference to the one which can receive two green aspects.
- Q43 (to NR) So on the basis of average late running, currently the 1Sxx train will normally go forward to Glasgow first?
- A43 (NR) Yes.
- Q44 (to NR) If there is so much concern about securing right time departures from Glasgow Central, why was it not put in ASR's PDNS?
- A44 (NR) At the time we were wrangling about the TPRs. Some of this goes back to the TPRs not being in place in time.
- Q45 (to NR) Why, if clearly the Lanark return working is a performance concern irrespective of the new TPRs, was a proposal to address it not made by anyone?
- A45 (NR) There has been discussion for a number of years regarding improving the 5 minute turnround but it would have had implications on resources.
- (ASR) The Lanark trains will now have an 8 minute turnround
- Q46 (to ASR) How many stops does the Lanark service make between Uddingston Junction and Glasgow Central?
- A46 (ASR) Two, at Uddingston and Cambuslang.
- Q47 (to NR) Normally we would expect a fast train to go in front of a stopper?
- A47 (NR) Putting the stopper in front is reflective of the pattern used in the other hours of the day. The Lanark train arrives at Glasgow Central at xx12 and the WCTL train arrives at xx15, the WCTL trains tend to have some pathing time between Uddingston Junction and Glasgow.
- Q48 (to NR) We are struggling to understand on what basis you are refuting XC's point that low right time presentation at Uddingston Junction is not important.
- A48 (NR) 9% more of the return workings of ASR's 2Bxx trains will leave on time from Glasgow Central. We think we could look at cleansing the data but we suspect that it would still have 2Bxx trains leaving on time more often.
- (XC) We have not yet seen the data, despite requesting it following the TTP1122 Panel hearing.
- (NR) This matter is addressed in our Sole Reference Document to this hearing (on pages 5 and 6).
- (XC) This indicates 9% of days, not 9% of trains. We have still not seen the data used by NR.
- Q49 (to NR) Is the 9% applicable to the 2Bxx Service Group or to the 12 00 time slot.
- A49 (NR) The 12 00 slot. The 2Bxx improvement expectation is set out in our Sole Reference Document.
- Q50 (to NR) Still looking at 1S31 and looking at Consideration (d) – journey time – this has been weighted by NR as not being a significant factor to be considered but regarded

instead as "the product of the decision". Can you help us understand what you mean by this?

A50 (NR) The ASR train has an unnecessary 3 minutes which is there in this hour but not in other hours.

(XC) The other side of this Consideration is that existing journey times should be maintained. It has been weighted by NR as being only a material consideration but we are unable to understand why.

Q51 (to NR) Can you explain?

A51 (NR) One of the trains gets sub-optimal journey time.

Q52 (to NR) Is not the nature of your decision about changing the status quo?

A52 (NR) A lot of things were coming together. A key driver is to improve performance along the West Coast route into Scotland and one way to achieve improvement was to put the ASR trains in front of the XC trains. Journey time was not at the front of our thinking.

Q53 (to NR) So the weighting you have given to Consideration (d) is questionable?

A53 (NR) Yes, agreed.

A54 (XC) Continuing regarding 1S31, then, concerning Consideration (e) – integrated system of transport, broken connections – we say that the only worsenment is to passengers on the XC train. Reference to LENNON indicates that there are lower numbers of passengers on the XC trains at this point but ASR's journeys will not change so clearly only passengers from XC's trains will be affected. Indication of connecting Motherwell journeys on XC trains is historically low; the actual numbers currently are higher. The ASR loadings now being quoted have doubled and in some cases trebled since the TTP1122 hearing. We are not sure whether they are accurate or where they came from. The SO figures are static, only the SX figures have changed.

(ASR) We are unable to comment but we are now using an automated system for counting passengers instead of using manual counts.

(NR) We accepted operators' loading figures at face value in order to comply with the determination of Dispute TTP1122. We are not experts in this area. In what we have written we have made some note of internal Scotland connections at Motherwell.

Q55 (to NR) So have you reconsidered the weighting given to this Consideration (e)?

A55 (NR) We accepted the weighting as 'high' on the basis of comments from ASR which are made about journeys in Scotland. We would now agree that there do not seem to be the volumes of people making connections.

(XC) The higher numbers are surely going to Barrhead rather than to Glasgow.

(NR) We can only point to page 19 of our Sole Reference Document to TTP1122. We would also comment that when Access Proposals come in to us, it is not always clear what connections the operator wants to make.

(ASR) Most services out of Glasgow Central are well served so connections are not really an issue.

(XC) For some of our passengers connections are an issue, such as at Motherwell.

- Q56 (to NR) Is it correct that required connections should be specified in an Access Proposal, so Consideration (e) should be weighed as 'low' rather than 'high' in this case?
- A56 (NR) Yes.
- (XC) Required connections are referenced in Condition D[2.5.1].
- Q57 (to NR) At the top of page 20 of your Sole Reference Document to TTP1122 it says that "NR believe that there would be a greater quantum of passengers affected if the connection into the xx27 Barrhead (all stations) service was lost from the ASR 2Bxx Lanark service". What evidence do you have for that statement?
- A57 (NR) This was based on the current figures as were provided to us by ASR. We understand that the numbers may increase with a 3 minutes faster journey time for these local travellers.
- Q58 (to NR) This hearing does not have the full evidence which was documented by ASR to NR for the TTP1122 hearing or subsequently, but would you agree that these current figures do not look right?
- A58 (NR) We have been taking TOCs' information at face value.
- A59 (XC) Continuing regarding 1S31, and turning to Consideration (f) – commercial interests – XC is using MOIRA and the baseline is the services being operated today. So far as can be ascertained, the ASR data says that it will be making a loss on all trains SX and SO following introduction of the new TPRs, but with speeding journeys up we would expect ASR's seven relevant trains to become revenue-generative. As for NR's opinion column on Consideration (f), it is unclear how a £42k SX revenue loss by XC can be balanced against a broken ASR driver's diagram in the case of 1S35 (the 14:12 arrival). XC has offered NR a STP (Short Term Planning) flexing option for reactive strengthening of services due to engineering work and special events but has received no response. Overall, the modelling methodologies which have apparently been used are not comparable and NR's decision is not understood.

Regarding materiality, XC recognises that NR has difficulty in this area of operators' commercial interests but would like to know where NR's weighting came from.

(ASR) There is a lot of engineering work coming up on this corridor so we will want to strengthen some of our trains but as yet we are unsure of the frequency with which such strengthening will be required.

(XC) If ASR wants more attaching/detaching, why was it not put into ASR's Access Proposal?

(NR) This a very difficult area for us. The Capacity Planning team members are not economists. NR has access to MOIRA but there is lack of clarity as to how to use it. We are not sure how to fairly compare long distance operators' revenue versus that of a local or commuter operator, so compared to the other Considerations we have given (f) a low weighting. We have not considered our own commercial interests such as Track Access Contract Schedule 8 payments because we do not know the likely delays.

- Q60 (to NR) On what basis generally do you weight one Consideration as important or not important? Where one Consideration has a more marked result in favouring one party against another, you seem to give it a high weighting because it has a more noticeable effect. We are gaining the impression that NR has no consistent standards for doing this weighting.

- A60 (NR) There is no laid down way to do this.

(XC) The nub is not just commercial concerns. We have lots of other issues here.

- Q61 (to NR) How have you applied Condition D4.6.3, which goes some way towards prescribing a methodology for applying the Considerations including their appropriate weighting?
- A61 (NR) We seem to have fallen into a trap in how to decide on the relevance of a Consideration so we have got into a behaviour which tries to consider all the Considerations. Our attention to Consideration (c) has been consistent throughout. In the case of Consideration (f), differing information has been presented by the operators and it is difficult for our Planners to judge.
- Q62 (to NR) It sounds as if there is no particularly coherent method in NR for applying the Decision Criteria to the particular circumstances involved. According to D4.6.3, the weighting should be the second part of the exercise, after deciding which of the Considerations are relevant and, of those, which are in conflict. Here, (c) and (f) are the main Considerations in conflict according to the additional evidence received from the parties after TTP1122, but the way the decision is expressed by NR is that it first gives the weighting in the abstract and then identifies the conflict.
- A62 (NR) Relying on just one or two Considerations does not seem right. Assessing all the Considerations and producing the decision document was one person's work for a week!
- A63 (XC) Continuing regarding the application of the Considerations to the specific services, NR's decision document weights Consideration (g) (Route Utilisation Strategy) as 'material', apparently because not challenged in TTP1122, but in fact we regard (g) as not really applicable at all.
- (NR) We agree that (g) is not applicable.
- (XC) Regarding Consideration (j) – utilisation of assets – we think NR has duplicated the area of (f) – commercial interests – in simply repeating the evidence on train crew and rolling stock resourcing.
- Q64 (to ASR) Whether or not a driver is an asset, what happens today if a driver diagram is broken?
- A64 (ASR) It is not just a matter of the cost of a driver as we have not got a driver.
- Q65 (to ASR) Are we correct to understand that you have revised your driver diagrams for December 2017?
- A65 (ASR) Yes. We review our driver numbers with every WTT change. For December 2017 we did it relying on the offer received from NR. Today we plan for 3-car trains in our permanent diagrams and if we need to strengthen trains we get around any resource issues by attaching it elsewhere. Our driver issue in December is a product of NR's decision.
- (NR) A peer review of our decision would indeed say to ASR that the driver diagram issue is only a product of the decision. However we recognise that there is a repetition of factors across the Considerations and we acknowledge the difficulty we have placed on ASR in terms of the driver.
- (XC) Looking at this on a train-by-train basis, 1S31 is one of the higher loaded services for XC involving tens of thousands of pounds of revenue.
- Q66 (to XC) Consideration (j) is emerging as not broadly going one way or the other, irrespective of the broken ASR driver diagram, but if the cost of the broken driver diagram is factored in to the financial information, you would say that it is still not likely to balance out?

A66 (XC) Our loss on a swap of our train with the ASR train affected by the driver diagram would be significantly greater than the costs incurred by ASR resulting from the broken diagram – in effect we would be funding it for them. And overall we think there remains a £184k annual loss to XC as against a £21k annual cost to ASR.

Q67 (to NR) Is there any sense in which, in the real world, you consider these sorts of figures to be just 'chicken-feed' in the context of rail industry finances? We would like your view on the materiality of, for example, losses of tens of thousands of pounds as against the hundreds of thousands or even millions of pounds that rail businesses are routinely concerned with.

A67 (NR) We agree that these sorts of numbers – even tens of thousands – might be of concern to someone.

The Panel noted that Consideration (f) requires Network Rail actually to consider only the commercial interests of Timetable Participants of which it is aware.

Q68 We have inevitably been distracted from our intended service by service consideration of NR's decisions, due to the largely general application of the Decision Criteria by the decision document across the whole service groups. Nonetheless, one way or another we seem to have covered the relevant evidence specific to each individual service. Has anyone any further points particular to any one or more of the services which have not already been drawn out?

A68 (NR) For the 14 12 SX slot, we still do not believe that we have a TPR-compliant solution in this hour if we have to swap the trains round, ie award it to XC.

(XC) The journey time of 2F33 appears to be an anomaly in this hour.

(NR) With the information to hand, we do not have a solution without increasing the journey time for ASR's resulting 14 15 service under our Flexing Right but having made the offer to ASR we believe we do not now have the power to flex it unless under the direction of the Panel.

Q69 (to NR) If you had been in time, would you have been able to do it?

A69 (NR) We believe yes as there is not understood to be any restriction on its journey time.

(ASR) We believe there may be a cement train around that time which affects things.

Q70 (to NR) Might you have been able to arrive at a TPR-compliant solution if you had been in time before making the offer?

A70 (NR) Although we had previously re-looked at it, we have not looked at it since the information came to hand nor has it been an issue raised previously.

Q71 It may be recalled that the rationale for the indications in favour of ASR given by the TTP1122 Panel for the 14 12 SX and 20 12 SO arrival slots were related to breaking the ASR driver's diagram in the case of the 14 12 SX slot and there becoming insufficient time for a detachment to take place in the case of the 20 12 SO. We have already explored the 14 12 SX slot but is there anything we need to know about the 20 12 SO slot?

A71 (XC) The evidence now submitted by ASR shows that a 3-car unit is going to be utilised so the problem has gone away.

