
TIMETABLING PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of dispute reference TTP1064
(following a hearing held at 1 Eversholt Street, London on 20 April 2017)

The Panel:

Clive Fletcher-Wood Hearing Chair

Members appointed from the Timetabling Pool

Shane Young	elected representative for Franchised Passenger Class, Band 2
David Langton	elected representative for Franchised Passenger Class, Band 3
Nigel Oatway	elected representative for Non-Passenger Class, Band 2
Toby Patrick-Bailey	appointed representative of Network Rail

The Dispute Parties:

Abellio Scotrail Ltd ("ASR")

Sam Price	Head of Legal
Dave Smith	Head of Operational Planning
Perry Ramsey	Operations Director
Ian Tucker	Senior Associate, Burges Salmon LLP
Henry Sackville-Hamilton	Solicitor, Burges Salmon LLP

Network Rail Infrastructure Ltd ("Network Rail")

Simon Henderson	Counsel
Luke Wygas	Counsel
Carlos Pires	Senior Associate, Eversheds Sutherland (International) LLP
James Shackleton	Legal Director, Eversheds Sutherland (International) LLP
Matthew Allen	Head of Timetable Production
Katherine McManus	Project Manager, Timetable Change
Fiona Dolman	Capacity Planning Director
Andrew Bray	Timetable Production Manager (Scotland)

The interested parties ("Interested parties"):

See Annex "A"

In attendance:

Tony Skilton Secretary, Access Disputes Committee ("Secretary")

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1 Introduction, Substance of Dispute and Jurisdiction

- 1.1 On 16 February 2017 ASR served Notice of Dispute with Network Rail in relation to Network Rail's decisions regarding Version 2 of the Timetable Planning Rules (the "New TPRs") applicable to the New Working Timetable Publication for 2018 (in effect, the timetable for introduction in December 2017). The dispute was brought under Condition D2.2.8. of the Network Code as applicable at the time and the Secretary registered it as TTP1064.
- 1.2 ASR indicated that the dispute was brought on the basis that revision contained in the New TPRs:
- was made without necessary and/or sufficient consultation or regard to the responses previously provided by Timetable Participants including ASR;
 - was made without sufficient analysis, modelling and/or accuracy;
 - was made without reference to or by incorrect application of the Decision Criteria or was based on or influenced by matters which are not included in the Decision Criteria;
 - was contrary to the correct application of the Decision Criteria; and
 - did not reflect the actual/proper operation of the Network.
- 1.3 I am satisfied that the matters in dispute raise grounds of appeal which should properly be heard by a Timetabling Panel convened in accordance with Chapter H of the ADR Rules to hear an appeal under the terms of Network Code Condition D5.
- 1.4 In its consideration of the Parties' submissions and its hearing of the dispute, the Panel was mindful that, as provided for in ADR Rule A5, it should "reach its determination on the basis of the legal entitlements of the Dispute Parties and upon no other basis".
- 1.5 Defined terms in the Network Code and ADR Rules are used in this determination whilst the abbreviations used are as set out in the list of parties above and in this paragraph 1.5.

"ADR Rules" means the Access Disputes Resolution Rules"

"ODA" means Observed Data Analytics

"ORR" means Office of Rail and Road

"PPM" means Public Performance Measure

"SLC" means Service Level Commitment

"SRT" means Sectional Running Time

"TOC/FOC" means Passenger/Freight Train Operating Company

"TPRs" means Timetable Planning Rules

"TRIP" means Timetable Rules Improvement Programme

"Website" means the website of the Access Disputes Committee

"WTT" means Working Timetable

2 Background, history of this dispute process and documents submitted

- 2.1 13 Timetabling Disputes were registered by the Secretary in relation to the New TPRs. On the face of the Notices of Dispute, elements of commonality were observed between them and, in the interests of efficiency, fairness and consistency the Secretary initiated arrangements for the Disputes to be heard by one Hearing Chair and the same four Timetabling Pool members over four days, being 20 April, 27 April, 8 May and 16 May 2017.
- 2.2 I was appointed as Hearing Chair on 14 March 2017 and the Dispute Parties were informed of the arrangements on 15 March 2017. At my request (and as permitted by ADR Rule H21), the Dispute Parties were required to provide Sole Reference Documents. Service by Claimants was due on 28 March 2017 and response from Network Rail on 12 April 2017. The proposed Panels were duly indicated to parties which might wish to become involved in the dispute proceedings by means of the Website.

2.3 On 21 March 2017 an e-mail was received from Burges Salmon LLP, acting for ASR, expressing some concern at the possible length of time that it would take for their client's case to be determined by the Panel. This was followed shortly by a letter from Eversheds Sutherland (International) LLP ("Eversheds"), acting for Network Rail, suggesting instead that more time was required in order for Network Rail to consider and respond to all cases and that Directions Hearings were necessary for case management purposes. Burges Salmon promptly made a further contribution that day, arguing that 20 April 2017 should be capable of being met for a Panel hearing. Eversheds responded on 22 March 2017 continuing to express concern that Network Rail could not anticipate responding fairly in the timescale which had been notified to the Parties. I provided guidance to the Secretary for a response sent later on 22 March 2017 in which I held firm to the timescales which had been set.

2.4 Correspondence was received from Eversheds on 29 March 2017 to which I responded by way of a Directions Letter on 31 March 2017. This correspondence is published on the Website.

In this Directions Letter I explained that I had reviewed the Notices of Dispute which had been received from all the Claimants and that I considered that the disputes could be divided into four Heads for the purpose of case management:

"A" - Issues of principle relating to the New TPRs.

"B" - Points of detail flowing from and dependent on the issues of principle under Head "A" above.

"C" - Detailed points relating to the New TPRs which were not related to the objections in principle under Head "A".

"D" - Other issues, including the Dispute (from DB Cargo and GBRf) relating to the alleged failure of Network Rail to comply with the Determination of an earlier Timetabling Panel and (from TfL) whether a Party can recover costs claimed to be abortive.

To assist the Parties a table was annexed indicating how I considered that the individual claims could be divided into these Heads.

2.5 In the light of my categorisation of the Claims into the Heads referred to above, my assumption that it would require at least two of the hearing days to determine the Claims falling under Heads "A" and "B", and the demands placed on Network Rail, I directed that Network Rail's Defence to the Claims falling under Heads "C" and "D" need not be served until 26 April 2017.

2.6 Eversheds wrote again on 4 April 2017 and I responded by way of a further Directions Letter the same day. This correspondence, which addressed points regarding validity of certain Notices of Dispute, is published on the Website.

2.7 I issued a further Directions Letter on 5 April 2017 (published on the Website) in which, given my assessment that so many of the claims on the substantive issue of non-consultation were so closely aligned, I suggested that once Network Rail had served its Defence it might be that the Claimants may decide between themselves to agree that one Claimant would lead in arguing points under Head "A" which were seemingly shared by so many of them. That letter also provided an amended table of matters allocated to the Heads in response to comments received from parties.

2.8 Eversheds wrote once more on 7 April 2017 and I provided comments to the Secretary for a letter sent on 11 April 2017. This correspondence is published on the Website.

2.9 The requirement was for the Claimants' Sole Reference Documents to be served for 28 March 2017 and for Network Rail to provide in response by 12 April 2017 a single Defence document annotated against the Claimants' submissions. All parties remaining in dispute at the relevant dates complied.

