

TRANSCRIPT OF HEARING OF TIMETABLING DISPUTES TTP493, TTP494 AND TTP495

Tuesday 18 September 2012, after hearing of dispute TTP518

MR BRANDON: I have written three opening statements so I will kind of address each one individually.

So the first one, then, Timetable Dispute TTP493: Grand Central has brought this dispute on the basis of Network Rail's incorrect interpretation of Conditions D2.4.3 and 2.4.4 of the Network Code and an e-mail to Grand Central from Andy Lewis. This e-mail states clearly that the paths would not be worked on until after the Timetable Offer Date. Quote:

"As we are now in the middle of validating the December 2012 timetable the only option we have left is to revisit this path (applying specifically to 1D93 SO and 1A68 SX) and any alternative solutions you may have, after the December 2012 offer on June 8th."

The e-mail was reluctantly complied with by Grand Central and on 30 April a letter was sent to Dan Grover at Network Rail outlining this and a number of other concerns. A meeting was held between Grand Central and Network Rail on 2 May to discuss these concerns. There had been no further response from Network Rail on these points until this dispute was raised.

The effect of the e-mail sent by Andy was that Grand Central's planner sought to comply with Network Rail's guidance and so did not submit a revised Access Proposal until after 8 June, the Timetable Offer Date. However, he worked closely with Network Rail's planners immediately after that date to identify a possible alternative path.

The e-mail from Andy Lewis is perfectly clear in that it states:

"...the only option we have left is to revisit this path and any alternative solutions you may have, after the offer date on June 8th."

However, in Network Rail's response to TTP493, paragraph 6.3.2 contradicts the statement made by Andy Lewis. It states:

"If an alternative Access Proposals (i.e. an alternative solution) other than the existing Priority Date Notification Access, had been received, Network Rail would have gone back to working on the Grand Central PDNS Access Proposal before working on any Access Proposal made post D-26."

Network Rail had been very clear in the e-mail from Andy Lewis and so the matter was escalated to the local CRE team to resolve, specifically the letter of 30 April and the meeting on 2 May. No action was taken.

The Panel is asked to confirm that the e-mail statement and actions by Andy Lewis placed Network Rail in breach of the Network Code by refusing to consider Access Proposals other than after D-26, the Timetable Offer Date.

Grand Central is seeking Network Rail to re-examine the 1518 departure from Sunderland utilising its flex under the Network Code to full effect. In addition, Grand Central also seek assurances that Network Rail does not impose arbitrary new timescales in the development of any future Working Timetables.

Moving on to TTP494:

This dispute identifies that Network Rail incorrectly applied the provisions for the creation of a Prior Working Timetable and failed properly to allocate paths in accordance with Part D 4.2.2 of the Network Code.

The Prior Working Timetable is an important part of the process that leads to the creation of a New Working Timetable. Its purpose is to allow Network Rail to manage network capacity efficiently and have clarity on what paths may not have Access Rights. It is therefore vital that Network Rail uses due diligence in creating a Prior Working Timetable and does not just issue the previous Working Timetable.

From its response, it appears Network Rail is not certain whether it actually issued a Prior Working Timetable.

Network Rail's Defendant's response, paragraph 6.2.2 states:

"Had a Prior Working Timetable been published, Network Rail does not agree with the assumption made by Grand Central that this would have excluded the 1B88 SX 1608 Kings Cross to Newark Northgate."

However, paragraph 6.2.3 acknowledges that a Prior Working Timetable was issued. Alliance is clear that Network Rail issued this on 27 January 2012 (as detailed in Annex C of the Sole Reference Document). The timescales in which it was created will have ruled out any review of Access Rights not utilised or paths operating without Access Rights. We do not accept the view put forward by Network Rail that it was right to issue a Prior Working Timetable that contained the 1608 Kings Cross to Newark, an East Coast service. This was not the path East Coast wanted in its Priority Date Notification Statement nor is it what Grand Central wanted. Network Rail has not justified the inclusion of this train to Newark.

In paragraph 6.2.4, Network Rail has identified that both the East Coast 1608 and the Grand Central 1608 were dealt with in accordance with paragraph D4.2.2(iii) and applied the Decision Criteria. This application of D4.2.2(iii) is incorrect. The East Coast Access Proposal did not contain all the information required to make it a compliant bid and, in addition, it included alternatively proposals which effectively conflicted with each other. Network Rail should have requested a revised Access Proposal under paragraph 2.4.7. Had Network Rail followed the process with East Coast properly, then the revised Access Proposal of East Coast would have received a priority under 4.2.2(iv) and not (iii). Grand Central received the correct priority under 4.2.2(iii). East Coast therefore had a lower priority bid, but Network Rail has treated the Access Proposals with the same priority.

In paragraph 5.10 of Network Rail's Defendant's statement, Network Rail state that:

"Network Rail took a collaborative approach with the operators in terms of progressing these [new] proposals...New aspirations or amended aspirations that required any further information that was not evident in their Priority Date Notifications were discussed with operators initially rather than being rejected."

If Network Rail had applied the Network Code correctly rather than adopt a "collaborative" approach, then East Coast would have had to have submitted a revised Access Proposal. In any event, Grand Central has a higher priority under paragraph 4.2.2, Part D of the Network Code.

Finally, in paragraph 6.3.2 Network Rail states that:

"Grand Central is not disputing Network Rail's application of the Decision Criteria to decide between competing bids for the same timetabling slot."

This statement is incorrect. The evidence of our dispute of the application of the Decision Criteria can be seen from letters from Alliance to Network Rail on 27 April, as shown in Annex F of the Sole Reference Document, and in Alliance's Sole Reference Document in paragraph 6.2, page 9. Alliance states that application of the Decision Criteria was incorrect. However, the point is that Network Rail has not applied the Code in this manner and so the application of the Decision Criteria is irrelevant.

Grand Central is seeking that Network Rail apply the correct priority in creating the New Working Timetable and that Network Rail path the 1608 Kings Cross to Wakefield Kirkgate service as originally bid. In addition, it is important that Network Rail in future comply with its obligations under the Network Code in relation to the Prior

Working Timetable. Grand Central seeks assurances that the Prior Working Timetable will not be just a re-issue of the most recent Working Timetable.

On to TTP495:

The issue in dispute here is the way in which Network Rail has prioritised Access Proposals in the timetable process between week D-40 and D-26. Grand Central submitted a compliant Access Proposal at the Priority Date for 1N93 as the 1323 London Kings Cross to Sunderland. One reason Network Rail rejected this service was because there was a conflict with 6N50.

6N50 did not appear in the Prior Working Timetable issued by Network Rail. This service was bid for as a Train Operator Variation. This was confirmed by Fiona Dolman in a letter to Alliance Rail on 22 May, as shown in Appendix D of the Sole Reference Document. In this letter she states:

“We have received a spot bid from GBRf for an additional train in the Dec 2012 timetable.”

This train was 6N50.

The offer letter to Grand Central listed that 1N93 was rejected because it conflicted with 6N50. As a Train Operator Variation it does not have a higher priority than a compliantly bid Grand Central Access Proposal submitted at the Priority Date.

Regarding Network Rail’s Defendant’s response, we have the following comments:

Page 14, paragraph 6.1.2, Network Rail states in relation to 6N50 that “this was not the reason for rejection of the bid”. This assertion is repeated in paragraph 6.2.1. However, the offer letter issued to Grand Central clearly rejects 1N93 because of conflict with 6N50.

In paragraph 6.3.1, Network Rail says that “at no point has 6N50 incorrectly been given a higher priority than it should have during the New Working Timetable preparation.” This statement is incorrect as 6N50 appeared in the earliest versions of the New Working Timetable, despite not being bid for at the Priority Date and not having Firm Access Rights.

The issue to be confirmed by the Panel is to ensure Train Operator Variations bid for after the Priority Date do not receive a higher priority than bids for services enjoying Firm Rights and bid compliantly at the Priority Date.

Thank you.

(Pause)

THE CHAIR: Thank you very much. Network Rail, please.

MR A LEWIS: TTP493 to 495. Non-provision of a Prior Working Timetable and general adherence to the Network Code.

The matters that are referred to the Panel's attention are generally covered by three key elements:

- (i) TTP493 - Network Rail's decision to reject Grand Central's new Access Proposals for 1A68, the 1518 Sunderland to Kings Cross, and 1N93 1323 Kings Cross to Sunderland on 14 April 2012, midway through the Timetable Preparation Period.
- (ii) TTP494 - The matter in dispute is Network Rail's failure to issue at D-45 the Prior Working Timetable.
- (iii) TTP495 - The matter in dispute is Network Rail's failure to correctly prioritise Access Proposals during the Timetable Preparation Period.

Taking those one by one, TTP493:

In terms of adherence to the Network Code, with the exception of delivering a Prior Working Timetable in a correct format, Network Rail believes it has acted properly, reasonably and in the best overall interests of the industry. The Network Code is the recognised tool that we must use to support our decision-making as to how the Rights and new Access Proposals of Timetable Participants are incorporated within the New Working Timetable. Network Rail is effectively accountable for translating customer requirements for access to the network into a safe and reliable timetable plan. The effective execution of this process, and hence the production of a robust timetable, is critical to efficient use of timetable capacity and the industry's delivery of train performance plans.

Network Rail does recognise its obligation to be compliant with its network license and the cross-industry Track Access Agreements in respect of the production of a National Rail Timetable, and the timetabling process outlined in Part D of the Network Code.

After taking a view that a significant amount of work had taken place on Grand Central's Significant Change document first of all, and then the Priority Date Notification Statement, all of which had failed to find pathing solutions at that time, the decision therefore was taken on 14 April to halt any further work on the existing Grand Central's PDN submission as the continued optioneering of these trains was now beginning to add a significant risk in terms of our delivery of the remaining amount of validation and the

delivery of other Timetable Participants' PDN submissions.

TTP494:

The Prior Working Timetable is until December 2012, something that has never really been requested by any other operator or in turn provided by Network Rail. However, as Grand Central rightly highlighted, Network Rail should have been in a position to provide this document to ensure full compliance with the Network Code and the associated Production Schedule. Network Rail did actually provide a Prior Working Timetable of sorts, which was effectively a WTT, but we were reminded on a couple of occasions that that was not actually the format that was expected.

Remedial action has actually been put in place relatively quickly and for the May 13 timetable a submission was made to operators on July 7 in the recognised format, or requested format, sorry. In light of this, we must not lose sight of the original stance taken from Network Rail that provision of a Prior Working Timetable would not have affected any of the decisions taken on the structure of the New Working Timetable which was subsequently compiled with.

TTP495:

In terms of correctly prioritising New Access Proposals during the Timetable Preparation Period, Network Rail firmly believes it has correctly followed the conditions of D4.2.2 to determine which Timetable Participants New Access Proposals should be included in the New Working Timetable.

6N50 was not the reason for rejecting Grand Central's 1N93 service. Network Rail actually only made the decision to progress 6N50 when we formed a view that 1N93 could not be pathed due to numerous existing clashes on the East Coast Main Line, and when we were then - we then looked at the next level of priorities, as described in the Network Code, which then incorporated 6N50 and allowed us to work on that accordingly.

So, in conclusion, Network Rail's main responsibilities are to operate, maintenance, renewal of the network in order to satisfy the reasonable requirements of users of railway services and funders. An efficient and effective timetabling process, focused on capability and network capacity and performance, are crucial to the industry's success. Network Rail asks the Panel to determine that the correct decisions have been made which impact Grand Central by Network Rail during their compilation of the December 2012 New Working Timetable.

(Pause)

THE CHAIR: Right. Thank you very much. I think I am going to ask this at this stage, does anybody at this stage, in either Grand Central or Network Rail, have anything they wish to add to what they have said, including by way of, as it were, comment on the other, having heard it? I will offer you that opportunity now.

MR GROVER: One thing I would just like to add on the comment in Alliance's opening statement, is that the letter they wrote to us, to the CRE team, on 30 April following the meeting on 2 May to which no response was given, they wrote subsequently on 10 May to Fiona Dolman covering largely the same issues and Fiona replied on 22 May, as referenced in a document. So that, from our point of view, is considered to sort of only have one conversation, as it were, going on. So -

MR BRANDON: Yes, that is fine.

THE CHAIR: Sorry, could you just elaborate on how that fits into the picture?

MR GROVER: Sorry. It was more just responding to the point where they mentioned that we had not responded to those points because Fiona Dolman responded on 22 May to -

THE CHAIR: To the subsequent letter?

MR GROVER: Yes, which covered largely the same points.

THE CHAIR: I think I will just invite East Coast to make a comment as the Interested Party if you wish to.

MR FISHER: It is only very briefly. In respect of TTP494, which is the specific element where East Coast is concerned - at the moment I would just like to say we disagree with the Grand Central's claim that the Priority Date Notification Statement was invalid and we support the Network Rail view in the response document.

THE CHAIR: Right. Thank you. I am going to have a break in a minute to consider the questions, but I think I might - it might be efficient if I just take one subject area by way of questions first before we do, and that is to just deal with the Alliance/GrandCentral thing again. Now, as I understand it, from the information you have given me, which is very helpful, for the most part, as with TTP518, it is stated and absolutely accepted that, in effect, Alliance and Grand Central are practically the same, Alliance acting as agent for Grand Central. So notwithstanding - in the language used in the submission there is perhaps a little confusion as to who was doing what, but effectively we are talking about Grand Central for the most part.

But, as I understand it, from what was said in your information and in the chronology which you have helpfully provided, there is an element, which I am trying to get my head around, of where Alliance has been acting in its own right, and I think that

was in relation to one of two bids made at the same time.

MR YEOWART: Yes.

THE CHAIR: I just want to get my head around how that impacts. That was in relation to - which number are we talking about?

MR BRANDON: TTP494, I believe.

MR HANKS: Yes, it is. Yes.

THE CHAIR: 494 only, I think; is that correct?

MR BRANDON: Yes.

MR HANKS: Yes, that is correct. Yes.

MR YEOWART: Okay, I will explain the background. Alliance was an independent company, or not an independent company but an owned subsidiary of Arriva, and has been since June 2010. In November - and subsequently to November 2011, Alliance had made submissions to run a service under its own banner to certain destinations in West Yorkshire. In November 2011 Grand Central was purchased by Arriva and therefore became part of the same owning group. We have the same Chairman, we have the same Vice Chairman, we have the same Company Secretary. As a result of that -

THE CHAIR: May I ask if you are subsidiaries at the same level, i.e. directly owned by Arriva?

MR YEOWART: Yes. Well, no, slightly different in that, as indeed some of your colleagues here own shares in First Group, I own shares in Alliance but I don't own shares in Grand Central.

THE CHAIR: Right.

MR YEOWART: Grand Central is wholly owned by Arriva. Alliance is majority-owned, controlling-owned by Arriva.

THE CHAIR: Right.

MR YEOWART: Apart from that, everything else -

THE CHAIR: Okay. There is no other company between Arriva and either of them?

MR YEOWART: No. We both report directly into Arriva UK Trains.

THE CHAIR: Okay.

MR YEOWART: As soon as the transfer of Grand Central was made, we had a meeting with Network Rail because some of our applications, Alliance's applications, conflicted with Grand Central's applications and we wanted to make it quite clear to Network Rail there would no longer be any further conflict, we would not both seek paths that would be conflicting with each other, and that indeed we would now be undertaking all the

development work for Grand Central, as requested by the Group, our Chairman, our joint Chairman.

We had a meeting initially with Network Rail and then a formal meeting where it was discussed on 20 December.

MR HANKS: Yes.

MR YEOWART: Yes.

THE CHAIR: So this is all way before Priority Date?

MR YEOWART: Way before.

THE CHAIR: Way before D-45?

MR YEOWART: Yes. What we made quite clear was there would not be any conflict because Grand Central had a whole raft of potential applications it was preparing to submit and we had a specific set of applications that were already under consideration.

As a result of that merger of the two companies, once we had developed a different proposal for going forward, we decided that a number of Grand Central's applications would not be developed and now Alliance would continue to develop its own applications based upon what, at that time, was an expectation of rolling stock.

Now, as it happened, soon afterwards rolling stock became an issue (unavailable) and so Alliance's application to run up to five trains a day, or seven trains a day, sorry, in each direction into West Yorkshire became unfeasible, undeliverable, but we had identified capacity. Grand Central had an aspiration to run more trains to West Yorkshire and more trains to Sunderland, which we were developing, and it was identified that we could utilise some of the Alliance paths to be able to perhaps develop an additional path into West Yorkshire using Grand Central, using a different arrival point basically.

At this time, however, we had still not formally determined whether that was going to be made as an Alliance application or as a Grand Central application, and with the deadline looming for the PDNS, it was submitted as an Alliance application. Not long after that -

THE CHAIR: Sorry. If it had been made at that time, for Grand Central instead, it would have still been only an expectation because -

MR YEOWART: Yes.

THE CHAIR: - it was not in Grand Central's?

MR YEOWART: No, absolutely right, because although it was initially applied for as an Alliance application, it would have been operated by Grand Central and that had been

made quite clear because Grand Central had surplus rolling stock but only a small amount.

After further discussions with colleagues and the Regulator, Brian Hopkinson at the ORR, and some discussions with Network Rail, it was obviously easier and clearer now if everything came under the Grand Central banner. They are the operating company, they manage the service or they manage the network in relation to the delivery of the service.

So the PDNS was left as it was, and indeed quite often it was called “the Alliance train”, but the formal application to the Regulator to operate the service was made under the Grand Central banner, and indeed our colleagues at Network Rail undertook consultation.

THE CHAIR: As a supplemental to -

MR BRANDON: That was the Seventh Supplemental Agreement.

MR A LEWIS: That was the Seventh Supplemental Agreement.

MR YEOWART: There are various ways an application could be made. If it was an Alliance application, it would have been brand new, what we call a Section 17, because we did not have the support of Network Rail, and -

THE CHAIR: Because Alliance had and has no existing -

MR YEOWART: Not at the moment, no.

THE CHAIR: So it would have been a brand new Section 17?

MR YEOWART: It would, but because it was made under a Grand Central application instead, it is a slightly easier process and it was made under 22(a) i.e. a change to its current contract.

THE CHAIR: Yes.

MR YEOWART: The one thing I think we have established today, which is quite good, is that there has never been any misunderstanding between Alliance, Grand Central and Network Rail about how these services are progressing or indeed at the Office of Rail Regulation, which is quite important.

THE CHAIR: So at the point when that particular proposal/bid crystallised, in Part D terms, as a bid prior to or on the Priority Date, D-40, it was unambiguously a Grand Central bid?

MR YEOWART: No, it was an Alliance application at PDNS.

THE CHAIR: It was an Alliance bid at that stage?

MR YEOWART: Yes.

THE CHAIR: Not backed by - so it was a Level 3 -

MR YEOWART: It was exactly the same - Alliance.

THE CHAIR: Sorry. Had the 22(a) application for -

MR YEOWART: That followed.

THE CHAIR: But that was for a supplemental of Grand Central's?

MR YEOWART: After discussions with the Office -

THE CHAIR: So by the time it was bid by Alliance, there was no - the expectation of - what I am getting at is the expectation of Rights was somewhat amorphous in the sense that it was not at that stage backed by either an existing Track Access Agreement under which further Rights could be sought or by an existing application for something for Alliance?

MR YEOWART: Yes. It actually is no different whether it was Alliance or Grand Central. Grand Central only had Rights for three trains a day to West Yorkshire. This was to seek a fourth, so it was an additional service. Alliance had no rights Rights, so both Grand Central and Alliance sat with no Rights at that particular time, and so were seeking Rights to additional services, be it Alliance or be it Grand Central.

THE CHAIR: Right. Okay.

MR HANKS: Can I make two further points on that? There are perhaps two or three key things. One has been mentioned already which is the fact that Network Rail consulted on on the Seventh Supplemental Track Access Application so they were aware of the situation and clearly aware of the situation when they did that.

Prior to that, there is a letter submitted actually as part of Network Rail's evidence in the Sole Reference Document, in Annex A, where they talk about "the Alliance/Grand Central is a joint submission." This is prior to the Priority Date, it is true, but they were clearly recognising that we were very much working together on our submissions.

THE CHAIR: A joint submission?

MR HANKS: This is a letter from Matt Allen to Brian Cogan on 7 February. This pre-dates the Priority Bid but I was pointing out that Network Rail clearly recognised, as I think they now accept, that we were working together on joint submissions.

THE CHAIR: That is fine if Network Rail accepts it, but, I mean, in your minds, as it were, was that Alliance acting - was that sort of Grand Central plus Alliance acting as agent for Grand Central or was it a sort of joint submission in the sense of "We are both applying, with obviously different kinds of expectations, in parallel for the same things", and obviously two people cannot get but "We are both going to apply and see which..." -

MR YEOWART: No, we only applied for one. Alliance applied for that path.

THE CHAIR: Alliance applied for that -

MR YEOWART: Alliance applied for that path and Grand Central would have operated that path as an agent of Alliance.

THE CHAIR: As an agent of Alliance?

MR YEOWART: Had Alliance been successful. So the discussion we had about we act as their agent (inaudible)

MR BRANDON: However, after the submission date on 2 March, we obviously continued internally discussing how it was going to work between Alliance and Grand Central, and leading up to 20 March when Network Rail went out to consultation on the Seventh Supplemental, that was when it became clear that obviously this was going to be a Grand Central service as it was a Grand Central - it was submitted as a supplemental, Seventh Supplemental Agreement to the Grand Central Track Access Contract.

THE CHAIR: Sorry. When was that submitted?

MR BRANDON: That was 20 March Network Rail went out to industry consultation.

THE CHAIR: But when was your application?

MR BRANDON: To the Office of Rail Regulation?

THE CHAIR: Yes.

MR BRANDON: Industry consultation takes four weeks which, as I mentioned, Network Rail undertook for us, and that went into the Regulator soon after that, on the -

MR HANKS: 27 April, I think.

MR BRANDON: 27 April.

MR YEOWART: Early April was when the submission was made.

THE CHAIR: So when did you, Alliance/GrandCentral - well, Grand Central - when did Grand Central trigger that application in relation to 2 March?

MR HANKS: That took place on the week commencing 5 March when we had -

THE CHAIR: So after the Priority Date?

MR HANKS: It was after the Priority Date. We had had discussions before that but a new Managing Director took up post -

MR YEOWART: Yes.

MR HANKS: - on I think 1 March, but I haven't actually checked that date. I am fairly sure it was 1 March. We very quickly approached him for a decision on whether he would - that is what he wanted to do, whether he wanted to make that application on behalf of Grand Central.

MR YEOWART: While talking about it now seems very complicated, but we've actually

simplified it because there was only one point of contact because we acted, in every respect, and still do, for Grand Central. It was easier, as I say, when operating to keep everything in the one basket rather than have two separates.

MR HANKS: With hindsight being a wonderful thing, it would have been more sensible to have applied as Grand Central.

THE CHAIR: (Inaudible).

MR HANKS: But at the time it seemed more appropriate to apply as Alliance.

MR YEOWART: These deadlines are the problem, to get things in at a certain time!

THE CHAIR: Okay, thank you. We may need to come back and explore that one a bit further. Just to be clear, that relates to TTP494?

MR YEOWART: Yes.

MR HANKS: Yes.

THE CHAIR: Not the others. Okay. Apart from that, is there any other context in which Alliance, as Alliance, is relevant to any of the three disputes other than purely as agent for, and therefore to all extent it is the same person as, Grand Central?

MR BRANDON: Well, just to clarify, obviously one piece of evidence submitted was a response from Network Rail to an outstanding complaint that Alliance has with the Office of Rail Regulation. Obviously we did not provide the full document behind that.

THE CHAIR: No, I understand.

MR BRANDON: We saw it as quite irrelevant. It is an Alliance matter. The reason that piece of evidence was provided was purely for the statement acknowledging the non-issue of the Prior Working Timetable, just purely to provide that as a piece of evidence to the Panel. We do not see any other relevance of the Competition Complaint in any of the disputes.

As far as I can see, that is the only other place, across the three disputes, unless -

THE CHAIR: And that is definitely Alliance's complaint and -

MR BRANDON: That is -

THE CHAIR: - should be -

MR BRANDON: - undertaken by Alliance, to do with -

THE CHAIR: - treated as Alliance's complaint?

MR BRANDON: - Alliance bidding for paths and all the rest of it, doing the timetable work.

MR HANKS: Alliance has applications outstanding - or another application outstanding elsewhere, and it is in relation to that as much as to anything else.

THE CHAIR: Okay. And you take the view that that is not germane to this?

MR HANKS: Yes.

THE CHAIR: And it is up to us to decide how helpful or otherwise the letter that is the one document you have submitted from that, how helpful it is to what anybody says without the bits that it is responding to, which I have invited you to provide.

MR YEOWART: Yes, it is a difficult one because, clearly, the Competition Complaint is a very serious issue for us.

THE CHAIR: Yes, I understand that.

MR YEOWART: And, as a result, as the Regulator has it, we felt that if the Regulator is comfortable to give you the copy, that was the issue that we had -

THE CHAIR: I have not asked the Regulator for that. I am going to leave it on the basis that we will, as I say, decide what weight we can attach to that in the context of putting it forward, given that some bits, necessary to sort of make sense of it, are not there. That is your prerogative to withhold, I think.

MR YEOWART: I guess just to give a quick piece of background here, the Alliance applications and the work with the Regulator currently refers to the detailed applications that are still under consideration for a whole raft of services on the West Coast Main Line. It was only as Alliance then sought to run services there as well as on the East Coast Main Line that there has been some interaction between the two.

THE CHAIR: Right. Okay. Thank you very much. In that case, let's have a short break so we can just take stock before we go into Q&A.

(Adjourned.)

THE CHAIR: Right. We are going into Q&A now and I think we are going to depart a bit from the sort of structure I mapped out earlier, in that I think we will probably find ourselves doing Q&A from both of you per dispute, as it were, rather than trying to cover them all in one go. We think we are going to start with 494 because it seems that that is sort of slightly separating itself out, not least because it is covered by a discrete supplemental -

MR YEOWART: Yes.

THE CHAIR: What I want to drill down to, first and foremost, for all of it is, if I say it at the outset: irrespective of the sort of rather more general assertions of a failure to do this and that, whether a Prior Working Timetable was or was not issued or was issued in a timely way or contained what it should have done and so on and so forth, which we will get to, I

want to do all those sort of things only in the context of their impact on the central question which is, for each of these disputes, at bottom line they concern a specific path or slot (or in some cases slots) bid for in a particular way, and I want to look at and get your respective views on the contractual priorities that those bids had, how those match up against conflicting bids/proposals and therefore get into what the actual strict contractual entitlements were and things like issue of Prior Working Timetable are relevant insofar as they affect or do not affect that priority.

So, first, on 494 I am going to ask Grand Central to explain in some more detail what they think their priority was in respect of the relevant slots bid for, and then what they think East Coast's, as being the relevant conflicting one, priority was and why. Well, I know what you say Grand Central's was, you say it was Level 3. So can you expand on why you think it was that?

MR COOPER: There is a point about the Prior Working Timetable there. Do you want me to address that first?

MR YEOWART: It does have relevance.

THE CHAIR: I think I would like to come back to the Prior Working Timetable -

MR COOPER: Okay.

THE CHAIR: - as I said, in terms of effect on that priority.

MR COOPER: Yes.

THE CHAIR: Sorry, I may be jumping the gun. Level 3 is to do with expectations of Rights.

If you are saying that the expectations are entirely bound up with the whole question of whether and when the Prior Working Timetable was issued, then that is one thing.

MR COOPER: No.

THE CHAIR: But if you are not saying that, I would rather hear why you think it is Level 3, what your expectations were based on.

MR COOPER: So Grand Central's Rights, we are saying, were Level 3. You know, it was about expectations of Rights. There was an application. We did not have any Firm Rights so it was in terms of the Network Code D4.2.2(d)(iii) and that is what we had. The issue comes with our view on what East Coast's Rights actually were.

THE CHAIR: No, let's come to that in a minute.

MR COOPER: Okay.

THE CHAIR: Are you saying that your expectations, as per level (d)(iii), were founded or are evidenced by purely the fact that you stated there was an aspiration in your PDNS?

MR COOPER: Right. Yes, we had an aspiration. Yes.

THE CHAIR: So are you saying that it is the inclusion in the PDNS of that as an aspiration that, of itself, creates the expectation for the purposes of according a Level 3 priority?

MR COOPER: Plus we had submitted an application to the Regulator as well.

THE CHAIR: Ah, that is the question. As at the date of your PDNS?

MR YEOWART: No. The Section 22(a) -

THE CHAIR: I thought we established the case of -

MR YEOWART: - application to the Regulator went in June, I think.

MR HANKS: We will find you the date.

THE CHAIR: I thought we established, when we were talking about it before, remember we are talking about 494 now, that the Seventh Supplemental -

MR YEOWART: Yes.

THE CHAIR: - you said Network Rail consulted on 20 March or something, but I think we said that the actual trigger point for that, whatever that was, was around about 5 March when you had a new MD?

MR YEOWART: Yes, that is right, but you can make an application to the Regulator at any time for directions, and you only make a Section 22(a) application to the Regulator if you cannot agree with Network Rail, in which case it would be a Section 22 application for directions.

THE CHAIR: Right.

MR COOPER: It was 26 April.

MR YEOWART: The application to the Regulator, though, does not have an impact on any expectation of Rights at the bidding process or PDNS.

THE CHAIR: So the PDNS was -

MR YEOWART: Prior to.

THE CHAIR: - prior to or on the Priority Date? I think it was on the Priority Date, was it not?

MR YEOWART: Yes. Nearly everybody submits on the last day.

THE CHAIR: Yes. So at the Priority Date, had you done, said, communicated anything to Network Rail or anybody else -

MR COOPER: Yes.

THE CHAIR: - other than via the PDNS itself?

MR BRANDON: Yes. We were obviously in discussion with Network Rail up to 20 March when Network Rail went out to industry consultation for the Seventh Supplemental Agreement.

THE CHAIR: Sorry, you say up to 20 March?

MR BRANDON: Yes, 20 March was when Network Rail -

THE CHAIR: No, I am asking you if you did anything before 2 March.

MR BRANDON: Right.

MR YEOWART: Yes. Yes. Negotiation with Network Rail continues to try to develop a timetable which, by the time the PDNSs are submitted, quite often are not developed at a particular time -

THE CHAIR: We had all that discussion.

MR YEOWART: - unless you have already got a path which is Rolled Over, which clearly Grand Central, for the fourth path, did not have. We had been doing a fair amount of internal work.

MR HANKS: Can I come in on this because I think it is key? The evidence for this is actually in Network Rail's Sole Reference Document in Annex A. Again, it is the same letter I referred to earlier between - from Matt Allen to Brian Cogan on Tuesday 7 February. That includes Network Rail's assessment of a number of proposed paths, and it does include the ones we were looking for. They were referenced there, I think, by an unusual train identity which I shall find in a moment.

THE CHAIR: "At present we are unable to path either of their additional Sunderland to London Kings Cross aspirations but are working on a resolution which we are hopeful will facilitate one of those paths".

Is that it?

MR HANKS: The key thing, then, for the services, for the train we are talking about in TTP494 is in Section 3 of that Appendix on page 10 of 12, the heading on that page is "Alliance (work undertaken by Toby Hart, ECML portion)".

THE CHAIR: Sorry, are we in Annex A?

MR HANKS: We are. I believe we are in Annex A.

THE CHAIR: Of Network Rail's submission?

MR HANKS: Now, wait a minute.

THE CHAIR: Because I have only got eight pages of Annex A.

MR HANKS: Am I looking at the wrong...

THE CHAIR: Or are we now in Annex A of your -

MR GROVER: It is on the back of page 7, I think, looking at the heading.

MR HANKS: Have we bound this wrong? There appear to be two Annex As; is that right?

MR BRANDON: Have I bound it wrong? It is possible.

MR SKILTON: There is one that is headed "page 9 of 12" which has got handwritten

“TTP493”, which has “7 of 8” at the top.

MR HANKS: Yes.

THE CHAIR: I have not got anything “of 12”.

MR HANKS: Then on the back of that page?

MR SKILTON: The next page is the one that says “10 of 12” at the bottom.

THE CHAIR: We are talking about Network Rail’s submission of 493, 4 and 5?

MR HANKS: Yes.

MR GROVER: The confusion is there are page numbers at the bottom of this document and there is also the Annex numbering.

THE CHAIR: Oh, sorry. The “12” is the bottom?

MR GROVER: Yes.

THE CHAIR: I was looking at the top.

MR GROVER: I think we are looking at the bottom.

MR HANKS: I am sorry.

THE CHAIR: I beg your pardon. So in terms of the one at the top?

MR HANKS: So it is actually “7 of 8” at the rear of -

THE CHAIR: At the back side of 7 of 8, 10 of 12. Got it, yes. Got there in the end.

MR HANKS: Now, at this stage different train identities were used but the path we are looking at is actually - sorry, it is on the next page. It is on 8 of 8. It is referenced as 1DZ2AR.

THE CHAIR: It is a Kings Cross to Bradford interchange?

MR HANKS: At that stage that was the path that was being examined. The extension to Wakefield Kirkgate was added between then and -

THE CHAIR: And later became Wakefield Kirkgate?

MR HANKS: Yes. The train was still bid for to go via Bradford, so that was an extension of the...

THE CHAIR: Okay.

(Pause)

MR HANKS: So whilst I accept at that stage this is pre - this is before the bid, it was rejected in the sense that Network Rail did not accept that that would work without - that it was conflict-free but that the issues were not so great as to be insurmountable, or at least that was our view at that time.

MR A LEWIS: Yes.

THE CHAIR: So this is a Network Rail document which happens to be annexed to a letter to Brian Cogan at ORR, but that is kind of incidental. You are saying this is a Network Rail

document as at when?

MR HANKS: 7 February, isn't it?

THE CHAIR: That is the letter to the Regulator. But when the document that is attached to it is - it is undated.

MR HANKS: I believe it is all part of the letter, is it not?

MR GROVER: Yes, I believe it is an annexure to the letter.

MR ALLEN: So -

THE CHAIR: It says Network Rail's letter and it is Network Rail's annex of the same date, 7 February?

MR ALLEN: It is a summary of the work we had been doing between November and January on the Significant Change.

MR HANKS: The point I am trying to make by making reference to this is that Network Rail were aware of these aspirations.

THE CHAIR: That it was in Network Rail's mind?

MR HANKS: Yes.

THE CHAIR: Okay. Is there anything else you can point to? Because where I am going with this is to try to get you to establish that, as regards that path, as at the Priority Date when you put the PDNS in, that particular slot, or its then manifestation as at the Priority Date, i.e. extended to Wakefield Kirkgate, was either a contingent right of yours or an expectation of Rights "...which have been exercised" - well, yes, it was exercised by definition of putting it in the PDNS - "...and which Network Rail should have considered, acting reasonably, that that would be a firm or contingent right enforced during the timetable period", which is what is needed to give it Level 3 priority.

MR YEOWART: Yes. Every previous application comes in at that level. It is standard practice ever since the beginning, because they have no Rights but you make an application, you try to develop a timetable and you have an expectation of Rights and you work with Network Rail to try to develop those rights. Every previous application for Open Access application to come in is -

THE STENOGRAPHER: Sorry, could you say that again? "Every previous application..."?

MR YEOWART: Every previous application, Open Access application, made to Network Rail, certainly by me, has come in under that clause, D4.2.2(d)(iii).

THE CHAIR: By the Priority Date?

MR YEOWART: Yes, and to be fair to Network Rail, I think they take the view as well, because we have been undertaking this work for so long, that we are a serious bidder and

therefore when we make an application, it is made in the full knowledge, and this is one of the important issues for Network Rail, the full knowledge that if we are successful we can deliver, and certainly with a group the size of Arriva that has never been an issue.

THE CHAIR: Every Open Access Proposal?

MR YEOWART: Every Open Access Proposal comes in at that level.

THE CHAIR: At Level 3?

MR YEOWART: Because we have no Rights but we have an expectation of Rights.

THE CHAIR: Is it the case, then, that merely by making the Open Access Proposal, i.e. making the PDNS for Rights which are not covered under a prior agreement, it is accepted on all hands, is it, that that, of itself, creates not just an anticipation that we may or may not get Rights, but an expectation which Network Rail, as the network operator, or any other independent person, "...might consider, acting reasonably, will become firm or contingent"?

MR YEOWART: Yes.

THE CHAIR: In other words, that merely by virtue of stating the proposal, there is a 51% chance that it will get through? Is that accepted all round?

MR YEOWART: Yes. I suppose I just need to clarify the first bit. When I am talking about Open Access here, I am talking about Passenger Open Access obviously. It is different for Nick sometimes, they have Rights which they carry over.

THE CHAIR: All right.

MR YEOWART: In relation to a new Right -

THE CHAIR: Let's put that on one side.

MR YEOWART: - for an Open Access passenger operator, this is the section in which every application is made, D4.2.2(d)(iii), and that is based upon early discussions both with Network Rail and the ORR about the likelihood of the delivery of the service. Now, we are obviously quite experienced at what we do and we have been doing it a long time.

THE CHAIR: Okay.

MR YEOWART: It was much more difficult in the early days when somebody new on the block comes along who may not have that expectation, but that certainly is the case now.

THE CHAIR: Okay. That sounds to me - sorry, I do not want to put words in your mouth, Ian, but it sounds to me as if you are saying in fact, in practice, it has always been the case, and for reasons of common sense will always be the case, that it is never just a question of a PDNS being submitted kind of in a total vacuum so that Network Rail would not have anything to judge it on; it will always be in the context of prior discussion which

creates the expectation of what I would call the 51% chance that it will be firm.

MR YEOWART: Also we have to, in the PDNS, Chair, we have to identify what clause of the Network Code we are applying for these Rights and it is D4.2.2(d)(iii). Obviously if we have got Firm Rights, it is a different right if you are looking to extend something or if you think you have got different Rights, it is a different right. But the PDNS applications, and you can pull out as many as you would wish to from previous applications, will always identify that clause as being the expectation of Rights that the Open Access Operator has.

THE CHAIR: Right. Can I ask Network Rail, then, is that accepted? As I understood it, it is being said that, first of all, for common sense, practical reasons, an Open Access passenger application will always or normally have Level 3 priority because it will never go in in a vacuum; it will always go in in the context of previous discussion and so on with Network Rail, and it is that discussion actually, rather than its bare inclusion in the PDNS, which may create the reasonable expectation in Network Rail that it will become firm.

MR ALLEN: I think you have to understand whether that train slot, as described in the PDNS, is deliverable. So if what is proposed in the PDNS means that any other impacted service we are Flexing, with a capital 'F', within the Rights we have got, and it is into, you know - and, you know, it is compliant with Timetable Planning Rules and Engineering Access Statement, then it seems a practical way forward. If it fails one of those, if it is asking us to flex something we don't have the right to flex with another operator, then I'm not sure 3 is appropriate. But then I cannot see a fourth or fifth category that you can put it in in the terms of priority for dealing with it.

So I think you need to understand the detail of where it is because obviously we could not go and give a new operator a right or an expectation to the right if we have got a distinct right agreed on the network that meant we could not deliver that for them.

THE CHAIR: Okay. To sort of paraphrase that, it is sort of being said in response, well, yes, there may well be situations where the inclusion in the PDNS of an open Access Proposal with no prior Rights does create the expectation because previous discussion with Network Rail has led to, as it were, the agreed inclusion in the PDNS, but, equally, there may be situations, and probably they would say this is one of them, where the discussion has produced a failure to agree on its deliverability and therefore, one would assume, the expectation that it will become firm, or 51% of it becoming firm, a 51% chance, and that, in those circumstances, merely saying, "Well, we are going to stick it in our PDNS

anyway and see where we get with it” does not, of itself, necessarily create the expectation in Network Rail, acting reasonably, that it will become firm during the course of the period -

MR YEOWART: No, Network Rail are incorrect in that assumption. Historically and according to the Network Code, if you are making an application for Rights that you do not yet have, and you have an expectation that those Rights, if those paths can be identified, will be awarded, and you make your application under 4.2.2.2(d)(iii), and that has always been the case. It has never ever before been challenged by Network Rail.

They can pull out every PDNS application from Grand Central from 2002 when they first started and, apart from when Grand Central has been awarded paths and therefore its PDNS has got Firm Rights, so therefore higher up the pecking order, every further application for Rights -- indeed it will be exactly the same with Hull Trains and it will be exactly the same with Wrexham and Shropshire - comes in at that level each and every time. Indeed, any operator seeking new Rights for a service that is not yet firmed up or determined but with an expectation of Rights, always comes in at that level, always comes in at that level.

MR HANKS: Can I add something to this? This is going back to the opening sentence of clause 4.2.2 in Part D of the Network Code:

“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...”

THE CHAIR: “Subject to the following principles”?

MR HANKS: Yes. The problem is if you say that the application - sorry, the submission here does not fall into 4.2.2(d)(iii), which section does it fall into because there does not seem to be any other category that it can fall into?

THE CHAIR: It is an abstract possibility that it does not fall into any of the sections giving authority, in which case it would be treated as something that falls outside 4.2.2 which would in effect be a spot bid.

MR COOPER: No.

MR YEOWART: No. The reason it is there, Chair, and it is quite clear, it is part of process. If, what you are saying was correct, and it was the only way to secure Rights first, we would have to completely reverse the process. We would have to, first of all, go to the Office of Rail Regulation seeking it to give Network Rail instructions to approve Rights for us, which would put it probably in contravention of its own Network Code, so it

cannot work that way.

So what we do is we work with Network Rail in order to identify our bidding priorities and, as I said, our bidding priorities have always been the same if it is new Rights. They're exactly the same bidding priorities that East Coast will have had for an additional path. It is the same for everybody.

Once that PDNS has gone in, because we are bound by timescales, then, beyond that, we then still have to seek permission by the Regulator if indeed we find a path that we are allowed to operate that path. But we bid with an expectation of Rights. I would be very concerned if today there was some consideration that perhaps what has gone on since privatisation is somehow unclear because it is not unclear to me and certainly to my colleagues who bid in this process.

THE CHAIR: I am sorry if I am flogging this one to death, but it is the crux of the thing. What the contract says, what the Code says is not for Level 3, is not just an expectation of Rights because the Timetable Participant says it has an expectation of Rights, but it is an expectation of Rights which have been exercised, yes, subject to a proviso:

“...provided Network Rail considers, acting reasonably, they will be firm or contingent rights enforced during the timetable period...”

Now, that, of itself, foresees the theoretical possibility of the situation where Network Rail, acting reasonably, may consider that even though there is an expectation on the part of the Timetable Participant, nevertheless those Rights will not be firm or contingent Rights during the timetable period.

MR YEOWART: Well, that puts Network Rail in the position of becoming the Office of Rail Regulation, because the Office of Rail Regulation actually is the final arbiter and awarder of Rights.

THE CHAIR: Indeed ORR is the final arbiter of what “acting reasonably” in that context would be on the part of Network Rail.

MR YEOWART: I would have thought on this occasion that history would have been well on the side of all the operators and Network Rail in that this is how it has always been considered and there has never been an issue with it before, not even where there has been conflict issues. We have had conflict issues with GNER previously bidding for the same paths with the same expectation of Rights, and the Regulator has ultimately called it on behalf, on one occasion, for Grand Central and on another occasion for what was GNER's successor, as National Express East Coast.

I think the process is clear. If the process was not clear for us, and I realise it is

not clear for you, Chair, but if the process and the bidding Rights were not clear, we would have dealt with this or the Regulator would have had to have dealt with this some time ago.

But the bidding Rights, 4.2.2(d)(iii) are consistent. Our application is consistent with those Rights. We have the rolling stock to operate that train. We ultimately did identify the path for that train, but Network Rail then applied the Criteria differently even though we do state that the Criteria should not have been applied anyway because the bidding Rights were different.

The PDNS was properly constructed. The PDNS made it clear under what Rights we were bidding for. It has never been challenged, ever, and as a result of that we would have expected Network Rail, as they did, to continue to develop a path for us in the expectation that if they did develop it properly, it would get Rights. It is only usual -

THE CHAIR: So where they are saying apparently as at February some time, as evidenced by their letter to ORR, "No, we cannot do it because of pathing issues", notwithstanding that, you would still say that as at 2 March they, acting reasonably, would have had an expectation that your aspiration to get that slot would have become Firm Rights in the course of the bid?

MR YEOWART: Yes. Unfortunately, Network Rail in the early days always state that it is unlikely we will be able to path our train. I'm sorry but that is the case.

THE CHAIR: So they should have had an expectation that their own issues would have been overcome by reasonable -

MR YEOWART: They know that things go right ultimately. If there is only a Rolled Over timetable, it is relatively straightforward. It is when the application is for new and additional services it becomes difficult. I accept their difficulty in the early days in trying to path things because they had a lot of other things to do, but history will show, as indeed Leeds are now running a train every half an hour when Network Rail had indicated some years ago that it could not possibly do that, that eventually, when Network Rail can focus, as indeed they did with Grand Central after 8 June, they can nearly always find a solution to the issues that they have.

THE CHAIR: Okay.

MR YEOWART: If we had to believe that Network Rail's initial response was a killer for us, we wouldn't be here. We would not be in the Open Access status.

THE CHAIR: Okay. To paraphrase it yet another way, are you saying that in effect, it is the case that no aspiration to Rights, as expressed in a PDNS, has ever been, or I think you

are saying in effect could never be, not accorded Level 3 priority by Network Rail on the basis that allegedly acting reasonably they do not think it will get through? That just could not happen? You are saying it never has happened and you are saying in principle it could not really happen because effectively any objection, they ought to assume will be overcome and resolved and -

MR COOPER: Can I come in here because I did work for Network Rail and it was to do with Open Access? You will progress proposals by train operators that you, youknow, think are going to run and then there are those that will not make the grade and will not even get to the ops planners. It is filtered out. So Network Rail does that job early on.

THE CHAIR: So, in other words, by the time it gets to the PDNS statement, what I just said is true?

MR COOPER: Network Rail does due diligence.

THE CHAIR: It simply could not.

MR COOPER: Yes, but it has got a process to filter out operators who are realistic and those who are not.

THE CHAIR: So by the time it gets to the PDNS, you are saying it simply could not be other than a reasonable expectation on the part of Network Rail, even if, on the face of it, it is saying "Oooh, a bit difficult", but actually it could not be other than a reasonable expectation that it will go through by the time it has got to PDNS?

MR COOPER: They look at all sorts of things. They have got a criteria that applies to the firm to see whether it is a viable business really.

THE CHAIR: Right.

MR COOPER: In addition, just going back to your Train Operator Variation point, that only kicks in after D-26.

THE CHAIR: That only kicks in after D-26?

MR COOPER: From D-26, variations to Working Timetable in 3.1.

MR HANKS: It kicks in after D-40, after D-40.

THE CHAIR: I thought -

MR COOPER: Sorry. From D-26:

"During the relevant Timetable Period, Timetable Participants may wish to vary (pause) the New Working Timetable" etc.

MR ALLEN: That is the New Working Timetable.

MR A LEWIS: This is point 4, just below 3.

MR HANKS: Where are you quoting from, Jonathan?

MR COOPER: 3.1.

MR HANKS: 3.1, so a different section then.

MR COOPER: And 4.2.2 - yes, that is basically for proposals, Train Operator Variations.

Sorry, this is for proposals after the Priority Date but before D-26.

MR ALLEN: Correct.

MR COOPER: Which is not what we are. We are at the Priority Date.

MR YEOWART: I think it is important as well just to point out that in the real world, 4.2.2(d)(iii) is actually the bottom bidding rights of the PDNS. There is nowhere else to go. This is the bottom.

MR HOLDER: That is the last one on the form, isn't it? You cannot go lower in the PDNS?

MR YEOWART: It is the bottom, right.

THE CHAIR: Lower than?

MR HOLDER: Than this.

MR YEOWART: 4.2.2(d)(iii).

THE CHAIR: Than Level 3?

MR HOLDER: It actually says:

“....temporary rights which wish to be negotiated with an expert and exercised in accordance with D2.4.1.”

MR THOMAS: Do you have to have firm contractual rights, though?

MR HOLDER: Sorry?

MR THOMAS: Do you have to have firm contractual rights?

MR YEOWART: No, that is only if they are Rolled Over. In effect, if you are making a new bid, you have to come in at the bottom. And although it is not shown at the bottom in the list because they are after the PDNS date, the bottom rung is 4.2.2(d)(iii). So we already come in at the bottom, so we cannot come in below it.

MR HANKS: As long as we meet the Priority Date.

MR YEOWART: Yes, as long as we meet the Priority Date. If we miss the Priority Date -

MR COOPER: We would have been fourth.

MR YEOWART: This is the argument that we have got with East Coast, then we would have come in fourth, yes, that is right. But as long as you are there at the Priority Date, you cannot come in any lower. That is it, 4.2.2(d)(iii).

MR COOPER: Devon and Cornwall were fourth when they did theirs.

MR THOMAS: You do not think it is possible to hit the fourth rung and still hit the PDNS?

THE CHAIR: I think, by definition, that Level 4 is only after D-40.

MR COOPER: Yes.

MR YEOWART: Yes. Our protection is there.

MR HOLDER: There is a gap, isn't there, between 3 and 4, in that it could be an expectation of Rights by the Timetable Participant but Network Rail, acting considerably, does not believe that it will be converted into a right?

MR ALLEN: Yes.

THE CHAIR: That is what I am trying to identify.

MR HOLDER: The question is, does that then go between 3 and 4 or does it fall off at 5 because it is not given any priority at all?

MR ALLEN: Yes.

THE CHAIR: There we are. Network Rail, do you have a view on this?

MR HOLDER: What do you do with the form? Do you allocate it to any of these? Because the wording actually on the form is not exactly the same as each of the sub-paragraphs here.

MR ALLEN: In our submission we put the Grand Central request and the East Coast request as 4.2.2(d)(iii) principally because you cannot get any lower than that if you have got a submission in the PDNS. My view, from a practical point of view, is that the Rights get established if we find there is a pathing solution that is compliant with everything I spoke about a few moments ago, in terms of EAS, our application to flex on other services and Timetable Planning Rules. If I think any one of those three fail, then, you know, the Rights could not be established because there are already Rights sold.

THE CHAIR: So that means it just falls off the bottom?

MR YEOWART: No.

MR ALLEN: I do not see how it could do anything different, to be honest.

MR YEOWART: What happens there, Chair, is we make, if it was a brand new application, either a Section 17 application to the Regulator because we don't agree with Network Rail's view. If we have already got a contract and we are looking to change it, it is a 22(a) application because we don't agree with Network Rail's view. And then the ORR make a determination as to who was right and who was wrong, and will then award Rights or reject them, which they do sometimes - you know, Grand Central has not always been awarded its Rights - and instruct, and this has happened on numerous cases, instruct Network Rail to award the Rights.

If I tell you that Grand Central currently runs seven trains a day in each direction on East Coast Main Line on a weekday and not one of those trains would have been

awarded under Matt's criteria, each one of those was instructed to Network Rail to be awarded by the Regulator. Hence, coming at 4.2.2(d)(iii) you do the work, hopefully we can get agreement on the path -

THE CHAIR: Were each of those applied for after the Priority Date?

MR YEOWART: Yes. The PDNS - well, it depends because sometimes it takes a year or two for the Regulator to make a decision if it is a new company right at the beginning. If it is a company looking to bid into a timetable and it already has rolling stock, and that is an issue for new companies but not for Grand Central on this occasion, then it is usually done the other way around, in which we work with Network Rail, we try to develop the timetable, we know we have the trains, we find the time, we then go to the Regulator and they approve the right.

On occasions where there is conflict, as there was in this one, the Regulator will make a call based upon it. But it is not for Network Rail, and that is incorrect to say that Network Rail would reject something. They might reject it, but that is not their call. The call is the Regulator's call.

MR GIBBONS: They can reject the path in the timetabling process and then you are calling to the Regulator.

MR YEOWART: Yes. Rejecting the path in the timetable process in effect is what we are saying about 4.2.2(d)(iii).

THE CHAIR: I will ask Network Rail to respond to that in a minute, but let me just be clear on something that occurs to me out of that. So you are saying that Grand Central had Level 3 Rights for all these sorts of reasons. As I understand it, you are saying East Coast, while Network Rail accorded it Level 3 Rights, it should not have been given Level 3 Rights -

MR YEOWART: No.

THE CHAIR: - because actually it was a non-compliant proposal in some respects.

MR YEOWART: We are now, yes. At the time we would not have known it was non-compliant. Now we have seen the paperwork, we believe it was not compliant.

THE CHAIR: Yes, you are saying it effectively wasn't. So it did not have that compliance?

MR YEOWART: No.

THE CHAIR: So what Rights would it have had?

MR YEOWART: Level 4 Rights.

MR COOPER: 4.

THE CHAIR: Level 4 Rights. But Level 4 Rights only kick in, by definition, after D-40. As

at D-40, what level Rights should you have been accorded?

MR YEOWART: After D-40 they changed their application and they went out to second consultation. That is the thrust of our argument. Therefore it should have dropped into Level 4.

THE CHAIR: So you are saying that their bid at or before the Priority Date, well, whatever Rights it was accorded, just lapsed because it was replaced by another one and therefore should have been treated as a post-Priority Date bid?

MR YEOWART: Yes. I am sure Shaun will argue the exact opposite, and I would expect him to, but our view is because the Regulator went out on a consultation on a changed Application after the Priority Date, then this was a Level 4 bid. Having said that, it is still possible for the Regulator to award a bid to somebody with lesser Rights at this level than he did.

I think where we partly may be getting lost is because of where it sits in the plan. I think if you just accept the fact that our applications at that level are at the bottom level at the PDNS stage -

THE CHAIR: Yes, but I am trying to establish what the bottom level contractually is.

MR YEOWART: It is that level.

THE CHAIR: Not just what you say the bottom level is but what it is actually in the abstract as per the contract. I was asking the question about East Coast. It is possibly illustrating that because it seemed to me that their bid, whatever it was, as at the Priority Date, your, Grand Central's assertion, is that whatever it was it was not Level 3 at that date because it was non-compliant. If that is right, that seems to me, at the very least, illustrative of the possibility that there is some limbo land below Level 3 and before you get to Level 4 which, by definition, only kicks in after the Priority Date.

MR YEOWART: No. I see where you are going. If there is a compliant bid at the Priority Date, there is an expectation of Rights, you have no Firm Rights, it comes in at Level 3. Every bid comes in at Level 3 and that is where all Open Access comes in anyway. If you make a variation to your bid, or if your bid is non-compliant in some way, i.e. it contains a conflict because you might want to do two things rather than one thing with one train, or you then amend your bid after the date, then you have lost your priority at 3 and you drop in at Level 4.

Our contention, from the application form -- our bid was fully compliant and it is identified in there what level we came in. East Coast's bid, if it is fully compliant, is at exactly the same level. No disagreement on any of that. Our view, however, is that their

bid was non-compliant because it contained within it a conflict. It was asking for two things on the same path. Then, at a later stage, to confirm that conflict, the Regulator went out to a second consultation, citing an amended application from East Coast. Now, East Coast will say they did not make an amended application, but it is also referred to in correspondence from Network Rail about an amended application.

That is not for us to determine. There were three letters between me and the Office of Rail Regulation around this matter which, unfortunately, we have now ended up back here making exactly the same points. Was it a changed bid? Was it not a changed bid? If it was a changed bid, the priority is quite clear. If it was not a changed bid and it was fully compliant, the priority is quite clear, exactly the same as us, unless the bid was not fully compliant. Unfortunately, that is the determination that we have sought from yourself today in relation to their PDNS.

The PDNS is here -

MR HANKS: Can I make one clarification on their PDNS being compliant? Our contention is that it was not compliant.

MR YEOWART: I did not say it was compliant. I said *if* it was compliant.

MR HANKS: Sorry.

MR YEOWART: Our contention was it contained within it conflicts.

MR HANKS: There is another contention that it is not a compliant Access Proposal and that I think is key, that it is not a compliant Access Proposal.

THE CHAIR: So your contention regarding the East Coast bid, setting aside what happened after the D-40, a changed bid or whatever -

MR HANKS: Yes.

THE CHAIR: - is that as at D-40, you had a bid in which was, by your definition, Level 3, and East Coast had a bid in which was 'level nothing'.

MR YEOWART: No, Level 3 as far as we were aware.

THE CHAIR: Because it was not compliant?

MR YEOWART: No. At the time - because we don't see a copy of the PDNS, somebody else's. They made an application by the Priority Date, we made an application by the Priority Date. We'd both gone out to consultation. As far as we were aware, it was compliant. The only time it came to our attention it may not be was when the Regulator went out to a second consultation on the East Coast application, citing that there had been a change, which meant it now got down the pecking order. That is when I first wrote to the Regulator. We had discussions with Network Rail, they were copied in, about the

priority because at that stage they, in our view, should have been giving priority to the Grand Central bid.

We were then advised that the application had not been amended, in which case it conflicted with itself because you cannot bid for two things on the same path within one application. So that generated further correspondence with the Office of Rail Regulation to say, well, hang on, you cannot have - you either do or you do not. Is it amended? Is it not amended? Is it compliant? Is it not compliant?

MR COOPER: This was confirmed when we saw the PDNS for East Coast.

MR YEOWART: Yes.

MR COOPER: So we have looked at the PDNS and it does conflict with itself and, also, there is no rolling stock specified. So that is why we are saying it is not a compliant Access Proposal.

MR GIBBONS: The rolling stock is not specified as to the extension of services beyond Newark, is it not?

MR COOPER: Yes.

MR HANKS: Yes.

MR GIBBONS: Not the existing service which runs to Newark, because I assume that East Coast will have provided some Rolling Stock Diagram to support the PDNS?

MR HANKS: Yes. Well, we have not seen the Rolling Stock Diagrams, but it does make reference to rolling stock.

MR GIBBONS: Shaun has actually just said, yes, they did so their bid was actually supported for Newark but not -

MR HANKS: If their bid was to Newark, and that is something we need to establish later on, I think, what the bid was for.

THE CHAIR: Right. Well, shall we hear Network Rail's view on that?

MR A LEWIS: I have got a question to Ian, if I may?

THE CHAIR: I would like to hear your view, first, on what has been said, if you do not mind, starting with the contention that, in effect, legally and contractually, any bid which goes in in proper form as a PDNS by a Priority Date is entitled to Level 3 Rights within or notwithstanding the exact language of (d)(iii) about "...Network Rail, acting reasonably, expecting..."; is that accepted?

Then, second, I would like to hear what level of priority you think was properly accorded to East Coast bid as at the Priority Date and independent of what happened after that, changes.

MR ALLEN: So in terms of making the decisions of what to include in the New Working Timetable, because we don't make the decision on Rights, then if the requirements are in at D-40 I don't think you can get any lower than position 3 on this sheet of paper. But there is a big assumption there that, you know, whatever is on that PDNS is deliverable by us, and I think that is my only caveat.

I have listened to what we have been talking about today, which is that the Rights at the minute, where we have got ourselves into a muddle with Rights is that the Rights are being retrospectively fitted to the Part D process, which is not really helping any of us in terms of making the right decision and stuff to be going through the New Working Timetable. For me, those Rights can only be agreed by the Regulator or we can be instructed to enter into those Rights if the new Access Proposal does not conflict with the existing Rights of other operators, you know, is 'Timetable Planning Rules compliant' and is 'Access Rules compliant'. That is something generally we cannot deliver in the timetable for anybody.

THE CHAIR: So -

MR ALLEN: I do not know really what to add.

THE CHAIR: To put that in the terms of my question, do you agree or disagree with Grand Central's contention that it effectively is Level 3 by default once you get to PDNS, that there is no other -

MR ALLEN: I agree in terms of the priority that it gets in terms of our timetable development work.

MR A LEWIS: If it goes in there.

MR ALLEN: It cannot get any lower than Level 3 unless it comes in after D-40. I cannot agree that that necessarily links to Rights being agreed for that train because obviously there are a lot more things around it which, from a timetable point of view, are not necessarily our decisions to make.

MR HOLDER: Do you agree that you can give Rights of up to 90 days without going to the Regulator in timetable changes, in a certain timetable, under a General Approval?

MR GIBBONS: General Approval.

MR ALLEN: If it is there, I will agree with that.

MR HANKS: Yes.

MR ALLEN: I am not going to disagree. But again, for me, there are those three criteria that that New Access Proposal, that new train, has to fit. You know, I guess, where does a specific 1608 proposal in a PDNS, if by the time we have been through that iterative

process of finding the right stock become, you know, 1538, how does that fit in terms of Rights, and all the rest of it, you don't have enough information until you have found that actual path in the timetable to be able to say what the Rights should look like for that new service, I don't think.

MR GIBBONS: Just to extrapolate on all the conversation and dialogue we have had, just to put it - this is just for understanding, any Roll Over freight slot from this year's timetable into next year's timetable will come in as a Level 3, exactly the same Rights as Grand Central's because it has exactly - there is no differentiation between a freight slot or a passenger slot.

MR YEOWART: Unless the freight slot was running as a spot bid in a previous timetable.

MR GIBBONS: But within the timetable, the Roll Over in December '11, Roll over in December '12, that freight slot will have exactly the same standing, in your argument (*referring to Mr Yeowart*) for December '12 for these slots.

MR ALLEN: So the next level of decision is application of Decision Criteria.

MR COOPER: If it was bid for at the Priority Date.

MR HANKS: Are we still dealing with 494, can I ask?

MR GIBBONS: I am just trying to extrapolate into -

THE CHAIR: Can I just pick up on that extrapolation? I will come back to Network Rail. Are you saying it makes a difference whether it was in the previous Working Timetable, final operating Working Timetable, as a result of a spot bid or otherwise as to how it gets Rolled Over into the new one?

MR YEOWART: Spot bids have to be firmed up at some time. You can't keep Rolling Over a spot bid in a timetable. You have to firm it up and then it has a right and then it Rolls Over.

THE CHAIR: So a rolled-over spot bid is still -

MR YEOWART: You cannot Roll Over a spot bid.

MR COOPER: It is six months or some extend to 12 months in freight contracts.

THE CHAIR: But if it got into the Working Timetable -

MR GIBBONS: Try three years, we applied for Rights.

THE CHAIR: But if it got into the previous Working Timetable as a result of a spot bid, that slot, when it gets Rolled Over, i.e. re-proposed, even if it is re-proposed next time round before the Priority Date, it still is somehow tainted with having originated as a spot bid; is that the -

MR YEOWART: It would be the same as for a passenger operator with a spot bid. You

cannot continue to Roll it. You must firm up the Right in order to improve your chances, I suppose, at the next bidding round.

I just need to go back to something that was said where Network Rail are incorrect in relation to the award of Rights by the Regulator. The Grand Central initial award of Rights did not come with a timetable. The Regulator had taken the view that Network Rail were not capable of producing a timetable within an agreed time so awarded Quantum Rights to Grand Central, which they can do, which is not specific Timetable Rights and instructed Network Rail to come up with a commercial timetable.

So it is not the case that on each occasion you go in at this level that the Regulator will expect to see a timetable and indeed that Network Rail will have produced a timetable. And there is plenty of evidence to show that in many times, on many occasions, Network Rail have been instructed to have approved Rights and then create the timetable.

Grand Central's initial timetable, three trains to Sunderland and back, was created after the Regulator had made an award and told Network Rail to create the timetable.

THE CHAIR: That may well be right. I am not sure how that – I mean you are talking of 2002/2003 -

MR YEOWART: I think it is relevant in the fact that Network Rail are suggesting -

THE CHAIR: - when Grand Central started up?

MR YEOWART: - that, you know, if they cannot firm up a path for whatever, then perhaps it would not get approved and then they should not do any more work on it, etc, etc. That was the way I had read what was being said.

THE CHAIR: That may well be the case but I am not sure that helps us on the exercise we are involved in now, which is trying to establish, as at this particular Priority Date, 2 March, in the first place what were the relative priorities per the contract, per 4.2.2, of the bids that were on the table as a PDNS at that time? That is what I am trying to fit it into, the wording of 4.2.2.

So I come back to Network Rail. Do you have anything else to say on that issue of it is Level 3 or bust, or it is Level 3, there is no bust?

MR ALLEN: Nothing else to add.

THE CHAIR: You accept that anything which comes in, by definition before D-40, is Level 3?

MR ALLEN: In terms of the decision we make on the priorities that we include in D in the timetable, there is nowhere else for it to go, I believe.

THE CHAIR: Okay. Can you tell me - and I will ask Grand Central this as well - what, then, do you think is the contractual effect? What do these words mean in 4.2.2(d)(iii)? "...contingent Rights or any expectation of Rights of any Timetable Participants have been exercised...". What do these following words mean "...provided Network Rail considers, acting reasonably, they will be firm or contingent Rights enforced during the timetable period"?

MR YEOWART: I believe that means, and I think in reality it has happened, that the Regulator will approve those Rights, because the Regulator ultimately has to approve Rights.

THE CHAIR: And if Network Rail, acting reasonably, does not believe that the Regulator will approve them, what...

MR YEOWART: I am not sure that Network Rail can do anything, actually, unfortunately. I think that is it. They're stuck with it.

MR HANKS: In this case, Network Rail clearly believe that that was a likelihood because when they applied the Decision Criteria - I accept they did apply the Decision Criteria, then they submitted that evidence to the ORR and so they -

THE CHAIR: No, no. I am trying to get to a point before the Decision Criteria become relevant, as you have said in your submission.

MR HANKS: Yes.

THE CHAIR: A lot of these things you do not even get to the Decision Criteria if you can establish priority.

MR HANKS: But what I am saying is that Network Rail clearly expected that one or the other of these bids would receive Firm Rights.

MR COOPER: Can I just come in because it goes back to what I was saying earlier about the due diligence that Network Rail does in assessing Open Access Proposals? Prior to it getting to the Access Planners, there is perhaps a year or two years' work there.

THE CHAIR: Yes.

MR COOPER: You know, we have to check all the finance and things like that. You know that, Paul, and I am sure Danny does. There is an awful lot of work that goes into it.

THE CHAIR: This is what you have said already clearly, that -

MR COOPER: It will not get here (*referring to a document*).

THE CHAIR: - the sort of irreversible practice is, and it will always carry on being like this because it cannot happen any other way, is that there will be no PDNS without there having been the dialogue, etc, etc, consultation, evaluation, and so on, exercise which

will inevitably create a reasonable expectation in Network Rail as at the time that the PDNS goes in, that those Rights sought will become firm, if they are not already firm at the time of submission.

The logical corollary of that, it seems to me, and is this what you are saying, that that proviso in (d)(iii) actually means nothing because it can never become operative, can never have any effect? A proviso, as expressed, is something which, as written, would normally mean that the words going before it do not apply. Now, you are saying, in effect, that that can never be the case.

MR YEOWART: For a *bona fide* operator, yes. But if it was just me, for example -

THE CHAIR: If you were to -

MR YEOWART: If I turned up Network Rail's door and said, "I have got 50 quid here. I'd like to run a train service", I would still make a PDNS in relation to (iii) for bidding rights, but it would be reasonable on that occasion for Network Rail to seek some assurances, both from the company and from the Regulator, about the likelihood that we might be awarded some rights.

I guess that is how Network Rail ultimately make that determination. We would not expect, for example, there to be an issue with East Coast being awarded Rights, properly submitted, or any other train operator, but it is there - as you can imagine in the early days, and this has been about a long time, there were a lot of people like me, and I was on my own at the very beginning, who turned up and said they would like to run a train service. You can imagine, over time, that has diminished but in the early days I remember going to many meetings when there were a fair number of people around the table with those sort of issues.

It has sort of funnelled down to the - I think the term "the expectation of Rights". Indeed when you complete your PDNS you have to actually point out where you think it is, and the bottom layer in the PDNS refers to that one.

THE CHAIR: Okay. That is very helpful. Can I invite you to recharacterise your argument on this point, and I will obviously then give Network Rail - you might want to respond to the arguments on recharacterisation. You will gather that I will feel far more comfortable with it -

MR YEOWART: I'm guessing chronology is important as well, Chair.

THE CHAIR: Sticking with this narrow point on priority and what Level 3 is, because this is getting to where you are at that stage you had that priority, that actually you are saying not that - well, effectively that proviso means nothing. It will always be the case that

anything which comes in as a PDNS, by definition, will only have got there after some sort of dialogue, which dialogue will create the “expectation”, but that in this particular case - and we will probably move on to the same consideration on TTP495 and 493, but in this particular case, the fact of the matter is, which you can demonstrate by evidence (and I will invite you to provide that to the extent that you have not already provided it in your submissions), the fact is that there was dialogue and consultation and so on and so forth leading up to the PDNS, and that dialogue and consultation, notwithstanding, for example, what is said as at February in that particular letter by Network Rail to the Regulator, notwithstanding that, that actual dialogue that happened in this case was sufficient to create the reasonable expectation in Network Rail by the time of the submission at the Priority Date that the Rights sought would become Firm Rights, i.e. would somehow be applied for and granted.

MR YEOWART: Well, we -

THE CHAIR: Is that really what you are saying?

MR YEOWART: East Coast went out to consultation on a new service to York, extending some trains at the back end of 2011. They made a PDNS within the time, as far as we were aware fully compliant because we don't see the PDNS. Grand Central - well, Alliance as such, but there was a Grand Central and - we'll call it “Grand Central” to keep it clear, an application to run additional service to Wakefield which was created at the PDNS with an expectation of Rights. So as we were looking - we then went out to consultation. Network Rail did that on our behalf. So at that time we had two applications for an identical path, both with an expectation of Rights.

THE CHAIR: “At that time”; at the Priority Date?

MR YEOWART: At the Priority Date. That is as we understood it at the time from the consultations that had been undertaken at that particular time. So we had expected then, quite rightly, that Network Rail would not be able to choose between these two applications because neither of us had Rights but we had an expectation of Rights - one of us would, one of us would not - and that would be the Regulator's call.

After we had gone out to consultation, there was a fresh consultation on the East Coast application undertaken by the Office of Rail Regulation which said there was a changed application from East Coast. Now, instead of going to York, which was its original application, it now only wanted to go to Newark, which is where it currently runs, which is a change to its application as far as we can see. Again, we still have not seen sight of the PDNS.

So instantly they go out to a second consultation, and I accept that Shaun will have his piece to say quite clearly, but from our point of view there has now been a change after D-40. As a result, they moved from D4.2.2(d)(iii) to (iv) because there has been a change in their application. We made that quite clear at the time to Network Rail, we made it quite clear at the time to the Regulator.

Now, prior to that, it is quite important that we did get into discussions with Network Rail about the Decision Criteria because until that time, until that second consultation, we believed we were both bidding at third priority. As a result, the Decision Criteria was important because we were identically ranked bids on the same path. After that came to our knowledge, that is when we said the Decision Criteria is no longer relevant because the path bid for - the changed path bid for by East Coast now has lower-ranked Rights than the application that we had in.

THE CHAIR: Yes.

MR YEOWART: That resulted -

MR BRANDON: We would have expected that East Coast should have submitted a revised Access Proposal in line with their revised application to the ORR.

MR YEOWART: Yes.

MR BRANDON: We would have expected that but it did not happen, obviously. But by revising the application, that is a submission after Priority Date and they would have moved down to Priority 4 in the order.

MR HANKS: This has not become any clearer by the fact that there was definitely a second consultation.

THE CHAIR: Yes. I am sorry to stop you there. We will come back to that, but I am going to have one last crack at this because so far you have steadfastly resisted my invitation to recharacterise your argument on a point that is troubling me, which is the status of the relative bids as at D-40, irrespective of what happened after that, irrespective of the changes and problems with Level 4.

So one last go. Would you like to say - and I will obviously ask Network Rail to comment on this - that you think you had Level 3 as at Priority Date by virtue of not just the fact that you were an Open Access Operator and that is always how it has been for Open Access bids but by virtue of the specific extent and nature and level of dialogue and consultation between you and Network Rail prior to then, which, as a fact, you would say, and I would invite you then to support this by some evidence, should be regarded as having created the expectation, the reasonable expectation for the purposes of (d)(iii) in

Network Rail, that the Right claimed for in respect of this path/these paths would become firm.

MR YEOWART: Yes. When we made our application it was compliant and, as a result of it being compliant, it dropped in at Level 3. I cannot agree with your assertion that maybe it would, maybe we wouldn't; it definitely would have dropped in at Level 3.

THE CHAIR: I am not asserting anything.

MR HANKS: No, you are inviting us to comment. Can we confer on this?

THE CHAIR: I am asking you to assert what supports your argument as to the fact of the extent of dialogue before you put that bid.

MR HANKS: Do you want an adjournment or -- may we confer?

THE CHAIR: Would you like to....

(Pause)

MR YEOWART: Can we just have one minute outside the room?

THE CHAIR: Shall we have a general break? Shall we say ten minutes?

MR YEOWART: Yes, thank you.

MR BRANDON: Thank you.

MR HANKS: Thank you.

(Adjourned.)

THE CHAIR: Apologies again for the somewhat extended adjournment but we have been considering the sort of process and timescale implications of where we have got to at the moment. We will come to that, if we need to, but, first, let's hear from Grand Central as a result of – I think it was you who were conferring on the position we had got to on the question I was asking.

MR YEOWART: Yes. Colleagues will come in in a minute. I may appear difficult today on this particular issue.

THE CHAIR: No, that is fine.

MR YEOWART: The reasons for that is I regard the Network Code as a Bible in relation to the development of new services, and always have, and I have been a bit concerned that today we have spent a long time considering the implications of the wording of the third section within that so I have clearly resisted any - things can be ambiguous and you clearly have got your view on that.

However, you did ask, you know, why we felt, at that particular juncture, we

had a proper expectation of Rights and that we had done work and could we provide the necessary evidence. Jonathan, I think you can do that.

MR COOPER: Yes. I mean there has been a lot of discussion with Network Rail, certainly since last year, not only on the East Coast but also on the West Coast, and there is a guy called Martin Hollins who has been our contact. So Martin has been aware of all these things that we have been doing. Now, if there was any doubt within Network Rail's mind, we would not be submitting the PDNS.

THE CHAIR: Right.

MR COOPER: That is how the process works; you do not get there.

MR GIBBONS: We would submit a PDNS for future service aspirations. If I take Thames Gateway, a classic example, we put in a PDNS for services from Thames Gateway, which does not open until Quarter Three next year, to be developed by Network Rail. So we have put services in there which we have no expectation of Rights for at this time.

MR COOPER: I can only explain what happens in Network Rail in Passenger Open Access and that side of the business.

MR GIBBONS: But Part D applies to all operators because it does not differentiate between a passenger operator or a freight operator or Open Access Operator.

MR COOPER: You are right. You are right but I can only comment on what Network Rail does in relation to passenger. They have got a quite rigid process. They put someone on your case to actually deal with you and lead you through the process.

MR YEOWART: I think in relation to a new operator, and I think that is where you were coming from, we have to satisfy quite a strict set of criteria, both with Network Rail and the Regulator, as to credibility, rather than wasting time in the process by asking for things to be done where we cannot deliver.

I am a bit surprised that you said you had not got an expectation of Rights.

MR GIBBONS: Well -

MR YEOWART: I think you probably have got an expectation of some Rights or you would not have done it.

MR GIBBONS: If they have the timetable path and it is offered to me but that is the only time I can acquire Rights.

MR YEOWART: Yes.

THE CHAIR: Right.

MR GIBBONS: Right.

MR YEOWART: Clearly, if there is a wording - did we get that? If there is a wording change

that needs to be made, then that will be consulted upon because that is how the Network Code is amended. Indeed, today is the first time it has really arisen in the way that you have identified it as a potential problem.

But we clearly, unlike Nick, we do have an expectation of Rights because we have the rolling stock and we have identified the capacity and we were working with Network Rail and we can - if you want the evidence, we had a CRE and it became Dan when we had those discussions last November when Grand Central became part of the group.

So we have developed quite considerably beyond where we were at the very beginning. Indeed, at the time, as my colleague has said, we had had an application, and indeed still do have an application, for services to operate on the West Coast Main Line and additional services still to operate on the East Coast Main Line.

THE CHAIR: An application for West Coast again after dialogue or in dialogue?

MR YEOWART: No, after dialogue. We have got an application after dialogue dog, yes.

MR GROVER: That is Alliance as opposed to as Grand Central.

MR YEOWART: Yes.

MR HANKS: Yes, that is right, that is Alliance.

THE CHAIR: Actually I will want to come back to that point about Alliance. It sounds to me, therefore, as if, sort of re-expressing it in terms which resonate with me, and notwithstanding what you were saying before we broke, you, Grand Central, are now saying not "Well, it is Level 3, it's Level 3. It's Level 3 because it's nothing else", but within the terms of Level 3 as drafted in this applicable version of the Network Code - and in fact we have established that it has changed in the past year materially in that respect, but on those words, as it stands, as a fact, in these particular circumstances, supported by evidence (which I can invite you to produce in due course), Grand Central did have an expectation which Network Rail, acting reasonably, might have expected them to have, that they would have Firm Rights because - and that Network Rail would have shared that expectation because of the actual dialogue and consultation that had taken place before the submission of the PDNS. That is what you are now saying, is it?

MR COOPER: That is what normally happens, yes.

MR YEOWART: Yes.

MR HANKS: Yes.

THE CHAIR: No, not "That is what normally happens".

MR COOPER: That is what happens.

MR HANKS: That is what happened on this occasion.

THE CHAIR: That is what happened on this occasion?

MR COOPER: That is our normal relationship with Network Rail, for any applications that we have going forward.

MR HANKS: And that is what has happened here.

THE CHAIR: I want to know -

MR HANKS: That is what happened here.

THE CHAIR: - what happened in this case, what we are looking at?

MR COOPER: Yes.

THE CHAIR: Because we will come to exactly the same question as to what happened on this occasion in - and we are still notionally within TTP494. We will come to the same issue on 495 and on 493, which is why I am flogging it to death.

MR YEOWART: No, that is fine. I understand that.

THE CHAIR: Before I invite Network Rail to comment on that, can I just clarify, because it has suddenly popped into my mind? We are on 494. Is 494 the one in which the actual bid was made by Alliance, not Grand Central?

MR YEOWART: Correct.

MR HANKS: Correct.

THE CHAIR: And does that have an impact on that expectation -

MR YEOWART: No.

MR COOPER: Clearly not because -

THE CHAIR: - in terms in which we have now characterised it as based on fact and circumstance?

MR COOPER: Dan became our CRE when it was handed over to GC. So it was an Alliance service -

MR YEOWART: Customer Relationship Executive.

THE CHAIR: Right.

MR COOPER: Within Network Rail, there was a CRE, Customer Relationship Executive, Martin Hollands, dealing with Alliance, and he still deals with Alliance. When this service became a Grand Central, it was Dan who picked it up.

THE CHAIR: I am not quite sure that that is answering my question. My question is, if it was Alliance that submitted the bid, the PDNS, was it Alliance that had created the expectation in Network Rail, acting reasonably, by the de facto dialogue and consultation that had previously taken place, and was the expectation thus created, an expectation that

Alliance would have Firm Rights to what was being in the PDNS?

MR YEOWART: Yes. It would have been, yes.

THE CHAIR: Not Grand Central?

MR YEOWART: No, it would, yes, at that time.

THE CHAIR: Are we all happy with that?

MR YEOWART: Well, that's how it would have been, yes, at that particular time.

THE CHAIR: When did it change from Alliance to Grand Central?

MR YEOWART: We were negotiating - it was in negotiation before and after that time, but at the time, because we are set by deadlines, we had to submit what we knew, and we knew at that time that Alliance had developed the path and therefore that was submitted as an Alliance application.

THE CHAIR: So is it the case that the expectation, the expectation created in Network Rail by the previous dialogue which you are going to prove happened, was an expectation that Alliance would have Firm Rights and therefore that Alliance would be applying as Alliance for its - well, it would not be a Section 22, it would be applying for a Section 17?

MR YEOWART: No, Alliance would have been applying for Grand Central to run that train on its behalf, which is ultimately what happened with the 22(a) application. If it was just going to be Alliance -

THE CHAIR: So that is a natural expectation that Alliance would have had Firm Rights?

MR YEOWART: Well, no, it would have been Alliance's Firm Rights until such time as it was agreed that we would then not ask Grand Central to operate the service on our behalf but actually to become a Grand Central service, which happened around about 20 March when we made the Section 17 – Section 22(a) application.

MR HANKS: No, that's when the consultation started, Ian.

MR YEOWART: Sorry?

MR HANKS: That was when consultation started.

MR YEOWART: Yes, but our consultation was undertaken as a Grand Central service, was it not?

MR HANKS: Yes, it was.

MR YEOWART: Yes.

MR HANKS: And the internal agreement which we referred to earlier, at the point when we decided that it would go forward as a Grand Central application was in the week commencing 5 March. I think it was the 6th or the 7th.

MR YEOWART: And we discussed that with the ORR.

THE CHAIR: So will you be able to show in what you produce to us in due course, as part of the evidence of the history of the dialogue and consultation on this point that happened, that there was expressly in contemplation a Section 17 application by Alliance for Alliance?

MR YEOWART: No, there was never a Section 17 for Alliance. It created a Section 22(a) for Grand Central. It would have been a -

THE CHAIR: No, I realise it was after the Priority Date but I am talking about the evidence that you are going to produce to us as to what happened before the Priority Date, before the PDNS, leading up to it, which would go to support the contention you are now making that there was sufficient dialogue and consultation with Network Rail as to leave them in effectively no doubt, acting reasonably, that you, Alliance, as the submitter of the bid, had an expectation of getting those Firm Rights. Now, the only way in which Alliance could have got Firm Rights and could have anticipated getting Firm Rights, as at the date of submission of the PDNS, would be an expectation that Alliance would be applying for a - well, a Section 18 it could have been if it agreed with Network Rail -

MR YEOWART: Possibly, yes, could have been.

THE CHAIR: - or, if not, a Section 17.

MR YEOWART: Yes.

THE CHAIR: Are you going to be able to show that that was in contemplation before the Priority Date?

MR YEOWART: I think we have probably got -

THE CHAIR: Not on 5 March but before 2 March.

MR HANKS: I think we have to say we cannot be certain of that. Those discussions took place but whether we have any evidence that we can present, we would have to check.

MR YEOWART: I will have to check with the ORR as well. I might have an exchange of e-mails because my exchange of e-mails were with Brian, although I quite often ring Brian. Hopefully we will have identified it.

MR HANKS: We will have to establish whether we have got e-mails with - Martin is going to be key to this because Martin was our CRE so we will have to see whether we have relevant -

MR GROVER: Yes -

THE CHAIR: By the way, Brian Hopkinson at ORR is?

MR YEOWART: He is the Track Access Executive for the East Coast.

THE CHAIR: Okay, thank you. Not Brian Cogan?

MR YEOWART: No, Brian is one of Brian's bosses.