Q72 (to ASR) What is the cost of a driver?

A72 (ASR) About £50k per annum, but it must be noted that the diagrams for December 2017 have already been negotiated and issued.

- Q73 (to ASR) If the driver's diagram in the 14 00 hour was now to be broken, how would you address it?
- A73 (ASR) In the short term we would cancel the train unless we could find a driver on overtime. We would then have to go through another re-diagramming exercise to see if a way could be found to run the service, bearing in mind that we do not have another trained driver at present.

There being no further questions or answers the Hearing Chair invited closing statements on behalf of all the parties.

Closing statements

By XC: Our issues remain regarding the application of the Decision Criteria by NR in the way that the evidence has been used and the weighting applied. Inaccurate data has been provided to the hearing and some data has not been shared with XC. Unsatisfactory opinions have been expressed by NR regarding commercial aspects in the dispute.

Any arrival times and the timing needs for any splitting of trains should have been in ASR's Access Proposal if they are required.

NR's imperfect application of Condition D4.2 has brought about the wrong outcome.

By NR: The December 2017 WTT has seen considerable change on this corridor and led to the need for NR to take a view regarding conflicting trains into Glasgow and in doing this NR will not hide from its objective to improve performance.

We accept that data can be imperfect and we generally have to take it at face value. Application of the Decision Criteria is difficult for us but we believe we tried to weight them in relation to the seven XC trains correctly. However we agree that our application did view the situation through a performance focused lens.

This is a very complex situation and we appreciate the way in which this hearing has been conducted by the Panel, in drawing out the relevant information clearly in a relaxed and open discussion. We will be very interested to learn what knowledge can be passed back to our Planners about how they should work, but our whole premise has been to give a reliable train service product.

By ASR: We agree with everything just said by NR. Perhaps we should look better at performance implications for the construction of future WTTs.

By WCTL: Nothing to add.

Following an adjournment and consideration by the Panel, the Hearing Chair outlined to the parties the substance of the determination which would be issued in due course, as follows:-

As indicated at the outset of the Q&A, it is necessary to revisit the principle, already addressed in TTP1122, of whether NR is entitled, in compiling the New WTT, to make a unilateral decision on its own initiative rejecting or changing (by exercising a Flexing Right) some aspect of an Access Proposal or Rolled Over Access Proposal generally by applying the Decision Criteria in the abstract, when it is not strictly necessary to make a 'decision' as such because there is no conflict with another Access Proposal or some other specific overriding contractually effective obstacle, such as the TPRs. The Panel's conclusion is that a proper interpretation of Part D does not give NR the right to make such a decision in the abstract, even for what it considers to be general industry benefit purposes, nor do the Decision Criteria (including the Objective as well as the Considerations) by themselves give NR such a right. Condition D4.2.1, as well as

requiring NR to apply the Decision Criteria in compiling a New WTT, requires it to conduct itself in accordance with the rest of Condition D4.2. Condition D4.2.2 places a basic duty on NR to endeavour "wherever possible" to comply with an Access Proposal or accommodate a Rolled Over Access Proposal. The Flexing Right is referred to there in order to enable NR to do just that, i.e. to make possible the acceptance of something in an Access Proposal or Rolled Over Access Proposal which would otherwise be impossible, and that is most likely to arise when it is necessary to make a decision because there are conflicting Access Proposals. The trigger for the need to use this Right therefore will usually be a conflicting Access Proposal but it could also include other serious conflicting matters such as, in particular, the TPRs; the more so where, as in this case, due process has resulted in relevant new TPRs not becoming known until after the Access Proposal has been made.

The Panel has also addressed the other question of principle also considered by TTP1122 as outlined earlier, of whether there is actually a need for finding "exceptional circumstances" under Condition D5.3.1(c), if the Panel's direction can avoid actually "substituting" its own alternative decision for that of NR, by simply directing NR to grant certain specific times as bid for by an operator whilst leaving NR to sort out any conflict arising by reason of that grant. The Panel has concluded that it has the power under both Condition D5.3.1(a) and ADR Rule H50 (which was not discussed in the Q&A but will be referred to in the determination) to make such a direction and that a finding of exceptional circumstances is therefore not necessary as a condition of that direction. The determination nonetheless will also express the view that the timing of a requirement for a timetabling determination not very long, or even very shortly, before the start of the New WTT is unlikely of itself to constitute exceptional circumstances.

Having used its best endeavours to engage in the service-by-service analysis of NR's reconsidered and very much more elaborate Decision Criteria document, as was recommended by TTP1122, the Panel finds that Network Rail's case for not accommodating XC's Rolled Over Access Proposal for the seven 1Sxx services, by reference to the Decision Criteria in the light of the new information provided, is not coherent; it does not follow a clear, consistent or logical path either in principle or practically in relation to the specific evidence produced by the Operators and cited in NR's Decision Criteria document, and NR has clearly both weighted and applied the Considerations incorrectly in evaluating both the Proposals under examination and any potential alternative solutions. XC's arguments for rejecting NR's analysis of the Decision Criteria have been relevant and persuasive but, of themselves, not wholly conclusive on all points. This, however, is a situation where the onus has rested on NR to make its case for not accommodating a Rolled Over Access Proposal, and it has failed to do so.

In the case, however, of the 14 12 SX arrival slot requested in XC's Rolled Over Access Proposal it is accepted on all sides that there is a non-compliance with the new TPRs. This appears to give rise to a sufficient conflict to require an actual decision on the part of NR applying the Decision Criteria and entitling NR correctly to use its Flexing Right in order to amend XC's proposal by providing for its 1S35 SX service to arrive at 14 15 rather than 14 12. NR will be able consequently to award the 14 12 SX arrival to ASR if it sees fit, but will not be directed to do so.

In practical terms, therefore, the determination will be that the xx12 arrival times are directed to be awarded to XC for all its 1Sxx services except the 14 12 SX arrival time for the 1S35 SX service. This direction will be given without specifying anything particular to be done or avoided by NR as a consequence in order to make the Timetable work, and thereby without engaging Condition D5.3.1(c) requiring exceptional circumstances.

[Post-hearing note: No order for costs was sought by any of the Dispute Parties.]

Annex C to Timetabling Panel determination of reference TTP1174

**E-mails and attachments from Network Rail to the Secretary
dated 20 and 27 October 2017, relevant to the Second Hearing**

**e-mail from Network Rail to Secretary of Access Disputes Committee
at 16 56 on Friday 20 October 2017**

TTP1174 post-hearing review

In advance of receiving the written determination, Network Rail have begun to look at how we might approach delivering the Panel Chair's decision as per the verbal instruction handed down at the hearing of TTP1174 on 11th October 2017.

Network Rail have now reviewed the detail of the retimings for weekdays, and applied the necessary consequential retimings to the full suite of train slots affected. It has now emerged that it is not as simple to change the running order between ASR and XC as first thought. At this stage we have not been able to produce a plan which is fully TPR compliant, without removing one train slot from a rolled over access proposal. Network Rail are yet to fully review the detail of the retimings for Saturdays.

Network Rail have examined the options to make the plan fully TPR compliant, and the key issue is the junction margin at Uddingston Jn between the Ayr or Glasgow Central to Edinburgh or North Berwick train plan and the conflicting Lanark to Glasgow Central train slot. At the first hearing into this dispute (TTP1122) on 8th September 2017, the Hearing Chair asked whether a timetable compliant solution that re-ordered the affected services could be delivered. A 40-minute assessment of this request suggested that a compliant solution in respect the affected services was available, and this assessment remains correct. However, the assessment did not include the full range of consequential retimings that might be required, and a 30 second TPR breach for the junction margin was not identified. The work undertaken post the Panel hearing to look at how we could re-order the services has lead us to look a wider geographical area and a greater number of services we now know would be affected. It isn't possible to achieve a TPR compliant solution for this interaction whilst also providing TPR compliant solutions for all the consequential retimings required.

In light of these further developments Network Rail does not believe it is possible to comply with the Panel hearing determination to re-order the XC and ASR services and this being a TPR compliant timetable plan. I not aware of this scenario having occurred before, and seek your guidance as to how you would recommend Network Rail to move forward within the spirit of the determination, as our existing position is one of not changing the running order of these trains.

Matt Allen
Head of Timetable Production – Capacity Planning

e-mail from Network Rail to Secretary of Access Disputes Committee
at 12 01 on Friday 27 October 2017

Please see attached documentation detailing the required amendments to the December 2017 timetable that would be required to accommodate the verbal instruction given at the previous TTP hearing.

All train slots can be accommodated, but there is a journey time impact to multiple ASR services, in addition to the direct impact on the 2Bxx services.

Andy Bray
Timetable Production Manager (Scotland)

1S31 V 2B93 SX & SO

1. In 1S31 remove 3 minutes pathing time from approaching Uddingston Jn, then move 1 minute pathing time from approaching Motherwell to approaching Newton West Jn. 1S31 now arrives Glasgow Central at 12:12.
2. In 1C56 remove the stop at Uddingston and add the time in as dwell time at Motherwell. Forward as booked.
3. In 2B93 add 3 minutes pathing time approaching Uddingston Jn to arrive Glasgow Central at 12:15.
 - This causes a non-compliance with 2F25 at Newton West Jn, TPR states a 3 minute headway is required for a train following a train stopping at Cambuslang, this would mean they have 2½ minutes.
 - In 2F25 add ½ minute pathing time approaching Newton West Jn, this will run ½ minute later through to Dalmeir and terminate on a ½ minute. **Extends 2F25 journey time by ½ minute.**
 - This causes a non-compliance with 2M15 at Finneston East Jn, TPR states a 3 minute headway is required, this would mean they have 2½ minutes.
 - In 2M15 add ½ pathing approaching Finneston East Jn, this train will run ½ minute later throughout to Milngavie and terminate on a ½ minute. **Extends 2M15 journey time by ½ minute.**

1S35 V 2B77 SX & SO

1. In 1S35 remove 3 minutes pathing time from approaching Uddingston Jn, then move 1 minutes pathing time to approaching Newton West Jn. 1S31 now arrives Glasgow Central at 14:12.
2. In 2B77 add 3 minutes pathing time approaching Uddingston Jn to arrive Glasgow Central at 14:15.
 - This causes a non-compliance with 2F33 at Newton West Jn, TPR states a 3 minute headway is required for a train following a train stopping at Cambuslang, this would mean they have 2½ minutes.
 - In 2F33 add ½ minute pathing time approaching Newton West Jn, this will run ½ minute later through to Dalmeir and terminate on a ½ minute. **Extends 2F33 journey time by ½ minute.**
 - This causes non-compliance at Rutherglen East Jn with 1C59 and a non-compliance with 2M23 at Finneston East Jn, TPR states a 3 minute headway is required, this would mean they have 2½ minutes.
 - In 1C59 move pathing time from approaching Newton East Jn to Rutherglen East Jn. In 2M23 add ½ minute pathing approaching Finneston East Jn, this train will run ½ minute later throughout to Milngavie and terminate on a ½ minute. **Extends 2M23 journey time by ½ minute.**

