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***TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE***

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**Determination in respect of disputes reference TTP1383, TTP1384 and TTP1385**  
(following a hearing held at 1 Eversholt Street, London, on 30 October 2018)

**The Panel:**

Clive Fletcher-Wood                      Hearing Chair

Members appointed from the Timetabling Pool

Pawel Nowak	elected representative for Non-Franchised Passenger Class
Jason Bird	elected representative for Non-Passenger Class, Band 2
Mark Sleet	appointed representative of Network Rail

**The Dispute Parties:**

For First Greater Western Ltd ("GWR")

Robert Holder	Network Access Manager
Peter Bridges	Possession Strategy Manager

For DB Cargo (UK) Ltd

Graham White	Access Manager South
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For Network Rail Infrastructure Ltd ("Network Rail")

Richard Turner	Customer Relationship Executive
Tony Worgan	Access Planning Manager – Western Route

**In attendance:**

Tony Skilton	Committee Secretary
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## **A Introduction, Substance of Dispute and Jurisdiction**

1. Disputes TTP1383 and TTP1384 were raised by GWR and DB Cargo respectively on 3 September 2018 in respect of Network Rail's decision, notified on 30 August 2018, to apply late notice overnight Restrictions of Use in the Swindon area commencing on Monday/Tuesday 3/4 September 2018 (in Week 23 of 2018/19). On 11 September 2018 GWR also raised Dispute TTP1385 in respect of Network Rail's decision, notified that day, to apply a late notice Restriction of Use in the London (Paddington) area on the night of Thursday/Friday 13/14 September 2018 (in Week 24 of 2018/19).
2. It was accepted by both GWR and DB Cargo that these Disputes were unusual, in that they related to Restrictions of Use which had already been imposed. Although it would not be open to the Panel to reach any decision affecting the imposition of the Restrictions of Use, both GWR and DB Cargo still wanted the Disputes to come before a Panel. I am satisfied that even though the RoUs had already been imposed, the matters in dispute raise grounds of appeal which may be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.
3. In its consideration of the Parties' submissions and its hearing of the Disputes, the Panel was mindful that, as provided for in ADR Rule A5, it should 'reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis'.
4. The abbreviations used in this determination are set out in the list of Parties above and in this paragraph 4:

"ADR Rules" mean the Access Dispute Resolution Rules  
"Chapter H" means Chapter H of the ADR Rules  
"EAS" means the Engineering Access Statement  
"ORR" means the Office of Rail and Road  
"Part D" means Part D of the Network Code  
"RoU" means Restriction of Use

## **B Background, history of this dispute process and documents submitted**

5. On 2 October 2018 the Allocation Chair ordered that the three Disputes should be resolved together on the grounds that they concerned the same or similar subject matter and that it would be in the interests of efficient and fair resolution to do so. I was appointed as Hearing Chair on that day and the date of the hearing was set for 30 October 2018. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide Sole Reference Documents. The proposed Panel hearing was notified generally by means of the Access Dispute Committee's website.
6. On 11 October 2018 GWR and DB Cargo served their Sole Reference Documents in accordance with the dispute timetable. Certain of the points which they raised called for clarification, both to assist the Panel in its consideration of the issues and to assist Network Rail in the preparation of its response document; Directions were accordingly issued to the Parties on 14 October 2018.
7. After considering the responses to these Directions received from GWR and DB Cargo, I issued a Note to the Parties (on 18 October 2018). In it I sought to summarise the substance of the Disputes, suggesting that in effect the claim of GWR and DB Cargo could

be re-phrased simply as saying that Network Rail had failed to comply with the provisions of Part D of the Network Code and/or the relevant Engineering Access Statement in imposing the RoUs. Both Parties agreed to this simplification of their respective claims. In the light of this, on 19 October 2018 I issued a Note indicating that it would be sufficient for Network Rail to provide an abbreviated form of Sole Reference Document in response to the issues raised by the two operators. On 22 October 2018 I issued a further Note to the Parties in which I set out what I expected to see addressed in Network Rail's Sole Reference Document.