- 2.10 On 6 April 2017 (and having regard for correspondence received from solicitors acting for ASR and Network Rail between 21 March 2017 and 4 April 2017, also my Directions Letters dated 21 March 2017, 4 April 2017 and 5 April 2017 with Annexes), the Allocation Chair made an order pursuant to ADR Rule B21 to confirm that the Disputes should be resolved together on the grounds that they concerned the same or similar subject matter and that it would be in the interests of efficient and fair resolution to do so. This order was qualified as being made without affecting the powers of the Hearing Chair to control case management and to determine questions concerning staged hearing of different aspects of the Disputes.

As explained below, and to meet ASR's request that a final Determination should be available as soon as possible to permit ASR to appeal, if so advised, at the end of the time devoted to this Timetabling Panel, at the first hearing day I ordered that this Dispute TTP1064 should no longer be resolved within the group of Disputes conjoined by the Allocation Chair on 6 April 2017. Nonetheless, to assist in the overall understanding of this Dispute this Determination includes references to case management decisions during the period before TTP1064 was separated from the other Claims.

- 2.11 Having carefully considered the considerable volume of material provided by the Dispute Parties, on 18 April 2017 I issued Directions indicating that I was now minded to hear each dispute separately. Further, at the hearing on 20 April 2017, as explained below, ASR requested that a Determination should be made available as soon as possible to permit an appeal to be lodged if so advised. I gave an oral Direction to this effect at the hearing, which was recorded in a Directions Letter issued on 4 May 2017. This Determination in relation to ASR's case - TTP1064 - results from that decision.

- 2.12 In accordance with Rule H18(c), following receipt of the Dispute Parties' submissions in respect of Heads "A" and "B" I reviewed them to identify any relevant issues of law raised by the dispute. On 18 April 2017 the other members of the Panel and the Dispute Parties were provided with my list.

I interpret Rule H18(c) as requiring me to identify such issues without prejudging whether they would actually have to be determined in each or any of the Disputes: I saw it as preferable to alert all Parties to such points and then for them to not actually need to be reviewed, rather than the reverse situation; this I consider to be important, if only to ensure that statements of law made by any Party are not assumed to have been accepted by the Panel and so risking the possibility of their being regarded as having any authority.

The issues identified were:

- Q1 The extent of the power of a Timetabling Panel (in general terms).
- Q2 Within Q1 above: what amounts to 'exceptional circumstances' under Network Code Condition D5.3.1?
- Q3 Can a Timetabling Panel only decide that 'exceptional circumstances' exist if the Claimant has specified in its Sole Reference Document that it regards this as being the case?
- Q4 Is Network Rail submitting, in paragraph 59 of its general Defence document, that if a Timetabling Panel is faced with a binary decision it is not entitled to overturn Network Rail's decision in the absence of exceptional circumstances? If this is a correct interpretation of Network Rail's position, is it correct in law?
- Q5 Within Q1 above: can a Timetabling Panel make general declarations?

- Q6 Q5 above raises the question as a question of law; it is difficult to distinguish this question from one asking whether there is any practical value in making declarations that Parties must observe the provisions of the Network Code or the ADR Rules.
- Q7 Is it within the power of a Timetabling Panel to order that sums paid to Network Rail by an Access Beneficiary to carry out modelling work, which are now claimed to be abortive as a result of the 2018 TPRs, are to be repaid to the Access Beneficiary? Or, as an alternative, can the Timetabling Panel order that any future modelling work is to be carried out by Network Rail at no further charge?

The above list having been compiled in relation to previously identified Heads "A" and "B", it was indicated that I would provide a further list when Network Rail served its Defence under Heads "C" and "D".

- 2.12 In view of the potential complexity of exchanges during the hearing, I directed (as provided in ADR Rule H47) that a full transcript should be taken to assist the Panel's subsequent consideration of the issues. In the absence of indication to the contrary within the ADR Rules, I regard the record or transcript of a hearing as being an aide memoire for the Panel in its consideration of the issues and not a document for issue to the Parties or for eventual publication.
- 2.13 The hearing of the disputes opened on 20 April 2017, by which date 5 of the original disputes had been withdrawn so 8 cases remained to be heard, being:-
TTP1064 from ASR
TTP1065 from DB Cargo (UK) Ltd (which set out 2 distinct issues)
TTP1066 from First Greater Western Ltd
TTP1068 from Transport for London
TTP1069 from GB Railfreight Ltd (which set out 3 distinct issues as Parts 1, 2 and 3)
TTP1071 from East Coast Main Line Company Ltd
TTP1073 from XC Trains Ltd
TTP1075 from Arriva Rail North Ltd.

ASR's case was to be considered first. Representatives of the other 7 Claimants were in attendance (and fell to be regarded as interested parties in this dispute TTP1064) together with representatives from some of the 5 operators which had declared themselves to be Interested Parties. The Interested Parties are listed in Annex "A".

- 2.14 Given the background to these Disputes, and the unprecedented volume of correspondence generated by the representatives of one of the Parties, I thought it appropriate to commence the hearing by offering some opening remarks at greater length than is my usual practice. These remarks are summarised in Annex "B"; after "house-keeping", the matters covered could be summarized broadly as:
- Role of the Panel
 - TPRs
 - Consultation
 - Constitution of the Panel

- 2.15 I confirm that I have taken into account all of the submissions, arguments, evidence and information provided to the Panel by ASR and Network Rail over the course of this dispute process, both written and oral, notwithstanding that only certain parts of such material are specifically referred to or summarized in the course of this determination.

3 Relevant provisions of the Network Code and other documents

- 3.1 The version of the Network Code Part D dated 13 July 2015 and the ADR Rules dated 23 September 2015 were applicable to matters to be determined in these dispute proceedings.

4 Submissions made by the Dispute Parties

4.1 ASR's principal submissions in its Sole Reference Document can be summarized as set out in paragraph 1.2 above.

4.2 In its Sole Reference Document ASR asked that the Panel, in essence:-

- (a) Direct Network Rail that the proposed revision of the TPRs be cancelled and not apply.
- (b) Declare that:
 - (i) Network Rail has not correctly applied the Decision Criteria;
 - (ii) There remain a number of significant unaddressed issues raised by ASR regarding the methodology employed to utilise ODA data for the revision of the TPRs and that further jointly specified methodological work should be undertaken to address these issues, taking account of alternative and more relevant data including that provided by ASR;
 - (iii) That work undertaken by the [Network Rail] TRIP team in Scotland has not been modelled to validate the values and prove the data is correct and that such modelling should be undertaken;
 - (iv) That no performance modelling has been undertaken to demonstrate a performance improvement and that such modelling should be undertaken; and
 - (v) That the Timetable Impact Study independently undertaken is too limited to demonstrate that all ASR's Firm Access Rights can be accommodated.
- (c) Give general directions to Network Rail specifying the result to be achieved in connection with the revision including the objective of the revisions, the appropriate level of assessment and modelling involved (including by reference to ORR guidance), and where relevant the appropriate assumptions to take. Such directions to include a direction to identify TPRs which where possible allow Access Beneficiaries to comply with Franchise Agreements and Service Level Commitments.
- (d) Or, as appropriate, deem the relevant timescales for the preparation of a WTT to amount to exceptional circumstances and substitute its own decision in connection with the revision of the TPRs.