1S39 V 2B85 SX & SO

1. In 2B86 reduce the 3 minutes pathing time approaching Motherwell to 2½ minutes and put the ½ minute pathing time back in approaching Wishaw.
2. In 1M90 remove ½ minute pathing time approaching Shieldmuir and add ½ minute pathing time back in approaching Abington to be back to booked before the Route boundary with LNW.
3. In 1S39 reduce the pathing at Carstairs from 2 minutes to 1½ minutes and remove the 3 minutes pathing time approaching Uddingston Jn. 1S39 now arrives Glasgow Central at 16:12.
4. In 2Y12 remove the stop at Uddingston Jn and add the time back in as dwell time at Motherwell.
5. In 2B85 add 3½ minutes pathing time approaching Uddingston Jn to arrive Glasgow Central at 16:15
 - This causes a non-compliance at Newton West Jn with 2F01, TPR states a 3 minute headway is required for a train following a train stopping at Cambuslang, this meant they had 2:30 minutes.
 - In 2F01 add ½ minute pathing time approaching Newton West Jn, this will run ½ minute later through to Dalmuir and terminate on a ½ minute. **Extends 2F01 journey time by ½ minute.**
 - This causes a non-compliance with 2M31 at Finneston East Jn, TPR states a 3 minute headway is required, and this
 - This then causes a non-compliance at Yoker with 5C04, TPR states a 1 minute junction margin for a train arriving Yoker and a train departing Yoker CS
 - In 2M31 add ½ minute pathing approaching Finneston East Jn, this train will run ½ minute later throughout to Milngavie, terminating on a ½ minute. **Extends 2M31 journey time by ½ minute.**
 - In 5C04 retime 1 minute later from Yoker CS and reduce the pathing time from 1½ minutes to ½ minute approaching Hyndland East Jn.
 - 2M31 causes a non-compliance with 2S03 at Finneston East Jn, TPR states a 3 minute headway is required, this would mean they have 2½ minutes.
 - In 2S03 add ½ minute pathing approaching Finneston East Jn, this train will run ½ minute later throughout to Dalmuir. **Extends 2S03 journey time by ½ minute.**
 - This causes 2S03 (6 car) to terminate at Dalmuir ½ minute before it forms 5L24 to the Down Siding to turnaround.
 - Retime 5L24 to depart Dalmuir ½ minute and reduce the time in the Down Siding.
 - This causes a non-compliance with 1Y29, headway required is 3 ½ minutes.
 - In 1Y29 add 2 minutes pathing time approaching Westerton, reduce the pathing time at Craigendoran Jn from 1 minute ½ minute and reduce the dwell from 5 minutes to 4 minutes at Arrochar & Tarbet.
 - This causes a non-compliance with 2V49 at Dalmuir, headway required is 4 minutes.
 - In 2V49 add 2½ minutes pathing time approaching Clydebank. **Extends 2V49 journey time by 2½ minutes.**
 - This causes a non-compliance with 2E76 at Dumbarton East as the headway required is 4 minutes.
 - In 2E76 add 01:00 pathing time approaching Dumbarton East. **Extends 2E76 journey time by 1 minute.**

1S47 V 2B77 SO

1. In 1S47 remove 3 minutes pathing time from approaching Uddingston Jn, then move 1 minute pathing time from approaching Motherwell to approaching Newton East Jn. 1S31 now arrives Glasgow Central at 20:12.
 2. In 1C58 remove the stop at Uddingston and add the time in as dwell time at Motherwell.
 3. In 2B93 add 3 minutes pathing time approaching Uddingston Jn to arrive Glasgow Central at 20:15.
-

Annex D to Timetabling Panel determination of reference TTP1174

Transcript (edited) of proceedings at the Second Hearing on 31 October 2017

CHAIR: We meet today, again as a Timetabling Panel appointed under Chapter H of the Access Dispute Resolution Rules for the second, reconvened, hearing of dispute TTP1174 brought by XC Trains against Network Rail. We still have one other TOC joined as a Dispute Party, ASR, and WCT has declared itself an interested party. I think, again, all are represented here today.

Today, we have a stenographer taking a transcript; we decided to take a transcript rather than leave it to the Secretary to compile a record, really because time has gone on and it will just save time in getting a record, which we need for compiling the determination.

We have two industry members on the Panel. The previous hearing had three, Rob McCarthy is unable to be with us today, but we are quorate under the Rules with a person down.

I said at the start of the first hearing that it was a slightly unusual dispute because it followed on a previous hearing. This is now the third bite of the cherry. It's a reconvened dispute, precipitated by a communication from Matt Allen for Network Rail, saying quite frankly that whereas we had indicated at the end of the previous hearing the substance of our determination, and Network Rail wanted to comply with it, on further research and reflection, it had found what seemed to be an obstacle – a technical obstacle to doing that, in terms of coming up with a solution to what we had said we were going to direct - a solution that was compliant with the Timetable Planning Rules. And so, on consideration, we thought the best way to deal with that expeditiously was to reconvene the hearing so that we could hear everybody's view on that, rather than try and do it by documents.

I am not going to rehearse the process which led up to all that because we did that last time. So, really what's happened since then is that we said we'd reconvene the hearing, and we found a day, today. We said, 'Please put in further submissions to put some flesh on the bones in what had been in Network Rail's email, and if possible, do it in time to enable XC [and ASR] to respond.' Network Rail duly put in a more detailed note of what it proposed to do, or what it would be necessary to do, and ASR said they didn't have time to –

MR SUTTON: No, not for that level of change -

CHAIR: put in anything, and I don't think we heard from XC in the short timescale.

So here we are. In the circumstances, I am going to invite the Dispute Parties again to make any opening statements they want to, to supplement what is already on the table. And then we will go through our question and answer process, as follows from that, and again, when we get to the end of it, and after any further closing statements or remarks, we will try to arrive at a conclusion which we can give to you in substance, in advance of the written determination, which will follow in due course. We'll always try to give a conclusion on the day so that, hopefully, it can be implemented quickly.

Normally I would invite an opening statement from the Claimant, which is XC, but in this case, since the reconvened hearing has been precipitated by Network Rail, in effect, I'm going to invite Network Rail to make any opening statement you'd like to.

MR BRAY: I will keep relatively to the point, hopefully. So, for the reasons set out in the communication prior to the hearing that was sent by Matt Allen on 20 October, Network Rail were unable to comply with the verbal determination handed down from the previous hearing for this TTP. Since the original communication sent on 20 October, Network Rail have now done further detailed work which was the information sent last Friday at midday. And, in fact, from doing that piece of work, the position again has changed slightly in that information that was provided on 20 October stated that we wouldn't be able to achieve a TPR-compliant solution without removing a Rolled Over Train Slot from the Timetable. Network Rail have worked with both parties and we've now concluded that in fact, we can accommodate all Train Slots. However, there is a consequential impact and I'll leave it for the Panel to decide how significant that is but there is an impact on nine journey time extensions for ASR, and looking at the detailed work we've done, there's up to 37 consequential re-timings as well.

As all parties I'm sure will appreciate, and indeed the Panel appreciate, this was a complex situation, and indeed, the whole process of developing a timetable is a complex situation, and we did work with all parties to review the changes that were necessary in order to reach TPR-compliant solutions. So, in terms of what we are looking for from this hearing, Network Rail are looking for

clarity on how we should deal with what we feel is probably an unprecedented situation when exceptional circumstances haven't been declared and also we're very mindful that we're close now to the commencement of the December 2017 Timetable, and we want to work in a way that limits the impact on the passengers ultimately.

CHAIR: Thank you very much. XC?

MR THACKRAY: It's fair to say that XC's position hasn't really changed since the previous hearing and the content of our opening statement from that hearing stands. We do note that Network Rail's position has moved on since the original communication and there is now a TPR-compliant solution identified that doesn't remove any train slots from the timetable.

I think that our only final point is that, having looked at some of the journey time extensions, those are journey time extensions that exist against the currently offered December 17 timetable, some of them will be reverted back to the current May 2017 timetable and therefore wouldn't be journey time extensions against today's timetable that passengers are using. That's some, but not all, based on our initial work at least.

CHAIR: Right thank you very much, would West Coast like to say anything at this point?

MR HOPTROFF: Not at this point, thank you.

CHAIR: Okay, thank you very much. ScotRail?

MR SUTTON: An abridged version of what I was going to say; TTP1174 was heard on 11 October and in effect, reopened TTP1122, and reached a decision which Network Rail were verbally instructed to implement. ASR is awaiting its determination and the offered variation from Network Rail before updating its resource plan and timetables.

Then, on 20 October, Network Rail highlighted that the original reordering of trains looked at on 8 September wasn't achievable without a substandard TPR margin at Newton West junction. As a consequence of the above, on 27 October, Network Rail sent out a re-hearing documentation and the retiming had increased from seven ASR services requiring retiming to 37. This demonstrates how interconnected the suburban services around Glasgow are. It also shows how a small amount of late running on the West Coast Main Line can transmit delay from Uddingston Junction, in this case, to Arrochar on the West

Highland Line, a distance of over 50 miles.

The number of passengers possibly affected has increased, and based on the latest passenger counts, are now over 3,000 who could see an extension of journey time. Had these route times been sent to ASR as a normal variation request, we would have declined these retimings as they extend journey time, and ASR would require a further derogation from Transport Scotland against its Franchise Agreement, a further worsening of the journey time metric for Transport Scotland. Amended train crew book on and off times of nine diagrams. Rosters and diagrams have already been consulted with the unions. Reduced turnaround times at Milngavie reduced now to five and a half minutes. Admittedly, this is still above the five minute value but they're now five and a half minutes. Amended services are reserveable – these are for West Highland services where passengers have already purchased tickets based on departure times. Public timetables have been extracted.

ASR has held off printing out public timetables for the Lanark services, pending the outcome of a decision from the original TTP hearing. It was lucky that the North Electric, A2B and West Highland timetables had not been printed and we've now put a hold on these books as well. These books were previously not being held as we expected all retiming to be south of Glasgow Central.

From a train crew point of view, the original hearing amended 14 diagrams; this is now up to 74. It's less than six weeks before the Timetable starts and the staff reps have already gone through these diagrams and rosters have been agreed. These further retimings and book on and off times will need to be re-consulted with the trade unions at a number of depots. Based on all the points, ASR request the Panel do not amend the times of those services as offered by Network Rail, so that ASR does not have to re-extract its public timetables, amend its train crew diagrams, as this Timetable commences operation in less than six weeks.

CHAIR: Thank you. I think in view of the fact that we have heard some things for the first time there, I'd like to have a short adjournment to consider that before we kickoff with questions.

MR SUTTON: We could have supplied that information if we'd have had more time to do so. That piece of work was only finished at four o'clock last night, so no time to put it in front of the Panel. If we'd had a longer period of time we could

have shared that information. But it is, as I said, less than six weeks before the Timetable starts.

CHAIR: We'll take a short break now.

(The hearing adjourned)

CHAIR: The reason why we have taken a little time over that adjournment was really just to consider what had been said and the impact it has on us. We will be looking at that in our questioning, in terms of what has been said about the specific impact on things, and the relevance or otherwise, of that. But first, we just want to address the basic issue, based what we said our previous determination was and the reason we are back here today, Network Rail having said that it could not comply with it in a TPR-compliant way.

And I just want to put this to rest now. Are we right in thinking that notwithstanding that Network Rail's first communication from Matt Allan appeared to say the problem is that 'we cannot comply technically because we cannot find a compliant solution', that has been completely superseded by the further work you have done, which is embodied in the document Network Rail put in on Friday. And that you are satisfied that you can find a TPR-compliant solution albeit with the other knock-on effects you mention?

MR BRAY: Yes absolutely, it's the "albeit" that we're seeking clarification on, We can find a TPR-compliant solution, however, the clarification we're seeking is to understand whether these changes are what the Panel considers we're able to go and make at this stage.

CHAIR So, notwithstanding what was said in the first email, well, you have said specifically you found that you don't have to go as far as removing a Train Slot from the proposal. But it is not the case that you now believe it is not possible to comply with the determination we indicated and also come up with a generally TPR-compliant timetable plan.

MR BRAY: Correct, we can come up with a compliant plan.

CHAIR: Right. Is there anything else we want to ask on that particular topic?

MR OATWAY: No, only that some of the effects of Matt's email, the appendix to Matt's email, for example 'TPR-compliant path available until Lanark Junction, where it becomes non-compliant headway in front of 9MXX'; I'm not sure what

9MXX is, but that is not mentioned at all in your bit, that's because that's dropped away, yes?

MR BRAY: Absolutely.

MR OATWAY: Okay that's fine.

MR BRAY: The process we've gone through is one of trying different options, seeking different solutions and that's what's given us the option that we've now put in front of the Panel and the other parties.

MR OATWAY: What is 9MXX, just for...

MR BRAY: That's Virgin West Coast so it's via the west.

MR GRIMES: It's one of ours.

MR OATWAY: Oh, is it, the Class 9?

MR BRAY: Yes.

MR OATWAY: It used to be Eurostar's were Class 9.

MR PATRICK-BAILEY: You said that you've tried different options to achieve what we've got in front of us. Is it the case then that there are other TPR-compliant options that exist to achieve the outcome of the determination as well?

MR BRAY: We haven't found another TPR-compliant option, I think the best way to kind of articulate the solution that we've come up with is that everything, all the interactions, all the junction margins, headways, through the section from Uddingston Junction to the Rutherglen Junction, everything is now on minimum headways, minimum margins. So there is really – the Timetable is essentially fixed through that area.