8. On 23 October 2018 Network Rail served its Sole Reference Document in accordance with the dispute timetable. I considered that certain further factual information explaining how the decisions to impose the RoUs were reached within Network Rail would assist the Panel at the hearing and later that day issued a further Note. Network Rail provided this further information on 29 October 2018.
9. ADR Rule H18(c) requires the Hearing Chair to review the Parties' submissions to identify any relevant issues of law raised by the dispute. To the extent that any issues of law arose, these were addressed in the Directions and Notes which I issued.
10. The Sole Reference Documents, the Directions and Notes and associated correspondence are available on the Access Disputes Committee's website.
11. I confirm that the Panel has read all of the papers submitted by the Dispute Parties. I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel over the course of the dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarised in the course of this determination.

### **C Outcomes sought by the Parties**

12. GWR and DB Cargo sought a determination that Network Rail had failed to comply with the provisions of Part D of the Network Code and/or the relevant Engineering Access Statement in imposing the RoUs. In summary, on issues of principle GWR and DB cargo were seeking Observations and Guidance on remedies to ensure that operators are properly consulted in accordance with Part D, with an effective right of appeal, even if RoUs are needed at short-notice.
13. In its response Network Rail made a well-judged concession that it had failed to comply with the provisions of Part D of the Network Code and/or the relevant Engineering Access Statement in imposing the RoUs. It sought an outcome on matters of principle, that the Panel should: '.. provide guidance to Network Rail and Operators in respect of timings for late notice possession requests'.
14. It was in response to this last request that I decided that one of the tasks which the Panel could most usefully undertake would be to examine the circumstances of these RoUs, to decide whether they fell under the 'emergency situation' envisaged in the EAS. While any such cases will be fact specific, a decision on this point might provide useful guidance to the industry.
15. The second task would be to ask whether Operators should have an effective remedy available to dispute short-notice possessions; if so, to offer Observations and Guidance on such remedies. To this end I invited the Parties to be prepared to make submissions on

whether the powers of a Hearing Chair to amend the procedure for a Timetabling Panel extended to providing an appropriate remedy, or whether a formal introduction of an abbreviated procedure into Part D would be required.

16. These were therefore the issues before the Panel.

#### **D Relevant provisions of the Network Code and other documents**

17. The versions of the Network Code Part D and the ADR Rules dated 12 July 2017 were applicable to these dispute proceedings. Condition D4.6 of the Code, The Decision Criteria, is of relevance and is attached at Appendix "A" whilst relevant extracts from the current (14 July 2017) version of the "Procedure for Altering Engineering Access Statement or Timetable Planning Rules other than through the Twice-Yearly Process Having Effect from a Passenger Change Date" are in the attached Appendix "B".

#### **E Submissions by the Dispute Parties**

18. For the reasons explained above, by the beginning of the hearing the thinking of GWR and DB Cargo had moved on from the arguments included in their Sole Reference Documents. Each of them made an opening statement; these appear in Appendix "C".

19. Network Rail did not think it necessary to make an opening statement. I endorsed the view of its representatives that they had said all that needed to be said on Network Rail's behalf.

20. In the circumstances of this Timetabling Panel hearing it proceeded primarily by way of a discussion between the Panel and the Parties, rather than the normal process of submission and counter-submission, with questions. It is for this reason that this determination does not include the usual record of questions and answers.

#### **F Oral evidence at the hearing**

21. Although I am adopting this customary heading in a written Panel determination, as already explained the hearing did not follow the normal procedure. The only point that it was open to the Panel to determine formally was whether or not Network Rail had complied with Part D of the Network Code and/or the EAS, which had already been conceded by Network Rail. Following my preliminary discussion with the Panel, I therefore made it clear that the Panel would have no difficulty reaching a finding to this effect. The Panel would also direct Network Rail to follow the proper procedure in future, reminding Network Rail of the points made by the ORR in its Determination of the appeal against TTP210.