4.3 In its response document, Network Rail noted that, along with other Claimants, ASR appeared to be seeking relief going far beyond what a Timetabling Panel had jurisdiction to grant under Network Code Condition D5.3.1 and therefore beyond what a Claimant was entitled to ask for. Network Rail's position was that all of its challenged decisions should stand.

4.4 In making an opening statement to the hearing on behalf of ASR, Mr Price sought to identify the key points from its submissions and ASR would then deal with points of law. ASR had noted that the preliminaries to the hearing had been unusual in terms of the procedural points that had been raised and the legalistic nature of them. ASR welcomed the direction from the Chair in opening the hearing but ultimately ASR's case was about an industry dispute process to reach a fair and timely outcome, which is particularly important given the time constrained dates faced in terms of the December 2017 timetable. So ASR wanted to set the context for the TRIP work that was undertaken in Scotland. The Chair had acknowledged the importance of the application of the Decision Criteria and ASR thought it important to understand the local context for that. It was worth noting that PPM in Scotland was currently sitting at 97% and there had been a massive improvement in PPM over the last year, which is since the time that this TRIP work was first started off in Scotland. The North Electric and Argyle lines are the most complex and service intensive areas in Scotland: the

changes that are being brought through I believe will directly affect 23% of our services, and indirectly another 40%, so it is a very big component of what is in itself a very big component of Scottish train services. At the time Network Rail embarked on this exercise both parties were concerned about performance on these routes and performance in general and we are keen to fix poor performance – a phrase to be found in some of the correspondence that had been presented to the Panel.

With ASR's performance standing at the end of the last Period at 93.9%, having exited a Performance Improvement Plan which had resulted from a number of iterative improvements across various different areas of the business, including timetabling, but also resourcing etc, ASR felt that the introduction at this time of real changes in Scotland based on historic, poorly performing timetables from 2015 with an unproven methodology and without modelling could only be seen as an unnecessary risk to the good performance that had been achieved in Scotland through that good performance improvement work and ASR believed that was motivated by a desire in Network Rail to introduce TRIP at a national level. ASR did not believe the proposed changes to be robust and believe they were being pushed through prematurely before being ready. ASR and Transport Scotland were also highly concerned about the potential impact of these changes on ASR's ability to operate the current SLC and upon capacity and journey times, which were a key strategic priority of the Scottish Government, reflected in specific commitments in the Franchise Agreement and also in Network Rail's High Level Output Statement for Scotland.

ASR thought it important to note its support of the principle of working collaboratively with Network Rail to make data based changes to TPRs. Prior to the commencement of these proceedings, ASR had made considerable efforts to try and resolve this matter without dispute. And following an avoidance of dispute meeting that had been held with Network Rail, ASR had made an offer that it had wished to undertake a collaborative review of the proposed changes, including a comparative analysis of ASR's data against Network Rail's. ASR would have instructed independent experts to come in and deal with the methodology issues at ASR's own expense; and what ASR had requested was that the changes be deferred until May 2018 to allow time for that process to happen. For the record, ASR still stood by that offer, albeit that the parties were now much more time-constrained than they were at the time ASR originally made its offer.

So to identify the key points of substance in ASR's submissions, they were challenging the introduction of the changes for the 2018 TPRs in Scotland on the basis that they were made without appropriate consultation, that the methodology undertaken used ODA data was flawed, and that the introduction of the rule changes did not comply with the Decision Criteria. Underlying all these issues ASR believed that Network Rail appeared to have been principally motivated by a national application of TRIP rather than the application of the Decision Criteria. ASR believed this view to be supported by Network Rail's response, which sought to justify adoption of TRIP at a national level and which described individual operators' concerns regarding issues such as resourcing, capacity and journey times as 'myopic'. The significant scope of the set of provisions - and how many of ASR's services they would affect - heightened the need to ensure that they are properly introduced for Scotland. ASR believed the changes being introduced were premature and unjustified. As already noted, the TPR changes were supposed to fix performance based on the assertion that Network Rail had made, but this was against the backdrop of significantly improved performance in Scotland relative to the period when the data Network Rail derived was first gathered. ASR had offered a collaborative approach, but unfortunately that had also been rejected.

Regarding modelling, from ASR's perspective these changes had been based only on a limited and what ASR believed a flawed timetable impact study. There had been no Vision or other modelling carried out in respect of these changes, and that was contrary to the diagram mapping for the TRIP process presented by Network Rail and confirmed by Mr Allen in his statement. And it was also different from the approach adopted for some of the other operators and routes under consideration by this Panel.

There had also been no performance modelling carried out of the changes that had been made. ASR believed this to be contrary to recommendations made by the ORR in its investigation into Network Rail's delivery of the regulated performance targets for Scotland 2014/15. ASR believed that the mythology used to introduce TRIP and ODA had a number of unproven issues that ASR was concerned about. Firstly, ASR would note that all of the ODA data was derived from historic timetables, which performed significantly worse than the current timetable that was in place. And these timetables predated significant changes made on routes following the Glasgow Queen Street closure. Network Rail had also acknowledged that this data had not been subject to any cleansing, which increased the risk that the snapshot that had been chosen was not representative, in ASR's view, of current performance. ODA had used the 25th percentile of data. ASR believed that Network Rail had failed to properly justify how the use of 25th percentile was selected as appropriate, and how this could in fact be representative of a well performing train, particularly when no data cleansing had taken place.

The ODA exercise had produced different values from ASR's own on-train GPS data, in some cases on routes where ASR believed there should be very similar station-to-station, start-to-stop type journeys where the data should really be more aligned. ODA work depended on berth offset data being available. This was frequently not available for the work undertaken in Scotland. Mr Allen's witness statement stated that where a large number of berth offsets are not available Network Rail would generally not undertake ODA analysis on those TPRs: this did not appear to reflect the approach that had been followed in Scotland.

Network Rail also acknowledged that ODA work does not take into account junction margins and collectively, ASR believed, always acknowledged the limitations of ODA. Discrepancies between ODA data and ASR's own data heightened the need of the collaborative type of review exercise that ASR had been requesting and the need for appropriate modelling of the changes before they are introduced.

Moving to consider the issue of whether or not Network Rail has properly taken into account ASR's objections and challenges - the issue of consultation - there was a great deal of time taken up in Network Rail's response dealing with consultation that took place in the initial ODA exercise, but ASR did not consider this to be a substitute for the Part D consultation, which was principally focused on the review of Carstairs to Glasgow. ASR's view was that the initial exercise saw a much more collaborative approach than was subsequently the case when it came to considering the formal rule changes. ASR would argue that much of the background correspondence was largely irrelevant and a distraction from these proceedings.

The consultation subsequent to the formal issue of the rule changes was inadequate, and failed to take into account valid concerns and objections, including the refusal to extend the timetable impact study to cover the minimum time periods which ASR believed were necessary to be representative of ASR's services, and the failure to address the significant discrepancies between ASR's GPS data and the ODA data. ASR had of course requested a collaborative review of that data, and contrary to Network Rail's submissions that GPS data was first made available in November 2016 at a meeting between the two parties.