THE CHAIR: Okay. Right. On that issue, then, I am going to say that we would wish you, please, to some extent depending on where we get in the rest of today but probably in any case, to provide, within some timescale, which we will come to, whatever evidence you can, in whatever form you wish to, of dialogue and consultation with Network Rail for as long a period as you want to go back but up to and not beyond the date of submission of the PDNS, i.e. the Priority Date, 2 March -

MR HANKS: Yes.

THE CHAIR: - supporting the contention that it would have been clear beyond doubt that obviously you were *bona fide*, in the game, not just sort of one-off, coming out of the cold chancer, and therefore a reasonable expectation -

MR COOPER: Sorry, can we -

THE CHAIR: Sorry, and, to conclude on that, the "you" in that case is Alliance and the expectation was that Alliance as the submitter of the bid, would have the Rights as Alliance and that sort of means that there was an expectation that a Section 17 or 18 would be submitted in due course by Alliance for Alliance.

MR YEOWART: Yes.

THE CHAIR: Okay.

MR COOPER: Can I just raise a point with this at (iii)? I think a lot of what you are asking for us is actually for Network Rail because this is not just about Open Access, this is about other operators as well. So -

THE CHAIR: Oh, I am coming to that.

MR COOPER: It is not for us to say. That is for Network Rail to say; how did they satisfy themselves that they met these Rights with operators?

THE CHAIR: It is for anybody who is interested in contending a particular priority to say and as you, Alliance, are contending that priority, you can support that contention. But I am certainly going to ask now Network Rail for their view on that. We will come to their view of the Alliance/Grand Central tilt in a minute.

Just getting back to the basic Level 3 and what that proviso means and did you have an expectation? Did you think you had an expectation at the date and, if so, why did you think you had an expectation?

MR ALLEN: For us, Level 3 is the order in which we handle the trains, New Access Proposals, that go in to the New Working Timetable. I mean, some of the background

that has been alluded in the references to the letter that I wrote to the ORR back in January I think it was, maybe early February, from November last year we had been working with Alliance/Grand Central and we are happy to take them at one voice in terms of talking as a joined-up unit now. That came out sort of in the back end of sort of, I think, late December, I think in reality, that there was talk on behalf of Grand Central and -

THE CHAIR: Sorry, that came out when?

MR ALLEN: Back end of December. December 2011 we had some clarity on that.

THE CHAIR: That in relation to this bid they were talking on behalf of Grand Central?

MR ALLEN: Yes. We knew in December the '08 train path would be resourced by Grand Central.

THE CHAIR: That directly conflicts which what has just been said.

MR ALLEN: Sorry, resourced. Yes.

MR GROVER: I am not sure that is correct.

MR ALLEN: Correct me, please.

MR GROVER: When the Notification of Significant Change came in, there were separate ones for Alliance and Grand Central. In December, it was decided that Alliance would now be doing Grand Central sort of timetabling work as well so they would be deconflicting these two. So basically we are going to take these away and we are going to give back to you non-conflicting aspirations because originally Alliance's aspirations clashed with Grand Central's aspirations.

So in December - when we say they were talking as one, we mean that Alliance was doing the timetabling work for Alliance as Alliance and for Grand Central as the -

THE CHAIR: As the agent.

MR GROVER: - as the agent. So that was in December and that was when all the advanced timetable work was done and that is when the letter that Matt sent at the beginning of February which basically sort of said that the significant aspirations that have been alluded to we largely cannot resource.

I believe at the time of the Priority Date Notifications, the expectation was that Alliance would be using Grand Central rolling stock to run the services.

THE CHAIR: Sorry. I said I want to put the Alliance/Grand Central tilt to one side for a minute.

MR GROVER: Yes.

THE CHAIR: I want your view, first, on the prior issue of what is said now by Grand Central,

as I have rephrased it in terms that actually sort of mean something to me, which is that purely in terms of creating the expectation in Network Rail, as Jonathan said it is as much a matter for Network Rail, more a matter for Network Rail as it is for Grand Central. Do Network Rail accept that within the terms of (d)(iii) as apparently drafted in that proviso, which we have all been struggling with, as a fact, never mind what sort of always happens in theory but in this particular set of circumstances, as a fact, there was sufficient dialogue and consultation in the period, some period, leading up to the Priority Date, the submission of PDNS, between, for the moment let's just say Alliance/Grand Central and Network Rail to create a reasonable expectation that Alliance/Grand Central would be successful in getting that slot and in getting Firm Rights to it, notwithstanding that in February you were writing to the Regulator saying it will never happen because it's too difficult, because it's -

MR ALLEN: The short answer is, no, we did not have a 51% assurance that the Rights for that path would be given to Alliance/Grand Central.

MR GROVER: I think -

THE CHAIR: In that case, can I ask you on what basis you accord Level 3 priority to Alliance/Grand Central on that bid?

MR ALLEN: I think I am going to end up circulating this to the discussions we have had sort of this afternoon. On the basis that there is not anywhere else to go, and what we are doing is making the priority in which we assess the proposals going in to the timetable if the New Working Timetable took away that we review New Access Proposals or for any operator going in to the new timetable, and there could be a whole shed load of those that do not have any Rights at all yet established, but are still sort of documented on someone's PDNS as their intention, and if you are using the word "expectation" with a small 'e', that they would have some form of right at the end of it if they found their way into the offered -

THE CHAIR: With a small or large 'E', it is with a small 'e', but it is a specific expectation. It is an expectation. The proviso is that "...provided that Network Rail considers, acting reasonably, that they [the Rights bid for, the Rights which have been exercised] will be Firm Rights in force during...(read to the words)...period."

MR ALLEN: The difficulty we had with the 1608 path is we -

THE CHAIR: Now, that is an expectation.

MR ALLEN: Yes.

THE CHAIR: It is not an anticipation of a possibility. That is why I put it, off the top of my

head, as an interpretation of that, that it means at least 51%.

MR GROVER: I think the difficulty is we had an expectation that the 1608 path would either go -- we had a reasonable expectation there would be Firm Rights for either East Coast to operate the 1608 path or Grand Central to operate that path. So a reasonable expectation that one of the two - because they cannot both have 51% because obviously that makes 102%

THE CHAIR: The purpose of delving into this whole Level 3 thing is to determine who, of conflicting bids, has priority? You cannot resolve that by saying, well, they have equal priority and will have an expectation that it will be resolved somehow.

MR YEOWART: But that is how the system works, Chair. If I can just reverse it just to show you how difficult the process is, and I do accept it is difficult for Network Rail. Early in this process, Grand Central's fifth Sunderland service, Network Rail wrote to the Regulator and said that they felt they would probably be able to path that train ultimately, which was due to leave -

THE CHAIR: Is that the subject of 493?

MR YEOWART: No, but it is relevant just in relation to what you are trying to get from Network Rail here. So at that time they are actually telling the Regulator they think that that service is deliverable. But, as it happened, it was not. So you can see how difficult it is for Network Rail to say, with any assurance, that something is or is not deliverable unless they have actually got a validated timetable.

So it is quite important, I think, in relation to what you term an "expectation of Rights" because I do not think any of us, unless it is a Rolled Over service, actually believe that any particular time early in the process Network Rail can confidently say Yes or No. They do expect, if they find it, that the Rights will be awarded. I think that is where we get to. Will the Rights ultimately be awarded because it is the Regulator who awards the Rights, not the other way round.

MR HANKS: There is a bit of logical conundrum here. There would be no need for the Decision Criteria if, to get to that Level 3 Rights, you had to be more than 51% certain of getting those Rights. That would mean that only one Participant would actually qualify to go forward under that clause. So you would never get to the stage where you had to decide between two applicants of the same priority.

THE CHAIR: Or I think maybe you would not get to the Decision Criteria. The Decision Criteria is applicable in all sorts of other conflict situations. They do not have to be applicable in that. I mean, if that is the net result of those words, then maybe that is the

result of those words.

MR YEOWART: The problem is though, Chair, that the game would be reversed because what every applicant would then do would go to the Regulator first, but the Regulator does not want you to go first; he wants you, first of all, to try to negotiate and agree a position with Network Rail, using the criteria laid out for your application process.

THE CHAIR: Okay. So you are now saying, as it were, putting Network Rail's position for them -

MR ALLEN: I like it!

THE CHAIR: - well, actually - we are back to saying that proviso does not really have any effect because "expectation" in that context is to be interpreted as meaning nothing, really, just a sort of -

MR YEOWART: I think the way -

THE CHAIR: Even in circumstances where, on Network Rail's side, whatever it was, two weeks before, they are saying, in a letter to the Regulator, it is undeliverable; nevertheless, within the meaning of that clause, somehow or other they have, by 2 March, a sort of expectation that it will be a Firm Right and therefore it will be deliverable.

MR YEOWART: I think, if I am right, and I am supportive of Network Rail in quite a lot of things but not in everything that they do, the expectation is the expectation that if the path is found, will the Regulator award it to you? Are you likely to have an expectation of that right? If it was Ian Yeowart on his own, and there are plenty of places around the UK where I could find capacity and Network Rail would agree that, yes, there is capacity you can run that train, it might not be on the main line but I could do it, but they really think I have an expectation as me on my own, for the Regulator to say, "Yes, Ian, you can run that train", you wouldn't.

That is where we come back to Jonathan's discussion earlier about the all the work we have to do prove who we are; we have to start off saying we abide by the Network Code, the Regulator makes it quite clear to us he will not consider applications until he is sure about *bona fide* status, i.e. are we capable of delivering something that he might award. I think that is where the "expectation" word comes in; do Network Rail expect, if they find it, that the Regulator will say yes?

THE CHAIR: So "expectation" means the expectation that if the path is found, it will go to A rather than B?

MR YEOWART: Yes. Either (a) have we got the capacity to operate it or (b) will the Regulator say -

THE CHAIR: Albeit it in circumstances where Network Rail, on the face of it, are saying a path cannot be found.

MR HANKS: In the circumstances here -

THE CHAIR: That is a hurdle that is to be ignored because -

MR YEOWART: It is really.

THE CHAIR:- in the grand scheme of things, by dint of pushing and shoving, it will be got over somehow.

MR YEOWART: Unfortunately, the timescales in the development of the timetable nearly always come to the conclusion that you have to say virtually No at the early stage. In the one occasion when Network Rail actually said Probably Yes, they could not deliver, and the one that they said No to, they could deliver. And that is the difficulty that Network Rail have got.

THE CHAIR: Okay. Network Rail, do you accept the argument that is now being advanced on your behalf that that is what "expectation" means, even in circumstances where, on the face of it, you are saying, "No, we cannot do it", actually you still have an expectation that you will be forced into doing it somehow or other?

MR ALLEN: Not as literally as that. I think some of this goes back to how long is a piece of strong. You can optioneer a timetable forever and do different tunes in it and compromise it in ways for performance, you know, it's back-to-back in disruption, its reliability. I think the discussion we had with TTP518 this morning shows how sometimes we get sort of suckered in to making possibly not always the right decision on putting trains into the timetable.

I do accept that if we do do some work and we find a legitimate path that we believe is 'performance robust' enough, is all the necessary criteria in terms of compliant, then we have an expectation that the Rights for that path, once we have found it, will get awarded. Will get awarded, full stop.

For me, a bit of the difficulty with where we have got to with this 1608 path is that Part D does not really help us make a decision between two -

THE CHAIR: Equal-level -

MR ALLEN: Equal-level things for the same path entitlement.

THE CHAIR: Indeed.

MR ALLEN: Yes.

THE CHAIR: The whole purpose of this, I am afraid, very laboured discussion has been to get to the point where it is or is not established that both bids were at Level 3.

MR ALLEN: Yes.

THE CHAIR: That is the point of getting to this, to see if Alliance/Grand Central's bid got to Level 3 in the first place, before we consider whether East Coast's bid also got to Level 3 because there may be other reasons, e.g. the alleged non-compliance of the bid at that stage which might have caused Network Rail at that time, acting reasonably, not to have had the expectation that the East Coast bid, in its non-compliant form, would become Firm Rights.

MR ALLEN: We have done effectively real-time a lot of timetable development with the New Access Proposals from Grand Central. I think that has also sort of not helped because then we have got into the mindset of, well, we want to do the right thing and try to get a satisfactory product that everybody is comfortable with.

THE CHAIR: Right, okay. So trying to wind up on this, and again I am trying to put words into your mouth that resonate with the way the words go, you would say that an expectation - you would go along with the suggestion that an expectation can be there reasonably in your mind notwithstanding that simultaneously the other side of your mind is saying, "Well, at the moment we cannot see how it is deliverable, nevertheless we know from experience that those difficulties, somehow through discussion, will be got over and those Rights will become firm for that bidder"?

MR ALLEN: I don't think we can say that for every request we get on a PDNS.

THE CHAIR: Right.

MR ALLEN: It is not possible. You know, straying out of the debate, Nick has mentioned his Thames Gateway request which is in exactly the same category -

MR GIBBONS: It is.

MR ALLEN: - as this category for Ian. Hand on heart, I am pretty certain we will not give them anything that looks like what is submitted to us. Now, we will find four paths in each direction we need and we will do it through dialogue and we will do it through understanding whether we need to flex other operators and lots of churn and aggravation with lots of other people. But I cannot actually, hand on heart, here say, with the amount of trains we have now got on the network out there, that I will find him his slots but we will do absolutely everything we can to get to that point in time, where we do offer them.

MR A LEWIS: Does that not tie with Ian's point, though, subject to us finding paths, you expect the rights to be granted?

MR GIBBONS: It also depends on what sort of Right you get granted.

MR ALLEN: Yes, correct.

MR HOLDER: It could be a Quantum Right.

MR ALLEN: Yes.

MR GIBBONS: It could be a Quantum Right, an Access Right, a lot of different Rights. We may never up with a 1608 path.

MR YEOWART: This one was slightly different because this was a specific path that had been identified whereas, you are right, quite often it is Quantum that you get as opposed to Access.

MR GIBBONS: So it may depend on what you end up getting.

MR YEOWART: I think the expectation of Rights really boils down to the fact that if we find something, are you capable of running it and will the Regulator let you run it, because that is where you come to and that is why it is important to work with *bona fide* operators. It does not exclude any operators, and I remember that from my days when I first started, but you have to go through a significant number of hurdles, proving your financial capacity in the same way that franchises operated, and you have got access to rolling stock. In Grand Central's early days, we had lease options, for example, without any of -

THE STENOGRAPHER: I am sorry, I am having trouble hearing you.

MR YEOWART: Sorry. In the early days, for example, Grand Central had lease options with Porterbrook, the rolling stock company. That was our rolling stock, the only stock that we had at that time. Without that rolling stock, and that would have been the occasion now with Grand Central if it did not have the rolling stock, we could not have an expectation of Rights because we could not deliver.

It is the ability to deliver, which is where Nick is. He has clearly got the stock he needs and Network Rail know that. They know that Alliance is a *bone fide* prospective train operator because the Group have said so. They have gone public and said so. In fact, Nick is part of the same group ultimately, and Grand Central does have rolling stock and has surplus rolling stock. So, therefore, if we find a path for Grand Central, then Network Rail would believe, quite rightly, that we would be able to deliver that path because we have the ability to do so. But without that ability to do so, you cannot have an expectation of Rights, and I think that is where probably that comes down to.

THE CHAIR: Okay.

MR HANKS: The other feature, I think, is the amount of flexibility, as hinted earlier, that the Rights, were they to be granted, may be only on a quantum basis. We have always been

happy to be very flexible about the Rights that were granted, so although we were bidding for a specific path, we are quite happy to have the discussions, and indeed our application allowed for a degree of flexibility within that path. We were not looking for a very tightly-defined slot, although we had identified a particular slot that we were bidding for.

THE CHAIR: Right.

MR ALLEN: Yes, in a practical way, when we – I guess this is, you know, how our planning teams react to the word “Right”. There are different levels of Rights that we need to do slightly different things. When we are in a position we are in at the minute where there is not a previous established Right and there is no actual Rights, we agree, if we can establish a path and a timetable that is robust enough, then I think we have the expectation that that right will be agreed.

THE CHAIR: Right.

MR GIBBONS: It comes back to what Ian said some time ago, that Level 3 is bottom of the pile, isn't it?

MR ALLEN: Yes.

MR GIBBONS: Whatever happens, it just gets dealt with after Level 1 Rights and all the rest goes with it.

MR ALLEN: If it is a *bona fide* proposal, it has got Rights, it has got rolling stock allocated, it has got a diagram attached to it, and we ought not to be having this debate about whether it is resourceable or not, because it has to be resourceable for it to be a *bona fide* Access Proposal.

MR YEOWART: Just as a matter of interest, last year the 1608 path, the previous timetable application, East Coast had Firm Rights so therefore it came in at Level 2 and that is why Grand Central never bid previously. It is only because the path has become available.

THE CHAIR: No, I understand that. I am going to ask East Coast to comment in a moment, Shaun. I am trying to sort of find way through which is consistent with the wording of (iii) as it stands, and it seems to me the only way you could interpret it to support what, in effect, you are both saying is that in that context “expectation”, the true interpretation of “expectation” there, as drafted in by the Regulator or whoever, is not “expectation” in the sort of dictionary sense, which I would say is a 51%, in other words a probability rather than a possibility, but something less than that for practical reasons that, as someone said, if it were a 51% probability you could never have more than one bidder with that expectation, creating that expectation.

Now, I do not think, of necessity, the Decision Criteria have to be sort of, by interpretation, brought in to be relevant on every issue that arises out of here, but an interpretation that gives Level 3 only one particular sort of occupant, at least in respect of conflicting paths, is, I suppose, difficult in its own right. But that does mean, putting in the words of Network Rail, the view that even though it is apparently sort of fighting tooth and nail to say, "Oh, it is really far too difficult, we just do not see how we are going to resolve this in terms of pathing" or all sorts of other things, nevertheless there is always the underlying supposition that somehow we will be able to resolve that and therefore those Rights will become firm.

Is that a reasonable expression of the Network Rail way of thinking?

MR ALLEN: We try to resolve everything that comes in, yes. As the railway becomes more congested, that is becoming more and more difficult. So I do not think we can say that we will resolve everything because, you know, as more and more trains go down, the options, the solutions are just running out. It is our behaviour and our thinking to go in and try to find a resolution to everybody's issues so that, you know, we can make the best use of the capacity we have got in the network, where there is a business need to do so.

THE CHAIR: Okay. So that, again to put it another way, in terms which sort of facilitate a working interpretation of that proviso in (iii), that is to say that you can simultaneously have an "expectation", for the purposes of that clause, that proviso, that more than one, two or more bidders for in effect the same slot or at least conflicting versions of the same slot, you can have an expectation, in respect of both of them, that they will be accorded Firm Rights because your corporate state of mind as Network Rail is that you have an expectation of probability that one of them will get it but you do not know who as at the stage of the bid.

Is that a right way of looking at how Level 3 operates -

MR ALLEN: I wish it wasn't, but -

THE CHAIR: - and why everything gets in as a default at Level 3?

MR ALLEN: I wish it wasn't but that is how it is, yes. I don't think we are as - and I go back to some of the questions I have asked around this particular thing, particularly internal, and I do not think I am airing anything that cannot be shared, which is when we do get these two competing paths because principally in a view where we have got things in that category and there are no Rights established, then we are looking for a timetable solution. The most flexible bits we can look at when we are looking for a solution, we have got no journey times that we need to comply with, we have got no windows for departures, no

station stops that we need to comply with, so the most flexible time for us to take a new train bid and work it into a timetable if we can do so.

What we do not have or what we are not very linked up at is understanding, you know, what brings the best value into (inaudible) when we have got two of those into the industry in terms of efficiencies, value for money and all the rest of it. When we get two competing timetable bids for the same slot, there is – you know, I do not think it would be unfair to say a bit of a gap in the linkage between some of our business planning stuff and the decisions that we are being asked to try to make in the timetable. I will -

THE CHAIR: Clearly, at the time you would not have been thinking in terms precisely in which I am now expressing it?

MR ALLEN: No.

THE CHAIR: But, in effect, you would say, well, you can have more than one bid at Level 3. By definition, everything that comes in that has the necessary approval or degree of gravitas and sense and presence in the first place -

MR ALLEN: Yes.

THE CHAIR:- has been demonstrated, everything comes in at Level 3 because that is all there is, notwithstanding the slightly unfortunate wording of that, that proviso with the word “expectation”, because it is an expectation that somehow we will work it out, and that is how we get to the situation where you can have more than one, and therefore a conflict of bids at Level 3, and that is the point at which the Decision Criteria come into play.

Would you go along with that sort of general -

MR COOPER: If you have got two competing bids at this level, yes.

MR YEOWART: That’s right.

MR A LEWIS: And both can be proven to work as well. They can both be proven to work as well. That was the first step, make sure that they path both and then we go to the Decision Criteria.

THE CHAIR: Right, okay.

MR HANKS: Yes.

THE CHAIR: But I imagine in this case you would go on to say that is all fine and dandy in theory, but in this case actually it is doubtful whether East Coast’s bid was correctly accorded Level 3 priority - we will come to that - and even if it was and you therefore get to the Decision Criteria stage, there is another debate to be had about the correct application of the Decision Criteria in this case -

MR YEOWART: Yes.

THE CHAIR: - which, I think is something we are going to have to leave for another day.

MR YEOWART: Okay.

THE CHAIR: But before we do, I think we should hear East Coast's views on it, as an Interested Party not a Dispute Party, on where we have gone with this interpretation of (iii), to try to make it workable.

MR FISHER: Again, it is -

MR YEOWART: Have you got any input!

THE CHAIR: We will come to consider your, East Coast's bid, in the light of the interpretation we are going down now?

MR FISHER: Yes.

THE CHAIR: We have not got to that yet.

MR FISHER: I think it is clearly a fascinating subject as the last couple of hours have demonstrated!

THE CHAIR: Oh dear!

MR FISHER: It's kept me awake! I think you're right. I think the whole thing hinges on an interpretation of the word "expectation" and what should be deemed, you know, a real expectation by Network Rail.

Interesting listening to both parties' points, Ian's point and the Network Rail point. Given that an expectation can be deemed as if you can find a path then you will get the Rights for it, which I accept probably happens in most times, most occasions but, as Ian will testify, it is about not to happen with the 1552 path, where a path has been found and the ORR are saying No. So is it right to have -

MR YEOWART: (Inaudible).

MR FISHER: Is it right to have that expectation that providing you can find a path, then the Rights will follow?

THE CHAIR: But is that the ORR saying, in that case, No after the event?

MR FISHER: They have said No after the event, yes.

THE CHAIR: Yes.

MR FISHER: And said No on other reasons, one being things that Network Rail have put forward in terms of the performance concerns for the route and the other being something internal to ORR and Grand Central in respect of the commercial case for the bid.

THE CHAIR: Network Rail had performance concerns on that?

MR FISHER: Mmm-hmm.

THE CHAIR: Sorry, the reason I raise that is because that – I mean, I was kind of with you -

sort of what you were saying was consistent with my somewhat forced interpretation of (d)(iii), to try to keep the show on the road, that Network Rail's state of mind can be somewhat ambivalent but they can still have an expectation in the very, very large sense of thinking, "Well, something is possibly going to happen, even though we have reservations". But if, in the case you are talking about, by the time ORR pronounces on it after the event, Network Rail still has performance concerns, I am wavering on the validity of the interpretation that I was kind of trying to get at.

MR YEOWART: A performance concern, we spent a long time with Network Rail's planners to find an alternative to the 1608 and eventually found one which was fully compliant, apart from there was an negotiation to have about a 30 second reduction in stop time at Doncaster. That was the only issue on that train.

THE CHAIR: Okay.

MR YEOWART: So, in effect, everything was the same apart from -

THE CHAIR: In effect it is back to notwithstanding there were concerns, there could still be a kind of legitimate, big-type expectation that somehow will be sorted out.

MR YEOWART: Yes.

THE CHAIR: I am sorry, Shaun. You carry on.

MR FISHER: No, that is fine. I suppose to place it back, I thought, yes, perhaps getting somewhere into a forced interpretation of it, I think clearly there is one instant exception there that perhaps throws it out and suggests, well, it comes back to the question of what is an expectation.

THE CHAIR: Does that mean you do or you do not go along with the somewhat forced interpretation which I/we have sort of arrived at as being sort of acceded to by both Alliance/Grand Central and Network Rail?

MR FISHER: Yes, I do. Yes.

THE CHAIR: You do -

MR FISHER: Yes, I do. Yes.

THE CHAIR: - support that interpretation?

MR FISHER: Yes.

THE CHAIR: Thank you.

MR FISHER: I think that is the best that is going to come at the moment!

MR YEOWART: We have all fallen foul of making applications that we think will be approved and then for some reason they are not. Shaun has had exactly the same issue with East Coast.

MR FISHER: Yes.

MR YEOWART: It does not just happen to us as operators. But, ultimately, the Regulator is the final one. But when we do the work, we do it with that expectation. All of us, we do that.

THE CHAIR: Okay.

MR GIBBONS: Just to interject for a minute. So if there has been some work which said there might be a 50 or 52 path here and the Regulator turns round and says, "Yes, but there are issues about me giving you some security of right", you can still, subject to being compliant with the timetable and an offer being made, you can still run that.

MR YEOWART: Not if the Regulator won't give us Rights we can't.

MR GIBBONS: Why not?

MR YEOWART: Because he is the person who approves the Right.

MR GIBBONS: You can run trains without Rights. I do. So do freight operators.

MR COOPER: If there is a released slot -

MR HANKS: We prefer not to run it without Rights.

MR GIBBONS: No, that is not what I said.

(Inaudible due to cross-speaking)

MR GIBBONS: Yes. (Inaudible) under some sort of General Approval for six months which takes you to the next timetable.

MR YEOWART: We will have that discussion on the way home because I have not thought about that. We could potentially go to -

THE CHAIR: Let me be clear, is that only under a General Approval, not just because you happen to put a train on the tracks and nobody stops you running?

MR YEOWART: The issue is, though, for us, as Nick probably realises -

MR GIBBONS: It is about the rights.

MR YEOWART: - as a passenger operator, there is no point us running a train for 90 days because passengers have an expectation that this train will continue to run. But I expect, yes, if we wanted to be really awkward and never ever get an approval from the Regulator again, we would stick it to him and say, "We are going to run it anyway" but I don't think we'd do that and -

THE CHAIR: And just roll over every 90 days.

MR GROVER: You're not allowed to roll over a 90 day -

(Inaudible due to cross-speaking)

MR YEOWART: No. It is a thought. I will have a think about it. It is a thought.

MR ALLEN: Same here. Good one, Nick.

MR THOMAS: The reason Nick does it is because he has an offer. That is the problem, isn't it, Nick?

MR GIBBONS: Yes.

MR ALLEN: Yes.

MR YEOWART: We never got an offer.

MR ALLEN: No, no.

MR GIBBONS: No. I am hypothesising.

MR YEOWART: Should have done but we didn't.

THE CHAIR: Is there anything else East Coast would like to say at this stage on where we have got to, beyond the interpretation of (d)(iii)?

MR FISHER: No, no.

THE CHAIR: As I said, we will come to applying that interpretation to the priority given to East Coast only.

MR FISHER: Yes, yes.

THE CHAIR: That is the next issue. So nothing at this stage. My colleagues, anything else to ask the parties -

MR GIBBONS: Not at this time.

THE CHAIR: - on where we have got to at this stage?

MR GIBBONS: Not at this time.

MR THOMAS: No.

MR J LEWIS: No.

THE CHAIR: Right. Just getting to the practicalities, it is now 6.05. We reckon that from where we are now, and how we got here, irrespective of the merits of that, we have probably got at least two hours, and possibly more, to get through the issues of 494 and then the specifics on 495 and looking at the contesting bids and things in issue, and 493 and so on. So we think, in all practicality, we are going to have to adjourn this somehow at some stage. We are not going to be able to conclude it today, even if we were to go on for another hour or two now.

We could go on, while it is sort of fresh in our mind on this issue of the interpretation, to address just the issue of the application of interpretation we have got to of (d)(iii) to East Coast's bid or we could stand that over to be the first thing we come to when we reconvene.

MR YEOWART: I think our view, Chair, we are actually, as you might expect, on a Grand

Central train, the last one which leaves at 1918 this evening. Having said that, if you wanted to continue on to a conclusion, which would obviously take us to 8, 9 o'clock, we would be prepared to do that and obviously travel on a later train.

THE CHAIR: Sure. That is precisely why I am saying, for people's planning purposes, that I do not think, unless we are prepared to stay here until midnight or whatever, there is a possibility that we will get to conclusion on all three today. Therefore, for practical purposes, it would be sensible to adjourn and reconvene, bearing in mind that the fact of the adjournment and what we all might do with it, to some extent, affects the dynamics of the whole thing.

MR YEOWART: Yes.

THE CHAIR: Right. If that is the case in your practical planning, I don't think it would, then, be helpful to go on now and flog this one to death even more on the East Coast, applying it to the East Coast before we then move on to all the other issues. I think it would be better to come back to that one fresh.

So I think I am going to propose that we adjourn now to reconvene at a date convenient to everybody. I will come on in a minute to what we all might do during that adjournment, but we have some dates to propose to you as a possibility. I think we said in order of preference, this coming Thursday, the following Monday and this coming Friday, in descending order of preference.

MR YEOWART: I definitely cannot do Friday. I will just go get my diary.

(Pause)

THE CHAIR: Sorry. I should make it clear that if we reconvene on any of those days, we will not have Jason.

MR J LEWIS: Sorry.

THE CHAIR: But we think we will still be quorate-compliant with the Rules. If anyone would want to object to that, say so now.

MR HANKS: Can I ask what time you were thinking of convening because bearing in mind we have to travel from York?

THE CHAIR: Same as today, 10 o'clock?

MR YEOWART: I could possibly do Thursday but I will have to change something else.

Monday would be preferable to me, but I realise it might be difficult for others.

MR GROVER: Monday is my preference.

MR J LEWIS: Monday or Thursday.

MR ALLEN: Monday.

MR HANKS: I can do any of those.

MR SKILTON: Is 10 o'clock too early?

MR GIBBONS: Ten o'clock is fine.

MR THOMAS: What time do your trains get in, gents?

MR HANKS: We have to consider our options. I mean, the Grand Central train doesn't get in until -

(Inaudible due to cross-speaking)

MR YEOWART: I guess we will have to pay to come down on an East Coast service.

MR SKILTON: What time does your train get in?

MR HANKS: Our train gets in at 1025 at Kings Cross.

MR YEOWART: What time is the first Bradford?

MR HANKS: No, the first Bradford is in at 1030.

MR YEOWART: We can do 1030 if we get something to Donny and then -

MR SKILTON: I imagine, on reconvening, the Panel will want to talk so, Peter, if we said 10.30?

MR YEOWART: That would be all right for us. It is only a 5-minute walk.

MR HANKS: If we need to be here at 10.00 we can be here at 10.00, can't we? We will find a way.

THE CHAIR: Sorry, is 10.30 over a watershed -

MR YEOWART: Grand Central services arrive at 1025. It is a five-minute walk from Kings Cross.

MR HANKS: A ten-minute walk.

MR YEOWART: We can have a discussion on the train so we don't need any pre time of course.

MR SKILTON: I would imagine if the Panel meet at 10.00 you will probably start about 10 30.

MR GIBBONS: If the Panel meets at 10.00, we will have half an hour to see where we are.

MR SKILTON: 10.30 Monday morning, everybody, and the Panel at 10.00.

THE CHAIR: Okay. Can I ask, are you all happy with the principle of adjournment, I think is the best way of doing it?

MR YEOWART: I think we have no option unless we stay over.

THE CHAIR: I do not want you to think, you know, you are getting short shrift or that -

MR YEOWART: No. I actually think, Chair, it has been difficult this afternoon.

THE CHAIR: That you have been sort of filibustered!

MR YEOWART: No, I think you have been very thorough and we have eventually explored the position and got to a position that I think everybody is comfortable with. It is quite an important point of principle.

MR SKILTON: One item of evidence that you have been asked for, if you can, if there is anything you can produce for Monday, that would be helpful.

MR BRANDON: We will provide it for you by Friday, if that is okay.

THE CHAIR: It would be helpful to have it Friday.

MR YEOWART: We will send it to you in advance.

THE CHAIR: I suppose I would say if, in the meantime, anybody wishes and is able to do any research that would, I suppose, support the interpretation which we are now seeking to put on that troubled paragraph, that would be helpful. I mean, I may say that, with the Secretary's able assistance, we have had a quick look at a previous version of this particular provision as at 2010 which was very different on this point, in that Level 3 did not have this "reasonable expectation" bit in it and actually supported the - it is probably the contention you were originally advancing, which was, well, it was just the bin for everything because - or an expectation could be just created by the fact of saying, "We have an expectation."

MR YEOWART: I think we might need to look at the consultation in relation to it.

THE CHAIR: I think everybody might want to be looking at that and I think we certainly will be.

MR YEOWART: I think the reason it was changed is for the very reason we have had the discussion, is to filter out the people who have really got -

THE CHAIR: I wonder if the change has actually filtered them in rather than filtering them out. Again, obviously when we reconvene, be assured I do not want to carry on flogging this one forever and a day, but we will have to start with dealing with it and its application to East Coast's bid and we will have to take it from there. If anyone wants to help to shed any light on it in the interim, please feel free.

Is there anything else I ought to deal with at this stage or that anyone else wants to suggest be done in the interim or anything we can do to help the process?

MR COOPER: Sorry, what was that?

THE CHAIR: Does anyone want to suggest that there is anything else that could or should be done by anybody in the interim to help the process along? No. Thank you very much. See you on Monday.

Monday 24 September 2012

THE CHAIR: We are back as an adjourned hearing of TTP493, 494 and 495. We have had an adjournment because we were frustrated by time, and in that adjournment we have all had time to think about the issues as far as we have got and we have also had the benefit of some further material provided by Alliance/Grand Central in response to our request for that, so thank you very much for that.

Obviously this is taking a different path than if we had just gone on through the hearing, but because we have had the benefit of the adjournment and that additional material, I think it would be sensible and helpful if we just recap where we had got to and where we think we are going from now as a basis of that.

So, where we think we had got to is that we had had the submissions from both parties on all three disputes and we had started the Q&A on dispute 494, the Sunderland path, where, effectively, the conflicting path is that of East Coast. On that, our Q&A had drilled into two issues: one was the effect of the relative identities of Alliance versus Grand Central as the bidder for and prospective holder of and operator of Rights. We got a certain way down the track with that and then moved on. We will want to come back to that today, in the light of having looked at all the material again and so on. The other, on which we spent a very long time, was the precise interpretation of the relevant version, which is the March 2012 version, I think, of Part D of the Network Code, of Part D Condition 4.2.2(d)(iii), which we established is different from the previous version, at least as at whatever month it was, 2010 of Condition 4.2.2 overall, for the whole way in which those levels of priority are expressed. So we were looking at the words of (d)(iii), in its relevant current form, with a view to determining eventually which of Alliance/Grand Central on the one hand and East Coast on the other hand had which level of priority as at the Priority Date, with a view to going forward for that and establish how the conflict should have been resolved.

We identified a problem of interpretation of this form of (d)(iii), in that it has this proviso at the end which effectively requires, in order to accord a Level (iii) priority, requires Network Rail to have a reasonable expectation, as at the Priority Date, that the wording is something like "...the Rights applied for will become Firm Rights" or

contingent Rights, and that “will become Firm Rights” is taken to mean “will be acquired in due course through the relevant application to ORR”. We stuck on the interpretation, in effect, of what a reasonable expectation may be, the difficulty being, certainly in my mind, that the word “expectation”, in its natural meaning, means expecting a probability, which I characterised as being 51%, that it means a probability that the Rights will be granted.

Now, the difficulty of that natural meaning of “expectation” is that if it is a probability, by definition, only one person can have a probability and so Network Rail could only have a reasonable expectation that one bidder would get a particular path if there are more than one applying. The evidence and account of everybody was that one way or another, in order to make the system work, Rights which are applied for by serious bidders have to come in at Level (iii) because there is nowhere else for them to go as at the Priority Date.

We bounced that one around and came to the conclusion that in order to make these words work, we really have to construe the word “expectation” as meaning an anticipation not of a probability but of a possibility that the Rights will be granted which means that, logically, Network Rail, as holding the ring in this, could have a reasonable expectation as at the Priority Date that there is a possibility of more than one bidder getting the thing, and the way in which that possibility gets resolved in favour of one particular bidder is something that happens after the Priority Date. We came to the conclusion that we should apply it in that way to give it meaning, and that sort of retrospectively applying a legal principle of interpretation to that, it is the principle that you always try and construe all parts of a contract so that they mean something rather than they mean nothing at all. That, really, is the principle that comes down to this. Not, it is worth adding in passing, not the principle of interpretation that, well, custom and practice sort of dictates that that is how it has been interpreted by everybody over the period in which it has been operated, which is another perfectly possible principle of interpretation, but in this case we cannot apply the custom and practice which has interpreted a different version of the Network Code in which this conundrum did not appear, because the previous version, as at 2010, did not have this problem of the proviso in (d)(iii) which effectively repeats the proviso in (d)(ii). The previous version was

constructed in a different way so that (d)(iii) really clearly could admit any serious bidder.

So that is the position we got to on that and, as I say, we asked for and got evidence from Alliance/Grand Central that, effectively, on that basis Network Rail could have had a reasonable anticipation that there were serious bidders that were interested/probably interested in this path and therefore there was a sensible possibility of them eventually working out and getting it.

So that is where we got on that, and that is effectively where we left it when we adjourned.

We will now go on to consider, still in the Q&A – I am not going to ask anybody to repeat their submissions on the other ones, so still sticking with 494, because that is where we are, and we will come on to 495 and then 493 afterwards, but the next issue to consider will be the application of that test to the East Coast bid to see where that puts them in the order of priority.

We then need to go back to something which was raised but we sort of stood over before, which is the effect on the whole thing, in 494, of the failure to issue or late issue of a Prior Working Timetable. Whether that has a bearing on the whole thing, we need to come back to that one, because we blocked that one out but Alliance/Grand Central have certainly raised that as an important issue on this view.

Then, still on 494, we will need to come back to the issue about who actually was the bidder and the operator as between Alliance and Grand Central, and whether that affects the position and the level of priority. That will then hopefully dispose of 494. Then we will come on to 495 and 493, and I hope we can obviously get it all done today.

So, starting off on the issue of the priority of East Coast's bid, applying the test which I have just enunciated as to what (d)(iii) means, how we are interpreting that, which favours Alliance/Grand Central. What do you, Alliance/Grand Central, say as to how applying that test should have placed East Coast's bid? Now, your submissions broadly say that in other respects East Coast's bid was non-compliant and therefore should not have been accorded Level (iii) priority. Would you like to elaborate on that?

MR COOPER: East Coast, our view is that they had the same level of Rights, which is the third level, which, as we know, it is an expectation, and I don't think Network Rail

have disputed that they have said that we have the same level of Right. Nobody had any Rights is what they have said. Do you want me to go on to explain about the prioritisation and why we believe -

THE CHAIR: Sorry. You are saying they said nobody had any level, any particular level of Rights?

MR COOPER: Yes. Yes, they said that in their statement.

THE CHAIR: I thought they were saying that effectively East Coast had Level (iii) Rights.

MR COOPER: Yes, the same Rights as us.

THE CHAIR: And I thought you wished to argue against that.

MR BRANDON: Sorry, no. I think we are getting a bit confused with the priorities and Rights.

MR COOPER: Yes.

MR BRANDON: So priority (iii), (d)(iii), is that they don't necessarily have Rights, i.e. Firm Rights, to operate those services but have an expectation of those Rights, therefore they were ordered priority (iii). Again, the same with us; we didn't have any Firm Rights so we were awarded priority (iii). This was at the point when the PDNSs were submitted. Now, once the PDNSs were submitted, again we had the expectation that they were prioritised Level (iii), we were prioritised Level (iii). However, eventually we got sight of the PDNS, which has incomplete information in it and, similarly, it has conflicting bids in their PDNS. As per the Network Code, by submitting that, we feel it was an incorrect proposal and Network Rail should have rejected the proposal based on it being an incomplete bid. As a result of it being incomplete, they should have been knocked down to priority (iv) after -

THE CHAIR: That is what I was seeking from you.

MR BRANDON: Yes.

MR COOPER: Yes.

THE CHAIR: So, as I understand it, setting aside the judgment on your bid and the priority of that -

MR BRANDON: Yes.

THE CHAIR: - you are suggesting that East Coast's bid, as at the date of the PDNS, as at the Priority Date -

MR BRANDON: Yes.

THE CHAIR: - should not have been accorded Level (iii) Rights, not because they did not have an expectation of Rights, in the sense we have been talking about, but because in other respects -

MR BRANDON: Yes.

THE CHAIR: - it was non-compliant in some respect, it did not contain something. That is what I wanted you to elaborate on.

MR BRANDON: Yes.

THE CHAIR: What your contention is in that respect.

MR HANKS: The specific piece of information that we feel was missing from there was about rolling stock, the rolling stock to be used. It is very clear in the East Coast PDNS that they say that (*referring to document*):

“These changes [referring to the changed services that they are looking for] have not been included in the electronic PIF or the rolling stock diagrams that accompany this document.”

“This document” being the PDNS.

THE CHAIR: This is East Coast saying this in their PDNS.

MR BRANDON: They are saying this in their PDNS, “We have not supplied you any information about the rolling stock to be used on these services.” The Network Code, where does it say...

MR COOPER: 2.5.1(e).

MR HANKS: 2.5.1(e).

MR COOPER: That is the requirement of the content of an Access Proposal I think.

THE CHAIR: “The railway vehicles...(read to the words)...Timing Load to be used...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.”

MR HANKS: I am not aware of any document in writing to the contrary. It has not been supplied to us or, I believe, as evidence.

THE CHAIR: So your contention, then, as regards the East Coast bid is that, aside from the possibility of that Network Rail agreement to the contrary, the lack of that particular information conflicts with the contractually-required, in accordance with 2.5.1(e), content of an Access Proposal?

MR BRANDON: Yes.

THE CHAIR: And that lack of the contractually-required content takes it outside 4.2.2(d)(iii)?

MR COOPER: What we are saying should have happened is, under 2.4.7, Network Rail should have notified East Coast that the information was missing and asked them to submit a revised Access Proposal.

THE CHAIR: Because you would say that, under 2.4.6(c), it is a proposal purporting to be an Access Proposal but which is defective or incomplete?

MR COOPER: Yes. Yes.

MR HANKS: And just to make clear, this is material. There was another path we were looking for where we were told it could have worked if our - a Grand Central path - could have worked if East Coast operated an electric train but did not work if it was a diesel, high-speed train. So it is a material piece of information to the bid. It is not as though it is - everyone knows what the answer had been.

THE CHAIR: Right. Understood, thank you. *(Pause)* Relating that to the language of 4.2.2(d)(iii), which accords third level priority to contingent Rights or any expectation of Rights, which is what we have been talking about, "...of any Timetable Participant which have been exercised...", are you saying that that defect in content effectively means that the expectation of Rights has not been Exercised, with a capital 'E', and "Exercised", with a capital 'E', defined at the beginning of Part D means:

"...as a consequence of (a) submitting an Access Proposal to Network Rail by the Priority Date in accordance with Conditions D2.4 and D2.5."

So if it is not in accordance with D2.5, it has not been Exercised and therefore it does not fall into (iii)?

MR COOPER: That is one way.

THE CHAIR: I do not want to put words in your mouths, but is that the thrust of the argument?

MR COOPER: That is one way, but we also - our argument was that Network Rail should have actually requested a revised Access Proposal and that would have dropped it down, after the Priority Date, to the fourth level.

THE CHAIR: Okay. So two limbs, then, to the argument?

MR COOPER: Yes.

MR HANKS: Yes.

MR YEOWART: Unless, of course, they could re-submit it by the Priority Date. Depending when the application is made, of course. If it is made on the Priority Date, anything -

THE CHAIR: Yes, but in this case, as with all, effectively they all came in on -

MR YEOWART: They usually do, yes.

THE CHAIR: - the Priority Date. Okay. Anything you want to add to that bit of the argument?

MR HANKS: Not that bit of the argument, thank you.

THE CHAIR: In that case could I ask -

MR SKILTON: Chairman, what about limb (b) of the definition?

THE CHAIR: The definition of a Rolled Over Access Proposal?

MR SKILTON: Do you have any questions about...

THE CHAIR: Is there any sense in which the East Coast bid could have been construed as a Rolled Over Access bid?

MR HANKS: Well, this is the second part of the argument. This is about the clarity as to what the bid was for. We believe that it is fairly clear that the PDNS, as submitted on the Priority Date, was to run - was to amend the existing service to extend trains to York, extend the Newark trains to York and to run some additional trains to York. Therefore we assert that that bid was for trains to York. That would then not be a Rolled Over bid. These are not trains to be Rolled Over because -

THE CHAIR: Because they are different -

MR HANKS: They are no different from what was currently there.

THE CHAIR: A Rolled Over Access Proposal is where an Access Proposal was submitted in a previous revision of the Working Timetable -

MR HANKS: Yes.

THE CHAIR: - resulting in Train Slots being included in the Prior Working Timetable, and that possibly engages the argument about whether and when the Prior Working Timetable was produced?

MR HANKS: Yes. It is very clear the first part of East Coast's PDNS includes a statement about all the other services that they do wish to Roll Over. So the services - or the service - that we are disputing here is not contained in that list. So it is very clear it is outside what they are looking to Roll Over.

THE CHAIR: Right. Thank you, that is very helpful. Network Rail, would you like to address those different limbs of the argument, starting with the non-compliance, the lack of rolling stock point and that that takes it outside part 2.5 and that means, arguably, it has not been exercised?

MR A LEWIS: Yes. To answer the questions sort of one at a time, we did actually make it quite clear during the build-up of the Significant Change workings because East Coast did apply for a York extension in December '11 as well and, again, during Significant Change we did tell East Coast it would not be workable, there was no way we could get the paths to York. There was an understanding of that, but I think it was to protect their own Rights, the comments about the extension to York -

THE CHAIR: I am sorry to interrupt, Andy, but I think you are addressing the Rolled Over bit.

MR A LEWIS: I am, yes.

THE CHAIR: Could we deal with the first one we were talking about, which is the first bit of the "Exercise" definition which is effectively it was not an Access Proposal because it was defective in that it did not contain some of the content, the required content, as regards the rolling stock?

MR A LEWIS: Right.

THE CHAIR: Then we will come back to the second bit of "Exercise" which is the Rolled Over proposal.

MR A LEWIS: Right. After speaking with East Coast, we clarified what exactly it was they were bidding for because it was our understanding it was going to go to Newark, and that is why we accepted as a Roll Over, because the detail was already in from the previous timetable.

THE CHAIR: Including the detail as to the rolling stock?

MR A LEWIS: To Newark, yes.

THE CHAIR: To Newark?

MR A LEWIS: Yes.

THE CHAIR: But not to York where they were bidding for?

MR A LEWIS: Well, it depends how you interpret this, because the way we interpreted the PDNS was if York wasn't available, which we had already made clear that it was not available during Significant Change, then Newark was what they were actually asking

for. So we processed this as a Newark bid rather than York.

THE CHAIR: So you received it and accepted it as a compliant bid for Newark including, by implication, the necessary detail as to the rolling stock because -

MR A LEWIS: Because that was already in.

THE CHAIR: - that was in an existing -

MR A LEWIS: It was in the previous timetable.

THE CHAIR: - timetable? So the fact that it was or was not actually specified in the PDNS, the rolling stock, you are saying was not material because you were entitled to infer it from the terms in which you knew it in the previous actual timetable, not the previous or existing notional Prior Working Timetable, because there is a difference as to whether and when that was there, but you are saying that at the Priority Date you are entitled to infer from the previous actual timetable that if they were bidding for a service to Newark, in the absence of anything said to the contrary, it would be with the same rolling stock?

MR A LEWIS: Mmm.

THE CHAIR: As had been previously operated on that service?

MR A LEWIS: And that is the way we tended to treat Roll Over bids from any operator, unless they actually specified changes.

THE CHAIR: Right. I am sorry to be quite deliberate about this -

MR A LEWIS: Right.

THE CHAIR: - but I am still considering this under this first limb of "Exercise", which is not that it was a Rolled Over Proposal but that, simply, it was an Access Proposal which either did or did not have the contractually-required content. Now I am putting words in your, Network Rail's, mouth to try to get to what I think is the argument that you might maintain, which is that the contractually-required content of that line (e) of 2.5.1, details as to rolling stock, -

MR A LEWIS: Yes.

THE CHAIR: - if it was not expressed in the PDNS, you were entitled to infer, as a matter of contract, from the fact that it had been thus in the previous actual timetable for that actual service?

MR A LEWIS: Yes.

THE CHAIR: Is that what you are saying?

MR A LEWIS: Yes, that is what we are saying.

THE CHAIR: Right. Before we move on to the other points, can I ask Alliance's view on that?

MR YEOWART: That would appear, on the face of it, to be a reasonable argument but the PDNS is specific. Have you got the copy of all our written evidence?

THE CHAIR: Yes.

MR YEOWART: Tab 2/16 has got the East Coast PDNS.

THE CHAIR: Yes.

MR YEOWART: At the beginning it says, it is only a short summary:

“The timetable is to be...” -

THE CHAIR: Hang on. Let me just get there. East Coast's PDNS is -

MR YEOWART: 2 and 16.

MR BRANDON: It was Appendix G.

MR YEOWART: Sorry, Appendix G.

THE CHAIR: Yes.

MR YEOWART: It says:

“This timetable is to be a roll forward of that which appears in December 2011 with the exception of the following alterations we are bidding for...”

And then it goes through some default changes. Then it says, on the third page:

“Additional services and services for which FCR is expiring December 2012, Part 1...”

And then over the page, Part 2 was then listing Newark “or to be extended to York”. I think it is quite clear that the PDNS made a clear distinction about this being an Access Proposal for these additional services, not a Roll Over of the original Newark services that were awarded in 2010.

THE CHAIR: So you are saying that they were not entitled to infer that the same rolling stock would be there and that that supplied the necessary content of the proposal because they have expressly said that the alterations are an exception to the 'roll forward'?

MR YEOWART: Yes.

THE CHAIR: That is “roll forward” with a small ‘r’ and ‘f’, in other words not within the definition of “Roll Over Proposal” but just the natural meaning.

MR YEOWART: Yes.

THE CHAIR: So you have said they have taken themselves outside that by expressly accepting - have they expressly accepted from that sort of loosely interpreted 'roll forward' the relevant Newark service? Where is that?

MR HANKS: Yes.

MR YEOWART: Part 2.

THE CHAIR: Is that all of these? Where is the - that is the relevant one. 1B88 is the relevant one?

MR HANKS: Correct.

THE CHAIR: In respect of that, they have said up above:

“East Coast also wish to bid for the following changes which were detailed in the 2013 TT Notification Significant Change Advice for November. These changes have not been included in the electronic PIF or the rolling stock diagrams (a confidence document). Items in red currently exist in the December 2011 timetable but the FCRs expire at the end of this period. Should it not be possible to fulfil this aspiration then, subject to any future decision to be made by ORR regarding Track Access Applications on the East Coast Main Line, East Coast wish to retain these services for the December 2012 timetable as they currently exist in the December 2011 timetable...”

On the face of it, I read those words as an exception to an exception. In other words, the PDNS starts off by saying it is a 'roll forward', in the loose sense, not the contractual "Rolled Over Proposal" sense. In the loose sense, "What we are after is what we previously had, except for everything we now list..." and then, in respect of that category, which includes the relevant 1B88 service, they say, "We except from the exception we have made, anything in respect of which we cannot get our aspiration, in which case we revert to saying it is a rollover, in the loose sense, of the December 2011 timetable", which would include all the incidence of that, including the rolling stock?

MR HANKS: But you cannot confirm the rolling stock. If some of those paths had been found and offered by Network Rail but others had not, then the rolling stock used for that might well be different. You cannot just infer from that PDNS, we maintain, you cannot just infer the rolling stock from the existing timetable.

THE CHAIR: Okay. So are you saying, then, that to make an exception to an exception like

that is just not good enough to have this general, “Oh well, if we can’t get it, then just roll it all over as a lump” -

MR HANKS: Yes.

THE CHAIR: - because that does not supply the necessary content of the argument which needs to be more specific as to how it would work in the new arrangement with, among other things, the specific rolling stock?

MR HANKS: Yes.

MR COOPER: Yes.

MR YEOWART: Yes. It is also the position that the Regulator does not like operators to, if you like, speculatively bid in an attempt to block up the network and to bid for other services that are undeliverable, or potentially undeliverable, as they have the same effect, and that has happened previously. The fact is, however, as well, that by bidding for them specifically, they have conflicted with their own application, with the Newark’s and York’s conflict. So you have got two conflicted applications or Access Proposals within one PDNS which is not acceptable either.

THE CHAIR: I suppose they might say that it is not a conflict because they have sort of put it as an ‘either/or’. “If we cannot get what we want, then we will go back to Plan B”, and Plan B is a sort of wholesale importing of all the previous content.

MR YEOWART: And that is fine. But Plan B drops you down from (iii) to (iv). You cannot have Plan A and Plan B together as a proposal.

THE CHAIR: You cannot have equal Rights for Plan A and in the alternative Plan B?

MR YEOWART: No. If you go back to where Grand Central and Alliance were, where we had conflicting interests, we would never have submitted an application that had a conflict within it as an Access Proposal, and that is the issue we have had here.

Now, we know there was a change because the Regulator went out to a second consultation, which we have not needed to discuss at the minute because we are only concentrating on the compilation of the PDNS.

THE CHAIR: Yes. Okay. So Network Rail, where you might have said, well, the way in which this is expressed is by way of, as I characterised it, “an exception to an exception”, there was a sort of general ‘roll forward’, in the loose sense, of the content of the previous timetable, including the rolling stock, (1) Alliance/Grand Central would say that

is not good enough because it is just not specific enough and (2) you cannot have your cake and eat it as another bidder can put in Plan A or, in the alternative Plan B, and expect them both to get equal Rights; you have got to go for one or the other. That is what I think is being said.

How do you view that?

MR A LEWIS: I mean, from a Network Rail perspective, during the build-up through Significant Change and just prior to the receipt of the PDNS, we did actually tell East Coast that we did not intend to do any further work on the York paths because it just didn't work, and we would proceed with Newark. That was made clear in constant dialogue with Shaun. We told Shaun that at the time and the planning team -

THE CHAIR: Before the submission of the PDNS?

MR A LEWIS: Before and after, yes.

THE CHAIR: I am not concerned with after, I am concerned with before.

MR GROVER: Yes, there was a letter to the ORR.

THE CHAIR: Definitely before?

MR A LEWIS: Yes.

MR ALLEN: This, from the very start, has always been the train between - one path between - the 1608 between two different companies' aspirations. We have been talking about this since November, you know, when everybody has put their Significant Change down. We are also being asked for where we thought we were going by the ORR about how we could make the different competing aspirations for the same path work.

For me, you know, when we started putting the detail of these things in front of our practical planners and the practical application of it, people have read that exactly how you have described it, Mr Chairman, in terms of an 'either/or' if that hadn't worked out, and maybe, rightly or wrongly, put some assumptions on the "If it becomes the exception of the exception, then it is delivered in the same characteristics that it is delivered in the current timetable."

You know, from a very practical point of view, there are thousands of services we do that with between every timetable change. Not that that is necessarily an excuse, but it is certainly, you know, a very practical approach that people take. If a train moves over into a new timetable, it is still there, it is not challenged by any sort of new Access

Proposals as such, then it gets delivered with the same capability as it was delivered in the previous timetable.

THE CHAIR: I understand that, Matt, but we have touched on this before -

MR ALLEN: We have.

THE CHAIR: - as to the extent to which you wish to argue, if you do that practical/getting to a result/common sense/in the best interests of the industry/compliance with our license obligations and so on considerations, somehow, as a matter of legal interpretation, qualify or override the obligation to stick with the letter of the contract and the Rights and obligations under that. As I understand it, that is an argument that you do not wish to advance, because I asked you that last time -

MR ALLEN: Correct.

THE CHAIR: - and you declined to do that.

MR ALLEN: Yes.

THE CHAIR: Because I said if you did wish to advance that argument, I would be very happy to hear it but I will need something to support it.

MR ALLEN: Mmm-hmm.

THE CHAIR: I think we had moved away from that. So however practical - obviously one, in a sense, wants to arrive at practical, pragmatic solutions for all these kinds of disputes - but my understanding is that mere practicality is not asserted to override the strict contractual position.

MR ALLEN: Agreed.

THE CHAIR: Okay. So sticking with the strict contractual position, are you saying that the fact that you, Network Rail, discussed with East Coast prior to the PDNS and made it quite clear that, as far as Network Rail was concerned, Plan A (York) would not work and would not be considered and therefore only Plan B would be considered, that that has a material effect contractually on the fact that notwithstanding that discussion, the PDNS, when it went in, included Plan A and Plan B in the alternative, in its express terms?

MR ALLEN: Well, it can't, can it? The whole discussion is around "can somebody put in their PDNS an 'either/or'", isn't it, really? That is what we -

THE CHAIR: You will understand where I am coming from on this. My inclination is to think that if East Coast had taken that discussion on board -

MR ALLEN: It should only have -

THE CHAIR: They would have put Plan B in the PDNS and bid for that.

MR ALLEN: Yes.

THE CHAIR: Is that right?

MR A LEWIS: Yes. That seems a fair assumption, yes.

MR ALLEN: What we are creating here is that there are lots of different things going on at the same time, isn't there, so there are people trying to establish a different set of Rights through a different process and we are, at the end of this, trying to make the right decisions in terms of the priority we put things into the New Working Timetable?

THE CHAIR: Yes, of course.

MR A LEWIS: Yes.

MR ALLEN: Which, you know, can go back to the type - ultimately, at the end of the day, it is influenced by the type of Rights you get given by the ORR, but in both these cases we have not been cited, while we are doing - prior to what we put in the timetable, exactly what those Rights are going to be. When we have looked at the two aspirations, which still go back and I still maintain this, we have given them the same level of priority as is their inclusion in the Working Timetable, or tried to as at that starting point, mainly perhaps because we know too much. I mean, we have worked on it from November.

THE CHAIR: In other words, you have gone outside the letter of the contract as implemented by the particular documents, the PDNS, in order to get to a sort of workable industry overall favourable solution?

MR ALLEN: In a way, it would have been helpful to us if East Coast had just put that in there

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THE CHAIR: That may be the case.

MR ALLEN: - because that probably would have upped them in the priority of what we are talking it. That would probably have put them up to Level (ii).

THE CHAIR: But they did not.

MR ALLEN: But they have not, which I guess is one of the reasons we are here today.

THE CHAIR: Before we move on to the next point which is the other bit of "Exercise" in the Roll Over Proposal, I think it is only fair to ask East Coast, who are here as an interested party, if they would like to comment on that.

MR FISHER: Yes, thank you. A couple of things. This element, which is only one element of the East Coast Priority Date Notification Statement, says this had been going on since November. As part of the Network Code process, the D-55, the Significant Change advice which, within that, East Coast submitted that it wished to extend Newark services to York and also to introduce two additional Kings Cross to York services and two additional York to Kings Cross services.

As part of that submission at D-55, Network Rail received all the relevant information in terms of stopping patterns and rolling stock workings because what then happened from November or, if not, actually earlier, right through til at least 7 February, Network Rail worked extremely hard to try to satisfy those aspirations. So there was absolutely no uncertainty as to any rolling stock plans, anything stopping pattern-wise, anything that I think Alliance/Grand Central referred to as making that element of what went into the final PDNS as being invalid. Network Rail were fully aware of those details.

Also, as has been alluded to in the background to this, the significant work that has been going on in terms of timetable development in relation to competing, conflicting aspirations for additional access on the East Coast Main Line, and in conjunction with applications received by the Office of Rail Regulation, and then dealing directly with Network Rail in trying to ascertain what was and what was not achievable, the volume of work that has gone on, which then ultimately led to a conclusion which is in Network Rail's submission, Annex A, on 7 February -

THE CHAIR: Sorry, the 7th of what month?

MR FISHER: 7 February.

THE CHAIR: February.

MR FISHER: - where, actually in Matt's name, Network Rail clearly write to update the ORR in respect of where all the timetable development work had got to at that stage. To be noted, it did not just include East Coast and Grand Central/Alliance, there is also stuff from GBRf and CrossCountry. Noting within that -

THE CHAIR: I am sorry, Shaun.

MR FISHER: Yes?

THE CHAIR: Can you just help me with where we are at the moment?

MR FISHER: It is actually in the main Network Rail submission document.

THE CHAIR: Yes. Annex A, got it.

MR FISHER: Yes, Annex A. It starts off with a letter and then followed with some significant detail on what I believe should be, yes, all operators' aspirations and how they were progressing. From that, and at that point in time, we would not contest that it appears quite clear that the whole package of East Coast's aspirations could not be delivered. And, in fact, from receipt of that letter, the ORR did actually contact East Coast and ask whether it wished to make any challenges to what Network Rail were saying and East Coast said, no, it didn't because we had been heavily involved in this process.

I think what, then, most people expected to happen - certainly ourselves, certainly, and I will talk for them for a second, Network Rail - is that between receipt of that on 7 February and before the Priority Date that the ORR would make a decision on the applications that they had received so that bidders could bid correctly as at the Priority Date. It is fair to say that decision never came in time for the Priority Date. In fact, ultimately, it probably took until I think about 17 August before it came through.

So come the Priority Date, whilst East Coast does not deny the significant work done up to 7 February by Network Rail on developing these paths, it still did not have what they expected to be some clear decision from the ORR as to whether that application, the Track Access Supplemental Application, should be declined or not, therefore, I think, come Priority Date, found itself a bit in limbo.

The decision was therefore taken, as part of the Priority Date Notification, to try, in as clear a way as absolutely possible and to avoid leaving anything out, to make it clear and not to disadvantage East Coast with any subsequent decision that may come from the ORR, to make it clear that our aspiration still was to run these services to York (that is extending the Newark services and also including additional services). However, should a decision finally come from the ORR or should Network Rail reach what they believe is an absolute final outcome that that is unachievable, then East Coast wished to retain the Newark services in exactly their current status.

THE CHAIR: Thank you. So, in a nutshell, you would say that because East Coast had not got clarity from ORR, had not got the green light on its principal aspiration -

MR FISHER: Or a red light.

THE CHAIR: Or a definite red light, had not got clarity one way or the other -

MR FISHER: Yes.

THE CHAIR:- come decision day, it still had to hedge its bets and go and put in its bid in the form of a Plan A or, alternatively, Plan B?

MR FISHER: Yes. Yes.

THE CHAIR: Are you saying that because of that reason for putting in an alternative bid, hedging your bets, that because the reason for that was, among other things, this lack of clarity from ORR which might have helped the situation if it had been less unclear, that that reason stops the Plan A or, alternatively, Plan B bid being characterised as non-compliant because not ultimately being sufficiently specific as to the rolling stock detail, which is the point at the core of this particular issue we are looking at? Are you saying that the lack of ORR clarity is a sort of reason for ignoring what might otherwise be viewed as a lack of sufficient specificity in the actual bid as it went in as regards the rolling stock element for the service which is in dispute?

MR FISHER: That element of information was already with Network Rail in respect of work that had been going on since November 2011. What we felt could happen was, by submitting more than one electronic PIF timetable file and a second version of the diagrams, is it ultimately will lead to downstream confusion as to which was the actual applicable version. So, actually, the version that we submitted with the PDNS was only for the Newark services.

THE CHAIR: I am sorry. Could you repeat that? You think that the effect of the PDNS you submitted -

MR FISHER: Yes.

THE CHAIR: - notwithstanding its actual words, was in substance, only for the Newark service?

MR FISHER: The rolling stock information and timetable information, yes.

THE CHAIR: Sorry. How do you get to that from the words of the PDNS which I was just reading out, which talk about the alternative bids and which say, "If not this, then this", and "If not that, then that" and "If we can't get what we want, well, we will have what we already have"? Because the argument being placed against that, in terms of its adequacy for specifying the rolling stock, is, well, just a sort of wholesale rollover like that is not

good enough to satisfy the requirement of the Network Code 2.5.1(e) that, among other things, you have to specify the rolling stock per service that you want to operate.?

MR FISHER: Right. If we split them into Part A (York services) and Part B (Newark services). Part A (York), number 1 aspiration, information submitted as part of the Significant Change notice -

THE CHAIR: I think “Plan A” or “Plan B”.

MR FISHER: All right, Plan A, submitted in November 2011, fully inclusive of details of stopping patterns and rolling stock plans and had been worked on in detail by Network Rail since at least November -

THE CHAIR: Submitted in November 2011 in the form of the Prior Notification Statement of -

MR FISHER: Significant Change advice, yes.

THE CHAIR: Yes.

MR FISHER: So that information was already held, already worked on in significant detail?

THE CHAIR: Right.

MR FISHER: Come the Priority Date and Plan B (the Newark services), whilst recognising that a decision had not yet been made on the York services, we wished to make it actual clear that should either the ORR make a decision on East Coast’s Track Access Contract obligation or should Network Rail make a final decision that they did not believe these paths were achievable, then East Coast most definitely wanted to continue with the Newark services, which we believe would have reached Level (ii) Priority Rights, as they were firm contractual Rights already held by East Coast at the time of the Priority Date.

THE CHAIR: And are you saying that that is what Network Rail should have understood from your PDNS, and the rest of the industry should have understood from your PDNS, notwithstanding its express words, which do not really say that?

MR FISHER: The information that accompanied the Priority Date Notification included the set of rolling stock diagrams and an electronic timetable PIF file that contained only the Newark services. But East Coast wished -

THE CHAIR: Let me be clear I am understanding this right. You are saying that the PDNS, as a whole, notwithstanding the words I read out in that section, should be taken as having made it clear that although the words said, “We would like Plan A but, if not, then Plan

B”, in fact should be interpreted as having saying, “We are really only bidding for Plan B because we know that is what we are going to get and that is why we supplied the supplementary detailed material in the PIF for only Plan B”; is that it?

MR FISHER: It is trying to say we do not wish to prejudge decisions that others shall make, be that the ORR or be that Network Rail themselves.

THE CHAIR: That suggests to me that you are saying that the PDNS should be interpreted as it appears to say on its face, the bit I read out, “We are going for Plan A and, if not, Plan B”, that is it.

MR FISHER: Plan A remained our top aspiration.

THE CHAIR: Yes. Right.

MR FISHER: However, you know, there was recognition that Network Rail were having real difficulty in being able to satisfy that aspiration.

THE CHAIR: But Plan A, you say, remained your top aspiration?

MR FISHER: Yes. And if, at the Priority Date, we had only bid for Plan A and then at some subsequent point in the future the ORR make a decision, or Network Rail come to a conclusion and say, “we cannot satisfy that”, then there were the Newark paths.

THE CHAIR: Okay, thank you.

MR FISHER: So that is - we wish to make it really, really clear that.

THE CHAIR: Thank you. That is admirably clear.

MR FISHER: Yes.

THE CHAIR: That is admirably clear. Network Rail, I imagine you would go along with that?

MR ALLEN: Yes.

MR A LEWIS: Yes.

THE CHAIR: Alliance/Grand Central?

MR YEOWART: Yes, we have some comments. From what Shaun has said, it would appear that this was an application on its own at that particular time. Alliance at that time also had a Significant Change notice with Network Rail to run a whole host of services into West Yorkshire, utilising the paths that East Coast currently occupy at the 08 timings plus the additional paths from four sets of services. In exactly the same way as discussions continued between all parties, they happened with us as well.

There came a time, however, when we were advised by Network Rail, a position

we may not have agreed on, but they asked us to make sure that all PDNS submissions were compliant, i.e. they could deliver. Now, by the time we had looked at Alliance's full aspirations and also Grand Central's aspirations, we realised there would have been a conflict because we also had a Plan A and a Plan B. When it came to making the final submissions, it was quite clear that we would also have difficulty on providing the information required on the rolling stock for the full Alliance bid but not for the Grand Central bid.

So, according to the Network Code - well, it was an Alliance bid, but Grand Central were going to operate the service on our behalf because they had some rolling stock. So when it came to actually making the submission, then we had to make a decision on do we put a submission in that is a conflict, i.e. submissions from two parties, or do we follow the Network Code, which is you make a submission, and particularly in this case a submission that was compliant. The paths that we wanted to operate were compliant. We had the rolling stock, it was identified. As a result -

THE CHAIR: As Alliance?

MR YEOWART: Yes. As a result, we had to make a decision on which plan to submit, not two plans within the same application, and that is what the Network Code requires you to do.

So it is quite important to understand that at the time we were also bidding for the paths that East Coast were also looking to extend at that time. So it does come down to, you know, can you make a compliant bid or do you make a bid with more than one option?

THE CHAIR: So you are saying that, as Alliance at least, your bid did contain the necessary contractual content in all its specificity because you plumped for one rather than the other. Setting that aside, coming back to East Coast's bid, as I understand it, you would still say, in response to East Coast's observations and Network Rail's, that East Coast's bid was non-compliant in the sense that, as I have tried to drill down into the actual contractual bids, it was not Exercised in terms of the first limb of that definition because it did not contain the required content of an Access Proposal, as to the rolling stock, with sufficient specificity because at the time the bid went in, whatever had transpired with ORR and Network Rail and everything else, the actual PDNS still went in as Plan A or

Plan B, and Plan B was just, “Well, if it is Newark, then we just lump in all the characteristics of the previous timetable”, and you would say, I think, that that does not have the necessary characteristic of being specific as to rolling stock, among other things, because the rest of Plan B and the interaction of Plan A and some interaction between them could have modified the characteristics, including the rolling stock?

MR HANKS: Yes.

THE CHAIR: So a Plan B that simply says, “Well, import everything from the previous time, lock, stock and barrel” is not a viable or specific enough proposal. Is that effectively what the argument is?

MR HANKS: Yes.

MR BRANDON: Yes.

MR YEOWART: That would be right, yes.

MR COOPER: Yes.

THE CHAIR: Right, thank you. Before I move on to the other limb of “Exercise” - we have got to knock these off in the order they come in the contract - colleagues, any questions or observations on that particular issue?

MR GIBBONS: I don’t think I have at the minute.

MR HOLDER: No.

MR THOMAS: I am not sure who this question is to actually, but if you accept Shaun’s argument that he was kind of banking one and trying to work a solution on the other, how do you think that ought to have been correctly displayed in the PDNS?

MR YEOWART: I don’t think you can. I mean -

MR THOMAS: Okay.

MR YEOWART: - that is why we only submitted one PDNS because we could easily have done exactly the same, banked one and bided for the others which would have been in total conflict with what East Coast attempted to do, but the process doesn’t allow us to do it, so -

MR THOMAS: Thank you.

MR BRANDON: It should have been a rejection of - it should have been a proposal for Plan A. They could not meet Plan A (the York services). There should have been a rejection. There should have then been a revised Access Proposal for the Newark services, which

would have then moved them down to priority (iv).

MR COOPER: That would have been under 2.4.6(a) because you can't accommodate it because you have got two competing bids. So Network Rail should have put its hand up and said, "Which do you want?"

THE CHAIR: So that is going down a different part of the process altogether, is it?

MR COOPER: Well, they should have said either, "Doesn't fit", which is - they have already said it didn't work so why didn't they say so and reject it?

MR THOMAS: So the Alliance view is that it cannot happen?

MR ALLEN: I think there is a subtle difference, though. The East Coast, in their other option, uses exactly the same path, from a timetable point of view, between Newark and Kings Cross. The York's - the aspiration to go to York is an extension, so the material timetable between Kings Cross and Newark remains the same.

I think the trade-off that our colleagues from Alliance/Grand Central are talking about was to get a West Riding service in. They were after an aspiration that they had got and as for the Sunderland, there was a direct swap between the two paths.

MR HANKS: Can I come in on that? That relates to one of the other disputes. That is not 494 where that is the case.

MR ALLEN: It understands how you define "conflict".

MR HANKS: Can I also pick up on the - sorry.

THE CHAIR: Sorry, the?

MR ALLEN: It understands how you define "conflict" in terms of the PDNS for East Coast, because the Plan A and the Plan B, do not, from a timetabling point of view, physically conflict with each other, they are in the same path. One path would just terminate a bit short, albeit 100-and-something miles shorter, but there is not a physical planning conflict between the two, as it were.

MR HANKS: Can I challenge that, please, because there is - although it is not a huge difference, there is a very small difference in that the Down terminating path at Newark involves crossing the Up - going Up the Up line, and so therefore it essentially, just at Newark Northgate, is a different path from extending the train to York. Even with that one small difference, they become different applications, bids.

MR THOMAS: So what you did not answer, Matt, how should it be displayed in here

technically correctly, or can it be?

MR ALLEN: The honest answer, Paul, is I don't know. It feels like there is a bit of learning that we have got here that says you cannot put an 'either/or' option into a PDNS, and that is the leadership that we should be putting out to the industry.

MR A LEWIS: But it was sort of determined by an ORR -

MR HOLDER: Could I interrupt?

MR ALLEN: By all means interrupt! We are kind of going into a bit of uncharted territory.

MR HOLDER: What if there were no competing aspirations and one operator has put in a bid for a Kings Cross to York service, and it was at 1608 from Kings Cross, what would you have done with that?

MR ALLEN: So there is no competition for the same path?

MR HOLDER: There is no competing aspiration. Just one operator wants to go 1608 from Kings Cross to York.

MR ALLEN: Yes.

MR HOLDER: What would have been your response?

MR ALLEN: And we couldn't get to York and in the end we offered Newark?

MR HOLDER: You would have offered Newark?

MR ALLEN: I think we would have -

MR HOLDER: You would have flexed the aspiration more and turn it into a Newark terminating?

MR ALLEN: Yes.

MR GROVER: Assuming that is what they want.

MR HOLDER: Yes.

MR ALLEN: Through the dialogue you have.

MR HOLDER: Before you offer, you have to liaise.

MR ALLEN: Plenty of dialogue, yes.

MR A LEWIS: Absolutely.

MR HOLDER: That is the way to put it out on your - on here.

MR ALLEN: Yes. Yes.

MR GIBBONS: There is something in the East Coast PDNS which is not clear at all, but Shaun said that in your PDNS PIF submission: you have said you attached a set of

Newark rolling stock diagrams -

MR FISHER: Yes, that is correct.

MR GIBBONS: - not York?

MR FISHER: Yes.

MR GIBBONS: So if you read the sentence in your PDNS, you have said:

“These changes [the changes listed below] have not been included in the electronic PIF.”

MR FISHER: Yes.

MR GIBBONS: That could have the interpretation that you actually, in terms of providing rolling stock diagrams for York, all the other forward new services were not included in the PDNS. That is the interpretation you could make from that statement?

MR FISHER: Yes.

MR GIBBONS: Network Rail, would you have the same view on that interpretation? In other words, you are saying you have not provided any rolling stock diagrams for these new services?

MR FISHER: Yes.

MR GIBBONS: Although you have not said it in here, you have provided a set of rolling stock diagrams based on a Roll Over.

MR FISHER: Well, I mean, it is the first bit -

MR GIBBONS: I am just trying to -

THE CHAIR: To put it back in the language that we have been using up until now, you did not provide the rolling stock diagrams for Plan A -

MR FISHER: Because they were already there.

THE CHAIR: But, by implication, you would say you provided the rolling stock to be inferred from the previous, for Plan B?

MR FISHER: Yes. No, no. Firstly, “East Coast also wish to bid for the following changes which were detailed all in the 2013 Significant Change Advice, dated 18th November”, of which Network Rail had all that detail necessary enough to develop the timetable.

THE CHAIR: Sorry, are you reading from a part of your PDNS?

MR FISHER: Yes.

MR GIBBONS: Part 2, the first sentence.

THE CHAIR: *(Pause)* The first sentence of Part 2, yes?

MR FISHER: Yes. So just the first sentence.

THE CHAIR: Yes.

MR FISHER: Network Rail already had all the relevant supporting information, as part of that, in November 2011, unless they wish to say otherwise.

MR ALLEN: No. Our understanding is that the electronic data that we have got, I will use the word “understanding” because I personally have not trawled through it, is that it contains the Newark’s and not them as York’s.

MR GIBBONS: That is the PDNS of 2 March.

MR FISHER: Yes.

MR ALLEN: So the electronic data transfer that supports the PDNS that comes with it - gosh knows where that stands in some of this - is with the Newark’s, shown as Newark’s and not as the aspiration for York.

MR FISHER: And also submitted with this document as part of the actual PDNS form was also a set of rolling stock diagrams which support the Newark services.

MR GIBBONS: Yes.

MR FISHER: So that was submitted as part of the PDNS.

THE CHAIR: So if I can put that into contractual terms, as I understand it, the point you are making is that you are entitled to comply with the requirement of Part D as to the content of your bid/PDNS and Network Rail are entitled to accept it as being compliant if, on this point of rolling stock, in effect, although it does not contain the details it refers back to a document which is in the arena and does contain that detail and that, even if the PDNS document itself did not contain that detail, the 18 November Significant Change Advice notification did contain that detail?

MR FISHER: Correct.

THE CHAIR: Alliance/Grand Central, what do you say to that?

MR YEOWART: Well, we have not seen that additional detail, but even if it does, we are still back to the question of can you apply for two conflicting bids within one PDNS? I think the fact that the Regulator went out to a second consultation, based in this case on an amended application, and it is in the public domain, amended application for Rights now to run to Newark only. I think it makes it quite clear that the process is you bid for

clarity, and this is clearly not.

THE CHAIR: But where I think we have got to is that the issue of can you bid for two conflicting bids or two alternative bids is relevant in contractual terms insofar as it has a bearing on the sufficiency or otherwise of the detail you give to one of the required elements under the contract, 2.5.1(e), which is the rolling stock. The issue of a conflicting bid or an alternative bid is not kind of a self-standing obstacle necessary to it being compliant; it is only insofar as it attaches to this issue of was the bid sufficiently specific on this point?

What is now being said is that even if the bid document itself was not sufficiently specific on that point and because it contained these two alternatives, Plan A and Plan B, nevertheless it refers to another document, sort of incorporates it by reference, which arguably did contain that detail.

Do we have, sorry, East Coast's - just remind me, do we have East Coast's - well, there is a document referred to?

MR HOLDER: Significant Change Advice? Yes.

THE CHAIR: The Significant Change Advice already in the annexes?

MR HOLDER: I haven't seen it.

THE CHAIR: Alliance or Grand Central?

MR BRANDON: No, we haven't seen it either.

MR A LEWIS: No, it is not in any - I could probably get it.

MR YEOWART: I am struggling to follow the line here at the minute, Chairman. The application was clearly not only for additional services to York, for extended services to York but also for additional services to York, and tied up within that is the assumption that if none of that can be delivered, which we knew in February could not happen, well, we will revert back to time. Now, had Alliance followed the same view and submitted all its West Yorkshire aspirations in exactly the same way, we would have been back to a position, which was a point that Rob rightly made, that ours could have potentially been offered shortformed, but the process is clear and we follow process.

THE CHAIR: Yes.

MR YEOWART: That is actually why we are here, is because of process.

THE CHAIR: Yes, and it is process that I am trying to drive at.

MR YEOWART: Yes, I understand that.

THE CHAIR: Compliance with process under the contract because that really is the only benchmark we have got to go at.

MR YEOWART: It is the only protection the small operator has.

THE CHAIR: Yes, okay. So you would be saying, then, that even if the detail as to Plan A (the York services) was sufficiently given in the previous notification and kind of irrespective of whether that was in the public domain or not, and other considerations like that, you would say that that still is not sufficient to be contractually compliant with 2.5.1(e) giving specification as to rolling stock? Because what we are actually talking about, the necessary contractual content, is the specification of the rolling stock for the service which in fact was awarded, and which we are trying to debate what level of priority it has, which was not the York service (Plan A) but Newark (Plan B).

MR YEOWART: Mmm.

THE CHAIR: Unless East Coast or Network Rail are saying that the detail of the rolling stock for that was contained in the prior document, the Significant Change Notification, which I do not believe you are -

MR A LEWIS: (*Shook his head*).

THE CHAIR: - you are back to saying is it a sufficient specification of rolling stock for the service which was actually accorded Level (iii) priority. Was it a sufficient specification of that to be compliant with 2.5.1(e) for it to have been merely referred to as, "Well, if we don't get Plan A, we'll have Plan B, and Plan B is 'please see as per previous timetable' back to that issue?

MR A LEWIS: No, they did submit - they submitted the rolling stock data by PIF for Plan B for Newark's.

THE CHAIR: With the PDNS?

MR A LEWIS: Yes.

MR GIBBONS: The PDNS. That is what I was trying to establish just now and Shaun says "yes".

THE CHAIR: Yes.

MR A LEWIS: The actual PDNS document, yes, the rolling stock information was for Newark.

THE CHAIR: For Newark?

MR A LEWIS: Yes.

THE CHAIR: Alliance/Grand Central?

MR YEOWART: I don't understand -

THE CHAIR: Your starting point on this, on this particular issue, was that East Coast's bid was not compliant in this respect, in that the Access Proposal was not Exercised within the meaning of the definition, because it did not contain one of the required elements of 2.5.1, which is (e), rolling stock information. We are now told that it did contain -

MR COOPER: But not for the extent -

MR BRANDON: Not for the York services or the new services, additional services.

MR HANKS: And potentially still, this PDNS is very clear that it is an application to extend those Newark services to York and that that bid - the issue, then, is as to whether the bid included the necessary information.

THE CHAIR: As a whole.

MR BRANDON: Why submit Plan A if you are not going to provide the rolling stock diagrams for the additional services and the extensions to York? Why not just submit Plan B, if that is the intention, with the rolling stock diagrams? There were no rolling stock diagrams. I think as has been supported by East Coast, there were no rolling stock diagrams for these additional services included in the PDNS.

THE CHAIR: No. On that point it is being said, even if they were not in the PDNS, they were supplied by incorporation, by reference to the previous document, which had contained that detail.

MR YEOWART: It does create a serious issue, of course, for a new operator and an outside operator because it basically gives the current operators - it creates a barrier to entry. It gives the current operator every opportunity to Roll Over and choose what it wants on the basis that if we can't get what we want, we will just Roll Over and we will keep Rolling Over. It is a real issue, Chair.

Now, our contention is -

THE CHAIR: I can see that, but that is a different issue to whether it is contractually compliant in the narrow sense of (d)(iii) "Exercised". The definition of "Exercised" refers to Access Proposal as having the "necessary content", "necessary content" defined by

2.5.1(e) including rolling stock.

MR YEOWART: Yes.

THE CHAIR: Which is the narrow contractual point on which we have been going along now, rather than the larger - the way the whole contract is couched is weighted against one particular part of the industry, which it may or may not be.