22. The hearing then turned to the question of whether Network Rail's decision to impose the RoUs fell within the definition in the EAS (at 2.4.3), which reads: '*Where a need arises to amend Engineering Access Statement/Timetable Planning Rules to cater for urgent safety requirements or other emergency situations, all parties concerned will co-operate in accelerating the normal timescales in this Procedure commensurate with the urgency of the circumstances*'. As it was clearly not responding to an urgent safety requirement, the Parties were asked to express their opinion on whether the circumstances leading to the imposition of the RoUs amounted to another '*emergency situation*'. Hardly surprisingly, Network Rail said yes, GWR and DB Cargo said no. The Panel's consideration appears below.

23. The final issue discussed was what process should be available to operators in the event of very short-notice RoUs or other possessions being taken by Network Rail. It was explicitly recognised that this Panel could only make recommendations on this point, not reach any binding determination. We quickly dealt with the question as to whether there should be such a process, by noting that even in the event of the accelerated processes envisaged in Part D and the EAS, each decision reached by Network Rail was to be reached having applied the Decision Criteria and was subject to an appeal to a Timetabling Panel. We interpreted this as meaning an effective appeal mechanism, however little time was available.
24. The Secretary advised the hearing that although only a limited number of disputes are registered in respect of short-notice decisions, he has on occasion been unable to assemble a Panel to determine such disputes. On some previous occasions, therefore, the dispute concerned had effectively been abandoned by the operator concerned, which was therefore left without a remedy.
25. Using these Disputes which are subject to this determination as an example, GWR and DB Cargo regarded this as an unsatisfactory situation. The Network Rail representatives reminded the hearing that they saw themselves as representing only the Great Western Route, not Network Rail at a national level, but having said, that they did not disagree.
26. The timings set out in Chapter H of the ADR Rules do not address the need for decisions to be reached urgently when necessary. The Dispute Parties felt that the best solution would be for Chapter H to be amended to introduce an appropriate procedure, if appropriate modelling itself on the ability of the Court to grant injunctive relief when justified by the circumstances.
27. The Panel indicated that it was prepared to include a recommendation to this effect in its Observations and Guidance; further, any of the Dispute Parties (or other operator) could seek to have Chapter H amended through the appropriate industry procedure. These processes are not quick, however, so the question arose as to what procedure might be adopted to deal with cases of this kind in the short-term.
28. Chapter H gives power to a Hearing Chair, where appropriate, to '*adapt the procedures adopted in respect of each dispute to reflect its specific requirements in terms of subject matter, timescales and significance. All procedures adopted must reflect the Principles and this Chapter H*' (Rule H16). Further, in Rule H20, this power is expressed slightly differently, '*Upon appointment the Hearing Chair may give directions as to any or all aspects of the procedures to be followed. The Hearing Chair shall have power at any time to make or amend the procedure to be followed by the parties in the TTP. The directions shall be in accordance with the Principles and this Chapter H and with any mandatory time requirements*'.
29. While the limits of a Hearing Chair's powers to amend procedures have not, as far as I am aware, been tested, in the Determination of the appeal against TTP1064 the ORR reminded the industry of these powers.
30. Prior to the hearing I invited the Parties to be prepared to make submissions as to whether a Hearing Chair's powers to amend procedures could extend to abbreviating the procedure to be able to reach a determination in a much shorter period than usual. In the discussion on this point a distinction was drawn between circumstances in which the Secretary was able to obtain a Panel, and those where he was not able to do so.