CHAIR: Is that the same thing as saying there aren't any other options, just that...?

MR PATRICK-BAILEY: I think interpreting what you've just said is, this is the least amount of impact that you could deliver to achieve the outcome, yes?

MR BRAY: Indeed yes, I would always hesitate to say there's never another option in timetabling because the nature of it is whenever you look at something again you can often see a different option and once we found this solution we sat with David from XC and shared it with Neil at ASR as well. It was felt that it was the option that probably caused the least amount of disruption to the operators affected. So we didn't then seek to find another option after that stage.

CHAIR: Okay right, fair enough. I just wanted to clarify the reason for doing that. Fine, well in the light of that, we are minded to maintain the determination that we came to on accepting XC's proposal and doing what needs to be done in

order to do that, you having now said unequivocally it can be done. We didn't think there was any doubt about that before but there was a possible doubt raised and now that doubt has been resolved. All the same, we are going to go onto the subsidiary issue in the same way as we did at the previous hearing, in the sense of in case theoretically we are wrong on that i.e. to look at the relative merits in a Decision Criteria sort of way and in the light of the new points that have been raised for this hearing.

Before we get to that, though, I just want to revisit the question of TPR compliance, in the light of what you have now said, on the one service where previously we did not direct Network Rail to accept XC's proposal because it was said then that there wasn't a TPR-compliant solution. And in the light of what has come up in this hearing today I just want to revisit that and check whether, in relation to that service, (and I can't remember the number of it, but you will all know), we did not dig into what the lack of TPR compliance was. Everybody seemed to accept, at face value, that there was not a TPR-compliant solution for that service so we did not direct acceptance, or did not say we would be directing acceptance in respect of that. Is that still the case?

MR THACKRAY: As I understand it, based upon Network Rail's work it's the second of the sections, so 1S35 versus 2B77 addresses the issue that was previously identified with 2F33.

MR SUTTON: The highlighted matter for that was a traincrew issue rather than a TPR issue.

CHAIR: That was another issue that...

MR SUTTON: Yes, that is a part of it. We cannot fix that from a traincrew point of view.

CHAIR: Can we come to that in a minute. Just on the point of TPR compliance, the reason we excepted that from what would have become a direction to accept the whole proposal, was the asserted inability to come to a TPR-compliant solution for that but we didn't really investigate what the non-compliance was. My recollection - my understanding - was that it wasn't a knock-on non-compliance for ASR or anybody else, but that it was an immediate non-compliance by XC's own service. I may be wrong there. That is why I want to revisit it to make sure we're right on that.

MR BRAY: It is the second item on the hearing documentation provided and yes, we

have found a compliant solution to that one.

CHAIR: Right, well that's very instructive. So, as far as that particular service is concerned, the only issue is the broken driver diagram?

MR SUTTON: Yes the traincrew driver.

CHAIR: And that, as I recall, was an issue which affects that service only.

MR SUTTON: Yes.

CHAIR: For whatever reason it doesn't affect anybody else?

MR SUTTON: It's the only one where we have a driver that comes in, disposes his set and another one takes over from him. The two activities cannot take place at the same time, which it is why it requires a seven minute reversal rather than a five minute reversal, which you always end up with as a consequence of this dispute.

CHAIR: Right, just go slowly on that. Go slowly on the actual – what the effect in practice would be and how, if that is a problem, it would be resolved?

MR SUTTON: We would on the face of it either have to provide an additional driver to cover that movement, so we'd take the Motherwell driver off at Motherwell, we'd use a separate man to drive the train from Motherwell into Glasgow Central and back out again, on the five minute reverse. Or we're in a situation where we're re-writing Motherwell and Yoker depots. That's in excess of 200 crew to try and find solutions.

CHAIR: What do you mean by rewriting Motherwell and Yoker depots?

MR SUTTON: Literally re-writing, we produce traincrew diagrams for each Timetable, unlike a number of other operators, which have a fairly stable Timetable. We actually amend our diagrams on a Timetable by Timetable basis to get the most economic and productive answer we possibly can. And that would be we would have to up-end those two depots to try and recover this another way.

CHAIR: What do you mean by upend these two depots?

MR SUTTON: Re-write, change, amend.

CHAIR: Amend what?

MR SUTTON: Amend the content of the work on a driver's traincrew diagram. Such that instead of – at the moment the concern is Motherwell 1609. Motherwell 1609 will be relieved at Motherwell on the way in from having worked the train from Lanark to Motherwell. They would then require a fresh driver from another depot, potentially a Glasgow Central driver to work the train from Motherwell into Glasgow Central. The service then has a five minute reverse, so

essentially the driver changes ends. He then works it back to Motherwell, where he is relieved by the existing driver taking back over again.

CHAIR: And how does this impact the doings of 200 people?

MR SUTTON: Because as far as we are concerned, taking the 2B77 we are actually talking about, we have 202 people on that train on a Saturday and the passenger count was 86 on a Monday to Friday, those are the numbers concerned. The problem we end up with, we can no longer comply with the trade union conditions of service if we make this change.

CHAIR: Sorry, the 200 people you are referring to are the passengers on the train?

MR SUTTON: Yes, I'm referring to the passengers on the train.

CHAIR: I thought you were talking about the people at the depot.

MR SUTTON: Because we were asked for passenger numbers as part of the original TTP dispute and we supplied those for the trains concerned.

CHAIR: I am still struggling to understand why.

MR SUTTON: The rosters are agreed six weeks before a Timetable change. We are past that point. We have already – to put some context into this, we are having to introduce an additional Yoker turn to conduct a 380 following electrification of the Edinburgh to Glasgow route. That requires four drivers released three days for union consultation for one turn. We would have to go through exactly the same process for each of these 74 alterations that we are now faced with.

CHAIR: You would have to go through that process for each of the...?

MR SUTTON: Yes, so we would have to release Helensburgh, Yoker, Dalmuir, Glasgow Central and Motherwell depots to go through their diagrams again from scratch.

MR PATRICK-BAILEY: How does ASR handle changes like that? I am conscious you make a number of changes throughout the Timetable and regular Train Operator Variation Requests throughout, so how do you handle this as a matter of course?

MR SUTTON: We have to go through and consult with the unions.

MR PATRICK-BAILEY: So you have go through a relatively regular pattern that ASR would undertake.

MR SUTTON: The key thing from our point of view is once we've issued the base rosters, so six weeks after our agreement between the unions we will try to do absolutely anything we possibly can to amend past that six week point. And that's noted with a number of 'Train Operation Variations we've sent Network

Rail and if Network Rail comes to us within that period of time, we would normally decline them, especially if it affects the book on, book off time, because we have to give that to the unions to consult their members, and that's where ASLEF come into this.

MR PATRICK-BAILEY: How many of these 74 affect book on book off times?

MR SUTTON: 11 of 74.

MR PATRICK-BAILEY: And how many of those are a product of the xx15 rather than xx12?

MR SUTTON: They all are directly.

MR PATRICK-BAILEY: So none of them are as a result of the consequential re-timings, they are the effect of...?

MR SUTTON: Sorry, for the xx12 to xx15 there are two, nine are then driven by the consequentials.

MR PATRICK-BAILEY: Consequentials, thank you.

CHAIR: Sorry, have we strayed into the general effect of re-diagramming because this is still just this one service, this one – you're saying this one broken driver diagram would spread out into this consequence, or are you saying that all these knock-on things?

MR SUTTON: The question there related to the knock-ons. Going back to the...

CHAIR: I strayed.

MR SUTTON: And going back to the original question that the only way we would be able to cover that service would be providing an additional crew to cover that service. Or basically re-doing the job again completely from scratch and to see if we can cover it another way.

CHAIR: So you are saying that one possible outcome, an alternative outcome, resulting on this one service, this one broken diagram is having to look at all the knock-on for all of them?

MR SUTTON: Yes, to redo the piece of work again.

CHAIR: Well, when you say 're-do' the piece of work?

MR SUTTON: We produce our traincrew diagrams for each Timetable. It's the same task for any operator goes through, XC will do exactly the same thing. They will produce a set of diagrams and consult it with the trade unions, with the depots. They are doing the same task, all we are just saying is rather than for their service, which is I don't know how many crews you have but a relatively

smallish number, this is an intensive suburban network, which you start the domino here, it just snowballs on.

CHAIR: Would you have had to do that in any event, if you had got the times and services you bid for in the first place, which were as existing?

MR SUTTON: No we wouldn't. The point is we've changed – we amend our diagrams, our diagrams are different for each Timetable. We change from each Timetable so when we bid to Network Rail we have a set of crew diagrams. When we get the offer back at D-26 we put the two things together, change accordingly and that's us. We then go to the unions to consult with them.

MR OATWAY: But then you asked, if I remember the TTP1122 hearing correctly, you asked for a rollover timetable?

MR SUTTON: Yes because we were...

MR OATWAY: So you asked for a rollover timetable so in effect you ask for the xx15 arrival?

MR SUTTON: Yes.

MR OATWAY: And then XC did the same and asked for the xx12. Overlaid on the top of that were the TPR changes.

MR SUTTON: Which we raised as a separate dispute.

MR OATWAY: Which you raised as a separate dispute but that went through so there would have been some changes anyway. And then Network Rail, of its own volition, swaps the two and as a result of that swapping, you've done your diagramming and so on. But am I right in saying that if Network Rail hadn't done that swapping right, and you just had the TPR changes with you ASR asking for xx15 and you XC asking for xx12, we would have ended up with this?

MR SUTTON: Had that not been offered to us at D-26, that would have just gone through the process.

MR OATWAY: So in effect it's just a timing issue.

MR SUTTON: Yes, had it come out of the D-26, so with that applies...

MR OATWAY: Yes, you would have either accepted it and done your diagrams accordingly or you would have raised it as a dispute and you couldn't accept these changes.

MR SUTTON: Yes, for whatever reason, yes.

MR OATWAY: Yes.

MR SUTTON: It is timing that is our problem in this process at the moment. That's from where we – yes, sometimes.

CHAIR: Right and getting back on to the particular service, one way of avoiding that big difficulty as you see it arriving from the late timing, would be the alternative, which is another train crew.

MR SUTTON: Another member of train crew, yes.

CHAIR: Another member?

MR SUTTON: Yes, another driver in this case, because it's a Motherwell driver that's broken so yes, we need a driver. The TE is the problem, the turn is just extended by three minutes.

CHAIR: Right, so when you say another driver, do you mean employing another driver or re-scheduling a driver you've already got?

MR SUTTON: It takes over 12 months to train a driver, we would have to put another driver's diagram out, we would end up putting another member of staff on the establishment; that would then be recruited over the normal matter of course. So, we would have to cover the service as best we could for an intervening period of time. That would then become another one on the headcount, so one turn was actually two and a bit humans so we'd end up employing another two members of staff and they are about £70,000 apiece.

MR OATWAY: That sounds right, if another driver has to be – but the alternative option is, like Neil said, basically starting again from scratch to see whether you can fit the additional turn, which is, in effect, the bit in and out of Glasgow, within the current establishment by totally re-diagramming everything to try and fit it in.

MR SUTTON: Yes.

MR OATWAY: Now that may become apparent after you've done half of the re-diagramming or it might mean to do the whole lot. But you know you can – it's, as Neil said, it would mean that they would have to do the re-diagramming. And then there's still no guarantee that it will be able to be fitted. So you might still end up having to employ a driver even if you re-did the whole lot?

MR SUTTON: Yes.

CHAIR: Right well, this, I think I have got the position of that particular service and the answer is that there is a TPR-compliant solution, but there is, for that one service, an additional commercial consideration, which it would have been

relevant to take into account if the Decision Criteria had been applicable and applied.

I said we would come back to the question of the Decision Criteria on the basis that our conclusion was that this was not a case where they needed to be applied unilaterally, but in case we're wrong on that. And we went through that in some detail last time, on the basis of Network Rail's new Decision Criteria document, which it had produced as a result of the direction of TTP1122 that it was due to come up with some more data, some more considerations.