MR COOPER: We would still argue as well, though, that it was a conflicting bid within itself. So, at that point, Network Rail should have said "Submit a revised Access Proposal".

THE CHAIR: Right. So your argument, then, is not as I had been sort of characterising it, based on non-compliance in the sense of having failed to supply one of the necessary components of information?

MR HANKS: That was the first part.

MR COOPER: Yes, we believe both.

MR HANKS: That was "a" as you have called it. That was the first part.

THE CHAIR: It is on the other limb that one way or another, if you hedge your bets by saying Plan A or Plan B, you are not actually Exercising your Rights, with a capital 'E', for the purpose of getting at level (d)(iii)?

MR YEOWART: In effect it is a Rolled Over Proposal. They didn't need to make a separate Access Proposal for anything additional; it just Rolls Over. But they have made an Access Proposal for additional trains and, in our view, it is not compliant because it conflicts with itself. We will have to accept the point, although we have not seen the evidence but I am sure it is right, about the rolling stock diagrams for the Newark's, but it should have come in the Rolled Over part.

THE CHAIR: I am inclined to accept the proposition that Plan A, if not Plan B, is a conflict despite the fact that Plan B is shorter than Plan A and not a sort of more direct sort of conflict.

MR YEOWART: There are physical conflicts as, Chris has pointed out.

MR HANKS: Yes.

THE CHAIR: Chris has pointed out there are some minor physical conflicts. But what I want to get at is, if you are not saying it is non-compliant because of this sort of contractual logic part I have been trying to go down, which gets us to say it is not compliant because it does not contain some necessarily contractually specified bit of information as to the

rolling stock, I would like you to tell me why it is non-compliant in a rather larger sense by reference to the relevant bits of the contract or the Code in having this conflict?

MR COOPER: I think it is 2.4.6(a):

“Where a Timetable Participant has submitted an Access Proposal which cannot be accommodated in the New Working Timetable...”

THE CHAIR: Hang on. Hang on.

MR COOPER: (b):

“A Train Slot in the Prior Working Timetable which cannot be accommodated in the New Working Timetable.”

Because you have got conflicting proposals. You cannot have both.

(Pause)

THE CHAIR: (a) and (b) and (c) of D2.4.6 are each dealing with different situations. They are alternatives. I mean, they could be cumulative but they are alternatives. The one we have been looking at, in effect, up until now, on this point about necessary content and on rolling stock and so on is (c).

MR COOPER: Yes.

THE CHAIR: Are you saying that this sort of separate point, that it is somehow non-compliant because the conflict -

MR COOPER: Yes.

THE CHAIR: - between Plan A and Plan B falls under (a) or (b) of 2.4.6?

MR COOPER: Yes.

THE CHAIR: Both or which?

MR COOPER: I think it is more likely to be (a).

THE CHAIR: That their Access Proposal “could not be accommodated in the New Working Timetable”. Are you saying that neither Plan A nor Plan B could be accommodated in the New Working Timetable?

MR COOPER: Not together, not both proposals.

MR YEOWART: Well, the Access Proposal is for York. It would be Rolled Over if it was for Newark.

THE CHAIR: I think they would say the Access Proposal was for York or Newark.

MR COOPER: But it is conflicting.

MR YEOWART: Which is why Alliance did not bid for West Yorkshire, all the services, because they were conflicting and were undeliverable. We had to make a choice as to which one we were going to go with, as the process directs you to do.

THE CHAIR: I think you are in effect saying that it does not really constitute a proper Access Proposal if it is expressed in this 'hedge your bets' Plan A or Plan B way?

MR HANKS: Yes.

THE CHAIR: You see, on one, as it were, narrow, linguistic interpretation, I can see that one could say, "I want A or B. One of those I know can be incorporated in the timetable." It turns out that one of those, not A but B, can be incorporated in the timetable. "Therefore I have not contravened (a) because I have not submitted an Access Proposal which cannot be accommodated because A or B can be accommodated."

But you are saying, well, actually, it does not make sense to interpret it that way because then everybody would hedge their bets and you would lose the certainty that the whole process is designed to try to achieve.

MR COOPER: Yes.

MR YEOWART: I think the fact, as well, that these issues will only arise where there is a conflict of aspirations where more than one operator wants to pass. Because if there is no other aspirant, it does not actually matter because you can bid at any time because you are just looking for capacity.

But it is one of the issues that all the Open Access Operators have found, is that the senior operators, if you like, on the network, do hedge their bets quite often to try to take up the opportunity for any capacity that arises on the network to prevent access, and it is a serious barrier to entry. The Regulator has mentioned it on a couple of occasions in some of their output. "Gaming" they call it. The Regulator calls it "gaming". It is in the East Coast "Lessons Learned" document.

THE CHAIR: Yes, I understand all that.

MR YEOWART: Yes.

THE CHAIR: But as you reminded us previously -

MR YEOWART: Yes, right.

THE CHAIR:- we are trying to look at the contractual position.

MR YEOWART: Absolutely.

THE CHAIR: Not the rather larger competition position.

MR YEOWART: No.

THE CHAIR: And if that is the position which the contract, as drafted, puts us in, well, that is how it is.

MR YEOWART: Absolutely, yes, and we have -

THE CHAIR: And changing that is a matter for another forum.

MR YEOWART: Absolutely. But we will get some clarity, and that is the important point of being here with these disputes.

THE CHAIR: Yes. Okay. I think I have drilled down into that element of it as far as we can reasonably go, and probably beyond. So I am taking the issue on this point about the compliance or otherwise of East Coast's proposal, which in turn affects whether it should have been given Level (iii) priority or something else, as being does it fit within (c) of 2.4.6, which is what we have spent most time on, which is the rolling stock information issue and, if it does, does it therefore fall foul of (a) of 2.4.6 by dint of it basically having been put in the alternative in the 'hedging your bets' form?

Do we need, before moving on, just to bottom out what would have been the other limb of (c) under the definition of "Exercised", which is whether, in fact, it should have been regarded as not just a loosely 'rolled forward' but actually as a defined Rolled Over Proposal, which is the other half of the definition of "Exercised", a Rolled Over Access Proposal? The definition of a "Roll Over Access Proposal" is:

"Where an Access Proposal was submitted in a previous revision of the Working Timetable resulting in train slots being included in the Prior Working Timetable which the relevant Timetable Participant does not seek to vary in the New Working Timetable."

I think I am going to answer that question for myself and then invite your views. I think putting it in as Plan A, alternatively Plan B which is Rolled Over, cannot be said to be something which the relevant Timetable Participant does not seek to vary because it is seeking to vary it.

MR A LEWIS: Yes.

THE CHAIR: Would Network Rail accept that?

MR ALLEN: Yes, no objection.

THE CHAIR: I think we can discount that one if you are happy with that? Fine. That means

we move on from consideration of whether East Coast's bid was compliant or not. Before going to the situation of what happens if we conclude that it was not compliant, I just want to give you the opportunity to revert to that other issue I mentioned, which in fact is partly adduced by the "Rolled Over Access Proposal" definition, of the relevance or effect of the Prior Working Timetable having been provided on time, in sufficient form or not at all. Would you just like to tell us again?

I might just remind us that my understanding, in your written submission on 494, you did not make as much emphasis on the relevance of the Prior Working Timetable. You did as regards 493 in your written submission, but then in your opening submission in the first part of this hearing, on 494 you characterised it, and Network Rail in response also characterised 494 as being sort of primarily a dispute about the rights and wrongs of having come up with the Prior Working Timetable.

MR HANKS: I don't think - we didn't see this as the major issue but it is a relevant issue and was included in our Sole Reference Document under TTP494.

THE CHAIR: Yes.

MR HANKS: But Network Rail, I think, have made much more of an issue of it than we expected so we felt obliged to respond to that in our opening statement.

THE CHAIR: Right. I understand, yes. Could you just, then, recap on what you think the relevance of it might be? Really, in retrospect, having heard the way in which we have tried to develop the argument along these contractual lines, does it have any bearing one way or the other on where we have got to in terms of trying to contractually determine the right level of Rights which should have been accorded either to Alliance/Grand Central or to East Coast?

MR HANKS: I think, in view of what you have just said about identifying East Coast's bid as being an intent to vary the existing timetable, then perhaps that argument fades away. That would have been more relevant if you had -

THE CHAIR: More relevant to that particular bit of it, but it is not relevant to the other bits of the argument.

MR HANKS: Yes. I think if they are not trying to Roll Over -- if we are saying that was not a Rolled Over bid for that 1608 path, then I don't think we have a particular concern about it.

MR COOPER: That is right.

THE CHAIR: It is not relevant to the 'were they specific enough about rolling stock' point?

MR YEOWART: No.

MR COOPER: No.

MR HANKS: No.

THE CHAIR: Thank you. Network Rail, anything to add on that -

MR A LEWIS: No.

MR ALLEN: No.

THE CHAIR:- that is relevant to the Rolled Over bit? Colleagues, anything else on that?

MR HOLDER: No.

MR GIBBONS: No.

MR THOMAS: No.

THE CHAIR: Or on the East Coast?

MR THOMAS: No, Chair.

MR GIBBONS: Nothing from me.

THE CHAIR: Right. Can I then move on to what you think the position is as regards the priority which should have been accorded to the respective bids if, in some respect, either of them were non-compliant as at the Priority Date, first East Coast. If we conclude, on the basis of what we have been talking about, if that East Coast bid was not compliant at the Priority Date and therefore should not have been accorded Level (iii), what would the position have been? What kind of priority should it have been accorded? Is it the case, for example, that what happened should therefore have been treated as something which came in after the Priority Date and would either have been Level (iv) or a Train Operator Variation or something of that ilk? I think I should ask Alliance/Grand Central that first.

MR COOPER: Okay. It would be under 4.2.2(d)(iv).

THE CHAIR: It would be Level (iv), as being something which did not -

MR COOPER: It was after the Priority Date.

THE CHAIR: It did not get through the gate at the Priority Date, you would say?

MR COOPER: Yes.

THE CHAIR: Therefore it was something that materialised between D-40 and D-26 in its final manifestation and therefore it is Level (iv)?

MR COOPER: Yes.

THE CHAIR: Network Rail?

MR ALLEN: I mean, if the question is if we are given a change that is different to a PDNS after D-40 and then, in terms of its priority, in terms of its inclusion in the timetable, it would go into (iv).

THE CHAIR: There is no question of it being less than that, for example, just a Train Operator Variation or treated as if it were a spot bid or something; it would be Level (iv)?

MR ALLEN: Yes.

THE CHAIR: Yes.

MR ALLEN: If we had rejected the PDNS and asked for a resubmission or it was an altered submission after the PDNS date, then it would.

THE CHAIR: Right. Thank you.

MR ALLEN: It is not clearer – I am not sure whether to say this or not. It is how things get influenced during the Timetable Preparation Period, but I guess if you are only influencing things that started off from the same point as they were described in their PDNS, then it still sticks with the priority that the PDNS had.

THE CHAIR: Right. Yes. Thank you. I think that concludes where I want to go on the relative priorities of the bids on the issue of (d)(iii), except, I am afraid, to come back to what I still regard as the important issue of what is the effect of the change of identity from bidder to operator between Alliance and Grand Central, which we went down before.

I am just wondering whether we should break before embarking on that because I think that might take longer than five or ten minutes, and I think we should be breaking for Leah's sake, if nobody else, before going on too much more. I think it would be sensible to take a break there before starting back on that issue, which would probably be the lunch break, Tony?

MR SKILTON: Yes.

THE CHAIR: In order to inform your thinking during the lunch break, can I just remind you that the issue I want to embark on is this potential hurdle, as I see it, of the change between Alliance, and having looked at the way in which the PDNS and previous documents were expressed as Alliance, to the Rights being arguably accorded to and

operated by Grand Central. That is where we will come back to.

MR YEOWART: Okay.

THE CHAIR: Thank you.

(Adjourned)

THE CHAIR: Hello again, everybody. I must apologise, not least to Leah, for having gone so long before lunch without a break. We will try not to do that again this afternoon, and we do of course want to get through it all this afternoon.

Having said that, I am afraid I must just go back on one thing which we talked about before the break, and I think I understand Alliance/Grand Central have got something they want to mention on that?

MR COOPER: Yes.

THE CHAIR: We will come to that in a minute. Can I just say, on our part, thinking about this and discussing it during the break, this is a point relevant to really the last bit of the argument we were considering before which is, is there ultimately some contractual non-compliance under 2.4.6 or 7, limb (a) I think - outside the whole rolling stock point, is there some general non-compliance in having bidding in the alternative, PDNSs in the alternative; "If we don't get A, we want B", and we looked at that. I don't want to go back into trying to fit that into the contractual wording, though that is something we are going to have to think about.

But I understand, I recall that something was said along the way which I do not think I paid enough attention to at the time. Is it the case that Alliance/Grand Central was told at some point during the discussion and consultation before the Priority Date, was told by Network Rail, that for Alliance/Grand Central to submit a bid for services in that 'either/or' form would be regarded as non-compliant? Is that what is being said or have I misunderstood that?

MR YEOWART: No. What had been said by Network Rail earlier in the process was that we should only submit a compliant bid.

THE CHAIR: Meaning and therefore not an 'either/or', well, this might be compliant or this might be non-compliant, if we can't do that we get the compliant one?

MR YEOWART: I apologise, Chairman. I think I partly caveated that by saying that we might not necessarily agree that that was the position we had to be in, but we were clearly told to submit a compliant bid.

THE CHAIR: Right.

MR YEOWART: Which ultimately we did.

THE CHAIR: Okay. I recall you were saying definitely that for yourselves, for whatever reasons, you decided not to hedge your bets and submit an 'either/or' bid but that you had to go for eventually what you wanted to say and make it as, as you thought, compliant and -

MR YEOWART: Well, we submitted at the time for what was deliverable and we knew what was deliverable at the time.

MR HANKS: Yes. Our understanding was that that was what we should be doing for the PDNS.

THE CHAIR: Okay. But you are not saying that at any point in the discussion or let alone in the correspondence that Network Rail delivered itself of an opinion that you should not go for an 'either/or' bid because that, in some way, would of itself be non-compliant?

MR YEOWART: No.

THE CHAIR: No.

MR YEOWART: No. The 'either/or' has only arisen today, that type of wording.

THE CHAIR: Yes, okay.

MR YEOWART: It has always been crammed with the word "compliant".

MR HANKS: However, in the same way that East Coast were told that certain paths were not going to work, we were told similar things.

THE CHAIR: Had been told that things would not work and certain things of themselves might not be compliant?

MR HANKS: Yes.

MR YEOWART: Yes.

THE CHAIR: But not addressing the 'either/or'?

MR YEOWART: No.

THE CHAIR: Okay, thank you. That is all I wanted to revert to. You had something else you wanted to say?

MR COOPER: It was just some evidence that we would like to bring to your attention that we actually submitted in the addendum to the Sole Reference Document for 494.

THE CHAIR: Yes?

MR COOPER: Lots were flying around so we missed this. Again under the same limb 2.4.6(a), the actual path for 1B88, which is the 1608 Newark, that was non-compliant, as a bid, with the Timetable Planning Rules. So what should have happened there, that should have actually been rejected by Network Rail and a Revised Access Proposal requested, but it was not.

MR ALLEN: I am not sure that is necessarily right, Mr Chairman. If any bid we receive in the PDNS suddenly clashes with another train in the timetable of a different operator, whether that means we reject that PDNS bid and ask for a new Access Proposal, I don't think that is correct.

MR COOPER: You have got to offer compliant paths, though, with the Rules.

MR ALLEN: Not arguing that, but what you have just said, Jonathan, was that we should have rejected and asked for a new bid. We could have done that with probably hundreds of trains that we were looking at, out of the sort of 10,500, 11,000 trains that we have got in the next year's plan.

MR YEOWART: It actually, Chairman -

THE CHAIR: Never mind, for the minute, the possible effect that you should have rejected and asked for a new bid. In terms of its effect on the first and foremost point which I am interested in, which is ultimately the effect you get under (d)(iii) in terms of what priority you accord, yes, I remember this in the addendum, so this is actually outside what we have been talking for; this is adduced as another possible reason for regarding -

MR COOPER: Yes.

THE CHAIR:- the East Coast bid, as in the PDNS, as non-compliant in some respect (and we will come and look at what respect) and therefore not level (d)(iii). Now, I remember reading these facts and I recall that as far as the fact of this, i.e. that the headway was too short -

MR BRANDON: Correct.

THE CHAIR: - I recall that in your response to this somewhere, Network Rail, you accepted that this was correct factually.

MR ALLEN: (*Nodded*).

THE CHAIR: That is still the case, is it?

MR ALLEN: Yes.

THE CHAIR: So the issue on this, then, is does that particular factual departure from, in this case, the Timetable Planning Rules, make it non-compliant within the terms of D2.4.6 and therefore not Level (iii) within the terms of D4.2.2? So which limb of 2.4.6 would this factual inconsistency with the Timetable Planning Rules coming under?

MR COOPER: We believe (a).

THE CHAIR: (a):

“The Timetable Participant has submitted an Access Proposal which cannot be accommodated in the New Working Timetable.”

Cannot because it conflicts with the Timetable Planning Rules?

MR COOPER: Yes.

THE CHAIR: Network Rail, would you accept that if a bid conflicts with the Timetable Planning Rules in a sort of normal commonsense way, it “cannot be accommodated” as opposed to “should not be accommodated”?

MR COOPER: Yes.

MR ALLEN: Do you want my short answer?

THE CHAIR: I will have the short answer and the long answer, whichever answer you would like to give.

MR ALLEN: The purist view of life is agreed. We cannot accept a bid or a New Access Proposal that is not compliant with the Timetable Planning Rules. I think, you know, the discussions we had last week with TTP518 are sort of very helpful when it comes to that particular issue.

THE CHAIR: Would you accept -

MR ALLEN: The problem I have – yes?

THE CHAIR:- that whatever you may think of it in the large, that what we are committed to trying to do in this entire process is take the purist view?

MR ALLEN: I agree.

THE CHAIR: AKA the contractual view.

MR ALLEN: Yes, I accept that, Mr Chairman. But whether the basis of that is whether we

should have offered 1B88 as opposed what is said in the PDNS is the point I go to in my slightly longer answer, which is this about the bids coming in and the priorities and the decision we are making in the timetable. I think in terms of the priority in terms of what we have got, the discussion that we have had, whether that train has become non-compliant in terms of the Timetable Planning Rules which has later come to light does not change the status in terms of how we start looking at that train going into the timetabling process.

THE CHAIR: Yes?

MR ALLEN: Because I suspect there are quite a lot of PDNSs you can pick up that you get to a point sort of in their journey where they conflict and you are trying to resolve those conflixtions with other train services or other PDNS submissions throughout the Timetable Preparation Period.

THE CHAIR: Well, in a sense we may or may not get to the point where what Network Rail should have done in terms of rejecting it and requiring something else is relevant because

-

MR ALLEN: It is not really -

THE CHAIR: - because we are still at the point of determining what level of priority it should accord.

MR ALLEN: Agreed. While it is not inexcusable to timetable something non-compliant with the Rules, I guess, you know, the first thing I would look at is, you know, was it something we did deliberately or was it something that really was sort of an error that somebody did not spot in the timetable when going through the drafting process and that sort of thing.

MR A LEWIS: That is -

MR ALLEN: I have not looked at it but it's something that kind of wasn't meant to be there but got there because of some kind of human error while we have been developing the timetable.

THE CHAIR: You know what I am going to ask you.

MR ALLEN: Yes.

THE CHAIR: Does human error - ?

MR ALLEN: Not really.

THE CHAIR:- in dealing with this whole process -

MR ALLEN: I suppose what I am trying to say is the deliberate -

THE CHAIR: - make a difference to something which, on a purist view -

MR ALLEN: Accidentally done it.

THE CHAIR:- is...

MR ALLEN: You can't defend the indefensible, Mr Chairman, which I am not trying to do.

THE CHAIR: I am sure nobody did it with any sort of improper motive or anything.

MR ALLEN: Yes, yes.

THE CHAIR: But if it happened, it happened.

MR ALLEN: Agreed.

THE CHAIR: So to conclude as regards the status of the East Coast bid, we have got to the point where, under the arguments we were exploring before lunch, arguably because of the 'hedge your bets' alternative, if not Plan A then Plan B type of bid, maybe that was non-compliant and therefore should not have been accorded Level (iii) priority (have not quite decided on that), but if not that, then possibly on any analysis this technical non-compliance, purist non-compliance could be said to have been a non-compliance which works its way out through those provisions of the Network Code. In saying that, it was not compliant and therefore should not have been accorded Level (iii) priority.

I asked the theoretical question before, well, if it was not accorded Level (iii) priority, what should it have been, and the answer appears to be, accepted on all sides, well, it would effectively be Level (iv) because what happened afterwards was effectively a revised bid which happened between D-40 and D-26 and therefore would have counted as Level (iv).

So before we come to the consequences of that, I want to revert to the other half of that argument, which is we have already determined, through our exploration of the interpretation of the word "expectation" in Level (iii) that Alliance/Grand Central may have, as it were, got through that test of having a Level (iii) bid. That leaves us to explore, did it get through the test of making an Access Proposal with the expectation that Rights would be granted to the same person/legal entity which made the proposal? Now, on the face of what we have seen so far, and we explored this to some extent in the Q&A session last week, on the basis of that, the position apparently is that Alliance submitted

the PDNS in respect of this particular path – I know there was lots of other stuff by Grand Central, but in respect of this particular path which is the one that TTP494 is concerned with, the PDNS/the bid/the Access Proposal was submitted by Alliance as Alliance for Alliance. And, on the face of it, with no mention in the PDNS at least of it being either submitted as agent for Grand Central, with the expectation of Grand Central operating what would become Grand Central's Rights, or necessarily explicitly, as far as I can see, with the expectation of, if Alliance were successful in its bid, then subcontracting the Right to operate it to Grand Central in exercise of Grand Central's Rights rather than Alliance.

Now, would you like to elaborate on that?

MR YEOWART: Yes. Alliance had submitted the PDNS with the intention of operating the service itself, utilising Grand Central's rolling stock and traincrew, which is quite regular within the industry for that type of thing to happen. At that time, we had not gone out --

THE CHAIR: I am sorry. Can I just be clear? Are you saying in the PDNS it is specified that, if successful, Alliance would operate in its own name but using Grand Central's rolling stock and crew?

MR YEOWART: It is not specific in the PDNS but the PDNS does identify the rolling stock which is Class 180, which is Grand Central's rolling stock that we would have utilised on that route. Class 180 but it is not specific. Grand Central -

THE CHAIR: Does it say it is Grand Central's 180 rolling stock or does it say -

MR YEOWART: No, it doesn't. It doesn't say. The only other 180 rolling stock operators are Hull Trains and they have no surplus. The original Class 180s are all back now at Greater Western and clearly they have no surplus either. It was those five Class 180s initially that Alliance had identified in its original submissions to the Regulator in September -

MR HANKS: October.

MR YEOWART: October 2011. So the only Class 180s that were surplus or potentially surplus were in Grand Central's stable.

THE CHAIR: So are you saying that Network Rail, as being required to make the judgment as to expectation and so on, could not but have necessarily inferred that the 180 rolling stock at least being referred to could only be Grand Central's?

MR YEOWART: I would imagine so, yes. We had had quite numerous discussions with Network Rail prior to the submission because clearly they want to know where the rolling stock is coming from, as we have identified already, and there was never any doubt that it was going to be Grand Central rolling stock to operate this service.

MR COOPER: Can I just -

THE CHAIR: Just one minute.

MR COOPER: Yes.

THE CHAIR: I just want to clarify that first. And are you also saying that if, one way or the other, they did or should have known that it was Grand Central rolling stock, that they should or did know that it would be Grand Central who would be the operator, which is rather different from saying you would be just using Grand Central rolling?

MR YEOWART: At the time of the submission, no, it was not. We hadn't made the decision that Grand Central would be the operator. We would utilise Grand Central's rolling stock at the time of the submission.

THE CHAIR: Right. So at the time of the submission, then, in view of what was both said explicitly in the submission and what you might say should necessarily have been inferred by Network Rail from its knowledge of the whole situation and also what might have been actually known by Network Rail as a result of specific discussion you had had with them, they might have known and taken into account that, if successful, Alliance would operate the service using rolling stock which it would somehow get on whatever basis from Grand Central, but not that, if successful, Alliance would somehow or other, through whatever legal mechanism, transfer the right to operate, achieved through the bidding process, to Grand Central to actually implement?

MR HANKS: As of 2 March, the Priority Date, that is true, that is correct.

THE CHAIR: Right, thank you. Unless you want to adduce something else, my provisional view on that is that it is a hurdle you cannot get over.

MR YEOWART: Okay. Well, our view on that would be that in respect of the Network Code at 2.4.5, there was no revision and no change to this Access Proposal regarding the manner in which the right was to be exercised, i.e. the approval of that path. In view of the fact that a change of ownership - because that is really what it boils down to because if Grand Central had not become part of the Group company then we could not have

achieved the ultimate application in the way that we did - then it does have implications for elsewhere on the network.

I am assuming, and I don't know, FGW submitted an application as First Group for the Greater Western franchise, for example, but it might not be First Group when eventually that timetable is delivered. The same on West Coast Main Line, Virgin will have submitted their PDNS and we expect that - well, subject to any legal change, that that will be a different operator.

It is a usual thing that happens. Now, had we made variations to the bid once we made the decision to go out to consultation, and it was done for clarification purposes but I accept you will make a determination today, at least we will get further clarification so we will know in future. But it is not without precedent and I am not sure if the industry could actually operate properly if there was always to be the right operator at the right time. It depends on variation. But that is your call, not mine.

THE CHAIR: I am not sure I am in a position – in fact I am sure I am not in a position to evaluate the effect of that on all the other situations which might have been progressed in a similar way.

MR YEOWART: I think I am saying, because we did discuss this at lunchtime as well, there was no uncertainty amongst any of the operators about how this would be delivered and I am relying on 2.4.5, D2.4.5, as to there was going to be a change from alliance to grand Central.

THE CHAIR: If you are right in that general sort of opinion, and you may or may not be, you may well be, it would not be the first instance where the wording of the Network Code and the contract, in whatever version, in whatever revision, does not actually accord with what (a) is done in the industry and what (b) should, in a commonsense world, be done in order to achieve an ordered industry. But we cannot remedy that defect, I am afraid, here.

MR YEOWART: No, I understand that.

THE CHAIR: I am afraid we have to stick to the purist view -

MR YEOWART: Yes.

THE CHAIR: - of the application of the contract, as we have it, to this particular set of circumstances. The hurdle I referred to, created by the fact that you bid by a different

legal entity than the bid was taken forward with after the Priority Date, that hurdle, to my mind, comes not under 2.4 but back to where we started, which is 4.2.2(d)(iii), and it is back to the issue of did Alliance/Grand Central have Level (iii) priority for that path as bid at the Priority Date, within the terms of (d)(iii) which requires “...an expectation of Rights of any Timetable Participant which had been Exercised, provided Network Rail considers, acting reasonably, they...”

Then I would insert in square brackets, “that is to say the expectation of Rights of that Timetable Participant”.

“...that they will have Firm or Contingent Rights enforced during the Timetable Period.”

It seems to me the problem with this particular set of facts, the problem for Alliance/Grand Central, is that the Timetable Participant which Network Rail, as at Priority Date, might have considered, acting reasonably, would obtain Firm Rights, that Timetable Participant was Alliance.

MR YEOWART: Correct.

MR HANKS: Yes.

THE CHAIR: And, in fact, it was not Alliance’s Rights which have or will become Firm Rights; it is Grand Central’s Rights?

MR HANKS: But at the time of the Priority Date, we had expectations that those Rights would be Alliance’s, and that was, I thought, the point that you asked us to consider and to provide evidence for at the end of the session last week.

THE CHAIR: Yes, indeed, and that was on the point of whether it was an expectation and how

-

MR HANKS: Yes?

THE CHAIR: - how you translate “expectation”. You provided evidence of that but this is a different point.

MR HANKS: Right.

THE CHAIR: This is not the point as to whether there was an expectation. This is the point as to whose expectation it was.

MR COOPER: At what date?

THE CHAIR: As at the Priority Date.

MR COOPER: Well, that was clearly Alliance.

MR HANKS: Clearly Alliance.

MR YEOWART: That was an Alliance expectation.

MR HANKS: At the Priority Date.

MR YEOWART: At the Priority Date.

MR HANKS: We have also provided evidence of our intention to transfer those Rights by seeking Rights with the ORR in Grand Central's name, and that was advised formally to Network Rail on 16 March I think it was.

THE CHAIR: But it must be the case that if the relevant Timetable Participant, as at the Priority Date, was Alliance and if, as at that date, theoretically Alliance achieve priority at Level (iii) priority, it has lost that priority because it (Alliance) has not proceeded with its bid which got that priority after the Priority Date. It is somebody else's. It is another Timetable Participant's bid that has been taken forward, starting effectively at 5 March when I think you said you triggered the Section 22(a) process.

MR YEOWART: We went out to consultation as Grand Central after discussions with the Regulator. I mean, it is an interesting point and clearly you will make a decision based around that point, but we would refer back to the implications for every other bid in relation to a change of ownership, if you like, of some rights.

THE CHAIR: Yes. There may be all sorts of repercussions because there are all sorts of actually different permutations of this sort of particular factual set of circumstances where you get a change between before and after, some of which, on the face of it, might appear not to throw up this hurdle and some of which might. For example, had you bid explicitly, as in all the other things we have been considering, as agent for Grand Central, with the expectation that the Rights would be those of Grand Central and that they would be converted into Firm Rights by Grand Central, if that had been expressed in the bid, as at the Priority Date, it seems to me the position would have been different because then we could have, as we have in all the other things we have considered, in 518 and in the other disputes we have got today -

MR YEOWART: Yes.

THE CHAIR: - it has been accepted that we can regard Alliance and Grand Central as one, as effectively Grand Central. But it is different in this one. Now, maybe in all the other

instances you refer to where it may be the same position, maybe some of those get through on that agency basis, I do not know. Maybe some of them don't, maybe some of them have the same problem.

MR YEOWART: We have to be clear, and on this, as indeed everybody has been, there was no expectation at the Priority Date that this service would be operated by anybody other than Alliance.

THE CHAIR: That is very frank.

MR YEOWART: And we would be using Grand Central rolling stock.

THE CHAIR: That is very frank, thank you. I will obviously think about it some more and we will discuss it, but provisionally that leads me to the conclusion that that is a bar to you, Grand Central, having acquired Level (iii) Priority Rights.

MR YEOWART: Well, at least we will have some clarity, won't we, at the end?

THE CHAIR: That being the case, on the basis of that provisional conclusion/hypothesis, matching that with the provisional conclusion that neither did East Coast have Level (iii) Priority Rights, for the combination of reasons we have been talking about, the resolution of this could be, well, after that, what level Rights did you each have and how should that conflict have been resolved and how was it resolved?

Provisionally, it seems to me that - well, in fact, as we have already asked and had the answer, if either or both of you did not have Level (iii) Rights then you had Level (iv) Rights because effectively, one way or the other, each of your respective bids came in as a changed bid or a new bid or whatever, supported by applications to the Regulator for Rights, after the Priority Date, between D-40 and D-26, therefore they are both Level (iv) Rights, and so how should the conflict have been resolved and how was it resolved?

Well, presumably it should have been resolved by application of the Decision Criteria?

MR A LEWIS: (*Nodded*).

THE CHAIR: Aside from that, is there any other consideration that I have omitted? For example, who actually got the relevant Rights which would support their path in the relevant application to ORR? Just remind me, I should know this but I have forgotten, East Coast already had Firm Contractual Rights?

MR FISHER: For the Newark services.

THE CHAIR: For the Newark service.

MR FISHER: Until December 2012, yes.

THE CHAIR: But that is not Firm Contractual Rights which were expected to be in force in the relevant period because the relevant period starts at December 2012?

MR FISHER: Yes. Yes.

THE CHAIR: So East Coast would have had to, and has it, made an application, a Section 22(a) application -

MR FISHER: Yes.

THE CHAIR: - to extend the Newark service Rights into the December 2012 timetable?

MR FISHER: Yes.

THE CHAIR: Has it made that application?

MR FISHER: That has been made and it has been successful.

THE CHAIR: And that has been successful.

MR FISHER: And it has been signed and sealed, yes.

THE CHAIR: And Grand Central's Seventh Supplemental?

MR YEOWART: Seventh Supplemental, yes, 22(a).

THE CHAIR: Has been applied for?

MR YEOWART: Has been applied for. It was rejected.

THE CHAIR: And was rejected.

MR YEOWART: It was rejected in writing on Friday, and that is still potentially subject to an appeal to the Regulator under the decision-making process. So we have still got to determine that. We only got it late on Friday night.

THE CHAIR: And that is what we have had today?

MR YEOWART: I think the one other point, Chair, in relation to the Decision Criteria is that back to the work that we did on 518, we must not forget that the 1608 Newark was non-compliant and should not have been offered as a non-compliant service when there was a compliant application in, albeit Level (iv), from Grand Central. The 1608 Wakefield service was a compliant application.

THE CHAIR: Sorry. Are you saying, therefore, that East Coast's Rights were not even Level (iv) because -

MR YEOWART: Well, they were Level (iv), but -

THE CHAIR: - they were still non-compliant?

MR YEOWART: Well, from an offer point of view, Network Rail should not offer paths which are non-compliant, and they offered a path to East Coast which was non-compliant according to the Rules.

THE CHAIR: So you are saying there is a procedural step/set of obligations incumbent on Network Rail, as the operator of the process, which they have not fulfilled, which falls somewhere between determining the relative priorities, even if those priorities turn out to be the same (in this case, Level (iv)), between that and applying the Decision Criteria, which mean that even where they have got two bids, hypothetically in this case both at Level (iv), where they do not then advance to apply the Decision Criteria in order to resolve the conflict between bids of equal priority, but where there is a procedural step they should go through in terms of further offer and acceptance which they did not comply with?

MR YEOWART: Well, they cannot offer a path which is non-compliance. We established that with 518. But they did offer the 1608 Newark and it is non-compliant in accordance with the Rules.

THE CHAIR: But the non-compliance under 518 was non-compliant in the sense that it was outside the Firm Contractual Rights. That is what you are talking about, is it not; that non-compliance as going outside 0749 to 0748?

MR YEOWART: That was Grand Central's contractual Rights, that is right, but we established that Network Rail had offered paths and the issue was about the non-compliance of some offers that required the movement of the 0749 to 0748, but Network Rail are not in a position to make an offer of a non-compliant path.

THE CHAIR: Sorry. In 518, and this will be apparent, I hope, from the way it gets written up, the relevance of that non-compliance of the FCC bid was not in terms of determining the relative priorities of two conflicting bids, that was not how it fitted into the picture. It fitted into the picture in a different way in evaluating whether it was contractually relevant to the sort of sequence of offer and acceptance, as to whether Grand Central had become contractually stuck with its initial acceptance of a deviation outside its Firm Contractual Rights.

MR YEOWART: Okay, yes. I mean, I cannot say because we have not got the written response yet.

THE CHAIR: That is the basis on which we considered that.

MR YEOWART: Okay.

THE CHAIR: Here, it is in a different contractual context. It is non-compliance to determine what the relative levels of priority were. Having arrived notionally at what they were and a situation where, in fact, it may turn out to be that they were still at equal levels of priority, albeit not the level at which both of you contended that they were, i.e. at (iv) and not (iii), what happens then to resolve the conflict contractually? Answer, we think, apply the Decision Criteria.

MR YEOWART: I would agree with you if the path was - if it is not compliant with the Rules, it cannot be offered because it won't fit, it won't work. It has to be a compliant path in order to be offered. If our path is non-compliant, it can't be offered. You can't -

THE CHAIR: The non-compliance you are talking about now, is that the sort of last technical non-compliance, the headway?

MR HANKS: Headway, yes.

MR COOPER: It was headway.

THE CHAIR: The headway consideration, not the rather larger proposition about PlanA/PlanB, can you have alternative bids?

MR HANKS: No. No, no. We are talking specifically about the timetable -

THE CHAIR: Specifically the deviation from the Timetable Planning Rules, in one way?

MR HANKS: I believe that is right. That is the argument that we are making here, yes.

MR YEOWART: Yes.

MR GIBBONS: Which would have applied to your path equally then?

MR YEOWART: No.

MR GIBBONS: You have got the same characteristics.

MR YEOWART: No.

MR GIBBONS: Have you not got the same operating characteristics?

MR HANKS: Not got the same characteristics, no.

MR GIBBONS: What is the difference, please?

MR HANKS: The stopping pattern is different.

MR THOMAS: So their stopping service was different?

MR HANKS: Yes.

MR THOMAS: Yes.

THE CHAIR: So you would say there is no equivalent or any technical non-compliance of your bid, whether in terms of headways or in terms of -

MR HANKS: We have to acknowledge there was - the only non-compliance as far as our - or the path that could have been offered, the validated path by Network Rail was half a minute below the Planning Rules at Doncaster for the station dwell time.

MR GIBBONS: So presumably yours was non-compliant as well, then? In strict contractual terms, your bid for a 1608 to Wakefield was non-compliant?

MR HOLDER: Not the bid.

MR HANKS: The bid itself was -

MR GIBBONS: I think -

MR HANKS: The bid itself was compliant.

MR GIBBONS: You had not had an offer.

MR HANKS: The identified paths -

MR HOLDER: It is the offer that is the problem.

THE CHAIR: The offer?

MR HOLDER: It is the offer that is the problem?

MR YEOWART: We -

MR HOLDER: The bid has to be compliant according to the Network Code. We have not established that the bid was to follow the Rules of the Plan to -

THE CHAIR: I think we have.

MR GIBBONS: I think we have.

THE CHAIR: It is being said that one of the characteristics of a compliant bid is that it must comply with the Rules, must it not?

MR HOLDER: There is certainly something about the Working Timetable should conform with the Rules in the corresponding Timetable Period. That is 4.2.2(a).

MR GIBBONS: In that case it would be 2.5.1(d) as qualified by the Train Planning Rules.

MR HOLDER: 2.5.1(d)?

MR GIBBONS: Yes, which is about the station arrival and departure times.

(Pause)

MR HOLDER: The times of arrived and departure.

MR GIBBONS: Yes, but then that would be quantified in what the minimum dwell time is.

MR HOLDER: Where does it say that?

MR GIBBONS: It will be quantified in the Train Planning Rules, won't it, because that is where that exists?

MR HOLDER: Who says we have to do that? Where does it say you have to do that?

MR GIBBONS: Okay.

(Pause)

THE CHAIR: There is a clear assumption, and at the moment I am struggling to find where that is currently expressed in black and white, that all forms of the planning timetable, starting with the Prior Working Timetable, moving to the New Working Timetable which then becomes the Working Timetable, that all manifestations of that will be compliant with the Rules, i.e. the Rules of the Plan as was, Timetable Planning Rules and Engineering and what-not Rules now.

MR HANKS: Yes. 4.2.2(a) is where that appears.

MR ALLEN: 4.2.2 does say that Network Rail shall endeavour -

THE CHAIR: Now, is there a similar assumption that all bids will be compliant with that aspect of the Working Timetable in its current manifestation?

MR HANKS: The difference is that the bids themselves must be compliant as far as they conform to the Rules by including all the relevant allowances and running times that are documented in the Planning Rules, and they must avoid conflicts with each other. So within any one operator's bids, they should not conflict with any Timetable Planning Rules. But, essentially, you cannot guarantee that a bid you make does not conflict with a bid anyone else has made. So there is talk about -

THE CHAIR: But if a bid you make in some respect conflicts with some part of the Timetable Planning Rules, does that make it not compliant?

MR HANKS: No, not if that is a headway rule -

THE CHAIR: Or not capable of being accepted by -

MR HANKS: If that is a headway rule with another train, no, that bid can still be valid because there is a possibility that Network Rail could flex that other train, if it is already in the Prior Working Timetable, or, if it is another operator's bid for a new path, you have no way of knowing necessarily that that is the case until Network Rail receive the bids on

the Priority Date.

THE CHAIR: This is something where I am going to harp back to 518 because I think, contrary to the previous one, the analogy is right here in the abstract. In 518 we were considering FCC's bid, for whatever reason, as to whether it was compliant or not, including the fact that it had a 6-minute rather than a 5-minute turnaround time.

It is obviously a different sort of non-compliance, is it not, because that is not a safety-related non-compliance like a headway is. I mean, as far as I recall, on all sides we accepted that one way or another that difference made it non-compliant, the effect of that, the relevance was completely different there but purely in terms of that abstract decision, is that right? We accepted that the excess turnaround time bid for was non-compliant?

MR HANKS: No, the excess was not the issue. The issue was that FCC would not accept an offer that was actually at the minimum turnaround time. So the minimum turnaround time, according to the Timetable Planning Rules, was 5 minutes but they would not accept an offer that only gave them 5 minute turnaround time. Is that the right interpretation?

MR A LEWIS: Yes, that is right.

MR HANKS: So it is a different view of it, I am afraid. It is not really the same argument.

THE CHAIR: Okay.

MR HANKS: I think there are two separate things about the bid being compliant and the offer being compliant. When the offer comes out, we expect it - we expect it - to be compliant with all the Timetable Planning Rules, including headways and junction margins. The bid itself should be compliant with -- if you like, self-consistent with the Rules, so taking a path in its own right.

THE CHAIR: Right, okay, thank you, "should be self-consistent with the Rules" within itself. But that sort of external non-compliance of the bid with the Rules is not fatal, it does not invalidate the bid because there is the possibility of Network Rail, through Flex, with a capital 'F', or flex with a small 'f', or some other sleight of hand -

MR YEOWART: That is a good term, that, sleight of hand.

THE CHAIR: - bringing it back within the Timetable Planning Rules at the stage of making the offer.

MR YEOWART: No, at the offer it should be compliant, yes.

THE CHAIR: Yes.

MR YEOWART: At the bid, it possibly -

MR HANKS: It is perfectly possible to make a compliant bid which is then rejected by Network Rail because they cannot fit it into the Working Timetable. There are circumstances, many circumstances where that happens.

MR YEOWART: We know. We know, yes.

THE CHAIR: Network Rail, do you accept that particular bit of the analysis as far as it goes?

MR ALLEN: On the whole, yes. I actually do not think there is necessarily an onus on a Timetable Participant to make a bid with necessarily all the right allowances in it actually. I cannot find the bit in print that enforces that.

MR HANKS: No, okay.

MR ALLEN: I think it was in the previous version of the Network Code, but I think the whole onus is on Network Rail, when it does its validation, to make sure it corrects those kind of things we are trying to do.

MR HANKS: Yes. Yes, okay. I may be harping back to the old Network Code actually.

THE CHAIR: That may well be the express intention of the Network Code, as it now stands, that it enables a practical - at least in that respect it enables a practical solution to be arrived at because that is what Network Rail is there for.

MR ALLEN: Yes. Don't get me wrong, it is helpful, the more complete the bid is to us.

THE CHAIR: Yes.

MR ALLEN: But I don't think it is a purist interpretation of the contract.

THE CHAIR: Okay. Boom boom! Thank you.

MR ALLEN: Sorry!

(Laughter)

MR ALLEN: That is another one we have lost!

THE CHAIR: So we are back to the situation of saying that whatever else were its problems under Level (iii), Alliance/Grand Central's bid was not vitiated by a technical non-compliance with the Timetable Planning Rules, because that is not how it works, and that is not inconsistent with the provisional possible view that East Coast's bid as at the Priority Date was non-compliant - or is it consistent - non-compliant because it did not

provide the right headway?

MR ALLEN: Again, East Coast couldn't have done that. You know, the East Coast bid would have met the same criteria in terms of, you know, in coming into us, as the Grand Central would have been. The headway was on another operator's train, 4E19.

THE CHAIR: Actually, it seems to me, that if we are right about that technical non-compliance, that applies to the sub-standard headway. That is something which did not make it a non-compliant bid in that sense because it is something which could have been juggled, flexed, large or small 'F', by Network Rail before making the offer?

MR ALLEN: During the preparation period, yes.

MR A LEWIS: Agreed.

MR ALLEN: Agreed.

THE CHAIR: Alliance/Grand Central, do you accept that?

MR HANKS: It is a sort of technicality we were just whispering about, I am afraid.

MR YEOWART: We will have to because that is how it works.

(Alliance/Grand Central conferred)

MR HANKS: Do you want to take a two-minute break?

MR COOPER: Can we have two minutes?

THE CHAIR: Of course, yes.

MR COOPER: Sorry.

THE CHAIR: Please do. It is an important point.

MR HANKS: Yes, it is.

THE CHAIR: I will just remind you of the context of that because if we conclude that actually you do not, as it were, get home on that particular technicality, which is what we did, then we are back at the rather more difficult question of alternative bids and their effect.

MR HANKS: Yes.

THE CHAIR: Sorry.

(Adjourned.)

THE CHAIR: Thank you. Yes, right, proceed.

MR BRANDON: Do you want to go first?

MR HANKS: We took a short break there to discuss. We felt there might be an implication about the inclusion of the train 1B88 in the Prior Working Timetable, but in short discussion we have decided that that is not something now that we can really make an argument about, so we don't wish to press that point.

THE CHAIR: The point about 1B88, East Coast's service, being non-compliant?

MR HANKS: Yes. In our evidence we said it should not have been included in the Prior Working Timetable. We still maintain that, but we felt there might be an argument, a further argument for our case based on that evidence but, after discussion, we have decided not to press that point.

THE CHAIR: Okay. What about the relevance of the point made in your addendum that it was non-compliant because it had a sub-standard headway, so it did not comply with the timetable?

MR HANKS: That is applicable to the offer. That is still something that we are concerned about but it is not about compliance of the bid itself.

THE CHAIR: So it does not stop the bid being compliant and therefore potentially getting Level (iii), but in fact you are saying that that may be a sort of procedural step or hurdle to get over between determining priorities and, if the priorities eventually work out the same, applying the Decision Criteria at the stage when Network Rail makes the offer, because, on any construction, the offer must be compliant with the Train Planning Rules?

MR HANKS: I think in some ways we are saying that even though it might be within the contractual rules, as we have been talking about today, we'd feel hard done by if our competitor in this has been offered a non-compliant path when ours was compliant.

MR COOPER: The Prior Working Timetable should have been compliant as well, though, by the process it goes through.

THE CHAIR: So we are back to the Prior Working Timetable now?

MR COOPER: Well, we don't -

THE CHAIR: I thought we had written this off.

MR HANKS: I thought we weren't getting into that argument, Jonathan.

THE CHAIR: Do we want to re-open that?

MR COOPER: No.

MR YEOWART: No.

MR HANKS: It may become relevant for another one.

THE CHAIR: I am more interested in bottoming out the question of whether, if we get to the conclusion on the various grounds that we have been talking about, that both bids were effectively at the same level at Level (iv), if there is still some reason for knocking out the East Coast bid before you get to resolving the conflict by application of the Decision Criteria, an intermediate stage of saying the bid, even at Level (iv), should not have been converted into a part of the timetable because the offer should not have been made, because the offer at least should have been compliant with the Train Planning Rules.

MR YEOWART: Yes. And even in some of Grand Central's other applications, if it is not compliant, it doesn't get offered. In fact, rejections on some of the applications that we have had, I know they are not referred to here but it is useful for background, they don't get made, the offer doesn't get made because the -

THE CHAIR: Right. So on that ground, you would still say that you do not get to a point where application of the Decision Criteria becomes relevant because it gets knocked out before that.

MR GIBBONS: Can we be clear as to whose train should not have been offered?

THE CHAIR: I think I understand we are -

MR GIBBONS: Just for clarity. It is probably a question for Network Rail!

THE CHAIR: My understanding and the way I -

MR ALLEN: Thank you!

THE CHAIR:- approaching the point, it can only be relevant if it is East Coast's train should not have been offered.

MR GIBBONS: That is why I want to understand which train should not have been offered.

MR ALLEN: The 4E19 -

MR GIBBONS: The 4E19.

MR ALLEN: - could not have been offered.

MR GIBBONS: Exactly. As opposed to -

MR ALLEN: 1B88.

MR GIBBONS: - 1B88. Which one shouldn't have been offered, because that changes the argument dramatically?

THE CHAIR: Yes, it does. Thank you.

MR ALLEN: I don't have the answer. I don't have the answer to hand. I would have to find out what the Rights were.

MR YEOWART: Although it doesn't quite change it dramatically because if -

MR GIBBONS: Well, at the moment it does.

MR YEOWART: If it wasn't offered, it might have created the opportunity for two trains to have been offered, two InterCity trains around that time. So it does -

MR GIBBONS: Yes. It still needs answering then, doesn't it, as to which train should not have been offered technically? I don't know the answer.

MR ALLEN: I don't know. I need to understand the Rights. I haven't looked, in preparation for today or last week, in detail at the Rights for 4E19. Unless you have got them, Andy?

MR A LEWIS: No, I haven't.

MR ALLEN: I believe it's got Level 1 Rights but I don't know where we are with its Flex, so I would have to come back to you.

MR GIBBONS: +/-30 for Freightliner.

MR ALLEN: I expect so, yes. I would have to do a bit of ferreting around and then come back to you, I am afraid. I know what we have done since our colleagues in Grand Central identified it and that is have a re-look at it and we have managed to make it better but it is still 30 seconds shy. It was a whole minute, I think, at one point, maybe 1.5 minutes shy of the headway. We have since done a bit of fiddling around and got it to be half a minute. In breach of the headway rules there, but...

MR YEOWART: Why this becomes very important, Chair, is that it is non-compliant and therefore it is a structural defect in the timetable which is work Network Rail are doing now to achieve an improvement in overall performance. Grand Central's eventual service that was identified in exchange for the 1608 at 1552 is fully compliant but was not offered because of a potential performance impact, and yet we have - that is not the subject - I say not yet the subject - of an appeal, but you can see the implications are that we will accept a structural defect in the timetable as an offer but not offer a compliant path. It is a very important point to be established.

THE CHAIR: Sorry, "we", Grand Central would accept?

MR YEOWART: No -

THE CHAIR: Or you are putting words in the mouth of Network Rail?

MR YEOWART: Network Rail are offering a non-compliant path in the timetable for East Coast at 1608 when it could have offered a compliant path, because we can deal with 30 seconds impact at Doncaster but you cannot deal with that as a headway issue. They have managed to get 30 seconds out. But despite all that and all the additional work that Grand Central has done to identify an additional path at 1552, which is fully compliant, which has no structural defect in it, that path had not been offered.

So you can see that there is some real tension now in the bid and offer process, and the offers must be compliant. If it is not compliant, Network Rail should not be offering the path because they import performance risk into the timetable, not least that -

THE CHAIR: That may be the case. I am afraid I am struggling slightly to see how that fits in to the logical analysis of where it gets into -

MR YEOWART: Well, if the path is non-compliant, it cannot be offered because you cannot offer it because it doesn't work, it doesn't fit.

THE CHAIR: Non-compliant in the sense of departure from -

MR YEOWART: Headway and the Rules.

THE CHAIR: - the Timetable Planning Rules?

MR YEOWART: Yes. That, as Network Rail have said as well, cannot be overcome.

THE CHAIR: So it should not be offered, right. So we are positing that as a sort of intermediate stage between determining relative priorities, which then come out to be the same, and moving on to applying Decision Criteria. There is a question as to whether, because of compliance with the Timetable Planning Rules or other structural defect, it ought to be offered at all even if it is, on the face of it, at the same priority?

MR HANKS: Yes. We would like the Panel to consider that.

THE CHAIR: Right, okay. Qualifying that particular argument, there is the very real issue, as Nick says, as to whether that procedural hurdle is erected in this case because the outcome may have been not that the East Coast path should not have been offered but that the other train, whoever's 4E19 is, should not have been offered.

On that, I suppose I can invite Network Rail to provide us with some more information after today if they would like to.

MR ALLEN: Yes, by all means.

THE CHAIR: Just to remind everybody of the context of that in the overall logical structure of

wherever this is going, if it turns out that it is the 4E19 that should not have been offered, therefore we are back at the position hypothetically where there were two paths with equal priority, hypothetically at Level (iv) rather than Level (iii), and one then moves on to the application of the Decision Criteria. So can we move on to that now? Hopefully that is the last issue that we can bottom out on 494.

So aside from considerations that paths should not have been offered, if the conclusion is rightly that at the end of the day Network Rail was left with two bids of equal priority at Level (iv), how did it/how should it have applied the Decision Criteria? Alliance/Grand Central?

MR HANKS: Right. This was very much a secondary part of our argument because our main complaint was that we should not even have got to the top line in the Decision Criteria.

THE CHAIR: I understand that.

MR HANKS: Having said that, we did – I am trying to find the date. In the middle - towards the end of April, I was invited by Network Rail, that was Andy Lewis and Martin Hollins, to meet to discuss the application of the Decision Criteria to Grand Central's path versus East Coast's path.

THE CHAIR: May I ask if, for purposes of that discussion, they sort of described what contractual context that was in, in the way we have been trying to arrive at it, or was it just in the abstract saying, "Well, if we apply the Decision Criteria, how do you think it will go?"

MR HANKS: That is a good question. I am not sure I know the answer but it might be in the evidence here.

THE CHAIR: Never mind. I am sorry, I do not want to derail anything.

MR HANKS: No, that is fine. There is a letter

THE CHAIR: We can come back to that, if you like.

MR HANKS: There is a letter from Andy. That is on 30 April, although that is actually, I think, after we had had the meeting, so that is formalising the process. It says:

"...As both competing bids have different impacts on other services bid for, it is necessary, for the purposes of the timetable production, to make a decision as to which bid to include as part of Network Rail's offer."

THE CHAIR: On the basis that they were competing bids of some sort?

MR HANKS: Yes.

THE CHAIR: Yes, fine. Okay. How did that work out?

MR HANKS: So I was presented with Network Rail's initial views on the application of the Decision Criteria and was invited to discuss them, which I did, having said, first of all, that I felt that it was not appropriate to apply the Decision Criteria but was prepared to discuss it.

THE CHAIR: Yes.

MR HANKS: I agreed with some of their decisions in the Criteria, including some which were in favour of East Coast, but disputed a number of others. So I put in writing, in a letter on 27 April, the ones that I disputed.

THE CHAIR: That is where in your -

MR HANKS: Now, that is -

MR BRANDON: Just hold on one second.

MR HANKS: *(Pause)* Appendix F.

MR BRANDON: Appendix F of our Sole Reference Document.

THE CHAIR: I know I should have F at my fingertips but it is helpful to be reminded. Yes. *(Pause)* In that letter, you conclude by saying, "Well, we still ought not to have to use the Decision Criteria."

MR HANKS: Yes.

THE CHAIR: But do you say in that letter "If we do use the Decision Criteria, rightly or wrongly, the result would be, in our opinion..."?

MR HANKS: I think I have to - it was very finely balanced, in my view, much more finely balanced than Network Rail concluded.

THE CHAIR: You do not actually come down -

MR HANKS: No.

THE CHAIR: - on saying the Decision Criteria, if applied, favour -

MR HANKS: I was trying to be as objective as possible on each criterion to give Network Rail views so that they could change their mind. I have to say I was disappointed that they did not change a single one of their initial views on the Decision Criteria as a result of my presentation at that meeting. I can understand that they would not agree with all of them, but I would have expected perhaps some movement on their initial views.

MR HOLDER: Which Decision Criteria was it that was being used? It was not the new ones -

THE CHAIR: That is what I was going to ask, yes.

MR HANKS: Yes, it was.

MR HOLDER: The new ones?

MR HANKS: Yes, it was.

MR HOLDER: Were they in place on the Priority Date?

MR HANKS: Yes.

THE CHAIR: I do not see any reference in this to, as it were, the new format of the Decision Criteria which start with an overriding Objective which was previously one of the Decision Criteria and is now the overriding Objective, which all the other Decision Criteria are now supportive of which -

MR HANKS: It is in my letter of -

THE CHAIR: In your letter?

MR SKILTON: The July '11 version was replaced on 16 March 2012, which is after the Priority Date.

THE CHAIR: Everything after July '11 has had the Decision Criteria in that form, has it not, in the new form of the overriding Objective supported by the other Decision Criteria?

MR SKILTON: Yes.

MR HOLDER: Yes.

THE CHAIR: I am sure the one we are talking about now had it in that form.

MR SKILTON: It was July '11 and the next one was 16 March and the Priority Date was 2 March. So it is the July version.

THE CHAIR: Yes.

MR HANKS: So we are working to the 19 July?

THE CHAIR: We are working, in fact, to the 16 March 2012.

MR SKILTON: The Priority Date is before that.

MR GIBBONS: It is before that.

THE CHAIR: Ah.

MR HOLDER: The question is, does it cut in - this is the 27th-

THE CHAIR: I have been operating on the basis that we have said all along it was 16 March 2012, and that is the one for -

MR GIBBONS: Is it the one that was in effect when the dispute came in?

THE CHAIR: This one. Whereas for another one it is 29 June 2012, but we have always said that, for this one, it is 16 March 2012 - good grief.

MR HANKS: Can I ask -

MR SKILTON: The dispute with ADC was registered after 16 March and therefore processing the dispute with ADC falls under that Part D, but if they are talking about applying the Decision Criteria as at the Priority Date, then it must presumably be the ones that applied on 2 March. I am not sure if there is any difference.

THE CHAIR: I don't know. Just set that on one side. What I am a little concerned about is that all our previous discussion on 4.2.2(d)(iii) has been premised on the version of the 16 March.

MR HANKS: Can I just say that it appears we used the 16 March version for the Decision Criteria, and I did not dispute that at the time.

THE CHAIR: I am not sure on the Decision Criteria whether there would have been a change.

MR HANKS: There was. Quite a dramatic change, actually.

THE CHAIR: Between July and -

MR HANKS: Yes, yes.

THE CHAIR: - and -

MR HANKS: There were 17 categories before, was it?

MR THOMAS: Simplification, Chair, apparently.

THE CHAIR: Was it the 16 March one where the overriding Objective came in?

MR ALLEN: Yes, I think so.

THE CHAIR: I thought that was in the July 2011 one.

MR HANKS: No, I think it was in the 16 March one. *(Pause)* As I recall the conversation, although it is not noted in the letter, looking at the overriding Objective, Network Rail's view, with which I concurred, was that there was no - the overriding Objective didn't actually help you to choose between the two. It was only when you looked at the individual Criteria that that helped you to choose. Because it says:

“The 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.”

Well, both bids, I think, fell into that category.

MR YEOWART: Well, they might have done at the time but with one of the bids now being non-compliant then it doesn't meet the overall Criteria.

MR HANKS: Good point.

MR GIBBONS: There is no - both bids are non-compliant.

THE CHAIR: The difference between the old and the new Decision Criteria - and what I am looking at, it does look as if the change was made between the July version and the 16 March version. But the difference between the old and new is that what was Decision Criterion (a) in the old version is elevated in the new version to being the overriding Objective, and the other bits of the Decision Criteria are slightly changed.

MR HOLDER: That is not quite right, is it, because (a) talked about "users of railway services" and the Objective talks about "users and providers of railway services" I think.

MR HANKS: Well spotted.

MR HOLDER: The point was we were careful to include funders like the Department for Transport.

THE CHAIR: *(Pause)* That is true. Okay. So what was Decision Criterion (a) has been partly lifted out and worked into the overriding Objective, along with the interest of providers. *(Pause)* Well, first, we need to establish which version of the Network Code and the Decision Criteria apply to this particular issue, as we have got to it, at the stage when they should have been applied. Because of this discrepancy, I am going to want to come back and consider the same thing on what we have already been through, I am afraid, in particular 4.2.2(d)(iii), to see if there is a difference.

But on the Decision Criteria – I mean, first of all, can I invite your views as to, in general, what determines what version of the Network Code, or Part D within the Network Code, applies to a dispute, and is it possible to have one version applying to one set of issues because of the state of the process at which they arrive, and another version applying to another set of issues?

So could you, for example, have one version of the Network Code that is, in force as at the Priority Date, applying to consideration of issues that fall to be determined as at the Priority Date, and a later version applying to decisions which, as part of the subsequent implementation of the same process, fall to be made at a time after the later

version has come into force? I am interested in everybody's views on that.

MR ALLEN: Our view is "yes", especially now that the preamble of a revised Part D removes any applicable to this timetable or that timetable. As soon as you have a change to these Conditions -

THE STENOGRAPHER: Sorry, could you speak up a little, please?

MR ALLEN: Not normally! So following the removal of, you know, in the preamble to any revised Part D, the applicable timetable these new Part D revisions apply to, now that that has gone, the answer is "yes". If these change midway point through the process, then the new rules are what you use as and where you are in the process.

THE CHAIR: Right. You use the current version of the Network Code?

MR ALLEN: Correct.

THE CHAIR: This means, legally, that we are saying the actual contract changes, by implication, at the point when the new bit of the Network Code is dubbed by ORR to take effect and legally interpolated into every then extant Track Access Contract. At that point the contract becomes changed. Thereafter, decisions falling to be made, in accordance with the Network Code, even if they are part of a process which started before that change, they fall to be made under the new version because the contract has changed?

MR YEOWART: Yes. I mean, we would expect it to be the new version, not least because it actually pre-dates the Offer Date. I mean we are actually talking - it is about the offer time when the Decision Criteria is actually applied, and that comes in on June 8th or June 7th.

MR HANKS: No, 8th.

MR YEOWART: And the Regulator usually, if there is a change that might have serious implications when those changes are made, says quite clearly that anything that was done before set date, these will come into effect from, and they didn't do it as far as I am aware on this one, on the basis of a Priority Date and an offer, they were in place. Therefore, if there is going to be an offer, it will be based upon what is in place, because you never make an offer before the Offer Date, do you?

THE CHAIR: Right. I think provisionally, just thinking about it, my view is that legally that is an interpretation that is open to be taken. If you are all agreed that that is an appropriate

interpretation and therefore would not challenge it, I am minded to conclude that on this particular point.

MR YEOWART: Yes.

THE CHAIR: I do not know if ORR would take a different view.

MR HANKS: Certainly at the time we agreed on the right set of Decision Criteria to be applied. Network Rail, I actually I think asked Martin which set of Criteria were being used and he said, "That's a good question" and they applied the new set.

MR GIBBONS: I think it is the – I can't say that word.

MR THOMAS: "Longevity".

MR GIBBONS: Thank you, of the process, you can start, you know, PDNS in the last, in July 2010 and arrive at the offer -

THE CHAIR: It is inevitable that any one timetabling process could span multiple sets.

MR GIBBONS: Yes.

MR HOLDER: It used to be held over for the next timetable planning cycle, didn't it, because you have to take cognizance of the Decision Criteria all the way through the timetable planning process. So you cannot suddenly make a decision on one timetable under one set of rules and the next day change it to another set of rules. It is difficult.

THE CHAIR: It is difficult.

MR ALLEN: Part of the timeline is to get the new Decision Criteria established so that it could be in place in December '12.

MR HOLDER: Was it?

MR ALLEN: I believe so. That was my understanding of getting it pushed through CRC.

MR HOLDER: Right.

THE CHAIR: Okay. Notwithstanding that in this particular chronology, the new Decision Criteria, the new Network Code incorporating the new Decision Criteria with the overriding Objective version, came into force and was dated 16 March, which is after the Priority Date of the then current timetabling process of 2 March, it seems to be accepted on all hands that, going forward, for decisions which fall to be made after that time, it was the new version which was contractually applicable.

Right. I will have to come back to considering how that works on the other issue for 4.2.2(d)(iii). But just sticking with the Decision Criteria, the next question to

ask ourselves is because we are at the point of saying, hypothetically, if the Decision Criteria fell to be applied, when would they have fallen to be applied, because it makes a difference, in terms of the timing.

If the Priority Date, when relative priorities should have been established, was 2 March and if the net result of all we have been saying is that as at the Priority Date the conflicting bids were equal at Level (iv), then should the Decision Criteria have been applied effectively at that date, or shortly afterwards, and before 16 March?

MR GROVER: I am not sure that on that date we had finalised the path for - when I say Alliance, I mean Grand Central. It was only later on in the period, I think after 16 March, although I cannot be 100% sure on that, that we had two then paths we were happy with and sort of -

MR A LEWIS: It was.

THE CHAIR: Yes. In fact, of course, I realise I have already answered my own question because if we are postulating the applicability of the Decision Criteria on the basis that the Alliance/Grand Central bid only had Level (iv), by definition that only became a Level (iv) bid when transferred to Grand Central because we have said arguably that is why it is only Level (iv) - it happened after the Priority Date. When did it happen?

MR HANKS: 16th March really because that is when we told Network Rail that it would be Grand Central rather than Alliance.

THE CHAIR: Actually on 16 March?

MR HANKS: It was actually on 16 March, yes.

THE CHAIR: Not on 5 March when you triggered Grand Central's application for its Supplemental?

MR HANKS: Well, that was internal on 5 March.

MR BRANDON: Sorry. The 6 March that we referenced was internally when it was decided it had become a Grand Central service. We then wrote to Network Rail on 16 March, via e-mail which was attached to that further evidence submitted at the end of last week. On 20 March we went out to consultation, or Network Rail went out to consultation on the Seventh Supplemental Agreement, which was then submitted to the ORR on 27 April.

THE CHAIR: Right.

MR HANKS: So prior to 16 March it was only internal discussions. There may have been

reached an internal agreement before that.

THE CHAIR: Okay. So if we are right in saying that the Alliance/Grand Central bid that was proceeded with was the Grand Central bid, that was effective, one way or another, from 16 March so no one would contest that, on that basis, if the Decision Criteria were to be applied, they were those in force from 16 March? Is that a fair statement of the position?

MR YEOWART: Yes. You have just got me thinking now about the legal status of the Alliance submission and whether it had to formally get changed to a Grand Central submission just because we went out to a Section 22(a) consultation. Does that actually change it? But Network Rail, that's -

THE CHAIR: I mean, we have explored that pretty extensively.

MR YEOWART: We did. You just make me think very much, Chair.

THE CHAIR: I don't want to stop you coming back on anything. I want you to have a thorough, fair hearing. So if you want to revisit that...

MR YEOWART: It is just a question in my mind, that is all, because you have posed - you have made us think very deeply about what has gone on, and apart from an e-mail which said this will now become a Grand Central train, I don't actually recall any formal change to the submission.

MR HANKS: No, there was no change, variation to the actual bid itself.

MR YEOWART: To the actual submission.

MR HANKS: And the letter of notification, I am sorry, I was wrong, it wasn't 16 March, it was actually 14 March. I don't know whether that makes any difference. I think that is probably a right side failure.

MR YEOWART: I am not sure it is. I think 17th would have been better!

THE CHAIR: I think 17th would have been better.

MR HANKS: Would it? Oh right, okay.

THE CHAIR: For ease of reference it would have been better.

MR HANKS: Well...

THE CHAIR: Can I invite you to conclude - not conclude, I have to conclude! You have to suggest what you would like me to conclude! Can I invite you to suggest that one way or another the operative time for applying the Decision Criteria in this case, not irrespective of the chronology, taking into account the chronology and everything that happened, was

at a time when it would have been the 16 March version that would have been applicable and to be taken into account?

MR YEOWART: I think we are happy with that.

MR HANKS: Yes.

THE CHAIR: Are you all happy with that conclusion?

MR HANKS: Yes.

THE CHAIR: Right, thank you. I think, Ian/Grand Central, unless you have anything very cogent to say at the moment on the issue of the status of Alliance's submission now, which we went into before, I would say if you want to provide us with something else on that after the event, we would ask you to do that within some time limit which we will set for providing anything else which has to be provided, and we will come back to that. But I do not -

MR YEOWART: No, we made our decision -

THE CHAIR: - necessarily want to take time to explore that yet again now.

MR YEOWART: It is just that you set me thinking on the basis as well that it was always referred to as "the Alliance application" by Network Rail. That's all. But I don't remember formally removing it. I know we are back to absolute in relation to contractual position. The submission to the Regulator is not pertinent to this actual process.

(Alliance/Grand Central conferred)

MR YEOWART: Oh right. The offer that was made to the company was actually to Alliance from Network Rail. The rejection was actually made to Alliance not to Grand Central.

MR HANKS: Though, at the same time, all the trains in the Train Planning System were coded as Grand Central trains. So there was an element of confusion, I suppose.

MR YEOWART: Which persists to this day, I would suggest!

THE CHAIR: The provisional conclusion on that point that we reached was that, one way or another, the bid that was proceeded with, not against Alliance/Grand Central's wishes but on their wish, was a Grand Central bid and on that basis we have provisionally concluded that the Grand Central bid which was proceeded with did not meet the Level (iii) test -

MR YEOWART: Yes.

THE CHAIR:- because if anything met that test it was the Alliance bid and the Alliance bid was not proceeded with.

MR YEOWART: Well, that's a question now that has got into my mind I am afraid.

THE CHAIR: If you want to come back on that whole issue, I will invite you later on to do that afterwards.

MR YEOWART: Yes.

THE CHAIR: But I think we will not take any more time on that now. We will move on. Having determined that at least for purposes of applying the Decision Criteria, it is the 16 March version we are concerned with, we are back to the relative merits asserted on each side as to how they were and should have been applied. Grand Central had its letter at Annex F, 27 April, being very even-handed and broadly not reaching a clear conclusion on it, to which -

MR YEOWART: I think it is worth -

THE CHAIR: - on 30 April -

MR YEOWART: Sorry.

THE CHAIR: - Network Rail replied setting out the Decision Criteria which are in alignment with the 16 March Network Code version and concluding, I think, that the weighting favoured East Coast?

MR A LEWIS: Yes.

MR HANKS: Can I just say, Chairman, in support of my previous argument, that that is almost identical to the draft letter that I received ahead of the meeting, so there was actually no change at all in Network Rail's position. I am not saying that that is necessarily incorrect, but there was no change as a result of the - basically as a result of the letter, the discussions I had and the letter that was sent on the 27th.

THE CHAIR: Sorry. Give me that again.

MR HANKS: So Network Rail, before - I cannot remember the exact date because I haven't got a copy of that here, but there was a draft letter from Network Rail setting out how they initially envisaged applying the Decision Criteria.

THE CHAIR: What, a forerunner of the letter of 30 April?

MR HANKS: A forerunner of the formal letter, yes, which pre-dated the later meeting that I was invited to. So in other words the draft -

THE CHAIR: And pre-dated your letter of 27 April?

MR HANKS: Yes. So the chronology was draft letter from Network Rail; meeting where we

discussed it; and I am sorry I haven't got the dates, precise dates of those, but they were quite -

THE CHAIR: Which is why you commenced your letter by saying:

“I understand that from our conversation it is likely that Network Rail will be applying the Decision Criteria [blah blah blah] to prioritise the competing applications for Alliance/Grand Central and East Coast trains...”?

It does not say “I understand how they will be applying it”; it is just “I understand that they *will* be applying the Decision Criteria.” Okay.

MR HANKS: So I have asked them “to take the following points into account”, and I don't believe that they have taken any of those points into account is really what I am saying.

THE CHAIR: What do you say, then, as to what they have set out in the letter of 30 April as to their application and an analysis of the Decision Criteria -

MR HANKS: The letter -

THE CHAIR: - whether or not they have taken your previous points into account?

MR HANKS: I see.

THE CHAIR: Or are you saying that not having taken your previous points into account of itself vitiates their application of the Decision Criteria as set out in that letter?

MR HANKS: The difficulty is that I have to accept, under the Network Code, Network Rail has the right to apply the Decision Criteria as it sees fit. There is not really any formal comeback. It is only by inviting comment that is influencing that.

THE CHAIR: No, that is not right. I mean ultimately this -

MR HANKS: Okay.

THE CHAIR: - forum and any appellate forum from this forum is the arbiter of what objectively is the appropriate application of the Decision Criteria in a situation where they are applicable.

MR HANKS: Okay.

THE CHAIR: So you are perfectly entitled to advance a view as to what this forum's conclusion should be.

MR HANKS: Okay. Thank you.

MR YEOWART: I was just going to say generally that if you go through each item specifically, it would appear totally unreasonable to believe that Alliance or Grand

Central was not successful in one of the applications. It is a subjective - it will necessarily be, in the absence of any hard factual evidence, a subjective position to take.

But in relation to the Criteria, as Chris has already said, we did some of our own work objectively and tried to be fair. There are some sections where East Coast would be clearly better, but if you go through the Criteria, notwithstanding the fact that the primary purpose falls on the basis of it being non-compliant, assuming it is the train we are talking about and not the freight train that we are talking about, but even if you take just one item, (k) for example, which is “facilitating new commercial opportunities, including promoting competition in final markets and reasonable access by new operators of trains”

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MR HANKS: Sorry, that is the old criteria.

MR YEOWART: That is the old one, is it?

MR HANKS: Yes, I am afraid so.

THE CHAIR: Sorry, Ian, can I stop you there?

MR YEOWART: Yes. Sorry, my mistake.

THE CHAIR: I think where we are at is if you have a view on their analysis and application of the Decision Criteria as most lately expressed, I think, in that letter of 30 April where, whatever they did beforehand, they have set out with reasonable clarity here, in respect of each of the Decision Criteria as per the 16 March version, although they have not referred to the overriding Objective, they have set out, in respect of the supporting Decision Criteria, in respect of each one, whether it favours one or other party or is neutral. I was frankly hoping to avoid having to go through them one by one but we will if we need to.

I am really looking to be giving you the opportunity to respond to that analysis there which may include - well, we don't agree with the analysis on (a), (b), (c) or (d) which concludes that they each favour East Coast because so and so or “Because it fails to take into account a point I had made in my previous letter” or something like that.

MR HANKS: Right. I am afraid I haven't prepared that specifically for today because I didn't expect that we would get to the Decision Criteria, which was clearly a mistake.

THE CHAIR: Well, sorry, let me say, then, if that is the case, is that something else that it would be appropriate to say let us have your views on that -

MR HANKS: I think rather than take up the time of everyone here, yes.

THE CHAIR: - within a timescale rather than -

MR HANKS: It will not take long but it is not something that we could probably achieve in a five-minute break.

THE CHAIR: Fair enough. That is better than asking you to do it off the top of your head. Very well. Let us stand that one over. Hopefully what is supplied, which will of course be copied around everybody, will enable us to bat that one on the head and put it in the context of the overall parts of where it will go without having to reconvene and so on.

Network Rail, in the light of that, do you want to say anything else on the application of the Decision Criteria to supplement what you have put in your letter there? You will clearly have an opportunity, if you want it, when you see what Grand Central say, to respond, provide information in response if you want to, and hopefully without the need to reconvene, but is there anything else you would like to point out?

MR GROVER: Only to add that obviously we did have sight of Chris's letter. It was not sort of ignored. It was taken on sight and we did reconsider - not reconsider perhaps.

THE CHAIR: Consider.

MR GROVER: Consider.

THE CHAIR: You did take the points into account in setting out your analysis as at 30 April?

MR GROVER: Yes, and the conclusions eventually reached, after some discussion, is what was set out in the letter back.

THE CHAIR: Okay. But as to the conclusions you put in there, you would stick with those?

MR A LEWIS: Yes.

THE CHAIR: Okay, thank you. East Coast, Shaun, do you have any observations to make on that? You do not have the papers in front of you, or maybe you do, I don't know.

MR FISHER: No, I do!

THE CHAIR: I do beg your pardon! In your corner at the back there!

MR FISHER: No, there is nothing that I would wish to say, thank you.

THE CHAIR: Okay. Right. Colleagues, any other contributions on that aspect as to the application of the Decision Criteria?

MR HOLDER: Could I ask, is it possible for both the parties to say how they think the Decision Criteria fit with the Objective? The Decision Criteria says that you have to take the decisions in accordance with the overriding Objective, if you like. To do that, you

might like to consider some of these elements, and then it says you may put weight on -

THE CHAIR: That is a very good point.

MR HOLDER: - to show how those elements or any other elements fit into the overall Objective which is to talk about:

“...the overall interest in the most efficient and economical manner”.

THE CHAIR: That is a very good point. As I said, you have both actually skated over the Objective which was lifted out, in part, from what was previously Decision Criterion (a). So it would be very appropriate and helpful if you were able to deal with that. I think, again with an eye on the clock and so on, the appropriate way to deal with that would be to invite Grand Central to give its view on that as part of stating its analysis and then to ask Network Rail to respond. I mean, I suppose I could say, “Network Rail, please provide your view on the missing objective from your analysis” and then Grand Central respond to that, but that is prolonging the agony, is it not?

MR HANKS: Yes. I think perhaps we should respond independently, though. I would point out again that it is actually Network Rail’s responsibility to apply the Criteria. I am pleased that they consulted us, which was good, but it is still their responsibility to apply the Criteria. So perhaps if that bit was missing then they should respond.

THE CHAIR: Very well. Yes.

MR HANKS: If we both respond independently.

THE CHAIR: Yes, that is an entirely fair point. I accept that. In that case, I will be inviting you both to put your additional information in: Grand Central, on the one hand, stating how you think the Objective should have been applied and also, in a sense, responding to what has already been said by Network Rail, including as to whether it did or did not take into account specific points you had previously made; and Network Rail, at the same time, I will be inviting you to provide your views on the missing bit of your analysis, which is to do with how you would/should have applied the Objective and, at the same time, saying anything else you want to in relation to the Criteria and then, of course, you will each get a chance to reply/comment on each other’s positions on that, which will also be copied to East Coast. I think that is correct, is it not, Tony?

MR SKILTON: Yes.

THE CHAIR: Yes. Right. Having got that far, is there anything else to be said on 494?

Colleagues?

MR THOMAS: No, Chair.

MR GIBBONS: I don't think so.

MR HOLDER: No.

THE CHAIR: Right. Then let us move on to 495 and 493 in the hope that we can, with the benefit of where we have got to on some of what have turned out to be more abstract issues on 494, deal with them expeditiously.

Taking 495 first. I would like to know, please what – I think in the interests of expedition, I am going to depart from Grand Central first and then Network Rail, and I am going to direct this to Network Rail first off.

I think the first issue is to know where Network Rail say it was not just GB Railfreight's service, which admittedly was a spot bid, which conflicted with Grand Central's bid; it was a whole stack of other things. I think we want to know from Network Rail what you mean by "conflicted with". Do you mean all those other things you have listed? There are half a dozen of them. Again, I do not want to have to go through them individually unless we have to. By saying, "They conflicted with it so that was the reason we rejected it", do you mean they conflicted in the sense that they had either higher priority than the Grand Central service bid, higher priority contractually (according to the analysis we have reached for how you apply that) or do you mean that they had an equal priority but came out better on the Decision Criteria or that they had some other sort of priority over the Grand Central service bid?

MR A LEWIS: Right. Bit of a mixture, to be honest. There were one or two services. I think the overall thing is whether or not we could Flex all of these services because that would have been the ideal opportunity to try to Flex everything. 6N50, that was actually only considered when we determined that we didn't think there was an expectation of the path on 1N93 so we dropped down the next decision in the Criteria to consider 6N50. The way we got to that consideration was by going through - there were five issues raised.

THE CHAIR: Sorry. I am not with you on 6N50.

THE CHAIR: The GBRf one.

MR A LEWIS: Yes.

THE CHAIR: But we are asking about the other ones.

MR A LEWIS: Yes. Right. The other ones, there were a mixture -

THE CHAIR: Sorry. If you are talking about Flex, with a large 'F', that only becomes relevant if the other things you list have equal priority with the Grand Central bid. I think that is the case, is it not?

MR ALLEN: Or higher priority.

THE CHAIR: Or a higher priority, yes, indeed. Equal or higher.

MR ALLEN: So for -

THE CHAIR: Is your basic point that these other things you say conflicted with -

MR A LEWIS: Yes.

THE CHAIR: I am trying to get at what you mean by "conflicted with".

MR HOLDER: Sorry, no. Isn't it all of them? As long as they are in the first three Levels and have Access Rights? You only compare 1, 2 and 3 if you cannot sort it throughout the other ones, looking the other ways, if there is really only room for one path. Is that not the way it works? You asked the question whether you got it right.

THE CHAIR: If you have got a 1 and a 3, you would not Flex 1 in order to accommodate 3?

MR HOLDER: Yes, you would.

THE CHAIR: You would?

MR GIBBONS: As long as it is within the contractual Rights.

THE CHAIR: Because that is what Flex, with a capital 'F' is?

MR GIBBONS: Yes.

THE CHAIR: Yes, fine. Understood.

MR ALLEN: Agreed.

THE CHAIR: Thank you. On that basis, what was the conflict between those half a dozen or so, other than the GB Railfreight spot bid, and the Grand Central bid?

MR A LEWIS: Right. What is the best way of answering this? Do you want a one by one or just an overriding -

THE CHAIR: If it is all the same it would be helpful to have them all the same, but if it is different for each, we possibly need to know in round terms what each one was.

MR GIBBONS: They are all different.

MR ALLEN: They are all different.

MR A LEWIS: I think the main one would be 6H88, the Daw Mill to Drax service, which we

were unable to find -

MR SKILTON: Sorry. To Drax?

MR A LEWIS: Daw Mill.

MR THOMAS: It is a colliery, believe it or not.

MR ALLEN: 6H88 has got Level 1 Rights for which Flex, with a capital 'F', is +/- 30 minutes.

In terms of pathing the Grand Central train as in the PDNS, we couldn't find an alternative path for 6H88.

MR A LEWIS: Which was within the 30 minutes Flex.

MR ALLEN: Which was within the Flex, yes. So the others are all slightly different. 6H33 is a Quantum Right for DBS. That is a Level 2 Right, as I understand it, which arguably could be subject to +/-30 minutes because there is a bit of a clause in the DBS contract which says "Everything in our contract is +/-30 minutes", which is unusual for a Level 2 Right, but there we go. Now, that - Andy?

MR A LEWIS: That was biggest one, 6H88. This was communicated to Grand Central as well. That was in the summary. The actual real issues were, when we reached Doncaster, at Shaftholme Junction we were just totally unable to find a path within the contractual flex because of the sheer number of services on the Down line from the Shaftholme -

THE CHAIR: Sorry, you could not find a path for who?

MR A LEWIS: To facilitate the Grand Central path without having to flex 6H88 outside of its flexing Rights.

MR ALLEN: What about 33?

MR A LEWIS: 33 was another one, but that wasn't as bad.

THE CHAIR: Sorry. Just sticking with that one then, let's just take that as an example. So 6H88 was a 'level what' bid?

MR COOPER: Can we add something, because it is relevant if you are going down that route?

We checked the Rights of 6H88 and it has got a cap on it so it is actually outside the Rights.

MR HANKS: Tell them what the cap is.

MR COOPER: Yes. The cap is you can only have, I think it was three departures.

THE CHAIR: A quantum cap?

MR COOPER: Yes.

THE CHAIR: A cap on quantum.

MR COOPER: And there was up to seven. We have raised this with Network Rail. Was this the meeting with Dan?