Inadequate preparatory work by Network Rail, including the lack of modelling work or the creation of a day's timetable based on the revised values, further hampered meaningful consultation as neither ASR nor Network Rail was in a position to fully understand the potential impact of the change on journey times and capacity. Then Network Rail has made these changes without applying the Decision Criteria, contrary to the requirements of Part D.

Network Rail had been asked formally to provide evidence of any contemporaneous assessment carried out of the application of the Decision Criteria to the rule changes but had failed to do so. Mr Allen's statement confirmed that no such assessment was carried out. And Network Rail's response sought to justify implementation of TRIP at a

national level rather than address the specific changes proposed for Scotland by reference to the Decision Criteria. ASR considered that Network Rail had failed to carry out adequate preparatory work to be able to properly apply the Decision Criteria. The impacts of the changes on journey times and capacity were not understood by Network Rail, and Network Rail ignored potential resource implications for ASR. Network Rail had, in its submissions, effectively argued that the introduction of TRIP was highly likely to improve performance, and that that outweighed the other factors and concerns of operators. In the backdrop of Scotland, where performance was - as noted - today sitting at 97% and having been 93% at the end of the last period, it was not evident that there was a problem to solve in terms of PPM, or indeed that the rule changes would improve performance.

Mr Price wished to conclude by saying that Network Rail had been motivated in its desire to implement TRIP at a national level by trying to bring these TPR changes through prematurely for Scotland, rejecting a proposal of a collaborative approach based on a joint review of ASR's data and independent expert assessment. ASR considered that these changes should not be introduced until a proper process has been completed and justifiable provisions identified.

- 4.5 Having run out of the time allocated for an opening statement, Mr Tucker, acting for ASR, indicated that he had a number of legal points to offer but he was prepared to provide them in writing or alternatively to wait to see whether they would need to be made in response to any forthcoming submissions by Network Rail. These legal points - provided in written form but not given orally in ASR's opening submission - appear at Annex "D".
- 4.6 I had indicated to Network Rail that as I had requested it to provide a response which dealt with all the Claims in general terms, before responding to each Claimant in detail, which I had explained that the Panel had found very helpful, that Network Rail would not be restricted to the usual 10 minutes for its opening submissions.
- 4.7 Introducing the opening statement for Network Rail, Mr Henderson proposed to deal initially with general points which it was thought would be applicable to all of the Claimants. In that way it was hoped to make Network Rail's position clear in a way that would be of assistance to all of the complaints. Mr Henderson noted that the Hearing Chair saw the Panel's role as partly facilitative and this was something very strongly encouraged by Network Rail. Network Rail was hoping that resolution could be achieved and not necessarily through the formal dispute resolution process whereby judgement would be handed down from up high.

Network Rail's opening submissions would be under seven headings. First of all, to briefly introduce Network Rail's response documents. Secondly, to touch upon the background to TRIP and to ODA. Thirdly, to touch on the scope and scale of the disputes before the Panel. Fourthly, to consider the extent to which there are common issues of principle. Fifthly, to talk about the consultation process; sixthly, the Decision Criteria; and finally the relief available to Claimants, including the power of the Panel to grant such relief. And in doing all of this it was hoped to touch upon some of the legal issues that the Hearing Chair had identified under Rule H18(c).

Network Rail was relying on various materials, some of which were relevant to all of the Claimants and some of which were specific to individual Claimants. The Network Rail response document introduced the various materials relied on by Network Rail, and set out some of the key arguments which Network Rail said were applicable to all of these claims. In particular, Network Rail was making clear why it said care needs to be taken with treating the Claimants' claims as giving rise to common issues of principle, with the need, as Network Rail saw it, to ensure that each claim is treated individually, and that one party's complaints are not treated as being, as it were, bleeding into another party's complaints. Further, the relief being sought was, in Network Rail's view, not permissible generally under Part D of the Network Code.

Appendix 1 to the Network Rail response was an important witness statement prepared by Matt Allen, Head of Timetable Production within the Capacity Planning team at Network Rail and he was present and available for questions and to assist the Panel in any way he might. The statement contained evidence relevant to all of the claims and explained the background to TRIP and ODA, the consultation process followed by Network Rail, and the Decisions Criteria as applied by Network Rail. The other appendices set out Network Rail's detailed responses to the substantive parts of the Claimant's claims.

It would be apparent from the content of that material and from the letters that had passed between Eversheds and the Panel that Network Rail took these claims extremely seriously indeed and the fact that there was such a legal team appearing in force for Network Rail was testament to that fact. Network Rail was facing an unprecedented number of claims, and the fact that they were being heard concurrently had meant that an enormous amount of work had to be done in a short timescale. Network Rail was prepared to deal with the claims, obviously, and was happy to do that.

In passing, Mr Henderson thought that there was likely to be a further response to the latest letter from the Panel, simply as a matter of record, to deal with certain aspects that were raised about the powers of the Panel and so forth; this was just to ensure that Network Rail's position was explained and put on the record. That letter was in the process of being finalised but it was suggested that it would not in any way touch upon the proceedings on this hearing day.

4.8 Interjecting, in this context the Hearing Chair explained that as with any new system, it takes time to bed in and he thought everybody had learnt lessons since the most recent major revision of the ADR Rules so the time may well have come that some things have to be aired. Mr Henderson welcomed that indication, saying that there were certain matters or observations in the most recent letter to the parties regarding which Network Rail would wish to make observations. Network Rail did not see any need to engage on these points in this hearing but wished to put a marker down.

4.9 Continuing, Mr Henderson explained that a very important message from Network Rail today was that Network Rail was not prepared to countenance any suggestion that the overall TRIP programme or large sections of it, whether in relation to Scotland only or elsewhere, should simply be set aside without further thought in a wholesale way. Leaving aside the question of whether the Panel has power to grant any such relief, Network Rail would say that on analysis the scale and nature of the specific criticisms made by the Claimants collectively and individually was actually much less extensive - much less widespread - than some of the, what one might say, more grandiose language put in some of the Sole Reference Documents perhaps suggested. That was not true for all of the complaints but it was true for some of them. It was true for the ASR complaint, which pitched it in a very high way and suggested, put colloquially, that the baby should be thrown out with the bathwater; and Network Rail strenuously resisted any suggestion to that effect.

Regarding the background to TRIP and ODA, it would be seen from Mr Allen's statement that TRIP is part of a major long-term project within the whole rail industry to improve efficiency. It dated from 2014. It was first developed under the auspices of the National Task Force. It had support from every interested party in the rail industry, including all Timetable Participants, the Office of Rail and Road and the Department for Transport. And TRIP was in fact Stage 2 of the Performance Planning Reform Programme commenced in 2012.

Stage 1 of the Programme involved a uniform framework for performance improvement planning, which included PPM – the attrition tool. And "PPM attrition" was the term used for any reduction in performance from 100% PPM. The current move in annual average for national PPM in the year to 31 March 2017 was 87.6%.

The TRIP project had identified six causes of delay, of which the most significant was the so-called specification error, that being delay associated with the way the timetable is created and then operated. That suggested in itself that despite the best efforts of all those concerned with drawing up and implementing the timetable, there was a significant - and in Network Rail's submission unacceptable - error of margin built into it, which the whole of this programme was aiming to improve.