And among other things, the broken driver diagram was mentioned in that, not the particular consequences of it, it was just mentioned. Looking at the issues if the Decision Criteria were applicable, how would they have been applied? At the last hearing we went through the relative Considerations and came to the conclusion that the best one could say was that a coherent case for applying them in a particular way, as it were, favouring the swap of the arrival times, hadn't been made. Now we have some additional arguments, first in ASR's opening statement, and now with this particular issue of the broken driver diagram, to try and assess the relevance of these two, a Decision Criteria decision, if it were theoretically applicable. The question I'm asking is how important are all these considerations, including the detail relating to the broken driver diagrams but all the other things you've mentioned in your opening statement, if it has taken until now to actually flush out all this detail?

MR SUTTON: In fairness, at the first hearing - of TTP1122 - I think we were fairly clear on the effects on ASR based on what was, at that time, a straightforward swap. What's only become apparent is following that Network Rail have conducted further investigations, which were shared at 1201 on Friday, but the ramifications actually go a lot lot further as far as ASR is concerned.

CHAIR: And the possibility of those sort of ramifications, the first time you, ASR, were aware of this was when Network Rail shared that information?

MR SUTTON: We had a feeling from the original hearing, we thought there was another non-compliance there but wasn't sure. And we hadn't had an offer of Variation from Network Rail actually demonstrating the paths on paper as to where exactly everything was. It was only when they did the work and they came out with a position on Friday but we've then subsequently gone through and done the work on this lot, actually understanding what the Variation is and

that's why I'm giving you the numbers, it's 37 trains.

CHAIR: ASR mounted a challenge to the TPR changes as part of the TPR change process?

MR SUTTON: Yes, we did.

CHAIR: And then took it to appeal?

MR SUTTON: Yes.

CHAIR: Wouldn't that exercise have led you towards, if not the detail of this, i.e. the actual specific knock-ons down to the half a minute journey time extensions and so on and so forth, at least to some general appreciation that there was quite a significant, in your estimation, issue to deal with?

MR SUTTON: It did, one of the key parts, I think, which needs to be taken into account on the original hearing, which was whatever it was, TTP1064, was that Network Rail withdrew from any changes on the North Electric network and kept the changes south, on the Argyle line. Specifically as we had highlighted the North Electric, as soon as the change moved into the North Electric network we felt the whole thing did not work and Network Rail had not demonstrated a Timetable that actually delivered that. We've had subsequently changes that have been proposed for May 2018, those had been withdrawn or are in the process of being withdrawn, and that's because you put the changes for the Argyle line and the North Electric together and they do not work, and we did highlight this as part of TTP1064.

CHAIR: You highlighted that as part of TTP1064, the TPR change dispute and appeal. And despite that the appeal went against you?

MR SUTTON: Yes.

CHAIR: Why do you think that was?

MR SUTTON: Maybe because we argued it at a too general level rather getting down to the actual granularity of this train versus this train versus this margin versus this margin, would be my only guess. Rather than actually saying we said that en bloc when you combine everything together it doesn't work rather than actually taking the fact that this change versus this change may well work. But when you put this change in it doesn't work anymore.

CHAIR: You see, where I am going with this is that that rather seems the case with this as well, that getting to that level of granularity is something ASR could have done at an earlier stage, even of TTP1122. But if not then, certainly at the first

stage of this TTP1174, which was the result of TTP1122 basically saying to everybody, 'This isn't granular enough, go away and provide some more information.'

MR SUTTON: We said that as part of the discussion from ourselves and Network Rail, we have been engaged in that discussion. The fact of asking for what are all the times that flow from it and that's – as I said, it was only on Friday that the detail of every single train came out, which we've now gone through and come up with our evidence on that. When we did the original TTP1064 we did produce a timetable based on our view of what that – all the changes put together and we could not make it TPR-compliant. That was when you combined the Argyle line and the North Electric, that's the key point. TTP1064 was subsequently only the Argyle line change, not the North Electric change that was withdrawn by Network Rail.

CHAIR: So Network Rail's – without going into the detail of it, Network Rail's now TPR-compliant solution is kind of like a rabbit out of a hat, which you would say you couldn't really have worked out for yourselves, or come to the conclusion at a rather earlier stage, that there could be a solution if you look at it in more granularity?

MR SUTTON: From our point of view it is Network Rail's role to make us a Timetable offer. Network Rail have not made us a valid Timetable offer following either TTP1122 or subsequently the following TTP1174. We've not had a Network Rail offer of Variation for these trains.

CHAIR: So are you saying that it is not really incumbent on you, even in the light of the dispute that has arisen on TTP1122 and this dispute to think about and address these things until it comes up and sort of slaps you in the face with an offer of a Variation from Network Rail?

MR SUTTON: When we bid at D-40 we try to be compliant with ourselves and all other operators' trains within Scotland when we know where they are. Most other operators just bid internally and conflict free. We try to be externally conflict free as well because it makes our own lives easier, it gives certainty when we are literally producing train crew diagrams. In this case we have waited for an offer from Network Rail when we have enough things on our plate doing things related to E&G and various other problems we've got ourselves in Scotland, which we're trying to currently fix without trying to resolve this. We have

waited for an offer from Network Rail, that's been a key thing. We wanted a determination following TTP1122, a clear determination as to which way it was going to go and we just got on with it. And we still want a clear determination.

CHAIR: So when, at the first stage of TTP1174, you having become a Dispute Party - ..

MR SUTTON: We were a Dispute Party on TTP1122, yes. We had indicated we were an interested party with TTP1174 initially, yes.

CHAIR: -When you were invited to put in your case as it were, you didn't then think it was the case that all these things were sufficiently important or none of these things, are you saying you couldn't have contemplated all of these things in order to put in a more cogent detailed case than what you did, which was simply a short email saying, 'We agree with Network Rail'?

MR SUTTON: We did supply a detailed response with TTP1122, the original hearing. We did supply the detail in TTP1122 for the trains that we were under the impression that were being flexed, because those were the ones we were advised were.

CHAIR: Well indeed, but the result of TTP1122 one way or another was that there wasn't enough detail here to decide on, so everybody should go away and provide some more.

MR SUTTON: Which we did to Network Rail, we supplied all the detail Network Rail requested of us. Had we had an offer from Network Rail, an offer of Variation from Network Rail for these services with all the detail, we would have gone through it in the same way we deal with other Variations from Network Rail. We did...

CHAIR: Why did you not think it appropriate to provide that detail to...?

MR SUTTON: As an example, we did not have the detail of the XC service exactly where it was for, but on looking at 2B77; we were aware of a conflict for the West Coast service, which is why Network Rail didn't have a TPR-compliant solution to that service.

MR PATRICK-BAILEY: Are you suggesting that the Timetable as published at D-26 wasn't compliant?

MR SUTTON: Yes.

MR PATRICK-BAILEY: And therefore the Timetable as it is now is not compliant?

MR SUTTON: No.

MR PATRICK-BAILEY: Because it hasn't changed.

MR SUTTON: But there have been numerous Variation Requests from both parties, both Network Rail and ourselves, to try and fix conflicts and issues we have discovered on the Timetable, separate from this.

MR PATRICK-BAILEY: So there has been some ongoing change to the Timetable?

MR SUTTON: Business as usual.

MR PATRICK-BAILEY: Yes, quite, hence my question earlier, around not fully understanding how, so what on the face of the changes, certainly beyond the 1600 hour changes, feels relatively minor. And I would expect to see those types of changes as a matter of course, particularly with how ASR choose to manage their service throughout the Timetable.

MR SUTTON: Yes, it is only when the 16 00 one starts straying into the evening peak, the build-up to the evening peak.

MR FLETCHER: Can I just – with regard to the 16 00 hour or whatever it is called

CHAIR: I am just going to ask Network Rail if they wish to add anything and then I will ask you to comment or respond to that. Do you Network Rail want to add anything to what we've just been talking about on this? The relevance of this is to a consideration of if the Decision Criteria were applicable, how they would be applied and when they would be applied, balancing the interests of the parties. And where we have been going with this is if it was – if all these details or the consequences of a broken diagram, but also the sort of new detail that's been included in the opening statement - if that had been so important, why somehow could it not have come up at an early stage in this, and the relevance of that is because it seems that the problem now is one of timing rather than substance. Do you have anything to add on that side of the argument?

MR BRAY: Yes, I certainly will do. So, on conclusion of TTP1122 we were asked to go away and reapply the Decision Criteria, so at that stage it wasn't, in Network Rail's sense, a timing exercise, it was to reconsider and re-apply the Decision Criteria based on new information supplied. So we, at that stage, didn't look at the detail of what the timetable construct would look like. It was purely down to what decision are we making, that was the kind of exercise that we did at that point.

That then led us on to the next TTP1174, and it was only at this stage, following the last hearing, that we now looked into this in the detail that we needed to and that's led us to the stage where we are able to share the minor

details, the finer details of what's required to be done. So at no point up to now would we have produced a Variation Request because we've not -- that's not been the instruction, that's not been the requirement on Network Rail - so at this point we're really sharing that level of detail, so I appreciate what Neil's saying in terms of the time, it doesn't leave a great deal of time for traincrew alterations. However, the process that we have followed through the Panel process hasn't led us to this stage any sooner.

MR OATWAY: But it is fair to say, I think, that in both TTP1122 and TTP1174, Network Rail was asked the question, if the paths were switched, would that have any effect on anything else and the Panel was told that it wouldn't apart from the issue with the broken diagram, which ASR had raised at TTP1122 and again at TTP1174?

MR BRAY: Yes, with respect, on the first, TTP1122, we were asked to leave the room for 45 minutes. We had none of our normal IT equipment that we'd used to plan the Timetable so I remember there was David, Richard, Neil, myself and two guys back in Milton Keynes on the telephone trying to work through, in 45 minutes, a very complex scenario. And on reflection I don't think that was the right thing to ask the parties to do because it did lead us to a position where we thought there was a compliant alternative solution, which I guess then was in everyone's thinking throughout the rest of the process. And it wasn't something that we visited in a huge amount of detail until this stage here.

CHAIR: Well, this is what Matt Allen said in his first communication on this, that that was the product of a run on the hoof, 40 minutes of discussion. And on revisiting it that turns out to be wrong, but the result of that now, as I understand it, is to say - well -whatever that was, there is a TPR-compliant solution so TPR compliance somewhere previously along the line is not the issue anymore.

MR PATRICK-BAILEY: I am struggling a bit with what you [Network Rail just said, which is that the outcome of TTP1122 was for you to invite more information to make a decision around how you had used the Decision Criteria.

MR BRAY: Yes.

MR PATRICK-BAILEY: But as part of the reconsidering your decision you didn't do any timetabling work, you simply applied the information that you received on top of the Timetable as was.

MR BRAY: We received the information in respect of the timetable as it was, with the

XC service arriving at 11 15. We didn't then look at the alternatives. As I say, we'd already spent that 45 minutes looking at the alternatives. I guess our subconscious was that yes, there is a solution here so we could alternate the paths if required, but we didn't then go back and look at any detailed timing work as part of that process to see what the alternatives would look like because we, as I said, we assumed, made an assumption.

MR OATWAY: I was just going to say that whilst it was not part of the determination, TTP1122 did sort of indicate the possible outcome of a Decision Criteria application by the Panel if, all things being equal, that the majority of the services would go in in XC's favour apart from the broken diagram one. And I think there was one other, 20 12 on Saturday. So, presumably Network Rail would have, could have envisaged the fact that TTP1174 could still go that way. And therefore it would have been incumbent on Network Rail, I would suggest, to actually find out the effects if it did go that way, as to whether there were any other facts that it hasn't looked at so far, i.e. in the timetabling sense, to actually counteract that. And we could have been then talking about this at TTP1174 rather than now at TTP1174 and a half.

MR BRAY: Yes that is noted, that's a fair comment, I think I guess the thing with Network Rail is that this isn't the sole piece of work that we're having to deliver. We've got lots of other things to deliver at the moment as well, so it's trying to make sure that we give it the necessary attention but continue the timetabling process.

MR OATWAY: Yes, I fully appreciate that.

MR BRAY: No, with hindsight ...

MR OATWAY: Yes, with hindsight, yes you know at TTP1122 you could have said 'Sorry, we can't really say what's going to be affected if we switch them back again because we're going to have to do the timetabling' and then you probably would have been asked to go away and do it. And we would have come up with that after TTP1122 let alone TTP1174 but anyway we are where we are.