MR HANKS: It was prior to the meeting, yes.

MR COOPER: So we sent this to Network Rail, so Network Rail was aware of the issues we had got with 6H88 and the caveats on the quantum.

THE CHAIR: I am sorry -

MR ALLEN: Unusual for a Level 1 right to have a quantum.

THE CHAIR: Sorry, let me stop you there. To try to keep the discussion sort of going in a straight line -

MR COOPER: It is just wrong to -

THE CHAIR: To try to keep the discussion going in a straight line, I am going to stick with Network Rail telling us -

MR COOPER: Okay.

THE CHAIR: - and it seems like it is necessary to do it one by one. What was the relative priority, overriding priority for each of these asserted services, and then I will ask you to come back and challenge that either on the ground that what they say is wrong or that there is some other reason why you did that priority.

Let's do it in that order, please. Sorry. Please continue, Andy. So 6H88, what were you saying? You could not vary it without going outside its Flex, with a capital 'F', in other words, without going outside its FCRs?

MR A LEWIS: Going to the point Jonathan raised, I haven't heard that point before so I can't dispute that.

MR GIBBONS: We think that only applies to Level 2, or below, Rights.

MR ALLEN: That is my understanding.

MR GIBBONS: A Level 1 right is a Level 1 right and it is within that contract. The quantum does not apply, the cap does not apply to Level 1.

THE CHAIR: What, as a matter of how it is in the Contract?

MR GIBBONS: Yes.

THE CHAIR: In their particular Contract?

MR GIBBONS: The quantum cap only applies to Level 2 or below.

MR COOPER: Have you looked at this in the Contract?

MR GIBBONS: No, I haven't looked at it in terms of the contract.

MR COOPER: It was a very unusual provision in the actual contract. It was specifically -

THE CHAIR: Are you saying that in their actual - would it be Schedule 5?

MR COOPER: Yes.

MR GIBBONS: Schedule 5 -

(Inaudible due to cross-speaking)

MR GIBBONS: ... I don't know but generically we understand that it doesn't apply, quantum cap does not apply to Level 1 Rights.

THE CHAIR: What, that you cannot have a quantum cap?

MR GIBBONS: Yes, in the -

MR THOMAS: The way it works, Chair, is you have – Level 2 Rights are from a number of destinations to a number of destinations and you are allowed a number of those but to limit them - to stop them all running on any one day, you have calling caps at certain locations. So if you had, just fictitiously, 12 trains from a number of different locations, you might only be able to run five of those through any one location, and it is to limit the looseness of Level 2 Rights clogging up the network.

It is unusual, as Nick says, that Level 1 Rights are subject, because normally they are standalone, sit outside that. But if Jonathan has found something in the contract, then, you know, the contract will say what it says.

MR GIBBONS: Well, would it?

MR A LEWIS: And then -

THE CHAIR: I am getting lost.

MR THOMAS: Sorry, Chair.

THE CHAIR: There is this particular distinction between Level 1 and Level 2. Going back to our definitions of Level 1 and Level 2 -

MR THOMAS: Forgive me, Chair, sorry.

THE CHAIR: This is not 4.2.2(d)(iii)?

MR THOMAS: No, it is not. To add further confusion, in Schedule 5, particularly freight Access Rights, there is a difference between a Level 1 Right, which is very like a

passenger right, that says it will leave this location, go to that location and it is fairly fixed all the way through. A Level 2 Right is particularly to serve a number of different ports to a number of different power stations so that the variety of coal that might come in. So you might have coal come in to Scotland or Liverpool or wherever else this stuff comes in, I have forgotten, Nick, and go to any one of a number of different power stations.

THE CHAIR: Okay. Those different levels are expressed in the template Schedule 5?

MR GIBBONS: Yes.

MR THOMAS: Yes.

MR HOLDER: As quantum.

THE CHAIR: As quantum.

MR HOLDER: Quantum is Level 2.

MR GIBBONS: Otherwise it is capacity in the timetable.

MR HOLDER: It is a path - not a path, but an A to B Right which can be flexed normally up to 30 minutes either way.

THE CHAIR: Right. The template Schedule 5 version may or may not be modified in some particular way in the actual - it is actually expressed in the Track Access contract. Right.

Do we need to explore (if not now, later) how this particular different kind of level or classification of level Rights works in order to determine this point?

MR ALLEN: I can check. It was only this morning that I spoke to CRE -

THE CHAIR: Or does it not actually have a bearing on the issue?

MR ALLEN: We spoke to CRE for Freightliner who confirmed it was a Level 1 Right, +/-30 minutes Flex, but I am happy to go away and check Jonathan's interpretation.

THE CHAIR: Forgive my ignorance on this point. Does the classification of a Right as Level 1 or 2 or anything else, in terms of how it features in Schedule 5, have a bearing on its relative priority over somebody else's Right whose priority is determined in accordance with Condition 4.2.2(d) of the Network Code, Part D?

MR HOLDER: It still applies, does it not, because it is a Firm Right?

MR GIBBONS: It is a Firm Right.

MR HOLDER: It is similar to a passenger. It could run out of date, it could terminate -

MR GIBBBONS: But in this sense it hasn't.

MR HOLDER: In which case it would be part (ii), and that Right exists when you are making the bid, it is not there for the whole of the time.

MR ALLEN: Or it could be part (i).

MR HOLDER: Or it could be one that carries on so it could be a Priority 1.

MR GIBBONS: In a freight contract it would be a 1. A freight contract is not due to expire until 2016, or something like that. So in other words, in terms of 4.2.2(d), it is 4.2.2(d)(i).

MR HOLDER: Yes. As long as it became a Level 1 Right before the Priority Date.

MR GIBBONS: The Priority Date, yes. I don't know.

MR HOLDER: No.

MR ALLEN: It was in their Nineteenth - well, it was in their Seventh Supplemental. I have got that somewhere.

MR GIBBONS: Before the Priority Date?

MR ALLEN: Before the Priority Date.

THE CHAIR: So if 4.2.2(d)(i) - so if 6H -

MR ALLEN: 6H88.

THE CHAIR: - 6H88 is, in part 4.2.2(d) terms, a level of what I have called wrongly a Level 1 and a 4.2.2(d) -

MR HOLDER: Priority 1.

MR GIBBONS: Priority 1.

THE CHAIR: Sub-clause, sub-clause (i) priority, then irrespective of whatever it is in terms of its own Schedule 5, Level 1, 2 or whatever, what status does that have versus the Right bid for that we are talking about in TTP495 by Grand Central?

MR GROVER: The thing is if you cannot accommodate them but then you accommodate the one which is the Firm Right, which would be 6H88 in this case.

THE CHAIR: Was Grand Central's right, therefore, remind me, a -

MR YEOWART: Level 3.

THE CHAIR: A Level 3. So in terms of Part D 4.2.2(d)(iii) - (d)(i), (ii), (iii), (iv), 6H88 was a (i)?

MR GROVER: Yes.

THE CHAIR: And Grand Central's was a (iii)?

MR COOPER: Only if you take Network Rail's view of it because I think, you know, it is all -

if this has got a cap on it, which we thought it had, it falls outside the contract. So you know, what is its status?

THE CHAIR: In other words, if it has a cap on it, then it is not Firm Contractual Rights -

MR COOPER: It is outside the contract.

THE CHAIR: - Exercised or not -

MR ALLEN: How do you define -

MR HOLDER: What is the -

(Inaudible due to cross-speaking)

THE CHAIR: What would be the result of that? Would that then fall to be treated properly as a spot bid, as a Train Operator Variation?

MR COOPER: I don't know. I think it falls outside the contract.

MR HANKS: So therefore -

MR GIBBONS: It has some sort of Right.

THE CHAIR: So therefore it is a spot bid.

MR COOPER: I don't know what -

MR GIBBONS: Surely it would have some sort of Right? It may not be Level 1.

MR HOLDER: What does the clause say?

MR GIBBONS: What, in Schedule 5?

MR HOLDER: In the Track Access Contract.

MR GIBBONS: I don't know. I don't know what it says. It's not my contract.

MR ALLEN: I can go and make a call to find out and get a copy sent across.

THE CHAIR: I am sorry, we cannot accommodate that, I am afraid, where we have got to time-wise. If this is an issue that needs to be explored, then I -

MR COOPER: I don't think we are actually arguing about 6H88. I think it is the issue about 6N50 and how that was prioritised.

THE CHAIR: But, sorry, if you are not arguing about any one of these -

MR COOPER: The issue we had was with the 6N50 and the fact Network Rail had rejected what they had described as a spot bid.

THE CHAIR: Hang on. Sorry. I should have perhaps commenced 495 with a brief summary of how we see the sort of overarching issue to be determined, which is this: Grand Central's contention is that its 4.2.2(d)(iii) level priority bid for whatever service it was

was rejected by Network Rail, was not offered, on the ground that it conflicted with a GB Railfreight service, somehow bid for, and Grand Central say, on any analysis, that was not a conflict where the GB Railfreight service bid for had any sort of priority over the Grand Central service bid for because the GB Railfreight bid was, on any analysis, a spot bid. So it did not even get into the 4.2.2(d) system of determining priorities.

MR COOPER: No.

THE CHAIR: To which Network Rail respond that may or may not have been the case, but, actually, the reason we rejected the Grand Central bid for that service was because it conflicted with five or six other services bid for by other – I cannot remember whether it is passenger and/or freight.

MR A LEWIS: It is passenger.

THE CHAIR: Some extra passenger/freight, which conflicted with the Grand Central service bid for.

So the issue which we are trying to - the most relevant and hopefully only relevant issue on 495 is whether these other five or six services bid for conflicted with the Grand Central bid in the sense that they properly had priority over that bid and therefore Network Rail was entitled to give them priority over the Grand Central bid, rather than trying to first accommodate the Grand Central bid, if it had priority over them, and then work the other ones around them if it could. That is the issue.

That is the context in which I am inviting you to tell me, either as a group or, if we cannot do it as a group, individually, all those five or six conflicting bids, how they stood in the contractual pecking order vis-à-vis the Grand Central bid. In other words, to elaborate on what, in contractual, purist terms, you, Network Rail, mean by “conflicted with”?

Now, it may be that that exercise is something we cannot realistically accomplish in discussion in the remaining time we have available today, in which case I would invite you to provide that analysis by way of further information and then to be responded to and so on and so forth. I invite views as to what the most efficient and expeditious way of dealing with this issue, as I have described it, would be. In other words, to carry on discussing it now or to invite Network Rail to produce the analysis in that way after the event?

MR GROVER: We believe that those four trains are 4.2.2(d)(i) in terms of they are trains with Firm Rights. And we could not accommodate both those, with a capital 'F' Flex and -

THE CHAIR: Right, thank you.

MR GROVER: - 1N90.

THE CHAIR: That is precisely the general analysis that I was looking for. You would say unambiguously they are 4.2.2(d)(i), which I have been inaccurately calling Level 1, priority and that is why they conflict with Grand Central's Level (iii), (d)(iii), bid and that is why they would have been accorded priority over it; that is what you are saying?

MR ALLEN: Yes.

MR A LEWIS: Yes.

THE CHAIR: Grand Central?

MR YEOWART: Our view is, yes, if they have got higher-ranking Rights through the bidding process, we don't dispute that. But in order to come to a solution on a new bid, Grand Central's bid for a new timetable, there is always a requirement, nearly always a requirement for flex, particularly on a busy route.

Our contention on this one is that there were timetable solutions to be found by flexing within the contract on the services 6H88 and others because Network Rail quite often look at the first impact and then don't look at another impact, i.e. the knock-on, in order to create the opportunity. I am afraid that has quite often been what we have received from Network Rail. We understand workloads, etc, but that is what the process says. But the minute that they have not gone to try to find a detailed solution, they were very quick to offer a path which did have lesser Rights than Grand Central's. In our view - bidding Rights lower than Grand Central. In our view, they did not exhaust their process in order to try to find us a workable solution.

I think that is borne out by the fact that the train - the official response to the Regulator from Network Rail was that they were hopeful they would find a solution. As a result a lot of detail was, from our point of view, highlighted towards this train.

It has, unfortunately, been our understanding of how Network Rail deal with these Rights that they do find it hard, and I think they would admit themselves they find it hard, to go beyond the first impact.

So quite often with flex it is not one train that needs to be flexed, there is a host

of trains, and Grand Central's timetable this year was developed with a huge amount of work done by Chris on unlocking further conflicts down the line when Network Rail had rejected those paths at the outset. There are a number of occasions in this timetable and Grand Central's path that were rejected and then solutions were found.

The minute they had offered Rights on 6N50, the opportunity for that disappeared, and they should not have made those decisions in that way.

THE CHAIR: Sorry, 6N50 was the GB Railfreight -

MR YEOWART: The Rolled Over spot bid.

THE CHAIR: Right, the spot bid of GB Railfreight.

MR YEOWART: You should not Roll Over spot bids for a start, that is the first thing.

MR GIBBONS: Why not?

MR YEOWART: Because the system does not allow it, the process doesn't allow for bids to be Rolled Over into a new timetable. I know we had this discussion last week.

MR GIBBONS: Yes.

MR YEOWART: You asked me the question and then I -

(Inaudible due to cross-speaking)

THE CHAIR: I am going to come back to that one. Remind me to come back to that issue because I do want to examine that.

MR ALLEN: Okay.

THE CHAIR: Just sticking with the straight-line contractual analysis of the other bids -- sorry, I keep on saying it is five or six. How many is it?

MR GIBBONS: Those four trains there.

THE CHAIR: Those four trains there. You have got as far as saying Network Rail's position is they conflicted in the straight contractual sense that they had a higher priority than - they were Priority 1 versus Grand Central's Priority 3. Grand Central, as I understand it, says in reply, that may have been the case but it is the position, when determining priorities under 4.2.2(d), that even for Rights of differing priorities - in fact we checked this point earlier. Is there still the opportunity to Flex even a Level 1 in favour of a Level 3? The answer to that was, in theory, yes, was it not?

MR HOLDER: Yes.

THE CHAIR: So there was the opportunity and indeed the entitlement of Network Rail to Flex

any of these Priority 1 bids in order to accommodate Grand Central's Priority 3 bid, and Network Rail did not avail itself of that opportunity, maybe because the knock-on consequences of doing that were just too difficult or whatever. I mean, in theory, nothing is too difficult.

MR YEOWART: No.

THE CHAIR: So that being the argument, I should ask the question of everybody: what is thought to be – I think it is agreed on all hands that Network Rail has the ability and the entitlement to apply Flex, with a capital 'F', on bids of differing priorities - what is thought to be the position as regards any obligation of Network Rail, contractual obligation as opposed to sort of moral obligation, to apply Flex?

MR YEOWART: It has an absolute obligation to apply flex otherwise the timetable is set in - it cannot be -

THE CHAIR: Right. Where do you derive that obligation? Is it from the contract, from provisions of the Network Code or is it from - sorry, I actually used the term "moral" wrongly. The obligation could be derived elsewhere, e.g. from Network Rail's License.

MR YEOWART: It is from the License conditions.

MR COOPER: It is in relation to managing the timetable efficiently and effectively.

THE CHAIR: Right.

MR GIBBONS: Best use of capacity and all that sort - it is all those sorts of things that come into that debate. That is why that Flex is there.

THE CHAIR: Okay. So -

MR HOLDER: 4.2.2 gives you this Right.

MR ALLEN: It comes into 4.2.2, "Network Rail shall endeavour wherever possible..."

MR HOLDER: "...wherever possible to accommodate all proposals."

MR ALLEN: Yes. To keep it simple, I'll go for that one.

THE CHAIR: "...subject to...". But that general obligation is subject to, among other things, the order of priority stated in (d) which is:

"The Train Slot shall be allocated in the following order of priority..."

First this, second this, third this and so on.

MR ALLEN: Yes.

MR GIBBONS: If you don't use the Flex, you ossify the timetable and nobody gets in.

MR HOLDER: No, but that (a), (b), (c) only applies “where Network Rail is unable to include all requests...”

MR THOMAS: That is right, Rob.

MR HOLDER: So if you can, it has got to massage everything to get everything in it.

MR THOMAS: And it is only -

THE CHAIR: Sorry, which one only applies only where?

MR HOLDER: Here.

THE CHAIR: Only applies?

MR HOLDER: “...where Network Rail is unable to include all requests for Train Slots.”

THE CHAIR: “Where the principles in (a), (b) and (c) have been applied but Network Rail is unable to then prioritise...”, the priority comes in. That is interesting, isn’t it?

MR HOLDER: So first it says it “shall seek to accommodate”.

(The Chair and Mr Holder both read out certain parts of the same document)

THE CHAIR: First, “The New Working Timetable will conform with the Rules”; second, “Each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant...”, but that of course still permits Flex, with a capital ‘F’.

MR HOLDER: Yes.

THE CHAIR: Third, (c):

“In compiling a New Working Timetable, Network Rail is entitled to exercise its flexing right.”

I guess what you are saying is that in observing the overriding principle of endeavouring “...where possible, to comply with all Access Proposals submitted to it”, “entitled” becomes “obliged” to exercise its flexing right? So, there, it means “entitled” as against somebody else in the process against whom the flexing right is being exercised and then, fourth, where all that has been done, including exercise of the flexing right, where possible, pursuant to its entitlement, where all that has been done, but (d) “Network Rail is unable to include all requests,” then the priorities apply? *(Pause)* I am inclined to accept that as meaning that Flex, with a capital ‘F’, consistent with Firm Contractual Rights, should be exercised before priorities are analysed.

Grand Central, therefore, are saying that Network Rail did not apply Flex to the degree in which it could have done in respect of these four services, and therefore the fact

that their bid (Grand Central's) was at Priority 3 and these four were at Priority 1 does not come into play unless, before that, and the way it is set out in the contract, unless Network Rail has reasonably exhausted the possibility of Flex, with a capital 'F', on these bids.

MR A LEWIS: *(Nodded)*.

MR HANKS: Can I -

THE CHAIR: Sorry. May I leave you to think about that? I would like you to come back to me on that, but I think it would be a suitable point to have a break.

(Adjourned)

THE CHAIR: Thank you. We carry on where we left off with Network Rail about to tell us that they could not, and why they could not, apply Flex, with a capital 'F', to each of these four services.

MR A LEWIS: Just before I do that, I think it is worth mentioning this isn't the first time we looked at these services. We had worked very closely with Grand Central for the best part of six months on these services from Significant Change through. So possibly the suggestion that this is the first time it got difficult is a little bit way off the mark, to be honest. Chris will be the first to confirm that we worked very, very closely and collaboratively all the way through with Grand Central.

We did revisit these post-offer as well and eventually found paths for all these services post-offer. They weren't the exact times that Grand Central were after but all these services have now been pathed. That might just be worth mentioning. I know it has not been brought up yet.

THE CHAIR: What about the one that is the subject of Dispute TTP495?

MR A LEWIS: Yes, that has been pathed. It is not at the original required time, but that does now have a path and it has Rights approved by the ORR.

THE CHAIR: This is the same thing but to Hartlepool?

MR GROVER: No, one of them – I think this clashed with 1N93 which is a Kings Cross to Sunderland train, and it has been pathed from Kings Cross to Sunderland -

MR A LEWIS: That is a different -

MR GROVER: Yes.

MR HOLDER: Has it got a path to Sunderland and Rights to Sunderland?

MR GROVER: Yes.

MR A LEWIS: It is just worth mentioning that also it has not just been dead in the water; work has continued after this and these paths have been found subsequently post-offer.

THE CHAIR: Please can we keep the discussion to the path that is the subject of the dispute?

MR A LEWIS: Yes.

THE CHAIR: Which is a path to Sunderland. Just remind me of the time that was bid for so I can call it the right thing?

MR ALLEN: 1323.

THE CHAIR: 1323 to Sunderland. As I understand it, the dispute for TTP495 is still extant because Grand Central are not satisfied that that service has been pathed as it should have been contractually. That is still the case, is it?

MR YEOWART: Yes.

THE CHAIR: So, Andy, are you saying that is not correct, that it has been pathed contractually or -

MR A LEWIS: Just to let you know, that that has been pathed more -

THE CHAIR: - that you have somehow, outside the contract, bent over backwards and done something with it?

MR A LEWIS: I wouldn't disagree with that. I definitely wouldn't disagree with that but not to the exact time that Grand Central originally asked for. There has been a lot of work that has gone on post-offer, definitely, to find a path, but it was a different time to the original path that was aspired to from Grand Central.

THE CHAIR: Are you saying that notwithstanding Grand Central is still in dispute over this path, Network Rail have actually pathed it through the bid and offer and reconciliation process, and have now pathed it in accordance with Grand Central's contractual Rights? Is that the relevance of what you are saying, "We have done all we can to do it"?

MR YEOWART: We don't actually have any contractual Rights for that. We do now but we didn't then. The Regulator has approved it.

THE CHAIR: In accordance with the sequence of contractual Rights built up in stages through the bid, an offer process and then eventually perfected through the application to ORR,

are you saying that you have been compliant with the contract? Is that the point of what you are saying, in saying, "It is not true to say we haven't done anything, we have done something" or are you just saying, "Well, it may not have been quite contractual but we have actually sort of, in a general non-contractual way, done everything as co-operatively as we can"?

MR A LEWIS: It's probably a cross between the two, actually.

THE CHAIR: I am sorry, it cannot be a cross between the two. It either is contractual or it is not.

MR A LEWIS: Okay. Yes, we have been contractual. Yes. The one thing we haven't done that we would have liked to have done was get an offer before the actual formal offer on 8 June rather than post-offer.

THE CHAIR: Can we come back to where we were in the contractual analysis?

MR A LEWIS: Yes.

THE CHAIR: Which was you were going to tell us how, in respect of these higher priority, in your terms "conflicting", bids, how you have tried to but could not exercise the Flex, with a capital 'F', that you were entitled to, and therefore they ended up with the higher priority prevailing over Grand Central's lower priority?

MR A LEWIS: Right. So the four services that we have mentioned in our Sole Reference Document, starting off from the top with 1N85, the issue we had there was that was looking to see if we could actually apply the contractual Flex. The issue we had with that one was an East Coast service that was actually booked as an HST, and it would have actually required a change of traction to have sufficient time in the schedule to subsequently divert via Doncaster and to allow 1N93 to pass.

We did actually have a meeting an Alliance/Grand Central and East Coast pre-offer to discuss this but East Coast were unable to facilitate the required resourcing. That's right, Shaun, is it?

MR FISHER: That is correct, yes.

MR A LEWIS: We didn't explore that one because -

THE CHAIR: Would that change of traction have been outside the limits of Flex, with a capital 'F', a requirement to do that?

MR GROVER: Yes.

THE CHAIR: There is no right to Flex in the sense of requiring a different form of traction required?

MR GROVER: It has a contractual right to run as an HST.

THE CHAIR: Yes.

MR A LEWIS: And also East Coast were unable -

THE CHAIR: Are you saying that there was no other form of flex in terms of timing, Flex with a capital 'F', i.e. consistent with their Firm Contractual Rights, that was available to you?

MR A LEWIS: Yes, because the pathing was so tight that was the only option we had, the different sort of traction would have freed up the opportunities to do that diversionary move. That was the only option we had.

THE CHAIR: Right. Grand Central, in respect of that service, do you accept or do you have grounds for contesting the assertion that there was no Flex, with a capital 'F', available to Network Rail, in respect of 1N85, the 1308?

MR COOPER: 1N85, it depends what the Rights were because – I mean, there are two issues with this.

THE CHAIR: I know it depends on what the Rights are. I am just asking you, do you happen to have any factual basis of your own knowledge to contest that the Rights were such that it is not correct to say that Network Rail had no Flex available to them or it had exhausted all of the Flex?

MR COOPER: I think they would have a lot of Flex if that train - basically, if there has been a change to that schedule that requires a change in rolling stock, then it falls outside of the Firm Rights that it has.

MR HANKS: No, it is the other way round.

MR COOPER: Is it?

MR HANKS: We were seeking - we would need a change of rolling stock to achieve what we wanted to do.

MR COOPER: Right.

MR HANKS: I accept there was a problem reported with that path, however, the point I want to get back to, and will do in due course, is that that was not given as a reason for rejection in the offer letter. I know it was an issue that was raised with us earlier on in the process, and I know it has been raised in Network Rail's Sole Reference Document.

But it was – I just point out that that conflict was not referenced in the formal offer letter that came from Network Rail.

THE CHAIR: I meant to ask you this earlier on because it actually comes earlier on in the logical sequence of how we approach this. Are you saying that none of these four allegedly conflicting higher priority services were adduced in the first place as the reason for rejecting your bid and that only the GB Railfreight spot bid was, in the formal sense, adduced as the reason for rejecting your bid?

MR HANKS: No. In the early stages of developing the timetable there was correspondence from Network Rail and 1N85, which is referred to here, was adduced as a reason for rejection, but that a number of – I worked closely with Grand Central, as Andy has - sorry, I worked closely with Network Rail and Grand Central to try to find a solution by proposing either flex on our side or trying to identify Flex that Network Rail could apply. In some cases, Network Rail accepted that. So there were some - some of those conflicts were actually resolved. I am afraid I have not -

THE CHAIR: Could we just keep to one path at a time?

MR HANKS: Right.

THE CHAIR: This -

MR HANKS: Right. This path was referenced on 14th -

THE CHAIR: This was referenced in the formal rejection?

MR HANKS: No. It was referenced in a letter of 14 April but not in the formal rejection.

THE CHAIR: Were any of these conflicting services referenced in the formal rejection?

MR HANKS: Which ones are we talking about? The ones in Network Rail's Sole Reference Document?

MR GIBBONS: Yes.

THE CHAIR: The four that had been stated by Network Rail that they rejected -

MR HANKS: Yes. The only two -

THE STENOGRAPHER: Sorry. You are talking over the Chair. Sorry.

MR HANKS: I am sorry.

THE CHAIR: The four that were stated in Network Rail's Sole Submission to be the reason for rejecting the Grand Central offer as distinct from the GB Railfreight spot bid.

MR HANKS: Two of those were mentioned in the formal rejection. They were 6H88, which

we have discussed, and 6H33. Sorry, that is not in there, is it? No. Sorry, only 6H88 was mentioned. However, there is another one that is mentioned that is not referenced in Network Rail's document, and that is 6E84.

THE CHAIR: There is another one what?

MR HANKS: Another path. So the offer letter from Network Rail states 1N93 1323 Kings Cross to Sunderland, rejected due to 6H88, 6E84 at Doncaster, rejected due to no available path Durham Coast with GBRf service 6N50, and then there is a little further information about that as well.

THE CHAIR: And 6E84, was that the GB Railfreight one?

MR HANKS: No.

THE CHAIR: No. Sorry.

MR HANKS: That is another part – I am not certain, but I think it was -

MR GIBBONS: It is a (*inaudible*).

MR HANKS: Yes, yes.

MR A LEWIS: That was on the summary we sent that -

MR ALLEN: Can we get rid of that one!

MR GIBBONS: No! And you know why!

MR ALLEN: Yes, I do.

MR HANKS: I am confused as well by the reasons for rejection. I have taken as the formal reasons for rejection the ones included in the formal offer letter.

THE CHAIR: Okay. Let's come back to the 'reasons for rejection given' point in a minute. Let's just finish on the point of whether we can reach an agreed position as to whether available Flex, with a capital 'F', was or was not exercised, in relation to, in the first place, the four that we have in the Sole Submission. We were talking about 1N85 1308 Kings Cross to York. Network Rail, as I understand it, say that could not have been Flexed any further to accommodate the Grand Central bid?

MR A LEWIS: Yes, without the change of traction.

THE CHAIR: Do Grand Central have any material of their own knowledge to contest that assertion?

MR HANKS: No. I accept that.

THE CHAIR: Because if you do contest it, I will be very happy to ask Network Rail to

provide, later, backup material in terms of what Flex was available and why it could not have been exercised. But if you are prepared to accept that assertion, I need not do that.

MR COOPER: No.

MR HANKS: You're not?

MR COOPER: No.

MR HANKS: Oh, I am sorry.

MR YEOWART: No, I'm not. That service was not shown as a reason for rejection at the Offer Date.

THE CHAIR: No, I am coming back to that point.

MR YEOWART: Yes. As a result -

THE CHAIR: Purely on the terms of whether they did or did not exercise the available Flex.

MR COOPER: I think we would like to know what Rights that train would have. It is relevant to the change, if they are saying it needed a change of traction.

THE CHAIR: No, no, we have said that change of traction is outside permitted Flex, with a capital 'F'. I am talking about Flex with a capital 'F'.

MR COOPER: Okay.

THE CHAIR: Flex within and consistent with whoever's it was Firm Contractual Rights.

MR COOPER: Okay.

THE CHAIR: Do you contest their assertion that they could not Flex it, with a capital 'F', anymore, that particular service, in order to accommodate your, Grand Central's, particular bid?

MR YEOWART: We will have to say "no", Chair, on the basis that because it was not shown in the rejection letter, we are not sure what Flex, because it is not a train we have looked at since, what Flex was available to it within the contract.

THE CHAIR: You are perfectly entitled, as far as I am concerned, to say, "We are not sure and therefore although we do not have specific grounds on which to contest it, because we don't have any grounds upon which to accept it, we would like to see those grounds."

MR YEOWART: Yes.

MR GROVER: In their Annex B to their Sole Reference Document, they have annotated Andy Lewis's e-mail with sort of additional comments that they sort of wanted. So for 6H88, they have pointed out the fact they believe there is a caveat of three trains. They have not

actually put any caveat on 1N85. I mean, it is mentioned there. They have been aware of these and have commented back on them, on this train.

MR YEOWART: The problem there, Chair, is it is an ever-moving feast. We can only take what is offered at the Offer Date and the reasons for rejection. That train, and has Andy has rightly said - and we appreciate the fact they continued to work - because it was not identified at the Offer Date as a reason for a rejection, we naturally assumed they found the solution, as indeed they do quite often. So for us to revert back to it now, for a letter that was actually exchanged in April -

MR HANKS: April.

MR YEOWART: - in April when the offer actually came in late June, there was plenty of time there for work to have been undertaken. So at this juncture, no, I do not accept that there was not an opportunity to Flex that train.

THE CHAIR: Okay. Notwithstanding that you may or may not have commented on it in the previous thing, you are saying, "Although we don't actually have specific reason of some facts we know about people's agreements in order to contest it, nevertheless we don't just accept, as a given, that it could not have been flexed more."

MR YEOWART: Yes.

THE CHAIR: I think that is fair enough and so I will invite Network Rail, on that point, to provide supporting evidence -

MR A LEWIS: No problem.

THE CHAIR: - as to what the Flex was and why it could not be Flexed out that to accommodate that path. *(Pause)* Right. Same point on 6H88, the second one listed in the Sole Submission?

MR A LEWIS: 6H88, this was probably actually the biggest reason for not being able to facilitate the Grand Central path. This one ties into the actual number of services on the Down line from Doncaster to Shaftholme and we were just unable to find a path within the 30 minutes Flexing Right for the service that could facilitate 1N93. This one was in the offer letter and it was communicated at an earlier stage, at the back end of April, to Grand Central. If I had to choose an order of ranking, this would probably be the show-stopper.

THE CHAIR: Okay. You are saying that with respect of 6H88, again, you could not Flex it

within the contractual Rights, “Flex” with a capital ‘F’, you could not Flex it - well, there was no available Flex left or whatever, to accommodate/enable the Grand Central bid and, moreover, you say, that, at any event, was specifically notified as a reason for rejecting the bid?

MR A LEWIS: It was in the offer letter and communicated in a separate document previously.

THE CHAIR: Right. Grand Central, do you contest that?

MR COOPER: Yes, we do.

MR HANKS: We accept the points that it was included in the letter and in the offer letter.

THE CHAIR: Yes. But you contest that it could not have been Flexed within whoever’s it was contractual Rights?

MR COOPER: Right. I think the debate about what contractual Rights it has, and the reason why we say that is because - we have got it up here (*referring to laptop*), we have just checked, there is a cap -

THE CHAIR: Sorry, can I just ask which operator are we talking about in respect of 6H88?

MR COOPER: It is Freightliner.

MR HANKS: Freightliner Heavy Haul.

THE CHAIR: Right.

MR COOPER: So on this Right, it is subject to a maximum of three departures per day from Daw Mill to all destinations. So we checked, when this train was being discussed, and there were actually seven departures from Daw Mill. So in terms of – you know, this is a Right that is subject to a maximum of three departures. Now, I don’t know how Network Rail has assessed that and what it has done to make sure that it has got Level 1 Rights.

THE CHAIR: How does this relate to the entitlement to apply Flex?

MR COOPER: Because if it has not got a Level (i) Right, it is something else, and it won’t have the 30 minutes. It will have something else. Perhaps it is a spot bid.

THE CHAIR: Sorry. Level 1 in what sense, the Schedule 5 Freight Level 1?

MR COOPER: No, this is in the contract.

THE CHAIR: Priority 4.2.2(d)(i)?

MR YEOWART: No.

MR COOPER: Right. This is in the contract for Freightliner.

MR GIBBONS: So this in their contractual Rights?

MR COOPER: Yes.

MR GIBBONS: It is in their Schedule 5 contractual Rights?

MR COOPER: Yes.

MR GIBBONS: So what does it say? "L1" does it say?

MR COOPER: It is L1, and it has got 30 minutes.

MR GIBBONS: And it has got +/-30 minutes flex?

MR COOPER: But that is subject to a maximum of three departures per day from Daw Mill to all destinations.

MR GIBBONS: So it must be Level 3 then.

MR COOPER: Well, I don't know. Is it?

MR ALLEN: Yes, please.

MR THOMAS: I think that is the question, Chair -

MR GIBBONS: It is.

MR THOMAS: - to be asked about it.

MR GIBBONS: Yes.

MR THOMAS: Is that specific train included in the cap? And, if so, why does that outrank any of the -

MR COOPER: I think we would like to know how Network Rail satisfied itself that it has actually got a Level 1 Right and it has got 30 minutes.

MR HOLDER: It says "departure time" -

THE CHAIR: Would Network Rail not say, if the Right is up to a maximum or to a cap of 3 and they have awarded 1, that is within -

MR COOPER: It is, but when you have got seven -

THE CHAIR: So on what basis are you saying that it was outside Freightliner's Firm Rights?

MR COOPER: Right. We asked this question and we got no response to it from Network Rail about what level of Right it has. Something hasn't got Rights here and we don't know if it is that one.

MR GIBBONS: Let's see what it says.

THE CHAIR: On what basis do you say something has not got Rights? I am really struggling on this.

MR COOPER: Because there are seven trains out of Daw Mill and only three have got Rights,

Level 1 Rights.

THE CHAIR: So are you saying that in response to the bid, whatever it was from Freightliner, they granted seven -

MR COOPER: Yes.

THE CHAIR: - trains where they only had Level 1 Rights in the Schedule 5 sense for three -

MR COOPER: Yes.

THE CHAIR: - which was the cap?

MR COOPER: Yes.

THE CHAIR: And, therefore, one of those seven, but we don't know which one, or four of those seven but we don't know which four, were non-contractual?

MR COOPER: Yes.

THE CHAIR: And therefore we do not know whether the one which is -

MR COOPER: Yes.

THE CHAIR: - adduced as overriding your bid -

MR COOPER: Yes.

THE CHAIR: - was contractual or non-contractual?

MR COOPER: Yes.

THE CHAIR: Because of the way in which the cap operates under -

MR COOPER: Yes.

THE CHAIR: Right, okay. I am with that one. Network Rail, how does that work?

MR A LEWIS: I think the only thing we can do is go back to the CRE and get clarification.

MR ALLEN: Yes and I'm not sure we are going to get any. I have just spoken - my honest view, I don't know but we will take it away and have a look at it. We understood that the train had got +/-30.

MR HOLDER: It does not say "paths", does it? It says "three departures."

MR ALLEN: "Three departures a day".

MR HOLDER: So it has seven Rights to seven Q paths and can only take up three of them.

THE CHAIR: What is a Q path?

MR GIBBONS: It is Rights for seven paths -

MR HOLDER: In the timetable to be used when needed, which means they don't run every day, they just run -

MR GIBBONS: Rob, Rob, don't confuse it anymore.

MR HOLDER: All right. I'm sorry.

MR GIBBONS: They have a right to run seven services from Daw Mill to a variety of destinations, okay, so it is coal out of the ground.

THE CHAIR: No. They have a right, as I understand it, to run three.

MR ALLEN: Three to all destinations. What does "all destinations" mean? Is that three to every destination?

MR GIBBONS: Well, they still have a right to seven paths out of Daw Mill.

MR COOPER: They are running them. I don't know if they have got any Rights.

MR GIBBONS: So you are saying - ah.

THE CHAIR: He is saying they haven't got Rights. He is saying they only have Rights under -

MR GIBBONS: I need to read it to make sense.

THE CHAIR: - the Track Access Agreement may be because of the way the Level 1 cap works in this case.

MR GIBBONS: Yes.

THE CHAIR: Or, two, they only have a right to three, not seven.

MR COOPER: Yes.

THE CHAIR: But seven were granted.

MR GIBBONS: I get where you are now. So you have investigated the timetable, found seven under Freightliner Heavy Haul?

MR COOPER: Yes.

MR GIBBONS: Sorry. That was not clear.

THE CHAIR: The problem we seem to have, where we are stuck, is that if that is right, then four out of those seven were contractual and - no, sorry, three were contractual, four were non-contractual because they exceeded the cap, but we can't -

MR ALLEN: Identify which ones.

THE CHAIR: - say which were which.

MR COOPER: But Network Rail must have been able to prioritise.

MR HOLDER: Are any of the other seven paths ones that you would have to flex to allow this train to move out of the way of the Grand Central train?

MR ALLEN: What we'd have to look at, I suspect is if the 1150 slot out of Daw Mill was in Heavy Haul's Eighth Supplemental, I think, as an 1115 slot out of Daw Mill. It is in their Eighteenth Supplemental, currently with the ORR for signing, but it is not likely to be signed because of things that I don't understand, in as an 1150 out of Daw Mill.

MR GIBBONS: It wouldn't get signed because half the paths out of Daw Mill are transferred to us.

MR ALLEN: Yes, and I also think Freightliner has got a bigger issue about how they are doing their Rights.

MR GIBBONS: (*Inaudible*) ... the world of Freight Access Rights and it's horrible.

MR HANKS: As I read over the weekend, it is likely to close in 2014 anyway.

MR THOMAS: Chair - sorry.

MR ALLEN: The advice we got in the process, until Jonathan rightly pointed out this strange note, was it had got Level 1 Rights +/-30, and that is how we proceeded throughout this until it certainly came to light to me today.

THE CHAIR: Sorry, Level 1 in the Schedule 5 sense?

MR ALLEN: In the Schedule 5 Rights.

THE CHAIR: +/-30.

MR ALLEN: +/-30.

THE CHAIR: And that is because that particular Schedule 5, following the template probably -

MR ALLEN: Yes.

THE CHAIR: - gives a Flex, with a capital 'F', of +/-30?

MR ALLEN: For trains with TAA Level 1 Rights.

THE CHAIR: But how do you apply a Flex of timing where the Rights given under the contract are not specified in terms of timing or time bands but are only specified in terms of quantum?

MR ALLEN: That is the problem we have got. That's only - I've just been aware of that this morning or this afternoon because, up until just a few minutes ago, the information we had been given about from, you know, the Customer Manager for that service flow, was that, you know, they had got hard-wired Level 1 Track Access Contract Rights.

MR GROVER: The contract says it is subject to three departures per day. So, I don't know, there is an interpretation around there, but this could be something that has been put in

there for performance reasons, that they don't want all seven paths to run on any one day, but any three of those paths can run on any given day as long as no more than three, that could be the interpretation.

MR ALLEN: It is speculation. We will have to see if we can find a definition of that meaning, but I think we are going to struggle, I suspect.

THE CHAIR: Okay. Rather than go on with this point to the point of exhaustion -

MR GIBBONS: Tony, I think before your time, we had a hearing across the road in Kings Cross about Transfer of Rights, Audley Coal, capita were addressed in that. I cannot remember which one it was.

MR THOMAS: I am not so sure whether it's capita or whether this is a traditional cordon cap and whether it - it feels like something different. I think as Network Rail is the signatory to the contract; it ought to decide what it thinks the contract says, offer that as an explanation to Jonathan and to Alliance colleagues and you take a view on whether that is legitimate or not.

THE CHAIR: I think that is right. That is what I was going to say.

MR THOMAS: Sorry, Chair.

THE CHAIR: I do not think we have the opportunity, with the facility of time now, to go into this particular one anymore in the abstract. We need exactly that; we need Network Rail's analysis of what it believes to be the contractual position with respect to that particular service with Heavy Haul, with a view to ultimately, on the basis of that information, saying what the answer to the question we started with was, which is: Had it exercised all the Flex it possibly could, and it may be that if the Rights were expressed in terms of quantum only, then because you are not comparing apples and apples, you cannot Flex, time-wise, a Quantum Right so maybe there is no Flex, I do not know.

But we need Network Rail's analysis of its contractual position and, derived from that, a statement of whatever ability it had to Flex, with a capital 'F', that service bid for in order to accommodate the service Grand Central bid for and say they should have got.

MR A LEWIS: Yes, okay.

THE CHAIR: That was going to be an important one because the fact is that if - correct me if I am wrong, colleagues, but if Network Rail get home on any one of these four, they get

home on having not accommodated on - their right not to accommodate Network Rail's - not to accommodate Grand Central's bid?

MR HOLDER: Yes, except that a path has been found now, which is consistent with Grand Central's current Rights and aspirations. So, in effect, their bid has been flexed into a viable path, which must be within other operators' contractual Rights.

MR A LEWIS: It is at a different time.

MR HOLDER: Yes.

(Inaudible due to cross-speaking)

THE CHAIR: Sorry. We have already explored that and asked Grand Central the question in that light, that does that mean that effectively the dispute goes away and the answer is "no".

MR YEOWART: No.

MR HOLDER: In that respect, you are right.

MR YEOWART: Just so that you are aware, the issue with the additional path offered is that what Grand Central is trying to achieve is some semblance of spacing for its customers so that not everything is bunched together. It is all right having four trains an hour between Leeds and Manchester, for example, but if they all go within three minutes of each other there is really no value.

The 1323 filled up, as best we could, the gap between 1123 and 1650. The offered train, which we have had to accept because of the quantum, at 1253 doesn't actually achieve what we are seeking to achieve, which is get some proper space between the services.

THE CHAIR: And so the problem with it and the reason why you are still in dispute over it, notwithstanding having got it from ORR, the problem with it is not that it only goes to Hartlepool when you were bidding for Sunderland, but its timing is such that it bunches too much with other services?

MR YEOWART: It is an impact on resource utilisation which is part of the consideration through the development of anybody's timetable. And we expect that for all people, you know, to make best use of your available resources, which is quite important, hence a balanced timetable is very valuable to an operator, particularly a small operator.

THE CHAIR: But if you accept that - sorry, I am just trying to get my finger on what is the

practical problem still with what you were offered?

MR HANKS: The short term -

THE CHAIR: It is not that it only go goes to Hartlepool, it is to do with the timing which I thought you were saying is because it bunches services too much, but you are saying it is more than that, it is to do with resources -

MR YEOWART: Well, it is also a resourcing issue, yes, in order to get a proper balance in the timetable. Resourcing a return service from an incoming service, for example, that type of balance, between the trains. But it is also an issue for Grand Central on the basis that the dispute was brought because, again, this service was developed after the Priority Date which means you don't get Flex options. You, in effect, are going cap in hand to all other operators to see if they will agree to do something to allow your service to operate.

The biggest problem and why we have brought the disputes is to get Network Rail to apply all the Flex at their disposal, including the variation options that they have at their disposal, to shift stuff around the clock face, if necessary, to give the best possible utilisation of the capacity. On nearly every occasion, the developed timetable happens after the event, i.e. after the Offer Date.

THE CHAIR: So the reason you are dissatisfied with what you have got from Network Rail and subsequently validated by ORR in granting the underlying Rights, the reason why you are dissatisfied with that is that it does not satisfy your aspirations in a way in which the service you bid for, had you got it and it had been granted at the Priority Date so that it would not have had the effects you mention of going around with cap in hand, would have been better and would have more satisfied your aspirations?

MR YEOWART: Yes.

THE CHAIR: Both in terms of where it went to, i.e. Sunderland rather than Hartlepool, but also, more importantly, as regards its timing and therefore its impact on resourcing and all that; is that right?

MR HANKS: No, it does - just to correct, it does actually go to Sunderland. This train is not the one that would terminate at Hartlepool.

MR BRANDON: It is 493 that is the dispute over the path which has to terminate at Hartlepool. TTP493.

THE CHAIR: Yes, thank you, for correcting me. Yes, okay. So, on any analysis, it is not to

do with where it goes or where it terminates but the timing and impact on resources issue

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MR HANKS: Yes.

THE CHAIR: - that is the source of your dissatisfaction with what you have eventually got versus what you wanted?

MR HANKS: Correct.

MR YEOWART: I think it is also worth pointing out that although we don't dispute that Network Rail assisted in developing this path, the 1253, the additional path that we found after the event, is where it was implemented by Grand Central to develop a further path. We went looking for something else on the basis that that path had been rejected. It wasn't a case that Network Rail came knocking on our door saying, "We found you another path." It doesn't work like that.

THE CHAIR: The path you eventually got -

MR YEOWART: Yes.

THE CHAIR: - with which you are dissatisfied with anyway, as a result of your, "Well, we will forage around for what we can get."

MR YEOWART: And after the event, that is the best you can do, yes.

THE CHAIR: But either way - okay, you have got that so you have got it, but you are still dissatisfied with it and with the process which got you there, hence you are still in dispute.

MR YEOWART: Yes.

THE CHAIR: So we cannot - you know where I am coming from is whether we could knock this on the head on the basis that effectively there is not a real dispute still on this one because you have got something. That is not the case.

MR YEOWART: Yes.

THE CHAIR: So I will not proceed along that avenue if you tell me that is not the case.

MR HANKS: No, it's not the case.

MR YEOWART: No.

THE CHAIR: Therefore, the analysis we have embarked upon, service by service of the four which are adduced by Network Rail in their submission, and we may have to extend that to the fifth, which is not mentioned there but was mentioned apparently in the rejection -

we will come to that - as to whether Network Rail has done what it could in accordance with its sort of overriding obligation, as we have deduced it, from Condition 4.2.2, to explore to the limits the available Flex, with a capital 'F'.

Now, given where we have got to with that analysis on 6H88, where I think we have got to the point where we are going to have to draw a line under it and ask Network Rail to provide the supporting evidence, I am inclined to do the same with the other two rather than try to explore them now because I suspect we will get to the same point anyway, and also with whatever additional service it was that is not in the Sole Submission but is in the rejection letter, i.e. the one other than the GB Railfreight.

MR A LEWIS: If I can just mention that one, Chair, that 6E84 is actually tied in with 6H88 which we have covered. It is the second issue. They are sort of intertwined so when we answer one, that would include the other train as well.

THE CHAIR: And 6E84 is the one in the rejection letter?

MR A LEWIS: Yes. 6E84 and 6H88 are sort of intertwined as part of the same reason. So one reason will give the answer to both services.

THE CHAIR: All right, fine.

MR A LEWIS: Yes. It will be included -

THE CHAIR: Please provide it in a comprehensible way so that we can all see that we have knocked them off service by service.

MR A LEWIS: Yes, of course.

THE CHAIR: Even if some of them relate to each other.

MR A LEWIS: Yes, no problem.

THE CHAIR: Thank you.

MR A LEWIS: Could I just mention one thing as well, Chair, to save somebody else bringing it up? The 6N50, that shouldn't have been in the offer letter. That was entirely my fault and it was an oversight. It should have been removed.

THE CHAIR: The 6N50, the GB Railfreight -

MR A LEWIS: The spot bid shouldn't have gone in the offer letter. That should have been removed from the offer letter during the course of it, and it wasn't, unfortunately.

THE CHAIR: Right. That seems to be quite important. Would you go on to say that not only was it a mistake to have mentioned that but it was also a mistake not to have mentioned

in that letter these four services? The ones you mentioned in your Sole Submission?

MR A LEWIS: No, I think those - the four services are correct. The offer letter was wrong.

THE CHAIR: Yes. So are you saying that it would have been a mistake that you did not mention those four services in the offer -

MR A LEWIS: Yes. Sorry, yes.

THE CHAIR: - in the rejection letter?

MR A LEWIS: Yes.

THE CHAIR: Right. What is the contractual effect of that mistake? Would you say it does not have a contractual effect, it does not, in substance, put you in breach of contract or would you say it does put you in breach of contract and therefore their service should have had priority eventually because you did not mention -

MR A LEWIS: 6H88 is, as I said earlier, if I had to prioritise, 6H88 on its own would probably be reason enough for this rejection.

THE CHAIR: That is not the question I asked. I have moved on from considering whether these were, in substance, sufficient reason for, in theory, rejecting their bid.

MR A LEWIS: Yes.

THE CHAIR: I have told you I have already got to the provisional conclusion, which I think we all support, that in the abstract if any one of these four, or indeed the other one in the rejection letter is in itself sufficient grounds for rejecting the Grand Central bid because it effectively had contractual priority and could not be flexed outside over the Grand Central bid, which the GB Railfreight, which you mentioned did not. I think we are all agreed that it did not have, on any analysis, contractual priority. But that if you can prove that any of these others, in the abstract, overrode, in contract terms, a Grand Central bid, you could get home on any one of those. So the additional evidence you are going to provide is what you can, in that respect, as regards each of those four services.

But we have moved on now to the subsequent point which is, even if you can, in respect of any one of those, demonstrate that, in the abstract, in theory they overrode, was that overriding of Grand Central's bid, in some respect, contractually vitiated by not having been included in the formal contractual rejection letter?

MR ALLEN: We would say no, and that is because we wrote to Grand Central on 14 April with the problems we were having with their Access Proposal for these two trains which,

as an appendix, had all this information about -

THE CHAIR: On what date, sorry, Matt?

MR ALLEN: 14 April so that was before the offer – I think this is part of sort of my colleagues from Grand Central's kind of feeling about, you know, we put that kind of line down in the middle of the preparation period where we said, "I'm sorry, we are going to have to stop looking for solutions for these PDNS items. Here is why. We will come back to that bit of work but we need to finish the rest of the PDNS work we have got outstanding for other operators."

THE CHAIR: I thought that was relevant to 493?

MR ALLEN: It is relevant to all of them.

MR GROVER: But it is relevant in here in terms of the contractual - the contractual point under which they were notified was under 2.4.6, or 2.4.7?

MR YEOWART: I think the issue we have, Chair, as you can see now, is that where there are opportunities to continue working and flexing services to make a compliant offer to us by 8 June, the Offer Date, that because the work stopped much earlier -

THE CHAIR: Whether or not they offered, they should have carried on taking them?

MR YEOWART: Because otherwise, when you are doing work after the Offer Date, it is always at somebody's beck and call to try and get flex, because there is no flex available after that date. That is the crux -

THE CHAIR: After the Offer Date? We are not talking in this one about the Priority Date?

MR YEOWART: No, Offer Date.

THE CHAIR: On any analysis, we are in that period between Priority Date and D-26?

MR YEOWART: Offer Date. I know this partly refers to TTP493 but the Offer Date is 8 June. We are now talking mid-April, some time before and Network Rail have admitted that they stopped doing further work on these applications, which seriously disadvantaged Grand Central in being able to be offered in compliance -

THE CHAIR: We will come back to this on 493, but in respect of 495, on this point we have got to, as to the effect in terms of contractual status of the rejection letter, which was dated when?

MR YEOWART: 8 June.

MR HANKS: Do you mean the formal letter?

THE CHAIR: Yes, the formal letter.

MR HANKS: The formal letter, 8 June.

THE CHAIR: Which you say was -

MR YEOWART: Yes.

THE CHAIR: So the Offer Date, in fact, this is not a prescribed Offer Date, that is the date on which they made the offer?

MR YEOWART: No, it is a prescribed Offer Date.

MR GIBBONS: It is the industry-prescribed Offer Date.

THE CHAIR: It is both the industry-prescribed Offer Date as part of the process and the date on which they did actually make the offer?

MR YEOWART: Yes.

THE CHAIR: You would say that the fact that in the offer made that did not include these ones, any of which they might be able to prove, in the abstract, definitely did override your bid. Nevertheless, because of not having put them in the offer letter as at 8 June, in a context where, before then they had already said, "Look, this is too difficult and we are not even going to consider it", that would contractually vitiate any one of these, even if it did, otherwise in the abstract, because it could not be flexed, override your service bid for. I am again trying to express your argument for you in terms which I can understand it. Is that -

MR COOPER: Mmm.

THE CHAIR: Right. Network Rail, what do you say to that? We are embarking now on the effect of the e-mail - we will come back to this on 493 - the effect of your having said, "We are downing tools on trying to make this work at a time before the Offer Date", and therefore when you make the offer at the Offer Date, even if underlying it you have got a good contractual reason for any one of these services actually contractually overriding their bid. Nevertheless, in terms of process, you did not achieve the right to regard it as overriding because, before the Offer Date, you said, "We are downing tools on this particular thing" and then in the offer you did not actually mention the one which you could have relied on, arguably, even if you provide the evidence that, in theory, you could have relied on it.

MR A LEWIS: One of the ones we could have relied on maybe, but the key one is - the very

key one is actually in the offer letter, 6H88 is in there. There are others that we should have mentioned, yes, but the key one-

THE CHAIR: 6H88 is in the offer letter? I thought it was expressed that it was not.

MR HANKS: No, that is the one that does overlap between the letter of 14 April and the offer letter.

THE CHAIR: I am sorry.

MR A LEWIS: Sorry, there were admittedly others that we should have put in that we didn't, but the key one was in there.

THE CHAIR: Sorry. I thought you had said there were only two in the offer letter, one of which was the GB Railfreight which goes out the window and the other of which was 6E-something.

MR HANKS: There were three mentioned in the offer -

THE CHAIR: Three mentioned.

MR HANKS: Three mentioned in the offer letter. I think that is what I said. I hope that is what I said. Two were linked together, and that was the complication. There were three trains mentioned in the Offer Letter as reasons for rejection.

THE CHAIR: Right.

MR HANKS: Two of those were linked together; they were 6H88 and 6E84.

THE CHAIR: Right, okay. And the other was the GB Railfreight one?

MR HANKS: And the other was GB Railfreight.

THE CHAIR: Okay. So at least in relation to 6H88, the point about non-inclusion in the offer letter goes away.

MR HANKS: Yes.

THE CHAIR: Therefore, if, in respect of that service, Network Rail can demonstrate sufficiently that they could not do anything with it contractually because of Flex, then they get home on that one?

MR HANKS: Yes.

THE CHAIR: Is that a fair statement of the position?

MR YEOWART: If it becomes impossible to use Flex, yes, we would accept that.

MR HANKS: Yes, I accept that.

THE CHAIR: Right. In respect of the other three in the Sole Submission, even if they can

produce evidence that they were entitled to regard it as overriding your bid, you would still say that the process defect of having said they are going to down tools too early and then having failed to include them in the formal offer letter as reasons for rejection, would, of itself, contractually disentitle them from relying on what they could otherwise have relied on?

MR YEOWART: Yes.

THE CHAIR: Okay.

MR ALLEN: I think I'd have to -

THE CHAIR: Do you want to push back on that?

MR ALLEN: Yes, I think I would. I need to perhaps look at the book in a little bit more detail.

I agree it is not the best bit of workmanship in terms of not having the complete information documents in the offer letter, but the information that has been exchanged between Andy and his team and Chris and Grand Central is far above probably what other operators will have seen in terms of work progressing on their bids on LNE for this particular route.

THE CHAIR: Right.

MR ALLEN: Yes, a 'T' has not been crossed and an 'I' has not been dotted in terms of that end letter, but I think throughout the process we have been giving the reasons of where we are up to in trying to find alternative paths for this service. So I kind of object to the suggestion that we are not sort of sharing information with Grand Central/Alliance about how we are being able to progress the changes we are trying to make on their paths.

The team, I know, have spent hours and hours tripping across to see Chris and Chris coming to see them to talk through and look for physical solutions on the planning screen of the system to do it. So, you know, we have been quite transparent all the way through this process, which I think is definitely in here somewhere about there will be no surprises when we do get to D-26 about how we were progressing with this work.

THE CHAIR: The offer letter, 8 June, that is before D-26?

MR ALLEN: It *is* D-26.

MR A LEWIS: It is D-26.

THE CHAIR: Oh right, it *is* D-26.

MR SKILTON: It is the old 42-7.

THE CHAIR: Yes. Okay.

MR ALLEN: You know, the 14 April letter was the kind of just a temporary line in the sand, as it were, to say, you know -

THE CHAIR: The 14 April letter, sorry, is that the e-mail which says, "We are downing tools for now"?

MR ALLEN: Yes, the 'down tools e-mail'. It is not done lightly because we had been working on this since November. It is not that -

THE CHAIR: Right. Okay, thank you. So you would say, then, that in respect of any of these ones which were not included in the offer letter as reasons for rejection, the process that had been - that fact, the failure to include them, plus the process that had been gone through before, including the 'down tools e-mail', was not such as contractually to disentitle you from relying, if you otherwise can rely, on any one of these services - which is what you are going to provide some evidence for - to rely on any one of these services to trump Grand Central's bid?

MR ALLEN: Correct.

THE CHAIR: So you dispute the argument on the effect of that contractual process on that -

MR ALLEN: So, for example -

THE CHAIR: - including the failure to include them because, you would say, in the course of that extensive discussion when you were bending over backwards with them -

MR ALLEN: I wouldn't say we were bending over backwards.

THE CHAIR: - you will have mentioned all these services -

MR ALLEN: Yes, we will have mentioned these -

THE CHAIR: - and explained why they trumped.

MR ALLEN: 6H88 is the one that became the top trump, as it were.

THE CHAIR: "In terms of Drax."

MR ALLEN: Any one of them does not change where we are materially with the timetable, so long as there is one, so that we can satisfy everybody's requirement to, for want of a better phrase, take top trump in the 1326.

THE CHAIR: So are you saying - I mean, we have not actually got there and I don't want to go there, but I divine that you are saying that the 6H33, in terms of Drax, you will prove it, to have been a show-stopper in contractual terms?

MR ALLEN: What I am saying is any one of those four could prove still to be a show-stopper in terms of contractually.

THE CHAIR: I have accepted that any one, in theory, can be a show-stopper.

MR ALLEN: And the transparency - because none of those named trains should have been a surprise to Chris because of the dialogue that was happening through the process, and the transparency that we got through that. The fact that, you know, we may find the one that wasn't on the offer letter being the one that becomes that show-stopper, I don't believe changes the contractual position that we are in.

THE CHAIR: Okay.

MR ALLEN: I think we could get some criticism if we had not been very open about the way we were working with everybody through that process and done a lot of it behind closed doors.

THE CHAIR: But you are saying you were open and that openness would have extended to, even if you have did not put in the offer letter, having discussed each of these ones at some stage and gone through the reasons why they were show-stoppers?

MR ALLEN: Yes.

THE CHAIR: Notwithstanding that you only mentioned two or three of them, three of them -

MR ALLEN: Correct.

THE CHAIR: - in the offer letter, of which one, the one on which the thing started, was, we think, unarguably not a show-stopper because it was a spot bid?

MR ALLEN: Correct.

THE CHAIR: And we don't have to look at the GB Railfreight one any further or - and therefore possibly we don't need to come back to this issue about can you Roll Over a spot bid and everything because it is agreed on all hands that the GB Railfreight spot bid was not a show-stopper.

MR ALLEN: No.

THE CHAIR: And so, on its own, would not have entitled you to reject their bid?

MR ALLEN: Correct, and we would only need to revisit that if the determination you gave us at the end of this process was that we had done something wrong and we had to somehow get the 1323 into the slot out of Kings Cross. I am not sure we would get a determination that says that.

MR YEOWART: I think in view of -

THE CHAIR: Well, you may do.

MR ALLEN: Yes, exactly, and that is what I say; we would have to find a way of delivering it and then that would unpick the GB Railfreight that we put it in.

THE CHAIR: Right. It would unpick it but it would not - in response, if we did come to that conclusion, we are not saying that somehow we would - then have to reconsider the -

MR ALLEN: The importance of it.

THE CHAIR: - GB Railfreight spot bid as somehow militating against that?

MR ALLEN: Correct.

THE CHAIR: We have disposed of that.

MR ALLEN: Absolutely.

THE CHAIR: Therefore we do not need to consider - are Grand Central happy with this: we don't need to go back to this point which we sort of parked earlier on about whether you can Roll Over a spot bid or not?

MR YEOWART: As long as it is clear -

THE CHAIR: It is not going to affect the outcome whether you can or not.

MR YEOWART: No, but it may affect future timetable applications.

THE CHAIR: It may do, but that is -

MR YEOWART: We need to have it clear that you cannot Roll Over a spot bid and that was one of the determinations we -

THE CHAIR: I do not think we are in the business here of sort of trying to consider other potential conundrums for the operation of the thing as a whole and trying to make general rulings on that if they are not relevant to an issue that is in dispute.

MR YEOWART: Well, I guess we can take it from the fact that Network Rail have said that it was a mistake, it shouldn't have been in there. We can take it as read that Roll Over spot bids do not have priority in front of a properly declared bid at the Priority Date.

THE CHAIR: I think you can take it how you like. What I take from it and what will probably go in the determination will be that this particular spot bid did not trump Grand Central's bid because it was a spot bid. Not because it was a Rolled Over spot bid but because it was a spot bid and therefore in the first stage analysis of priorities, it does not get there. You have frankly, thank you, acknowledged that, well, it should not have gone in the

offer letter because it was not a good point to make.

MR A LEWIS: That is correct, yes.

MR ALLEN: Yes.

THE CHAIR: Okay. So we do not need to dwell on that one any more.

MR COOPER: I think one of the issues with that, though, is it did go in the offer letter and it was a reject. It was a reason why we are here. It was a -

THE CHAIR: So what?

MR COOPER: Well, it shouldn't have happened.

THE CHAIR: So what? What result or solution are you seeking as a result of that?

MR COOPER: We don't want it to happen again. We don't actually want it to end up here again because they have done the same thing next year.

THE CHAIR: Right. This may be an apposite moment just to dwell on the nature of the eventual determination we are able to and can sensibly give and the nature of the remedies that we can sensibly give. I am not going to, at this stage, or possibly at all, go through one by one the specific outcomes and remedies. You have expressed a sort of double level of outcome in your Sole submission. You have required, first, a determination sort of in the abstract on matters of principle and then, second, resultant specific remedies.

It is my feeling, and I suppose I will invite your observations and I ought to invite the observations of my colleagues on the Panel on this, but it is my feeling that we should - and I don't necessarily want to address this as a matter of technical jurisdiction - but we should only grant/determine practical remedies in respect of the particular services that have been affected, and that we should not be - and I really leave open the question of whether we even have jurisdiction to, but just in a general practical sense we should not be attempting to make a determination that is some sort of declaratory judgment which says, just in the abstract, for example Network Rail has behaved in an appalling way and is enjoined from ever doing any similar thing ever again.

I just do not think it lies within the scope of what this Panel and - I know it is technically my determination assisted by the Panel, but I don't think it lies within my remit to give a determination in that sort of generally injunctive 'for the future' sense now.

MR THOMAS: Would it be helpful, Chair, if Network Rail acknowledged that 6N90 was put in there in error because of the type of train it was? Is that a compromise position? Because -

MR ALLEN: I think we have acknowledged that -

THE CHAIR: I think they have acknowledged that very frankly, but Grand Central was going on to say, "Well, it is still sort of relevant and somehow ought to be dealt with in the determination in some way to say 'and you should never do any such thing ever again'", and I am saying I do not think it really is a proper way to make a determination to go to that length.

MR YEOWART: I think I am happy with where we have got to in relation to Network Rail and what has been said about this path 6N50, and no doubt we will have further discussions with Network Rail because I am sure Network Rail, like us, don't want to be here again when there is another timetable change.

But the reason we came back to it, Chair, was we had asked, as part of the opening statement, that part of the remedy was to confirm the position of Train Operator Variations. But, having said that, I am fully aware of what you have just stated and that you do not regard this as being the right forum for that sort of determination.

So we will go with whatever decision you make and we will continue to work with Network Rail to ensure we are not here again when there are timetable decisions to be made.

THE CHAIR: Okay. I am explaining all this because I really do not want you or anybody to be dissatisfied with the outcome in a technical sense. I suppose I can actually give teeth to what I have just said in terms of looking at the underlying contractual position on the power to give determinations, which is Network Code Part D 5.3.1, which states that:

"The Timetabling Panel or the ORR [which would be the appellate body here] 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."

Now, "the result" means the result of any appeal, which means an appeal by a particular Timetable Participant, in other words the raising of the dispute. I take that as meaning the specific result in relation to that specific dispute, not a general injunction as

to how, in all future circumstances, particular powers and obligations should be exercised and observed.

Power (b):

“It may direct that a challenged decision of Network Rail shall stand.”

Now, that means a specific decision.

Or (c):

“It may substitute an alternative decision in place of a challenged decision of Network Rail...”

“Provided that the power described in (c) shall only be exercised in exceptional circumstances”, whatever that may be.

So, it is looking at that, as the framework within which we operate, that I am pointing it out to you, that you are probably not going to get the decision in the form in which your submission actually seeks them. But, whatever, it will be remedies directed towards the specific dispute and that means the specific Slots in dispute.

MR SKILTON: Chairman, there is precedent which supports the line you are taking, that the decision should only be aimed at delivering the coming timetable and not going beyond it. You start afresh if the situation arises again.

THE CHAIR: Thank you, Secretary. I may say obiter, off the record, that I would love to be able to pontificate for days and for pages on the transgressions of everybody in this and why the system does not work and what should be done to make it work, but that is not the remit.

MR ALLEN: The only thing I was going to add, Chair, is I think there is a responsibility to take the learning from this and spread it back to our teams so that we -

THE CHAIR: Yes. The reasons for getting to the particular specific remedies will obviously illustrate views as to what has been done, should not have been done, should have been done, how it could have been done better.

MR ALLEN: We need to take that learning -

THE CHAIR: But not in an injunctive sense.

MR ALLEN: Yes, absolutely.

THE CHAIR: Right. Well, I thought I had better just make that clear. We need to get on to 493, which I hope we can dispose of relatively quickly with the points we have managed

to establish so far. If we are going to go on, we ought to take a break, I think.

In housekeeping terms, can I ask everybody, are they, including Leah, are we okay to carry on to try to dispose of it, subject to whatever further information you want to provide, but at least to dispose of the hearing bit of it as much as we can today?

MR YEOWART: We are okay, Chair, although we have the same situation as we did last week, which is the Grand Central return train for us, on the basis of Network Rail's inability to path a later train, is 1918.

MR HANKS: We didn't ask for one.

THE CHAIR: Right. In that case, I have to ask you this time, as distinct from last time, would you be prepared, if necessary, to fork out for somebody else's train?

MR YEOWART: If necessary, yes, we would.

THE CHAIR: Right. Network Rail, are you equally happy to carry on if we need to?

MR ALLEN: Carry on.

THE CHAIR: And Leah?

(A brief discussion was had with the stenographer)

THE CHAIR: Thank you very much. I think it is fair to make that clear. I am not going to ask you to put a deadline on it. Let's just say we will have a short break, carry on and try to dispose of 493 as soon as we can.

(Adjourned.)

MR YEOWART: Just before we start, we would just like to raise a point for us to clarify something that was said previously about evidence that was required.

THE CHAIR: Would you like to do that in your closing statement when we get there?

MR YEOWART: Are you expecting that tonight or -

THE CHAIR: Yes.

MR YEOWART: Okay. It is just that obviously before we do the final statement we will need to pull everything altogether.

THE CHAIR: Obviously we are hoping that closing statements will be brief.

MR YEOWART: Okay.

MR ALLEN: Network Rail will be.

MR YEOWART: I might have to be writing them while we carry on. Okay, no, that is fine.

THE CHAIR: I think we are done on 495.

MR THOMAS: I think so, Chair.

THE CHAIR: We did not leave a strand of argument kind of not fully unravelled? So we are going to try to knock 493 on the head. In my view, and please anyone tell me if they disagree, the issue we want to concentrate on is/was the rejection/failure to grant the relevant slot which, please remind me what it was?

MR HOLDER: The 1518 Sunderland.

THE CHAIR: The 1518 Sunderland to Kings Cross, yes, was the failure to grant that, in effect, a breach of contract by Network Rail in failing to accord priorities or apply the Decision Criteria or do anything else it should serially have done under the relevant part of the Network Code, such that it would entitle Grand Central to - and here I am going to explicitly recharacterise the remedy sought by Grand Central in their submission, which is - I have not got it in front of me, but in effect it is to say that Network Rail should not have done it - yes, thank you, Nick: that "Network Rail did not adhere to the timescales and, in doing so, disadvantaged Grand Central in the timetable process."

I have to say that that falls foul of the principle that I was expounding on before. It is not within our remit to give that sort of general "You have done something wrong". The point is to give a specific remedy in respect of the particular Slots at issue. So, if there is to be a remedy, it would be that, as a result of, in effect, some breach of contract by Network Rail, the, whatever it was, 1518 or 1523, Sunderland to Kings Cross service should have been granted, should have been put in the timetable and so should be changed to that effect and then it would be up to Network Rail as to how it would accommodate that.

So the issue is, was there a breach of contract and, on the face of it, the reasons advanced as to why there might have been some sort of breach of contract which would lead to that result are, first, the procedural failure in terms of getting a Prior Working Timetable out in time or at all and, second, the alleged failure by Network Rail properly to give procedural consideration to Grand Central's bid for this particular slot, resulting in, and evidenced by, the 'down tools e-mail' from Andy, to which we have already referred.

That is how I see the issues. So I am going to ask Grand Central first, then, to give us your views on the issues thus expressed, how it amounts to a breach of contract.

MR YEOWART: Okay. We will try to keep this one straightforward, probably won't be but we will try to keep it straightforward. The term "down tools" is a term that we have used. When the tools were downed in April, we lost seven weeks' ability to flex and vary trains, not only on the ECML but also elsewhere. Had work continued through that time, we had found a solution that would have allowed the 1518 to operate on the Durham Coast by Flexing a freight train. That Flex was not available because it was done after the Offer Date so there was no option to Flex.

That would have impacted on another Grand Central service from Bradford, which we had also asked to be moved in order to accommodate this train and, again, we had six or seven weeks where we could have worked on to find a solution to that service as well. But, unfortunately, downing tools, getting an offer and then trying to vary it after the date meant it was impossible to do that. We contend that had that work been undertaken prior to the Offer Date, as we would have expected, that Network Rail could have used all its Flex in order to facilitate what Grand Central required.

THE CHAIR: As always, is that Flex with a capital 'F'?

MR YEOWART: Yes, all Flex.

THE CHAIR: To use whoever's it was Firm Rights?

MR YEOWART: They have also got options to vary. Yes, within people's contracts, clearly -

THE CHAIR: Within people's contracts, okay, thank you.

MR YEOWART: We are not looking to go beyond that. The implications for the 1518 are that we would no longer have a Hartlepool termination. There would be a service to Sunderland which would form the 1518 coming back, whereas currently that is not possible.

THE CHAIR: What have you actually got in terms of Rights from ORR?

MR YEOWART: ORR have said that they have approved Rights to -

THE CHAIR: Hartlepool?

MR YEOWART: - Hartlepool, but if we are in a position to find a solution to get to and from Sunderland - I can't remember the exact wording - but they will approve the Rights for what we loosely term "the fifth Sunderland".

MR HANKS: We have Firm Rights to and from Hartlepool and contingent Rights -

THE CHAIR: From Hartlepool?

MR YEOWART: To London Kings Cross.

MR HANKS: To London Kings Cross.

THE CHAIR: To London.

MR HOLDER: Contingent Rights.

MR HANKS: And Contingent Rights to start back from Sunderland, so it is contingent on being able to find a path.

THE CHAIR: Right. So what you have got is, instead of the 1518 Sunderland via Hartlepool to Kings Cross, you have got Hartlepool to Kings Cross -

MR HANKS: Effectively -

THE CHAIR: I am not talking about a return, just talking about that.

MR HANKS: But effectively an hour earlier than we were looking for.

THE CHAIR: And an hour earlier, so not the 13 -

MR HANKS: No. It would be - the 1318 from Sunderland would pass through Hartlepool at about 1345. Instead - sorry, 1545.

THE CHAIR: 1545.

MR HANKS: It is getting late, the 1518.

THE CHAIR: 1545, considering you have got 1445 or something like that?

MR HANKS: Yes, 1447 in fact.

MR HOLDER: It is the terminated (*inaudible*).

MR YEOWART: In order to form the Up service.

THE CHAIR: In order to provide the rolling stock.

MR YEOWART: And the consequence of that is road transport to get crews in and out, and potentially passengers, between Sunderland and Hartlepool.

THE CHAIR: Right. So that is what you have actually got from ORR.

MR YEOWART: Yes.

THE CHAIR: Would you say that one of the reasons why you have only got that from ORR is because Network Rail did not get it in to the timetable as you say they should have done if they had done it at the time they should have done it?

MR YEOWART: Yes. ORR has approved the Rights for the train service that at the moment

is timetabled, which is the Hartlepool service in -

THE CHAIR: In the existing timetable?

MR YEOWART: No, in the new timetable from December 2012.

THE CHAIR: In the new timetable, right. So are you saying or are you speculating that ORR might have granted the full Sunderland to Kings Cross service you wanted if Network Rail, in compliance with, as you would say, the contract, had included it in the New Working Timetable?

MR YEOWART: Yes. I think it is a bit more than speculation, Chair. The Regulator has made it quite clear that had we had a Sunderland service, it would have been approved.

THE CHAIR: When you say "had we had", you mean, had Network Rail -

MR YEOWART: Had it been timetabled.

THE CHAIR: - included it in the provisional timetable, New Working Timetable, ORR would have gone along with it?

MR YEOWART: Would have approved it, yes.

THE CHAIR: Right, okay.

MR YEOWART: The determination only came out on Friday so it's probably not in the public - late Friday afternoon, so it is probably not in the public -

THE CHAIR: Is that the one we got this morning?

MR SKILTON: Yes.

THE CHAIR: That is the one we got this morning, yes. Right. Thank you. Can you tell us, then, what contractual provision, i.e. provision of the Network Code Part D, Network Rail were in breach of in not including the full bid for the Sunderland 1518 service in the New Working Timetable at the Offer Date? Is that right, at D-26? Is that when you would say the breach, if there was one, occurred, in the failure to include it in the -

MR YEOWART: Yes.

THE CHAIR: - in the offer.

MR YEOWART: 2.4.4 in the -

THE CHAIR: Just so we are clear on this, the version of the Network Code which we are talking about at this stage, because the relevant time, if there was a breach or if there had been an offer and there was not one in breach, was the Offer Date of 8 June, and therefore would we be agreed on all hands that, if it makes a difference, it is the 16 March 2012

version of the Network Code that we are considering on this point? Does everybody agree with that?

MR A LEWIS: Yes.

MR HANKS: Yes.

THE CHAIR: Thank you. So it is 2.4.4:

“Access Proposals submitted by D-40 the Priority Date are given [i.e. should be given] priority in the compilation of a New Working Timetable in certain circumstances set out in Condition D4.2”, which we know all about.

“Access Proposals submitted after the Priority Date but prior to D-26 will be incorporated by Network Rail into the New Working Timetable as far as reasonably practicable, taking into account the complexity of the Access Proposal, including any reasonably foreseeable consequential impact on the New Working Timetable and the time available before the end of the Timetable Preparation Period and in accordance with the principles set out in Condition 4.2...”, which is priority and Flex.

Are we saying that this slot was bid for by D-40, the Priority Date?

MR A LEWIS: Yes.

THE CHAIR: Or between the Priority Date and D-26?

MR YEOWART: No, this was bid for as a Grand Central bid by the Priority Date, D-40.

THE CHAIR: Right. So all the stuff about between Priority Date and D-26, including the stuff about taking account of foreseeable impact and time available before the end of the Timetable Period, as far as Network Rail is concerned, that does not enter into consideration, you would say?

MR YEOWART: No.

THE CHAIR: The obligation under 2.4.4 on Network Rail, you would say, would be to give your bid priority, in compilation of a New Working Timetable, without further ado according to 4.2. According to 4.2, as we know only too well - and fortunately we have established by looking at it there is not a difference between 4.2.2 in the July 2011 Network Code and the March 2012 Network Code. It might have sort of produced a bit of a difficulty. We do not have that difficulty fortunately. 4.2.2 says - we all know what it says.

On the basis of 4.2.2, your bid for a 1518 Sunderland to Kings Cross service,

you would say, had which priority under (d)?

MR YEOWART: (iii).

THE CHAIR: (iii)?

MR YEOWART: Yes.

THE CHAIR: Because it was -

MR YEOWART: We had an expectation of Rights.

THE CHAIR: - expectation of Rights, probably for all the same reasons as the other ones, that you had been in extensive discussion over it, you had an expectation of Rights and you, as at the Priority Date for that, 2 March, in respect of that, had you already submitted a Section 22(a) application which covered that or was that covered by -

MR YEOWART: I will just check with Chris, Chair.

MR HANKS: Sorry, what was -

MR YEOWART: When did we put the 22(a) in for Grand Central?

MR HANKS: It went out to consultation on?

MR BRANDON: 28th February and then we submitted it to the ORR on 26 or 27 April. The same date as the Seventh Supplemental. They went in together.

MR YEOWART: Two -

THE CHAIR: Sorry. I thought you said -

MR HANKS: Consultation together.

THE CHAIR: I thought you said the Twenty-Eighth Supplemental.

MR BRANDON: Yes. Sorry. The Grand Central Twenty-Eighth Supplemental went out to consultation at the end of February, 28 February, and was submitted to the ORR on 26 or 27 April. I just mentioned that it was the same day as the Seventh Supplemental was submitted.

THE CHAIR: So that does not matter?

MR BRANDON: Irrelevant, irrelevant.

THE CHAIR: Right. So unlike the previous one and the Seventh Supplemental, in this case you would say the actual sort of start date, the trigger date, which is the start of consultation, was in fact before the Priority Date?

MR BRANDON: Yes.

THE CHAIR: By four days?

MR BRANDON: Yes.

MR YEOWART: Well, this was clearly a Grand Central service. The other one was – yes?

THE CHAIR: And for this, we are not troubled by -

MR YEOWART: No.

THE CHAIR: - differences between Alliance and Grand Central?

MR YEOWART: No, this was a Grand Central application.

THE CHAIR: Network Rail, are we happy with that?

MR A LEWIS: Yes.

THE CHAIR: We have already said that this was a Grand Central, whether or not Alliance was bidding as agent for it, it is Grand Central through and through.

MR ALLEN: Yes.

MR A LEWIS: Yes.

THE CHAIR: Right. Therefore, you would say you had clear expectation in, at the very least, the strange sense that we have put on it in the previous ones, that it had Level (iii) and yet it was not put into a New Working Timetable nor eventually confirmed at the Offer Date of D-26 because, the reason being given -

MR YEOWART: It was rejected -

THE CHAIR: Before Network Rail said, “This is too difficult” in the ‘down tools e-mail’. Prior to that, the difficulty was what? What was it conflicting with? What was it alleged to conflict with?

MR YEOWART: Initially it was alleged to conflict with our own Bradford service, that is a Grand Central Bradford when I say “our own service”.

THE CHAIR: Was that accepted?

MR YEOWART: No. We believe that could be flexed. We had sought that train to run an hour earlier from Bradford.

THE CHAIR: Sorry. Let me unpick that. You believed that could be flexed; you mean your own service which it conflicted with -

MR YEOWART: Yes.

THE CHAIR: - could be Flexed, with a capital ‘F’ within your Rights?

MR YEOWART: Not actually - sorry, I - Chris did the work. Chris?

MR HANKS: Can I explain? In the bid, there was a bid for an additional train from

Sunderland to Kings Cross at 1518, which we are discussing. There was also a bid to amend the timing of a Bradford to Kings Cross train, that is 1A67. We asked to re-time that 15 minutes earlier than it currently runs. The point of asking for that is that the path that 1A67 currently takes was the path that we were looking to use for the 1518 Sunderland train.

THE CHAIR: So in respect of that one, you were not asking for contractual Flex, with a capital 'F', you were asking for a change -

MR HANKS: Yes.

THE CHAIR: - re-timing -

MR HANKS: At that stage, yes.

THE CHAIR: - outside your Firm Contractual Rights?

MR HANKS: No. No. That is -

THE CHAIR: Oh, within your Firm Contractual Rights?

MR HANKS: No, that train - well, sorry. Obviously the additional train did not at that stage have Firm Contractual Rights, it only had expectation of Rights. The Bradford train is one that runs already and the variation that we sought was within Contractual Rights.

THE CHAIR: So it was, in effect, contractual Flex if it would have been a change within and consistent with -

MR HANKS: Yes.

THE CHAIR: - your existing Firm Rights?

MR HANKS: Yes. Sorry, yes, that was.

THE CHAIR: What you were seeking in respect of the potentially conflicting Bradford one, however that conflicted -

MR HANKS: Yes.

THE CHAIR: I do not know the geography of it, I do not think I need to, but whatever it was, you were seeking in the bid to have Network Rail exercise contractual Flex -

MR HANKS: Yes.

THE CHAIR: - of that service, so as to avoid an actual conflict with the other service which you wanted.

Right. What reason then, in the discussion that followed, did Network Rail, as far as you are concerned, give for not acceding to that?

MR HANKS: They said they were - reported they were unable to find a path in the new time for the Bradford service and so were therefore unable to accommodate the new service in its place.

THE CHAIR: So they were saying they could not exercise that degree of contractual Flex in the Bradford service because that would have -

MR HANKS: That would have affected -

THE CHAIR: - conflicted with something else which had greater priority over that or -

MR HANKS: Well, something else that had - they identified "conflicts" and didn't give any further information about those conflicts, but I assumed, as is usually the case, that either they had not applied any Flex or that it would have been outside contractual Flex, and I do not know which applied in those cases.

THE CHAIR: Okay. Obviously I will ask Network Rail that. Before we do, is there anything else you would like to say by way of making good the assertion that they were in breach of contract in not arriving at the new timetable and eventually the offer in accordance with the priority determined plus any Flex exercised in accordance with D4.2.2? Anything else or does it boil down to that sort of assertion of the conflict with other stuff?

MR HANKS: I think so.

MR YEOWART: Yes.

THE CHAIR: Right. That is what you are saying. Okay. Network Rail, this is sounding to me, on the face of it, a similar sort of analysis as we just went through on 495. In respect of those things which you were saying conflicted with either the service bid for the 1518 from Sunderland or the sort of variation to the Bradford service which Grand Central say could have been accommodated within the limits of their contractual Flex on that service, you are said to have asserted that there were other conflicts which made effectively either of those not possible.