## G Analysis/Observations and Guidance

31. The first question was whether in deciding to impose the RoUs Network Rail was faced with an emergency situation of the kind envisaged by the EAS. The Panel was assisted by what it thought to be a clear and honest submission by Network Rail giving the background. In considering this question the Panel had considerable sympathy for the Network Rail staff formally making the decisions, as it was quite clear that as a result of earlier failures in planning and executing work relating to both Great Western electrification and Crossrail there was both external pressure and high level pressure from within Network Rail for the RoUs to be imposed regardless, and clearly without the process required by Part D being followed.
32. Network Rail must recognise, however, at all levels, that such conduct amounts to a breach of the provisions of Part D and, at worst, could be regarded as seeking to avoid the possibility of any effective remedy if imposing short-notice RoUs which will obviously affect passengers and freight customers.
33. Whatever Network Rail thought internally, the Panel concludes that the phrase 'other emergency' must be interpreted on an industry-wide basis, and that this was not an emergency on this basis.
34. The Panel recognises that decisions of this kind are necessarily fact-specific, and that this decision is only guidance to industry parties, but hopes that it might be useful as guidance.
35. On the second question, of the need for an effective appeal process, the Panel concluded that the provisions of Part D dealing with abbreviated timescales when short-notice requirements emerge, with the exception of urgent safety requirements, all state that Network Rail's decisions are subject an appeal to a Timetabling Panel. The Panel has no hesitation in concluding that this must mean an *effective* right of appeal, however it is to be achieved.
36. In such a dispute it is obviously incumbent on the Secretary to establish whether a Panel can be assembled. If so, if necessary a hearing could be conducted by telephone conference call. This Panel assumed that for a Hearing Chair to amend the procedures to that extent would probably be regarded as acceptable were that procedural point appealed to the ORR.
37. If, however, the Secretary was unable to assemble a Panel, or even a less than complete Panel, could there still be a remedy? While this is only a personal opinion and cannot bind any of my fellow Hearing Chairs, given my view that there should be an effective remedy by way of appeal against all decisions reached by Network Rail (with the exception of urgent safety-related decisions), if similar circumstances were to arise in future I would be prepared to amend the procedure to hear the dispute on my own if this were the only way to obtain a determination (and to issue a significantly abbreviated form of written determination). I am conscious of the reference to '*any mandatory time requirements*' in Rule H20, but these are not defined and given the broad powers of a Hearing Chair I cannot see why any time requirement in Chapter H should have mandatory status.
38. In such circumstances I would encourage whichever party was disappointed by my determination to appeal, to obtain a ruling from the ORR as to whether amending the procedure to this extent had extended the elastic of the powers of a Hearing Chair to amend procedures beyond breaking point.

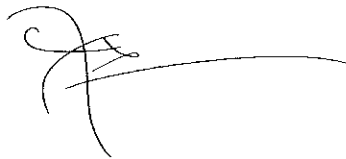
39. In summary, therefore, the Panel recommends that Chapter H should be reviewed to include an effective appeal procedure if short-notice RoUs are imposed, noting that unless and until Chapter H is amended I at least consider that the powers of a Hearing Chair to amend procedures could be used to provide an effective appeal process as a last resort.

40. ADR Rule A7 provides that in reaching a determination each and every Forum shall:

*(b) be bound by any relevant decision of the ORR on a Regulatory Issue and any relevant decisions of the courts.*

## **H Determination**

1. Having carefully considered the submissions and evidence, and based on my analysis of the legal and contractual issues, it is my determination that in imposing the RoUs which are the subject of this Dispute hearing Network Rail failed to comply with the provisions of both Part D and of the Engineering Access Statement.
2. Network Rail is reminded of the views of the ORR expressed in the appeal against TTP210 on this point, so whatever internal pressures may exist, Network Rail should ensure that future decisions are reached only in compliance with the provisions of Part D.
3. I confirm that, so far as I am aware this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Clive Fletcher-Wood  
Hearing Chair  
8 November 2018



## APPENDIX "A"

### EXTRACT FROM THE NETWORK CODE, PART D (July 2017)

#### 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.

## APPENDIX "B"

### Procedure for Altering Engineering Access Statement or Timetable Planning Rules other than through the Twice-Yearly Process Having Effect from a Passenger Change Date

2.4.1 This Procedure has been devised in accordance with Network Code Condition D3.4.3 to provide a means of altering Engineering Access Statement and/or Timetable Planning Rules other than through the twice-yearly process having effect from the Passenger Change Dates. It supersedes the interim arrangements included within certain Train Operators' Track Access Agreements and within certain Regional Engineering Access Statement and Timetable Planning Rules documents.