MR PATRICK-BAILEY: There is a key learning point there. I don't - I struggle - to see how the information presented at TTP1174 could possibly be viable if we only had one timetable and would apply the information on top of it and we had a set of assumptions for the other outcome, if you see what I mean. So we have

some tried and tested information for one outcome and we have some basically just a set of assumptions for the other, which suggests to me that there is definitely some learning around how Network Rail prepares for any kind of Decision Criteria application in conversation with the Panel.

MR THACKRAY: If I may, I say that actually stretches back to May because the decision at May was between the switching of the trains as then offered at D-26 and the set of assumptions that were then looked through. If a decision is to be made during the preparation period it should be at this level of detail on both sides. The conversations in May were about shall we switch the order of the trains to allow ASR to go first or shall we leave it as it currently is and obviously the latter wasn't fully possible because of what we're looking at now. So we couldn't have fully applied the Decision Criteria, even back in May without this level of detail on both sides of the decision to be made. Ideally, obviously, involving ASR, having prepared their diagrams that go in alongside the bid at D-40.

MR SUTTON: We don't share diagrams in D-40. We are not required to do so.

MR THACKRAY: No, had this been provided during the preparation period at this level of detail you would have been able to look through the diagrams that you'd have prepared at that stage. And at that stage there would then have been a broken diagram because it would have been planned on the five minute turnaround.

MR SUTTON: We would have found another way or obviously there would have been additional plus ten at Motherwell, which would then have led to a separate dispute, yes.

CHAIR: I will come back to that in a minute; just getting back to clear out the broken driver diagram issue in respect of that one service. Viewing that as a commercial matter coming under the whatever it is, commercial service Consideration in the Decision Criteria, you ASR sort of roughly put a figure on that of £70,000 for the driver.

MR SUTTON: Yes, we pay them £44,000 but their actual cost to the business is about £70,000 a year.

CHAIR: Because of the on-costs or...?

MR SUTTON: Well, factors of training, maintaining competency and such things of that sort of nature. Their actual take home is £44,000 but the costs within the

business as used is £77,000. To cover one term it needs 2.2 drivers.

CHAIR: Right.

MR THACKRAY: They are very expensive personnel.

CHAIR: I was going to ask what XC's sort of equivalent commercial position was?

MR THACKRAY: The drivers, they are undoubtedly costly to recruit. I think it will probably be that there's a top level cost there, there's a chance that working through it all again, whilst it would take resource within the train planning team, it could be delivered at zero cost potentially in terms of recruitment.

CHAIR: No, what I'm asking is what, if one were balancing this in a Decision Criteria way, what are – just remind us what XC is saying is the cost of avoiding that on that service?

MR THACKRAY: On that particular train we addressed it in our Sole Reference Document for the first hearing of TTP1174 in 5.3(f), part five where we said with regards to the specific decision for Network Rail to favour 2B77 SX ahead of 1S35, Network Rail concluded the impact on the broken driver diagram outweighs the modelled £42,000 per annum loss to XC and we stated at that point we are unsure how a driver diagram would be quantified in terms of impact. And to what extent work had been sort of gone through to look at how it could be resolved. Because the – whilst we were sort of aware of the complete package of evidence shared by ASR with Network Rail after TTP1122, what's presented in the Decision Criteria documents simply said a broken driver diagram outweighs the £42,000 loss that we'd modelled due to the extended journey time.

CHAIR: Yes, and then we just pointed out that on the other similar service there was a – you ASR have put in 8 thousand or something.

MR SUTTON: Was that the Saturday equivalent?

CHAIR: It was the Saturday.

MR SUTTON: Which amount I don't think is about the Saturday diagram. I don't think it's broken in the same way so it's yes.

CHAIR: Thank you. Just then finally getting back to the £72,000 for a driver plus everything, I have to ask the HMRC-type question; are you ASR really saying that all that additional cost plus the circumstantial cost results from that single requirement?

MR SUTTON: Yes.

CHAIR: And it is wholly and necessarily and exclusively incurred for that one circumstance and that having that additional driver wouldn't somehow be factored into your roster and your other services?

MR SUTTON: Yes, we would base it on minimal complement: if we don't need to employ them, we don't employ them. Like all the businesses here we try to keep our costs to a minimum. The drivers are actually our largest cost.

CHAIR: Indeed, but having incurred the cost, what I'm saying is might not there be some compensating benefit other than just solving this particular problem?

MR SUTTON: Probably not, actually.

CHAIR: So, to attribute the whole cost of £70,000 whatever it is.

MR SUTTON: If a service wasn't required we wouldn't require the resource. If the service was left arriving at the time xx 12 we wouldn't incur the cost, we wouldn't require the additional resource if it was offered.

CHAIR: No, I understand you're saying that. What I'm putting to you is that nevertheless having incurred the additional cost, the weight of that cost might be mitigated in applying the resource as a benefit to other areas of your business.

MR SUTTON: The only benefit that I can see would be from reducing, potentially, Motherwell's average turn length. At a depot, normally within our terms and conditions, you have an average number of hours per week a driver is required to work. An average turn length for a depot is normally based on nine hours. If you're above nine hours then potentially you are increasing more spares into the roster. That would be maybe the only slight mitigation that this would reduce Motherwell's average turn length but the cost would still be the same.

MR PATRICK-BAILEY: I assumed that to get any kind of benefit you'd actually have to go through the re-diagramming exercise in totality anyway so it's kind of six of one and half a dozen of the other.

MR SUTTON: You end up in the same place; it would be difficult to say that there would be any direct savings from having that first.

CHAIR: Getting back to the overall consequences, not just of that particular service, but if you have to incur that particular cost. Of all the other things you say would happen if at this stage Network Rail were to have to comply with a direction of this Panel to effectively, as we would put it, accept XC's proposal, the way you think of that clearly is as a swap for what is on the table at the moment?

MR SUTTON: Yes.

CHAIR: I mean I would be inclined to think of it as, well, just going with what was proposed. But I understand you think of it as a change to what is there at the moment?

MR SUTTON: Yes.

CHAIR: You, ASR, have effectively acknowledged that it is what we've come to call a timing problem, meaning that it's late in the day. Had it all happened one way or another before, then you would have dealt with it in the ordinary course of business?

MR SUTTON: Yes.

CHAIR: Would you, ASR, say that that timing difficulty and the additional cost of it to you in dealing with it, if that's the way the decision goes, arises from the way Network Rail has dealt with it? You are in dispute about it, you haven't really put in a submission and you haven't made any claims other than to say well, Network Rail says we don't agree with it.

MR SUTTON: In some ways, because it has happened very, very late in the process, had we ended up with the determination going in favour of XC for all the trains at TTP1122, at that stage in the process we'd have still incurred the additional cost of a crew diagram but the additional consultation with the unions regarding the other services would be less. Whereas the situation we are now in is that we'd have to re-release all the depots I listed previously to get them to go through the diagrams again. And we have a risk at this late stage there may be a failure to agree from the union side. And we could end up with industrial relations problems as a consequence of it. I know it's a very minor, very petty thing but we are talking ASLE&F here and that is possible, that is distinctly possible.

CHAIR: I suppose I'm thinking about rather more tangible, foreseeable costs than, you, know, a dispute breaking out, such as the cost of re-printing stuff.

MR SUTTON: We are lucky we haven't printed timetables, we are very lucky and that was purely just by the fact that we had – we'd cleared the printers, the printers hadn't actually started printing it. We've cleared nine of our 21 books that are already printed and luckily none of those ones relate to this dispute. We'd held off on the Lanark service specifically because we were waiting for the determination for TTP1174, from the original hearing. But the other ones we'd

cleared to print and we've subsequently stopped them being printed. Network Rail haven't paid for one of our reprints of books for a few years now where late changes have had to be made.

CHAIR: One of the things the Panel at this stage can award is some form of compensation award to a party. Now, you have not sought that, I am sure Network Rail in the first place would say if you haven't sought it you can't get it, but that notwithstanding, if we were to conclude that it was appropriate, would that...

MR SUTTON: The element of...

CHAIR: Some sort of compensation be something you think you could prove, i.e. that there was something to be compensated for?

MR SUTTON: The additional crew, the additional diagram yes, because that would be over and above our current number so yes, that would be a direct cost to business. Without the initial stages before, when the roster would be covering a rest day working, which is £270 a shift.

CHAIR: So you're saying, if, basically, is if the timing problem hadn't arisen because it's all gone so late in the day, you would have somehow covered the cost of...?

MR SUTTON: We would have ended up with putting an additional turn in but at that point we probably wouldn't have looked to recover back from Network Rail. I mean we had the dispute registered for the December Timetable relating to our services being diverted from Braidhurst to Wishaw to reverse as a direct consequence of the TPR changes which Network Rail introduced. But from a contractual basis we had no means within our Track Access Contract to seek any form of compensation. In fact we've had to train I think it's in excess of 280 crews on that new section of route. But from a Track Access point of view we have no means of recouping that cost. So it's the same with this one, we would have just sucked it up and taken it on the chin, I suppose.

CHAIR: If you had simply been awarded the...?

MR SUTTON: Had it gone the other way, yes.

CHAIR: But with whatever knock-on effects that the TPR changes led to.

MR SUTTON: Yes, because it doesn't infringe, we have no mechanism with our Track Access Contract. There is no journey time protection, there's no interval protection in our Track Access Contract, the same as there isn't on XC's, for these services, which is why we removed the dispute for us because we had no

contractual basis.

CHAIR: Okay, but there are not any other costs of the knock-on effects in respect of all the things coming into place?

MR SUTTON: No the typeset is relatively small, it's only tiny.

CHAIR: Okay, so that wouldn't be something you would take up?

MR SUTTON: No, because it's a relatively small amount of cost.

CHAIR: Right, and the one area is the broken diagram costs; that, is not something you thought...?

MR SUTTON: Had it happened at D-26.

CHAIR: ...sufficiently important to include in any submission to this Panel for the...?

MR SUTTON: If we ended with the situation where the broken diagram was a consequence we would look to cover that initially under rest day working, there would be a direct cost for doing that until we're in a position where we can actually incorporate it within the base plan. And as I said, that would be a rest day payment, five days a week for crew.

CHAIR: Right, so all that is leading me to the conclusion not only that there is no point in looking at a form of compensation award as part of this for ASR because it is not something that is really of interest - or do you think it is?

MR SUTTON: The only material element would be the rest day working for the crew, that's the only material element.

CHAIR: Yes, but there is also, in the larger sense, to my mind it highlights the conclusion that overall the disruption is not that significant.

MR SUTTON: The TPR changes that were applied by Network Rail to the Argyle line actually cost ASR two additional crew diagrams. That's before this dispute happened because of the times that the trains were re-timed but we did not, as I said, going back to my previous comment about the Track Access...

CHAIR: That is the result of the TPR changes.

MR SUTTON: Yes.

CHAIR: You challenged that through the process?

MR SUTTON: Yes.

CHAIR: That is not the result of any conduct on the part of Network Rail in terms of compiling a Timetable and this process, which is what we looking at now.

MR SUTTON: No, that is just a feature of the TPR changes that we've had on the Argyle line, that cost the addition of two diagrams for ASR.

CHAIR: I think that is all I want to ask on the whole balancing decision issues and the non-compliance. I would just like to turn back to the question of exceptional circumstances, which was raised by XC in their submission at the first hearing. Our provisional conclusion, at the end of the first hearing [day], was that actually we did not need to find exceptional circumstances in order to make the decision that we were minded to make because we would not be making a decision which substituted the Panel's timetabling decision for that of Network Rail, which is what the Network Code says requires something called 'exceptional circumstances', but we would be making a direction that requires Network Rail to achieve a particular result without specifying the means by which it is to do that.

I think that is still going to be the conclusion after today but nevertheless, again, as an alternative and in case that first conclusion is wrong, we did consider whether, as it had been raised, the particular circumstances did amount to exceptional circumstances which would have justified us actually substituting a decision in detail for that of Network Rail. And at the first hearing we concluded and announced this at the end, that we didn't think that the mere fact of late timing, proximity to the Timetable date of these determinations and decisions being made amounted to exceptional circumstances. Because, as was said, there are many cases where decisions come up right next to the Timetable date and have to be dealt with.