What were those conflicts and how do you characterise those as having had greater contractual priority, in terms of D4.2.2, over either the - well, in fact, both the 1518 Sunderland bid and the proposed variation to the Bradford service which could otherwise have accommodated that? What do you say were the conflicts and how did they have contractual priority?

MR GROVER: Could I just clarify what time departure is the re-timed Bradford set for?

MR A LEWIS: 1522.

MR GROVER: My understanding, 1522, would that not be outside of the Contractual Rights for the Bradford train in terms of the departure time range -

THE STENOGRAPHER: Sorry, could you say that again, please?

MR GROVER: Sorry.

THE STENOGRAPHER: Sorry.

MR GROVER: The re-timed Bradford service, which I understand was being looked to re-time to 1522, as part of this - the departure time range in the contract says a train between 1530 and 1600, so it is not something that has come up before but I believe that would actually be outside of your Firm Contractual Rights.

THE CHAIR: So you are saying if that had been re-timed, it would not have been within the limits of contractually available Flex, with a capital 'F' -

MR GROVER: Yes, I believe it would be outside of that.

THE CHAIR: - as a fact, it would be outside that?

MR HANKS: I am not sure. We are looking to see if we have got that evidence here, just to check.

THE CHAIR: You have just told me -

MR HANKS: I believed it was. I believed it was.

THE CHAIR: - categorically it was within.

MR HANKS: I understood it was. But if this is being disputed, we do need to check the fact.

THE CHAIR: Okay. Is that something to check now or is that something we should ask you to provide information on after the event?

MR BRANDON: I am not convinced I have got it here, Chair, so we are going to have to provide it.

MR HANKS: We may have to provide that.

MR HOLDER: But you still have a Quantum Right?

MR GROVER: Yes. But just in terms of the departure time, it would be flexing, technically speaking, outside of what its contractual Flex is. I do not know if the -

THE STENOGRAPHER: I am sorry, you are speaking too fast for me to get any of that. Sorry.

MR GROVER: Sorry.

THE CHAIR: Can you slow it down and be a bit more distinct?

MR GROVER: Yes. The right to quantum would still exist, but my understanding is that the 1522 departure for the Bradford train would take it outside of its Firm Contractual Rights to a departure time from Bradford between 1530 and 1600.

MR COOPER: I don't think it really matters in terms of if an operator comes up and says, "We would like to go outside our Contractual Rights."

THE CHAIR: You would say that if you are prepared -

MR COOPER: Prepared to do it, yes.

THE CHAIR: - for them to go outside your Contractual Rights, well that is up to you.

MR COOPER: Yes.

THE CHAIR: It is only if, really, whether within or outside your Contractual Rights in terms of time, what Network Rail is saying in terms of a conflicting proposal of somebody else overrides that variation in or outside your Contractual Rights, only if it overrides that in priority contractual terms, does it enter into the equation. So, Network Rail -

MR ALLEN: Doesn't it move down a peg in the priority for 4.2.2? I don't want to go back to that whole debate.

MR HOLDER: No, they have got a Firm Right to quantum.

MR ALLEN: I will take your word for it, Rob. I'm not going to argue. I think this is one where we have noted seven trains that were impacted by this proposal so we are going to have to take those seven away in the same way we do for TTP495, by giving the Flex, capital 'F', and depending where they are, see if we would be in breach of their Rights.

But I suppose the two things for us are, you know, when we talk about Flex, we are not talking about one train and another train; we are potentially talking about one train on seven trains, and, you know, where do you stop the definition of "Flex", with a capital 'F'? Do you never stop it and go on forever or do you say, once you have got to three flexes, you stop?

THE CHAIR: Well, you tell me that. That is a very pertinent question.

MR ALLEN: And I think where we got to -

THE CHAIR: What do you think your obligation, in the way in which we kind of deduced it from 4.2.2, to exercise the Flexing Right, we said that although it is expressed in 4.2.2(c) as "...in compiling a New Working Timetable, Network Rail is entitled to exercise its

Flexing Right...” We concluded previously, and I think everybody agreed with this, that because of the way 4.2.2 is constructed, that actually amounts to an obligation to exercise its Flexing Right before applying the paragraph (d) priorities, an obligation to exercise its Flexing Right in order to achieve the overriding principle at the beginning of 4.2.2, which is “...endeavour, where possible, to comply with all Access Proposals submitted to it”.

I think you accepted that that, in effect, gave you an obligation to explore the exercise of your Flexing Right, with a capital ‘F’. So I guess I have to ask you now the question we ducked before, which is, if it is right to deduce, via that interpretation of 4.2.2 that you have an obligation to consider the exercise of a Flexing Right, why should that obligation stop anywhere in particular at whatever knock-on level until you have, in effect, exhausted all of the theoretical possibilities, including whatever permutations of knock-ons that has?

MR ALLEN: I think, for us, where we got to is that we have got to do everything we reasonably can to exhaust all those opportunities, but we got to a point, in about the midway point in the Timetable Preparation Period, where we were running the risk of not making a full offer to everybody else that runs on the East Coast Main Line, to which point we kind of said, well, what we have got available to us in terms of time left to finish the timetable offer for the wider picture, the resources we have got at our fingertips to deliver it, we had to say we stopped work on the additional paths to deliver other work that was bid for that we believed was more important in connection with 4.2.2.

THE CHAIR: Where, from the words of the contract, do you derive the implied limitation on the implied obligation to exercise a Flexing Right?

MR ALLEN: I guess the only thing I could go back to is that 2.4.7 puts an obligation on us to advise people, where we were sort of developing the New Working Timetable -

MR THOMAS: Forgive me, sorry, it is 2.7.4. I am looking at Matt’s Network Code and he said 2.4.7.

MR ALLEN: No, I don’t mean 2.7.4.

MR THOMAS: Oh, do you not?

MR ALLEN: It is 2.4.7.

MR THOMAS: Forgive me.

MR ALLEN: 2.4.7, you know, we have to notify our Timetable Participants as soon as we

become aware of a problem with Access Proposals in the New Working Timetable that we think are unlikely to be delivered.

THE CHAIR: But that obligation to notify Timetable Participants as soon as possible after you become aware of it, only bites on the things in 2.4.6, which are -

MR ALLEN: 2.4.6?

THE CHAIR: 2.4.7 is a continuation of the sentence started in 2.4.6. It is a really odd way of drafting.

MR ALLEN: An Access Proposal which we cannot accommodate in the New Working Timetable. Wouldn't the 5th Grand Central Sunderland path come under that category?

THE CHAIR: Right, but that begs the question as to whether it cannot be accommodated in the New Working Timetable, and we explored that in relation to – I cannot remember whether it was 494 or 495, but we explored what does “cannot” mean in that context in 2.4.6(a) and we concluded that it meant not just because it is too difficult but which, as a matter of contract, *should* not be accommodated in the New Working Timetable. I think that is what we concluded, was it not?

MR HOLDER: Yes.

MR ALLEN: Yes, that makes sense.

THE CHAIR: So I am afraid you have just come full circle and begged the question as to what should you have accommodated in the New Working Timetable as a matter of contract with the other Participants, which, because you would say as a matter of contract, they had greater priority than the service bid for by Grand Central?

Can I just ask, where do you or did you list, in the same way as we looked at the ones on 495 -

MR ALLEN: Page 8 of our Sole Submission.

THE CHAIR: Right.

MR GIBBONS: It is in their Sole Submission.

THE CHAIR: It is in their Sole Submission. So it is a conflict with this.

MR GIBBONS: Conflict, conflict, conflict, conflict, conflict [*referring to the document*].

THE CHAIR: Right. Rather than flog through each one of these individually, would it be appropriate -

MR ALLEN: Yes.

THE CHAIR: - to invite you to provide, along with everything else which we will list at the end, your analysis, in contractual terms -

MR ALLEN: Yes.

THE CHAIR: - of what those particular conflicts mean?

MR ALLEN: Yes.

THE CHAIR: "Contractual" in the sense of why these had contractual priority over the service bid for by Grand Central, the 1518, and the proposed variation to the other Grand Central Bradford service, which variation would have removed the otherwise internal conflict between the two services.

MR ALLEN: Yes.

THE CHAIR: Why do all these have contractual priority over those, thus entitling you, Network Rail, as a matter of contract, to not include their service bid for in the New Working Timetable nor make it good with an offer at the Offer Date? Is that a clear picture?

MR ALLEN: Very clear, yes, Chair.

THE CHAIR: Right. Going down the sort of decision tree, if you cannot provide that evidence, then I think it is game over; is that right?

MR ALLEN: (*Nodded*).

THE CHAIR: Because that would mean that Grand Central were contractually entitled to that path plus the varied Bradford path, their varied Bradford path to be accommodated, therefore Network Rail were in breach of contract and therefore the determination will be that they should get that path.

MR ALLEN: (*Nodded*).

THE CHAIR: If you can provide that evidence - again, it is probably any one of those, that the conflict was a conflict in the sense of a contractual priority over either or both of the 1518 bid for by them or the variation to the Bradford service which would have accommodated it. If you can provide that evidence on any one of those, that re-engages the argument possibly, does it not, that even so, either that that priority was somehow overridden by the procedural defect of stopping trying to do something about it, as evidenced by the 'down tools e-mail' or the other point still hanging over is whether it was somehow vitiated by the fact that it all had not got in there properly because there was not a Prior Working

Timetable at the right time or at all.

Grand Central, do you want to advance either of those points.

MR YEOWART: I think you have summed it up well, Chair. It is all about timing and workload, or not workload but following the Code basically in relation to what is required and what is expected.

THE CHAIR: Sorry. To be clear, are you saying that if they can provide the contractual evidence in respect of any one of those, it is game over because you do not have a point about the effect of the 'down tools letter' or the Prior Working Timetable or are you saying that you would still have a point?

MR YEOWART: I think the importance of the evidence, which is something we were going to pick up in correspondence about previous work, is that this must be evidence that they already have in relation to the decisions that they made in June, not evidence that they would create now, so back-filling a decision that they made. That is critical. Because the decisions were made based upon evidence and we did not see sufficient evidence written as to how detailed and deep they had gone into their Flexing options. We felt that they stopped that too early and did not continue looking for as long as they should have done to try to find a solution.

THE CHAIR: So you mean it must be something that they can show was within their knowledge at the time?

MR YEOWART: Well, I wouldn't like to think that Network Rail retrospectively now do work to prove the position that they made a - or took a view on in April when tools were downed.

THE CHAIR: Yes.

MR YEOWART: They said then it could not happen, so therefore it is not right that between April and September that Network Rail can now look back again and see if they can provide the evidence.

THE CHAIR: Right. So you would say that the evidence of a contractual conflict in the sense of priority of any one of those other services should be evidenced by something that was known and around at the time when this consideration was being undertaken and no later than the date of the 'down tools e-mail'?

MR YEOWART: Well, no, I suppose it is fair to say no later than the Offer Date because we

have picked up the fact -

THE CHAIR: No later than -

MR YEOWART: Although they said they were not doing any work, it is possible that Network Rail still were. So the Offer Date would be the date.

THE CHAIR: The operative date is the Offer Date. They have up until then to make good their contractual obligation, irrespective of what they have said before then about what they might or might not -

MR YEOWART: Yes, because we have in the offer letter, or the rejection letter, the reasons, and there is not sufficient detail in those reasons for us, hence the dispute that they have done insufficient work.

THE CHAIR: So if they can provide evidence, in respect of any one of those six conflicting services, that at some time prior to the Offer Date they knew of and established a contractual conflict, in the sense of a priority of that service, over the combination bid for by you, of the 1318 plus the variation of the Bradford, then they get home on that?

MR YEOWART: 1518 I think it was.

THE CHAIR: I beg your pardon.

MR YEOWART: No, that is fine, it is just for the notes.

THE CHAIR: 1518? Sorry, we have been talking about the 1318? Sorry, it is the 1518.

MR ALLEN: It is 1558 now.

(Alliance/Grand Central conferred)

THE CHAIR: I am just giving a pause for Grand Central to confer amongst themselves.

MR YEOWART: Sorry, Chair. We were just conferring. There was an exchange of correspondence between Grand Central, or Alliance on behalf of Grand Central, and the Offer Date with various parties within Network Rail to try to address some of these issues but a lot of those issues were not addressed and were not responded to.

THE CHAIR: Right.

MR YEOWART: And hence the -

THE CHAIR: But irrespective of that, I think where we have got to is that you have accepted that if Network Rail can come up with evidence that, at the latest, by the Offer Date, they had established, in the sense of knowing themselves, that there was a contractual priority reason - and what they meant by a conflict was that - then they get home on that.

Would you go on to say that even if they can demonstrate that they had that evidence, it is not sort of binding and therefore not a show-stopper, unless they had already communicated it to you by then -

MR YEOWART: Yes, I think that is reasonable.

THE CHAIR: - in that form or, at the very latest, in the offer itself, including the rejections?

MR YEOWART: Yes.

THE CHAIR: Would you go on to say that?

MR YEOWART: Yes, I would because it is important for us to understand in detail the reasons why services are rejected.

THE CHAIR: Right.

MR YEOWART: As we have already established, unfortunately if we have not got the right reasons we cannot find the right solutions and that is very important.

THE CHAIR: Yes. I can understand that. Network Rail, would you accept that last point.

MR ALLEN: I don't think I can, to be honest, because if we failed to communicate something in somebody else's TAA that is a Right above Grand Central, I don't think we would be able to go back and – you know, so if, out of those seven trains we have got, there is a genuine item that we know - find, post – you know, when we look back at the contract which is somebody else's Firm Contractual Right both in terms of D4.2.2 and their TAA, which is higher priority than the Grand Central path, I don't think it is within our gift to not give that other operator that path just because we failed to put it in an offer letter to Grand Central and explain why we did not accept the Sunderland path.

THE CHAIR: No, that is not – I do not think that is quite what we are saying.

MR ALLEN: Right.

THE CHAIR: We are saying that the logical sequence of the argument, on behalf of Grand Central, as the aggrieved Timetable Participant, is that accepting that it can theoretically be shown that there was a contractually-binding conflict in the sense of a Rights priority of any one of those -

MR ALLEN: Yes.

THE CHAIR: - and if you can provide evidence in whatever form that there was that and that the evidence shows that there was that at any time up to and including the actual issue of the offer, including the content of the offer itself and the reasons for the rejection, I think

we have established they would accept that on any one of those, you could get home. But they would say that it only goes that far if, as well as having that evidence that you knew about it and had established it, that you communicated it to them. The latest time when you could have done that would have been in the offer itself, which I think they were saying you did not, you did not actually put those reasons in the offer.

So do you accept that as a principle? If not, why not? If yes, did you give that communication, if not in the offer, some time in the discussion/correspondence before it?

MR ALLEN: I think I know what you are asking. I guess it depends on what that looks like.

We have got here because obviously somewhere along the line we have failed to get that information across to Grand Central. So what makes me nervous about saying 'yes' to it specifically is if there is, for example, one of the trains, I cannot remember if it is in that list, but if it does have that contractual priority above Grand Central, you know, if we named that train to these guys, would that be enough or - a bit of me says -

THE CHAIR: Well, you say, yes, we can probably be assured if Grand Central accepted the, whatever it was, was sufficient and had been communicated to them, then we would not be here.

MR ALLEN: Yes, exactly.

THE CHAIR: So I think we have to leave it to you, and if you cannot say it now it goes into the pot of the stuff you have got to produce.

MR ALLEN: Yes.

THE CHAIR: If you want to go on to say, "Not only here is our evidence that these were the relevant contractual considerations in terms of establishing a priority in the conflict, but this was the extent to which we communicated it and we think that this was sufficient, even if Grand Central..." -

MR ALLEN: I am happy to agree we link the contractual -

THE CHAIR: So you will provide that at the same time -

(Inaudible due to cross-speaking)

MR ALLEN: - the e-mail of such and such suggested this was a problem.

THE CHAIR: Yes.

MR ALLEN: No problems with that.

THE CHAIR: And they had actual, at least sort of constructive notice of what the point was -

MR ALLEN: We will link that back to what we have shared with them.

THE CHAIR: Okay, right. Let me, I hope finally on that point, then, just ask that if Network Rail were to get home on all those things in the way in which I have expressed it and the sort of sequence, you, Grand Central, would you still say that there is some contractual relevance in terms of a sort of overriding vitiation of the process which is so overriding that it would place Network Rail in breach of contract where it otherwise would not be in breach of contract, of either the 'down tools e-mail' or the failure to provide a Prior Working Timetable on time or at all? Are those two things still issues if Network Rail provide support for what we have just said?

MR YEOWART: Well, provided the evidence that is supplied is in line with what we are expecting, then I suppose we would have to accept that the 'down tools e-mail' has created an unnecessary dispute because we would not be here if we had had that information. Therefore, again, I would hope that it will ensure that we do not appear here again because of it again.

THE CHAIR: That may well be the case. We would all hope that.

MR YEOWART: Yes, yes, that is critical. In relation to the Prior Working Timetable, I think we have established that that is a part of the requirement under the Network Code. I think we have seen that an incorrect Prior Working Timetable or an incomplete Prior Working Timetable creates further disputes because we bid into space that clearly, in Network Rail's view, should not be there but it was there because the trains weren't complete.

So it is very important now that Network Rail do take on board the fact that the Network Code is drafted in such a way as to be contractual and therefore it is their responsibility.

THE CHAIR: And that it all has a purpose -

MR YEOWART: Yes.

THE CHAIR: - in the grand scheme of things and should be adhered to.

MR YEOWART: Yes.

THE CHAIR: But sort of the final opportunity, if you like, to raise a point on this: are you - sorry, let me start again. Am I right in thinking that you are in fact accepting that notwithstanding the shortcomings in failing to provide a Prior Working Timetable on

time or at all, that did not ultimately affect the contractual position in respect of the bid and eventual offer for or failure to offer the particular services we are talking about?

MR YEOWART: Sorry. Just say that again, Chair, for me.

THE CHAIR: Sorry, too many negatives upon negatives. We think it is accepted that, as a matter of practice, and in fact compliance with the strict letter of the Network Code, Network Rail should have provided a Prior Working Timetable and, in some respects, either did not provide it at all or did not provide it at the right time or did not provide the Prior Working Timetable that it should have provided because it did not contain the - it had not been through the exercise it should have been according to the Network Code. That failure, which we have not really explored in detail as to whether it was, but it seems to me to be accepted in the submissions generally, without having gone into it through the Q&A, it seems to be accepted that there was a failure in that respect. Arguably, that failure in itself amounts to technically a breach of contract by Network Rail.

But I am asking you to confirm if you accept, as I think you do, that notwithstanding that deficiency in the provision of the Prior Working Timetable, which arguably was a contractual deficiency, it did not actually have an effect on your contractual position as regards the paths bid for and the offer. It may well have sort of caused you to act in a way differently than you would have done if you had had a Prior Working Timetable to work on, but that, actually, it did not affect the contractual analysis of the strict position on bid and offer and what Network Rail should have done in the interim because that contractual position is determined by what we have just been talking about, which is whether any of these allegedly conflicting services were in fact contractually rightly prioritised over what you bid for as at the time of the Offer Date, and that the rationale for that prioritisation was established, known, and known by Network Rail at the latest by the issue of the offer letter, and that that contractually-binding stuff was at least communicated to you in some respect, without getting on to too much of a debate as to whether it was satisfactory or not.

You will have the opportunity to come back on that particular point when they provide whatever they provide.

MR YEOWART: I think our view on the Prior Working Timetable is that it is a very important document. It did contain the Newark services which didn't have Rights, so in effect we

were - although we had, as has been established, the same Rights as East Coast to bid for these services, they took a priority because they were already there, for some reason when they should not have been there, there should have been white space. On one of the other disputes, in relation to the 1518, there was an impact because freight trains were in there which had been Rolled Over, we have established now that that should not have happened either.

So I think it will be difficult for me to say, "yes, we have accepted that that was the position and if Network Rail prove all these bits that, in effect, the Prior Working Timetable was not so much of an issue", because it was an issue and will be an issue next time unless Network Rail can get it right.

THE CHAIR: So is the answer to my question that you do not accept that the failure, whatever it was, in the Prior Working Timetable, whatever its deficiencies, had no contractual impact?

MR YEOWART: Yes, I believe -

THE CHAIR: In respect of 493.

MR YEOWART: Yes.

THE CHAIR: Let's forget the other ones. We are just on 493.

MR COOPER: What we are saying, we are just trying to find some facts where trains were put into the Prior Working Timetable, and I know that somewhere Network Rail made a reference to that in the documents where basically they have hinted that we would have to fit around a 1608, I think it was.

MR HANKS: I think it is not relevant to this dispute, I am afraid, Jonathan.

MR COOPER: Okay.

MR HANKS: I think that is not a point in this particular case.

MR COOPER: If it is a general point about the Prior Working Timetable -

MR YEOWART: I think this is -

THE CHAIR: It is not a general point, it is a specific point in relation to this service, the one that is disputed under 493?

MR HANKS: I think if the contractual position is established by Network Rail, that will resolve a number of problems. What we have not really addressed is - the issue is, really, have they attempted then to use Flex within - use contractual Flex within those

Contractual Rights?

THE CHAIR: Yes, that is the point on which we have said they are going to provide stuff.

MR HANKS: Okay.

THE CHAIR: Right.

MR HANKS: Is there any way - sorry, I should address this to the Chair. Is there any way that

-

MR YEOWART: No.

THE CHAIR: I come back to asking you, does the Prior Working Timetable issue have any contractual bearing on it -

MR YEOWART: No, not on this one.

THE CHAIR: - on 493? Never mind -

MR COOPER: Not on 493, no.

MR YEOWART: No, we do not think so.

THE CHAIR: - never mind your whole business in the round, which I fully take on board.

MR HANKS: I think we have now reached agreement that it does not.

THE CHAIR: Thank you. So in 493, then, the impact of the 'down tools e-mail' on the timing of the whole thing and the issues over the Prior Working Timetable have gone away?

MR YEOWART: On this one.

THE CHAIR: And in determining the dispute, we can do so on the basis of the Contractual Rights, as I have characterised them, which will be supported or not by the additional material that we have invited Network Rail to provide on all the different issues in that respect and on which, of course, Grand Central will have the opportunity to make comments?

MR BRANDON: Yes.

THE CHAIR: Are there any other issues on 493 raised by the submissions or what has arisen since? Either the written Sole Submissions or the statements to start with or the ensuing discussion, is there any other issue on 493 that I have not touched on and should have done and given people an opportunity to speak on? Network Rail?

MR ALLEN: No.

MR A LEWIS: No.

THE CHAIR: Grand Central?

MR YEOWART: No.

MR BRANDON: No, thank you.

MR HANKS: No.

THE CHAIR: Alliance?

MR YEOWART: No.

THE CHAIR: Colleagues, anything else you want to explore on 493?

MR THOMAS: Not from me, Chair.

MR GIBBONS: No. That is fine.

THE CHAIR: Anything else that we want to explore on any of the others while we are here?

MR HOLDER: No.

THE CHAIR: Anything else *we* want to explore, because I am going to invite you to make closing statements in a minute?

MR THOMAS: No, thanks, Chair.

THE CHAIR: Because, I am sorry, you have already missed your Grand Central train and I think we can hopefully get through pretty shortly now. Anything else any of us wants to clarify on any of them?

MR THOMAS: No, thank you.

MR GIBBONS: Not from me, thank you.

MR HOLDER: No.

THE CHAIR: Thank you very much. There is just one thing I want to clarify on one, and I think it may sort of have an impact on the thing you want to clarify, and it is in relation to the East Coast PDNS where we got to the point of saying – in terms of the rolling stock issue, we got to the point of saying, well, actually that went out of the window as an issue and then we got back to the Plan A/Plan B point. The rolling stock went out of the window because even on the Plan A/Plan B bid the relevant detail and information required by the Network Code 2.5.1(e) in respect of the rolling stock, in respect of Plan A (the preferred York service), if not included in the actual bid, was incorporated by reference in the bid in the PDNS by the reference in it to the previous November '11 Notification of Significant Change which itself would have contained the necessary detail. I think that might be the point which you wanted to come back on. So we will come to that in a minute.

My question was in relation to the Plan B incorporation of the relevant detail, the Roll Over/roll forward of the existing Newark service where I think we established that the detail in the form of a PIF and something else had been provided in conjunction with the PDNS, even though it is not actually sort of expressly referenced in it, saying "...and the PIF and so on and so forth are attached as annex [something or other]..."

MR FISHER: That detail went in our e-mail to Network Rail on the Priority Date. The bit that has been annexed as part of this dispute is just one selected item that Grand Central/Alliance have chosen to put forward to the Panel.

THE CHAIR: Right. But it is considered, certainly as between Network Rail and East Coast, that that relevant detail of the rolling stock in relation to Plan B (the Newark service) was provided? We have not actually seen the evidence of it.

MR FISHER: I can provide the evidence, if you like.

THE CHAIR: Is that contested at all, the Newark one, not the other one -

MR HANKS: Yes. I think I am happy to accept that they did provide that Newark - the rolling stock details sufficient for the Newark service.

THE CHAIR: Right. There is a sort of oblique reference to it in the PDNS but not kind of a direct "...and it is attached".

MR HANKS: I would just like to clarify that the only - that we have submitted as evidence the only document that we were copied in on for the PDNS, so if that was not the complete PDNS then we have not seen the rest of it.

THE CHAIR: Right. I might as well ask you to deal with it now or in your closing statement, but in relation to the Plan A (the York bit of it), are you saying there is a doubt as to whether the relevant information was provided with the prior Notification of Significant Change as at November?

MR BRANDON: We haven't seen evidence of it. So if the rolling stock diagrams for the York services were provided at the Notification of Significant Change date when that was submitted back in November, I think we are willing to accept that that is referenced in the PDNS document that we have submitted.

THE CHAIR: Yes.

MR BRANDON: However, if the rolling stock diagrams were not provided in November at the Notification of Significant Change date, then there is an issue still.

THE CHAIR: Would you say that between them Network Rail and East Coast should -

MR BRANDON: I think they need to provide evidence that the rolling stock diagrams were provided for the York services and additional -

THE CHAIR: - provide evidence (*inaudible due to Mr Brandon speaking over the Chair*).

MR HANKS: I think that should come from Network Rail because they were the recipients of that.

THE CHAIR: Yes, indeed, not from East Coast. I am assuming you are saying now that, as a fact, it was there?

MR A LEWIS: Yes. We will provide that.

THE CHAIR: Right. But we don't need to ask Network Rail to provide any more substance in relation to the Newark one? It is accepted that -

MR BRANDON: I think so, yes.

MR HANKS: Yes.

THE CHAIR: - that it was provided in sufficient detail?

MR YEOWART: Yes.

THE CHAIR: Okay. So if they do provide the detail in relation to the York one that satisfies that it was provided with the earlier notification which was incorporated by reference in the PDNS, then we are back at the point where the non-compliance by not giving rolling stock details, that argument goes away?

MR YEOWART: Yes.

MR BRANDON: Yes.

MR HANKS: Yes.

MR BRANDON: There obviously still remains an issue -

THE CHAIR: And then we are back to the -

MR BRANDON: - of not being compliant with the -

THE CHAIR: - compliance or non-compliance of the fact of having the alternatives between Plan A and B.

MR BRANDON: Yes.

THE CHAIR: Okay, good. Thank you. In that case, I will invite you to make any closing statements briefly that you would like to.

MR YEOWART: Okay. I will leave a copy as well. Is that okay?

THE STENOGRAPHER: Thank you.

MR YEOWART: Thank you, Chair. The rules are defined to ensure the most efficient use of capacity through agreed Track Access Contracts which themselves are based upon the correct interpretation and application of those Rules.

Network Rail is correctly funded to undertake necessary timetable development work to ensure it uses all its options through Flex and timetable variation to deal with Access Proposals submitted in line with the Network Code.

Network Rail, by its own admission, downed tools in April 2012 and so the opportunity to Flex other operators' services or vary the timetable was lost. This has resulted in Grand Central seeking agreement for any changes with other operators as opposed to having the benefit outlined by the Network Code.

In relation to the 1608 Newark, Network Rail has confirmed this East Coast path is non-compliant. A non-compliant path cannot be offered and, as a result, the application of the Decision Criteria becomes irrelevant. The path does not work and cannot be made to work compliantly. The Alliance 1608 Wakefield path is compliant. The 30 seconds dwell issue at Doncaster can easily be addressed. The sub-standard headway on the 1608 Newark cannot.

If the Decision Criteria had ultimately applied, Grand Central will provide evidence that this, too, has been incorrectly applied in favour of East Coast.

We are grateful for the opportunity to have these issues determined in such a detailed manner within this forum and hope that as well as understanding the decisions it will also help to ensure clarity on future applications and obligations. Thank you.

THE CHAIR: Thank you, Grand Central. Network Rail?

MR ALLEN: I am probably going to say three things in our closing statement but I will probably only remember two, because that's the kind of thing I say.

First, whatever the determination looks like, I think there is a degree of learning we can take away from the two days we have had here and I actually think it will make interesting reading and we have got a lot to look at in terms of thinking what that does. So, from that point of view, while the topic is very complex and has gone round in lots of different circles, I honestly think we are going to get something that we can take back and help improve this process in the future.

Second, I am not sure I can actually agree that we have got unlimited resources to actually go to every degree of nook and cranny about exhausting Flex, but I do agree that we have an obligation to make sure our decisions are transparent and that we do very visibly and very vocally explain, when we get to a genuine show-stopper, supported by the contract, that that is what we should do. If we failed to do that this time round, then as I say, it is something that we can learn from for next time round and see where we can avoid a similar confusing situation. I am not ever going to say we will never appear in front of the ADRC again, but I do think we should probably appear in a slightly more focused way.

I would just like to thank the Panel for their time, and am grateful that I do not have to pick up your overtime bill for this, that is all I have to say! Thank you very much for a very interesting hearing.

THE CHAIR: Thank you very much, Network Rail. I am not sure whether I need to but I am going to ask East Coast if they have any final observations?

MR FISHER: No final observations, thank you, Chair.

THE CHAIR: Thank you, Shaun. In that case, I think I will just ask the Secretary if he would not mind recapping and just summarise what it is that we have left hanging over as the additional information or evidence to be provided by anyone.

MR SKILTON: Network Rail's letter of 30 April regarding the Decision Criteria; Grand Central to provide their views particularly on how the Considerations as listed fit the Objective. But I think that went on to become Network Rail to provide -

MR ALLEN: Agreed, yes.

MR SKILTON: - their views on the missing bit.

THE CHAIR: The Grand Central one was to provide both their views on how the overriding Objective applied and also their views on the Criteria as expressed - the analysis of the Criteria and its application as expressed in the Network Rail letter of 30 April I think it was.

MR HANKS: Yes.

THE CHAIR: And on Network Rail's side, because they have already expressed that analysis in that letter, it was to supply the missing bit, which was how the overriding Objective applied.

MR SKILTON: Both of those to copy to East Coast for information.

The next item is the trains that prevented - analysis of what is believed to be the contractual position on 6H88 along with 6H33, 1S45, 6E84, so that block of trains, analysis of what is believed to be the contractual position and ultimately a statement of whatever ability there was to Flex in order to accommodate the Grand Central service, and whether Network Rail did Flex all Rights as much as it could. That is to go to everyone and Grand Central to reply, to comment.

Next is re-timing the 1522 ex Bradford. Network Rail to demonstrate that the proposed re-timings for 1522 was outside the limit of Grand Central's contractual Flex. I think that was before we got into the discussion of quantum, but there is still an undertaking to provide.

We then get to Network Rail to provide an analysis in contractual terms in relation to priorities of other services over the bid for the Grand Central 1318.

MR GIBBONS: 1518.

MR YEOWART: 1518.

THE CHAIR: 1518.

MR SKILTON: 1518, and also the proposed variation to Grand Central's Bradford service, which would have removed the conflict from Grand Central's other service.

Then when we got to the final decision and the view whether it was up to Network Rail to say what relevant contractual information was communicated to Grand Central to explain why and they did not get what they wanted. That is it, Chairman.

THE CHAIR: Thank you. Just to clarify -

MR SKILTON: Sorry. Also, Network Rail, sorry, to provide the evidence of the York rolling stock.

MR HANKS: Yes.

MR SKILTON: And that it was submitted.

THE CHAIR: Yes.

MR BRANDON: Yes.

THE CHAIR: Thank you. Right. I think we ought just to clarify exactly which box each of those goes into in terms of which dispute it relates to.

The Decision Criteria material relates to 494 and is necessary in order to deal

with the point if we conclude that it becomes relevant, having gone through the rest of the analysis, that the Decision Criteria were relevant to be applied, so both the sets of information will come under 494.

The one in relation to the four services, to prove what their contractual priority status was is relevant to 495 and all the rest are relevant to 493, except the rolling stock one which is also relevant to 494, the East Coast one. Yes. Have I got that right?

MR GIBBONS: Yes.

MR THOMAS: I can't oppose it, Chair.

THE CHAIR: Right. And also to say in relation to all the further information which we have asked to be provided, the Secretary said in respect of some of them, well, Grand Central should be given the opportunity... I think the blanket position is, in relation to everything that is to be provided by whichever party, the other party will be given an opportunity to respond to/comment on it as they think appropriate.

In relation to the 494 ones, those are to be copied to East Coast. I am not sure that the other ones need to be copied to East Coast, but I think the 494 ones needs to be copied to East Coast, and I would accept any comment East Coast would want to make on it -

MR FISHER: Thank you.

THE CHAIR: - as it is about their services. I do not think 495 and 493 need trouble East Coast.

MR GIBBONS: They have got trains which are listed as having Firm Rights and formed part of the obstruction to Grand Central getting their paths.

THE CHAIR: Oh, they are in the four and the six, are they?

MR GIBBONS: Yes, there are East Coast trains in there.

MR HANKS: But they are not the only ones?

MR GIBBONS: No, no, they're not. But they are the only ones that are party to the dispute.

MR BRANDON: A specific one was the 1N85, wasn't it?

THE CHAIR: Both the Wakefield 4 and the something else 6. Okay. Would either Network Rail or Grand Central/Alliance have a difficulty, in respect of all of this further information, if it is copied to East Coast?

MR YEOWART: No.

THE CHAIR: And East Coast has the opportunity, if it wishes, to comment?

MR YEOWART: No, we have no problem.

MR A LEWIS: No.

THE CHAIR: Okay, so be it.

MR ALLEN: Just a query, Chair. Do we need to copy any information to the other operators, either Freightliner Heavy Haul or DB Schenker, that have trains in that list, for example, or do we kind of wait and do it when we are at determination?

THE CHAIR: Secretary, correct me if I am wrong: I do not believe you do need to in relation to these disputes that we are considering.

MR SKILTON: They have all been told about this dispute, they have all had the chance to come and sit on the back row. I would say that -

THE CHAIR: Those which have not taken the opportunity to be here -

MR SKILTON: They have all had the chance to read the submissions on the website, they have all been pointed to them. They could have come if they wanted. If they don't like the outcome of this determination, they can appeal it.

THE CHAIR: They can appeal *this*?

MR SKILTON: Yes.

THE CHAIR: They do not have to start a new dispute of their own, they can dispute this?

MR SKILTON: No. Or they can dispute the outcome. If it has an impact and Network Rail tries to do something that affects them, they can appeal that.

THE CHAIR: If they were to appeal this, would they then become entitled to any information which they had not already seen? I suppose they would, would they?

MR SKILTON: I would not advise you to publish it.

THE CHAIR: But if not publishing it, may have an entitlement under whatever the bit of the rules governs an appeal by an outside party that was not a party at the original hearing.

MR SKILTON: When you appeal to ORR, you start with a blank canvas of whatever you are doing.

THE CHAIR: And they do not have any rights by virtue of making that appeal to call for information from anybody?

MR SKILTON: No.

THE CHAIR: Do they have to make best -

MR SKILTON: Even the transcript is not disclosable to the Parties; it is private to the Panel.

THE CHAIR: So an outside party, if it were to appeal, not having been even an Interested Party at the hearing, would just have to make its appeal on the basis of whatever it could that is in the public domain?

MR SKILTON: Yes, which therefore essentially comes down to either direct impact because Network Rail is trying to change them or if they think, as a matter of principle, the National Network needs not to accept the determination because it has unfortunate implications downstream.

THE CHAIR: Right.

MR SKILTON: So ScotRail could appeal it if they want, when they read it.

THE CHAIR: Right. So the position on giving further information is that we, as the ADC Panel, on these particular disputes are not obliged and probably not entitled to give the additional information that is provided to the rest of the world, potentially other Interested Parties or potential other appellants, and that is it as far as we are concerned.

To answer Network Rail's question, I think it was, it is up to Network Rail if, as part of its obligations in relation to anybody else contractually, in terms of progressing whatever bids and procedures in relation to this timetable or any other one, it makes the judgment call that it should give this or any other information out in order to avoid them bringing another dispute.

MR ALLEN: Yes.

THE CHAIR: That is Network Rail's call.

MR ALLEN: Yes.

THE CHAIR: The timescale for the further information. Today we are Monday, 24 September. We are obviously rolling on towards the timetable date. I have to confess that any additional time taken to provide this information will give us a little bit more breathing space in relation to dealing with the 518 we have already got on the stocks, and then to dealing with this. I am minded to propose that the additional information should be provided by Friday, the end of next week. Is that too long?

MR YEOWART: I think it is too long, Chair, because the evidence should already be there. It is just a case of collating it.

THE CHAIR: The evidence should already be there.

MR GIBBONS: Go for Friday this week?

THE CHAIR: Would Friday this week be too short?

MR YEOWART: That seems reasonable.

MR BRANDON: Sorry, is that Friday this week for Network Rail to provide evidence and us to respond?

THE CHAIR: No, that is for each party to provide the material they have been asked to provide and then we will set a separate timescale for everybody else to respond.

MR HANKS: Grand Central is happy for it to be this Friday.

MR ALLEN: I don't suppose we could go to Wednesday, the 3rd by any chance, could we?
We will go with the flow. If the 28th needs to be the day, then we will make it happen.

THE CHAIR: The 28th, that is this Friday, is it?

MR YEOWART: Yes.

THE CHAIR: Is that acceptable to you, Network Rail?

MR ALLEN: At 1700, yes.

THE CHAIR: Close of play, 1700 this coming Friday, 28 September. Responses, comments by everybody on what is produced by 1700 the following Friday?

MR YEOWART: That seems reasonable, yes.

MR BRANDON: Yes, happy with that.

THE CHAIR: Which is 5th October. Is that sensible? Not too short, not too long, in relation to the timetable process?

MR YEOWART: No.

THE CHAIR: Will there be any further timescale on that? We do not know until we see it all. We will have to deal with that when we come to it. Hopefully that would be the only iteration we need, one set of information, one set of comments and then we will be able to deliberate on what we have got.

I suppose we have to reserve to ourselves the right, if we need to, to ask for yet a further iteration but we will deal with that when we come to it. Is there anything else that needs to be said at this stage? Secretary, is there any other procedural element that I should deal with?

(The Secretary conferred with the Chairman)

THE CHAIR: I am not minded, of my own initiative – I was not even going to invite

submissions on the issue of costs, but I suppose I should ask the question, does anybody have anything they want to say on the subject of costs?

MR YEOWART: Not really, I do not think. Not from our point of view because we do not know the outcome yet.

MR ALLEN: No.

THE CHAIR: Thank you. Let me say quite clearly, I believe that is the right position to take because I think - well, the fact that we have taken this time and it has been fairly exhaustive and there has been sufficient indication that there have been several very genuine issues raised by this which are quite hard and which it has been entirely proper to pursue to this level of the Dispute process. In that light, the Rules provide that the costs lie where they fall. I think that is correct, Secretary?

MR SKILTON: Yes.

THE CHAIR: Yes. In that light, I can tell you that I will not be making any determination as to costs.

MR YEOWART: Thank you.

MR HANKS: Thank you.

THE CHAIR: I think that genuinely is it. Thank you all very much for your time and attention and willingness to respond to sometimes rather pernickety and pedantic questioning, but I think it has actually been very helpful through the process and we look forward to receiving the further information.

MR YEOWART: Thank you.

MR COOPER: Thank you.

MR BRANDON: Thank you.

MR HANKS: Thank you.

MR A LEWIS: Thank you.

MR ALLEN: Thank you.

MR GROVER: Thank you.

MR FISHER: Thank you.

THE CHAIR: And thank you to our stenographer -

THE STENOGRAPHER: You are welcome.

THE CHAIR: - for staying.

MR HANKS: Yes, thank you.

(Adjourned)

Monday 12 November 2012

THE CHAIR: We are here as a reconvened hearing of disputes TTP493, 494, 495. This is the third session we have had of the three disputes. We had half a day on them in September after the dispute between the same parties was heard on the same day, TTP518, which we have since issued a determination on. We then had some more information requested to be provided, and then a reconvened hearing later in September. As a result of that, whilst we got to the end of the material, we required some more information to be provided by both parties and commented on by each party. As a result of that further information and some of the additional material and arguments that were raised in that further information, we decided that it would be sensible to have a third day to deal with the issues arising out of that further information and the arguments raised there. That's why we're here today.

We have a new stenographer, Tim. I said the same as I said to his predecessor Leah that if, at any time, we are being inaudible, speaking across each other or he can't follow it to say so, please. It would be helpful if we just go round the table again for that purpose and to identify everybody who's here and if, when we break and reconvene, we could sit in the same places, please. I'll start. I'm Peter Barber; I'm the hearing Chair.

MR HOLDER: I'm Robert Holder from First Great Western.

MR SKILTON: Tony Skilton, Secretary.

MR HANKS: I'm Chris Hanks, Head of Development for Alliance Rail Holdings.

MR BRANDON: Chris Brandon, Alliance Rail Holdings.

MR COOPER: Jonathan Cooper, Alliance Rail Holdings.

MR YEOWART: Ian Yeowart, Alliance Rail Holdings.

MR ALLEN: My name is Matt Allen. I'm the Operational Planning Manager for Network Rail.

MR LEWIS: Andy Lewis, Timetabling, Network Rail.

MR THOMAS: Paul Thomas, a Network Rail panel member.

MR GIBBONS: Nick Gibbons from DB Schenker.

THE CHAIR: I should mention that Rob Holder and Nick Gibbons are also panel members.
Sitting in the back row?

MR FISHER: Shaun Fisher from East Coast as an interested party.

THE CHAIR: Also for Tim's benefit I should mention that whilst the four gentlemen over there have all identified themselves as representing Alliance Rail Holdings, they are also, for the purposes of this exercise, representing Grand Central –

MR HANKS: Railway Company.

THE CHAIR: Which is the actual party to this dispute, along with Network Rail. As I say, we are here to consider the issues raised mainly by the further information provided as requested since the last hearing. The Secretary circulated those issues to everybody. I want to take them in a slightly different order than they were listed in the circulation from the Secretary; I want to take the more general issues first and then get to the specifics, in the hope that, when we get to the specifics, which is actually going through some of the services that are said to conflict, we don't necessarily have to go through line by line every point on every one of those, but we can pick some out.

The first general issue is the relationship between the bid by Alliance and what came to be the bid by Grand Central, before and after the Priority Date. The second general issue is what data are necessary to an evaluation of whether Rights have been Exercised for the purpose of prioritising conflicting service bids. The issue there is that raised by Alliance/Grand Central in its further information letter that, in order to have a full understanding of the particular point as to whether Rights had been Exercised with a capital 'E', as required by the Provision of the Network Code, it is necessary to see some or all of the PDNS, the Priority Date Notification Statement, in which Rights are Exercised – that being the vehicle through which the Exercising of Rights is communicated, as at or before the Priority Date. That is a general issue as has been raised by Alliance/Grand Central, in relation to a lot of these services.

The third general issue then, and this relates to all three disputes, is the position of Network Rail when required to apply various provisions of the Network Code, which I'll group into two: the provisions relating to how it prioritises bids, as at Priority Date; and

then how it applies the Decision Criteria for the purposes of ranking bids of the same priority at a later stage in the process. The issue being raised by Alliance/Grand Central in relation to a number of the specific services being dealt with is whether, and to what extent, Network Rail is able to justify after the event and in the context of the dispute having arisen the way in which it implemented these processes, if it didn't provide that justification at the time when it was implementing the process; and whether the fact that it produces a retrospective justification, however good or bad that might be, the fact that it is retrospective of itself somehow doesn't stack up with its obligations.

We will deal with those three general points and then we will come on to, in the case of TTP494, the one involving East Coast, the specific issues of application of the Decision Criteria, that being potentially relevant if we decide that, in TTP494, the relevant conflicting bids – that of Alliance/Grand Central on the one hand and East Coast on the other hand – in fact, for various possible reasons, had the same priority and, therefore, the Decision Criteria become relevant. Then it comes to the question of the application of the Decision Criteria, and that is something on which further information is provided.

Lastly, for TTP493 and 495, the points of difference on the information provided were as to the prioritising of the conflicting bids – Alliance/Grand Central's on the one hand for a particular service, and a whole host of services, on the other hand, which Network Rail has said conflicted with the service bid for.

I hope we will get through all that today and in a timely way. I also hope and intend that we will be in a position to issue the decision, in substance, with as much skeleton reasons as we can, today at the end of it, so that the parties will have the decision today, at least in as much substance as is necessary to act on it, being very mindful of the fact that, time having gone on, we are not far away from the timetable change date now, and so it's quite important that, whatever the decision is, everyone should know about it and particularly Network Rail is able to do everything necessary as a result of it. Then of course we will issue the written form of that in due course, as soon as we can.

That's the way we intend to proceed, so let's start with the issue of the relationship or distinction between Alliance's bid for the Priority Date – this is TTP494 – which morphed into a service to be run bid to be run by Grand Central after the Priority

Date, for which Grand Central duly applied for Rights via a supplemental agreement to its Track Access Agreement, via a Section 22A process for changing its existing Track Access Agreement. The broad point here, my understanding of it, is the difference between the identity of the legal entities that bid for this particular service, before and after the Priority Date. I think it is agreed factually on all hands that the bid was submitted via the PDNS of Alliance by Alliance. I can't remember exactly when; it was probably, as most of them area, on the Priority Date itself. As at the Priority Date, the bid was that of Alliance Rail Holdings. Alliance has said it was its intention – and this was made perfectly clear to everyone – that, were it to be successful in that bid, the actual trains would have been run by Grand Central.

What happened after that was that, quite soon after the Priority Date, which was 2 March 2012, for various reasons Alliance and Grand Central, which are both in common ownership of Arriva, or were by that stage, decided that Grand Central should proceed with the bid, Grand Central among other things having the stock and also having the existing Track Access Agreement. Grand Central could proceed to get the necessary Rights, which it's agreed on all hands neither Alliance nor Grand Central had at the time. Whoever it was only had the expectation of Rights, not actual Rights. Therefore, to acquire those Rights, Grand Central, having an existing Track Access Agreement, could apply to ORR for the necessary Rights for the service in question via a Section 22A agreement as a change to its Track Access Agreement, rather than as Alliance not having had a Track Access Agreement would have had to do. They'd have had to apply for a new Track Access Agreement, either as a Section 17 agreement, i.e. not agreed with Network Rail, or hypothetically, if it were possible, as a Section 18 agreed agreement. It's suggested that, had it had to do that, it would have been a Section 17; it's assumed that Network Rail wouldn't have agreed, so it would have to go as Section 17.

The reason I have raised this as an issue to be heard at this reconvened hearing is because, in its submission of additional information, although not requested to do, Alliance did have another go at this particular point, arguing in summary that Alliance's bid should be considered as at the Priority Date for whatever priority it was accorded and should have been given that priority. Therefore, Alliance doesn't see a contractually based argument for saying that Alliance or Grand Central had any priority later on less

than Alliance had as at the Priority Date, because the question of priority crystallises as at that date. The first point I would like you to address, gentlemen, is even assuming that to be true, as you said in your further submission, how do you assert that the priority according to Alliance's bid transferred to what became a Grand Central bid after the Priority Date? Let's start with that.

MR COOPER: On this point, although we put in at the Priority Date an Access Proposal, our expectation at that point was that Alliance would be running services. After that date, on 14 March, it's changed, but we don't feel that there was any need to actually change the Access Proposal. There was no change to the actual paths. That's how it carried on; nobody from Network Rail came over and said we needed to submit a revised Access Proposal for this. We didn't think it was necessary. It's just gone along and it did transform into a Grand Central service. There's nothing in the Network Code that says that you can't actually change and it doesn't say what happens if you do change the operator.

MR YEOWART: The actual operator of the service was Grand Central right from the very beginning. I think we made that clear last time. The rolling stock identified was Grand Central; the application made it quite clear we'd be using Grand Central rolling stock. After the event, the only change was the submission to the regulator about where the Rights would sit if they were awarded, i.e. if the regulator would say yes to the application. There is nothing, as far as I'm aware, as of right now, in saying that, if it is an issue, we could submit to the Regulator now for a Section 17 to run the service as Alliance. Network Rail was kept fully informed about the reasoning behind it and it was to ensure that it was easy to manage, through the process. Clearly, after we'd had some internal discussions after the Priority Date, as to whether or not it would be better all round – and we did have these discussions with the ORR as well, as you know – it would be simpler if it was submitted, therefore, as just a change to a Grand Central contract when we sought permissions from the regulator. That's what we're talking about here, seeking permissions from the regulator. They were quite happy with that.

THE CHAIR: 'They', you mean Network Rail was.

MR YEOWART: The regulator was happy with us doing it that way.

THE CHAIR: When you say 'the regulator was happy' that you did it that way, the regulator

couldn't have been anything but happy; the regulator was there to accept whatever application you make. The regulator wouldn't have got involved in the question of whether it was Alliance or Grand Central. The regulator would just take the application as it found it. If it came in as a Section 22A application from Grand Central, it would evaluate it on that basis. If it had come in as a Section 17 application for a new Track Access Agreement with those Rights in from Alliance, the regulator would have taken it on that basis. The regulator wasn't involved in evaluating the relative merits of deciding which of those routes to take.

MR YEOWART: There have been discussions between the regulator and Network Rail of the position, both of Alliance and Grand Central, previously. We have to remember that Grand Central only became an Arriva company late in 2007, so the timescales between the two are quite short. Initially, Alliance was bidding against Grand Central for capacity on the route. Grand Central also wanted particular bits of capacity. When it became part of group, as has already been established, we had some meetings with Network Rail to confirm that there would no longer be any conflict – we would not seek to conflict – and therefore we would make the applications very clear. The only reason that the Alliance application was kept as it was, was because of the routing for the arrival into Bradford, because that was an Alliance route, not a Grand Central route.

After the PDNS date, we then had further discussions about how we would take it forward, on the basis now that we only had one path. Initially we were expecting two paths to be offered and potentially two bits of kit to be required from our colleagues to Grand Central. The decision, which I think was the right one, was that the submission to the regulator would be for a change to Grand Central's contract, but we could easily have and still could make a submission to the regulator for this to be operated as an Alliance service. The reality is, and we've tried to be very straight when we've been here, is that it didn't make any sense. It is not the way to do it to have one extra contract when Alliance has got longer-term aspirations, over the next two or three years, to run a more significant service. We have made it absolutely clear, I think, where we are. We haven't tried to hide anything; this is what we've done. The decision is down to the panel.

THE CHAIR: I understand entirely that what you're doing is quite clear to everybody. Are you saying at all that, through some process, the regulator in any way sanctioned, legally

blessed, the transfer of Alliance's bid to Grand Central as becoming Grand Central's bid and therefore having the priority that Alliance's bid had had as Alliance?

MR YEOWART: Can I just have one second? *[Pause]* We're just going to check. There's been a lot of correspondence between us and the regulator about various things, and I don't want to say that the one I had from the regulator said, 'Yes, that's a very sensible way to go forward,' if that referred to another matter, but we have had such emails from the regulator. We're just going to check. *[Pause]* We deal with different people at the regulator on each side of the Pennines. It's Brian Hopkinson on the east side and David Wearing on the left.

MR BRANDON: I am pretty sure we have it, but it might take me a few minutes.

THE CHAIR: Okay, well Chris can look for that.

MR YEOWART: What I do know is we dropped him a note to say what we were doing. I am certain, but I could be wrong, that we got an email back from the regulator saying that was a sensible way to proceed. We'll need to be sure that it referred specifically to this instance.

THE CHAIR: Even if you do find that, are you saying that the regulator has the power legally to, in effect, transfer a bid from one timetable to another?

MR YEOWART: I don't know; you'll have to speak to the regulator about that matter. The issue has only come about –

THE CHAIR: I'm just giving you the opportunity to make that argument.

MR YEOWART: I don't know; you would need to speak to the ORR. The reason the issue has come about is because the path that we had found, a clean path that we expected to be offered, was not offered whereas, had it been offered, we wouldn't be here, because there would be no reason for any of us to be here.

THE CHAIR: Right, Network Rail, would you like to respond to that, including on the issue, if you have a view on it, as to whether, if it becomes relevant, the regulator has some power to transfer a bid from one Timetable Participant to another?

MR ALLEN: Okay. On the process, we challenged colleagues at Alliance to understand how their service is going to be resourced. I absolutely agree with some of what Ian said about the practical approach going forward was then that these services would be resourced by Grand Central's rolling stock for the bid that Alliance had made.

It's actually, looking back on the challenge that you yourself, the Chair, has put down to what we've done has retrospectively made us go back and look at the contracts. At that time, we very much focused on the practical approach going forward, and we were still working on the premise that we were going to try to deliver everything for everybody and do the best we can with the timetable, which is what our guys do every day. It's only over the last few weeks when we've started to look at the issue of whether we were right to continue that approach without any kind of warning – possibly not – and now do we look back and get the view that a Timetable Participant can't just trade a slot between each other and be expected to have the same status that it would have done if it had been a single participant all the way through the process, from Priority Date down.

THE CHAIR: You're saying that is your view now.

MR ALLEN: Yes, very much so. It's a bit of uncharted territory. Talking to colleagues and racking my own grey matter on this subject, I've never come across a passenger train changing between a different operator. We've got a whole other part of the Network Code that moves freight trains between different operators, but it's quite structured; it's very formally set out. There are ways of doing it.

THE CHAIR: There is a contractual legally based procedure for where those transfers happen.

MR ALLEN: Yes. The bit that we would have to accept some criticism for, hopefully constructive, would be not leading that process of that change and being very upright about, actually, there's a difference now in terms of the priority that the change had, in terms of how we developed the new Working Timetable. We just ploughed on without looking back. There's not really a great deal else to add to that. I don't think we've had any letters from the ORR that says – I haven't seen every communication between Network Rail and ORR on the topic of the Rights – but I don't believe they've given us an instruction to say treat it as one and it has the same priorities. I've not seen that and I'm not sure that...

THE CHAIR: Are you able to say, express a view, whether in theory the ORR has that power if it chose to exercise it?

MR ALLEN: My view is that the short answer is no, but I think there would have had to be some healthy dialogue to understand how they thought they could do that. If we'd got some kind of instruction on that matter, I would expect it to come in a more formal view

of a letter saying that we're instructing them to enter into some kind of Rights agreement or something; but I don't believe that they've got the power to derail that, else they're compromising themselves, in terms of we went through this process and they then heard an appeal from this group, having relooked at it. I don't believe that they have the straight right to give us the authority to stray away from that, without having gone through the steps of, 'We, the industry, have made the decision,' have that tested at the panel here and then be tested again as to whether we've got it right. That for me is the structure we should follow, if we're in uncharted territory.

THE CHAIR: Andy, did you want to add anything to that?

MR LEWIS: No, thanks, Chair.

THE CHAIR: Okay, thank you. Would I be right in thinking that, if the ORR were to exercise or, on the face of it, exercise such a power, you would expect to see it doing so with some formality and stating the legal basis on which it was exercising such a power?

MR ALLEN: Very much so. It kind of moves from our practical application of deed to our legal experts having the dialogue with the ORR to give us the guidance about how we should deal with these things.

THE CHAIR: Have your legal experts or anybody else had that dialogue with the ORR, as to whether there is such a power?

MR ALLEN: Not that I'm aware of. I've, following the bullet points in your last email to us about the structure for today, queried it internally with our legal department about the transfer of participants' bids between each other, in which their view came very much back in terms of what I've just said: it can't be done without there being a loss of priority and a new bid coming in from the new operator that intends to run the service.

THE CHAIR: Okay, thank you. Before I go on, did you find the email?

MR BRANDON: I don't know if it's exactly what I was looking for.

MR YEOWART: It's one that slightly predates the later one, but it's a question that we've been asked by the regulator. This was on 17 February, so prior the Date. 'If you have the opportunity to operate a limited number of Alliance services commencing December 2012,' it's Annex D in the pack, 'is it your intention you would operate it by GNER,' which is the operational company of Alliance on the East Coast Main Line and just another acronym to confuse you, 'or by Grand Central. If the former, is there

sufficient time for you to obtain the necessary safety certificate, etc.?’

We’ve said, ‘We’ve considered the point in some detail,’ and we were still considering the point in some detail at the time. ‘Depending on the number of paths,’ which is back to where I said we were expecting to get more than one path, ‘it may be operationally more expedient for Grand Central to operate them, and we’ll make our intentions clear in the application.’ At the application time, it was expected still to be an Alliance service. ‘We’d be happy to discuss the matter further with the ORR, if you are minded to award the Rights to Alliance.’

THE CHAIR: That is Alliance to ORR.

MR YEOWART: On 17 February in response to a series of questions from the ORR on 14 February. It’s Annex D.

MR BRANDON: It’s Annex D of an additional piece of information, the second piece of information that was requested in the whole timetable process, I believe.

THE CHAIR: That’s telling the ORR of the intention that, if Alliance were successful in its bid, Grand Central would run the trains as Alliance’s agent.

MR YEOWART: Yes, there is a formal way of dealing with it for another operator to operate the services on your behalf, which does happen. DRS has done it for Northern, for example, down the Cumbrian Coast, and DBS do, for a number of people, on odd occasions, provide crews.

THE CHAIR: Does that happen in the same way for passenger operations as it does for freight?

MR COOPER: Yes, it has done. Central and Chiltern used to something similar on their 16:50 out from Snow Hill to Dulwich.

THE CHAIR: What happened here was that, after that letter and after the bid, it changed from an Alliance bid, the resulting service being operated by Grand Central as agent, exercising Alliance’s Rights, to Grand Central applying for Rights in its own right, and with a view to operating those Rights itself. It’s agreed that that was a change. What actually happened was a change from what was expressed.

MR YEOWART: Yes, that’s right, although the regulator was partly expecting something might happen, hence he wouldn’t have asked the question otherwise in the first place.

MR COOPER: To give an example, I think Matt was saying where we’re not aware of where

other operators bid for Slots and another operator takes over. It happens at franchise time and it changes. Other operators bid on behalf of another operator and take those services forward.

THE CHAIR: Yes, let's just deal with that one. My view, unless you're going to try to persuade me to the contrary, is that the change and transfer of bids and services, ownership of Rights, ownership of assets and everything else that takes place on a change of franchise is not analogous to what happens in the course of timetable development and the process through Part D of the Network Code. There is a very clear statutory process with statutory procedures for statutory transfers of Rights, obligations and assets on a change of franchise, which is, in my view, entirely different from what happens during the bidding process for timetabling purposes under the Network Code. Would you disagree with that?

MR COOPER: I disagree that the statutory process is clear, because it's not and there are different ways to do it. What I would say is you have the Network Code that the operator still has to adhere to, whoever it is who's taking it forward, and you've got the statutory process that usually transfers the contracts. This doesn't appear to deal with it; the Network Code doesn't appear to deal with operators changing; it just happens. It appears to be silent to me.

THE CHAIR: I was going to come back to that, because that's in effect what you said in your first statement: that the Network Code doesn't say anything about change, in this context of the timetabling process. You appear to be deducing from that that, because it's relatively silent on it, therefore it can happen.

MR COOPER: Yes.

THE CHAIR: I will take issue with you on that. I would say that, in order to effect this change between legal entities, which in the context of this particular process under the Network Code are referred to as 'Timetable Participants', to sanction that sort of change, the Network Code would have to say 'the contract'. The Network Code, remember, is always part of a contract. The Track Access Agreement between an operator and Network Rail is the only way in which it has life, as incorporated into a bilateral contract between an operator and Network Rail. The Network Code does not have life in the abstract, apart from that.

MR COOPER: It does by way of a letter, Part D does. You don't have to have a contract to enter into Part D.

THE CHAIR: You will only get the right to have participated in Part D by virtue of acquiring the Rights after the event through a contract.

MR HANKS: No.

MR COOPER: No.

MR YEOWART: No, if you agree to be bound by Part D of the Network Code and provide a letter to Network Rail, which we've done, then that then entitles you to participate fully.

THE CHAIR: Yes, but you will only crystallise the Rights eventually, and retrospectively the right to have participated in the preparatory process through Part D, by eventually acquiring Rights through, as Grand Central was seeking to do, either a supplemental agreement to an existing contract or, if it had been Alliance, a new contract. That's the only way it can happen. If the dispute were to arise at a stage before a Track Access contract had been either put in place or amended, as the case may be, as to the Rights of an expectant Timetable Participant, again that only arises as a matter of bilateral contract. The letter, and its acceptance by Network Rail, amounts to not even a collateral contract; it is just an ad hoc contract between the would-be timetable – well it's not would-be – it's an actual Timetable Participant but, by signing that letter, you're signing up to a sort of preparatory bilateral contract with Network Rail, which includes the rights to be dealt with according to those provisions of the Network Code.

The Network Code does not just sit there. It's not a regulation that applies to everybody by some sort of overarching statutory provision. It only takes effect as a matter of contract. That is borne out by the fact that you say you have to write a letter. That is itself a preliminary contract.

MR COOPER: It's a contract, yes. What we're saying is there is a process. You don't have to have an existing Track Access Contract. You can sign up to a letter with Network Rail and then you agree to be bound by those Conditions.

THE CHAIR: You agree to be bound and that agreeing to be bound is itself a preliminary contract, which will be eventually replaced, if things go forward, by a Track Access contract or an amendment to an existing Track Access contract. The point of where I'm going with this is that the system operates, as a matter of contract, between legal entities;

you can't have a contract between different parts of the same legal entity. For the purposes of the Network Code and Part D, the legal entities participating in it are called Timetable Participants. As far as the operators are concerned, they may be operators that already have a Track Access Agreement or they may be people coming to the table for the first time without a Track Access Agreement, who therefore enter into this preliminary agreement via the letter, which incorporates the right to be dealt with according to the Network Code.

The point of it all – where I'm going – is that the Timetable Participant, which participates by virtue of one of these types of contract, is a specific legal entity that makes a bid. The bid is that of that legal entity. The fact that the Network Code, incorporated in the contract between that legal entity and Network Rail, does not expressly say you can't transfer your bid in a binding way to another Timetable Participant, which has a different contract than Network Rail, does not mean – in my view legally, which is why I have been inviting your observations on this – that such a transfer can be made and have legal effect. In order for such a transfer to be made, to be capable of being made and having legal effect, in my view, the Network Code, the contract, would have to expressly provide a procedure for it – to permit it and provide a procedure for it to be made – and it doesn't. Because it doesn't, you fall back on the default legal position, which is that a legal entity operates in its own right discretely, and the rights attach to it, the obligations attach to it, and that's the end of the position.

Now, I invited you to argue against that conclusion and you're welcome to have another crack at it, if you want, because I think it's fair that you have the opportunity to do that. That's why I was also asking if it's asserted anywhere that there is something overarching that I haven't considered, which facilitates and powers this sort of transfer from one Timetable Participant legal entity to another, for example by diktat of ORR, through some power ORR has as part of the process. I don't see that being asserted by anybody. I certainly haven't found any such power.

MR COOPER: I think what happened is the bid was moved along without any question about the change in ownership. What we thought was that, if there would have been any concerns about that, they would have been raised under Network Code 2.4.7, which would have been a revised Access Proposal. That didn't happen.

THE CHAIR: Sorry, any concern, what, on the part of Network Rail?

MR COOPER: Yes. If it was such a big issue, this change of operator, then surely it would have been a revised Access Proposal and we could have dealt with that there and then.

MR HANKS: Do you want to read that out, John, I think it would be helpful what it says in 2.4.7?

MR COOPER: 2.4.7, yes: 'Network Rail must notify the Timetable Participant of this fact...' Sorry, I'll read 2.4.6 as well: 'Where a Timetable Participant has: (a) submitted an Access Proposal which cannot be accommodated in the New Working Timetable...'

THE CHAIR: Let me find it. Just so we're clear, this is one of the issues where which version of Part D we're dealing with –

MR COOPER: June.

MR YEOWART: It would have been March at the time.

THE CHAIR: I believe that, for the purpose of this issue, which is what happened up to and as at the Priority Date, we're talking about July 2011 version.

MR BRANDON: Yes, but I do believe it hasn't changed in this copy I've got, but we've got both copies.

THE CHAIR: Okay, so we're on 2.4.7.

MR YEOWART: 2.4.6.

MR COOPER: I'll read it out: 'Where a Timetable Participant has: (a) submitted an Access Proposal which cannot be accommodated in the New Working Timetable; or (b) a Train Slot in the Prior Working Timetable which cannot be accommodated in the New Working Timetable; or (c) submitted a proposal purporting to be an Access Proposal but which is defective or incomplete, 2.4.7, Network Rail must notify the Timetable Participant of this fact, as soon as possible after it has become aware of it, so that the Timetable Participant has the opportunity to submit a further Access Proposal under Condition D2.4.1(c).'

THE CHAIR: They're very odd grammatically these two. In fact, 2.4.6 and 2.4.7 are part of the same sentence. Are you saying on that then that the Alliance Access Proposal in expressly proposing that its bid, if successful, should be operated by somebody else, i.e. Grand Central, was defective or incomplete, for example, as under 2.4.6(c), and Network Rail should have spotted that?

MR YEOWART: I think, to be fair, it would be unreasonable to expect Network Rail to have spotted it if it had just happened quietly, but it hadn't happened quietly. It was clear discussion.

THE CHAIR: Yes, there would have been a lot of discussion. It was all open and on the table; I understand that. Two points on that: one, I don't think you are actually saying that Alliance's proposal in proposing openly and discussing with everybody that, if successful, the train would be operated by Grand Central was defective or incomplete. I don't think we are saying that. As I said at the outset, I think the position, if you had gone ahead on that basis with the proposal continuing to be that of Alliance and Alliance applying, through Section 17 or Section 18, for the Rights necessary to give effect to that proposal and had got the Rights and got the Slot as Alliance, eventually, and then the trains had been operated by Grand Central or anybody else as agent on your behalf, that would have been an entirely different situation. In other words, proposing to do that wasn't a proposal that was defective or incomplete.

MR YEOWART: I think what we're saying is, when we'd advised Network Rail and the regulator that this is what we were planning to do, if it was not correct to do it that way, that's the conclusion I think –

THE CHAIR: No, that's not the conclusion we're coming to.

MR YEOWART: By changing the operator and therefore the request to the regulator for the Rights to Alliance to Grand Central at that time, then we wouldn't have done it, because we would have continued on.

THE CHAIR: That's not what we're saying. That's why, to my mind, you can't say it was a defective or incomplete proposal, and Network Rail should have spotted it and given you another crack at it. We're not saying it would have been defective, incomplete or unworkable to have the actual services operated by somebody else than the Rights holder. What we're saying is that actually the Rights holder itself changed from Alliance to Grand Central, and that is the technical legal difficulty you face.

MR YEOWART: I don't dispute anything you've said up to the very last piece. The PDNSes are not dealt with on the day. They're not all looked at and dealt with on the day and most of them go in at right at the end of the day. They're dealt with over a period of time. What we're saying is our PDNS submission became defective the minute we

advised Network Rail that we were now proposing to operate this service under a Grand Central contract directly.

THE CHAIR: Can I stop you there, Ian? I'm not persuaded that that's right, I'm afraid. I'm not persuaded that Alliance's proposal was defective in proposing openly that, if the Rights were awarded and were made good, the actual service should be operated by Grand Central. We haven't explored in detail and I don't propose to explore what would have actually been the position for one passenger operator to operate the Train Slot bid for and put in the timetable for another operator. I don't think we need to go into that. I'm sure it's obviously done in the freight world, but there are different procedures for that. Whether it is and can be done in the passenger world we don't actually need to determine today, because that's not what happened here.

What happened was the bid was made for Rights to be acquired by one person, one Timetable Participant, and after the bid had been made, and notwithstanding what you say about in practice obviously the PDNSes are evaluated over a period of time, the actual priority – which is a point you have made in your submission – crystallises in theory as at the Priority Date. What happened was that the Rights bid for were eventually not going to be operated by somebody else, but applied for and therefore effectively bid for by somebody else, 'somebody else' in the sense of a different legal entity, a different Timetable Participant, Grand Central, a different company. That's what actually happened. It may be an unfortunate technical oversight, but I can't at the moment see a way of getting around that.

MR YEOWART: You may be right, Chair.

THE CHAIR: The legal distinction between the two legal entities.

MR YEOWART: Indeed, one of the reasons that we're here as well is to get some clarity, so that these sorts of issues don't come up again. I would just again point out however that the offers made to us were always for the Alliance pass, not for Grand Central. You're right.

THE CHAIR: The offer later on?

MR YEOWART: From Network Rail was always identified as the Alliance pass.

MR HANKS: The offer from Network Rail made on 8 June was to Alliance Rail Holdings.

MR YEOWART: Not to Grand Central.

THE CHAIR: There's a difference between an offer made for something called the 'Alliance pass' and an offer addressed to the Timetable Participant, Alliance.

MR HANKS: There were two separate letters and they were both addressed to Alliance, one on behalf of Grand Central, the other one directly to Alliance.

THE CHAIR: The one we're talking about?

MR HANKS: Yes, the one we're talking about.

THE CHAIR: Was that addressed to Alliance on behalf of Grand Central?

MR HANKS: No.

THE CHAIR: That was addressed to Alliance as Alliance.

MR HANKS: We'll just check the details, but it was definitely addressed to Alliance. *[Pause]*

THE CHAIR: Sorry, we're just looking at the offer letter I think we're talking about, which is dated 8 June and addressed to Chris Hanks and Alliance Rail Holdings. I'm just looking for the 16:08 service. It's TTP494.

MR HANKS: The reference is a train identity 1D81 GB, if that helps. *[Pause]*

THE CHAIR: I'm sorry; I can't find it at all in here.

MR BRANDON: There are actually two offer letters, both dated 8 June. The first page looks almost identical, and I believe they were at Annex I in the sole submission document, I think – Alliance's sole submission document or Grand Central's sole submission document. I'll just clarify that for you. *[Pause]*

MR HANKS: In fact, I have to say that neither letter makes reference to train operator by name, but they are two separate letters.

MR BRANDON: One of the letters is in response to the Grand Central PDNS and the other is in response to the Alliance PDNS, so they have differentiated between the two PDNSes and written two different offer letters.

THE CHAIR: Got it in the other one, 1D81 GB SX 16:08 Kings Cross to Wakefield.

MR HANKS: That's correct.

THE CHAIR: 'Rejected in conjunction with Decision Criteria...' By that time, 8 June, the offer date, as I understand it, unambiguously that service and, in fact, all the services in this letter and that's why there's a different letter than the other one addressed to Alliance on the same day, unambiguously were regarded as being services to be operated, if they'd been accepted or not, if they were rejected as here, by Grand Central in its own right.

MR YEOWART: Yes, that's correct.

THE CHAIR: Therefore, the fact that that letter is addressed to Alliance Rail Holdings – as with all these letters, it doesn't even identify the name of the company properly. It doesn't put 'Limited' after it. It's all pretty casual and informal. Would it not be fair to say that that letter, since all those services were Grand Central's, were known to be going to be operated by Grand Central in its own right, was addressed to Alliance as agent for Grand Central?

MR YEOWART: I wouldn't have thought so, to be fair, because it was always referred to as Alliance Services, despite the fact we put a Section 22A application out. I think that letter was addressed directly to Alliance.

THE CHAIR: Could they be Alliance Services?

MR YEOWART: Sorry, just one second. *[Pause]* Okay, the guys have just handed me the letter on 14 March that we sent to Network Rail to state that the West Riding Service Group, which are the ones we're talking about there, were previously Alliance Services but they will now be Grand Central Services, and additional trains are being bid for from December 2012, to the regulator, through Section 17. I'm coming back to if there's a technical error in the way that we made the application initially, then there is.

THE CHAIR: It's not an error; it's a fact.

MR YEOWART: It is after the event, but I think you can see that the –

THE CHAIR: One is just trying to analyse the facts as they are.

MR YEOWART: We fully understand that, because we've said, Chair, we need to make sure, because these are so critical to a smallish company, that these issues are dealt with.

THE CHAIR: That's why we're going into it in a lot of detail.

MR YEOWART: We're very appreciative of that and we're fully supportive of the point. I think on this one, I would have to accept what your initial decision basically is, which is that, technically there are two legal entities; there's a change here. What we're trying to show here is the difficulty, particularly for a new operator, of trying to get into network. At that particular time, we told Network Rail on 14 March what we were doing. Had it been clear that actually that will drop you down the pecking order; 16:08 will potentially drop to a similar level that I believe East Coast was at, actually below us and not in front of us, then we wouldn't have done it, because it would have been easy to have made a

Section 17 application on the back of Alliance.

THE CHAIR: Well, relatively.

MR YEOWART: It is; it's the same document but just written differently. That's all. The decision would probably have been the same, because it was ultimately rejected, as you know, at that particular time. One of the biggest frustrations here is the complexity of the Network Code, and the inability now, in a way, for everybody to pull the Code together and apply it correctly. I know it's probably not relevant to the 16:08, but had we been offered the path that was clean and identifiable, we wouldn't be here and we wouldn't be arguing about this technicality. I accept the point that it was a different legal entity.

THE CHAIR: If that's the conclusion we come to, I believe it's important for you and other people to know that this is a bit of a technical tripwire, particularly for people in your position. Just as in other contexts we say to Network Rail, 'Look, you can't be too lax in operating these procedures and sort of saying, "Well, it doesn't matter; we'll just try to get a decent result,"' the same holds good for operators in, as it were, playing it by the book. There is an important distinction, which you all need to be aware of, between different Timetable Participants. You can't just take a sort of free and easy view that we don't quite know which company it's going to be, so we'll talk about Company X by Monday and, by Friday, it will have shifted slightly to Company Y, because we're all in same group now.

MR YEOWART: The issue here is we have to think a bit further strategically forward now, as a group, when we're doing these types of things. The expectation was that, having identified a clean path around the time of this 16:08, we would be offered it and, therefore, the issue was not likely to arise. But it has and it has come back to bite us now. We need to make sure that, in future, that doesn't happen. The technicality of the Network Code is critical. You're right; if we've fallen foul of it, then we've fallen foul of it, but Network Rail must also apply it.

THE CHAIR: We're coming to that. We're coming to that; don't worry. We'll just finish off on this one then. I think we've dealt with the argument that, because Network Rail doesn't say you can't change or transfer from one Timetable Participant to another, you can. That is not the case. In order for the Network Code to provide for it, the Network Code would have to provide something express for this and it doesn't. The one

remaining point, which we can be quite short on then, is the one that was raised in the issues as we sent them out to you, which is that there is another document, another piece of legislation relevant to the whole situation, which is the Infrastructure (Access and Management) Regulations, which on the face of it do expressly appear to say one Timetable Participant may not transfer capacity. It's dealing there with capacity in the large sense, but that means, for practical purposes, Train Slots.

MR YEOWART: I think this one is slightly different on that.

THE CHAIR: Had we not got to where we'd got already, I was going to invite you to say why that doesn't –

MR YEOWART: There is an issue on that one, in respect that, until the regulator actually approves a Slot, then there's nothing to transfer. On this occasion, it's not relevant to us because, unless the regulator had said yes, then we've got nothing to transfer. I know you can't trade Slots, and clearly that's not what we were seeking to do. That issue's not relevant to us at this stage.

THE CHAIR: Yes, it does use the expression 'trading in' rather than 'transferring' capacity. No, it uses both.

MR COOPER: It uses 'transfer'.

THE CHAIR: This is regulation 16(6).

MR COOPER: 16(6) says, 'Subject to paragraph (8), an applicant who has been granted capacity...' Nobody has been granted capacity here, so you can't go down transferring it until you've been granted it.

THE CHAIR: You're saying, in this case, the transfer, if it was a transfer, was a transfer before any capacity had been granted or before the train path had been granted.

MR COOPER: But there's nothing to transfer.

THE CHAIR: It's not of itself prohibited by this particular regulation.

MR COOPER: The other thing as well is, for it to be transferred, bearing in mind that Network Rail was advised on 14 March – that's when we told them this was going to be a Grand Central service – we hadn't been allocated any capacity at that point. The offer was 30 June.

MR HANKS: No, 8 June.

MR COOPER: So it's only on 8 June, after Network Rail was advised.

THE CHAIR: You're saying this regulation doesn't bite, in its own right, until after the offer. It was by virtue of the offer date that capacity is granted or not granted.

MR COOPER: Yes.

MR YEOWART: You may need to caveat that as well, keep that and think about that further because, until the regulator says, you haven't got any Rights at all. Although at the offer date we might have been offered some capacity, until the regulator says yes, we still have nothing.

MR COOPER: That applies to train paths as well.

THE CHAIR: Fine, well thank you for that. We will think about that. If that's right, what that means is that that regulation in itself isn't the kind of killer blow and we're back to what we've just been talking about anyway, which is the effect of the Network Code not giving any power and the effect of there not being apparently any other source of power, for example for ORR to direct or permit a transfer of putative rights, as opposed to actual granted capacity, from one Timetable Participant to another. Does anybody have anything else they want to say on that issue – Grand Central, Network Rail?

MR LEWIS: No, thank you.

THE CHAIR: Colleagues, anything? Any other questions? Thank you very much. Do we need a short break – that's the end of that issue – before we come back to the next one?

MR YEOWART: I'm okay to carry on, as long as everybody else...

THE CHAIR: Well let's proceed and try to deal with the next issue then, which is in substance if Network Rail needs to produce the entire PDNSes covering the services that are in dispute, as to whether they're in conflict or not, in order to produce a full evaluation. This issue has been sort of compounded by the formal request, as part of this process, in the intervening period between the last hearing and this reconvened hearing, by Grand Central for disclosure of some PDNSes, which we rejected for the reasons we gave; the reasons being, first and foremost, that what was being asked for was so broad as to be unworkable really. Can I just ask Grand Central if they want to make any observations on that particular bit of the process and the fact that that particular request was rejected and the reasons for that rejection?

MR COOPER: The only thing was we accept it was very wide but, until you get hold of the PDNSes, you don't know which bits you're actually looking for. We would see that you

get hold of the PDNS to actually identify whether a Right's been Exercised. You actually go through it. It was very difficult for us to specify a specific point; that's what we're saying. We would hope that Network Rail would have done that, but we don't believe that they do.

MR YEOWART: The issue with PDNSes, as has been found over the few days we've had here, is that they are critical and that their compilation is critical. Hence, they produce a template for you generally to complete, which is what Alliance and Grand Central did. I find it difficult to understand why they don't publish them, as a matter of course, because they're created and then we can scrutinise them in the way that we scrutinise contracts to ensure that the PDNS is complete. If it's incomplete, then it has an impact, again in relation to the Network Code, people's rights and where they should stand in the Network Code at the bidding time. We have been a little disappointed that Network Rail has been so reluctant on so many occasions. As we've seen, we know that some PDNSes now are deficient that they are so reluctant to share what is clearly shown by the Network Code not to be a commercially confidential document.

THE CHAIR: What we are considering here though is not, I think, whether it is necessary, desirable or quite a good idea or not for everybody's PDNSes to be put on the table in the grand scheme of things, in the course of the timetable preparation process. That's not what we're here to determine. The issue here is if it's necessary to adjust a competent determination of this particular dispute to have the whole PDNS covering the relevant services and alleged conflicting services in dispute, to have the whole PDNS on the table. My preliminary view, I'll be quite straight, is that it's not necessary.

I think, from what we've seen, the huge amount of information provided, which has all been very helpful, where it comes to particular details of conflicting services, and we will come to that when we get into the points on some of these preliminary services later, Network Rail has been quite open about what was bid for by other operators and the detail of it, which is alleged to conflict or not. Some of those we can go head to head as to what is said and whether the conflict is real or not, whether it could have been adjusted and all those points. In terms of what is submitted by Network Rail as representing in substance the content of what would have been generated as a particular piece of a PDNS of some other operator, we as a panel are entitled to take that at face value, as we do

every other piece of evidence and information that is submitted to us. As I always say in the written determinations – because this isn't made entirely clear in the Access Dispute Resolution Rules – we treat the evidence submitted as true, as if it had been given in more formal tribunal proceedings under oath as being true, unless there is a very good reason for doubting it.

Now, I'm going to ask Network Rail in a minute to opine on this, but my provisional view on something like these PDNSes is, where Network Rail or any party produces detailed information and says this is the case – 'This is the result of a particular process and this is how it worked out' – we take that to be true. The default position is that we take it to be true, unless somebody produces an argument or conflicting evidence to the effect that it isn't. It's not a sufficient argument to say, 'We can't tell whether it's true or not without seeing everything else on which it was based.' Would you like to come back on that, because in effect that's what you're saying in your submissions: that you don't know what you don't know, and therefore in order to know what you might not know, you need to see everything that could conceivably be relevant?

MR BRANDON: To clarify from our point of view, you're quite right in that you should take things at face value; however, our concerns arose out of the significant issues that we'd seen with the East Coast PDNS. We believe that that was a deficient PDNS. Had we not requested to see that, Network Rail had claimed it was a complete PDNS and had acted as if the PDNS was correct, and they assigned them priority 3.

THE CHAIR: Sorry, which one are we on?

MR BRANDON: The East Coast PDNS. We believe that that was a deficient PDNS. Had we not seen that PDNS and not raised the argument that it was deficient, Network Rail would have just continued to accept that that PDNS was correct and that they had issued the correct priority. Since we saw that, we believed that it was deficient, so clearly there was some difference in the way Network Rail had interpreted that PDNS and the way we had interpreted the PDNS. That leads us to believe potentially there are other concerns that we may have with other PDNSes. We can't be content that what Network Rail is saying about those PDNSes is in fact correct, based on the issues we have found with the East Coast one.

MR COOPER: The other thing is, when Network Rail put its response to Grand

Central/Alliance, we went through that and there were a number of clashes with other operators. Without seeing that PDNS and checking for that specific train how Network Rail dealt with it, all we've got from Network Rail was it's within its contractual Right. There's a leap of faith to believe that that Right has been Exercised properly, and actually Network Rail had looked at the PDNS to make sure it's being Exercised properly. If it hasn't been Exercised properly, then you end up with quantum Rights. That's the bit we don't know. There were a number of trains that we spotted, and we just thought, 'Actually, there's an issue here. We don't believe Network Rail looks at PDNSes and we've got some evidence from our own side with how they dealt with the GC PDNS.'