At their heart the revisions which had been proposed by Network Rail – very, very few of which were actually being challenged – represented the attempt by Network Rail, supported in the main by the vast majority of Timetable Participants (the vast majority of whom were not at this hearing because they did not challenge the revisions) to reduce that margin of error and eventually to produce a zero error timetable.

TRIP had always envisaged the use and application of both theoretical, i.e. modelled data, and real world data sourced from the operational rail network itself. The real world data derived from ODA. This was an enormous project in its own right, and represented a significant amount of investment on the part of the whole industry. Again, this was about the whole industry. It had enabled huge quantities of real time actual data from the operational network to be gathered and analysed. The quantities of data involved were far, far greater than were involved in previous more manually based approaches. The data gathered suggested that changes were required to 1,487 Timetable Planning Rules, which was about 20% of the overall number of 7,700 rules that were reviewed. Approximately 70% of the recommendations were for increases to the previous planned timings. Network Rail submitted that that conclusion should not be a source of surprise.

It was clear that the previous rules had significant limitations. The existence and level of specification error spoke for itself and was evidence that the previous rules must have contained several inaccuracies. The emphasis in this approach was real world data. Some complaint was now being made that in gathering this data Network Rail was occasionally measuring things which were not properly to be measured, such as speed restrictions or the like. There were at least two answers to this. First, the sheer amount of data gathered meant that the impact of any individual measurement was likely to be very small indeed. Secondly, and perhaps more fundamentally, the whole point of the ODA approach was to measure how the network actually works in practice. And in practice, things do not always run as smoothly as perhaps they could or should. So it was important that a realistic view be taken of how the network and any particular line is likely in the real world actually to operate and this, Network Rail would say, was a significant advantage of ODA. It was also important to recognise that the data sources within the ODA were not just extensive: they were already in widespread and accepted use for other purposes across the industry, which the Timetable Participants accepted and benefited from. In particular, measurements relating to performance and compensation payments already relied on ODA data. So any suggestion that ODA was somehow unproven or unreliable should, in Network Rail's opinion, be viewed very sceptically.

ODA was not perfect - like any other method of analysis it had its limitations. But Network Rail would say that it is undoubtedly an improvement on what has gone before, providing a level of detail and insight into the actual workings of the network which had not been possible until now.

Furthermore, and this was extremely important as Network Rail had made clear in its extensive evidence, it did not simply take the data derived from the ODA exercise and apply it slavishly without regard to other sources of information. It examined the data. It used it to better inform its views about how the network actually operates. Where ODA threw up an anomalous result, Network Rail made every effort to pick that up through its own internal analysis or by considering detailed points raised by Timetable Participants. And Network Rail was openly prepared to continue doing that.

There is some attempt on the part of a minority of Claimants who, as already indicated, were themselves a small minority of Timetable Participants to undermine the whole TRIP and ODA project. As already said, it Network Rail submitted that the Panel should be very slow to accept any such wholesale criticism, still less to make any order which would have such widespread effect. The reality was that this was a programme which had had a huge amount of support from all Timetable Participants as well as the industry as a whole: the Panel should be astute to that level of support and, as said, not be tempted to throw the baby out with the bathwater.

There was a very serious concern on Network Rail's part that in many of the Claimant's cases there were in fact a relatively small number of real concrete complaints but decision had been taken, perhaps for tactical reasons, to dress up these minor complaints as though there was some fundamental concern with the TRIP and ODA projects. As could be seen from Network Rail's evidence, and particularly from the appendices responding to particular Claimant's concerns, there had in fact been extensive consultation concerning TRIP and ODA generally. Network Rail thought it inconceivable that the sorts of concerns which were now being expressed by some of the Claimants would, if true, not have been forcefully put by interested parties months if not years before. Network Rail rejected the suggestion that the fact of a consultation going back many years was in some way irrelevant; it was highly relevant, Network Rail submitted, to the overall picture that emerges of careful, detailed consultation in accordance with Part D.

The Panel would be asked to look, in due course, at the individual complaints, but not, Network Rail would say, to consider any suggestion that the overall programme should be challenged. The impact of any such draconian approach could have a potentially devastating effect on the overall efficiency of the network, and also the very many Timetable Participants who were entirely content with the revision of the rules that under consideration at this hearing but who would be affected by any such widespread order. Any finding by the Panel that any part of the TRIP or ODA project was inherently unreliable would have far reaching consequences for other players in the rail industry and would cause a level of disruption and expense wholly out of proportion to the minor dissatisfactions described by the Claimants. It was also, Network Rail would suggest, very doubtful that anyone in the industry would expect that a Timetabling Panel decision would have any such far reaching effects on those not before it. Looking at the powers of the Panel, Network Rail would submit that the Panel's powers were understandably much more limited than some of the Claimants seem to have supposed.

Moving now to the scopes and scale of the disputes before the Panel, Network Rail considered it very important for the Panel to have a proper account in its mind of the scale and scope of the disputes. There were three important features to point to. First, there were only a small number of Timetable Participants who maintained any objection. Secondly, the number of detailed objections when one drilled into the Sole Reference Documents and got away from the higher level criticisms, was low. Thirdly, the picture that emerged was one of progressive agreement and the narrowing of disputes, a process that Network Rail hoped could continue today and throughout this dispute process.

Expanding briefly on each of these points, only seven out of 36 Timetable Participants were appearing before this Panel. The other 29 were content with the revisions. Some of them had raised no complaint, others had continued to engage with Network Rail and their differences had been resolved, but as of the here and now the vast majority of Timetable Participants had no complaint.

It was also important to take a realistic view of the actual proportion of the rules being challenged. In total there was something like 6,600 revisions proposed in Version 1 of the TPRs. Following a period of detailed and careful consultation that number was reduced to something like 6,200. It should be noted in passing that that in itself demonstrated the thoroughness and conscientiousness with which Network Rail approached the issue of consultation.

Of the 6,200 rules it is only a very small proportion – Network Rail estimated approximately 4% at most – that were challenged in any way by these appeals. Again, therefore, the Panel was reminded that it would not be just wrong but also potentially deeply damaging to make any findings which had the effect of fundamentally challenging or undermining the overall shape or validity of the rules in any far reaching way.

Finally, the picture that emerged was one of increasing consensus. The statistics spoke for themselves. 13 Timetable Participants issued Notices of Dispute. Only 10 of them issued Sole Reference Documents: three did not proceed beyond the Notice of Dispute. Of those 10 a further three had now withdrawn, having reached agreements with Network Rail, leaving only seven Claimants, many of whom, on analysis, had actually only made narrow and limited complaints. Network Rail was pleased to have been able to resolve matters in this way and was prepared to continue sensible consultations with all of the Claimants - and was confident that similar engagement on the part of the Claimants could lead to a significant reduction of the issues remaining in dispute.

As to the extent to which there were common issues of principle, Network Rail had explained in its response that its view was that on proper analysis there were not really any such common issues of principle. Network Rail welcomed the Chair's direction that individual cases would now be dealt with separately.

Network Rail did not wish to suggest that there was not some commonality between the sorts of complaints advanced by individual Claimants. For example, it was clear that a number of the Claimants were saying that they did not have sufficient information or knowledge to make an assessment about a particular revision. But in order to determine whether that particular criticism was justified, the Panel needed to look at individual circumstances pertaining to that Claimant and that particular revision. The Panel could not deal with these matters on a broad brush basis because the evidence demonstrated and illustrated that the overall consultation had been thorough and entirely in accordance with Part D of the Network Code. The only issue for determination was whether a particular line of detailed consultation was taken as far as it needed to be under the provisions of the Network Code.