I just want briefly to ask your views on whether, in the light of what we have now, we should reconsider that, i.e. whether it might be considered exceptional circumstances, particularly in view of what was said in Network Rail's first email, which is what precipitated this reconvened hearing. He [Matt Allen] said in his email to the ADC Secretary 'I am not aware of this scenario having occurred before, and seek your guidance as to how you would recommend Network Rail to move forward', so I suppose that was echoed in Network Rail's opening statement today, that it is an unprecedented situation. So, in that light I am really just asking - revisiting the situation - might this be considered exceptional circumstances the way it's gone? We've heard that it is now a timing problem and the sort of cost. Would you think that might be exceptional circumstances for the purposes of that provision in the Network Code?

MR BRAY: We still do not see that it is exceptional circumstances. I think D5.3.2 applies, which is where one would expect some directions, which if stated, is what would be in the determination in terms of the outcome that we should reach.

CHAIR: Okay. I should point out in that context, that in terms of getting to where we want to get as to how we direct Network Rail to act and what we can do, we have been reminded of the relevance of D5.6.1 about implementing an appeal ruling. 'Network Rail shall be bound and empowered to take such steps as may be necessary to implement all rulings made by a Timetabling Panel or the ORR pursuant to this Condition D5. All such steps shall be taken promptly.'

That, to my mind, lends weight and power to the ability to go under D5.3.1(a), which empowers the Panel to direct a result to achieve without stating the steps to be done; D5.6.1 empowers Network Rail to take those steps, i.e. to, for example, to make these knock-on decisions provided they are compliant. One of the questions, sorry, just reverting on the question of compliance, I had meant to ask - I am right in assuming that your knock-on re-timings, your TPR-compliant solution, all those knock-on adjustments, re-timings, are within Network Rail's Flexing Right as far as ASR's Track Access Contract is concerned?

MR BRAY: There's no flexing we would seek to make that would compromise our compliance with the Track Access Contract.

CHAIR: None of all those knock-on services are hard wired to a level which...?

MR BRAY: No, it's not like we've got a number of missed station calls or something like that, no. Could I seek some further clarification on D5.6.1 please? Are we saying that Network Rail has the power, and that's how I read it, to implement these rulings and we don't then need consent from ASR to accept these changes before we make them effective in the Timetable?

CHAIR: We have been considering that and the effect of that on the fact that the offer has already been made. I think our provisional conclusion is that, yes, D5.6.1 does empower Network Rail to – yes it's referred to in D4.7 - D4.7.1 says everything's binding unless changed by an appeal through Part D, which could either be to us or then to ORR.

MR BRAY: So that then makes it a fresh appeal to the decision?

CHAIR: That decision shall be binding save to the extent that it is changed by an

appeal authorised by Part D, i.e. by this TTP Panel.

MR BRAY: Thank you, that helps.

CHAIR: The only reason I am hesitating slightly is because I have slight doubt as to where D5.6.1 leads. I am not sure, off the top of my head as it were, whether that would empower Network Rail to actually breach a Track Access Contract in some way, for example, to go outside the firm rights. Fortunately that's not something we need decide on but it just gives me a little doubt in interpreting that, but I think coupled with D4.7.1 the answer is yes, that does give the necessary teeth to a D5.3.1(a) ruling that doesn't otherwise have it, the power to give a ruling specifying a result to be achieved but not the steps to be taken. Those steps are empowered.

MR BRAY: As a result of this?

CHAIR: As a result, provided they are otherwise within the contract.

MR BRAY: Or even if not within the contract in terms of if it becomes an appealable decision and that was one of the facets of the appeal?

CHAIR: I think where we have got to, as far as the Panel are concerned, we can arrive at a decision on what we've heard so far without going into further detail on the specifics of the compliant solution plan i.e. going through all or any of those services point by point to see if what you Network Rail propose is actually viable and is accepted as viable. Does anybody else wish to ask anything on that, or explore that further, XC in particular?

MR THACKRAY: No thank you.

CHAIR: I ask that, among other things, to try and make sure that we don't have someone come back, including Network Rail, at another stage saying, 'Actually we've looked at it again and it doesn't work for that reason or another'. Are we all happy we don't need to drill down into the detail of that but can take it as presented? Okay, therefore we can safely conclude, for the purposes of coming to a decision, that it is accepted on all sides that there is a TPR-compliant solution to granting, to accepting XC's original Rolled Over Access Proposal for the xx12 arrival times for those seven services, notwithstanding that there are other considerations in respect of all of them, and one in particular, which have been evaluated and which we will evaluate again for the purposes of coming to the conclusion of this, and to confirm that nobody is going to come back and say effectively 'we were wrong'. We're all happy with that?

Okay, thank you. Before I invite you to say anything else you want to as a conclusion, there is just one other matter I think I need to raise, which is the question of costs. There have been made no submissions as to costs so far but I am going to invite submissions. I am going to suggest that we adjourn for lunch and invite you to come back afterwards to make any submission you want to on the question of costs and I am really talking about the costs of this hearing rather than the previous hearing. No submissions were made for that but it is unusual that we have had to have this extra hearing. I will then invite you to make any closing remarks you wish to. I hope that maybe after another adjournment we will be able to indicate the guts of what we decide.

(The hearing adjourned)

CHAIR: We're going to press on. Toby Patrick-Bailey has to go shortly. But we can get maybe get through part of all or anything that needs to be said on the subject of costs before we get to closing remarks. I am going to ask XC first, if you want? Any submission in relation to costs?

MR THACKRAY: No, we're not seeking any costs. D5.7 says that Network Rail have had to be unreasonable or make a decision in bad faith to claim costs and we don't think that's been the case here. So, D5.7 refers to the liability of Network Rail in terms of, 'Where a decision of Network Rail is overturned on appeal, Network Rail shall only be liable ... in damages in respect of a decision where it is made in bad faith or was unreasonable'.

CHAIR: That's not what we're talking about. Sorry, I should have been far clearer in talking about costs. Costs is the costs of attending a hearing where the Rule is

....

MR SKILTON: ADR Rules H59 and H60.

MR THACKRAY: We're still not seeking anything.

CHAIR: Sorry. I should have been clear. Yes, H59 and H60. H59 says 'The Hearing Chair shall have power to order one or more Dispute Parties to meet part or all of the Costs of the Timetabling Panel and of any other Dispute Party assessed by such means as the Hearing Chair shall determine.' H60 says 'An order for Costs shall only be made where the Hearing Chair is satisfied that either: (a) the case of the relevant Dispute Party shall have been so lacking in merit that the

reference should not have been made (or defended); or (b) the conduct of the relevant Dispute Party before or during the reference was such as to justify an award of Costs being made against it (or them).’

Now, I should have been clear in inviting you. I assumed that you would be familiar with that. And the reason I am raising the subject of costs at all is because part of the costs that are relevant are the costs of the ADC itself of the hearing and I’m only raising it in relation to this hearing – of the two things I’ve just read out. I’m not thinking at all in terms of limb (a), that the case was so lacking in merit the reference shouldn’t have been made. It is purely the issue of conduct being such as to justify an award of costs. And I should be quite clear, what that means is not improper conduct. It’s just conduct; what’s been done or not done; being factually, logically, the case of incurring costs that would not otherwise have been incurred. And the reason I raise it, is because in this case – and it’s only relevant to this hearing – this hearing has come about through Network Rail making a statement to the ADC, to the Secretary, after the last hearing stating effectively its inability to comply with the decision that had been indicated in advance of the written determination: its inability to comply technically. And that, as a result of further work by Network Rail, has been shown to be not correct. And therefore, in a purely causative and not fault attributing or blame attributing – but just purely, in a factually causative sense – the reason why this hearing has taken place and therefore people have incurred costs in relation to it is because that first statement was made which has subsequently – very quickly subsequently – proved to be not correct. So, it’s in that light that I was asking XC first to make a submission. I am contemplating making an order of the costs of the ADC for this hearing for that reason. And I was going to ask Network Rail to speak to that, if you wish to.

MR SKILTON: Don’t forget ASR.

CHAIR: And I will, I think having said that, I will ask Network Rail to speak first and then ASR.

MR BRAY: Network Rail do not support the award of any costs. Neither party, XC or ASR, cited costs as a request at any stage in this process, taking into account what you have just said there. The only cost that may be relevant is the cost for convening this hearing today. I don’t see there is any further cost that could be awarded, from reading the Rules. And if there was any other costs claimed by

any parties, these should be addressed as a commercial claim rather than through this process, within the Timetabling Dispute process.

CHAIR: As a commercial claim, how – you mean under the Track Access Contract?

MR BRAY: Yes, the conversation we had previously about costs that may be outside of the timetabling process but related to the timetabling decisions that will be made.

CHAIR: I'm pretty confident that the sort of costs we're talking about would not come under that, as distinct from what we were talking about before, which would be cost incurred as a result of the decision rather than as a result of the hearing having been heard. I think costs in the sense of the parties' costs and the ADC's costs as a result of having the hearing, can only be dealt with under this. Before I come back to the parties on that, do you have anything else to say about the ADC's costs of the hearing –?

MR BRAY: Well, I accept –

CHAIR: – if I were to propose to make an order for paying the ADC's costs of the hearing because of the circumstances I've outlined?

MR BRAY: We'd accept if it was cost of the ADC, I think. There's obviously a lot of learning to take away from this process – and hindsight's a wonderful thing and there's lots of things we'd do differently if we were in this situation again. But, no, I wouldn't be in a position to put up much of an argument against that.

CHAIR: Thank you. ASR, do you –?

MR SUTTON: Yes, from our own point of view, obviously, the costs that follow from this would be the costs of releasing the traincrew, if you actually go back through the diagrams again. And that relates to Motherwell, Yoker, Helensburgh, Bathgate, Airdrie and Glasgow Central.

CHAIR: No, let me stop you there. Those are not the kind of costs we are talking about. We talked about that before the break. We're talking about purely the administrative costs of – in this case, ASR – participating in this hearing. This hearing, not the previous one.

MR SUTTON: Okay. No. We don't have – I travelled down on a sleeper – that didn't cost anything. I'm travelling back up on a Virgin pass and that doesn't cost anything. So, there is nothing on that basis. But the result of this hearing will drive a further cost for ASR beyond that.

CHAIR: That's another matter.

MR SUTTON: Yes.

CHAIR: Okay. XC, anything else to say?

MR THACKRAY: No, the same as with ASR, we travelled on a free pass.

CHAIR: So, in effect, you're saying you don't have any costs?

MR FLETCHER: Nothing demonstrable.

CHAIR: So, the principle doesn't matter anyway. In that case, I will ask you to make any closing statements you wish to. Again, I think, starting with Network Rail.

MR BRAY: We don't feel there's anything further to add following the previous two hearings and today's hearing; everything's been covered that was required to be covered so no further comments from us.

CHAIR: Okay. Thank you. XC?

MR THACKRAY: No great further comments. Just to note a point from our opening statement as well that some of the increased journey times highlighted by Network Rail in their TPR-compliant solution that's been proposed aren't journey time increases against the currently operating Timetable so the passengers won't see any impact from these changes. And equally we do also believe that some of the non-compliances that it seeks to fix are non-compliances that exist in the currently published Timetables as well and therefore aren't strictly related to the decision at hand here. I think beyond that, other than saying thank you to the Panel for again giving their time, nothing further from XC.

CHAIR: Thank you. ASR?

MR SUTTON: Nothing further to add. I think we've come through it all with the previous hearings. We've got nothing further.

CHAIR: Thank you. And West Coast?

MR HOPTROFF: Nothing to add.

CHAIR: Right. Thank you. In that case, I'm sorry to have you going in and out, if you'll just give us a couple more minutes and hopefully we'll be in a position to give you an indication of the determination of this hearing.

(The hearing adjourned)

CHAIR: Thank you for waiting. I just want to outline for practical purposes what the decision following today's reconvened hearing will be, in advance of the

written-up version of this with the reasons. And obviously this will be by reference to the provisional indication I gave at the end of the first hearing.

The first point is that the decision of principle we reached at the first hearing stands in respect of the applicability or otherwise of the Decision Criteria; that's to say, the power of Network Rail to apply the Decision Criteria in the abstract – as we put it – where we concluded at the last hearing that, departing from the decision of TTP1122, we do not think Network Rail under the Network Code has the power or the right to apply the Decision Criteria in the abstract, generally, to just any part of the process of compiling the Timetable; nor to exercise its Flexing Right – and apply the Decision Criteria to the exercise of a Flexing Right – in the abstract, unless there is a decision to be made on accepting an Access Proposal or Rolled Over Access Proposal because it conflicts with another Access Proposal or Rolled Over Access Proposal.