MR HANKS: Explicitly we're concerned about the Exercising of Rights, and there should be a clear statement on the PDNS.

THE CHAIR: This is all on the issue of whether a Right was Exercised, which is one of the components of the prioritisation process.

MR HANKS: One of the things the PDNSes are required to do is to state where the Rights come from or where the Expectation of Rights comes from, and that's a key part that we want to understand.

THE CHAIR: It's one thing to say, in respect of a particular PDNS, which, I can't remember how, you did have access to, the East Coast one, and found some fault with it and found some non-compliance in some of the services bid for, with the Timetable Planning Rules, that's relevant. It's perfectly sensible to put it. In fact on that issue, and I meant to just wind up on the previous point and where it was going on that, because it gets to the relative priorities, if we're right on the Alliance/Grand Central point that effectively bumps the Grand Central bid down from 3 to 4. Then there is the argument that the East Coast bid itself should be bumped down from 3 to 4, because of the non-compliance of PDNS. Therefore, they both get considered as level 4 and therefore it's a question of Decision Criteria. That's the broad thrust of the argument, isn't it? Yes, the East Coast PDNS may well have been relevant in that case.

I believe that's different from saying that, in respect of every other service that we're considering as possible services, because there was a problem of some sort with that particular East Coast PDNS, therefore you can suspect that there may be a problem with every other PDNS.

MR COOPER: It's not just because of that. It's because, as I said, the Network Rail response that came to the panel listed out trains. For us to be certain that Network Rail had Exercised its Rights correctly, we needed sight of the PDNSes, so we don't know. The other thing I would say is that Network Rail, in all its responses, has never made any reference to the PDNSes being used. It refers to contractual Rights and states what the contract says, which is different from whether those Rights had been Exercised. There's just an assumption from Network Rail that the Rights in the contract had been Exercised. That's what our concern is.

THE CHAIR: We will see, when we get to the specific services, that it may well be relevant to say on a particular service that is asserted by Network Rail to have been conflicting with the service bid for by Grand Central, which is the nub of the argument, in respect of that particular service, one, was it in the PDNS and what was the contractual Right. The other one is to give the information, in respect of that service, that would have come from the PDNS. I can't see at the moment why, in order to get that information, it should be necessary to have the entire PDNS for whichever operator it was that happens to cover that particular asserted conflicting service, in order to trawl through it to try to find some hitch with it.

MR COOPER: You could say it's not; it's the relevant bit, but we weren't comfortable with the fact that Network Rail had used any of the PDNSes. Yes, you could say that, if we'd had spotted that it was a Northern service and a particular service, we could have focused in on that right.

MR BRANDON: I think you're correct; we should have been more specific in the way we made the request. We should have asked for specific points, relating to where we thought the PDNSes may be incorrect.

THE CHAIR: Would it be satisfactory then if, when we get to consideration of the specific services, we, as we will, ask Network Rail to point us to the information that's already given and, where necessary, to supplement that – I don't mean by providing further; I mean today – with what was in the relevant PDNS on that particular issue; and to accept what they say on that at face value, unless there is a positive reason for doubting it? To put it bluntly, unless you can say with some reason and substance, 'Network Rail, we think you're lying on that issue?' you can't say, 'Well, we're not sure whether this is

accurate or whether you're quite telling the truth on some of it, so we want to have a look through the whole thing to see if we can find something.'

MR YEOWART: The issue, Chair, is that we're more likely to move towards the latter part of your words just then. I am very uncomfortable about Network Rail's ability to provide the correct information that's required at any particular time. That's evidenced by our response to some of their responses. We were for example last time promised that we would see a copy of the rolling stock diagrams and then, within a week, that's not possible; we have to put a full response in, in relation to their return. You're also aware of a competition complaint with Network Rail, so it's not just in relation to here. I have a real issue with Network Rail and Network Rail's ability not necessarily to lie, but Network Rail's ability to be as transparent as it should be with the information it has at its disposal and its ability to share it with a company like ours.

We are in a particularly difficult position because we're a small company, despite the fact we're part of a big group. We're independent from the rest of the franchises within the group, and a non-operational company. This is about a small company, Grand Central. We've already identified a significant number of issues in relation to Grand Central in its timetable. We've already identified a significant number of issues where Network Rail has said one thing and then it's been different. As a result, it's quite reasonable for us to expect Network Rail if they say anything that we're uncomfortable about that they provide the evidence, as indeed we have to provide the evidence. Providing the evidence is provided – and I think we said it in my letter, unfortunately for Network Rail, I would not be prepared to accept it at face value. I would want to see the evidence. I think I've made that quite clear. Bearing in mind where we are and the responses that have taken place, I would want to see evidence of anything that Network Rail says that contradicts some of the things we've put forward or, indeed, seeks to answer a question that's put forward, when we're not comfortable with the response.

I see absolutely no reason why PDNS becomes such a problem. It's actually easier just to produce the whole document and let us spend some time trawling through it, than ask Network Rail to actually look at it and pick out the bits that are interesting. I suspect – and it's only me suspecting – that the reason they're not freely available is because the bulk of them are deficient in some way. I might be wrong and I will

apologise if I am. That's actually Network Rail's fault; that's the people who put in the PDNSes. I'm quite happy for all our PDNSes to be public. It is a public document – there's no commercial confidentiality within a PDNS – so why is it such an issue?

The reason I am suspicious is because I've had these issues with Network Rail since I first started doing this work in 1997, and it's never gotten even better; it's never gotten any clearer. It's just that now we have sufficient group backing to get to the bottom of it and we're slowly dragging that out now. I am uncomfortable about accepting what Network Rail says at face value, not because they're actually trying to mislead, but because I don't think they do the detailed work required to get an answer that they can justify with evidence. It's the evidence-based answers that we need.

THE CHAIR: I'll invite Network Rail to respond to that in a minute. Can I just say that, as a general principle, I do not think it is the job of this timetabling panel – it is not the jurisdiction of this timetabling panel – to address, in a general way, the discomfort and general suspicion that an operator has, however well founded or ill founded, with Network Rail's practices? It is not the jurisdiction of this panel to – as I think I said at the outset of the hearings – to grant some of the larger remedies and outcomes sought in the sense of general injunctive, for all time, 'Network Rail, this is an edict on how you should behave in the future,' or anything.

The function and jurisdiction of this panel, under the Dispute Resolution Rules, is to adjudicate the specific matters in dispute to equip itself with enough information that is accepted and not challenged, on any substantial basis by everybody, of that calibre to equip itself to make the necessary decision. I propose to do that by reference to the specific services which, as a matter of ultimately contract, are alleged to have been in conflict with and overridden the ones bid for, and to look at the information necessary to make a determination on those particular issues. Network Rail, would you like to respond or add any observations on that?

MR ALLEN: I don't know where to start really, to be honest. I'm not going to kind of sit here and say we don't read the PDNSes, but I do think it is a fair criticism to say whether they've got the right focus that points us in the right direction at the start of the process. I'm just reading this one here. I was looking for it as we were talking. There used to be a clause about rolling things forward and, for bigger operators and for ourselves, we got

into probably a slightly poor practice of using those very without words 'roll over' as absolutely everything else that you're entitled to is in that bucket and it goes with it. I'm not going to defend anything other than we perhaps use that phase far too casually around this process. I'm also looking at the PDNS template that we use. It very clearly states that it's referencing back to the Prior Working Timetable. Again, we know that we did that part of the process very inefficiently or didn't do it at all for the timetable we're talking about, so there's an error in the way we've done business there that's not disputable.

We've perhaps not used these documents as powerfully as we should do. I'm not convinced they've ultimately driven us to making the wrong conclusions as to what to include in the timetable, but there is something I recognise about perhaps being more transparent about how we've used them, and that isn't by any means saying we should publish the whole lot to everybody. I think we've got far too relaxed in perhaps some of the ways we do business with them, I suspect. I don't want to say much more than that, to be honest. A lot of what we try to do is to try to make these processes that are very complex as straightforward as possible to execute. I think we've perhaps not taken those decisions about trying to make the process streamlined with enough understanding of how these elements fit together in the processes.

THE CHAIR: Thank you. Andy, did you want to add?

MR LEWIS: It was just something on the transparency. It was just something to add. On request, we did actually give the East Coast PDNS to Grand Central with the blessing of East Coast initially. The second issue with the rolling stock, we were intending to provide those, but it did raise a bit of an issue with East Coast, who actually asked us... You did write to Tony. We were asked not to provide that on a confidentiality basis, and Shaun did actually write to Tony on that basis. We were asked not to do that. We had the document ready, but we were specifically asked not to provide it. It wasn't a case of not being transparent; we were trying to follow an operator's request, until you'd cleared it with Tony. It wasn't anything underhand; we were specifically asked not to provide it.

MR ALLEN: What strikes me is that we've got a flaw in everything we've just done really, because the PDNS template very clearly points to, 'I confirm that I'm Exercising my Firm Rights in the Prior Working Timetable you've published.' We never published that,

so how can anybody actually say that they are going to Exercise their Rights.

THE CHAIR: You are accepting that, in this case, you did not publish the Prior Working Timetable.

MR HANKS: Sorry, we dispute that.

THE CHAIR: You said that, in effect, what was produced was the Prior Working Timetable.

MR HANKS: We were issued with a Prior Working Timetable.

MR ALLEN: We're in a strange kind of halfway house. We produced a document that was...

THE CHAIR: Sorry, that's an important issue on other things. Are you still saying, Network Rail, specifically you did not produce a Prior Working Timetable.

MR ALLEN: Nationally, to every operator, to every Timetable Participant, we did not issue a Prior Working Timetable.

THE CHAIR: Do you agree with Grand Central that, for the purposes of dealing with them, it can sensibly pragmatically be said that whatever it is you did produce for their purposes was the equivalent of the Prior Working Timetable?

MR ALLEN: Yes, agreed.

MR LEWIS: It didn't fulfil the obligations of the full Prior Working Timetable.

THE CHAIR: It was not the entire national Prior Working Timetable as required by the Code. Thank you; that's very helpful, all that response, because it gives us some very helpful bases on which to evaluate the way in which these specific services that we're going to come on to do actually conflict or not conflict with the specific services that Grand Central is concerned about, and the issues of lack of transparency and so on that Network Rail quite candidly acknowledge. I think that's appreciated. They are very relevant to the specific things.

I conclude on this issue, for practical purposes and in order to move forward, that it is not necessary in order to arrive at a determination of these disputes to require Network Rail to provide all the PDNSes that might be asked for, even if they were to be identified, which they haven't been yet. I conclude that, for the practical purposes of getting to a decision in a sensible timeframe, we can go to the specific services and, where necessary, ask Network Rail to attest to what was the content of a particular PDNS, if that is relevant to a particular service, and to take that at face value, unless a very good reason is given for suspecting that it may not be accurate. That's the basis on

which I would like to proceed.

As I've said, I do not propose to embark on the very interesting but not ultimately germane to these proceedings issue of whether PDNSes, in general, should be put on the table and how PDNSes are treated as a matter of legal obligations and confidentiality, because I see that as a bit of a minefield. From what I've seen, there are various conflicting provisions in different sets of the whole regulatory matrix, ranging from licences and regulatory provisions through to the Network Code, the Timetable Planning Rules and all sorts of things, as to what should and shouldn't be kept confidential according to who wants it to be kept confidential and who doesn't want it to be kept confidential. Actually, trying to resolve the conflicts between some of those provisions would certainly be a useful exercise, but that's an exercise not for this panel.

For practical purposes that disposes of the second general issue. Again, mindful of the time, the third general issue I hope we can deal with quite quickly, so I'd like, if everybody is happy, to go straight on to that and then we can have a break and possibly do lunch at the same time. Is everybody happy to –?

MR HANKS: Could we have a two-minute break, just a comfort break?

THE CHAIR: We will have a short break.

(Adjourned)

THE CHAIR: The other general issue that I want to try to deal with as quickly as we can is, as raised by everything we've heard so far, and again focused on in Grand Central's latest bout of further information is that the timing of Network Rail's application and rationalisation of the processes it has to apply is relevant; in the sense that, if it's only coming up with the analysis and justification for how it has applied – and the two processes we're concerned with here are, one, prioritisation according to Condition D4.2 of the Network Code, and secondly the process of applying the Decision Criteria, where they become relevant because of conflicting services of the same priority – it applies its justification retrospectively, and particularly retrospectively in the context of a dispute and for the purposes of that dispute. That is not as good as, less valid than and arguably not sufficient as it would have been had it applied that analysis and communicated it at

the time of actually implementing the process.

It seems to me that there are two different variants of this to consider, because the outcome of each might be different, I think. One is the more simple situation where, in either dealing with the prioritisation or applying the Decision Criteria, Network Rail hasn't really communicated anything particularly clearly at the time of or immediately after doing it, but has only really retrospectively come up with a more precise analysis of the thought process, because it's been required to for the purposes of dispute. The other is where Network Rail has actually communicated some or all of its thought process at the time and then, when it's asked to provide its comprehensive analysis of what the process was after the event and for the purposes of the dispute, it comes up a new or modified version of what it has previously provided. That second variant is, in several cases, what Grand Central is alleging as being the case. The general issue I want to look at is whether, in legal contractual terms, Network Rail doing it in either of those ways somehow invalidates the justification it gives and therefore prejudices the analysis to the point where it can be said that it doesn't stand up because it has either been given retrospectively or changed retrospectively, and whether that in itself is a knockout blow.

I ought to make clear my provisional view on this – and I have held this in other determinations on other timetabling panels, and it has been held by other Chairmen on other timetabling panels – is that, at least as far as the application of the Decision Criteria is concerned, not necessarily the other case of applying the prioritisation procedure, but in terms of applying the Decision Criteria, it does not invalidate Network Rail's application of them if the justification is, to some extent, worked out retrospectively, provided what is worked out retrospectively doesn't clearly differ from what was happening at the time and the way the Decision Criteria were applied at the time. The fact that Network Rail sometimes comes up with a grid in which it goes through the things and applies weighting to them after the event, it has been held, is not an invalid way of doing it, partly for practical commonsense reasons that to require Network Rail to have done the formal analysis, grid process, gone through that and argued it at the time, in respect of every bid and service, would be impossible practically and would just completely choke the whole process. That in substance admits a degree of retrospective analysis as being a valid way of dealing with it. Now, having said that, let's hear your

observations.

MR YEOWART: I disagree with that, Chair, as I'm sure you would expect me to. I thought, although I'd need to see the actual wording, we'd agreed at the last hearing that they would not retrospectively try to fit and that that was made quite clear, the Decision Criteria. I disagree that it would clog the system. There can't be hundreds of trains that need to go through the Decision Criteria. I don't know of any on ours; this is the only one. Generally, while freight may be possibly but, certainly in the passenger world, most passenger services are rolled over, except on the routes where you have open access, and that's the issue that we have here.

THE CHAIR: Sorry, are you saying in the case of services that are rolled over, because they have Firm Rights, therefore they're always in 1 or 2, and so conflicts of priority don't get to be considered, so the Decision Criteria don't. There isn't a welter of decisions to be made at the time of adopting the process.

MR YEOWART: Network Rail would know if there are, but I'm not aware if there are. Even so, even if there are, Network Rail is funded to do the job properly in relation to the Network Code. The argument you're putting forward is a bit like saying we're only little and no; 'We don't know why, but we'll just say this for now and we'll have six months to sort it out.' That's a bit like making it fit after the event. In no way can this be correct.

This was one particular train, only one train, that they had to issue. Ignore for the moment the fact that the 16:08 train to Newark is non-compliant and therefore should not even be in the new Working Timetable, so therefore we never get the Decision Criteria, the fact is the Decision Criteria are a pretty straightforward set of rules to come to a decision on. Based upon these two services, we've not seen anything that Network Rail has put forward that justifies either, from the first decisions that they make, for which we put in a response that was ignored, because there was absolutely not one word changed in the final decision, and where we are now. We've put a full response in for that.

In relation to retrospective fitting, as a small operator on the network, we would find that to be a barrier to entry; it would be a clear contradiction in fairness for Network Rail to be able to do it. I'm sure East Coast would argue exactly the same point had it come down in favour for the 16:08. I find it actually quite lax to believe that Network Rail, with all its resources, would need time to be able to make a decision. Bear in mind

they had quite a lot of time, from the PDNS submission to 8 June when the actual awards were made. That is a significant amount of time, from March to June, on what is one train. If you think how much time we've had to spend trying to detail and get to where we are, to apply the Decision Criteria is for me a pretty simple thing to do; it's a fair thing to do and it is not something that I believe could be done retrospectively and be seen to be fair. I think that's one of the biggest issues that we've got.

THE CHAIR: I think we'd all accept that whatever, as a matter of correct interpretation, Network Rail is required to do by the contract, by the Code, it must do and it doesn't lie with anyone to say it's too difficult, too complex or too expensive to actually do what the contract requires it to do. I think we'd all agree with that. The issue is more what does the contract require it to do when you actually interpret the contract, in this case the requirement to apply the Decision Criteria. The interpretation, which I and other panels have held previously, is that the requirement to analyse and communicate the analysis of the reasons for application of the Decision Criteria is not necessarily something that has to be done at the time if, in substance, it can be analysed at later date, in a cogent way that's consistent with what was actually done at the time.

MR YEOWART: I would agree with you there, Chair, if that was a decision on no application of the Decision Criteria on any of the competing applications, but it is impossible to apply the Decision Criteria without actually having applied the Decision Criteria at the time. If you said, 'I've got two here; I'm not sure so I'm going to carry on working and I'll let you know later...' To say, 'I've got two here; I'm not sure but I don't like that one, so no, and I'll find a reason to make it fit after,' is very different from just applying it where there are two –

THE CHAIR: You're actually pinpointing one of the instances of what I was just saying, the obverse, which is hypothetically a situation where Network Rail has not in substance applied the Decision Criteria, but comes to it clearly after the event, looking back at it, rather than in substance in a general way applying it, and then sort of filling in the rationalisation and detail after the event. I think those are different situations, and I would agree with you that, where it's clear that simply the Decision Criteria have not been applied, but some other thought processes are gone through of a general 'let's just try to make it work' nature, yes, I would take your point on that.

On 4.9.4, the conflicting East Coast, am I right in thinking that, by definition, given the decision it took on prioritisation, namely that Alliance/Grand Central was... Is this right, level 3? The East Coast was at a higher level.

MR BRANDON: No, Network Rail assumed they were both level 3 priority.

THE CHAIR: Sorry, that's absolutely right; I'm wrong. Network Rail in prioritisation said they're both at the same level so, at the time, knew it had to apply the Decision Criteria. There was an effort made at the time to apply the Decision Criteria.

MR HANKS: Not an effort; there was a communication of the application of the Decision Criteria.

THE CHAIR: It was communicated to some extent or to no extent at all?

MR ALLEN: The 30 April letter.

MR HANKS: It was very clearly communicated and referred to again in the offer letter.

THE CHAIR: On that one, you would say that it's my second variant. It's not that they didn't apply it; it's that they did apply and also transparently made known the rationalisation for it, but have subsequently changed it.

MR HANKS: That's what I find unacceptable. I can understand the arguments where perhaps the analysis hadn't been done at all in the first place, but where it has been done and then changed after the offer that does seem to be extraordinary.

THE CHAIR: You would presumably conclude, if we get to the position of saying the two conflicting services are of the same priority, only they're both level 4 and both not level 3, the same point applies: that they're conflicting; therefore the Decision Criteria applied and actually they've changed their mind. The retrospection there, you would say, is appreciated.

MR HANKS: Not only have they changed their mind, but they've actually stated now that they have applied a weighting. In the original letter, they'd clearly stated that they hadn't applied any explicit weighting.

THE CHAIR: We'll come on to the specifics of that, but I'm just trying to get the general principle. We still need to bottom out the other half of that, in case it becomes relevant on the others; as to whether, as a matter of principle, broad retrospective analysis is okay, where there has been in substance an application of the Decision Criteria at the time. Network Rail, what do you think about that?

MR ALLEN: Sorry, can you ask the question?

THE CHAIR: I'm coming back to the general question of what you think your position is as the network operator obliged to apply the Decision Criteria contractually, in certain circumstances, if what happens in practice is, as you freely acknowledge to be the case and have done on many occasions, you don't go through it with a fine toothcomb at the time; producing for example the grid, setting out all the different criteria and the weighting you give to each one, in respect of every decision that is made along the way requiring the application of the Decision Criteria, but that you, Network Rail, apply it in a general sort of way and, when necessary afterwards, get down to the detail to support rather than change the application that has been made at the time.

MR ALLEN: I don't accept the application of the Decision Criteria was a straightforward thing. I think it's an exceptional, complex thing to do and it is very bespoke. For every individual trade-off you're having to make, for every decision you're making to de-conflict two train schedules, for every conflict you get, actually your thought process can be quite bespoke for each one you're trying to trade off against. They're a fairly subjective set of rules to apply, if I was being honest about it. The way we think about it, as long as we're getting the core theme right, so I can link it back to the objective that your decision-making goes; the way we think about it is, if at the start of the process you've got underlying how you will apply the Decision Criteria, you're thinking about it and you're making those decisions, then it is acceptable then to build on that with more granularity of detail that you require to present the case in a forum like this, as long as there are a couple of real core items that remain the same through the use of the Decision Criteria.

The other thing is that actually information is constantly changing. Different operators bring different bits of evidence throughout the process, when you start applying the Decision Criteria, which should not stop you from re-evaluating how you've used them, how you have looked at them, when the information comes to light. We've sat in forums like this many times, when actually new information gets presented and actually it challenges some of your original thought process about how you used the Decision Criteria to start with. Because they're subjective like that, I don't think that's an inappropriate use of the Decision Criteria.

THE CHAIR: That does of course assume that you did use the Decision Criteria in a conscious and communicated way in the first place, as opposed to just in a kind of subconscious 'we know roughly what we're doing' sort of way.

MR ALLEN: We shouldn't retrofit the Decision Criteria. We should be clear that this is along the lines we're going and I think it's acceptable, as long as we're making those kinds of points, that you can take those points and build on them with different sorts of granularity of information as time goes on.

THE CHAIR: Colleagues, anything more you want to know?

MR THOMAS: What I want to know is how many decisions does Network Rail make. I don't want a precise number.

MR ALLEN: Thousands is the thing, isn't it? The timetable is always moving. We're always making slight adjustments to the timetable that will give you a different view of the list of trains that conflict with another schedule, at any point in time. Some of the reasons why we've probably got a slightly different list of trains in the later information to the earlier information are because the timetable has moved on. Things only have to move by 30 seconds and what was compliant before is non-compliant now. Those kinds of movements in the timetable are happening every day.

MR THOMAS: How many of those do you think result in a train not being offered, rather than one being Flexed by another? There must be a difference there.

MR ALLEN: The only number I can give you, Paul, is what we do for spot moves for freight, and there are normally about 30 out of 400 trains that we reject because they don't go in the timetable. Those are all decisions that need to be traced back to the Decision Criteria.

THE CHAIR: That just as a yardstick is quite instructive, I find. Can you give a similar rough order of magnitude for passenger services?

MR ALLEN: Passenger services are a lot smaller. There are a lot of spot bids about passengers. Principally, I think one of our top operators has made 250 alterations to the next timetable before we've even published it. Now, most of those don't change the public times, but they change things around it or strengthened trains so you've got different balances. There are hundreds of these things happening, day in and day out.

THE CHAIR: For which you are not drawing up a Decision Criteria grid every time.

MR ALLEN: Absolutely not and, in some cases, not even changing the public timetable. It's

just the railway behind it trying to make itself more efficient or get the resources in the right place to strengthen the service when it needs to.

MR HANKS: Surely you don't need to apply the Decision Criteria every time you Flex a train.

MR ALLEN: I think we do, yes.

MR THOMAS: Only if it's in conflict, Chris. That number doesn't say whether you conflict or not, does it?

MR ALLEN: No, it doesn't.

MR YEOWART: The only time you apply the Decision Criteria is when you've got two trains with equal rights and you can't make a decision. If you're applying the Decision Criteria when you –

THE CHAIR: One of the ways of potentially resolving the conflict is to Exercise Flex, with a capital 'F', as opposed to non-contractual flex with a small 'f', contractual Flex, and specifically the Decision Criteria are applicable to the Exercise of contractual Flex.

MR YEOWART: I would suggest, in relation to the specific train we're talking about now, it is an unusual set of circumstances that an operator, who has been operating a train for a couple of years, has found his Rights will have expired specifically on the instruction of the ORR, at the same time as somebody else wants to run a train in that identical path. I don't know of any other instances when that has arisen. That is very unusual. The application of the Decision Criteria, as you just pointed out, may indicate one of the reasons why Network Rail is having such a problem in applying it. It should only be applied where there are equal Rights and you cannot Flex anything. The application of the Decision Criteria, as I said before, I thought was unusual if it's done properly, and needs to be done properly when it is. Flex is there to prevent all these types of things and it's when you can't do anything else.

MR ALLEN: I'd agree with that.

THE CHAIR: Sorry, do you say you do agree with that?

MR ALLEN: Yes. Flex is to make a decision between trains that have the same priority code, when you're trying to decide which one to go into the timetable, or whether you want to close a railway line instead of keeping it open or something. It becomes a constraint at different parts of the process, because there are times when we can't use our Flex. There are times in the operation period we can use it; outside of that, we're pretty fixed in terms

of what we do, and then we use to mutual acceptance about using Flex. Is that use of the Decision Criteria? It's got to be there in the back of people's minds all the time.

MR LEWIS: It's last resort, isn't it?

MR ALLEN: No, it can't be the last resort, Andy. If we're going to make effective use of the Decision Criteria, it has to be these are the rules of engagement I base all my decisions on. In that way it becomes a big word for me, which I can't say now; it becomes second nature, intuitive – that's the word I was looking for – that people use this in their day-to-day business. It would be very hard for us to say, 'Actually, you can't think about these things all the time.' For me, I want my people to have those just over half a dozen points in their head, so they are there when we get to making those decisions and not making them fit when they did that action. Think about the cost and the right thing to do.

THE CHAIR: Even if they're not actually mapped out on a piece of paper on a grid.

MR ALLEN: Yes. It's a good right-side failure in terms of people thinking about them all the time.

MR THOMAS: What I was trying to find, Chair, is through all of this clearly you wouldn't expect any operator to believe Network Rail; 'They trust us; get on with it; we'll show you afterwards.' I also don't think that producing one of these matrixes, if there are indeed hundreds and thousands of these, you could ever do that, but it's probably quite a rare thing that a passenger operator's train is refused, probably more common in the framework, and about whether you have a stepped level. If you're doing a more serious rejection, if I use that phrase for a second, whether the burden of proof on the Decision Criteria ought to be higher than that, than it would for something that's routine, for knocking a train by a couple of minutes. All the way through this, I've struggled with what burden of proof, at what stage, about how the Decision Criteria are used. It's something I haven't got my mind round.

MR HOLDER: The point is the depth of the problem. If you're coming up with a decision that has to be taken and you can see it might have some political impact or it's about taking the train out of the timetable, rather than moving one by a couple of minutes, there has to be a management process presumably to check that that decision is viable. You don't need to go through that process when it's just one or two minutes' Flex.

MR THOMAS: It doesn't say that in the contract, but there ought to be a commonsense view.

MR HOLDER: A management point of view.

MR ALLEN: It's very difficult to know which ones are the ones that are going to cause you political grief, isn't it? It could actually be the ones that you don't know about. The Decision Criteria and the use of it is a really hard thing. The industry talks a lot about applying it and using it, but actually there are no real guidelines to it; you can't weight any one above the other. You only need to pick one point out of the eight or nine we've got now to try to argue a point and say, 'Right, for these reasons, I've made a decision.' It's a very complex set of things to try to articulate and, actually, the smallest thing could actually say you've applied them wrong, by making an assumption that something had the capability it hadn't. A piece of traction or something like that could mean you'd got it wrong and you'd applied them all wrong.

THE CHAIR: Can I just come back to a rough stab at the relative numbers on the passenger side?

MR ALLEN: I'm not sure I could give you one for passengers.

THE CHAIR: To the nearest hundred or thousand?

MR ALLEN: Possibly not. I guess the question is what you would see in people's PDNS that was new.

THE CHAIR: I'm trying to get a feel for order of magnitude. Grand Central in Newark just said it's a matter of tens.

MR ALLEN: I think that's right.

THE CHAIR: Is that right?

MR LEWIS: That's right. The only time we've used it is for passengers is quite straightforward, in terms of their Rights. If one has a higher established Right, you don't need the Decision Criteria. As Ian touched on, we might never see the like of this again. It's very unusual.

THE CHAIR: That's very instructive.

MR LEWIS: If it's access where there's limited capacity –

THE CHAIR: I only see the ones that come to a dispute. I have seen a number where it seems that this has been a very big issue, that the difficulty of application of the Decision Criteria and the time when they were applied are quite critical. It's really quite instructive, if you are all agreed on both sides, that actually those sorts of difficulties,

which I had regarded as being quite important pragmatic difficulties for Network Rail, are a pretty low order of magnitude. I think you're all agreeing that. Is that right?

MR ALLEN: No, I'm not, to be honest. No, I don't, because I think the other important figure we need to put in there is not only just passenger-on-passenger, but passenger-on-freight, at PDNS stage, because there's no reason why a passenger train and a freight train can't have the same priority for inclusion in the timetable.

MR GIBBONS: Except the Flex is greater for a freight operator.

MR ALLEN: The Flex is greater, but it doesn't upset –

THE CHAIR: Let me put the question in another way, Matt: just very roughly, in terms of order of magnitude – tens, hundreds, thousands, tens of thousands – how often on the passenger side, in the course of the bidding process and, I suppose eventually, specifically at the point of making the offer, do you go into print on how you have applied the Decision Criteria, in arriving at a particular rejection or acceptance of a service?

MR ALLEN: For December 12, we've only done it once and we've done it with this one.

THE CHAIR: This is the only one for December 12.

MR ALLEN: Nationally, I think.

THE CHAIR: Nationally, this is the only one for the entire timetable process.

MR ALLEN: Where we've gone into print with decisions for the new Working Timetable, into lengthy dialogue about how we've used the Decision Criteria, this is the only one.

MR LEWIS: It's because they're using this one that has a higher priority than the other, or you can get around it by Flex. It's very rare it actually comes to this sort of complete stalemate.

THE CHAIR: As we've just said, rounding by Flex, at least Flex with a capital 'F', itself contractually requires a consideration and application of the Decision Criteria. I think we're all agreed, aren't we?

MR YEOWART: I'm not sure it does, no.

[Cross-talk]

MR LEWIS: If you can get it to work within 30 minutes, contractually you can do that.

MR GIBBONS: Presumably the contractual Flex, you Flex within it. There's no application; you just do it.

MR BRANDON: The Decision Criteria are almost a last resort.

THE CHAIR: You can do it arbitrarily.

MR GIBBONS: Within the Flex.

MR ALLEN: I think there is still some consideration you have to apply.

MR GIBBONS: There won't be a journey time on things like that.

MR ALLEN: Yes, journey time, resourcing.

MR YEOWART: That will be in the contract, won't it?

MR GIBBONS: If it all fits the contractual matrix.

MR ALLEN: If you Exercise within Flex, then it reduces somebody's right to challenge. I would still like, when our people think about it, to be thinking about those wider issues of the Decision Criteria.

MR LEWIS: They should be familiar with them definitely.

MR YEOWART: It would create you a problem if you could Flex trains and you didn't, and applied the Decision Criteria. You'd be back here in the end.

MR ALLEN: Again, if you take my interpretation of the Decision Criteria, it is the points you use to make the right decisions on what we're doing. Actually, they should be underpinning everything we do, whether it's Flex with a capital 'F' or a small 'f'. It's a different level of information you put in to presenting how you've used it.

MR YEOWART: To be honest, I'm not sure you're right, Matt. If it's within the contractual Flex, you should just ignore all of that, because the whole idea is to maximise what you've got and use the timetable. We know, when we sign up to a contract, what you can do.

MR ALLEN: If you're getting us on the topic of Flex, I think Flex is a very dated thing in the rail industry. It comes from a point in time when there were lots of gaps behind a train and you could move a train by a few minutes without making substantial changes to 30 other services. In terms of the contract, the Flex with a capital 'F' is what we've got, but how you actually use it –

THE CHAIR: Am I right in thinking that, in terms of the contract, the Track Access Agreement, Flex with a capital 'F' is an integral part of it, isn't it?

MR ALLEN: Yes.

MR YEOWART: Absolutely.

THE CHAIR: There's no sign of any potential to –?

MR ALLEN: There isn't but I think –

THE CHAIR: There was?

MR HOLDER: There was a move at one time just to rely solely on the Decision Criteria.

MR THOMAS: I'm just thinking over here, Rob, of two trains with 10 minutes' Flex, just a fictitious example, arriving at the same piece of railway. Do you use the Decision Criteria?

MR ALLEN: Yes, if you've got two trains coming into one point.

MR THOMAS: Even though you can't argue about it, because it's within the contracts.

MR ALLEN: Yes, if they've got exactly the same Rights.

MR COOPER: It's when they're the same Rights, exactly the same Rights, and they've been Exercised. You'd have to check that with the PDNS.

MR THOMAS: Sure. I genuinely don't know the answer.

MR COOPER: It's rare you would use it and that's evidenced by the fact you've got one dispute.

THE CHAIR: I was under the impression, but I couldn't find it, that there was a specific reference in one of the versions of Part D, but I can't remember which it was, and it may have been one of the things that's changed between the different versions, to applying the Decision Criteria to contractual Flex, with a capital 'F'.

MR COOPER: There's 4.2. [Pause]

THE CHAIR: There's 4.2.1. I'm looking at the July 2011 version.

MR SKILTON: It's exactly the same.

THE CHAIR: It hasn't changed.

MR SKILTON: The Decision Criteria is what's changed.

THE CHAIR: The overriding 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 then goes on to set out the priorities. Part of the prioritisation exercise in 4.2.2 includes an entitlement, as distinct from an obligation, for Network Rail to Exercise its Flexing Right. On the face of it, that, like every other decision it makes as part of the process, should be informed by an application of the Decision Criteria.

MR THOMAS: I think, Chair, having kicked that off, what I was trying to work out was something about quality versus quantity. If you're looking at 1,000 of these, then you're going to get low quality. If you're making one, then you ought to expect a higher quality. That ought to alter the consequence of the decision you're making.

THE CHAIR: It sounds as if the fact is that Network Rail does not consciously, and certainly not expressly – in the sense of putting it down on paper – apply the Decision Criteria at the time of going through this process, other than very rarely and, in this case, instructively, only once for the entire national timetable. That once happens to be the one that we're considering as the substance of this dispute, which is interesting.

It may be that, as a matter of practice, it should have been consciously and expressly applying, rather than intuitively and at the back of its mind, applying the Decision Criteria and writing about it in a lot more cases, including in the Exercise of Flex. Had it done so, I suspect that's the point at which it would have become impractical, for the running of the railway and the combination with the timetable, to issue a full written justification at the time of every instance of Exercising the contractual Flex. We don't really need to decide that then, because that's not the situation we're talking about.

On this issue, as regards application of the Decision Criteria and the timing, the provisional conclusion I am reaching is that there is an obligation on Network Rail to be rather more than merely intuitive. I hear what Matt Allen says, acknowledging the need to be intuitive about it, and I think that's a point well made. I'm coming to the conclusion that, actually, it needs to be more than intuitive. If there is only one, per national timetable in this case, instance where it needs to really go to town on applying the Decision Criteria to resolve a very distinct conflict, then it can do so at the time and not come up with a different justification afterwards, certainly not come up with a different justification afterwards, but not come up with a fuller and more granular, as you put it, justification afterwards.

I don't think that conclusion conflicts, as a matter of logic, with the sort of precedent I was mentioning earlier – my own and other previous decisions – which justifies Network Rail providing a more granular, detailed, analytical basis for having applied the Decision Criteria, in cases where it has clearly intuitively and at the back of

its mind, and to some extent communicated to all parties, done it at the proper way at the time. I must confess: I am trying to reconcile the conclusion I am coming to in this case with that previous precedence, in saying that.

Where that leaves us on this one is, I think, that we had an explanation of the analysis of application of Decision Criteria at the time and then, later on, we have another one. In any event, this falls on the other side; it's not one where it's just filling in the missing stuff after the event. It's doing more than that. It's changing, to a degree, the analysis of how they're applied. We'll come to that when we look at it later on.

That deals with the general issue of timing and analysis of the application of the Decision Criteria, which just leaves us with the same point, only in relation to the prioritisation process, under 4.2.2. My provisional conclusion would be that, even more so than in application of the Decision Criteria, it really is up to Network Rail to analyse the position properly at the time, in accordance with the contractual Network Code provisions and be transparent at the time about its analysis, communicate that to operators and not to fill in the granularity of how those particular prioritisation decisions were arrived at after the event, for the purposes of the dispute, and still less to change that analysis after the event. Therefore, subject to anything you want to say to me on that in a minute that's how I will approach consideration of the particular services when we get to them, and the analysis of the prioritisation in respect of those various services where, in substance, Network Rail is saying, 'We accorded it priority X,' and Grand Central is saying it should have priority Y. Network Rail, would you like to come back on that?

MR ALLEN: No, I agree with your summary.

THE CHAIR: Grand Central?

MR HANKS: Yes, we agree with that.

THE CHAIR: Colleagues, do you have anything else to say on that? Have I missed anything then on that general issue that we ought to deal with or are we there on that one? Fine, thank you very much. In that case, that would be the right moment to call lunchtime.

MR HANKS: What time shall we reconvene?

THE CHAIR: 14:00.

MR SKILTON: If you say 13:55 then we'll start at 14:00.

(Adjourned)

THE CHAIR: Thank you, everybody. We didn't quite make 14:00, but with engineering allowance we were nearly there. We are going to move to consider the specifics of the trains on each of the three disputes, where there are specific conflicts between what Grand Central is saying and what Network Rail is saying, arising out of the latest batch of information provided, which was asked to be provided on these issues.

For TTP494, that is the analysis of the application of the Decision Criteria on the provisional supposition that, one way or another, the Decision Criteria are applicable because the conflicting East Coast bid and the Grand Central bid, which is the subject of the dispute, where at equal priority, at whichever level for whichever reason. I would just like to go through what has been stated on the analysis of the application of the Decision Criteria to that particular evaluation, in the light of what we just discussed before that there shouldn't be a retrospective change at least of analysis by Network Rail, after the event and for the purposes of the information it provides for this dispute, from the analysis it gave at the time. Now, I'm a little unsure as to the most expedient way of getting through this.

MR YEOWART: Could I just make a point, Chair, before we do start, because the Decision Criteria are a part of the process, that we have pointed out in our response, and it was confirmed here at the last meeting that we were at, that the 16:08 train to Newark is non-compliant? That may have changed but that was what was said last time, and that it couldn't be made compliant. The Network Code says at 4.2.2(a) that 'a New Working Timetable shall conform with the Rules applicable to the corresponding Timetable Period.' If the train is non-compliant, it doesn't conform with the Rules; therefore, we should never have reached the Decision Criteria. It should have been rejected. It's better to bring it up now than later. If you accept that argument, then clearly we move into the Decision Criteria.

THE CHAIR: Up to now, we have taken that argument as resulting in not an absolute objection of the East Coast bid but, in effect, a bumping-down of priority from 3 to 4.

MR BRANDON: I think the priority change from 3 to 4 was as a result of the incorrect PDNS that they submitted, the lack of the rolling stock diagrams and the other issues we raise

with that. That was why the move from 3 to 4.

THE CHAIR: Sorry, isn't the non-compliance that incorrectness of the PDNS.

MR BRANDON: No, the PDNS was to do with the information submitted in it. There was the issue with it being rolled over from the previous PDNS. That was why it went from priority 3 to priority 4; it was a deficient PDNS was how we saw it. The non-compliance of the path that they bid for should have been rejected by Network Rail, because it didn't meet the Timetable Planning Rules.

MR THOMAS: It's deficient in station dwell times.

MR YEOWART: No, it was...

MR ALLEN: The bid went shy on the headway at Newark.

MR HOLDER: Is there anything in the Timetable Planning Rules that permits a Flex to be made of the strict rules? Is there a clause in there that permits it? I know there are individual cases.

MR ALLEN: I don't think so, Rob, to be honest.

MR COOPER: I think 4.2 as well is subject to the following principles. One of the key principles is it shall conform with the Rules, so you should never have got into the Decision Criteria.

THE CHAIR: My understanding was that the East Coast bid was non-compliant in a number of respects, partly in the rollover process and its interaction with the Prior Working Timetable and what had gone before, whether or not there was a Prior Working Timetable and all that, and how PDNS interacted with that; and also separately in being non-compliant with the Timetable Planning Rules. My understanding was that Network Rail accepted those different kinds of non-compliance. It accepted that the bid was non-compliant in those respects.

MR LEWIS: In terms of the Timetable Planning Rules, yes, but I don't think in terms of the PDNS.

MR ALLEN: No, if my memory recalls, when we debated this at the previous two hearings, we put them both on the same level in terms of their priority, and then we... No, I'm not sure I can remember actually, if I'm being honest. We were discussing the options.

THE CHAIR: I thought you had accepted or at least had not, shall I say, cogently challenged both types of non-compliance, that effectively it had not been properly done.

MR ALLEN: Correct, yes, because in connection with that, if it had been properly done, it would probably have had a level of rights more senior.

THE CHAIR: Exactly so; it would have been 1 or 2.

MR HOLDER: A bid doesn't have to be compliant to the rules of the planning now. It's just the offer that has to be compliant.

MR YEOWART: Yes, and in relation to the offer, the train is non-compliant. This is at a later stage now, and should not have been offered, as I've said, because it breaches the Rules. As Matt has just confirmed, you can't mess with the rules just to suit. As this has been identified and pointed out, and we have pointed it out here, then the train shouldn't be in the new Working Timetable. The 16:08 Newark should not be in the new Working Timetable.

THE CHAIR: It only becomes the new Working Timetable, as such, for the purposes of the Network Code, as at the offer date, because that's when everybody's offers crystallise into the new Working Timetable. Where I thought we'd got to was, rightly or wrongly, it was accepted, in effect, or at least not challenged that, as at the Priority Date, the East Coast bid was non-compliant in a number of respects. I thought that included non-compliance with the Timetable Planning Rules and that that was a material consideration at that stage as well. For all those reasons that meant that, at the point of evaluating its priority, it was not a level 3 and, therefore, it became effectively a level 4 bid, being effectively a different bid, a revised bid, that came in after the Priority Date.

MR YEOWART: Even if it did, even if we put in a spot bid now, the train as non-compliant would not be accepted or would not go in the timetable. It was a bit like the Grand Central big was compliant at the Priority Date and became non-compliant or lost its ranking, if you like, after the Priority Date, because of the change to the new operator. In effect, that's how we drop down the priority as well. In relation to the train itself being offered, it can't be offered if it doesn't meet the rules applicable at the time. The 16:08 Newark does not meet the rules applicable. This is one of the big issues. I know you'll stop me if I stray a little bit, but one of the big issues for Grand Central or Alliance has been odd half-minutes here and there that have been non-compliant, which have prevented it from changing or moving on its own timetable. This timetable, as we know, this train in particular, is non-compliant.

THE CHAIR: Sorry, just to clarify that, Ian, you're saying an issue for Alliance/Grand Central has been that similar sorts of non-compliances of half a minute here have, in your case, been taken as 'Sorry, folks. That's it, out.'

MR YEOWART: To be fair, we also expect not to be offered, because they are non-compliant.

MR ALLEN: We did explore this in one of the earlier hearings. I thought we'd got to a position where we kind of understood where we were with it. We know we've got probably various trains in the national timetable with non-compliance, which have got in for one reason or another. We think we've got different interpretations of the way the TPRs are used at Kings Cross for long-distance trains that are non-TPR-compliant that are in the timetable that we've offered. Some of those are related to Grand Central services. I wouldn't have thought it was the best thing to go into in terms of revisiting that as the golden nugget that made the decision to go East Coast or Grand Central in terms of the 16:08 path out of London.

THE CHAIR: Let's put aside the generality of Grand Central's complaint that, broadly, 'We've had to live by having this applied systematically and pedantically to us, so why shouldn't everybody else?' What is your position then on this specific issue about the specific non-compliance of the East Coast Newark bid? You say it's not the golden nugget; are you saying that means, yes, it was a non-compliance but it doesn't matter?

MR ALLEN: The difficult position we are put in is that we've accepted this from May 2011 as a non-compliance. Rights were established for it. I'd need to go and look at actually if it's the East Coast train that's non-compliant and another train, because obviously it could be the way we've done something differently with a different train that's forced non-compliance. I don't know how it was created first time round, if you see what I mean. It could be 4E59 that clashes with it.

THE CHAIR: Are you not able to say, as of now, without going and checking lots more stuff, whether it could have been made compliant or not? As offered, it was or was not compliant.

MR ALLEN: As offered, it was not compliant.

THE CHAIR: As offered on 8 June it was not compliant.

MR ALLEN: Correct, and we've looked to try to make it complaint and we're still shy of 30 seconds in terms of making it absolutely compliant.

THE CHAIR: The East Coast Newark bid was not complaint.

MR ALLEN: No, their bid was compliant; our offer was non-compliant.

THE CHAIR: Let me just explore that.

MR ALLEN: It's a fault we've got in the timetable today.

THE CHAIR: The bid was arguably non-compliant on the rollover PDNS front, but was compliant as regards the Timetable Planning Rules.

MR ALLEN: The bid doesn't need to be compliant with the Timetable Planning Rules.

THE CHAIR: Okay, so it's a question of compliance and timetable planning.

MR HANKS: Sorry, can I take issue with that? It needs to be compliant with the Timetable Planning Rule in its own –

MR ALLEN: East Coast on East Coast needs to be compliant with Timetable Planning Rules, and all trains put in the timetable.

MR HANKS: It doesn't need to avoid conflict.

MR ALLEN: Correct. In this case, it's not complying with an East Coast train. It's not East Coast on East Coast where the non-compliance is. It's either a freight train on East Coast or East Coast on freight train. Don't ask me which way round it is, because I'm not sure I can tell.

THE CHAIR: An operator couldn't bid two services that conflicted with each other, because they are –

MR ALLEN: You're not supposed to, but I don't think the book says you can't actually anymore. It used to. The full onus on the way it is now written, having been reshaped over the last 18 months, is that it's up to Network Rail to de-conflict all bids, but historic best practice, whatever you want to say, is that an operator will be compliant with their own services. There are numerous occasions when operators' bids are not compliant with their own services.

THE CHAIR: Pragmatically, it would know that, if it wasn't compliant with its own services, it would get booted out.

MR ALLEN: It's given us some confusing messages about what they're trying to achieve and it ought not to just fall on us to resolve.

MR HOLDER: When it's doing the Prior Working Timetable, you just issue a particular timetable that's already in practice, don't you? There's no onus in here to take out any

non-compliance.

MR ALLEN: No, and there is no onus to take out trains for which Rights expire, unless you've got some real view that that's what's going to happen.

MR HOLDER: That's an option, isn't it?

MR ALLEN: Yes. As we said before at an earlier hearing, there's a whole opportunity we as an industry haven't yet got right about how we use the Prior Working Timetable to the most advantage, but that's not for here and today. There's a massive bit of work we could do to improve that slightly earlier part in the process.

THE CHAIR: Is where we're getting to then that we are agreed that, as of the Priority Date, the East Coast Newark bid was non-compliant in the sense that the PDNS didn't stack up?

MR ALLEN: I'd have to look back at what we said before. I'd want to be consistent with whether I thought we'd got there before.

THE CHAIR: That's my understanding of what was said before.

MR ALLEN: We said it dropped down a level.

MR THOMAS: I think there's a difference of non-compliance. It was not compliant enough to make it a certain level of priority, so it drops it down.

THE CHAIR: Maybe 'non-compliant' is not the word.

MR ALLEN: It's the priority that's included in the new Working Timetable, where we dropped it down a level.

THE CHAIR: It was deficient in some way. It is accepted that it is deficient in some way, as to disentitle it from being accorded level 3.

MR ALLEN: Correct, and that's because the PDNS had an option in it, effectively. I think that's what we were fundamentally saying. We said PDNSes should really have an option.

MR BRANDON: It was a Plan A and a Plan B basically.

THE CHAIR: Sorry, just say that again.

MR ALLEN: There was an option. We had this lengthy debate about –

THE CHAIR: Oh yes, it was put in the alternative, wasn't it? Yes, exactly.

MR HOLDER: In effect, aren't there two bids?

MR ALLEN: I think that's where we got to in the end. Probably one ought to have been

rejected and a resubmitted bid to come through.

THE CHAIR: It was the whole backing two horses.

MR COOPER: It just goes to what Matt was saying there: it conflicted with itself. It had to have done.

MR FISHER: I disagree with all this. I'm sorry, but it was a very clear either/or based on what was going on at the time. There was never any intention that both sets of options could apply. I don't think there's ever been any dispute about that. It was simply to try to reflect where reality was at that moment in time, with the submission of the PDNS, in terms of development work that Network Rail had been undertaking and ORR was yet to make a decision on conflicting applications of Access Rights on the East Coast Main Line. I don't believe that the Network Code or any PDNS instructional guides say that you can't do this.

THE CHAIR: Wasn't there an argument, or maybe I'm just formulating this for the first time now – I thought we did actually explore this – that by definition, if you put in two mutually exclusive options as your bids, you can't have, and Network Rail, getting back to the language of prioritisation of level 3, could not have a reasonable expectation that both of those bids would acquire Firm Rights, because by definition they couldn't. That's the interpretation of the contract.

MR ALLEN: We also explored if the 16:08 York that only gets as far as Newark, the fact that it's in the same path as far as Newark but terminated short –

MR HOLDER: Is the 16:08 Newark an offer to the 16:08 York.

MR ALLEN: Correct, so we explored that.

MR HOLDER: Which is legal.

THE CHAIR: Is the 16:08 Newark an offer.

MR HOLDER: If East Coast had only bid for one train and it was the 16:08 and it ran as far as York in the bid, if Network Rail, and it being their right, couldn't find a path as far as York, but could find a path as far as Newark, and there was no other competing bid, it could have offered a Kings Cross-Newark train as an offer to that bid for a York train.

THE CHAIR: That means that these particular options were not mutually exclusive.

MR ALLEN: Which I think is what we were talking about at previous hearings.

THE CHAIR: In the sense that you could do both because, if you went for the York one, by

definition that would include the Newark.

MR HANKS: I challenged that last time as being absolutely true, because of the crossing move that you have to make at Newark for trains termination. I argued there, if you were going to follow that argument literally, then it's not quite true, because the last part of the journey involves a different move at Newark. It isn't a subset of the path to York.

MR YEOWART: The fact is, Chair, you did agree last time that it would be a level 4 priority, and that's what we spent this morning just dropping Grand Central's down to the same level.

THE CHAIR: Exactly that: I thought it was generally agreed on all sides that, in one way or another, the East Coast bid should have been regarded as level 4 priority, which is exactly why we spent time on whether or not Alliance/Grand Central...

MR ALLEN: That's certainly been our thinking all the way. The request to run the 16:08, competing for the 16:08 path out of London, is that both Alliance/Grand Central and East Coast have had an equivalent priority to it and that we're making a straight trade-off between one and the other.

THE CHAIR: Now we are looking at a new argument, or it may well have been there before and I just didn't spot it, that even assuming that, at whichever level of priority, they were at the same level of priority, and therefore you would think it was a matter of applying the Decision Criteria in order to determine which of the conflicting services should be offered; that doesn't actually get us there, even if the Decision Criteria had been correctly applied in favour of one of the East Coast level 4 options, assuming that had come in after the Priority Date and therefore would be level 4. That doesn't actually get us there because, come the offer itself, it was, for a different reason – non-compliance with the Timetable Planning Rules – deficient. Therefore, even correct application of the Decision Criteria in getting to that offer didn't cure it of that deficiency. That's the argument that's been raised now and, as I say, was probably there before but I failed to spot it. I understand the argument now. What does Network Rail say to that?

MR THOMAS: I don't know whether anyone knows the answer to this but, the Alliance bid, would that have been non-compliant? If one wasn't and one was.

MR YEOWART: It's the crossing move.

MR THOMAS: It is, okay.

[Cross-talk]

MR ALLEN: Sir, we treated the Newark path in the same way, rightly or wrongly, in May 2011.

MR LEWIS: There were a few Flexes that needed to be done on freight, but they were within contractual guidelines.

MR ALLEN: We took the three return trips to Newark to be a package of trains, as they were looked at in May 2011, and our application of the Decision Criteria will have been marred by, or will certainly have been influenced by, treating them as a group of trains and having lived with the defect in the previous timetable without any consequences. That's just how it was.

THE CHAIR: What are you saying that means as regards the strict technical non-compliance with the Timetable Planning Rule, if that is what it was? Do you accept that it was technically non-compliant with the Timetable Planning Rule because of the headways?

MR ALLEN: In terms of the three-minute headway, there is no specific rule that says what the margins should be for two trains at Newark making the same crossing move. This is another difficulty I have, and again it's the world of contract versus a little bit of the world of practical doing things. There is no Timetable Planning Rule for two moves at Newark that follow each other across the crossing at Newark South. There is no TPR for doing that. The infringement is on the interpretation of a three-minute headway between a location south of Newark, which I can't remember the name of, and Newark itself, so the headway is written on trains going one behind the other at 125 miles an hour.

THE CHAIR: That sounds like a pretty important headway to me, if that headway is written in.

MR ALLEN: We're not doing that in this case. We've got two trains that are crawling under restricted aspects to do a very slow-speed junction move down to a back platform at Newark.

THE CHAIR: I'm sorry, you're losing me here. What is the alleged non-compliance?

MR ALLEN: If you interpret the Timetable Planning Rules – no, don't get me wrong; I may be being a little bit disingenuous. I don't want to lead anybody up the garden path. The Timetable Planning Rules are that you're on a three-minute headway, full stop, plus a junction margin at Newark. There is nothing in the Timetable Planning Rules for what the margin should be for two trains crossing at Newark South to the back platform or the

slow line that's behind the back platform. In the same way we've got places like Claypool Loop on the East Coast Main Line, where there is no margin for a train coming out of Claypool Loop behind a passing train. Actually, you could say you could just have a 30-second margin for a train coming out behind another train that's flying through, because the aspects will come off; the driver will get a proceed; and actually you'll start to make best use of the capacity on the network.

THE CHAIR: Coming out after 30 seconds instead of waiting for three minutes?

MR ALLEN: Instead of waiting for three minutes, yes. It's one of those hard things that the TPRs, in accordance with this, look very black and white. When you do some of those practical planning things with the timetable actions, then you can actually start to infringe on the rules a little bit, all for the right reasons.

THE CHAIR: Grand Central, what do you say is the specific alleged non-compliance?

MR YEOWART: The TPR is actually black and white. It is three minutes and that's it.

MR HANKS: It's not; I wasn't going to query it, but it's actually four minutes. The headway is four minutes on that one.

THE CHAIR: As I understand it, without looking at the actual wording of it, and I'd quite like to do it without that if we can, what's being said is that the actual Rule specifying this four-minute headway applies to through trains not going into the back platform or whatever it is to stop at Newark. Is that correct?

MR HANKS: I understand that argument but, if Network Rail felt strongly about that, then it's within its gift to get those rules changed, albeit through consultation. They haven't done that.

THE CHAIR: Sorry, that's not the point. The context of this particular point is whether there was a non-compliance of the offer, of the service as offered to East Coast in the offer letter, and a specific non-compliance with the Timetable Planning Rules, such as to be effectively a knockout blow, so that we don't even need to consider the Decision Criteria. In order to understand whether that is the case, we need to know what the relevant Timetable Planning Rule is and what was the non-compliance with it. Now Network Rail, as I understand it, is saying, 'Yes, there's a sort of semi-applicable Timetable Planning Rule here, but it doesn't actually directly apply to the particular situation, the particular bid, because the Timetable Planning Rule in question governs through trains,

and the bid and the service we're talking about here is one that stops at Newark.'

MR HANKS: I understand the argument, but the way the rules are constructed is that there are standard rules for things like headways and junction margins, and there are then exceptions listed location by location. If there is a specific exception for Newark for particular moves, then they are listed separately. There is no separate list here, so that headway rule applies.

THE CHAIR: How does it apply?

MR HANKS: It permits any two trains arriving or passing Newark in the same direction –

THE CHAIR: Arriving or passing?

MR HANKS: Yes, arriving or passing.

THE CHAIR: Does it say that or is this the interpretation you put on it?

MR HANKS: I'm not sure whether the rules specifically say that.

MR GIBBONS: It just says there has to be a four-minute headway between trains.

THE CHAIR: At all points between Kings Cross and wherever it's going to?

MR GIBBONS: Wherever the four-minute headway starts. It can be three minutes coming out of Kings Cross. If the Rules say it is four minutes between, for the sake of discussion, Grantham and Doncaster, it's four minutes that apply to every train, because there's no variation shown in this case.

THE CHAIR: The default position would be that applies to every pair of trains sequentially on the line, whether or not the one behind has come straight up on the through line or has just popped out of Newark station.

MR GIBBONS: Because there is no location. Chris is quite right; because there's no specific location allowance for trains going in or out at that point, even in the Kings Cross direction or Doncaster direction. You have to assume four minutes.

THE CHAIR: Okay, I can understand that.

MR YEOWART: Chair, just as a way of trying to move on a bit, in Network Rail's sole submission document, on page 13, 626, it says, 'Network Rail accepts the issue made by Grand Central in the amendment as regards some Timetable Planning Rule discrepancies within the schedule,' and 'Network Rail is actively seeking to eliminate all such discrepancies.' You can have a look at the copy.

MR ALLEN: I didn't want to mislead people but, looking in the TPRs, there actually isn't a

section for Stoke to Doncaster, full stop. If we're going to fall on what's black and white, I don't know what is black and white.

THE CHAIR: You're saying there is no Timetable Planning Rule headway applicable to this section.

MR ALLEN: Looking at the version here, there is no Stoke-to-Doncaster headway margin given, so I need to find the generic one at the front.

THE CHAIR: That's not what you said before, at the time or in the submission.

MR ALLEN: I haven't tried ever to say it wasn't compliant, other than just demonstrate that sometimes the rules are not as black and white as we think.

MR HANKS: The rules are very clear.

THE CHAIR: Fair enough. Can we at least accept, because I think it's something I'm beginning to understand, that this particular Rule is not something so confusing or only tangentially applicable as to admit different interpretations? It is the default position –

MR ALLEN: I accept that this is default, unless it's clearly said otherwise.

THE CHAIR: As Nick was explaining, if you've got a Rule that says it's accepted that it does say, effectively, on the relevant stretch, somehow or other, wherever that be defined as starting or finishing, it requires a headway of four minutes. Given that there isn't anything that says that something else happens, depending on whether the train comes out of the station or not, that's the default position. Does Network Rail accept that?

MR ALLEN: Accepted.

THE CHAIR: Thank you. Is it agreed then that the consequence of that is that, irrespective of the right or wrong application of the Decision Criteria, the East Coast bid, as offered, should not have and does not take precedence over the Grand Central bid – and that's the Grand Central level 4 bid, as made notionally after the Priority Date – that it should not have taken precedence over that and that, therefore, the Grand Central bid should have been offered in preference to the, in inverted commas, 'non-compliant' East Coast offer? Is there any route round that conclusion? Colleagues, while Matt's deliberating, anything to add on that?

MR HOLDER: Is the headway inconsistency such that it would be solved if the Newark terminated earlier or does it have to be later? It is at Newark, isn't it?

MR ALLEN: It is at Newark.

MR HOLDER: I was just thinking, if you took a call out of the Kings Cross-Newark East Coast train, would that work?

MR ALLEN: The East Coast train turns into the platform –

MR HOLDER: What is it that makes the Alliance train work and doesn't pass?

MR ALLEN: It goes straight through. What happens is, at 14:59, it turns at Newark and does the move to the up-and-down slow time at the back at Newark, and then the East Coast train comes three and a half minutes behind it and effectively does the same move but at platform 3, I think it is, at Newark. That's the infringement and, for some reason, we can't put another half-minute in the East Coast service, because then you get a conflict with something coming on the up line, I think, because the down is crossing all the up lines. How long's a bit of string there? How often does 4E59 run? It's in the timetable, so it's there.

MR HOLDER: I was just thinking if there was a way of making the East Coast path work by taking a call out or two and making it short. Would you have to look at the Decision Criteria between that path and the Grand Central?

MR BRANDON: Surely that would have been a Revised Access Proposal they would have had to have put in there, because that wasn't part of their initial bid.

MR ALLEN: What's the different definition of a Revised Access Proposal, when you've got a PDNS that covers something more and you've offered something back slightly less? We have to be a little bit practical about the way we execute some of this stuff. If there's a fundamental flaw in what we've done, absolutely that's the burden we take. If we offered a York service or a Manchester service without a Stockport stop in it, and that made it work but it had a Stockport service in the bid, that shouldn't require an operator to make an amended Access Proposal for us to do so, not during the preparation period of the new Working Timetable.

To answer the Chair's question a few minutes ago, it's a genuinely hard one. We made the decision to put the East Coast service in, packaged with looking at the three Newark round trips that they were. We understood they came together in terms of the efficiencies, having balanced resource and that for East Coast. Hand on heart, we never genuinely looked at the 30-second rules, issuers being the one that would kick out the East Coast bid. You could say that our thoughts and our decision-making there were

flawed, by having operated the timetable for 18 months with this error in it already.
That's not an excuse.

THE CHAIR: Do you want to tell us why packaging the three Newark services together would have been a contractually valid reason for enhancing the status of an otherwise non-compliant offer on one of those particular services?

MR ALLEN: Sir, the only defence I could possibly try to start to defend from is it's about delivering objectives. It's about the best use of what we've got. It's delivering a service that fits. From my understanding the three –

THE CHAIR: Are you telling me then that delivering the objective, i.e. by that time, as part of the Decision Criteria, was a contractually valid way of eventually prioritising at the offer stage?

MR ALLEN: I'm just trying to delay as long as possible saying –

THE CHAIR: I want to give you every opportunity to make whatever argument you want.

MR ALLEN: I don't think there is. I don't think Network Rail can... We explored this with 518, didn't we a little bit, in terms of this very issue about non-compliant offers? I accepted then and will have to accept now that it's something we cannot do.

THE CHAIR: I'm not trying to be critical; I'm just trying to get to what the technically correct position is.

MR THOMAS: For me, Chair, I suspect the right thing to have done, if there is some confusion about this, and a slower train following a faster train requires less of a margin, you propose a specific Timetable Planning Rule for that move. That would have been the thing to do.

THE CHAIR: With all these things, one would think that would be the answer: that if what's there doesn't work or isn't sufficient, there's machinery to change it.

MR ALLEN: There is.

MR GIBBONS: I don't think you should have treated the Newark terminators as a package of trains, because they're two hours apart.

MR ALLEN: That may be the learning, Nick, to be honest, that we pick up. Again, it's not contractual, but very practically it's a complex thing. As the railway becomes more and more congested, Flex becomes harder. It's alright when we treat it very simply, but it becomes extremely difficult to just Flex one or two trains and keep the impact on one or

two trains. You're talking about dozens sometimes, when you look at these things. The Timetable Rules are never going to give you every eventuality. We wouldn't be sat here if we made that very practical decision about running a train out of Claypool half a minute behind. We said, 'Yes, it's a breach of the rules, but it's acceptable.' It's not a great argument, but if we had those kinds of rules for all the 700-and-something loops we have on the network, 'Your headway's four minutes but you can come in at half a minute shy,' having a train passed or whatever it is, you're talking about an extremely complex set of rules.

THE CHAIR: I'm sure that's understood by everybody.

MR ALLEN: We couldn't even run, let alone interpret when the time came.

THE CHAIR: Thank you. Well, I think that probably enables us to dispose of 494. I would just like briefly though to address the issue of the application of the Decision Criteria, just in case this goes further or that we come to the wrong conclusion on this or whatever. Just try to bottom out the issue of what would have been the correct application of the Decision Criteria, even though it is, as the say in the courts, *obiter*, i.e. it's probably not essential to the actual decision. I'd just like to explain to you what my provisional conclusion was going to be on the application of the Decision Criteria on this particular issue, and then invite your comments on that, just so that we've got it on the record.

My provisional conclusion was going to be that, in terms of the argument for and against how you apply the Decision Criteria to this particular service, as expressed in the further information you both put in – Network Rail, Grand Central and Grand Central's response to Network Rail – Network Rail didn't respond or said it had nothing to add in answer to Grand Central; my provisional view was that, in the round, Grand Central had won the argument, partly because Network Rail didn't comment on what Grand Central had said in its first submission. In the round, without going through them one by one, the way in which Grand Central expressed that the application stacked up and one or two changed from neutral to favouring this way, strongly favouring or marginally favouring, overall the weight came down in Grand Central's favour is what I felt. I will invite Network Rail's observations on that in a minute.

Second, also Grand Central had made the argument that supports what we were looking at in more general terms this morning that a certain amount of Network Rail's

analysis of the application of the Decision Criteria, as expressed in this information put into us, was retrospective and changing what had previously been said to a degree where it didn't really stack up to regard that as overriding what had previously been said and what Grand Central was now saying. That was where I was minded to go had the Decision Criteria on this issue proved to be the determining factor, which it now looks as if they're not. I'd just like to give Network Rail the opportunity to come back on that, if you'd like.

MR ALLEN: No, I'm happy not to come back on that.

THE CHAIR: Does that mean that you would accept that conclusion?

MR ALLEN: If that's the determination, then I would want to go and look at it and properly –

THE CHAIR: I will put that in as, albeit *obiter*, as they say –

MR ALLEN: Then it will be for us to go back and perhaps find –

THE CHAIR: I wouldn't want to do that unless I'm confident that it's accepted.

MR ALLEN: I'm not going to not accept that as a point of view, looking at that, reflecting on it and then looking at properly trawling through every –

THE CHAIR: To put it another way, this would have been your opportunity to come back at the specific points that Grand Central made and say, 'No, actually, that's not right for this reason,' and so on.

MR ALLEN: It goes to that, if some our thinking was that we missed three trains and that was flawed to start with, and that we should treat them bespokely, having just accepted that possible end –

THE CHAIR: You're accepting that the way in which you had applied some of the Decision Criteria in thinking about it retrospectively, in the abstract, the weight you gave to them was the weight attached to three trains as a package. Probably, in any view, it is not, however collaborative and socially justified it might be, in accordance with the contract and the Decision Criteria.

MR ALLEN: I can accept how that becomes the interpretation of it, yes.

THE CHAIR: Colleagues, anything to add on that, on the Decision Criteria or that as a putative conclusion on the Decision Criteria, in case it were to become relevant? Are you comfortable with that? Thank you; I don't think we need to go into the further detail of all the Decision Criteria on that and the objective.

I would just observe, just for future reference, that even in providing that information as requested, I accept Grand Central's comment that Network Rail didn't actually answer the questions as they were asked. It may be that I wasn't entirely clear in putting the questions or explaining how the questions had arisen, but what I had been after was, on one of them, to do with the objective, because Network Rail, in its previous analysis, hadn't addressed the objective as introduced by the March version of the Decision Criteria. It had addressed the, with a capital 'C', Considerations but not the objective, so I asked them to supplement that with the Considerations. Instead, Network Rail came back with a general 'wumph', here it is, everything, Considerations, whatever. That doesn't really have any particular effect, other than I would just urge Network Rail, as in all things, to look at the detail a bit more on these things.

For what it's worth, I would address the same observation to Grand Central on different things. There were other places where Grand Central didn't answer the question quite, but instead came back with a load of more stuff. 'Oh, while we're at it, let's have another pop at this and everything else,' which is part of the reason we're here today. As soon as someone says that, you feel that, as a matter of natural justice, you've got to give everybody a chance to comment on it. There we are.

Good, well that just leaves us with the tough bit on 493 and 495 of looking on what's said head to head between Network Rail and Grand Central on some of the specific services, which are the potentially conflicting ones with the services as bid. Is it best to start with 493, I think? Now, colleagues, I could do with some help here. My inclination is to ask the parties in the first place to identify which is the best example of a head-to-head. I'm hoping we don't have to go through all these different ones, because you go through and chuck a whole load of stuff into the pot, including some stuff that wasn't mentioned in the previous round. My view overall on this is that Network Rail has only to establish one service that, as a matter of priority, in the application of Decision Criteria of straight priority, eclipsed the service bid for by Grand Central, in order to get home on that. Am I right on that, colleagues?

MR THOMAS: I think so, Chairman.

MR GIBBONS: Yes, I think so.

THE CHAIR: In that case, perhaps the most expedient way of trying to hit it on the head is to

ask Network Rail to identify their best one, the one that they think is most likely to get home.

MR ALLEN: For us it's 6H88. 493? Actually that's 495. *[Pause]*

THE CHAIR: 6H88 is 495, isn't it? Are we okay to deal with 493 first? *[Pause]* By definition, it's got to be something that you say has a level 1 priority to start with.

MR ALLEN: There are at least three or four here.

THE CHAIR: Let's concentrate on those. You have a choice of 1A67, 4L28, 2Y97.

MR ALLEN: Let's try 2P79.

THE CHAIR: Sorry, which one?

MR ALLEN: 2P79. To be honest, we'd prefer to go through all the ones we've identified, once we start knocking them off the list, if you know what I mean. I don't think we've picked any one above the rest, as it were, when it comes to dispute 493.

THE CHAIR: Okay, let's look at what you say on that and what Grand Central says on that. This is a Firm Right, level 1.

MR HOLDER: Which one is this?

THE CHAIR: This is 2P79, Northern, 16:19, Scunthorpe to Lincoln.

[Cross-talk]

MR HOLDER: That was mentioned in the offer letter.

MR ALLEN: Not specifically.

MR LEWIS: It was mentioned in the letter preceding the offer letter, where it says 'numerous conflicts as per the...' and then it's the same, just cross-referenced.

THE CHAIR: Let's just recall the context of 493 and check that I've got it right. In 493, the complaint started off as characterised not as you've offered a service wrongly, which conflicted with ours, when you should have offered ours. The complaint was characterised as more as a grievance. It was the 'down tools' letter, wasn't it? Network Rail during the process had wrongly abandoned the process before it should have done and that had tempered Grand Central's whole approach to it. It would have acted differently had it not done that and carried on discussing it.

I think, in the course of the last hearing, we effectively put all that lot on one side and said what it boils down to is a straight dispute between the service as was bid for, at what priority we think it had, and I think it was level 3 – that was the Grand Central bid,

and there's no clouding of Alliance or whatever – it was a Grand Central bid at level 3 and whether or not Network Rail behaved fairly or unfairly in the course of the process. Eventually, there was an offer all round and the Grand Central service wasn't offered because Network Rail says there were actual conflicts with a whole stack of services, these ones here. We're looking at this particular one, 2P79, which had a greater priority and therefore it doesn't have to apply the Decision Criteria. It was just a greater priority and that's the one that got home. Network Rail, in its application of contractual processes, is entitled to do that. That's the context and the argument by Network Rail, I think. Are we on the same page on that?

Is it necessary to say more of 2P79 than that it had level 1 priority and was therefore awarded after tweaking it around a bit to make it fit in with all sorts of other things? What does Grand Central say in response to that on 2P79? Grand Central says they agree with the Rights contained in the Northern contract. On the face of it, that means they would agree that it had level 1 priority. However, 'Network Rail has been asked to provide analysis of how it decided its contractual priority. It has stated the contractual Rights of Northern, but not how it decided contractual priority.' This is one of the points where they say, yes, the priority might have been correct, but we don't know whether they were Exercised, because we haven't actually seen the document if they were Exercised with a capital 'E'.

MR COOPER: There are two issues with this from the GC's point of view. There's the issue about whether the Rights were Exercised, because we don't know. Having seen sight of the PDNS for East Coast, we've taken the view that the Rights were not Exercised correctly. We don't know if that's the case with Northern, because Network Rail will not share those with us. The second issue is to do with the Flex. Network Rail seems to see Flex – and the only comment we've had on Flex from Network Rail is about, I think, plus or minus five minutes. They also like to vary it within the contract, which we mention in our response, which they don't use. There are two issues: it's how Network Rail has actually assessed –

THE CHAIR: That was very succinctly summarised. Got that. Okay, well let's address those two issues. The first one comes under the umbrella of the general issue we were talking about this morning. Is it necessary to prove not only that the Right had level 1 priority,

but that that Right was Exercised? Is it necessary to prove that by more than Network Rail saying, in this forum, 'Yes, it was Exercised. It was in the PDNS'? Does Network Rail say that? Are you confident in saying that? I don't want you to say, 'Oh, we can go back to the ranch and dig out the PDNS.' You ought to know by now.

MR LEWIS: Yes, they did put in on the electronic bid. It was in there.

MR COOPER: Sorry, what was in there?

THE CHAIR: Say that again.

MR ALLEN: 2P79.

THE CHAIR: Sorry, I didn't get that clearly. What did you say was in the electronic bid?

MR LEWIS: 2P79 in that format.

THE CHAIR: Was in the...?

MR LEWIS: In the electronic bid. They didn't put a paper copy; they put an electronic bid containing all the services.

THE CHAIR: Is the electronic bid the same thing as we have been calling the PDNS? Could we stick with consistent terminology here, please?

MR LEWIS: If somebody puts in an electronic bid, the PDNS will just have any differences from the previous year, because otherwise it gets submitted electronically. It has the detail of every single service on.

THE CHAIR: Is the electronic bid the equivalent of what we have been talking about as the PDNS?

MR ALLEN: Yes.

THE CHAIR: There seems to be some doubt.

MR COOPER: Not necessarily; it doesn't have to be.

MR HANKS: How does an electronic bid explain how you're applying the Rights or where you got the Rights from to run those trains?

MR LEWIS: We'd expect Northern to put every one of their 2,600 trains on –

MR HANKS: I would expect them to say, 'Our electronic bid, as supplied, is supported by our contractual Rights, as set out here in this contract, and here are some variations that we may or may not want to run for the following timetable.'

MR LEWIS: That would broadly correlate. Any changes to last year's plan would be detailed on the PDNS. Anything that wasn't a rollover would be –

THE CHAIR: Sorry, what is the difference between, if there is one, the electronic bid and the Priority Date Notification Statement, PDNS?

MR ALLEN: I don't think there is one, Chair, as long as it comes in on time.

THE CHAIR: Accepting that anything can be on paper or electronic, is the format different?

MR COOPER: The format for the PDNSes can be different throughout all the train operating companies.

THE CHAIR: I'm sure there must be a difference. There is a template, isn't there?

MR COOPER: There is a template that train operators don't tend to use.

THE CHAIR: That's an electronic template.

MR ALLEN: A PIF is an import of all Northern's trains on the whole timetable.

THE CHAIR: The what?

MR ALLEN: The PIF that Andy refers to.

THE CHAIR: What's a PIF?

MR GIBBONS: It's an electronic file with all the data.

MR HANKS: They're interface files to help you.

THE CHAIR: You mean PIF as in .pif?

MR ALLEN: Yes, it's a type of file. It's loosely referred to as a PIF and it's an import that came in with Northern's PDNS. It's the whole of the trains in their –

THE CHAIR: Okay, so it is the PDNS in electronic form.

MR HANKS: I disagree. The electronic bid is a set of Access Proposals. The Access Proposals are not themselves the PDNS. The PDNS should have Access Proposals to support it. The PDNS should be a statement from each operator as to what it intends to run, what it intends to roll over and where its Rights come from to support those services that it wants to run.

MR HOLDER: You could have an electronic bid on the timetable and a covering note, which says, 'Everything in this electronic bid is covered by our Exercised Rights.'

MR HANKS: Yes.

MR LEWIS: It's a supplemental for Northern, with any changes that we made to last year's services as well, anything that was changed, otherwise it's expected to be a rollover.

MR GIBBONS: Was there an expression of the Rights to be applied in the PDNS? That's the question.

MR LEWIS: I'll have to double check that.

MR THOMAS: There is some reasonableness in this, isn't this, if an operator has 2,600 trains.

To yours, Nick, what would you put in there? Give us a good example of that.

MR GIBBONS: I can't remember the full wording, but effectively it says that on the Priority Date all the Rights that currently exist on that date are to be rolled forward into the forthcoming timetable.

MR HOLDER: That's what we do and we would also say if we were looking for new Rights.

MR GIBBONS: We would do the same thing.

THE CHAIR: That stacks up with what the Network Code requires. D2.4.1: 'A Timetable Participant shall set out its requirements in respect of the New Working Timetable in a written proposal, to be referred to as an "Access Proposal" where: (a) it wishes to Exercise any Firm Rights ... where those Rights were not Exercised to obtain Train Slots in the Prior Working Timetable; and/or (b) it wishes to make changes to any Train Slot in the Prior Working Timetable; and/or (c) it wishes to set out its requirements in response to a notification by,' something else. Of course, that is predicated on there being a Prior Working Timetable. Now, it seems that here we have agreed that, one way or another, there was a Prior Working Timetable. It may not have been the best or most compliant Prior Working Timetable ever, but there was a Prior Working Timetable.

Therefore, what I thought we were talking about when we had been talking glibly about PDNSes, before the waters were muddied by references to electronic bids and PIFs, was I thought Access Proposal equals PDNS, Priority Date Notification Statement. That's an acronym and a term that has cropped up in the industry and is commonly understood to equate to what the Network Code talks about as an Access Proposal. Are we agreed on that? Are we there?

MR COOPER: Yes.

MR ALLEN: Yes.

THE CHAIR: An electronic bid I would therefore take to be: an electronic version of a PDNS equals an electronic way of communicating an Access Proposal. Is that right?

MR COOPER: It is part of it, because that won't state what the actual Exercise Rights are. That is just a list of Train Slots. It's a timetable.

MR GIBBONS: Whether they are supported by Rights or not, it doesn't tell you that.

MR COOPER: No, it doesn't tell you anything like that, no.

THE CHAIR: So what is the role and status in the whole procedure of an electronic bid?

MR BRANDON: It's the supporting information for the PDNS. There should be a statement which, in effect, details the Rights that they are exercising and any amendments to the previous timetable. The electronic PIF file that Andy refers to is the supporting document that shows the previous timetable that is being rolled over, as detailed by the Rights holder Exercising the PDNS, if that makes sense.

THE CHAIR: The PDNS is the Access Proposal as defined, because the Access Proposal is a sort of proposal by exception to the Prior Working Timetable, and the electronic PIF file is supplementing that, providing the other trains that are not the exception, which are the rolled-over ones, if there are rolled-over ones, plus other details such as the rolling stock. Would that be how it works? That's a practical working tool not specifically mandated by the Network Code, but then nor would it have to be, because you can figure out, as an industry, with the practical working tools you need to make the system work. That's fair enough. Okay, but for contractual purposes, what we are concerned with is the PDNS and not the stuff that goes in the electronic bid. Is that correct? Can we forget digression on to the electronic bid?

Where did we get on to there? We're trying to determine whether, in the case of 2P79 –

MR ALLEN: Sir, I think I have Northern's PDNS on my laptop. I would like to answer your specific question.

THE CHAIR: Yes, that's right. You've got the PDNS.

MR ALLEN: Yes. If I'm allowed a few minutes, Mr Chairman, to look at it, I'll come back and answer your question yes or now.

MR GIBBONS: Can I come back and help here?

MR ALLEN: Or we use 4L28.

MR GIBBONS: Can we use 4L28? That 4L28 is a DB Schenker train, the company I work for, and I can categorically assure the Committee, the panel, the claimants and the defendants that we quite clearly stated in our PDNS the Rights to be applied on the Priority Date. Those Rights were in place at 14:00 on the whatever it is of March.

THE CHAIR: Thanks very much, Nick. That's helpful, but I don't want to have to rely on that

as the only one, as the knockout, because I think Grand Central would fairly say it's all very well taking evidence from a member of the panel.

MR GIBBONS: Okay, I understand that. I was just trying to be helpful.

THE CHAIR: I quite understand. Quite right. I'm looking for the one, if there is one, which is the knockout blow that stops us having to trawl through every single one of them. We may come back to that.

MR COOPER: Can I make a point? The whole point of saying about whether Network Rail has assessed whether Rights have been Exercised properly, they've already done that. Now, there shouldn't be any doubt. Matt shouldn't have to go away and look at his laptop to see whether the Rights have been Exercised correctly.

THE CHAIR: Absolutely. I'm pretty sure that they're saying, off the top of their head, it has been Exercised, but you are saying, 'We don't quite accept that. We want something a bit stronger.' We're entitled to try to meet your point on that by saying, 'Come back and say, staring us all in the face, hand on heart, if not on oath...'

MR ALLEN: That's what I want to say to you.

THE CHAIR: Exactly, 'Yes we are satisfied that it was.' If they do say that, then I am not minded to provide the PDNS to substantiate it. I want them to be comfortable in saying that. If you want to go and look it up, please do. Shall we take the opportunity of a break for that for five or ten minutes?

(Adjourned.)

[Chris Brandon had left the meeting.]

THE CHAIR: Over to you, Matt.

MR ALLEN: I can confirm that Northern Exercised their Rights in their PDNS submission.

THE CHAIR: Right, and that it was Exercised properly and fully, in a form that complied with...

MR ALLEN: Yes.

MR LEWIS: It's still live next door, if anybody does want to see it. It's there; we left it on the screen.

THE CHAIR: Fair enough, thank you. Grand Central, do you want to challenge that statement

as being true?

MR YEOWART: No, if Matt has said that it's there and Exercised correctly, then we'll accept that.

THE CHAIR: Thank you. In that case, is there any reason for not concluding that at least as regards – 2P79 Northern Rail, 16:19, Scunthorpe to Lincoln had level 1 priority? It was properly and duly Exercised in the PDNS, in the Access Proposal for the purposes of the Network Code, and Network Rail was entitled, in making the offers, to prefer, in the technical sense, that service as having a greater priority over the conflicting service. Let's just remind ourselves of the number so I can come back to it. What was the Grand Central service we were talking about? 1A67.

MR HANKS: 1A68, it is.

THE CHAIR: Of, is it? Oh yes. The only remaining available argument on that point is that, even with the greater priority, Network Rail should have availed itself of contractual Flex to accommodate the conflicting Grand Central bid service, if it could. Is that the argument that's being made still?

MR YEOWART: Yes.

MR HANKS: Yes.

THE CHAIR: What's the answer to that, Network Rail?

MR LEWIS: We did actually try our best to impose the Flex there, but it wasn't just that service; there were other services as well. We did show the argument in better detail in our response to why we couldn't impose that Flex.