2.4.2 This procedure will be used by Network Rail to add, substitute or delete engineering access opportunities contained within Engineering Access Statement. All possessions so agreed will be regarded as being within Engineering Access Statement. Network Rail is committed to the achievement of the Informed Traveller deadlines resulting in details of amended train services being available 12 weeks before the date of operation. Consequently, wherever possible, Network Rail will consult with Timetable Participants regarding possessions and other capacity restrictions which are disruptive to agreed train slots in sufficient time to allow details of those disruptive possessions to be included in a Confirmed Period Possessions Plan which will be published 26 weeks prior to the start of each 4-week period.

2.4.3 Where a need arises to amend Engineering Access Statement/Timetable Planning Rules to cater for urgent safety requirements or other emergency situations, all parties concerned will co-operate in accelerating the normal timescales in this Procedure commensurate with the urgency of the circumstances.

#### 2.4.4 Changes Initiated by Timetable Participants

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#### 2.4.5 Changes Initiated by Network Rail

2.4.5.1 Network Rail may propose changes to any part of Engineering Access Statement/Timetable Planning Rules.

2.4.5.2 Network Rail shall notify to all Train Operators affected details of the proposed change including a concise explanation of its reasons. Proposed changes to Engineering Access Statement shall be notified by Network Rail individually by e-mail.

#### 2.4.6 Response by Train Operators

2.4.6.1 Each Timetable Participant receiving notification of a proposed change in accordance with paragraphs 3.3.2 above will consider that proposal and respond to Network Rail within 10 working days from receipt of the notification, indicating:

2.4.6.2 its agreement to the proposed change or

2.4.6.3 details of a counter-proposal and an explanation of its reasons or

2.4.6.4 in the case of Timetable Planning Rules items such as section running times, a request that a joint investigation is carried out.

2.4.6.5 Any Train Operator whose response is not received by Network Rail within 10 working days will be deemed to have agreed to the proposed change and will forfeit any right of Appeal.

#### 2.5 Decision by Network Rail

2.5.1 Network Rail shall give due consideration to responses received from Timetable Participants in accordance with paragraphs 3.4.1 or 3.4.2 above and shall decide which changes, if any, should be made to the Engineering Access Statement/Timetable Planning Rules.

2.5.2 In reaching its decision, Network Rail shall have due regard to the Decision Criteria in Network Code Condition D4.6.

2.5.3 Network Rail will notify its decision to each affected Timetable Participants within 5 working days of the last date for receipt of responses under paragraph 3.5.1 above.

2.5.4 Any Timetable Participant, if it disputes Network Rail's decision, may Appeal to a Timetabling Panel and any such Appeal will be dealt with as though it had been made in accordance with Network Code Condition D2.2.8. Any Appeal must be referred to the Access Disputes Secretary in accordance with the timescales shown in Condition D5 (i.e. within 5 working days of notification by Network Rail of its decision).