It was also important to bear in mind that this was a two way process. If Network Rail was provided with proper and sufficient evidence of a particular concern, or a specific question in relation to an identified revision, it could of course respond to that. But Network Rail could not reasonably be expected to deal with vague expressions of dissatisfaction or blanket failures to approve or to engage properly and co-operatively within the consultation process. So each specific instance of so-called failure to consult needed to be looked at separately and for that reason Network Rail was saying that the Panel should not treat matters which related to one Claimant as though they related to all the Claimants.

So, for example, it would be perfectly possible – not accepted by Network Rail – but perfectly possible that there may have been some minor failure to notify a particular Claimant of some matter relevant to its interests. But that did not mean, and should not be held to mean, that there had been a widespread failure of the consultation as a whole, or that other criticisms in relation to consultation are well founded.

Turning to the consultation process itself, Mr Allen's witness statement dealt with the very extensive consultations that had taken place. Network Rail was fully aware of its obligations under Part D of the Network Code and of the need to consider representations and objections. The Panel would have seen paragraphs 60 to 78 of Mr Allen's witness statement and was invited to look at those again as well as the sections in each appendix where the details of consultation with particular Claimants were set out.

In summary, each geographical area or Route was led by a Timetable Production Manager, who is responsible for maintaining an effective relationship with operators within his/her route. Subject to some individuals being on leave, those managers were available if the Panel wished to hear from any of them. They were not in the room just for space constraints, but they were elsewhere in the building and available. They had the detailed knowledge of this process and they were ready to deal with these things.

An ongoing priority for those managers was to avoid operators being surprised by the new WTT when it is published at D-26. In order to achieve that, Network Rail encouraged active participation from Timetable Participants throughout the process. If that process had not worked then there would have been 36 parties sitting at this hearing, not seven.

Network Rail carried out extensive work to familiarise Timetable Participants with ODA and the aims and methods of TRIP generally. Timetable Participants were introduced to the ODA itself through so-called first peek sessions in July 2015. There had been regular TPR forums for all users which explained the ODA tool and its proposed use. Familiarisation sessions were adapted for each TPR forum – presentations followed by discussion at the forum.

It was right to say that levels of engagement had varied between Timetable Participants, but in many cases queries, comments and feedback were provided prior to any form of consultation process under Part D, which included comparisons with other sources of data where available.

Version 1 of the draft TPRs was published at D-59, 21 October 2016 and formal consultation with the 30 passenger operators and six freight operators followed at TPR forums and individual meetings. This was a line by line review of proposed changes and individual values proposed. In many cases, as the Claimants know, this led to a change being varied, cancelled or agreed. And then Version 2, as we know, was published on 3 February 2017, and the consultation process was continuing.

By and large there was an extremely good relationship between Network Rail and each of the individual Claimants - a relationship which was highly valued - and an enormous amount of information exchange and explanation takes place before and outside the formal requirements of Part D of the Network Code. It was difficult to see how such an enormous undertaking could probably be completed without that type of information exchange. The reality was that in general it worked extremely well, so Network Rail was very concerned and strenuously resisted any suggestion that there had been any wholesale failure to comply with the requirements of Part D, or to provide information in time or give individual Timetable Participants the opportunity to make representations as they saw fit. The general structure and thoroughness of the consultation process could not in serious doubt, and there was ample evidence of the many TRIP TPR forums, delivery of proposed revisions and detailed exchanges between the parties. The majority of the Claimants did not make any fundamental criticism of Network Rail's approach to consultation and Network Rail wished to rely on that as well as clear evidence of its adequacy, to say that the Panel should resist the suggestion made by one or two of the Claimants that there had been some wholesale failure.

Network Rail was not suggesting that in each and every case, each and every detail of any particular consultation was necessarily perfect. Given the sheer scale of the task facing everyone, it was hardly surprising that some matters might be overlooked or perhaps not gone into in as much detail as in an ideal world they might be. It was for that reason that Network Rail treated its consultation obligations as ongoing ones and continued to engage in fruitful dialogue with many of the Claimants. Network Rail had approached this hearing with an open mind, and was fully prepared to continue its discussions with individual Claimants where they had genuine concerns about particular identified revisions and the reasons for them. And in particular, if any of the Claimants wished to bring forward evidence, even if perhaps they should have put it forward before now, that they want Network Rail to look at, that could perhaps be done in the context of these appeals.

As for the Decision Criteria, again it was suggested that great care needed to be taken with making any wholesale criticism of Network Rail. It was clear from the evidence that Network Rail was fully aware of the Objective and the Considerations set out in Condition D4.6 and that it took obligations to consider these matters very seriously. The whole structure of the decision making process was geared around ensuring that the Considerations are given their proper due; the fact that proposed revisions were discussed so extensively with operators also meant that there was ample opportunity to challenge Network Rail if there was a serious question about the approach being taken by Network Rail. Network Rail submitted that no criticism could properly be made of Network Rail in relation to this.

The whole point of the industry sponsored TRIP project, which ODA fed into, was to improve the efficiency of the network. That being something in everyone's interests to achieve, Network Rail suggested that it would be wholly artificial to go through each of the Considerations and wonder how it might have been applied differently when one is considering the primary obligation of ensuring that the network runs more efficiently and delays are reduced. The - slightly strange - suggestion that Network Rail had its own agenda, being that it wanted to implement TRIP at the expense of everything else - was simply not understood. What Network Rail wanted to do was to improve the efficacy of the network, and the hearing was asked if that did not sit with the Decision Criteria, then what did? Network Rail therefore said that the challenge to the Decision Criteria was wholly misconceived.

Network Rail identified that there was a further, fundamental point to consider, when the Chair had touched upon, but which the Claimants had failed to address, this being Network Rail's obligation to consider the overall interest of current and prospective users of the network. The phrase came from Condition D4.6.1. It was not Network Rail's job simply to consider whether a particular revision to a particular rule might cause a degree of inconvenience and potentially some loss of income to a Timetable Participant; Network Rail's obligations were much wider than that. Network Rail had to balance a whole series of interests. That was not to say that individual Timetable Participants did not matter - they did because they were users of the network and they were specifically referred to as part of the Considerations - but their commercial interests did not automatically prevail over all other interests, and they did not have a trump card to play.

Stepping back, what Network Rail was trying to achieve generally - and it had to be said, with an enormous amount of support from all of the Timetable Participants, including all of the claimants - was an improved network where specification error is reduced or, in an ideal world, eliminated. The fact that some individual revisions to TPRs may be unwelcome to a particular Claimant could not be made to prevail over that fundamental requirement. And it was right to say that none of the Claimants had really attempted to bring this wider perspective to bear in their Sole Reference Documents, so they gave little to no assistance on how the Considerations should be applied when the perspective that Network Rail is obliged to take was brought to bear. When balancing competing interests of multiple users, it was hardly surprising that some elements did not suit everyone. If it was of any comfort to the Claimants, they could rest assured that the same applied to Network Rail as its own interests did not necessarily prevail otherwise. But that fact said nothing about any failure on Network Rail's part.