MR HANKS: There were two options you showed in the supplementary information. The two options involved retiming 2P79 two minutes earlier to reinstate headway. I can see that there are some issues with that one. The second one I'm less clear about. It says 'Flexing the service by six minutes so that 2P79 will follow'. Can you clarify whether that's six minutes earlier than the 17:01 departure that it's currently in the timetable as or is that six minutes earlier than the pattern, which I think would make it at 16:56? Is that actually saying that it would be 16:50? The reason I raise that is that Flexing by five minutes from the pattern would be fine.

MR LEWIS: I see what you're saying, yes, with the five-minute threshold. It's a maximum journey time, but you can get one journey in at 90 minutes. *[Pause]*

THE CHAIR: While Andy's just contemplating that, can I ask Grand Central –

MR LEWIS: It would be the half hourly one, sorry, Chris.

THE CHAIR: Sorry, would it be right in thinking – I'm just trying to relate this particular spot we've got to back to the wider picture – that if the answer to this or indeed on any of the others is, actually, we could by a bit of jiggling round have Flexed, that's precisely the sort of thing that would have been able to be done, if Network Rail hadn't downed tools? This is the downed tools application, isn't it?

MR HANKS: Yes.

MR LEWIS: No, this was mentioned on the original summary. This was one of the trains that we did actually look at.

THE CHAIR: Sorry, is your conclusion that – I'm sorry, I wasn't really following the detail of that point – that train could or could not be Flexed?

MR LEWIS: No, it couldn't be Flexed. It would break both Flexing –

THE CHAIR: Because Flexing that one would cause a conflict with other trains of greater priority than Grand Central's.

MR LEWIS: It would break its own contractual stipulation. The amount we had to Flex it to make it work would break its own contractual regulation.

THE CHAIR: So Flexing it with a capital 'F' within its contractual Right was not possible because...?

MR LEWIS: Within its own Right wouldn't have been sufficient to make the Grand Central service.

THE CHAIR: Wouldn't have been enough to accommodate Grand Central's anyway.

MR HOLDER: What's the potential to Flex the whole for the rest of the day...?

MR LEWIS: The rest of the day's services?

MR HOLDER: Every other hour around the new departure time.

MR LEWIS: I suppose that would have... Would that not constitute a recast?

MR GIBBONS: That's Significant Change, isn't it?

MR COOPER: It is right that Network Rail can do. It's in a separate section in the Northern contract. They can actually move trains around the clock face.

MR ALLEN: The two routes you are talking about is the Doncaster two minutes' one, which we all accept. The second one is the journey time where, if we did Flex it to make it

suitable, we're a minute over the maximum journey time allowed for that train. The current journey time is 84 minutes and we'd need to put – we put 2P79 one minute over our contractual journey time Flex for that time.

THE CHAIR: Did you approach Northern to ask them if they would, as a matter of good will – which I think is an expression you used to Grand Central in – where was it?

MR ALLEN: I don't think we could honestly answer that question.

MR LEWIS: No, we didn't. Maybe if that had been the only one, if that had been the only instance, but there were...

MR ALLEN: No is the specific answer to that question.

THE CHAIR: No is the answer to that, but you would still say that it's a matter of pure contractual obligation –

MR ALLEN: There's no obligation for us to approach Northern.

THE CHAIR: There's no obligation to you to approach Northern to accommodate something outside their contract and you would say you couldn't accommodate Grand Central's bid by Flexing Northern within the contract. That's the second point there. Grand Central, do you accept that?

MR HANKS: Well, I don't quite understand the argument about the journey time now, because I was looking at the actual interval or the departure time Flexing. In Network Rail's statement, it says that currently all journeys are 81 minutes, but there's the facility for one journey to be up to 90 minutes. You're saying that there already is one that's within the –

MR LEWIS: Northern Rail has Rights to a half hourly departure on the next line. Being as Doncaster and Sheffield are stopping services, that would be Flexed by up to five minutes.

MR HANKS: What I'm not clear on is what minutes past the hour those trains currently leave Doncaster to Sheffield for most of the day. Is it 26 and 56, or is it 31 and 01, or something in between?

MR LEWIS: It would be – I think it's 06 and 31, isn't it? I think it's 06 and 31 off the top of my head.

MR GIBBONS: It's somewhere between 03 and 28, the departure times, depending on which hour you're in. It does move around a little bit.

THE CHAIR: Is this an issue or not?

MR HANKS: Only inasmuch as it wasn't something that was pursued, not in my recollection anyway, before the offer letter, so it does come back to the point about should more work have been done before the offer to examine this. Sorry, I don't recall. Andy, do you recall whether this train was included? It wasn't mentioned in the offer letter, but I do not recall whether it was mentioned in any Flexing spreadsheets? I don't believe it was, but I stand to be corrected.

MR LEWIS: It's on the letter that was sent on 14 April, the one I've referred to.

MR HOLDER: The offer letter talks about a 15:03 email, which I couldn't find.

MR LEWIS: That's a separate one. It's in here somewhere. That's the one that was sent to Chris. It's also on the one on 14 April as well. It's the first entry on that, the email of 14 April.

MR HOLDER: I've got the 14th here.

THE CHAIR: Is that from one of the Annexes to the original submission?

MR HOLDER: That's Annex A to something.

MR HANKS: You're right; it is mentioned in the 14 April email. I possibly had overlooked that, even though you had subsequently provided it.

THE CHAIR: Is this going anywhere, this point?

MR HOLDER: It is this one.

MR HANKS: It is the very first item; it's hidden above the graph.

THE CHAIR: This seems to show that they'd had a go, but there were other... [*Pause*] That's that one. Grand Central, last crack at this one; are you saying that there is any contractual obligation on Network Rail to have exhausted all possibilities for contractual Flex of 2P79, the Northern service, in order to accommodate the conflicting Grand Central bid, a contractual obligation that Network Rail failed to satisfy? [*Pause*]

MR YEOWART: No, we can't.

MR HANKS: We can't really pursue that argument, because we haven't got any evidence for what could or should have been done with that particular train.

THE CHAIR: Thank you for being candid about that. Can we therefore conclude that we don't need to examine in the same detail any of the other services in relation to 493?

MR YEOWART: We're alright with that. You really wanted to have a go, didn't you, on 493?

I didn't want to steal your thunder, Nick.

[*Cross-talk*]

MR YEOWART: We're okay. As you say, if there's just one service then there's just one service. That's it.

THE CHAIR: There are so many, I would be frankly surprised if we didn't find at least one other one where there was a similar irresolvable problem.

MR YEOWART: Maybe, but you can see now why for us the PDNSes are critical. If we'd been able to see them, we could have dealt with a lot of this without coming here, you see.

THE CHAIR: I think that disposes of 493. There may well be, when I think about, observations to make about the conduct and the things that were originally raised, the 'down tools' thing and all that. Actually, when you get to the germ of what the dispute is, the conflict between these two services, it does appear that it gets through on the basis of one service, so therefore that's it. Bending over backwards but with an eye on the clock, does Grand Central want to say anything else on that score, before we move on to 495? Thank you.

Right, 495 is the one that was adduced in the relevant letter – was it the offer letter? – as being the conflicting service. The service conflicting with the relevant Grand Central bid, which was a GB Railfreight service, for which Grand Central said, 'That was a spot bid anyway, and so didn't have on any basis priority over us,' to which Network Rail said, 'Woops, well maybe. Actually, here are these half a dozen other services that actually conflicted with it, which did have priority. We may not have mentioned them at the time, but actually this is it.' Is that about where we got to on that?

MR ALLEN: Pretty much, yes.

MR LEWIS: Some of them were mentioned, but they weren't all mentioned at the offer letter, so that's pretty much it.

THE CHAIR: Just remind me; were any of the ones that you say were an actual contractual conflict mentioned in the offer letter?

MR LEWIS: Yes.

THE CHAIR: It wasn't just the –

MR LEWIS: No it wasn't just them; it was a combination.

THE CHAIR: Just the GB Railfreight spot bid. Can we again pick your best of the ones that were mentioned in the offer letter, so that we arguably don't get into the 'You made up your minds retrospectively' argument?

MR ALLEN: We're going to pick a freight train, 6H88

THE CHAIR: 6H88.

MR HOLDER: That's the one that says it's subject to three Slots, isn't it?

MR ALLEN: This is the one where there's a comment in the schedule 5 table for this one having level 1 Rights, plus or minus 30 minutes in terms of Flex, but Heavy Haul restricted to three trains out of Daw Mill, but it doesn't say clarity on whether it's running through three trains a day or clarity on whether it's three days in the timetable.

THE CHAIR: Sorry, what doesn't say that?

MR ALLEN: The schedule 5 footnote really.

THE CHAIR: The Freightliner Access Agreement doesn't actually clarify what the underlying Rights are.

MR ALLEN: What the footnote means in them. Maybe I might regret choosing 6H88

THE CHAIR: Do you want to choose this one and get into that?

MR HOLDER: Try another one.

MR ALLEN: I'll try another one. The next one is 1N85 then.

THE CHAIR: Oh, East Coast. Hello again, Shaun.

MR HANKS: Was that mentioned in the offer letter?

THE CHAIR: I would prefer you, if you can, to choose one that was mentioned in the offer letter.

MR ALLEN: Okay, what else was in the offer letter?

MR LEWIS: 6E84.

[*Cross-talk*]

MR ALLEN: Equivalent Rights, plus or minus 30 minutes' Flex, however it was amended in the previous timetable by 30 minutes.

MR HOLDER: It still has a Right to be within 30 minutes of the current path or previous path, doesn't it?

MR THOMAS: Is it the previous path?

MR GIBBONS: Yes, the previous one.

THE CHAIR: This was mentioned in the offer letter.

MR LEWIS: Yes.

THE CHAIR: Grand Central, is that accepted?

MR YEOWART: I don't think so. Is it?

MR HANKS: It was mentioned in the offer letter.

THE CHAIR: It had priority 1. Is that acceptable all round?

MR YEOWART: No.

MR COOPER: No. It didn't hold the Rights on Tuesday, Wednesday or Thursday, because it only operated Mondays and Fridays, I believe.

THE CHAIR: Yes, on Tuesday, Wednesday and Thursday, DBS did not hold the level 1 Rights, so it can't be a Firm Right. 'If this path was progressed to a compliant Access Proposal at the Priority Date, it would have had a priority under level 3. If it came in after Priority Date it would have been level 4.'

MR HOLDER: Mondays and Fridays.

MR ALLEN: It was an SX bid from Grand Central to run on the Wednesday and Thursday.

MR HOLDER: I assume you've got the Rights for that.

MR ALLEN: Yes, agreed that, but the bid would be the Access Proposal that they had requested was an SX path. Should we have offered it for three days and not –

THE CHAIR: Let's focus on that. The Grand Central bid, just remind me what the service number of the conflicting one was.

MR HANKS: 1N93.

THE CHAIR: That was 1N93. That was an SX bid, so how do you deal then with a conflict on only some days within?

MR ALLEN: It's very unusual for it to happen with passenger trains.

THE CHAIR: I'm sure this is all very unusual.

MR ALLEN: On freight trains, you have a bit of dialogue and you may do Tuesday, Wednesday, Thursday for the other Friday and Monday, Tuesday, and all the rest of it, so you alter the days that the trains can actually run.

THE CHAIR: Did you have that dialogue in this case?

MR ALLEN: No, we haven't explored. I don't think we ever asked the question to colleagues at Grand Central about offering them a train for just three days.

MR HANKS: Rather than get bogged down in that, can I point you to the last line of our statement on this? It says, 'Finally, the conflict to which Network Rail alludes was resolved and this is no longer an issue.' If that's not the case, then I put that to Network Rail to say why it isn't, but my understanding is that that conflict has been resolved. As I understand it, there was actually a conflict not just with 1N93, but between 6E84 and 6H88.

MR ALLEN: When was that mentioned, Chris?

MR HANKS: It was checked at the end of September/beginning of October but, as far as I'm aware, it was actually resolved if not before the offer date then soon after. I think it was probably after the offer date.

THE CHAIR: Sorry, just remind me again of the train we're talking about, the Northern service?

MR HANKS: Which one, the Grand Central one?

THE CHAIR: No, the...

MR HANKS: 6E84.

THE CHAIR: I had a question on that: is that correct that it was resolved, so it's not a conflict?

MR ALLEN: Sir, we revalidated 1N93. We put it in as per the PDNS submission as proposed from Grand Central and, on 28 September, to put the argument about retrofitting evidence to one side, this was what the timetable looked at on that day, when we put that train in. There was still a conflict with the Access Proposals bid for 1N93 and 6E84, so that's a long way of saying I don't believe that.

THE CHAIR: Are you saying the conflict was not resolved?

MR ALLEN: That's what I'm saying, yes.

THE CHAIR: Grand Central, why did you say the conflict was resolved?

MR YEOWART: We'd need to check back on something.

THE CHAIR: I want to substantiate that.

MR ALLEN: I wouldn't disagree there was a possibility that, at one point in the process, when some of the work was going on, we had a different view, but when we put the train in as per the bid schedule, looked at it with the timetable on full preparation for this letter on the 28th –

THE CHAIR: This is as at the offer date, we're saying.

MR ALLEN: It would be looking at the timetable that we offered, yes, after the offer date.

MR GIBBONS: In other words you're confirming the offer you've made.

MR ALLEN: Yes.

THE CHAIR: Sorry, just to be clear while they're looking at that, this 6E84 is one that was mentioned in the offer letter to Grand Central as a reason for putting it. I know I can check it in the documentation.

MR HANKS: I think the confusion here perhaps is that it says the timetable conflict is headway conflict at Doncaster. It still says that in ORR's latest later, and that I know was where the original conflict occurred, but the detail now says it conflicts with the path at Shaftholme Junction, which although is near Doncaster is not the same as Doncaster. The problem is I don't have any evidence in front of me to say whether that particular conflict has or has not been resolved. My understanding is the conflict that was resolved was the one at Doncaster, but it's possible that, by resolving that, a different conflict has occurred.

MR GIBBONS: The question is: have you got anything that demonstrates that that conflict was resolved by Network Rail?

THE CHAIR: What Network Rail's statement, the latest one in the additional information, on this point says, 'The conflict, headway conflict of 1N93 at Doncaster,' what was looked at, 'the 6E84 departs Doncaster at 14:50, conflicts with 1N93's rejected path at Shaftholme Junction. A train that is preceded four minutes' headway through Doncaster,' I'm not sure what that means, 'by Freightliner Heavy Haul 6H71,' which also takes the same route north of the station. This is referenced in the commentary for 6H88, which we avoided. Cutting to the quick, is there a serious substantial reason for refuting this particular service as a valid priority-based conflict with the service 1N93, which was bid for? If there is, we'll examine it, but I have a sense that we're sort of scratching around a bit here.

MR HANKS: Well, I haven't got the evidence in front of me to support that, because I know I haven't examined that conflict.

THE CHAIR: I don't want to throw anything out on the basis that your party hasn't got evidence because it has been deprived of the opportunity to get the evidence.

MR YEOWART: The issue about that at the end is we would have expected Network Rail to

have gotten an issue with a statement that was clearly made in our response, that they would have said that's not right. We would not have said that if we had something, because we have spent a lot of time and detail looking, but clearly we haven't brought it because the expectation was it's gone. Actually, it's not been challenged that it's gone so we weren't expecting it to crop up. Now, it's possible we've made a mistake. I'm not saying that we haven't, but we have been quite particular in responding to these. If we can't find it –

THE CHAIR: You'll understand, and I hope think, that this is fair treatment that this really has to be the last bite of the cherry.

MR YEOWART: Yes, we understand that. *[Pause]*

MR HANKS: We'll withdraw that objection on the grounds of that being resolved, because I haven't got the evidence to say otherwise, but I think we wish to revert to the previous discussion we were having then about the days in operation.

MR LEWIS: Is that the three days to Sunderland.

MR HANKS: Yes.

MR LEWIS: Would you take three days?

MR YEOWART: There's precedent for this, Chair, just so that you know. When Alliance has been bidding for services on the West Coast Main Line, we've had to have some validated services, which are dated because of a similar conflict, and we have accepted those in a validated timetable, albeit on an offered timetable at the moment. It's with the regulator. There is a precedent. It is our intention that these services do go to Sunderland and don't stop at Hartlepool. There's a financial cost as well as a – well, not performance risk, but it is mainly financial cost. There are other services that go through, but this one has to turn around or it's balanced to turn around at Hartlepool. If we could get it three days, we would.

THE CHAIR: That's what I was going to ask you. Would you have, if offered it for Tuesday, Wednesday, Thursday, accepted it and, if directed to be offered it now, would that dispose of it? I'll come to the question in a minute, because I realise that's not the end of the story. Don't worry. *[Pause]*

MR YEOWART: Yes, we would.

THE CHAIR: On that particular conflict, you would have accepted and would accept now, if

offered it, Tuesday, Wednesday, Thursday, those being the days when that conflicting service didn't have a contractual priority. Okay, Network Rail, do you want to pick another runner as potentially an unarguable five-day conflict?

MR ALLEN: A little bit of the problem I have now is, before we left whatever we just left alone, there must be some reason why 6E84 will be made SX, and I would like to understand where that fell in the ranking of 4.2.2 and its priority for inclusion in the new Working Timetable. Do you see what I'm getting at?

THE CHAIR: No.

MR HOLDER: The 29 April email, Annex B, talks about 6E84 MFO.

[Cross-talk]

MR ALLEN: That's what I'm getting it. Is there something in your PDNS that gives the same Right as that and this?

[Cross-talk]

MR GIBBONS: There'll be an Expectation Right for the application to the ORR.

MR ALLEN: Where does that put it in its exclusion in the new Working Timetable in terms of level of its Rights? That's my query, because it probably puts them on the level.

MR GIBBONS: As an Expectation of Right, yes.

MR ALLEN: That's what I wanted to get some clarity on.

MR GIBBONS: I can't tell you for sure.

MR ALLEN: I can't, because we've not looked at that specific train. The caution being put on it may not be as simple as being able to go back and try for three days. It may not be the right...

THE CHAIR: It appears that this particular service MFO was adduced as a reason for rejecting before the offer letter, in the email of 29 April, which was Annex B probably to Network Rail's submission, I should think. I don't know if that particular point was come back on by Grand Central or whether it just sort of went into the pot along with everything else.

MR COOPER: In terms of the Rights?

THE CHAIR: Yes. Network Rail, is there another service you can pick to avoid us concluding possibly that that particular conflict could have been accommodated and therefore could be accommodated by offering them a three-day service? Do you want to pick another runner, preferably one that one was included in the offer letter, which is a knockout

conflict, in terms of priority and any other?

MR ALLEN: I think we're back to 6H88 then.

MR YEOWART: Chair, can we just have two minutes and literally just minutes? I'm partly confused myself now, so I need to make sure I'm unconfused before we move on to the next session.

(Adjourned.)

THE CHAIR: I think we've got to the point where we had, on 6E84, the DB Schenker service, identified it as a relevant conflict, priority 1 and all that, on Mondays and Fridays, but not Tuesday, Wednesday and Thursday, so we were considering whether there is another service that has a five-day conflict, which is nor arguable against, and I think at that point Grand Central wanted to go and check something.

MR YEOWART: We just wanted to check, Chair, because of the detail that you'd gone into, that if we were successful here that the 13:23 was also acceptable to Grand Central, because it is an odd service.

THE CHAIR: Sorry, is that the one which we're saying could be –?

MR YEOWART: Potentially the Tuesday, Wednesday, Thursday. We wouldn't want you to come to a decision potentially in our favour and then find that it was not acceptable to them, but they've confirmed that it is.

THE CHAIR: An acceptable potential solution on that particular conflict would be to take the three days, where it appears there is not a conflict.

MR YEOWART: Yes. It may seem strange on the face of it, but the fact is –

THE CHAIR: You don't have to tell me.

MR YEOWART: The earlier service is a long extra journey time, so it almost arrives at the same time as the very earlier service. It's a right-side failure; i.e. if a customer turns up for it, it's still going to be there, even though it's half an hour later.

THE CHAIR: Okay. At that point then, Network Rail was looking for something that is, if they want to, referenced in the offer letter as a conflict, which is another potential five-day knockout blow, rather than just a two-day knockout blow, and that was back to 6H88, where there's the difficulty of the interpretation of the underlying access Rights of

whosever service that is, which is Freightliner. Before we embark on that, are we able to know if we can resolve that? Do you feel we're going to get through all that without a conflict?

MR ALLEN: We've got 1N85, the East Coast, Kings Cross-York. That train's not in the offer letter, but I think it's mentioned in the previous correspondence.

MR HOLDER: I understand it was Flexed.

MR ALLEN: Only if East Coast would agree to change the traction on it.

THE CHAIR: 1N85 wasn't in the offer letter but had been mentioned before. Is that the point?

The retrospective justification hurdle you would say wouldn't apply, in that respect.

MR ALLEN: I would indeed, yes.

THE CHAIR: You'd say you fully explored it.

MR ALLEN: It was transparent earlier in the process, yes.

THE CHAIR: What did Grand Central say on that? Let's refresh our memories. Could have Flexed it within a wide margin and, arguably, it wasn't Exercised properly. Again, we can ask Network Rail to verify that or not. Grand Central, what's the point of objection here on 1N85, this potential knockout conflict?

MR COOPER: On this one, we don't believe we've actually looked at using the contractual Flex fully, and also we'd argue that the PDNS that was supplied didn't actually Exercise the Rights correctly.

THE CHAIR: Is that latter argument based on site of the actual PDNS?

MR COOPER: It is, yes.

THE CHAIR: However you've got it, you've got the East Coast one. This isn't one where you just have a general suspicion that there's dirty work at the crossroads, because you've got the actual thing, so you say that this one specifically wasn't Exercised. Without getting into the detail of that, on that point, Network Rail, is that right that it wasn't Exercised properly?

MR LEWIS: I don't think we explored the Flex on that one, because there were so many different issues.

THE CHAIR: If it wasn't Exercised, we don't need to look at the Flex issue.

MR HANKS: I think it's worth pointing out as well that 1N85 – tell me if I'm wrong, Network Rail – the conflict there is potentially with a retimed 6H88, rather than directly with

Grand Central's proposed train. Is that right?

MR LEWIS: It may be now.

MR HANKS: In other words, it's a knock-on effect of Flexing 6H88.

THE CHAIR: It's second level.

MR LEWIS: It's effectively because of the effect on 6H88.

MR HANKS: We need to establish where 6H88 fits in the scheme of things before we look at 1N85.

THE CHAIR: What about the point as to whether it was Exercised correctly?

MR ALLEN: 6H88?

THE CHAIR: No, 1N85.

MR ALLEN: In each case, the PDNS clearly says it's a rail forward, with the exception of the following trains that don't have Rights or whose Rights expire before the start of the timetable.

MR YEOWART: It should also have contained the rolling stock diagrams.

MR ALLEN: I don't know whether it did.

MR YEOWART: To be fair, in the response, we were told it did but in the response it said that they were verbally carried over from the PDNS. The Network Code says they must be written.

THE CHAIR: Earlier today when we were exploring the distinction that arose between a PDNS equals contractual Access Proposal and the electronic bid, I thought it emerged and was accepted on all sides that the PDNS Access Proposal did not necessarily contain the rolling stock, but that was the sort of detail that was supplemented in the electronic bid.

MR ALLEN: These changes are effectively the electronic bid of rolling stock diagrams that was accompanied.

THE CHAIR: The PDNS, the Access Proposal for Network Code purposes, would not of itself be contractually deficient in not having the rolling stock diagrams. That's my understanding.

MR COOPER: It would, because it won't be an Access Proposal, because in your Access Proposal you've got to have rolling stock diagrams or timing loads.

MR HOLDER: Yes, or timing loads.

MR GIBBONS: I thought we established previously that they had submitted their rolling stock. Both Network Rail and East Coast stated that –

MR COOPER: But then Network Rail also said they were verbally agreed.

MR FISHER: That's a different issue. That's the thing relating to the York extensions.

MR ALLEN: The electronic bid will have the timing load information in it.

MR COOPER: The thing with that PDNS though is it doesn't actually state which Rights they're using. If you look at the GC one, we've followed the Network Rail template, which is provided.

MR FISHER: So have we. It's just that that's a supplementary document to the PDNS.

MR COOPER: It doesn't actually look the same.

MR FISHER: You've not got the PDNS template document.

MR COOPER: We have from Network Rail.

MR FISHER: Have you?

MR COOPER: Yes.

MR FISHER: Where is it?

MR COOPER: I've got one here.

MR FISHER: Why does it look different from a normal PDNS template?

MR COOPER: It's got different references in it.

MR FISHER: Has it?

MR COOPER: Yes. They changed it this year slightly. Have we got a copy of ours? That's the template. We've followed what the template is. Those are the template ones.

THE CHAIR: Sorry, can I cut you short a bit on this? I am struggling to see that you're making out the case that an Access Proposal is contractually deficient in not following a particular template, in not including the rolling stock, whatever. I can't see what you can point to in the contract that makes that mandatory.

MR COOPER: If you actually go to 2.5, the contents of an Access Proposal, in there one of the things that we picked up on was you've got to actually identify the railway vehicles or timing load used. The other thing that you've got to do is, under 2.4, a 'Timetable Participant shall set out its requirements in respect of the New Working Timetable in a written proposal [where] ... it wishes to Exercise any Firm Rights and/or Contingent Rights and/or any expectation of Rights.' What we're saying there is you've got to

actually state which Rights you're wanting to use. .

THE CHAIR: None of that says you have to have the rolling stock diagram.

MR COOPER: It does under 2.5, 'content of an Access Proposal'.

MR ALLEN: Which part?

MR COOPER: 'Railway vehicles or Timing Load to be used'.

THE CHAIR: It doesn't need to state the rolling stock diagram, does it?

MR COOPER: No, but railway vehicles or timing load.

MR GIBBONS: So you've got a timing load. It doesn't say diagrams.

MR ALLEN: The PIF from East Coast will have the timing load on it, whatever your timing load is for East Coast Trains.

THE CHAIR: Even if it was the railway vehicle, you could state the type of stock to be used without actually stating it in a form of a diagram.

MR COOPER: Yes, you could, but the East Coast one is silent, but we've got the PDNS.

THE CHAIR: Sorry, the East Coast one is silent on what?

MR COOPER: On rolling stock.

MR ALLEN: Each one of these has got a timing load next to it – additional service 125 91 410. I assume that's 125 timing load, class 91 with 10 vehicles on it.

MR COOPER: What about your rolled-over Rights then?

MR GIBBONS: That's a supplement to the PDNS. Shaun's just said that that there is a supplement to your form of the PDNS.

MR FISHER: Yes, it is.

MR COOPER: That's not your full one, so actually that's provided with only a supplement when they told us it was the PDNS.

THE CHAIR: Whether it provided it to you or not...

MR YEOWART: It's difficult for us, Chair, because we were told we had been provided with the PDNS and we've used that as part of our evidence. It's a bit embarrassing for us to find that actually we weren't, when we were told that we were and it's created some issues.

MR ALLEN: All the way through this we've had the problem with rolling stock. I can't see where there's a contractual bullet point. We all know the railway would grind to a halt timetable planning wise if insisted upon rolling stock diagrams. We can make a decision

on Access Proposals going to the timetable based upon the timing load.

THE CHAIR: Never mind rolling stock diagrams, what is pointed out correctly by Grand Central is that part of the contractually required content of an Access Proposal, aka PDNS, is the railway vehicles or timing load.

MR ALLEN: Correct and we've had that for East Coast.

THE CHAIR: Grand Central is also saying that that element of it, whether in the form of rolling stock diagrams or in any other form, was not in the document that was given to them in whatever context, whatever they asked for, as being the East Coast PDNS, aka Access Proposal. What is that document that you're holding there? Has that been included in any of the submissions?

MR ALLEN: This is in the Annexes that we've had for this.

THE CHAIR: Is it in your submissions?

MR ALLEN: I don't think it's in ours; I think it's in Alliance's/Grand Central's. On it, it does include in brackets next to each train time or whatever a comment on the timing load.

THE CHAIR: Grand Central, however it got to you, contained that information because it's in your submission.

MR COOPER: Which was provided to us by Network Rail when we asked for the PDNS.

MR YEOWART: It was included.

MR GIBBONS: I assume that Network Rail only provided part of the PDNS that was relevant to your interests on the East Coast Main Line, which was that, as opposed to the whole of the PDNS, which was to do with the Scottish services and Newcastle services.

MR FISHER: Electronic export file and rolling stock diagrams.

MR HOLDER: Is this one of the trains that is an either/or to York.

MR ALLEN: No.

MR HOLDER: Is it just straight to Newark?

MR ALLEN: It's a straight rollover.

MR HOLDER: What were the Rights associated with it? It is a part of an interval or is it a quantum Right?

MR FISHER: This is for 1N85.

MR HOLDER: Yes.

MR FISHER: It's separate; it's not part of Newark.

MR HOLDER: It's at York, sorry.

MR FISHER: It's at York, yes. That's got Firm Rights to the end of the contract.

MR YEOWART: Yes, I thought it was Firm Rights for quantum on the Yorks.

MR ALLEN: It's got five off-peak paths. The first one must leave Kings Cross no later than 07:20 and the last one must leave no later than 15:00.

MR YEOWART: It was Firm Rights for quantum during the time and calling pattern, but not departure time range.

THE CHAIR: Not what, sorry?

MR YEOWART: Departure time range.

THE CHAIR: That is in your PDNS.

MR YEOWART: In the contract, we think. We've checked the contracts and I think the Yorks – I mean, the Newarks ran out.

THE CHAIR: In East Coast's contract?

MR YEOWART: In East Coast's contract, yes. The Yorks do have Firm Rights but for a quantum of services, not for a specific departure range.

THE CHAIR: I'm sorry, I thought we were trying to drill down to what was in the PDNS, the Access Proposal, or in any documents supplementary to it.

MR YEOWART: To be fair, Chair, we've accepted the fact that the information provided, we can't find our copy of it.

THE CHAIR: What's the relevance of what was in the contract?

MR HOLDER: I asked that as well, Chair.

THE CHAIR: Sorry.

MR HOLDER: I'm just seeing what the scope for Flexing it was.

MR YEOWART: If we accept that it was properly bid for, then it's down to what Flex Network Rail has got to move the train.

THE CHAIR: Sorry, can I just try to establish where we've got to? It is accepted then that 1N85 was – are we talking about 1N85? Yes. 1N85 was a higher-priority, priority 1.

MR COOPER: We've got a copy of the PDNS.

THE CHAIR: Please would you listen to my summary and tell me whether I've... I'm trying to establish an agreed base incrementally as we go forward. Where I think we've got to is that it is accepted, on all sides, that 1N85 East Coast was a higher priority, was

priority 1, was Exercised as an Access Proposal, because the contractually required component parts, including details of rollover, vehicles or timing load, if they weren't in the PDNS bit of the Access Proposal were in a supplementary document which, on any analysis, Grand Central has had and seen, however it has, because it included that particular document in its own submission. I can't remember how it got that document or it says it got that document but, for the present purposes, that's enough to know. We can check that out later.

MR HANKS: That is the key bit that's missing from that. The two things that are missing from the document are an explanation of where the Rights come from for altered services and anything about timing load. It may be that those are contained in a separate document, but they're not in this tabled one.

MR GIBBONS: That's a supplement to the PDNS.

MR HANKS: This is the document that we were supplied with.

MR ALLEN: The timing loads are on there.

MR GIBBONS: Excuse me; you have that document, which is a supplement to the PDNS.

Yes, Shaun; that is a supplement. It is not your PDNS.

MR FISHER: Yes, it is to assist Network Rail.

MR HANKS: It is headed '2013 timetable PDNS', which is why we took it as being the PDNS rather than... It's now been explained to us that it isn't.

MR GIBBONS: That may be what you asked for. I don't know what you asked to provide.

MR COOPER: We asked for the PDNS.

MR GIBBONS: The whole PDNS?

MR YEOWART: Today is the first time we've been made aware that this is actually a supplement.

MR GIBBONS: That document does give the timing load for the 1N95 or the 13:08 Kings Cross to Newark, doesn't it?

THE CHAIR: However you got it, you have got it. It contains the contractually required details, among other things, of rolling stock – sorry, railway vehicles or timing load.

MR HANKS: I'm sorry; it does not contain the timing load for the... Sorry, it's rolled forward.

MR COOPER: It doesn't explain about the Rights that are Exercised and how they're

Exercised.

MR GIBBONS: Because that's in the PDNS.

MR COOPER: There is something more than that. Is that what you're saying, Network Rail?

MR ALLEN: I haven't seen anything more than that.

MR COOPER: This also appears to cover all the rollover, so I'm surprised it's a supplement.

It covers all the timetable. It's saying this timetable's been rolled forward of that which operates in December 2011, with the exception of the following alterations.

THE CHAIR: Sorry, what's the contractual point of being surprised at it, that it's contractually ineffective or that there's been a lack of transparency?

MR COOPER: No, this is about how the Rights are being Exercised. What we're saying here is that we don't believe the Rights have been Exercised, because it doesn't say which Rights they're actually using. This is a list of trains. It doesn't say about Rights; it talks about paths.

MR GIBBONS: Can I have a question to Shaun? One assumes that your PDNS, in the standard format and standard template, reflected the Rights that have to be Exercised in the December 2012 timetable.

MR FISHER: Yes, it did, yes.

MR COOPER: Clearly Network Rail hasn't seen that, so how can they decide what Rights have been Exercised? They've just said so; Matt's said he's not seen it.

MR GIBBONS: Just because he hasn't seen it, it doesn't mean to say Network Rail hasn't. Sorry, a bit of pedantry here.

THE CHAIR: I'm struggling to see what the issue is over whether the Rights, in respect of 1N85, have been Exercised with a capital 'E'. I thought it was accepted because I thought Grand Central had, however they got it, East Coast's PDNS, equals Access Proposal, and had been able to satisfy themselves that the Rights had been Exercised, except for, arguably, the details of railway vehicles. We then move from that to saying that actually they have a document that has the details of railway vehicles and/or timing load in it. It now turns out that that document, which has been called a supplement, is the only document that Grand Central arguably has that is not the whole PDNS. That of itself I don't think is fatal because, if we need to, we can presumably resolve this question of whether the Rights in respect of the service we are considering, 1N85, were Exercised

with a capital 'E'; in the same way as we did for the previous one, by Network Rail telling us and looking us in the eye, having if it wants to confirmed by looking at the actual PDNS, yes, it was Exercised in all its glory with the relevant detail. If Network Rail is able to say that, we can ask Grand Central if it wants to say, 'No, you're lying.'

MR YEOWART: If Network Rail confirms that they've had the PDNS properly completed and submitted, then we'll accept that.

THE CHAIR: That would be satisfactory, would it?

MR YEOWART: Although we would like on record to say we're a bit disappointed having asked for it and being told we'd been given it.

THE CHAIR: You think what you've actually been given is what is now being called the supplement.

MR YEOWART: Yes.

THE CHAIR: I understand that.

MR YEOWART: That's what's created the confusion here now.

THE CHAIR: I absolutely understand that.

MR COOPER: That's part of the reason why we brought the dispute, because that was the PDNS.

THE CHAIR: That is noted as a source of confusion.

MR FISHER: Chair, can I ask whether this actually then reopens anything in 494 with regards to what seems to be an emerging decision that our PDNS is deficient or invalid, given that we've spent three full days?

THE CHAIR: I don't believe it does make a difference or reopen it, because the point at which the PDNS becomes relevant in the logical train of thought arriving at a conclusion on 494 is that there was somehow a deficiency, procedurally and/or content wise, between the PDNS, however that was manifested, of East Coast, and the way in which it was incorporated eventually in the offer. That deficiency was accepted all round. I can't quite remember exactly what it was. It was to do with the relationship of things that were rolled over, weren't rolled over and there were changes to rollover.

MR THOMAS: Wasn't the point of 494, Chair, the half-minute non-compliance and Timetable Planning Rule deficiency at Newark, with Nick's diagram?

THE CHAIR: That's a separate point, but on the PDNS point that comes later in the argument.

On the PDNS point, remember we had the discussion about, on the one hand, non-compliance with the Timetable Planning Rules, when we concluded that that is relevant only on the offer date.

MR GIBBONS: It's to do with expiry of Rights, isn't it?

THE CHAIR: It's to do with Rights expiring, what is wrong with –

MR GIBBONS: Before the commencement of the timetable – remember we discussed this in one of the first two days' sessions. This is where we got the train coming in at level 3.

THE CHAIR: I believe it was accepted on all sides that there was some deficiency in that particular bit of the process that led to the conclusion that, in that respect, East Coast's proposal had not been properly Exercised in respect of whatever it was under 494 and, therefore, should not have been regarded as level 3 but level 4. I think that's where we got to.

MR YEOWART: I think so. To be fair, Chair, if it had been level 4, the fact it's non-compliant meant it should not be in the new Working Timetable.

THE CHAIR: That's a later part of the argument.

MR YEOWART: But it was a position that's been clarified.

THE CHAIR: Network Rail, I think you accepted that, because I asked you if you did and you said you did.

MR ALLEN: Yes, we accepted the East Coast one had equal priorities for inclusion.

THE CHAIR: How does that affect 493, which we're talking about?

MR ALLEN: I am literally rereading the summary and I'd be thinking out loud and we'd be going over old ground again, but it clearly says these are the trains we had Rights for in December 2011 that expire, stop. Clear enough, thank you – point of clarity. Should it be possible to fulfil an aspiration to go to York? That's what we'd like to do. This then took us round to all the debate we're having about what people put into their Section 17s and so on to the ORR for Rights, and then got us on to the big-‘E’ and little-‘e’ discussion about expectations of Rights.

THE CHAIR: Did it have an expectation or not?

MR ALLEN: Well, that gave us all the debate where we said anything that's Access Proposal has got an Expectation.

THE CHAIR: On that point, we concluded that you have to interpret Expectations as meaning

the possibility rather than probability.

MR ALLEN: Correct. We had Expectations that Newark was a practical proposal, but not the Yorks, so it was a big 'E' on the Newarks and a little 'e' on the Yorks.

MR COOPER: It's not about Network Rail's expectation; it's about the operator expectation.

MR ALLEN: Didn't we cover that before for Network Rail? That's not what it says though, is it?

MR HANKS: Can I ask if we're revisiting now 494?

THE CHAIR: I don't want to revisit 494, but I do want to conclude on 495 whether we have got to the point of finding a service that unambiguously conflicts with, and therefore knocks out, the Grand Central bid. The one that we picked on at the moment, among a number, is 1N85 East Coast, where I thought we had got to the point of saying that it was a higher priority and, in respect of that service at least, was properly Exercised in the PDNS – that's to say for the purposes of the Network Code the Access Proposal – submitted by East Coast and setting aside subsidiary considerations of whether it was produced to, in full or in part, Grand Central and whether they were slightly misled by it or confused by it, as to what it was and what its constituent parts were, as I think we have all been confused.

MR YEOWART: We would concur with what you said about the PDNS now. This is a rolled-over bid anyway. The Yorks have Firm Rights different from the others. We'd now move over to the position that the Firm Rights though are quantum-only Rights, not Firm Rights to departure time ranges. Therefore, the 13:08 had considerable Flex available to Network Rail and that will now be the area that we would like you to examine.

THE CHAIR: Were the Rights Exercised point is resolved. Yes, they were Exercised. That's accepted.

MR YEOWART: Yes, we accept that.

THE CHAIR: Okay, and then the point is: was there available Flex, contractual Flex with a capital 'F', which should, as a matter of contractual obligation derived from wherever, have been considered and Exercised by Network Rail to resolve that conflict and admit the Grand Central bid?

MR LEWIS: For three days, wasn't it?

MR YEOWART: Initially it was for five, yes, but we've established it's for three.

THE CHAIR: We're talking about five days. We've gone off; 6E84 was the three-day one.

MR YEOWART: We're now on 1N85, because that runs every day.

THE CHAIR: We're trying to find a five-day one and the one you've hit on is 1N85.

MR ALLEN: Yes, I was back on 494 actually.

THE CHAIR: I thought we were on the home straight, with the last point to be considered the one that we're looking at as the potential five-day knockout blow for Network Rail.

MR ALLEN: Why have we said 1N85 isn't the knockout blow?

THE CHAIR: The last point is whether there was contractual Flex available.

MR ALLEN: There may be Flex.

THE CHAIR: Which should have been, as a matter of contractual obligation, Exercised.

MR ALLEN: It's being assumed that we couldn't find a Slot then between the window of 07:20 and 15:00 for that train.

THE CHAIR: That's what you're assuming, I think.

MR ALLEN: That's kind of what we're saying.

THE CHAIR: In general, we have established somewhere along the other, along the way, at this stage in the process, that strictly speaking there isn't a contractual obligation expressed in unambiguous terms in the Network Code on Network Rail to Exercise contractual Flex on one operator to the benefit of another operator, and you'll accommodate that; but when you read a whole lot of things together, including Network Rail's general obligations under the Network Code, and probably also its licence obligations, there is a sense of obligation that, if contractual Flex can be Exercised to accommodate one operator in conflict with another, up to a point it should be Exercised. There will come a point of pragmatism – that's also recognised – where Network Rail can't go. The final issue we are looking at now is whether before that point to which it would be completely unpragmatic to go, because of umpteen different levels of knock-on and so forth, whether on this particular service, which is the potential five-day knockout blow, there was contractual Flex available, which could have been used but wasn't.

MR ALLEN: We've only got two left to choose from, which are 6H88 and –

THE CHAIR: This is specifically on 1N85. We're not trying to choose another service. This is the last point on 1N85. We've established that it was of a higher priority and we have

established, with some difficulty, that it's accepted that the Rights were Exercised, so it's the Flex point. Now, Grand Central is saying... What are they saying on Flex? That there was a load of available Flex.

MR YEOWART: Yes, if they only had quantum Rights, they had no departure time protection.

THE CHAIR: 'Network Rail presents the case that it has little or no Flex available to move 1N85. This is incorrect. Network Rail has effectively unlimited contractual Flex between 07:20 and 15:00. Despite this, Network Rail has not provided any evidence that it looked in Flexing 1N85 effectively in anything but the existing path.' Then it goes on to talk about a right to vary, and I think you're saying that's not a Network-Code-type Flex; it's a specific contractual Right to vary derived from the relevant Track Access Agreement, which you've got, however you've got it. I'll come on to that in a minute.

MR ALLEN: We haven't looked at throwing that train up in the air and pulling it down anywhere between 07:20 and 15:00. I can't sit here today and confirm that we couldn't find it another Slot somewhere between then.

THE CHAIR: Let's just remind ourselves of the time bid for. What's the Grand Central train we're talking about?

MR HANKS: 1N93.

THE CHAIR: 1N93, thank you. The time bid for, for 1N93, was 13:23. Grand Central is saying the potentially conflicting 1N85 East Coast SX 13:08 could have been Flexed anywhere between 07:20 and 15:00. I suppose it would be reasonable for Network Rail to say to Grand Central, 'If you bid 13:23, we assume that 07:20 probably wouldn't cut it for you.'

MR ALLEN: Sir, we did look to move 1N85 a few minutes either way, but we haven't looked to take it out the timetable and find a brand new Slot for it, which is what that contractual Right would allow us to do, on the pure interpretation of it.

THE CHAIR: In terms of a sensible amount of Flex either side of what was bid, what are you saying – that you looked at it and there were conflicts with it?

MR ALLEN: It started entering conflicts with other trains, yes.

THE CHAIR: Sorry, where do you say that?

MR ALLEN: We continue to say that with the description where we talk about 1N19 and 1N16 sort of catching the train up. I guess the other thing to add to that is that if we

were –

THE CHAIR: ‘Non-compliance with TPR headways ... holding it at Grantham by increasing the flow if it conflicts with something else.’ You looked at Flexing 1N19 – conflict with something else. This is one of these things where it’s knock-on level after level.

MR ALLEN: The whole exploring about East Coast/Sussex, how can they balance it and diagram it, and all those kinds of things, would go into the decision, would have to go into the decision. This train had got 4.2.2(d)(i) Rights over the –

THE CHAIR: You’re saying this is a Decision Criteria point. On the basis of what we said previously, yes, when it gets down to this point of we’ve resolved all the conflicts but it’s down to availability of Flex, that is a Decision Criteria matter, but you haven’t said this is one of those cases where, at the time or indeed in what you produced after the event, you haven’t produced an analysis of it on Decision Criteria grounds.

MR ALLEN: No, and that’s partly because this has got a higher Right for being included in the timetable than the Grand Central.

THE CHAIR: Yes, we’ve accepted that. We’re down the road on that point. Given that it’s got a higher Right, given that it was Exercised, what was the extent of your obligation to Flex or not? Answer: you say, without reference to the Decision Criteria, ‘We had a reasonable stab at it and it produced this, this and the other irresolvable knock-ons at the first and the second levels.’ Grand Central, what do you say to that?

MR YEOWART: Just one second there, Chair. [*Pause*] Okay, the position, Chair, with the 13:08 is that we don’t know what Flex Network Rail has looked at because they haven’t identified it. Indeed, to talk about perhaps being caught up or catching something else up would indicate that Flex is very tight for the timing that they have at 13:08. As Grand Central has proved, when you start looking, the 16:08, for example, we found a 15:52. At 13:08, there’s potentially a 12:53 and also a 13:23. It really is a case –

THE CHAIR: Sorry, those would be potential alternatives for you?

MR YEOWART: No, for East Coast. The problem is too many of the operators that are established – and that’s the difficult, are established – believe that they have Firm Rights for departure time ranges when they don’t. Every train at the moment north is at 08. The Yorks are at 08; the Newarks were at and still are, some of them, at 08; but they have no right to leave at 08. The problem is whilst ever Network Rail continue to believe that that

is a solid departure time and we very much have to work around that time, it creates an issue for us.

THE CHAIR: Sorry, Ian; let me stop you there. I entirely see what you're saying that, if there is a sense that actually everything was being engineered around and therefore chucked out of the window in order to accommodate a firm departure time of another operator, East Coast or anybody else, to which it wasn't contractually entitled, that's outside the rules of the game; but the point we're on here is whether this particular service we're considering as the potential knockout five-day conflict for the Grand Central we're talking about, whether it could have been and contractually should have been Flexed, contractually, to the point where it would accommodate Grand Central's reasonable expectation, in relation to the one it had bid, which probably wouldn't mean Flexing something to the point where a service bid as 13:23 by Grand Central could have been accommodated at 07:20 or possibly even 15:00, because that wouldn't really cut it.

MR YEOWART: That would be unreasonable, yes.

THE CHAIR: Network Rail's argument in response is that what it actually did was look at the possibility of Flex to a level where it was reasonable to do so, taking account of the successive knock-ons of Flexing this, well that has an effect on that and that has an effect on that, and so on and so forth. What it did was, I guess, reasonable in terms of satisfying whatever slightly – what's the word? – unclear, because only implied from the totality of the contractual documentation, obligation to Exercise available contractual Flex. I think we've got to the point where Network Rail has made that argument and it's up to Grand Central to say, 'No, it wasn't reasonable and you should have Exercised it further, for these reasons.'

MR YEOWART: I don't think from the information that we got we are aware of what Flex was Exercised on the 13:08. We were just told there was some input; there'd been some work done. We don't know where Network Rail looked at Flex. We don't know whether they looked at moving it 10 minutes, 15 minutes, 20 minutes. 30 minutes is reasonable for a train that's only got quantum Rights. As we've found with the Grand Central services, Network Rail doesn't do enough work. The 16:08 that we've discussed was ultimately the only path available. Grand Central found another one at 15:52.

THE CHAIR: They're saying in the latest batch of information they've provided to us, they've

summarised what was looked at.

MR YEOWART: They summarise it with no detail. I don't know whether or not that's correct. Are we talking a two-minute-later departure?

THE CHAIR: They said what the conflicts would be. I'm not sure whether you're saying what they say is not correct or that it doesn't go far enough.

MR YEOWART: I don't think it goes anywhere near far enough, Chair. That's the problem that we've got. It's too easy to come up with a conflict and not resolve it. We understand that there are quite a lot of conflicts that arise, particularly on a busy railway, but a railway that's not declared congested... As we have proven on numerous occasions, there are other opportunities to find capacity. On this occasion in particular, we don't think and there's no evidence that Network Rail has provided that they have done any detailed work about finding a different path or a different start time for the 13:08 to York.

THE CHAIR: What they say in the information they've provided to us is, 'Flexing 1N19,' which is already a first-level knock-on, 'would conflict with the 1N16 East Coast from Kings Cross to Leeds, as there's current minimum headway.' It was proposed to make it electric to alleviate the headway, but East Coast was unable to facilitate. I'm assuming they weren't obliged to do that. They have provided what appears to be a series of considerations, which they went through to see if 1N85 East Coast SX 13:08 could be Flexed to accommodate the Grand Central bid. On the face of it, they have stated a few steps, which they have considered, which they say didn't result in resolving the conflict. Is that right, Network Rail?

MR ALLEN: That's correct, yes.

THE CHAIR: Are you saying that they should have gone further and considered further knock-on levels?

MR HANKS: With your permission, Chairman, can we take a short break? I think we might be able to resolve this. There are one or two things I'd like to discuss. Will you allow that or not?

MR ALLEN: If it was as simple as moving a train by two minutes, we've got no motive not to do something that's straightforward. We wouldn't have come here today if there was a simple solution of Exercising a couple of minutes of Flex. We're talking about a

potential impact of a different set of diagrams and all sorts of things. I don't know quite where the view comes in that we've dug our heels in and we don't want to put any new train on the network.

THE CHAIR: It's fair to say that we have established – and I hope we are all agreed – that when we get to this consideration of Exercising contractual Flex, one, there isn't actually an express obligation, as such, in the Network Code and the contract to do it. It's a deduced, implied obligation from the totality of bringing together the Network Code, the Track Access contracts, the licence and the sort of practicalities of the whole thing. That deduced, implied obligation to use the power to Flex – and it's only stated as a power – may Exercise Flex in the Code, the implied obligation to use that power is to use it to a reasonable and pragmatic extent.

Clearly reasonable opinion may differ on this – it's not a clear-cut issue – but in affording more time to this, I would only be willing to do so if you think you can come up with something pretty cogent to say it was demonstrably unreasonable, that there was something that could have been done. Now, I appreciate you're not the network operator, so there are certain unknown unknowns for you. I'm not trying to ask you to prove a negative, which is difficult, but there is only point in continuing to thrash this one around if you think you can come up with something that is you-know-it-when-you-see-it common sense and something that you can say that they didn't do and was unreasonable for them to have omitted. Do you think you can do that?

MR HANKS: Yes. I think given a few minutes –

THE CHAIR: Let me just look at what it was you said in your response to that particular thing, when you had the chance to respond to it in writing. All you said in your written response on that, when you had chance to think about it, was 'It has potentially unlimited Flex between 07:20 and 15:00.' Well, I don't think anybody's going to conclude that Network Rail should have Flexed a bid 13:23 service to 07:20. There must be some reasonable limits within that. Network Rail has given a summary to a certain extent of what it did in terms of considering Flex and the knock-on effects. Are you going to come up with something specific, where you say, actually, if it had done this to that service and this to that service, on the basis of what it said, it could have accommodated us at a time which, in relation to 13:23, would have been reasonable, say within 20 minutes either

side?

MR YEOWART: It's the 13:08 train we're talking about.

THE CHAIR: If you think you can come up with that, I'll give you the time to do it.

MR HANKS: Either that or something that will resolve the matter very quickly.

THE CHAIR: Alright, 10 minutes.

(Adjourned)

THE CHAIR: Before I ask you to come back on what it was you went out to consider, I probably should just say first that it has been pointed out to me in the interim that, on this point we're considering – available contractual Flex – what Network Rail says, in relation to the service we're considering, 1N85, in its last submission of information to us, as to what it did in terms of Exercising Flex, doesn't actually address specifically Flexing the time of the service under consideration, 1N85 13:08. It talks about there being a conflict between the Grand Central service 1N93, as bid, due to a non-compliance with various headways, due to this East Coast service, i.e. the 13:08 as bid, being a stopper, but that assumes that the 13:08 is fixed at 13:08. Messing about with the dwell times would cause this service, i.e. the 13:08, to conflict with 1N19, another service. Then what was looked at was Flexing 1N19. It's been pointed out to me that actually Network Rail has not said in this what it looked at, if it looked at anything, to actually Flex the time of the alleged conflicting service itself, the 13:08. I'm going to come back to that if necessary, but you tell me what it was you went out to consider. It may have been a similar point. I don't know.

MR HANKS: Actually, that was the second point. The first point I'd like to check with you, Chairman. At the start of looking at 495, you said we'd focus on what was mentioned in the offer letter. In fact, the rejection due to 1N85 was not mentioned in the offer letter. I just want to clarify whether we've gone beyond that. I accept 1N85 was discussed before the offer. To that extent, I was surprised that it was not mentioned in the offer letter as being the reason for rejection.

THE CHAIR: Can I just say again to sort of try to move things forward where I think we've got to on that point, was it in the offer letter or not, which all goes to if Network Rail

complied with its transparency obligation is we would probably accept it as okay, complying with the obligation to be transparent as a conflicting service, if it was mentioned in the offer letter or before, in prior discussion or correspondence, because in those circumstances one would think there was sufficient transparency in the process overall. In other words, you were being told, as part of the process, what the conflict was.

Where I have a difficulty, which was the one we discussed as a general issue earlier on, is where the allegedly conflicting service has been identified after the event and arguably only for the purposes of this dispute process. When we come to looking at potentially what I call the 'knockout blow conflicting services', I would accept something that either was in the offer letter or was clearly the subject of previous correspondence. Thank you for pointing that out, Chris.

MR HANKS: Leading on, the second point was the one that you've just raised. The question was: did Network Rail actually look at moving the 13:08? In particular, it would appear that there were possible Slots either 15 minutes earlier or 15 minutes later. 15 minutes later is the 13:23 that Grand Central was looking for – 12:53, because actually that's a Slot that has subsequently been offered to Grand Central.

THE CHAIR: Right, if it had Flexed the 1N85 East Coast 13:08 as bid, within its contractual Flex, to 13:23, as bid by Grand Central, and had just swapped the Grand Central bid for 13:08, would that not have resulted in the same conflicts, due to headways and knock-on things?

MR HANKS: Almost certainly not, because the stopping patterns are different. I'm not saying it would have been compliant, but I'm saying that they would be different.

THE CHAIR: Okay, so it doesn't necessarily follow that a straight swap would have had the same conflict. Alright, and what about the other possibility of the 12:53?

MR HANKS: Again, I don't know, because I haven't looked to see, but we know there is a possibility of getting a train out of London at that time, because that's been offered to Grand Central, albeit with the different stopping pattern.

THE CHAIR: Thank you. Network Rail, what you have told us in your further information as to what you looked at to address the conflict on this particular service does not, on the face of it, show an attempt to Flex the actual time of the service under consideration.

MR ALLEN: Yes, but we're looking for a stopping path coming out of London with a pretty restrictive pattern that we've just alluded to in the previous conversation. It's not a straight swap to the path that people have identified in different hours, because that won't give us the stops that we need for that particular service. The evidence we've provided doesn't articulate how further forwards and backwards we've looked for the 13:08.

THE CHAIR: Reading what you've said there in that latest submission of information, in the light of where we've got to, does leave me with the impression that you regarded the East Coast bid of 13:08, in terms of its departure time, as set in stone, and that whatever you were doing to try to accommodate and Flex everything else round it was around that as a fixed point, rather than looking at Flexing the point of departure of that service. Is that a fair impression?

MR ALLEN: I think that's how you can interpret the text. Knowing the specialists who have looked at these trains, they've looked at all combinations of solutions under our definition of reasonableness, which may not be the same as colleagues', to try to find a slot in the timetable. Again, I haven't brought a graph with us, so we can't dwell on it.

THE CHAIR: I really don't want to and don't think we need to get into that level of detail. This is what you've said by way of the further information you were invited to provide. That is the clear impression it gives. Now, I'm giving you the opportunity now to supplement that, if you want to, not by reference to umpteen levels of train planners and graphs, but just by making your submission now, which I will take at face value, if you want to tell me that in fact consideration was given, through whatever processes, to actually using available contractual Flex to Flex the departure time of the bid 13:08.

MR ALLEN: Like I said earlier on, we haven't chucked the path up and started hunting for a brand new path in the hour. We've looked to try to move and tweak that path a few minutes either way to make a compliant gap for the 13:23.

THE CHAIR: Let's be clear what we're talking about: that's not what this information says. It does not say what was looked at was moving the 13:08 a few minutes either way or moving it even 15 minutes either way. There's nothing in here about moving the departure time. It looks, on the basis of what is said here, as if that was taken as a given and a fixed point of reference, and all the movement that was looked at was around that. Is that a wrong impression?

MR ALLEN: You can read that evidence and get that impression.

THE CHAIR: I've got to put you on the spot to tell me now rather than go away and have another think about it.

MR ALLEN: I'm happy that, on face value, that's what that says.

THE CHAIR: That is effectively what happened.

MR ALLEN: I can't say that, no, because I wasn't the person who was altering the graph on the day.

THE CHAIR: Andy, can you shed any light on that, as the person involved?

MR LEWIS: It hasn't been elaborated very well, but I would say that. Just taking what Matt said, knowing the specialist who did this, they would have looked either side, but it hasn't been elaborated very well in the summary. I don't know how far back they would have went, because there are services. There's a 13:00 and 05 as well, so it would have been quite tight going back about 10 minutes. There's a service three minutes preceding it and eight minutes preceding it.

THE CHAIR: If Dan Grover had been here today, would he have been able to speak to that or is that not within his remit?

MR ALLEN: We have people who are our specialists, who physically did the work for us, to come in at that level of detail.

THE CHAIR: What is your view, as the people who are here today on the spot, of what is suggested by Grand Central as the bounds within which, 15 minutes either side to particular times, on the basis of the information available to them, which is obviously more limited than what's available to you, either 12:53 or 13:08 and arguably doing a stop, which may be could have been accommodated? Can you say that that would be a possibility or can you say, as of now, 'No, that wouldn't have worked,' because of whatever?

MR ALLEN: It would depend on the stopping patterns of the three Slots available. We know that the three Slots we're talking to for Grand Central are pretty stop-free paths. Certainly in the south part of the East Coast Main Line, these trains do all stops, all key stations.

MR FISHER: This particular one does, yes.

MR ALLEN: It is very unlikely that, plus or minus 15 minutes, we will find a stopping path

for an intercity train down the East Coast Main Line, conflict-free of all other trains.

MR FISHER: And that gets to York in time for its return working.

MR YEOWART: If it comes earlier, it should be okay obviously.

MR ALLEN: Even in my limited knowledge of the East Coast timetable, you have a departure at XX:00, 03 and then a little bit of a gap and the 08, don't you? The intercity trains need to be bunched together, with the slowest ones going last, as it were.

THE CHAIR: The 08 as bid for is a stopping service, and the 23, as bid for by Grand Central, is a fast service.

MR YEOWART: So is the 12:53 a fast service.

MR HOLDER: Is that the same train?

MR YEOWART: It would be, yes. We bid for the 13:23 and Network Rail eventually offered the 12:53. I know colleagues here are struggling a little bit about what, and I've said some things in here, in my summing-up, about my colleagues here. I wouldn't like them to put themselves in a position where they're not clear. My understanding, if you look at this timetable, is the 13:08 will have been a reference point. I have no doubt about that. Now, we can't be sure unless we speak to the people who actually did it. I understand where the guys are trying to come from, but you've only got to look at the East Coast timetable to realise franchise service timings are reference points. It's absolutely clear.

Grand Central has in its contract 15 minutes' Flex, plus or minus. We had that with 518, of course, because we were looking at moving outside it. That's a level of Flex that's reasonable for an intercity operator. We have demonstrated that, clearly, there's an option at 12:53 and there's an option at 13:23 to potentially open up a better path for Grand Central at this particular time. What I didn't want colleagues here to do was to potentially say – which I felt they were alluding to – was that probably we did look at 13:09 or 13:12, because I don't think that they did. I can't be certain, but I don't think that they did and they've been absolutely honest in everything that they've said while they've been here these last few days or the few days that we've been here. We haven't got access to the planners who actually did it, but I think the evidence is clear; it's a reference point, as you've pointed out. Otherwise there's no need to reference that there's a problem here and a problem there.

THE CHAIR: I think in fairness those who are there have said, 'No, we can't say it wasn't a

reference point,' and we just have to take that at face value from the people we've got here for the three days. Where that leaves us then, on this point, is simply that, as regards 1N85, arguably it is not the knockout blow that gets Network Rail home in terms of establishing a contractually valid unalterable conflict with the service bid for by Grand Central. Is there any other one of these that was in the offer letter or transparently made known to Grand Central beforehand because, if there isn't, we're going to come back to the 6E84 three-day?

MR ALLEN: 6H33.

MR LEWIS: That wasn't on the offer letter but was on the advance information.

THE CHAIR: 6H33 to Drax, direct clash with 1N93 at Temple Hurst Junction. What was looked at? *[Pause]* To which Grand Central said this isn't contractually supported. Is that right?

MR HANKS: It might be helpful to go to the last paragraph of our argument and get Network Rail's view on that, before we get into contractual arguments.

THE CHAIR: 'Falls outside the definition of a service in pure contractual terms.' 'Why?' is my question on that – because it doesn't have Rights? Because it would have expired under the six-month rule in the Track Access contract?

MR COOPER: Yes.

THE CHAIR: Network Rail, is that correct?

MR ALLEN: No, we believe it's got level 1 Rights.

THE CHAIR: Level 1 is what it says or what Network Rail says.

MR ALLEN: Level 2, sorry.

THE CHAIR: You've said level 1 in the information.

MR ALLEN: No, page 7, subject to plus or minus 30 minutes.

THE CHAIR: No, this is where we're getting into two different meanings of level 2. By level 1 and 2, I mean as 4.2.2 of the Network Code, not the particular freight categorisation of 'level' with a capital 'L'. Sorry, we had that confusion before, (d)(i). Grand Central is saying this one doesn't get there because it's not a level 1 in the Network Code (d)(i) because the Rights would have expired.

MR GIBBONS: I don't understand that, sorry.

THE CHAIR: What they say is it does not have Rights, nor does it have the train operator

variation Right, is this would have expired under the six-month rule in paragraph 2.5 of DBS's Track Access contract.

MR COOPER: We can either discuss this or we might have a solution that means you don't have to discuss all this.

THE CHAIR: Is that what you went outside to discuss?

MR HANKS: No, but I'll highlight now the last paragraph in our argument here may mean that we don't have to discuss this contractual issue.

THE CHAIR: Fine.

MR HANKS: Notwithstanding all the above, it appears that Network Rail has identified, as train 6G14 in the train planning system, which is the computer system that they use, a path between Joan Croft Junction and Hambleton West Junction, which occupies a Slot 15 minutes before 6H33, which could be used by 6H33; or its alternative guise 6H44, which departs Immingham 10 minutes earlier but is scheduled to arrive Drax at the same time. In other words, there are two different trains. They cannot both run on the same day, because they are scheduled to arrive at the power station at the same time, but they set off from different origins at slightly different times. It's very clear in the timetable planning system there is an alternative path that someone's had a look at, which could be used for that purpose. There's an alternative Flexing solution, which still appears to be within any contractual Flex.

THE CHAIR: Network Rail?

MR ALLEN: That's the first I've heard of Chris's counterproposal.

MR HANKS: It was in our response.

THE CHAIR: It was made on 5 October.

MR ALLEN: Sorry, it's not been investigated. It would have been helpful to have, perhaps planner on planner, a bit of discussion about it as opposed to just popping it into a formal response. I must have missed that and haven't had chance to look at it.

MR YEOWART: To be fair, we did put it in a month ago and it was a response that we thought you would have –

MR ALLEN: I'll happily go away and look at it.

MR HANKS: To help you understand this, 6G14 that I refer to is a partial path; it only exists for that little bit of the route. This suggests to me that someone at Network Rail has

specifically looked to resolve this problem.

MR ALLEN: It's impossible for me to give an assurance that that path would actually work for the whole train, if that's the kind of thing we're looking at. We would have been looking at the whole-train solutions to pathing problems and not just partial pathing problems, because these are real-life trains. There's a whole project going on looking at strategic freight paths, which is starting to see part-paths appear in the TPS system but, in terms of a contract point of view, it's probably work that's been done a long time after any offer that we did for the December 2012 timetable.

THE CHAIR: I'm sorry; say that again please.

MR ALLEN: To be honest, I'm not really sure what I was saying.

THE CHAIR: I'll read it in the transcript later.

MR ALLEN: You'll let me know. There may be a partial path. When we've been looking at these problems, we've been looking at full paths for solutions. We are going through a bit of work that identifies partial paths at congested bits of the railway that may link to full paths.

MR HANKS: That path will work all the way through to Drax, because there's a lot of pathing time in 6H33.

MR ALLEN: I would need our people to prove that.

THE CHAIR: The result of that, if that solution were adopted, am I right, would be that would juggle around these DBS services and admit the 13:23, as bid for, Grand Central service? Is that right? Or would admit the Grand Central service, but Flexed a little bit either side?

MR GIBBONS: But only three days a week.

MR ALLEN: Actually, we still need to do something –

THE CHAIR: This isn't a three-days-a-week point, is it?

MR HANKS: This one isn't, no.

MR GIBBONS: If we count it back, we're looking for a five-day-a-week solution.

THE CHAIR: I'm still on a five-day-a-week solution.

MR HANKS: I don't believe this one is a reason for rejecting Grand Central's bid, because there is an alternative solution for 6H33, which was not explored or offered to us.

THE CHAIR: That's where it figures in the logical train of the argument we've got to. If

that's correct, it is not the five-day showstopper. Do you accept that here and now? I'm sorry; after three days, we can't say, 'Please go away and check with your train planners.'

MR ALLEN: Yes.

THE CHAIR: Do you accept that?

MR ALLEN: If my colleague says yes, I'll believe him.

MR LEWIS: I'll accept that one, yes. If Chris has looked into that and he's adamant that it will work, yes, we'll accept that that works.

THE CHAIR: Would an appropriate eventual direction then be to adopt that solution or, assuming we've got to this point in the logical train of thought, simply to direct that the 13:23 be accommodated as bid, without specifying how?

MR ALLEN: It can't be accommodated as bid because of the Monday and Friday –

THE CHAIR: I thought this solution was that –

MR YEOWART: It is on this one though, talking about the five-day.

THE CHAIR: The apparently conflicting 6H33 and the other ones, which have been put up as being both transparent and potentially a knockout are not a knockout contractually or one of them is only three days.

MR HANKS: There is one further train that I would like just to get clarified, because it was the basis on which the dispute was brought. That was a reference to 6N50, but that has not been referenced subsequently by Network Rail. I just want to clarify the reason why that is no longer seen as a conflict.

THE CHAIR: It's one that was identified but no longer.

MR HANKS: It was one that was identified as a reason for rejection in the offer letter and was specifically referenced in our dispute.

THE CHAIR: Right, but has been withdrawn.

MR HANKS: It has not been referenced subsequently.

THE CHAIR: So it need not trouble us anymore.

MR YEOWART: We hope so.

MR HANKS: I'd like to understand why that is no longer an issue. There's a reason for asking the question, because it was specifically around train operator variations. Our assessment was that that was a train operator variation and should have been given a lower priority.

MR LEWIS: It shouldn't be one of the reasons for dispute though, should it? That was after

the other five or six that already got looked at because of the other issues.

THE CHAIR: Just thinking about it then –

MR LEWIS: If the rest of those could all be resolved, that 6N50 shouldn't be pathed, if all the other issues could be resolved.

MR HANKS: But our feeling is that that should be referenced in the determination, because that was specifically the train that we referenced in the dispute.

THE CHAIR: Why does it have to be referenced if it's no longer relevant?

MR THOMAS: I think, Chair, it's probably still an offered path to GBRf, so would need removing. GBRf is outside the room, and will have a train and be expecting a train, in order to accommodate this path. This is another one of those trains that will have to be moved.

THE CHAIR: The way I'm minded to move this, in terms of getting to a determination, is to arrive at a determination of what should or should not be done as regards Grand Central, the party to the dispute, having got to that conclusion through considering the possible arguments against that and, hypothetically, knocked those arguments out or partially knocked them out; then determining what should be done by Network Rail as regards the party to the dispute, Grand Central, without being prescriptive as to how Network Rail should deal with the knock-on consequences of that on other services. For that reason, I'm not minded to sort of try to wag Network Rail's tail to the extent of saying, 'As regards all these other services that have been referenced, you should do that with this one, that with this one.' I'm not here as a timetabler.

MR ALLEN: I suppose our guys have spent a lot of time – I do get a little bit frustrated with colleagues from Grand Central about the flippancy that they sort of say, 'You've not looked at this, Network Rail. You've not done that.' We've dedicated a person who's more or less at Chris's disposal to meet and talk about these trains to try to find solutions, which we're now talking about in these documents.

I would be a little bit concerned if we were going to have a determination that suggests to reinstate the 13:23 as bid, because somehow we've still got to find a solution to all these planning conflicts. I take it that it doesn't feel like we've done enough work to present our cases in terms of why, for this document, we can't pronounce a solution, but I'm a little bit sceptical that we will actually find solutions in the straightforward that

way we're talking about, now putting a train back into the timetable at 13:23 at Kings Cross. If we could have done it, we would have done it to avoid the previous three days. I still, with the exception of the train we've just spoken about, 6H33, don't see where the planning solutions lie for 1N85, 1P38, 1S45 and 6H88.

THE CHAIR: We have been looking at those, not quite all of them yet – maybe we'll have to look at all of them – we have been looking at those sequentially to see if they are respectively an irresolvable conflict with the service as bid for. We have come up with one that is for two days of the week, Monday and Friday. I was going to say, even if this solution that we're talking about on 6H33 is admissible, it still doesn't get us away from the conflict, which I think has been proved, as regards Monday and Friday. On that basis, the best Grand Central is going to get is a direction to be offered Tuesday, Wednesday and Thursday, because of the proved contractual conflict with 6E84.

MR ALLEN: Taken as read that 6H33 is a solution that Chris has identified and that works, and Andy has kind of said that it has or believes that it does, how does that get around something like 1N85 then? That's based on the assumption that we will find another slow path in the hour, plus or minus 15 minutes either side of that, which will deliver the calling pattern for East Coast and is still deliverable in terms of compliance, in terms of turnaround and all the rest of it.

THE CHAIR: I think where we got to on 1N85 was that, whilst you had demonstrated the relevant priority and that the Rights were Exercised, with a capital 'E', you had not got to the point of demonstrating that sufficient attention had been given to Flexing the departure time, as opposed to any other aspect of that service.

MR ALLEN: We are kind of assuming that we will be able to alter that departure time if we say the 13:23 goes in there, aren't we? That is my nervousness about it.

THE CHAIR: Yes, but it's a necessary consequence of saying...

MR ALLEN: When we look to do that, hand on heart, we will find a bunch of other consequences that will give us the same story that we're talking about with 1N19 and 1N16, in terms of being a few minutes –

THE CHAIR: I've invited you to take the opportunity of saying why, within the reasonable bounds of contractual Flex, the knock-on consequences are such that you couldn't do it. We've got to the point, I thought, where you couldn't actually say that.

MR ALLEN: Without the detail of the timetable, actually looking at it over the shoulder of an expert, I can't say whether. That's the absolute devil in every bit of this, in the detail.

THE CHAIR: That's the point of being at the end of the third day of a hearing on this and having given you the opportunity to provide all this information, as to why you couldn't do it. If, after all that, you still can't say why you can't contractually can't do it...

MR ALLEN: This is kind of the position we're in. We can look at the timetables constantly. 'Can you do a few minutes there? Can you do a few minutes there? Can you do that?' We'll go back, if the determination says that's what we need to go back and do. The amount of time Chris has been and sat with some of our planners and all the rest of it, I am struggling to find why we haven't come to this solution a lot easier, if it's as simple as this, because it isn't as straightforward, I believe, as just us saying, 'Right, if you come off at 13:04 instead, that will give us the compliant path.'

While this may not be a formally congested bit of railway, it is an exceptionally busy bit of railway with a lot of interweaving conflicts, so it is a bit of a leap of faith for me to say that we will be able to put that path in and be able to live with that in a robust performance style that we're talking about. The brains that we've had looking at this, while they haven't answered every possible question that we've come up with and wanted to challenge them with, I think with the time we've got, the picture we've got on the graph and even the information and confusion we've got about what's got what Rights, they've done a very good job to try to find what we have got.

THE CHAIR: There's some difficulty here, because the consequences of what you're saying are, effectively, that a timetabling panel can never come to a conclusion on this sort of dispute, because it's always open to Network Rail to say, 'Well, sorry; we don't know whether we can make it work.'

MR ALLEN: I'm not saying that at all. I think the detail that Chris has given us on that 6H33 is absolutely perfect, but we haven't had that level of detail for the other conflicts. Nobody's disproved that we can resolve all the other conflicts on this list, as straightforward as that. When we come and look at it, my professional opinion is we will struggle to find the solutions as easily as we are talking about them in this room.

THE CHAIR: The conflicts we have looked at, we have successfully gone through them, and admittedly we haven't got through them, but the ones that you have identified, given the

opportunity – you’ve had plenty of opportunities to identify them – as contractual conflicts, in the course of this discussion, we have knocked them out, partially or wholly, as being contractual conflicts. That on the face of it means that you are obliged to give precedence to something that takes, through various means, contractual precedence and accommodate the other practical but non-contractual conflicts accordingly.

MR ALLEN: Again, we haven’t really resolved 1N85. All we’ve said is, from a contractual point of view, the evidence Network Rail provides – and I take that criticism and fully acknowledge it – doesn’t demonstrate how we’ve looked either way to change the ultimate departure time from Kings Cross.

THE CHAIR: But what can we go on other than the evidence you provide?

MR ALLEN: I see what you’re saying. I’m concerned that, if part of the determination is we put a train in and we do come and look at 13:08, and then still can’t find a solution to it, where does it go? With us thinking that, actually, the 13:08 had a higher priority in terms of its inclusion into the new Working Timetable, than the contractual inclusion priority level for the Grand Central train – I may have answered my own question as it’s all about reasonableness – I have a concern that, if it was as straightforward to find that path, like we’re talking about it, we would have found it. This isn’t us digging our heels in because it’s too much work or we can’t be bothered, like our colleagues have indicated that they think that’s what it’s like.

THE CHAIR: Surely there must come a point in a dispute resolution process like this where one has to say, ‘Enough is enough.’ You’ve had plenty of opportunity to have the relevant people, who have the relevant knowledge, to provide the relevant information and, if necessary, to turn up to the hearing to provide the information. Now, I don’t really see how the system can work if we get to the point after three days, or two and a half days, of hearing, with all the wealth of information that’s been requested and been provided in response to requests, where we still have one party saying, ‘Well actually, I don’t know what the position is on that and whether, in practice, it will work or whether it will gum up the entire network, or at least the East Coast Main Line or wherever, because we just don’t know what the knock-on effects are. Therefore, you can’t decide in a way that would cause us that problem.’ It doesn’t sit with the nature of the whole dispute resolution process. I’m sorry about that.

MR THOMAS: I agree with everything you said, Chair. Just looking between the two positions, Matt and Andy, you can't prove that you can't do this. I know that's a double negative, you can't prove that you can't do it, i.e. you haven't demonstrated that you've gone to what is regarded as a reasonable amount of validation work.

MR ALLEN: Define 'reasonable'. There are five trains there we've described what the impacts are if we try to put the train in, in the 13:23 Slot out of Kings Cross, which our experts have looked at and, on the face value, cannot find a solution from. If we've called the priorities wrong, and we've included these trains first instead of the Grand Central train, then fine; we put the Grand Central down first and we Flex all the others, whether they fit or don't fit in the timetable, accordingly. We felt these had a higher priority for their inclusion in the timetable, so we included them and then worked to try to find a solution for the Grand Central path.

THE CHAIR: Matt, can I just come back to you on this expression 'fitting into the timetable'? What we are actually looking at here is not, in a general sense, a fitting into the timetable, but accommodating everybody's contractual Rights. Sorry to be pedantic and lawyerly about it, but that's actually what we're here to determine. Where we have got to is that you have been invited to provide and have provided arguments and evidence to support the contention that you could not accommodate Grand Central's particular bid under consideration, the 13:23 1N93, because of overriding contractual obligations to which you are subject to other operators, in respect of specific other services that would conflict with the bid Grand Central service. We have tried to go through a process of, one by one, trying to find what I would characterise as 'the knockout blow', which would entitle any one service to say, 'We, Network Rail, are contractually obliged to honour and accommodate this bid, and that precludes us from accommodating your bid, Grand Central, in terms of priority and every other consideration, Grand Central, contractually you lose on that one.'

MR ALLEN: Sir, the bit I would like to understand then is we've offered the Grand Central path at 15:52 or 15:53 or whatever; what actually gave Grand Central the contractual Right to the 13:23 Slot, over the evidence we presented there?

THE CHAIR: Sorry, you've offered the Grand Central path at 15:53.

MR HANKS: No, 12:53.

MR ALLEN: 12:53, sorry.

THE CHAIR: You've offered that path.

MR ALLEN: Yes.

THE CHAIR: Instead of 13:23?

MR ALLEN: Yes. What has given that the overriding –

THE CHAIR: I thought Grand Central was saying that they hadn't been offered the 12:53, but that was a solution that could be...

MR HANKS: No, I was saying that Grand Central had been offered the 12:53, but that one possibility... It basically takes nearly half an hour longer than the 13:23. It ends up at Sunderland at almost exactly the same time. It might be a few minutes different.

MR YEOWART: The path we had bid for was at 13:23.

THE CHAIR: I'm sorry I didn't understand that.

MR HOLDER: When was this offered, with the main offer or after?

MR HANKS: It was post offer.

THE CHAIR: You have been offered the 12:53.

MR HANKS: Yes.

THE CHAIR: As an alternative to the bid-for 13:23?

MR HANKS: Yes.

THE CHAIR: Your position is that that's not good enough.

MR YEOWART: Yes.

MR GIBBONS: Does it meet the contractual requirements, the 12:53?

MR YEOWART: It's an additional path; it's an extra path we bid for.

MR THOMAS: The bit, Chair, where Matt just got to, what I was trying to say was actually you can't prove that you can't do it, but alternatively you can't prove that you can do it.

MR ALLEN: But I can prove I can do the 13:23 at 12:53.

MR GIBBONS: You've been offered a path at 12:53. It's not your bid path, but it's the issue of contractual window or it doesn't exist because you have no rights to support it at this point in time. Is that right?

MR YEOWART: At the offer date, we weren't offered any paths.

MR GIBBONS: No, but subsequent to that a solution has been found for a path, from Kings Cross to Sunderland, at 12:53 opposed to a bid time of 13:23.

MR HANKS: Yes, correct.

MR GIBBONS: Which actually, in contractual terms, meets a requirement. It may not suit your need, but it meets a requirement of a path in the timetable.

THE CHAIR: In response to that, you are saying that's not good enough, in the sense that Network Rail, through contractually Flexing other conflicting services, could get us nearer to the bid 13:23.

MR YEOWART: We could have been offered a 13:23 path at the offer date, but we eventually, as has always been the case with Grand Central, had to accept a secondary path after the offer date. Network Rail is pretty good at finding something additional. The big issue with this path is the 12:53 arrives at almost the same time as the 13:23. Grand Central already has significant pathing time in its trains compared to East Coast. Contractually, we bid for the 13:23. It's been proven here today that the process has not been correctly followed in order to get us to an offer for the 13:23.

MR GIBBONS: Which you couldn't run as bid, in a sense. We've established that. You've been offered an SX 12:53.

MR YEOWART: As indeed we were on the West Coast and accepted them. We have form, if you like, about accepting.

MR GIBBONS: I'm just trying to find a way through where we actually are. You rejected a path as bid, as SX at 13:23. There are a number of conflicts, but one is a very positive conflict of two days a week. Subsequent to the offer, they made you an offer for an SX path at 12:53, and principally it's the journey time that you are unhappy about. There's nothing contractual about the journey time.

THE CHAIR: You are saying Network Rail's obligation, of which it is in breach, is to Exercise its contractual power to Flex other operators' bid-for Rights contractually, within the terms of their contract, to the point where it can accommodate your bid at level 3 at as near as possible to 13:53, the bid-for time, as is consistent with the maximum possible Flex it could operate with everybody else, at all levels, at whatever knock-on, and that Network Rail has to do the sums to achieve that outcome.

MR YEOWART: Yes, and if it's not possible, then we should have been offered, at the offer date, what was best possible. At the offer date, nothing was possible.

MR HANKS: This dispute probably would not have arisen had we been offered even the 12:53

at the offer date.

THE CHAIR: What happened at the offer date was simply that the 13:23, as bid, was rejected from the offer letter?

MR HANKS: Yes, and the reasons that were quoted in there, all the trains that were quoted in there, we felt there were reasons why they should not have been –

THE CHAIR: Except there wasn't a conflict, except the two-day one. It would appear there is a Monday and Friday conflict there.

MR YEOWART: We've accepted that here today, yes.

THE CHAIR: I'm not quite sure where to go with this to try to get to a resolution.

MR YEOWART: If we look at 518, Chair, I remember we were given exactly the same argument.

THE CHAIR: We are at a point where we are considering only Monday to Friday. Yes?

MR HANKS: Yes.

THE CHAIR: We could, with everybody's agreement, direct that Grand Central should be offered the 13:23 for Tuesday to Thursday. Have I got that right?

MR ALLEN: I can't agree to that until I can prove we can find a solution to those items there. Why does this come in on top of 1N85? It can't.

MR HOLDER: At this stage, do we not need to look at two options. One is to have the 12:53 path and the existing offered timetable for everybody else to see what revenue that brings into the industry against costs; and look to another one, the train at 13:23 to Sunderland, and the timetable as Flexed, and see what that does to the revenue versus costs for the industry. Whichever comes out better –

THE CHAIR: You mean apply one of the Decision Criteria.

MR HOLDER: Apply the objective of the Decision Criteria.

THE CHAIR: Either you apply the Decision Criteria in their entirety, which means the objective as supported by the considerations, or you don't.

MR HOLDER: Yes. Do what you need to do with the Decision Criteria on those two options.

THE CHAIR: You apply the Decision Criteria objective plus considerations at the point of using potential contractual Flex to resolve a conflict between bids.

MR HOLDER: Yes.

MR GIBBONS: There's another question here: is it not better to have a five-day-a-week

service that actually serves the destination you want versus a three-day-a-week service, for the reality of business?

MR HOLDER: That's one of the Decision Criteria.