## APPENDIX "C"

### Opening statements made to the hearing

#### By GWR

1. This is after the event. It is being pursued by GWR because it believes a system needs to be in place whereby late notice possession changes are able to be made solely in an environment where open decisions can be made that clearly meet Decision Criteria given the weightings that comply with the Decision Objective or are determined by a fair and timely disputes process.
2. The Network Code intends that the normal Informed Traveller process be accelerated when the industry finds that it is not possible to meet the ideal public train service alteration deadlines of twelve weeks out. This is a wise move as it is inevitable that on occasion Informed Traveller cannot be met if the industry's best interests are to be served.
3. The current Engineering Access Statement contains (as it is required to do by the Network Code) the process to be followed in this regard. It has not taken the Network Code literally but has instead (possibly by pure drafting error) limited changes post Informed Traveller to those of a safety or emergency nature. These are not defined but could for instance apply to rectification of a broken rail, or advice that a landslip, snowdrift or a severe weather route prioritisation strategy will be ongoing. These are operations driven. The EAS therefore precludes occasions where in the industry's interests a possession could be taken outside Informed Traveller for commercial reasons, whereas the Network Code actively seeks the provision.
4. To seek to define "emergency" so that it includes commercial examples will again limit the scope of late possessions to those within the definition, and there are bound to be examples on occasion where it is in the interest of the industry to implement outside this scope.
5. That leaves (a) amending the EAS at the next opportunity to widen the scope to fit the intent of the Network Code; and (b) having a process in place to ensure Decision Criteria and Objective driven decisions apply.
6. Without publication of the application of the Decision Criteria after review by Network Rail of toc and foc comments, the affected toc or foc cannot be sure that the decision is sound. Doubt regarding motive is then possible especially when alternatives have been offered by the toc most affected by any delay to completion of infrastructure enhancement.
7. No alternative seems to be possible to either (or a mixture of) (a) an injunction process to apply where a stakeholder believes criteria have not been met even where Decision Criteria application has been published; or (b) a swift Hearing process to determine compliance with the Network Code in a particular case.
8. A change to the EAS (for instance to define "safety" and "emergency" or to remove these conditions) can be proposed by Network Rail or any toc or foc, and be consulted the industry for implementation.
9. A change setting up an injunction could be through a change to the EAS, or a change to the Network Code. Again any party in the industry could propose this for consultation for change.
- 10 It is our understanding that the ORR through its Determination of the Appeal against TTP102 determined that the Panel should have set out the process in that case that NR should have followed.

#### By DB Cargo

In Week 23 of this year Network Rail proposed a week of additional midweek night possessions between Didcot and Wootton Bassett to (as described by Network Rail) complete "construction ... ready for testing and commissioning the following weekend".

We are now approaching the 5 year anniversary of the start of additional access for electrification on Wales and Western route, especially for additional midweek night access between Didcot and

Wootton Bassett so the diversionary route via the Berks and Hants is certainly a familiar one for DB Cargo and we would not normally dispute possessions of this type that have been proposed and a decision issued in a timely manner. The reasoning behind this formal dispute is the timescales involved, with an initial proposal received on the preceding Wednesday and a large degree of uncertainty as to whether the possessions would be taken that continued through the subsequent days.

Network Rail in their Sole Reference document state that "this decision was taken under the basis that there was diversionary route for most of the trains affected". Whilst this statement is indeed true it masks a lack of understanding of both the Industry and their own organisations' train planning timescales. As I have detailed in my paper the proposal was sent after the deadline for Informed Traveller and the ongoing uncertainty resulted in missing the deadline for A for C and subsequently requiring submission as VSTP's. Network Rail was not able to offer any additional resource to process these VSTP's and required a number of phone calls at a senior level for the trains to be eventually timed; the last being received on the Monday afternoon.

It should be borne in mind that if we did not have schedules for those trains they would not have run; these were trains that had already been confirmed as running with our customers who would then be severely inconvenienced should the trains have subsequently been unable to run. In these circumstances we cannot plan for what might not happen. At a practical level the diversion itself requires additional traincrew and also traincrew with different route knowledge which in itself added even more uncertainty to the plan at very late notice.

Network Rail asserts that they used the Decision Criteria but given that this was not communicated we are unable to understand the reasoning behind it; Network Rail in response to GWR's dispute seems to place commercial interests of Network Rail above those of the Timetable Participants. There are also a number of references to the 'Hendy' dates and requirements for which the dates seem to be completely non-negotiable, even when the need to meet those dates risks the commercial interests and the subsequent reputational damage to ourselves.

With this dispute hearing DB Cargo is seeking guidance as what should be considered 'reasonably practicable' timescales? The Panel should note that if a decision had been issued prior to 09 00 on the Wednesday morning then DB Cargo would not have formally disputed these possessions. And in addition that whilst Network Rail asserts that Condition D3.5.2 entitles 'them' to prescribe what is a reasonable timescale, the timescales involved here meant that Condition D3.5.3; which should protect DB Cargo's interests, could not have been met.