Mr Henderson wanted to finish by saying a few words about the relief available to the Claimants and the power of the Panel to grant such relief, because, in Network Rail's submission, this was an issue which the Claimants had not properly wrestled with in their Sole Reference Documents. The Panel was referred to paragraphs 54 to 70 of Network Rail's central response document. For the reasons set out in that response, Network Rail submitted that it is essential when considering whether any of the Claimants might be entitled to relief - and if so, what relief - that the Panel considers each Claimant and its claim separately and individually - this is, considers only the relief sort by the individual Claimant and does not grant relief sought by one Claimant

to another Claimant. Most importantly the Panel should bear in mind the limits of its own powers as set out in Condition D5.3.1.

In order to determine the Claimants' various complaints, the Panel would plainly and properly and quite rightly need to look at parts of the Network Code and ascertain and conclude what the parties' respective obligations were under them. That was a different matter from the powers of the Panel to make orders, and that was an important distinction. Having looked at previous decisions of the Panel, in particular one that would be talked about under the Chair's Heads "C" and "D", it was clear to Network Rail that the Panel had a very clear distinction in its own mind, which it had properly applied in the past, regarding the distinction between discursive background and the order that is granted at the end of the day.

There were three available orders under Condition D5.3.1. Option (b), which was the one favoured by Network Rail, was simply to direct that each of Network Rail's decisions stand, and in effect that was to dismiss the complaints. So that is what Network Rail was seeking.

Option (c) was only applicable in exceptional circumstances, and this was the option whereby the Panel substitutes its own decision for the decision of Network Rail. Network Rail suggested that there were good reasons why this would only be exercisable in exceptional circumstances. The Panel did not have and does not claim to have the full range of material and expertise available to it, which Network Rail has, in order to arrive at its own decision as to which TPRs should actually apply. Further, the Panel cannot know, without extensive consultation, which it was not in the position to carry out, how a change of rule might affect other Timetable Participants, most of whom were not engaging in this dispute process and the great majority of whom had declared themselves content with Network Rail's approach and were doubtless preparing themselves for that approach in due course. As such, and unsurprisingly, the Network Code required that the Panel should be slow ever to substitute its own decision for that of Network Rail.

Further, and very importantly, none of the Claimants apart from ASR – and then, Network Rail suggested, even that in a very half-hearted and unconvincing way – was suggesting that there were exceptional circumstances. That was quite right since Network Rail would submit that it was perfectly obvious that there were no such exceptional circumstances; what we had here was the ordinary situation whereby a number of TPRs had been suggested – more perhaps than at other times, but there was nothing to prevent that – in a timely way, in accordance with the timetable set out in the Network Code. It needed to be considered whether there were any particular concerns arising out of the challenges made to a very small number of those proposed revisions. That was not an exceptional circumstance.

The Panel had specifically raised a number of issues about the question of exceptional circumstances, so what were exceptional circumstances? We did not get any guidance about that from the Network Code itself. In Network Rail's submission, you needed to be careful going outside of the Code for these sorts of things, because the Code was a self-contained code and guide. As the Hearing Chair had already indicated, it may well be that there are ways in which the Network Code might be improved, but Network Rail thought that it may well be deliberate since it is difficult to define what is exceptional, or predict circumstances that are out of the ordinary because they are indeed out of the ordinary. So it is very difficult to predict them – they are so unusual.

So Network Rail submitted that the Panel should resist seeking to define or demarcate what exceptional circumstances are or might be, and that needed to be determined on a case-by-case basis. But were a Panel ever were to legitimately exercise this power, it must be right, Network Rail would say, that the Panel be in a position where as a result of those exceptional circumstances it felt fully confident that it had full knowledge of and insight into a particular issue, such that its own determination of that issue was clearly to be preferred to that of Network Rail's. In other words that it had better

insight and better information available to it than Network Rail: and that would only very rarely occur and was likely, Network Rail suggested, to depend on the Panel being presented with a very wide range of evidence from all relevant parties as to the matter in issue. That was not the position here.

The Panel had also raised the question of whether it can only decide that exceptional circumstances exist if a Claimant has specified that in its Sole Reference Document. Network Rail's submission was that the answer to that question is, 'Yes, it can only be determined that there are exceptional circumstances if that has been alleged.' First, it would be extraordinary, Network Rail thought, if the Panel were to find that exceptional circumstances existed when a Claimant had not made that allegation. The Claimant would be uniquely placed to set out the facts and matters which it says amounts to exceptional circumstances; if it does not make that allegation, then the Panel should not, Network Rail submitted, properly consider whether or not there really are exceptional circumstances.

Secondly, Network Rail asserted that the Panel must determine the dispute as presented, and Network Rail must be given a full opportunity to consider and respond to that dispute as presented. Where there is no allegation that exceptional circumstances exist, there is no case to answer on the point and, therefore, no need for Network Rail to respond to it. The issue is essentially not then before the Panel.

The Panel had also raised the question of whether Network Rail's position, which it set out in paragraph 59 of its response, is that when the Panel is faced with what has been referred to as a binary position it is not entitled to overturn Network Rail's decision in the absence of exceptional circumstances. That was confirmed as being position. Once a decision has been made by Network Rail following the consultation process, then that decision is binding on Timetable Participants: the substitution of that decision by an alternative decision of the Panel, Network Rail would say, can only be made in exceptional circumstances. Reverting to the previous position would itself be a substitution of an alternative decision.

That left the power under option (a). This was an important, albeit limited, power whereby the Panel is empowered to give general directions that a particular result is to be achieved but not the means by which it is to be achieved – so an important distinction was drawn there. But, for example, it would seem right to Network Rail that if the Panel concluded in relation to a particular identified proposed revision that some additional consultation should be taking place in relation to it, it could so order.

When one looked at the relief sought by each of the Claimants it seemed that what Network Rail would call tripartite distinction has not been at the forefront of the Claimants' minds. They were seeking variously all manner of declarations – the setting aside of rules, reverting to previous rules and associated suggestions, which was - Network Rail contended - simply not in the Panel's power to provide and which would be hugely disruptive were they to be provided.

First, Network Rail thought that if the Panel were to start providing declarations of the sort contended for, the reality would be that it would find itself in the position of rewriting the TPRs, and in fact probably rewriting the Network Code in a significant but piecemeal way – and piecemeal because it would just be responsive to individual complaints. That is not the proper function of a rapid resolution appeals process, which has as its central aim the sorting out of practical, detailed timetabling issues in a timely and efficient way. So Network Rail submitted that the Panel did not have the power to make these sorts of general declarations and should be very careful about granting them, because they are dangerous to give these things. The Network Code is the code, and it should not be amplified in a piecemeal way. The effect of it may well be that the very careful demarcation of the Panel's important powers set out in Condition D5.3.1 would be circumvented. Yet the parties' rights and obligations derive from the Network Code. If there are problems with the Code – if it is incomplete or deficient – then Network Rail considered that the Code should be amended.

Network Rail considered that it was not appropriate or within the Panel's power to interpret the Network Code in such a way that its terms are varied. Of course the Panel could make observations about the need to observe provisions of the Network Code although, as the Hearing Chair had observed provisionally, it may be that such observations are of little practical value since they simply echo the Code. But, nevertheless, that was, in Network Rail's view, a perfectly valid exercise.