Where there is no such conflict – as was the case here – we concluded that the need or entitlement to exercise a Flexing Right in relation to an otherwise unconflicted Proposal doesn't arise. The exception to that being if there is some other overriding contractual or technical reason for rejecting or changing an otherwise unconflicted Access Proposal – the obvious example being non-compliance with the TPRs. And at the first hearing we concluded that was the case for one of the services in question – 1S35, I think – where it was stated and accepted on all sides – as far as we understood – that awarding the xx12 arrival time to XC for that would have in some way not been compliant with the TPRs. So, our decision – as announced at the end of the first hearing day – was that the arrival time of xx12 would – for that service only – would not be awarded to XC; but that the arrival time of xx12 in respect of all the other six services would be awarded to XC. Our decision on that issue now, in the light of the new evidence that we've heard about TPR-compliant solutions, is that the arrival time of xx12 for that service also should be awarded to XC because it has been confirmed that there is a TPR-compliant solution to deal with that.

That's the basic decision in respect of the order of the arrival times, which was the main substance of the dispute.

We think it appropriate, as we did after the first hearing, to indicate – as it were – an alternative decision, in the event that we are thought to be wrong on that first decision as to what the position would be if the Decision Criteria had

been applicable, as to how they have in fact been applied. And the answer there, as far as we're concerned, is that – the same as we said at the end of the first hearing – we don't think Network Rail has made the case in the revised and augmented Decision Criteria document it produced, as directed by TTP1122. We do not think it has made the case on the Decision Criteria, even if they are applicable – which we say they're not – for rejecting XC's Rolled Over Access Proposal and swapping the arrival times around with, as it happens, ASR.

Going through Network Rail's application of the Decision Criteria Considerations, we concluded before that it was rather incoherent – the way the weightings had been applied versus the applicability of the Criteria. It just didn't add up to making the case, in a situation where in effect the onus is on Network Rail (as the holder of the ring in the process) to make a case for altering or not going with an otherwise compliant Access Proposal. And we still think that's the case.

One point which has arisen on that is, again, in respect of that service which was previously thought to be non-TPR-compliant, but which is now compliant, but where there was the additional issue of the broken driver diagram. We think that even in comparing the costs and factoring that into the Decision Criteria process, the case hasn't been made out on application of the Decision Criteria, even taking that into account. And one additional reason for that in respect of specifically the effect of the broken driver diagram, is the fact that that issue only arose after the decision had been made by Network Rail to change it the current Timetable. The Decision Criteria, if they are applicable, should have been applied by reference to the circumstances at the time when the original decision was made. And if they had been applied then, as we understand it, the broken driver diagram wouldn't have arisen because if the proposal had been accepted originally then ASR would have kept the same times that it had previously and would have done its diagramming and rostering accordingly and wouldn't have incurred a problem.

So, that problem, which was factored into the later construction of the application of the Decision Criteria, is actually just another example of what came to be acknowledged by ASR as a timing problem. It arose because that's how the process goes and we had to do certain things in advance of knowing what the outcome would be. As a result of which, we've got to incur some costs

in undoing them when we know how it all pans out. And, as we understand ASR's view on that, that's all part of the circumstances of participating in the process. ASR don't apparently think they need to claim any compensation in respect of that timing difficulty.

MR SUTTON: We didn't in relation to Wishaw, the reversals at Wishaw. That's cost us significant amounts of money. But to my understanding, there is no mechanism under the contract to reclaim those costs, so we haven't. That's a separate discussion for another day. But that's my point.

CHAIR: I'm not familiar with that. But if that's the case, the mechanism is to bring a dispute?

MR SUTTON: Yes.

CHAIR: – at the time. That, in a longish way, is the – as it were – the alternative conclusion on the substance of applying the Decision Criteria and the result that would have had.

The other issue we considered was the supplementary one of “exceptional circumstances” for the purpose of the particular powers under the Rules to grant an award. In short, we've reached the same conclusion as we did after the first hearing, that whatever exceptional circumstances may be for the purposes of a tribunal panel substituting its decision for that of Network Rail, the mere fact of it butting up close to the Timetable is not “exceptional circumstances” by itself because everybody seems to accept that it happens all the time and sometimes decisions happen in much closer proximity to the Timetable Date than even this. Notwithstanding that in this case, the fact that it's getting close to the Timetable is the product of an unusual set of iterations of the same problem – coming back and having several goes at it – so unusual as to have Network Rail saying at one stage, ‘unprecedented’. Nevertheless it seems to be accepted that it's not exceptional for those purposes.

That notwithstanding, the exceptional circumstances issue is again only a theoretical alternative issue because we feel we can decide this not on the basis of substituting our decision for Network Rail's decision but under the power to direct the achieving of a particular result without specifying the precise means by which it's to be achieved. So, that – what we will be directing in the determination – will be, as we said again at the end of the previous hearing, –to accept XC's proposal in respect of the arrival times for those particular – now all

seven – services, but without specifically directing Network Rail to do it in the way in which they have outlined in that paper, but secure in the knowledge that – they having outlined it in that paper – there is at least one TPR-compliant solution – there may be others – open to Network Rail. And it is up to Network Rail to do that as they think appropriate.

And then finally, we address the matters of Costs. The Dispute Parties don't want to pursue an application for Costs, so we won't make an award of costs or consider it in respect of them. But we will make an award of the costs of the ADC – of this hearing only – under the conduct limb. And I emphasise again, this is not a question of improper or blameworthy conduct, it's just that – as was very fairly accepted by Network Rail – the holding of this hearing and considering the matter afresh, arose from the original statement, which was later countermanded, that there was a problem over compliance with the previously indicated decision, which has turned out to be not a problem.

I think that's all I need say. So, thank you very much for your attendance and there will be a written determination to that effect in due course.

MR SUTTON: Just one question – are Network Rail able to make an offer prior to your written determination coming out? Are we allowed to issue an Operator Variation Request? If a written determination is, let's say, in a week or two weeks' time – I don't want to wait another two weeks. I want this out and closed now.

CHAIR: Yes, they can.

MR SUTTON: Good.

CHAIR: They can indeed. And indeed, the point of trying to give you a reasonably coherent summary of the decision at this stage is to enable you to get on with it.

MR SUTTON: Yes. That's exactly the view we take.

CHAIR: The other thing I meant to mention – sorry – in my summing-up was the provision we referred to, D5.6.1, which states that Network Rail is empowered to do what it needs in order to comply with a Panel decision. So, yes, not that it's for us to do that, but Network Rail is encouraged to do it and to do it with the agreement of the other parties and hopefully not come up with another previously unperceived problem. Right. That's it. Thank you very much.

(The hearing concluded)

Annex E to Timetabling Panel determination of reference TTP1174

Extracts from the Network Code PartD

D1.1.11 Flexing Right: a right, exercisable by Network Rail in allocating a Train Slot in the New Working Timetable, to vary a Train Slot:

- (a) sought in an Access Proposal; or
- (b) arising from a Rolled Over Access Proposal; or
- (c) sought in a Train Operator Variation Request,

in any way within and consistent with the Exercised Firm Rights of the relevant Timetable Participant or, where the Train Slot which is being varied is a Strategic Train Slot, in any way without limitation.

D2.5 Content of an Access Proposal

2.5.1 Each Access Proposal shall include as a minimum in respect of each Train Slot, save to the extent that Network Rail expressly agrees in writing to the contrary:

- (a) the dates on which Train Slots are intended to be used;
- (b) the start and end points of the train movement;
- (c) the intermediate calling points;
- (d) the times of arrival and departure from any point specified under paragraphs (b) and (c) above;
- (e) the railway vehicles or Timing Load to be used;
- (f) any required train connections with other railway passenger services;
- (g) the proposed route;
- (h) any proposed Ancillary Movements;
- (i) any required platform arrangements at the start, end and all intermediate calling points;
- (j) any relevant commercial and service codes; and
- (k) the proposed maximum train speed and length and, in relation to a freight train, the proposed maximum train weight.

2.5.2 Where an Access Proposal has been submitted by a Timetable Participant, Network Rail shall be entitled to require any further information in respect of that Access Proposal that it reasonably considers to be necessary or beneficial to the preparation of the New Working Timetable.

D2.6 Timetable Preparation – D-40 to D-26

- 2.6.1 During the Timetable Preparation Period (D-40 to D-26) ("Timetable Preparation Period"), Network Rail shall compile the proposed New Working Timetable.
- 2.6.2 Between D-40 and D-26:
- (a) all Timetable Participants shall have access to the evolving draft of the New Working Timetable either:
 - (i) by way of "read-only" remote computer access or such other electronic means reasonably requested by a Timetable Participant ; or
 - (ii) to the extent that a Timetable Participant does not have the required systems to facilitate remote computer access, by read-only computer access upon attendance at such of Network Rail's offices specified by Network Rail;
 - (b) Network Rail shall consult further with Timetable Participants in respect of their Access Proposals and the evolving draft of the New Working Timetable, and shall continue to answer enquiries and facilitate and co-ordinate dialogue as stated in Condition D2.3.4.
- 2.6.3 In compiling the New Working Timetable, Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2.

D4.2 Decisions arising in the preparation of a New Working Timetable

- 4.2.1 In compiling a New Working Timetable in accordance with Condition D2.6, Network Rail shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in this Condition D4.2.
- 4.2.2 Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:
- (a) a New Working Timetable shall conform with the Rules applicable to the corresponding Timetable Period;
 - (b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;
 - (c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right;
 - (d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority:
 - (i) first to:

- (A) the Firm Rights of any Timetable Participant that will subsist during the whole of the Timetable Period and which have been Exercised; and
- (B) any rights Network Rail has for Network Services included in the Rules;
- (ii) second to Firm Rights of any Timetable Participant, that were in force at the Priority Date but will expire prior to or during the Timetable Period and which have been Exercised, provided that Network Rail considers (acting reasonably) that new Firm Rights, substantially the same as the expiring rights, will be in force during the Timetable Period;
- (iii) third to Contingent Rights or any expectation of rights of any Timetable Participant which have been Exercised, provided Network Rail considers (acting reasonably) they will be Firm or Contingent Rights in force during the Timetable Period;
- (iv) fourth to any:
 - (A) rights or expectation of any rights of any Timetable Participant notified in an Access Proposal submitted after the Priority Date but before D-26 in accordance with D2.4 and D2.5. Where more than one set of rights or expectation of rights are so notified, capacity is to be allocated in the order in which Access Proposals containing details of the rights (or expectations thereof) are submitted to Network Rail; and
 - (B) Strategic Paths contained in the Strategic Capacity Statement.

D4.6 The Decision Criteria

- 4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective").
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the "Considerations") in accordance with Condition D4.6.3 below:
 - (a) maintaining, developing and improving the capability of the Network;
 - (b) that the spread of services reflects demand;
 - (c) maintaining and improving train service performance;
 - (d) that journey times are as short as reasonably possible;
 - (e) maintaining and improving an integrated system of transport for passengers and goods;
 - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
 - (g) seeking consistency with any relevant Route Utilisation Strategy;
 - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
 - (i) mitigating the effect on the environment;
 - (j) enabling operators of trains to utilise their assets efficiently; and
 - (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates.

4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in the light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.

4.6.4 The Objective and the Considerations together form the Decision Criteria.

D5.3 Powers of dispute resolution bodies

5.3.1 In determining any appeal pursuant to this Part D, any Timetabling Panel or the Office of Rail Regulation (as the case may be) may exercise one or more of the following powers:

- (a) It may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;
- (b) It may direct that a challenged decision of Network Rail shall stand;
- (c) It may substitute an alternative decision in place of a challenged decision of Network Rail;

Provided that the power described in (c) above shall only be exercised in exceptional circumstances.

D5.6 Implementing and appeal ruling

5.6.1 Network Rail shall be bound and empowered to take such steps as may be necessary to implement all rulings made by a Timetabling Panel or the Office of Rail Regulation pursuant to this Condition D5. All such steps shall be taken promptly.