MR YEOWART: Yes, but there is a five-day-a-week business, because we could potentially have a 12:53 on a Monday and a Friday, which is why the 13:23 is a right-side failure for us. As you can imagine, a 30-minutes difference, which equates to a 20-plus-minute difference in journey time is a significant commercial disbenefit, and would not have arisen had the offers been made at the offer date. The issue that we've brought here, not just this one but all of them, have been based around a small operator basically being the last on the graph, the last into every decision and ultimately having to fight for everything after the date. We needed to prove the position. Now, we will lose some – we are aware of that – and we will win some. We need to get some clarity, and the industry for too long has been collaborative for certain parties but not for others. It's that lack of collaboration –

MR GIBBONS: As an observation, you are not alone, because freight operators –

MR YEOWART: We understand that.

MR GIBBONS: -suffer from this, day in, day out, throughout the timetable process and my colleagues from Network Rail will probably back us up.

MR HANKS: There is a cost issue for Grand Central as well, which is one of the reasons we're pushing this, in that, at the moment, with the 12:53, there's a shorter turnaround at Kings Cross, which means in effect there has to be double-crewing for this train. There has to be an extra driver and conductor, I think, for the train to make the service work.

MR GIBBONS: The question here is: what happens if you lose the 13:08 departure in terms of your turnaround at Kings Cross? I don't know. Does it become substandard if it goes earlier, for example? I don't know.

MR HANKS: That's the issue.

THE CHAIR: Sorry, can we return to the actual substance of the dispute, which is the contractual Rights of Grand Central, and set to one side all the feelings of 'We're not treated fairly' and all that stuff? Possibly we could juggle this, that and the other. We are trying to get to a contractual solution and I thought we were very nearly there. We got to the point where we take the contractual entitlement of Grand Central, under the relevant

provisions of the Network Code, as incorporated in its Track Access contract, according to which it bids for these. We are not concerned with who's got Track Access contract, Alliance and all that on this one. We are strictly on TTP495 here, in relation to this particular service as bid, and as to whether there were other bilateral contractual obligations binding on Network Rail by virtue of the Access Contracts of other operators or preliminary contracts incorporating the Network Code of other would-be operators, which would, as a matter of correct interpretation of the contractual provisions as between Grand Central and Network Rail, entitle Network Rail to take a particular line in respect of this particular bid.

The point we have got to is that Network Rail has said, 'We are entitled to reject this bid by Grand Central, because contractually it has less priority than other services, which were bid for by other operators, which have a greater priority and which we cannot Flex within the contractual terms of our contracts with those other operators.' We have been testing that last proposition, one by one, in relation to these services. Where we've got to is for one or two of them – I forget the numbers – Network Rail has not made that contention good, but for 6E84 it has made that contention good as regards Mondays and Fridays.

We then fell on to considering 1N85, where my understanding is that Network Rail didn't make the contention good, because it was unable, in this forum, to say why it couldn't Flex the departure time of the East Coast service at 13:08. It's actually produced a lot of stuff about Flexing other knock-on things without looking at that time. Therefore, that is not what I call 'the five-day knockout blow', so that doesn't knock out the Mondays and Fridays. The remaining question is: are there any other services, which Network Rail can produce, which unambiguously provide a knockout blow for five days and therefore for the Mondays and Fridays?

MR ALLEN: The one we haven't discussed is 6H88, isn't it?

THE CHAIR: Right, are you saying 6H88, on any basis, is a level 1 priority service that was unambiguously Exercised and which could not have been contractually Flexed to a reasonable degree, because that's what we have come to the conclusion is the implied contractual obligation on Network Rail – to Exercise its power to Flex to a reasonable degree – you're saying that couldn't have been done to accommodate.

MR ALLEN: Yes.

THE CHAIR: And the reasons for that are...? Actually, it's not level 1, is it? It's priority 2.

MR ALLEN: Yes, sorry; priority 2 for that.

THE CHAIR: That's the one which you thought was 1, but not it's 2. Anyway, it's higher than 3, which is Grand Central's.

MR ALLEN: I thought Grand Central was a 4.

MR HANKS: No, level 3. *[Pause]*

THE CHAIR: 15:02:30, and then there's more than a page of other conflicts. I don't want to go through this page of other conflicts line by line. I want you to tell me whether all these ones listed here as bullet points are contractually superior services to the one bid for by Grand Central, 1N83, which could not be Flexed within the contractual Flex available to accommodate it. Sorry to put it like this, but yes or no?

MR ALLEN: Yes, they can't be moved to establish 6H88 in a path that was routed around the 13:23 Slot. The only way, when the guys were looking at that, we could establish running a Grand Central train at 13:23 was to take 6H88 out of the timetable and put it in a different, I think we've said, three hours before or three hours after, in a considerably different space.

THE CHAIR: That would be a breach of contract.

MR ALLEN: The contract agreement with Freightliner.

MR HOLDER: What about this maximum three Slots business?

MR ALLEN: I sought clarity from the owners of the contract on that and it wasn't interpreted as three –

THE CHAIR: What do you mean by the owners of the contract? Do you mean Freightliner?

MR ALLEN: Sorry, the Network Rail person who responds for the contract. It doesn't stop them from having more than three Slots in the timetable.

MR HOLDER: They just pull any three of those on one day.

MR ALLEN: It could be, but what they believe is it's a historic handover from when the stuff was part – historically, Daw Mill traffic was run by Fastline out of Daw Mill, and then Freightliner got the contract then when Fastline went bust. We believe, when there were two operators out of Daw Mill, Freightliner's was capped to three schedules. Jarvis/Fastline are now disappearing off the graph. Freightliner does all the work. We

think it's a historic footnote that was there to help manage the Slot plan, but it doesn't mean anything today, I hope.

MR HOLDER: They would have been level 2 Rights beforehand, at that date.

MR HANKS: They've traded paths.

MR ALLEN: Sorry?

MR HANKS: I asked whether they were traded paths. That was a slightly flippant remark, I'm afraid.

MR ALLEN: It was a part-change process with trading paths between freight operators.

MR YEOWART: Chair, we gave a detailed response to this particular item in our 5 October letter. Rather than go through, it might be worth just reading this; I'm not quite sure. Again, we didn't get any response from Network Rail in relation to this item.

THE CHAIR: Grand Central's response to that is not that Network Rail could have Exercised Flex to juggle these around, but that actually the wrong priority was given.

MR YEOWART: Yes, 6H88 doesn't have the Rights that Network Rail suggests it has. They suggested that they were to be included in the 8th supplemental. There's a copy of the 8th supplemental attached to that response, and they're not in there.

MR COOPER: This train is already operating outside the Rights that Network Rail believed it was operating within.

THE CHAIR: If that is correct – we'll come back to that in a minute – then the position would be that Network Rail should have evaluated 1N93 against 6H88 on the basis of the Decision Criteria. That would come in before or at least alongside the process of seeing what could be done as regards Flexing all the other knock-on services.

MR HANKS: We'd argue that, if there was no application for Firm Rights for that train, it would actually fall at level 4; it would be operating as a train operator variation. Was that our argument or not?

MR YEOWART: Yes, I think it was generally. As far as we can see from the information that's available in the contract, it's operating outside its contract.

MR HANKS: It's simply outside its contracted range.

MR COOPER: It's outside its contracted range and it's also...

THE CHAIR: Are you saying it's 3 or 4? Are you saying categorically...?

MR YEOWART: We can't be certain unless we see the PDNS, but 3 at best, 4 probably.

MR COOPER: It doesn't have any Rights.

THE CHAIR: Can you say for certain without seeing the PDNS?

[*Cross-talk*]

MR YEOWART: You must mean freight Rights. I have enough trouble with passenger Rights.

THE CHAIR: Sorry, why can't you go for 3 or 4 without seeing the PDNS?

MR COOPER: Because we don't know it's been Exercised. We haven't got sight of whether they've been Exercised properly. That's the reason: we don't have sight of it.

THE CHAIR: If we make the assumption that it was Exercised properly or if Network Rail tells us that it was Exercised properly, what would you say?

MR COOPER: Then we'd have said 3, if it was Exercised.

MR YEOWART: I'd have a difficulty with Network Rail confirming that, on this occasion, this was Exercised properly, having found what we've found looking particularly at the freight contracts and some of the things that were said in the response, i.e. that that this was included in the 8th supplemental when it clearly wasn't.

MR COOPER: It didn't have any Rights. There was a supplemental allegedly being progressed, but actually there was no evidence of that. It's not at ORR; it's not gone out to consultation.

THE CHAIR: Okay, but at best, you say, it was 3 if it was Exercised. Arguably, you say it may not have been Exercised.

MR YEOWART: To be honest, the evidence, Chair, would point to it being 4.

THE CHAIR: Okay, but at best it's 3, you say. The consequence of that is that the decision criteria would be applicable. What do you say would have been the result of the correct application of the Decision Criteria, if it were the case that both of these, 6H88 and 1N93, were level 3?

MR YEOWART: To be fair on that, we could only put forward the case for the passenger service, and it would be up to Freightliner Heavy Haul to put the case forward for theirs. I would not know what the value of their service was, but I think the issue here, Chair, is quite clear: we were told categorically in the response that there was a 19th supplemental. This train was amended to 11:15 in the 19th supplemental. I could not find it on the ORR website and I rang the ORR and asked them if they had yet made public the

19th supplemental, in relation to this service as identified. They told me quite clearly they had not received a 19th supplemental. Network Rail, unfortunately – and it is a term that I don't use lightly – in this response lied.

THE CHAIR: There could be all sorts of other explanations for this confusion.

MR ALLEN: I think I take a bit of a personal objection to being called a liar just like that.

MR YEOWART: I haven't called any individual –

MR ALLEN: Sorry, that's exactly what you've just said. I signed it and, if there's an error in the letter, I'll be the first person to put my hands up and understand what's going wrong. That isn't the way I do business. I'm sorry, but I've listened to a lot of jabs all through today and that's just about the one that's going to break the camel's back, I think.

MR YEOWART: Okay, in which case I need to put the position quite clearly. It was identified that the 19th supplemental had been submitted to the ORR in relation to this service, not ambiguous about it may have been or we're doing it or we're thinking; it's been submitted. It has not been submitted to the ORR. Whichever way you look at it, that is an untrue statement. Whatever word you want to put to it, you can put to it, but the fact is I am not going to be pulled up either for identifying something that's been said in print that has proven to be false. That's the actual position with this.

We took great care to check with the ORR, and unfortunately, although I've got quite a lot of time for Matt and what they've done here, the fact is he's made it clear on a couple of occasions that he had not read our response; he has not picked up the detail of our response. It is not Grand Central that is treating these matters flippantly, I would suggest; it is other parties.

THE CHAIR: Can we try to take the heat out of the lying issue by saying that I don't think it's relevant? All that needs to be said is that it is asserted that, for whatever reason, the statement that the 19th supplemental has been submitted and the relevance of that is, I think, whether it comes out as 3 or 4. The assertion is that that statement is not true because, as a fact, it has not been submitted. Can I just ask Network Rail purely on that one issue: do you say that statement now is correct or incorrect?

MR ALLEN: I'm happy to believe Ian. I have no reason to play games on trust here. I asked our customer managers, who manage the contracts with our different operators, the contractual level of what it was. More or less verbatim, that's what I repeated back in

this document that I thought was true. If it's not, then...

THE CHAIR: You say, as present at this table today, say that Network Rail's people generally have said, 'Yes, the 19th supplemental was submitted.'

MR ALLEN: That's what I was advised. If somebody's been dishonest with me internally, then I'll pick that up. I wouldn't have written it if I...

THE CHAIR: That's a matter for you within Network Rail, but I don't think there's any question of, as it were, parties lying in this particular forum, so let's put that one to bed. At least there can be said to be a doubt as to whether the 19th supplemental was submitted. That may or may not be relevant in any case.

MR YEOWART: There's no doubt, Chair. The person at the regulator who confirmed it to me was Brian Hopkinson. I'm quite happy to put the name down. I told him why I was ringing. I checked the Network Rail website and the ORR website, and he confirmed to me there has not been a 19th supplemental. There'd been a lot of talk, but nothing had been submitted.

THE CHAIR: Network Rail, I'm going to ask you to accept that statement at face value.

MR ALLEN: As I said I would do a few moments ago, yes.

THE CHAIR: Thank you, fine. Accepting that statement at face value, and in any case you had the opportunity to challenge it in coming back on this document, and you didn't – you said you had no comment to make – I think we are entitled as a panel to take what is said in Grand Central's response to your information as being true factually, as far as it concerns the facts.

Without going further into the detail, I think I can say that the result of that is that 6H88 Freightliner bid service is not the five-day knockout of Grand Central's bid. It might have proved to be that if you'd provided other material but, on the basis of what we've got before us, after two and a half days of hearing and after a lot of other information, we have not got it demonstrated that 6H88 knocks out, in the sense of having a contractually higher priority, Flex and so on.

MR HOLDER: Can I just say, if the supplemental wasn't acted, doesn't that leave the train still with level 1 Rights but for a different time?

MR GIBBONS: Yes, it's got Rights.

MR HOLDER: It has its previous Rights, and also under level 1 there is a right to have a train

within 30 minutes of its current timings, isn't there?

MR GIBBONS: It depends on what the timing is.

MR HOLDER: There are two Rights in the freight contract. You tell me if I'm wrong. There's is a Right plus or minus 30 minutes either side of the timing in the contract. There's a Right to plus or minus 30 minutes of the timings in the current timetable as well.

MR ALLEN: Yes, there is. It's in the DBS. Freight Rights are another level of complexity and confusion, beyond all doubt, but 6H88 has a Firm Right for an 11:15 or something departure, which I don't think anybody can discredit, from Daw Mill going forward. It was Flexed 30-ish minutes or to the Slot it's now in, 11:50 or whatever that is.

MR HANKS: 35 minutes, which is outside the Flex.

MR GIBBONS: With the agreement of the operator.

MR ALLEN: With the agreement of the operator, for the delivery of the May 2011 timetable, and it was done there. Rob's absolutely right: there are two levels of Flex for freight trains; one that says plus or minus 30 minutes from the previous timetable; and one that says just plus or minus 30 minutes. Now, we could get into a hole of if that makes it 60 minutes if it's a new timetable change, but generally the lag that there is on freight Rights makes this kind of thing, when you look back at them, very complex. For example, the 4L28 that we were talking about in the previous TTP, 495, has got level 1 Rights for part of the route and not level 1 Rights for the second part of the route. We would all be helped by Rights being established before we do the timetabling process.

THE CHAIR: I'm sorry, I'm probably being less than intuitive here. Getting back to basics, how is an 11:50 service again in conflict with a bid for a 13:23 service, because the time at which they occupy the same place...? They occupy the same piece of track, okay. Network Rail, do you contest the conclusion that you haven't made good 6H88 as inarguably a contractual bar to 1N93, because you have not contested what Grand Central has said in response to your putting that up, both as regards the effect of the 19th supplemental, whatever that was and wasn't applied for, and generally the other points?

MR ALLEN: Sir, I think, if we've interpreted this wrong, the worst thing that we've done wrong is that we've put this with D4.2.2 level 2 instead of level 3, which gives it an equal priority for inclusion in the new Working Timetable to the 13:23. I don't think the new

Access Proposal – it is my view, what I think about it – that the 13:23 Access Proposal allows us to drive a coach and horses through 6H88, either operationally or contractually. I would like to also understand, going back to the reasonable levels of Flex we need to Exercise, the path has been offered at 12:52 to Grand Central; I’ve still not heard an awful lot that says we’re massively off the mark with the way we prioritised the inclusion of all these trains into the timetable.

MR GIBBONS: Can I just say, Chair, I’m struggling a little? I know we’ve been through the Rights surrounding those trains that conflict with the originally bid path, but I have a fundamental problem here that Grand Central has been offered a path at 12:53, conflict-free, five days a week, based against no firm contractual Right. Bar the fact that it doesn’t suit them in terms of journey time – and I accept that and we have that all the time – and acknowledging the fact that, if you’d taken the logical extent of the Flex that might have been available in the East Coast train 1N85, why is a 12:52 solution, at this time, not acceptable?

MR YEOWART: The reason it’s not acceptable is that –

MR GIBBONS: It’s met the contractual terms.

MR YEOWART: Not at the offer date. At the offer date, there was nothing to suggest that we would end up with any train at all.

MR GIBBONS: It conflicted, if nothing else, with 6E84, certainly on two days but against an SX bid. If there’s an error perhaps somewhere for getting knocked down, 6E84 – you bid for an SX path. They couldn’t offer you an SX path. We acknowledge that here today: they couldn’t offer you an SX path. Do we accept that position?

MR YEOWART: We’ve accepted it from the information that we have here today, so we get a three-day-a-week path. If we’d been offered that, we would have sought the Monday and Friday path.

MR GIBBONS: That may be somewhere in here that’s an option that might have been available as well, but that’s not what you asked for; it’s not what you bid for. Therefore, they couldn’t offer you what you bid for.

MR YEOWART: We don’t know for certain, do we? That’s the problem and that is why we’re here.

MR GIBBONS: We’ve established today we couldn’t do it.

MR YEOWART: No, we've accepted that, based on what we're seeing here at the minute – and I think we've tried to be as fair as everybody else – that there are issues around what could have been done, what couldn't have been done and what could have been offered. The fact is, had we not, after the event, identified the 12:53, we wouldn't have had any pass. We wouldn't have had a 13:23 Tuesday, Wednesday, Thursday and Saturday, which would have been acceptable to the group. That's why we bid for a pass on the West Coast Main Line. It is not something we don't do; it is something we do. We have rolling stock that we want to utilise.

I would have thought, considering all the problems that you have, that you empathise with the problems that a small operator has. What we are trying to do is establish the contractual correctness of the processes that Network Rail goes through. I think we have found, on some occasions, they are found wanting. I have no personal problems with the guys here. They know that. I know we've had a little bit of a spat recently, but Matt also knows that we had a discussion about his freight colleagues and their contracts, and I said that was going to be a long issue. We did agree that, didn't we, when we had our discussion. It's nothing personal against Matt. I'm just saying what was written.

The issue here for us is contractual completeness. I've mentioned that in my summing-up afterwards. We knew we would win some – and we did know we would win some – but we also knew that we may lose some, not that we would lose some, but we may lose some. The fact is it has taken three days. It's been very thorough. The whole idea really of these three days is to make sure we don't have to come here again, ever, in the future. I think you've gone some way down the road to ensuring that position with us but, on this particular matter, at the offer date, we had nothing. As a result of that, we should have had the 13:23. We've established that. It may be only three days a week plus the Saturday. We've established that and that's the position that we required.

MR GIBBONS: Again, I have a problem. You bid for an SX path; the SX path is not available. I don't know anything that was displayed in the Track Access, Part D, which says that, if you bid for an SX path, Network Rail is obliged to make you an offer for the other three.

MR YEOWART: If it can be identified through Flexing, but the whole history of Grand

Central has been not to be offered paths by Network Rail. You know that. The Chair probably doesn't know that.

MR GIBBONS: I'm aware of the situation. I'm very much aware of the position that freight operators find themselves in and, in some ways, it's often worse than your situation. I can assure you it is, but I still have a fundamental problem. We're talking about the principles here and the Code. Network Rail could not have offered you an SX path and there's no mechanism, unless someone can tell me there is, which says they're obliged to offer you three days out of five.

MR YEOWART: That's not my decision.

MR GIBBONS: I know. I'm just saying, I'm stating, I don't know of a mechanism in the Network Code that allows Network Rail to offer you three out of five.

THE CHAIR: Are you saying that, if the full SX, i.e. five days, as bid for, cannot be offered, then the obligation to offer anything falls away? If that's right that would suggest that, in other respects, if the exact characteristics as bid for, including the actual departure time, can't be offered, well then all bets are off.

MR GIBBONS: That's kind of what I'm sitting here, having listened to everything today and the previous two days, when we get down to the nub here, I'm not aware of anything, unless anybody else around the table is, that says there's an obligation on Network Rail to offer anything other than what is bid for.

THE CHAIR: My understanding is that the obligation on Network Rail is to do the best it can as near as it can, Exercising whatever Rights it can, in the entire matrix, in all its contracts with all the operators it has to consider. Just as that includes an overriding obligation to try to accommodate bids as much as it can, and therefore to Exercise contractual Flex as much as it can, as a matter of logic it follows that, where you're talking about an SX bid, which means a five-day bid; if the contractually overriding conflicts knock out some of those days but not all of them, then trying to accommodate the bid as best you can would include offering three days out of the five. That's where the power comes from, in the same way as Flexing the departure time and other characteristics. I think that's the answer to that one, Nick.

Can we get back, please, to the contractual consideration? Grand Central is entitled to say, as it has done, that whatever philosophically, morally or pragmatically it

might be thought it shouldn't accept or should be acceptable to it, such as the 12:53, it is entitled ultimately to be heard on whether contractually it is entitled to have done better than that. While I would love to arrive at a short, sharp solution that says, 'Surely 12:53 ought to be okay, whether we accept it,' we've got to exhaust the logical route to what the contractual position is, I am afraid.

Where that takes us, in my view, is that on 6H88, which is the service we're considering as the potential contractual five days' knockout, Network Rail has not made out the case that it is a five-day knockout. The best that can be said on either side is that, arguably, both of them were level 3. Had they gone head to head, that would have been a matter for the application of the Decision Criteria. What would have been the outcome of that? Well, Grand Central justifiably says, 'We have no idea, because we're not in a position to evaluate the merits, Decision Criteria wise, of freight services.' In any case, that evaluation wasn't done at the time or in any way. Trying to speculate on what would have been the application of that now after the event is a pointless exercise.

The best I can do contractually is say that, in all the circumstances, at the point where we've got to, in respect of 6H88 in particular, Network Rail has not got home on saying that that is contractually a five-day knockout, for a whole variety of reasons. When I look back at the transcript of this, I will identify that and that's partly to do with the presence or absence of the 19th supplemental and other things. It's basically that it hasn't provided an answer, either written beforehand or today, to some of the points made by Grand Central.

That leaves us with saying we already have what I've called 'a contractual knockout' for Mondays and Fridays on 6E84. Are there any other services that satisfy the transparency criterion of having been referenced in the offer letter or clearly discussed beforehand, which knock out Mondays or Fridays? I think we've exhausted them all, haven't we, or have I missed one?

MR THOMAS: You've gone through my list, Chair.

MR ALLEN: Yes, the information I have has been exhausted.

THE CHAIR: Right, in that case I think that takes me to the end of the Q&A on all issues. Colleagues, are there any other questions you want to put on any of the issues, particularly the last ones we've been discussing?

MR THOMAS: Contractually, we've been through it and I absolutely agree, like you say, that the Decision Criteria may have given one result or the other, but it wasn't done.

MR HOLDER: I've not gone anything else.

MR GIBBONS: I want to say one thing. I'm unclear from my own PDNS with Network Rail, in our PDNS there were a number of supplementals made reference to, which are with the ORR. I'm not clear in my mind, as I'm sat here, that 6E84 is not in one of those supplementals. That's just really a word of warning: I'm not sure. I haven't got my PDNS in here and I haven't got supplementals.

THE CHAIR: To run SX, you mean therefore including Tuesdays, Wednesdays and Thursdays.

MR GIBBONS: Yes, because it has changed. I know that for a fact. It runs more than Mondays and Friday. I'm not too sure which supplemental it might be and if it's declared on the PDNS. I just don't have that clarity.

MR ALLEN: I do have the DB Schenker PDNS.

THE CHAIR: I wouldn't want to proceed to a decision today, which is what I'm about to do, leaving that point at large, even though it's one that's been raised by a member of the panel.

MR ALLEN: I did try to raise it earlier on.

MR GIBBONS: I'll just make it quite clear. There are two things. Well, it's only one thing. If that supplemental has been referenced in the PDNS, and I need the supplemental to check which one it's in – it's the number versus the content and I haven't got that here.

THE CHAIR: Is that something that, as an isolated point, can be knocked on the head by the PDNS?

MR ALLEN: I'll have to see what I've got.

MR GIBBONS: It depends what the supplemental is. All we state is the supplemental 84 or whatever it is. There are a number of supplementals with the regulator. I need the details of the supplemental and I haven't got them.

MR YEOWART: A bit of investigation that we did would have identified that the Rights provided by Network Rail for the operation on the additional days were not in force at the Priority Date.

MR GIBBONS: I just don't know. I'm just flagging something up here.

THE CHAIR: Sorry, please say that again loudly and slowly.

MR YEOWART: The Rights provided by Network Rail for the service to run Tuesday, Wednesday and Thursday were not in force at the Priority Date. Therefore, it wouldn't have had higher priority.

MR GIBBONS: I'm just flagging something up.

MR ALLEN: They wouldn't need to be, because neither were your Rights. It just needs to be in the PDNS as an Expectation, with a big 'E'. It's into the same level and it's into the Decision Criteria.

MR YEOWART: Potentially.

MR ALLEN: No, that's where it would be. That's what we've just established.

MR GIBBONS: It's a flag. I just don't have the answer to give you, Chair.

THE CHAIR: Can I suggest we proceed like this? We take a 10-minute break and you check this particular point out and come back to us.

MR GIBBONS: I don't know if I can with the supplemental.

MR ALLEN: I can see what I've got.

THE CHAIR: I think I would rather Network Rail check that out, rather than a member of the panel. I'm inviting Network Rail to check this out, rather than Nick as a member of the panel. Let me finish. We will then proceed straight to invite brief closing statements by both parties, and we will then have another, I hope, short break and reach a decision, which we can announce tonight. Alright?

(Adjourned)

THE CHAIR: Thank you very much. I think I'd like to hear from Network Rail.

MR GIBBONS: They've got the whole picture of it.

THE CHAIR: As best as they can give it on the issue.

MR ALLEN: Sir, the best we can give you of the picture so far, and this is the bit we're waiting for clarity on, is DBS's PDNS does sort of reference very clearly the supplemental agreements.

THE CHAIR: This is 6E84.

MR ALLEN: This is the bit we're seeking clarity from. The email we've had from the

customer manager who manages the contract pertaining to Network Rail is that 6E84 has level 1 Rights for an SX path, recently agreed. What we just need to clarify is in terms of which supplemental agreement that was in that those Rights were clarified from, MFO to SX. As long as that number matches one of these numbers, almost like lottery numbers, in DBS's PDNS, then that will establish that train with level 1 Rights and them having been initiated at the start of the process in the PDNS.

MR GIBBONS: Somebody's finding me the supplemental number to see if it matches the PDNS.

MR YEOWART: It won't have Rights in front of Grand Central, just equal to Grand Central.

MR GIBBONS: You're right. It would have to go to the Decision Criteria. I accept that, but I'm just trying to see where we are to see if it becomes more of a problem than it already is.

MR YEOWART: You and I will have to decide which one is more valuable then, I suppose.

MR ALLEN: Grand Central takes the 08:20 from Middleton Towers out of the timetable.

MR YEOWART: We can accept what's been said and just move on if you like. If the PDNS says, and we've no reason to dispute it, that it was bid for at the time and it's given equal Rights, we can accept that and move on.

THE CHAIR: I will put this in context of where that gets us in the logical train of thought on the contractual Rights. Can I clarify if what's being said is that the 6E84 DB Schenker service, which was put up by Network Rail as being what I've been calling the knockout service that contractually conflicts with and takes priority over the Grand Central 1N93 service as bid? It was combated by Grand Central as having that status, on the basis that, for one reason or another in only had that status on Mondays and Fridays, not Tuesday, Wednesday and Thursday. Actually, looking at what Grand Central said on this in their last provision of information, I realise I'm not clear why that was so. Anyway, what is now being demonstrated, through the PDNS, is that this particular service, 6E84, did hold priority level 1 Rights, SX, therefore Monday to Friday inclusive, and therefore potentially is the knockout service. Is that where we've got to?

MR GIBBONS: If it is – we're waiting for clarification – it puts it on a level step. It's on equal stepping in terms of the PDNS.

THE CHAIR: Sorry, please stick to my question. My question is: has it been disproved that

it's the knockout blow? We'll come to what the consequence is, if not.

MR ALLEN: No, not yet.

MR YEOWART: Yes, I think it has, because even if the supplemental's correct, it's only got equal Rights with Grand Central; it hasn't got better Rights, so it's not a knockout blow.

THE CHAIR: Is that accepted, Network Rail?

MR ALLEN: Yes.

THE CHAIR: I'm struggling. I'm hearing comments around the table incidentally, and it will be much more helpful if they could all be addressed into the middle, please, to the effect of whether the relevant supplemental has been granted or not. Is it the case that you are all accepting the 6E84, for these reasons, did not have level 1 Rights and therefore is not the knockout blow to Grand Central's 1N93, which only had priority level 3 Rights? Does everybody agree that?

MR ALLEN: For the Tuesday, Wednesday and Thursday only.

THE CHAIR: For Tuesday, Wednesday and Thursday only?

MR COOPER: It doesn't have Rights on the other days.

MR ALLEN: We've established they've got Monday and Friday Rights.

THE CHAIR: I'm sorry, I thought the whole purpose of this latest exercise was to establish that it wasn't a knockout blow in respect of Monday and Friday.

MR GIBBONS: We're trying to establish, Chair, the number of the supplemental and whether that was referenced in our PDNS.

THE CHAIR: The relevance of the supplemental is what? How does that fit into the logic?

MR GIBBONS: It fits in because, where currently there are only Rights for 6E84 on Monday and Friday and nothing for Tuesday, Wednesday and Thursday –

THE CHAIR: As per the current Track Access Agreement.

MR GIBBONS: Correct. If there was an Expectation with a big 'E' of Rights that were expressed in our PDNS, through a supplemental agreement lodged with the regulator, for an SX service that would then make the Tuesday-Wednesday-Thursday issue different, inasmuch as there would be two trains with equal Expectation, and there would have to be the application of the Decision Criteria, as to which train went into the timetable for those three days.

THE CHAIR: Just take me through again why something which is or is not bid for as an SX

and does or does not have SX Rights, which I understand to mean Monday to Friday, where the Tuesday-Wednesday-Thursday point comes in, in the first place.

MR THOMAS: I think, Chair, that the train used to run two days a week and had level 1 Rights to support that. DBS wanted to extend that throughout the week, so they bid it as an SX but, at the time of the Priority Date, only had level 1 Rights for the Monday and Friday still.

THE CHAIR: It's under the relevant Track Access contract. The Rights were only specifically for Monday and Friday, not SX.

MR THOMAS: Yes.

MR ALLEN: Yes.

MR THOMAS: That is common in freight.

THE CHAIR: The only explanation in writing I have of this is what Alliance/Grand Central said in its last submission, which was that 'The revised Rights provided by Network Rail in their Annex came into force on 22 August 2012, as per the 97th supplemental agreement, and provided for an SX version. The Rights provided by Network Rail were not in force at the Priority Date. The Prior Working Timetable issued to Alliance/Grand Central has 6E84 operating as an SX service. Therefore, on Tuesday, Wednesday and Thursday DBS did not hold the level 1 Rights.' I realise that I didn't previously question that, but I don't see the logical connection between the sentence 'The Prior Working Timetable issued to Alliance/Grand Central has 6E84 operating as an SX service. Therefore, on Tuesday, Wednesday and Thursday DBS...' I don't see the progression logically from SX to it's only Tuesday, Wednesday and Thursday. Could somebody explain that to me, please?

MR YEOWART: In relation to Grand Central?

THE CHAIR: In relation to what's being said here.

MR HANKS: I think really that should have followed on from the second sentence, so it's at the time of the Priority Date, DBS held Rights for a Mondays-and-Fridays-only Middleton Towers to Barnby Dun. That's the key statement.

THE CHAIR: Oh, for MFO; it's that.

MR HANKS: Yes, Mondays and Fridays only, MFO.

THE CHAIR: And so what is now being established is whether that statement is correct or not,

yes?

MR GIBBONS: It is correct as the statement. Also, because we have established an SX path in the timetable, we can then apply to the regulator for Rights for an SX path. For freight, until we get a path from the timetable, we can't apply for Rights. We have a path in the timetable, which was obviously done prior to the offer; it's in the pre-timetable. We would have applied for Rights to the regulator through the supplemental process. In our PDNS, we would have made reference to a number of supplementals, which are the regulator, one of which I believe may contain this application to make it a five-day-a-week path. It would have gone from Monday and Friday to an SX path. Therefore, that then changes what we've been discussing earlier on today, inasmuch as the path being cleanly available to Grand Central on Tuesday, Wednesday and Thursday, because we have an Expectation of a Right that covers that, then we have equal standing, so then there would have to be an application by Network Rail of the Decision Criteria, as to the allocation of that path. I think that's about right.

MR YEOWART: That's very well put.

THE CHAIR: Is it the case then that, on any analysis, Mondays and Fridays are knocked out for Grand Central. That's still accepted.

MR GIBBONS: Yes.

MR HANKS: We have accepted that.

THE CHAIR: The issue is because there may have been in force at the relevant time already an application for Rights or an Expectation of Rights, for Tuesdays, Wednesdays and Thursdays as well, and that that was bid for, those days have an equal priority with Grand Central's bid.

MR GIBBONS: Yes, but at the moment I can't establish...

MR THOMAS: I don't believe that puts it in any different category from a number of the other services that they were bidding for.

MR GIBBONS: It doesn't make it clean-cut.

THE CHAIR: That's where I was trying to get to. Let's assume that it is the case that, for Tuesday, Wednesday and Thursday, which we had been regarding as a possible solution, the best that can be said is that, for 6E84, Network Rail should have regarded it as having equal rights. That would have been a matter for application of the Decision Criteria.

Aren't we then in the same position as we concluded we were on 6H88, in saying that that exercise of applying the Decision Criteria and coming up with a conclusion can't be done now, because we're not in a position to evaluate freight services, whatever else and passenger services. It wasn't done at the time by Network Rail; it appears to have been done purely retrospectively, as an artificial construct, for the purposes of this dispute. That type of application of the Decision Criteria, as a general principle previously, we have ruled out as being a valid exercise.

Therefore, what? Therefore, whilst we have knocked out Monday to Friday, because there was inarguably a contractual priority there for 6E84, we have not knocked out Tuesday, Wednesday and Thursday, and we cannot embark now on the exercise of applying the Decision Criteria to potentially knock out Tuesday, Wednesday and Thursday. Is that where we get to?

MR ALLEN: Could we probably use different language? It's not about knocking out; it's about having offered the 13:23 close to 13:23, because we have offered a train. We haven't knocked a train out of here. We've offered everybody's train that we've had Access Proposals for. We may have got the Grand Central wrong on three days, in terms of exhausting our contractual –

THE CHAIR: You're saying you've offered it close to because you offered the 12:53.

MR ALLEN: Yes. I'd have to accept that we probably got our contractual calling wrong in terms of how we named the priorities, but there are only three days when it gets closer to the 13:23 departure from Kings Cross, as bid, not five days. Knocking out, I think, means we're talking about a train not in the timetable. We've put all the trains in the timetable at the minute, and what we're challenging now is the reasonableness to what Network Rail has or not investigated how it's got close.

THE CHAIR: You've offered 12:53 for Mondays and Fridays. All we've said is the 13:23 is knocked out, but in fact you have offered the 12:53 Mondays and Fridays.

MR ALLEN: We have indeed offered it.

THE CHAIR: The residual issue is whether you're contractually obliged to try to do better and should have in fact done better for Tuesdays, Wednesdays and Thursdays, and therefore ultimately whether we should, as part of this determination, direct you to do better on Tuesdays, Wednesdays and Thursdays.

MR ALLEN: Correct. The other thing I would like is, whatever that path we find, if we're going to move the path to have a new-ish train at 13:23, we're going to have to safety validate that path and all the stuff that goes with it, just to make sure we're not infringing too much on a level crossing. We haven't done that with a 13:23, I don't believe, at the moment, but I've got no problem if that's the way that we're going with this determination. We have to relook at those three days in terms of getting close to 13:23.

THE CHAIR: That is the logical conclusion we come to as a result of this thought path, isn't it?

MR THOMAS: My only problem with that, Chair, is for other customers who were chosen above, wrongly or without any thought, if this is an either/or, you would reinstate the 13:23 Grand Central path. These other trains, which have similar priority contractually, would no longer work and they would all be disadvantaged. From an impartial Network Rail point of view, while that satisfies this dispute, it disadvantages a load of other operators that are not here.

THE CHAIR: Does it merely disadvantage them in a practical commercial sense or does it breach their contractual Rights?

MR THOMAS: I don't think it does the latter. What it does – and Chris's example about one of the reasons you don't like this path is an additional driver and a slower path that drives lower revenue – is you would do that potentially to another operator. 6H88 – sorry, that's probably not a good example, but one of these other services you might retime by half an hour or an hour, and cause it to have an additional driver and simply move the problem around the industry.

THE CHAIR: But not in breach of their contractual Rights.

MR THOMAS: No, but then Grand Central isn't in breach of their Rights at the moment.

THE CHAIR: That's the nub of the question. We're only going to determine that Network Rail should, for example, do better than 12:53 offered for 1N93 for Grand Central for Tuesdays, Wednesdays and Thursdays, if we conclude that Grand Central has a contractual Right to that consideration; and, by definition if you like, a contractual Right that's better than other operators' competing contractual Rights, which is what we've been trying to consider, on the basis of what Network Rail has told us are the other potentially competing contractual Rights. That's why we've been going through the

exercise of trying to say yes; those contractual Rights do best for Grand Central or no, they don't. Where we have got to is that, for one reason or another, they don't, other than as regards Mondays to Fridays, unambiguously, of 6E84.

MR YEOWART: I think it's important to remember as well it's not just about the timing of the train. It's the fact that we weren't made an offer. That's actually quite critical, because the 12:53 found after the event was actually found, in effect, by Grand Central, which then went back to Network Rail. Let's not forget that we also found the 15:52, having been rejected initially on the 16:08. Network Rail then refused to sell us that path. We have done our work to find the additional, and that's why it is now critical to ensure that, at the contractual offer date, we are treated equally alongside colleagues. Finding it after the event is a weak position for us, and we're trying to establish our correct position and everybody's correct position, in relation to the bid and offer process. As I think we've all established, there's room for improvement. We've learned a lot as well. There's a great deal to take away.

If eventually, Chair, you come to the conclusion that, yes, it does come down to the Decision Criteria for those there days, if that is ultimately your conclusion – it may not be – on this particular train, 6E84, we did mention that we were sure there was a resolution that Network Rail had identified. Of course, we couldn't go there because we couldn't provide the evidence. If the decision is that, yes, potentially Decision Criteria, that will take a bit of time. In the mean time, if we dig out the evidence, it might prevent the need to do that. It's only if we get to a position where you want a bit more info.

THE CHAIR: What I want to avoid above all else is a decision that leaves anything open to further dispute or the need for providing further information. I want to reach a decision that can be acted on, in a pragmatic way, to the satisfaction of everybody concerned. I very much doubt that we are going to decide that somebody should go away and have a crack at applying the Decision Criteria.

MR YEOWART: Okay, that's a fair comment.

THE CHAIR: Equally, I am loath to come to a decision that says, for a particular service, 'Yes, Grand Central had a Right to consideration of having things Flexed around to do a bit better than 12:53, so Network Rail go away and do the best you can,' because that leaves open to the possibility of dispute whether it will have done the best it can eventually. We

don't want everybody back here on that one. I think we have to try to come to something that is a uni-directional decision, if we can.

Where I've got to on the Monday and Wednesday is that Grand Central hasn't got the right. Having been offered, nonetheless, the 12:53, it's up to Grand Central independently of this panel to decide whether it wants to pick that up for Monday and Friday or not. One pragmatic solution for Tuesday, Wednesday and Thursday would be to say to Network Rail, 'Continue to offer 12:53 for Tuesdays, Wednesdays and Thursdays or something better if you can, but with no comeback if you can't.' That leaves it slightly open, and then there is any point that at which one could say, 'No, offer a better time,' or within a specific bracket, 'up to and including spot on the bid time of 13:23.'

Now, what I'm residually not quite clear on is whether 13:23, as bid for, at least as regards Tuesdays, Wednesdays and Thursdays, is contractually overridden by 6E84. I think where we've got to is that it's not. Is that right? Even though with this latest research or information into the PDNS we've discovered that maybe Tuesday, Wednesday and Thursday Rights had at least equal priority, were they bid for as Tuesday, Wednesday and Thursday?

MR ALLEN: That would be right. If they were in the PDNS and they were rolled over from a spot bid and they went in with that level of Rights, that feels like it's the right place for them to start, while their other Rights are being established.

MR GIBBONS: The application for an SX path was submitted to the ORR in September 2009 and granted this year. That's how long it takes. It says, 'Network Rail on 30 March 2009, eventually submitted the ORR in September 2009.' Now you see the difficulty that we have and everything you need to know about freight Rights.

MR ALLEN: Does that mean it was established at the PDNS statement?

MR GIBBONS: Yes.

THE CHAIR: Nevertheless, in this whole matrix of trying to reconcile all these conflicting bids, it is Grand Central that has chosen to stick its hand up and take this one to dispute. The particular possibly contractually conflicting service that we're considering DB Schenker's 6E84, DB Schenker will have been notified along with the rest of the industry of this dispute, and therefore given the change to participate, not as a panel

member, but in its own right, either as a dispute party or, at a secondary level, as an interested party as East Coast has done. DB Schenker hasn't done that, so DB Schenker as an interested party isn't in this forum making the running. Grand Central is. That's the way it goes.

MR GIBBONS: The Rights for 6E84 to operate SX were approved on 22 September 2009.

THE CHAIR: Where does this MFO assertion come from?

MR COOPER: You say the Rights are for SX.

MR GIBBONS: SX approved on 22 September 2009.

MR COOPER: That's not in the contract that's on the regulator's website.

MR GIBBONS: I'm just going on what we've got in front of us. Stan Kitchen, who's my timetable manager, is at home on his BlackBerry, has looked all this up to try to help us to get where we need to be.

MR COOPER: We've checked on the regulator's website and that's where our information comes from.

MR ALLEN: We believe we've got level 1 Rights as an SX to operate.

MR GIBBONS: Sorry, Chairman; it's whatever's on the ORR website, unless someone goes on to ORR's website to have a look.

THE CHAIR: It is being said, as it happens by a member of the panel, providing information that is material to this decision, this dispute, that the position on a particular set of Rights is so-and-so. Am I right in thinking that, as a matter of jurisdiction, as a panel, we can properly and we should properly take cognisance of that information, notwithstanding that it's been provided by a member of the panel, rather than other parties? I think we can, because I think the panel, among other things, has the power to be proactive in seeking out relevant information, just as it has in researching the relevant law and being inquisitorial in terms of trying to dig out information.

MR SKILTON: 'Where appropriate take the initiative in ascertaining the facts and law relating to the dispute.'

THE CHAIR: Thank you. Pursuant to that power, I think we can take cognisance of what our panel member, who happens to be with DB Schenker, has dug up as the information. Of course, we can and should give the parties the opportunity, if they want, to refute that as a matter of evidence that, one way or another, happens to be before the panel. Do you want

to refute that?

MR YEOWART: I'm not sure that we're in a position to refute it without seeing the supplemental. All we would state is it's possible that the supplemental was dated, i.e. it wasn't ongoing, and I don't doubt for one minute that what Stan has found is correct. What we did find, when we did our investigation, was that the revised Rights came into force on 22 August 2012, as per the 97th supplemental agreement. I'm just questioning why you would have to seek the 97th supplemental agreement for something that you'd already got.

MR GIBBONS: That was already done as the 45th supplemental agreement to give the SX path.

MR YEOWART: The 97th was, according to this... I don't quite see why you would need to submit a 97th supplemental agreement for something that was stated you actually already had in 2009.

MR GIBBONS: The way that freight access Rights work is you tend to apply for the whole service group, whether there's a change or not. You'd have something in there, which was already established and already has a Right, which would be submitted as the 97th, for example. Other changes around that established Right that have actually gone to consultation. That's the way that we do Track Access Rights, and I think Paul would understand that.

MR HANKS: The only problem would appear to be that, if this is true, and we have to take it at face value that it is true, then it looks as though the fault lies actually in the updating of the consolidated contractual table.

THE CHAIR: On the rail regulator's website?

MR COOPER: We have complained about things not being updated.

MR YEOWART: We have no reason to doubt, if that's the position, we understand where we seek contractually. That's why we've been here. If that's the position, and I don't doubt for one minute it is, then we accept the fact that DBS has got a higher priority and contractual Rights for a path. Therefore, that is a killer blow for us, in respect of that service.

THE CHAIR: If that's the case, at least we've got there through the right route.

MR YEOWART: And at least we know. It also allows us to ensure now we can put pressure

on to get contracts correctly updated, correctly referred to, which has been a major part, as you're aware, of the reason that we've been here for three days.

THE CHAIR: That gives you ammunition in dealing with the regulator, whilst it's not open to this panel to issue directions to the regulator to do things better.

MR THOMAS: It might give ammunition to Network Rail as well, Chair, who were co-signatories to all of these.

THE CHAIR: Okay, so to wrap up, I hope, on this one, am I right in concluding that the argument that was raised by Grand Central in its latest submission of information that the conflicting service adduced by Network Rail in its submission of 6E84, DB Schenker, only had the relevant priority for Mondays and Fridays? That argument is now accepted through the evidence that has been provided through various means today to be invalid.

MR YEOWART: On the information that's been provided to us today, we accept that information, yes.

THE CHAIR: That's accepted. The consequence of that is that 6E84, at least, irrespective of all the others that were adduced, is what I've been calling 'the knockout blow' for five days, not just two days. Is that right? Am I right logically in reaching that conclusion?

MR GIBBONS: Yes.

THE CHAIR: It's the knockout blow to the assertion that, under TTP495 dispute, service 1N93, as bid for by Grand Central, had priority, as bid for at 13:23, and should have been admitted. Logically, on the basis of that evidence, we can get as far as that conclusion. Is the consequence of that that we should make a determination that that simply is the case or is it the consequence that we should direct Network Rail to do something else, the next best thing? I think it's the former. I think that it doesn't lie with us on this to direct Network Rail to try to do something else. The offer of 12:53 may or may not still be on the table.

MR SKILTON: Chairman, right at the start of the dispute, Network Rail did ask you to direct that.

THE CHAIR: To direct that...?

MR SKILTON: That they accept the 12:53.

THE CHAIR: That they accept the 12:53, thank you.

MR SKILTON: Here's a summary. That is what they applied for. The second page shows

Network Rail asked you... [*Pause*]

THE CHAIR: Thank you. Is this actually...?

MR SKILTON: That was actually what they first said when they first submitted an application.

THE CHAIR: This is the sort of framework. [*Pause*] Even though they asked for it, I don't think...

MR SKILTON: It gives you the authority to give it, because they asked for it. It's in the public domain that they asked for it.

THE CHAIR: I hesitate to direct somebody to accept something, rather than leave it open to them whether they accept it or not. Isn't it up to them to decide whether it's the next best thing or not at all?

MR SKILTON: I would have thought so, yes.

THE CHAIR: I don't think it's necessary to an outcome of the dispute that was raised by Grand Central in the first place. That was the conclusion I was going to come to on that particular request. Clearly the other specific remedies sought by Grand Central I'm going to kick into touch as being either not necessary or not available. Yes, thank you for that. Right, is there anything else we need to consider on that one or have we got to the end? I think we've got to the end of that one. There are no other open questions.

The issue of how we actually frame the outcome and the precise remedies granted is one we just need to think about, having regard to the specific outcomes and remedies sought by the parties. We can do that in the first place shortly, when we just break to consider that and long when I come to write it up. We've actually exhausted the discussion on all the issues and the questions that any of the panel on this side wants to put. Thank you. I am going to invite the parties and also East Coast, as the interested party attending, finally, to make any closing statements or observations they wish to, starting with Grand Central, please. I've been handed a handwritten copy of a closing statement, which we'll hear in a minute. If this is the closing statement, I would ask that, if you can, you provide a soft copy in due course.

MR YEOWART: I'll type it up afterwards.

THE CHAIR: It will just be easier. It saves me having to type it up.

MR SKILTON: It will be typed up by Tim.

THE CHAIR: Indeed. Sorry, that's quite true; it will appear in the transcript. Thank you,

Grand Central.

MR YEOWART: Chair, thank you for undertaking a full and exhaustive evaluation of the disputes in question. These have clearly been difficult areas to address, but the importance to Grand Central as a small operator of establishing the principles of contract in the industry are very relevant, and we're grateful to the panel for providing that clarity.

Whilst there are clearly many issues between Grand Central and Alliance with Network Rail, I think it only proper to record that we have been grateful to Matt Allen and Andy Lewis for their honesty in addressing the many difficult areas that they have faced in these hearings. I sincerely hope that future timetable development with Network Rail will be carried out in a more constructive manner than has perhaps been the case in the past.

Grand Central and Alliance only seek to operate train services like those of our industry colleagues, and I am comforted that the decisions of the panel will, in the future, help us achieve that. Despite what colleagues at Network Rail have stated, we have not treated these matters flippantly, far from it, and indeed have acknowledged the work undertaken by Network Rail's planners. However, despite our best efforts, we've been unable to agree a position without recourse to dispute, and I hope we can all take away the lessons we have learned. Thank you.

THE CHAIR: Thank you. Network Rail?

MR ALLEN: Nothing significant to add, just to thank the panel for their time. I actually agree with Ian; it's been a thorough and exhaustive look at what we've done. It's generally really helpful. I think there's a lot of learning we can take out of it, so that we will work to hopefully deliver a better round for everybody next time. I welcome the guidance that your determination will give us. Like I say, that's a promise from us that we will take that learning away, distil in our teams and look to do the right thing, supported by the contract, for future decisions that we make on capacity.

THE CHAIR: Thank you. East Coast?

MR FISHER: I don't have a formal statement to make, but I would like to echo the comments of both Grand Central and Network Rail in thanking yourself, as the Chair, and the panel for what has been an extremely interesting three days.

I just have one question though regarding TTP494 and whether the East Coast

PDNS is deemed to be defective or invalid, in some way, as I believe I've heard today. If that is to be the case, then it's just to ensure that those decisions are being made for the right reasons and not on the back of any misunderstandings, as we've heard this afternoon, from colleagues who were unaware of complete paperwork, etc. As an individual, I am certainly not clear as to what, in any way, is defective or invalid within the PDNS.

THE CHAIR: I should be able to, but I'm afraid can't, give you a full answer to that question by reference to the transcript of the previous hearing, when we discussed that. My recollection broadly is that it turned on the relationship between a rollover timetable and the bits that weren't rolled over but with changes to them, and how that was expressed in the PDNS, and generally how the whole thing fitted together. It's not in terms of compliance with Timetable Planning Rules, which is a separate issue and, as we talked about earlier today, actually falls to be considered at a later stage, but purely in terms of how it fell out as an Access Proposal for the purposes of the relevant provisions of the Network Code, as at the time of its submission and as at the Priority Date. Colleagues, can you help me on this?

MR THOMAS: I think so, Chair, and, Shaun, it will come out from the Chair. The point was that it was deemed by effectively bidding for the Newark terminators and the services through to York, so the same train effectively. You were not able to do that.

MR FISHER: A bit the other way round: it was bidding for the York trains but making it extremely clear that, should that be unsuccessful, we wanted those services to continue to operate as Newark services.

THE CHAIR: Oh yes, it was bidding for services in the alternative.

MR FISHER: I don't view it that way, no.

THE CHAIR: I think we viewed that, as a matter of logic, you can't bid for two things in the alternative and simultaneously have an expectation that they both will be granted Rights, because by definition they can't both be granted Rights in parallel.

MR FISHER: There never was an intention or any expectation that both could be granted. All it was was a really simple clarification exercise towards Network Rail that, should the aspiration to run these trains to York be unsuccessful, then we definitely still wanted to run them to Newark.

THE CHAIR: We started using the word 'defective' and perhaps that, like 'non-compliant', was an inapposite word. It was in the context of if it attracted at least priority level D4.2.2(d)(iii) Rights, I think it is, in having an Expectation. I think we concluded that, as a matter of logic and language, you can't be said to have an expectation of two things that are mutually exclusive, because they're alternatives.

MR FISHER: No, we didn't, but we had a clear expectation of one or the other.

THE CHAIR: That's the point. If you say it's one or the other, you can't say of either that you have a clear expectation of it, because of each one it could be the case that it would be eclipsed by the other. You said they're alternatives and they're mutually exclusive.

MR GIBBONS: I don't think it helped either that the Rights expired with the timetable. You could Exercise your Rights for the Newark, because that's what you have Rights for, but then you can also offer an aspirational bid for York, which has no level Rights bar 4, probably. Yes? Does that seem logical?

THE CHAIR: If the Rights hadn't expired, then one would be talking about levels 2 or 1. The issue is whether it gets in at 3 or not.

MR FISHER: If we were to rewind 12 months previously, then that is what we did when we attempted back then to extend these services through to York, but with the Rights still in existence. We only bid for them to operate as York services knowing that we had Firm Rights to run them to Newark. Moving it forward 12 months when the Rights are expiring, how do you have an aspiration but, at the same time...

THE CHAIR: Shaun, I hear your comments. I've invited you to make comments on it. I think this isn't something that we are going to enter into a further debate on. The answer we've given is that: that it is relevant. I will obviously check, when I come back to look over the whole thing, as to whether there was anything else, but my recollection is that that's how it fits into the logical analysis of the position. 'Defective' or 'deficient' is probably the wrong word to use in respect of the PDNS.

It's purely that, one way or another, the bid did not attract priority level 3 in respect of this particular service, because it could not be said of it that Network Rail could have formed a reasonable expectation that it would have Rights, because of the fact that there were two things bid for in the alternative. That, as a matter of logical analysis, means you can't have an expectation of both of them, even expectation in the way in

which previous debate on 518 and on this one we concluded, to make it work, you had to construe ‘expectations’ meaning a possibility rather than a probability. You can’t say simultaneously, of two mutually exclusive things, it is possible that both of them will get through. You can only say it is definitely impossible that one of them will get through, because they’re mutually exclusive. That’s just how the logic goes.

Right, thank you very much. That concludes the discussion and statements part of the proceedings. I’d like to take a break to consider the position, with the hope that we can arrive at a conclusion to give you to now, in sufficient substance to amount to the decision, which can then be taken away and acted on. I hope it won’t be a long break.

(Adjourned)

THE CHAIR: Welcome back. Thank you, everybody, for attending this and for all your contributions, written and oral. They were most helpful and most valuable, on all counts. To the extent that it has been within my control, which is partly but by no means entirely, I apologise for having kept everybody here so late.

However, I think we have achieved the objective of getting to a conclusion today. We are in a position to give the substance of the decision on these three in a form as I said I hoped to do at the outset, which can amount to the decision for the purposes of the Rules. The reason I say that is that I want to be transparent and make it clear that it may prove difficult to prepare and agree and issue the fully written determination within the 10-working-day period proposed by the Access Dispute Resolution Rules. The requirement under the Rules is to issue the decision within 10 working days. What I’m proposing is that what I’m about to say will be sufficient to stand as the decision for the purposes of the Rules, and also, in a far more important practical sense and for practical purposes, enabling everybody, and particularly Network Rail, to act on it within what is now a relatively short timescale before the timetable change date.

The decision is on TTP494 – and I will set out the broad steps of reasoning that gets to it – Grand Central’s relevant bid for the service under dispute should have been accorded, in effect, priority level 4 under the Network Code, because it was a bid that came into being after the Priority Date. Therefore, the best it could achieve was priority

level 4. Alliance's bid, which was made prior to the Priority Date, and as at the Priority Date may or may not have had level 3 priority, in effect, was allowed to lapse. Without the legal possibility of transferring the bid Rights that went with it from one Timetable Participant, Alliance, to another, Grand Central, whatever priority was or should have been achieved by the Alliance bid at the Priority Date went by the board when its bid was not proceeded with and, instead, a bid from Grand Central came into being and was proceeded with.

The conflicting bid by East Coast should also have been accorded level 4 priority, because it failed to satisfy the requirements of Condition D4.2.2(d)(iii) in failing to give rise to a possible reasonable Expectation in Network Rail, as the recipient of the bid, that the relevant Rights would have been achieved, principally because the service for which the Rights would have become relevant was bid for in alternative mode, and, as we were just discussing the break, as a matter of logic, it's not possible to have an Expectation, even if the Expectation is only of a possibility that two parallel and mutually exclusive things could come about. When I refresh my memory of what has transpired in the previous instalment of this hearing, I may find that there were other twists on that, but that is the nub of the reason.

We had two bids, both of equal priority or both capable of being accorded equal priority, albeit, we think, at level 4 rather than level 3. Therefore, on the face of it, the Decision Criteria would have been applicable to resolve the conflict. The exercise of applying the Decision Criteria was carried out to a degree, and communicated to a degree. Had the application of the Decision Criteria remained the determining factor, I would have been minded to accept Grand Central's analysis of the proper application of the Decision Criteria as ultimately favouring their bid, and that would have been for a couple of reasons, which I explained previously, both on the general question of how you actually view them, weight them, what had been said on either side and when it had been said, and also the issue of when they were applied and whether they had been changed. Broadly speaking, I would have come to the conclusion that Grand Central's view prevailed.

However, that particular consideration, as it turned out, was not central to the final decision. Therefore, in a legal sense it's what we call *obiter*; it's beside the point. It's of

interest and relevance, but it's not actually on the critical path to the decision, because, on any view, the offer that was made to East Coast was itself non-compliant – and we concluded that the term 'non-compliant' in this context is correctly used – non-compliant with the Timetable Planning Rules, as regards the headway that needed to be accorded, having looked at it, interpreted and arrived at an agreed interpretation by everybody here, in the context of not having a specific provision dealing with the situation where you have a through-train headway expressed in the Rules, and without expressing a particular variant of that for a stopping train en route, at this case at Newark. We arrived at and agreed the default interpretation that, if the Timetable Planning Rules state an applicable headway for the whole of the route or at least that part of the route that includes that particular station, it's agreed that's the applicable Rule. It was agreed that was not complied with in the offer. Therefore, the path as offered to East Coast on the offer date should not have been given preference over the path that was offered to Grand Central. For that reason, we conclude and will determine that the path that was bid for by Grand Central should be awarded to them and included in the December 2012 timetable.

Now, when I come to actually write this out fully, I may express that conclusion in slightly different terms and I may add conclusions or observations arising out of everything that's been said and also out of the specific ways in which both parties expressed the outcomes and the remedies they want. I haven't really, for the purposes of this extemporary decision, gone back and looked at that in detail, but I will do that for the purposes of the written determination. That is the substance of the decision on TTP494. I hope, with sufficient reason and with sufficient clarity, it can be regarded as spending as the decision and something which can be acted on.

TTP493: here the dispute as brought was characterised in terms of complaining about Network Rail's handling of the process, as regards a particular bid, and in particular what we came to call the 'down tools' letter, which said, at a particular point between the Priority Date and the offer date, we've consulted and discussed this as much as we possibly can and we can't do anything more with it now until after the release of the timetable, which Grand Central asserted, of itself, disadvantaged them in the whole process. In the determination, I will observe that I do think that that approach disadvantaged Grand Central in the process, but not in a way that gives rise to any further

disputable consequences or that had a material effect on the outcome, because the outcome, as a matter of contract, is that whatever the process there was at least one service bid for by another operator, which was identified by Network Rail and accepted by Grand Central as, I use the expression largely, contractually overriding Grand Central's bid for the service in question, under 493. When I come to write up the determination, I'll explain more fully or recapitulate what we discussed on that and how we got to that conclusion. The decision on 493, accordingly, is that Network Rail was entitled not to award Grand Central the service that was bid for. In this extemporary decision, I'm deliberately not getting to the detail of the numbers of the services; you all know what they are and of course that will be written up. I don't want to do it for some and not all.

For the purposes of the decision on 493, that is as far as we think it necessary to go in terms of the actual decision, i.e. simply to say that Network Rail was entitled to – I was going to say 'to reject' – but I would rather couch it in terms that Network Rail was entitled not to accept the service bid for by Grand Central. This of course leaves it open, because not specifically directed by us, as to what Grand Central or indeed Network Rail may do as a result of that.

One of the specific outcomes sought by Network Rail, I think on both 493 and 495, was that Grand Central should be directed to accept whatever was offered instead. I'm not minded to direct that. I don't think it's necessary to a just determination of this dispute. I think it's preferable to leave it up to Grand Central as to what it wishes to do, whether it wishes to accept or have further consultation, chip away at it or whatever. For the purposes of the actual decision on 494, I will leave it at saying that Network Rail was entitled not to accept the bid and therefore should not be directed to accept it. That's 493.

For 495, in substance, in general terms, the outcome is the same as for 493, having got there by a slightly different route but the outcome is the same: that Network Rail was able to produce at least one service bid for by another operator that, effectively, worked out as having a higher contractual priority and being taken as conflicted with and overriding, in a contractual sense, the service bid for by Grand Central, which was the subject of TTP495. That's the one on which we devoted some time to considering whether that applied to all five days of SX. We came to the conclusion and I believe it

was accepted on all sides, by all parties, that it was right to conclude that this decision applies to all five days of the week, because of the way in which the service was bid and the content of the relevant PDNS and so forth. The decision on 495 is also that Network Rail was entitled not to accept Grand Central's bid for the particular service that was the subject of that dispute.

Also, as was the case with 493, we would not wish to go further than that and try to direct any specific action or consequence as a result of that, including directing that Grand Central should accept the alternative that was offered in that case. This is the difference from 493. In 495, it was not offered at the offer date, but was actually offered afterwards as part of the ongoing consultation process.

We did consider whether, because of that distinguishing factor, there was a case for making some additional determination or direction to Network Rail to the effect that it should have acted in a certain way, which would have resulted in the service that was eventually offered after the offer date as having come up in time to offer it at the offer date. I'm going to decline to go that far in the actual decision, because I'm satisfied that the process of continuing to discuss and consult with possibilities after the offer date is common in the industry, on both the freight and passenger sides. Therefore, the fact that, as it happens, Network Rail did not come up with that particular alternative offer at the time of the offer date and that, had it done so, it might or might not have affected Grand Central's reaction; nevertheless, the fact that it didn't do so but came up with it as part of the consultation at a later stage is not something that needs to form part of a specific direction that Network Rail should now do something or indeed that it should have done something. Having said that, there may well be some observations to make for whatever value observations, in the course of determination, have as to ways in which things might have been done better. The actual substance of the decision on 495, like 493, is simply that Network Rail was entitled not to accept that particular service as bid for by Grand Central.

As with TTP494, I hope it will be accepted by all parties that that is an adequate expression of the decision to count as the decision, and that it is in a form and with sufficient detail to be acted on for practical purposes with the timetable change date, clearly. Before I carry on and conclude, is there anything either party would like to

observe in relation to what's been said, Grand Central?

MR YEOWART: No, just thank you again very much for your time.

THE CHAIR: Network Rail?

MR ALLEN: No. The interesting one for us to work out is obviously we were instructed to enter into Rights on 16:08, but we'll find a way of picking that up, I'm sure.

MR LEWIS: It's just when it starts, because they're selling tickets for that, aren't they?

MR ALLEN: It's something we have to work on.

THE CHAIR: It's clear enough to work from; you're satisfied.

MR FISHER: Chair, I'm not clear on that, I'm afraid, on 494, as in you've said that the 16:08 path should be offered to Grand Central.

THE CHAIR: Yes.

MR FISHER: How does this fit with we have now, both parties, received decisions from the ORR in respect of our Track Access applications, and that East Coast was granted Firm Rights to a 16:08 service to Newark, and the Grand Central application was rejected on grounds other than anything related to the timetable?

THE CHAIR: I believe Grand Central is entitled, if it wishes, to go back to ORR and challenge that decision, with or without the benefit of this decision.

MR YEOWART: We will be going back to the ORR. We would have gone back to the ORR earlier, but we did say we would await the outcome of the timetable dispute, so the ORR is aware we've been awaiting the outcome of this dispute.

THE CHAIR: All this timetabling panel can do is look at the contractual position as best it can and decide what are the contractual Rights. The fact that those contractual Rights may need more in order to give them teeth and be operable – in this case the blessing of ORR – I don't believe of itself affects the decision that this panel has to make, as to what those contractual Rights are.

MR YEOWART: I think that's correct.

THE CHAIR: I think that is how I would resolve that apparent conflict that you raise, Shaun. I'm happy to hear observations on that from Grand Central first.

MR YEOWART: I think you're absolutely correct: it's now an issue for the ORR, based upon the information it should have had at the time and the position we find ourselves in now.

THE CHAIR: My view would be that the fact that East Coast has got Rights from the ORR,

under its Track Access contract, will not be the end of the story normally, because it would still have to get those Rights crystallised for each particular timetable through the contractual bid process. If it had had the Rights before and didn't have to seek them from ORR, it would have had to do that and it might not have got them. In this case, the way it has panned out is that the result of the contractual process has only caught up after the result of the regulatory process and is at odds with it. The practical effect of that is that the contractual process, as a result of this decision, does not operate to give body to the regulatory rights achieved by East Coast as regards this particular timetable. Network Rail, would you like to comment on that?

MR ALLEN: I think it's a territory of uncharted water. I wouldn't like to comment.

MR HOLDER: The rights only apply after the Priority Date, don't they? They only apply to the following timetable for all intents and purposes, as being a Firm Right to anything other than quantum.

MR YEOWART: I think it just raises an interesting position for ORR, and I'm sure the ORR will deal with it.

THE CHAIR: Can I throw this up in the air? If it were otherwise than as I've said, then we wouldn't have been considering this dispute at all, because the effect would have been once the ORR had pronounced on it, all bets are off, and that surely isn't the case.

MR YEOWART: No, otherwise we wouldn't be here.

THE CHAIR: Very broadly speaking conceptually, the way the system operates is that there are two processes that lead to a particular service being included in a particular timetable. Those processes happen sometimes sequentially, sometimes in parallel. That is the contractual process under the Track Access Agreements incorporating the Network Code, and there is the regulatory process, which leads to the embodiment of the Track Access Agreements, which spawn the contractual process. Normally those two processes happen in a particular sequence, which doesn't give rise to this kind of conflict. This may well be an unusual, possibly a unique, situation in that, because of the way the timing of the dispute has panned out, the regulatory process leading to the Rights has actually worked itself out in a way that turns out to be at odds with the subsequent contractual process for determining the Rights for the specific timetable. So be it. That's how it is. That's what the system leads to.

MR ALLEN: There's no assurance that the ORR would, even with the Grand Central path and the 16:08 path. It still needs to go through Track Access getting a TAA in place for that particular stock before it can operate to the timetable.

THE CHAIR: That's right. This panel does not have the power to decide or direct that, come hell or high water and irrespective of the outcome with ORR, Network Rail must include that service in the December 2012 timetable. The decision is only that, to the extent it can, consistent with other obligations on it including compliance with regulatory requirements and the regulatory Rights and the Track Access Rights accorded to Grand Central, Network Rail should allow the bid. To put it another way, it should allow the bid as made, only subject to the same considerations and other obligations as it would have been subject to, had it allowed the bid as at the offer date – i.e. had it offered the bid as at the offer date. The same applies now. That has to be the conclusion. Would colleagues agree with that as a rationalisation of how it works?

MR GIBBONS: It's logical, yes.

MR THOMAS: It's a problem for someone else, Chair.

MR FISHER: Yes, it is a problem for someone else, but I don't see how this is doing anything good for the end customer at all, which is surely what we're all meant to be here for as an industry. We've had trains on sale, reservations on sale, since 20 September including this service. We've now got to think what on earth we do with that, whether we suspend that with immediate effect, whether the train drops out of the timetable. We've now got questions whether four weeks from today this train will exist, on the basis that actually you've said it won't exist, unless that gets changed elsewhere.

THE CHAIR: Unless there is a way of finessing it through further consideration and consultation, accommodating it or something like it. I'm sorry; that is the outcome of the process. That's what the process inevitably leads to as a matter of legal entitlement. What we are here to determine is a matter of legal entitlement of the parties. We're not here to determine, in a very broad sense, the best outcome for the industry as a whole, including every named interested party and every unnamed interested party. We're here to determine the legal entitlements and obligations of the parties to the dispute, and that was what we've attempted to do.

MR FISHER: I don't see how that then fits back with decisions that have been made

subsequent to this dispute being lodged and then eventually heard.

THE CHAIR: It may well fit very awkwardly with them, but that is the process required by the whole contractual matrix incorporating the contractual dispute resolution process, and that's the process we've gone through, as best we can, and that's how it works out. The interaction with the regulatory process, I think, is as I have just attempted to define and deduce. The fact that it produces an awkwardness and it may be a commercial problem for one or another interested party, Timetable Participant, is an unavoidable consequence of the process that we're required to follow.

I don't know how long we can go on debating this particular one. I'm sort of inclined to say that I don't want to put a bar on further discussion but, if East Coast, as an interested party, had wanted to raise these points and put them in the pot for legal consideration, it could have done so earlier, and it could have done so with more ability to determine the outcome if it had chosen to join as a dispute party and raise this issue of the interaction of the regulatory Rights accorded through the Track Access application process and this contractual process. I'm afraid, at this stage, the fact that this decision, reached through application of the contractual dispute resolution process, may result in some practical and commercial disbenefits to another party doesn't actually preclude us from coming to that decision.

MR FISHER: I accept and respect that, yes.

THE CHAIR: Colleagues, anything to add on that? Do you all support that conclusion?

MR THOMAS: I think it comes down to the fact that Network Rail is not able to offer non-compliant trains with its own Timetable Planning Rules.

MR GIBBONS: Apart from the fact that they did.

MR THOMAS: Sure, absolutely.

MR GIBBONS: I think this is an accident waiting to happen and it happened.

THE CHAIR: It's unfortunate that, as it turned out, that was a killer, that particular point, having gone through all the other points in what might seem an inordinate length to get to there. That was the particular killer, but we've examined that point just like the rest and that's the conclusion that's come to, as a matter of contract, as a matter of law, as a matter of legal entitlement. I can only say it's regrettable if that particular conclusion has adverse commercial consequences for anybody involved in the process. The fact that it

does have adverse consequences isn't of itself a reason for not reaching that conclusion.

MR FISHER: Chair, I think in that respect it will all come down to an issue of timing.

MR GIBBONS: Correct: two issues of timing, particularly from the ORR's decision-making process which, as the industry is well aware, is somewhat tardy and has historically been that way.

MR YEOWART: Chair, I realise we've been very detailed in what we've gone through, but our very last train home tonight is at 22:00, so we will very shortly need to be leaving, I'm afraid. Grand Central, we all need to be going shortly. We have not come prepared for another night.

THE CHAIR: For the benefit of Shaun and East Coast, I have to say I'm not going to cut short debate on this issue purely in order to accommodate Grand Central's travel requirement but, nevertheless, I do think we have reached the end of the road on that particular discussion, unless you can tell me, Shaun, that you have some other purpose as an interested party.

MR FISHER: I have nothing more than I have raised already and all I can do is repeat that the timing will now be viewed as being absolutely appalling.

THE CHAIR: The timing of the process and the interaction of the two bits of the process?

MR FISHER: Yes, and ultimately it will come down to the timing of the hearing and the decision being four weeks before the timetable starts.

THE CHAIR: Indeed. It's mindful of that that I have at least tried to give what counts as an actable-upon decision now, rather than wait another two weeks or, as in fact it may turn out, a bit longer than two weeks to get to the fully written outline, but that's the way the process and the timing of the dispute has gone. Whilst it might be regrettable that that's the way the timing has gone, I think I can confidently say the fact that the timing has gone in this regrettable way is not the result of any fault or breach of the rules, any contract or the process by any participant on it; that is just the way it has turned out. If you, as an interested party, think otherwise and think that the timing, with this, from your point of view, perhaps regrettable result, results in some actionable dispute by you, as the interested party, no doubt you will take whatever course you think is appropriate.

MR FISHER: Undoubtedly so, but that will be on the basis of a written decision.

[Chris Hanks left]

THE CHAIR: I am trying to be as upfront as I can in saying I can't promise you a written decision in a timeframe that would enable you to do anything with it, in the sense of reversing it, to have effect before the timetable change date. That's the inevitable result.

MR GIBBONS: Chair, is there no mechanism that allows a note of the decision to be established, bearing in mind the criticality four weeks before the start of the timetable, where one of the two parties wishes to take an appeal somewhere they can do it with something that says, 'I am minded to...' I don't know what's in the rules.

THE CHAIR: As I've said, I want what I've just said, on behalf of us all, to stand as the decision, at least for the purposes of the Access Dispute Resolution Rules.

MR ALLEN: There's no contract, I suppose, and it's falling back on a good old-fashioned compromise, but is there something about recognising that we've got the decision wrong about the 16:08, not throwing the baby out with the bathwater, in terms of the product we, as the big 'R', are advertising to the travelling public from a couple of weeks' time, and saying we sorted it out in a planned way from May. Stop that path short. I'm only thinking about how we may be portrayed.

THE CHAIR: I hope you have every incentive to sort it out like that.

MR YEOWART: The issue is the path is non-compliant; that's the issue. I've concluded that it wouldn't be helpful for this panel to direct a particular solution, either for the December 2012 timetable or for the May timetable, but I would hope that, as a matter of practicality, everybody has every incentive to try to get to the best conclusion possible, certainly for May and also for December.

MR FISHER: Sorry, you've lost me a bit there. I thought the decision was that the 16:08 path, basically with immediate effect from December, should be awarded to Grand Central, which leaves East Coast with no path at all at the moment.

MR LEWIS: What do you do with the ticket sales?

MR GIBBONS: What the Chairman is trying to say is there might be an alternative solution for the 16:08 path.

THE CHAIR: I don't know if there's an alternative solution for December or indeed for May. That's something for Network Rail to work out with East Coast. It's something for

Network Rail to work out with any other operator that is affected by this decision.

MR FISHER: Thank you for that.

THE CHAIR: I'm afraid all I can really do is repeat that the timing of this decision, relative to the timetable change date and also relative to the determination by ORR of the Right and the fact that it succeeds the latter rather than precedes it, whilst unfortunate is a fact. It's not the result of disputable or actionable fault on the part of any party to the process. It just leaves the practical result that Network Rail has to work out, as best it can, with East Coast, which we know to be an affected party, and anybody else that might be affected by this particular point of view. It also leaves Grand Central with the need to, in order to give effect to and benefit from the decision, have another bite at getting the Rights, which would be needed to crystallise the decision. It may or may not get that; I don't know. If it doesn't get it, then that will mean that it doesn't get its service in the timetable, if it doesn't get it in time. I don't know. I don't know how ORR will react to the need for expediency.

MR YEOWART: I don't think they will react in time to get a decision for December.

THE CHAIR: It's not in our power as a panel to determine all these things.

MR YEOWART: I think you're absolutely right; the ORR will determine, from the decision -

THE CHAIR: Sorry; I'm keeping you from your 22:00 train.

MR YEOWART: I'll catch the 22:30 and then I'll have to find somebody to pick me up from Doncaster. I think there is a 22:30 to Doncaster. It's important; we've spent a long time and this is very important to both companies. At the end of the day, the 16:08 service currently is non-compliant. It can't be in the timetable. Whether we were here or not, it shouldn't be there as it happens. That's a real issue for us, because non-compliant trains in the timetable have a knock-on impact on performance. The reason we didn't get our 15:52 was performance. There's a lot behind the decision and the decision is important. How it's now taken forward is a matter for others.

THE CHAIR: I don't like leaving this sort of process with anybody sitting around the table looking either bewildered or distressed, Shaun. I'm not sure there's any more to say, other than... No, I decline to get drawn into issuing a preliminary written version of the decision, e.g. an edited transcript of what I've just said by way of summary of the decision. That could lead us into all sorts of procedural problems because, as soon as one

sees it and sets it down in writing, then of course one inevitably has to start crafting it and thinking it, and that would just be a preliminary process to the eventual full version. We just have to live with the situation that the process has led to.

I believe that the parties have accepted that – please correct me if I’m wrong – that what I have just said and outlined is sufficient to constitute the decision delivered orally, *ex tempore*, for the purposes of the rules and, in a practical sense, to enable the parties and indeed any other interested party that is cognisant of the decision to act on it. Of course, what it doesn’t do is give any other, as a practicality, interested party that, because it hasn’t been here, isn’t cognisant of the decision delivered orally, the opportunity to act on it. Network Rail, as holder of the ring, hasn’t identified anybody else who’s affected by this than East Coast, which is present and has had the opportunity to comment on it. Therefore, they will be knocking at your door, if you weren’t already knocking at their door, to try to get to some sort of commercial solution. I hope I’m not being too gung-ho in thinking that actually what we’ve issued is a sufficient decision for all of you to get on with who need to get on with it. Is that a fair way of looking at it?

MR ALLEN: It gives us what we need to go and look at and, as you say, find a resolution for. It’s up to us, with dialogue between everybody impacted and whoever may become impacted by it, to find that resolution to the issue.

THE CHAIR: I suppose I should say as a practicality it is obviously incumbent on Network Rail primarily, as the network operator and the holding of the ring in these matters, to as part of its reaction to the decision it’s just had be in contact with anybody else that it thinks may have an interest in it and be impacted by it, and deal with it accordingly, as well as East Coast. I’m sure Network Rail, in the discharge of its obligations in general including to its licence, will take that course.

MR ALLEN: It helps to give us a clear direction in terms of Part D and points us in the direction in terms of where we need to go next in terms of finding the solutions. Practically, it’s something that we’ll all have to give a bit of thought to and look at what the various options are, as we go through. I don’t know what they look like yet really. It’s non-compliance with the timetable, conflicting Rights and all sorts of other interesting things.

THE CHAIR: Perhaps I should just say finally, to try to deal with East Coast’s concern, albeit

only as an interested party, that because your concern is the way the timing's gone, you may not get an appealable form of the decision in sufficient time to appeal it and get a result of the appeal in time to make a difference to the upcoming timetable.

MR FISHER: Yes, but there's also what's already gone on in respect of this particular service, and of course its return working, which is now potentially in jeopardy. That has been on sale to the public for seven weeks. I've no idea how many tickets and reservations we've sold for that train. It's in our printed version of the pocket timetable and any other literature. I'm sat here at 22:00 on a Monday night wondering what the hell we do with this first thing tomorrow. Do we stop it? Do we keep it? I've absolutely no idea at the moment. How we work with Network Rail to try to resolve this, how this fits in with the ORR and how it fits in with Grand Central are very complicated issues. Does this all get resolved before the timetable actually starts in four weeks' time? I don't know.

THE CHAIR: Are you suggesting that that is something that this timetabling panel: a) should have taken account of before we reached the decision we have just reached; or b) should now take account of, with a view to possibly modifying the decision we have reached? I will say that I think, frankly, if you were to assert either of those things as an interested party it's too late in the process to assert that.

MR FISHER: I will say from my personal opinion that yes, I think it should. Taking this outside this room is going to leave some people bewildered as to how this decision's been reached, on the back of the decisions already made by the ORR and also in terms of what it means.

THE CHAIR: If that's true, then it follows, as night follows day, that what you're saying is the fact that ORR's pronounced on the Rights means that we could only have come to one decision and we wouldn't have been here.

MR FISHER: Yes, it does.

THE CHAIR: None of us think that that is the case, but even if you as an interested party, East Coast, thought that that was the case, you should have raised that earlier in the process.

MR GIBBONS: The Rights weren't in place at the PDNS stage, were they? The Rights for you have come later in the process so, in terms of timetable development, we're back to where we started. It doesn't change that, does it?

THE CHAIR: No.

MR YEOWART: The converse applies to Grand Central's customers, who haven't had the benefit of having the timetable and they've only got a restricted service. As we've identified in our response, there are plenty of options to get to all the destinations served by East Coast.

THE CHAIR: Grand Central hasn't had the benefit of having had the Rights it should have done in order to start selling tickets for this service. The unfortunate timing and the way in which the process generally has been conducted and been required to be conducted cuts all ways. Yes, it does leave, as a matter of practicality, East Coast with the urgent need to think tomorrow what to do about it and to sit down with Network Rail and arrive at the best solution it can, and also to decide what it does to its customers in terms of communication and contractually as regards tickets already sold. I'm sure this won't be the first time that a train operator has had to go back to its customer base and say, 'We've got to make a change that has a number of consequences. Those consequences are anything along the spectrum starting with, "We're sorry for any inconvenience caused," and at the other end, "And here's some money to compensate you."' That's how these things work out, isn't it?

MR SKILTON: It's happened with engineering works before. There's a dispute and it's been overruled.

MR ALLEN: We're not going to find the answer at 22:10 tonight, but we all need to do the right thing for the customer, because that's what does it. I don't know what it looks like but we need to find it. I can clearly follow through all the logic that we spoke about, about where we got to with the decision on the 16:08. We were painfully trying to encourage the ORR back in January to make all these decisions, so that we got the Priority Date where we were. It probably is a light to touch paper.

MR YEOWART: It's what Nick said, isn't it? It's an accident waiting to happen.

MR GIBBONS: It's happened.

MR YEOWART: We need to make sure there are no more; that's why we're here.

MR ALLEN: It's a bit of that, but I guess the other issue is that what's got us here quicker than anything is the timetabling non-compliance, with the headway at Newark. If nothing else, the industry needs to learn, because there is pressure every day for people to breach headways. As capacity becomes more constrained on the network, it's a big challenge to

do it. We saw it with 518. We have to think how we manage that and how we make sure with have a very solid rock to stand on.

MR YEOWART: You need to just address rules. The data for the headways could be reduced. We don't know.

MR ALLEN: Potentially that's not always the answer.

MR GIBBONS: We could sit here and talk about this all night long.

MR YEOWART: Absolutely.

MR ALLEN: We do know we've got some rules clashes and non-compliance potentially with some of the platform alterations that we need.

THE CHAIR: Thank you for those observations. That seems to be an entirely sensible, rational way of looking at it and acknowledging that things need to be done to improve the process on all counts.

Can I just observe that I would like to think that this timetabling panel should not be charged with having allowed logical analysis and analysis of contractual entitlement in some way to override the ultimate interests of the customer, in the sense of for example prejudicing East Coast potential customers who've bought tickets, but actually what this panel has done is what it is mandated to do by the rules and the process, which is to apply a contractual analysis? Ultimately that, in the grand scheme of things, should be down to the benefit of the customer overall. In this case, one would presumably weigh the potential benefit to Grand Central customers against East Coast customers. I wouldn't like to leave this hearing with the complaint ringing in my ears that ultimately the customer suffers as a result of this. I don't think that would be an appropriate conclusion.

Do parties agree with me on that?

MR YEOWART: Yes, I would.

MR ALLEN: In the short term, we've got something to sort out.

THE CHAIR: Yes, that's quite clear, but would you agree that that doesn't detract from the general point I've just made?

MR ALLEN: It doesn't detract from the contractual determination that needs to be made by the panel.

THE CHAIR: Very well. I think we're there. Thank you very much, everybody, for your contributions and good night. (The hearing concluded)