In concluding for Network Rail, Mr Henderson hoped that it would be clear from all the material that Network Rail was relying upon and from his opening remarks that Network Rail was taking these appeals extremely seriously. It was a measure of that concern that there had been a number of detailed exchanges regarding Directions and the like before this first hearing day. Network Rail was committed to arriving, if we possibly could, at sensible, pragmatic solutions to the points of detail which had been raised by the claimants, but Network Rail was concerned that for some of the Claimants, and some only, attempts were being made to undermine what had been a huge investment on the part of the whole industry, with widespread support from nearly all Timetable Participants, simply in order that some short-term commercial agenda can be fulfilled. Network Rail wished to submit that the Panel should not allow itself to be pulled into that agenda but should concentrate on resolving detailed points which had been raised regarding particular revisions. Network Rail also wished the Claimants to be clear that Network Rail would use all of the procedures at its disposal to ensure that this major project, which promises to deliver significant improvements to all users of the rail network, is not frustrated.

5 Oral exchanges at the hearing

- 5.1 At my invitation and following on from general remarks made, Network Rail put forward that ASR was trying to pitch matters at too high a level or too generally, when analysis seemed to show that ASR in fact had a relatively small number of specific issues. Network Rail thought ASR was complaining of lack of consultation when Network Rail thought any complaint might be that there had been some lack of agreement. Network Rail was very content to engage with ASR on the detail of its concerns as set out in the documentation before the Panel but Network Rail's key message was to resist any suggestion that there was widescale dispute about the TRIP programme, the ODA programme and the whole set of TPR revisions as they relate to Scotland and that the New TPRs should just be shelved. ASR had put its claim on a quite general basis underpinned by a small number of detailed complaints which it could be argued had not been pleaded in detail in its claim for relief.
- 5.2 Network Rail also observed that it seemed that a measure of agreement was achieved as late as 2 February 2017 but ASR had subsequently rejected the New TPRs.
- 5.3 ASR considered that Network Rail was mischaracterising its position and suggesting that ASR was making a grandiose attack on TRIP and ODA, but ASR's complaint was that the process that had taken place in Scotland had not resulted in a set of TPRs which were robust in the terms of what should be implemented under the Decision Criteria. ASR asserted that Network Rail had not sought to apply the Decision Criteria to the New TPRs, nor sought to complete the TRIP process in Scotland or to take account of the kind of information that should have been taken account of before imposing the New TPRs, which had effectively been decided upon, in ASR's submission, too early. ASR was saying that in Scotland Network Rail had put forward some amendments based on ODA whilst not taking into account GPS data which had been provided by ASR, whilst not doing any modelling, and whilst not applying the Decision Criteria to the changes which it was proposed to make.

ASR confirmed that there seemed to be some sort of progress being made by 2 February 2017 and ASR was prepared to continue to engage with Network Rail with the aim of agreeing a realistic time for when changes could be introduced to improve the TPRs in Scotland - which was what ASR also wanted. But the ODA data and the TRIP process was commenced based on old timetables, using different routes in

2015, before Queen Street closures, and the railway in Scotland was at the time dealing with very poor performance. At the moment ASR had very good performance.

ASR confirmed its submission that the decision to introduce the New TPRs, for which Part D required the Decision Criteria to be applied, had been taken without completing all the consultation and all the review that should have been undertaken; this meant that the TPRs being proposed for Scotland were not reliable and should not be brought in at this time.

- 5.4 I put it to ASR that its case gave examples which it did not actually specifically plead so I took it that ASR was looking for high level relief. Without prejudging the issue, I asked whether if ASR failed to secure high level relief it would then wish to go down to argue points of detail for the Panel to reach whatever decision it would be entitled to reach. ASR confirmed that Network Rail had previously been provided with a list of items of concern to ASR, there being data available from GPS which supported challenge of a lot of those items. ASR confirmed that its list and the GPS data was in play in its discussions with Network Rail and that whilst there were tentative developments on some of the issues, there were also issues still outstanding for attention. ASR consequently asked whether, if during the currency of this Timetabling Panel hearing it were to submit further details about the objections put to Network Rail on 2 February 2017, would those particular objections still be considered by the Panel? Asked for its opinion, Network Rail took the view that hearing of ASR's detailed objections was not now open to the Panel because ASR had sought a particular type of relief and should not have "a second bite of the cherry".
- 5.5 ASR explained that a large part of the reason why the claim had been put as it was was because ASR had provided Network Rail with GPS data, also a number of objections; ASR considered there to be a good deal of material that would need to be discussed between the Parties. ASR had proposed independent investigation – independent experts – to look at some of these matters. ASR had been proposing a May 2018 implementation date for the New TPRs as applicable in Scotland because this was considered realistic in view of the discussions that would need to take place with Network Rail. ASR thought it would be very challenging for this Panel hearing – and indeed for the parties – to deal over the time reserved with how one would apply the GPS data and how one would weigh and balance the different proposals that were being made. ASR did not think the impact study which had been done was sufficiently rigorous; did not think there had been any consideration of the right timetables on which to base ODA; did not think there had been any consideration of the available GPS data and did not think there had been adequate expertise applied, hence ASR was seeking the high level relief.
- 5.6 Noting that Network Rail had given attention to points regarding relief, ASR was prepared to respond quite forcefully on several of them. Whilst accepting that the hearing might return to the subject, ASR wished to remind the Panel of Condition D5.4.1, which provided for the status as it currently stood, being 'where an appeal to a Timetabling Panel pertaining to this Part D is pending, the relevant decision of Network Rail shall remain binding until such time as the Timetabling Panel determines otherwise.' ASR contended that on the face of this Condition, any contention that a Timetabling Panel does not have the power to overturn or reject a decision made by Network Rail would appear to be somewhat strained.
- 5.7 Having gathered that the aim of the TRIP programme was to improve the efficiency of the network, and in particular the performance of the network, the Panel noted that ASR was saying that its current performance was very good whilst operating under the current SRTs and various other aspects of the current TPRs. Network Rail was therefore asked what improvement to ASR's current performance levels did Network Rail think would be gained by changing the TPRs in December 2017 before having the further discussions that ASR wanted. Network Rail responded that it was a difficult question to answer in terms of how can you properly forecast what performance benefit would be obtained from making an intervention to an individual TPR. The industry did not really have a modelling tool that would give an absolutely convincing

indication but in the individual values that Network Rail had examined in Scotland there were clear discrepancies between some existing values and what the railway could be seen achieving today. The exercise was predominately correcting that, and Network Rail knew that getting it right would lead to incremental improvement in terms of performance. ODA work would address, in the main, some sub-threshold delay. There was no tool that would demonstrate with certainty that the railway would perform better. There were, however, current values which were less than the observed value that could be seen happening every day so addressing all that would help to deliver sharper performance. Nobody could predict what the change to performance would be but Network Rail believed it would be an improvement over the 97% that was there now.

- 5.8 ASR advised that the current good performance had been delivered through a detailed Performance Improvement Plan which incorporated attention to such matters as discipline in station working.
- 5.9 ASR observed that when previous timetable changes were made in Scotland the ORR criticised Network Rail for not carrying out performance modelling on those changes. There had been no performance modelling done of these new changes. Whilst accepting that the tools available may not be perfect, ASR would say that not to use those tools, particularly given the previous criticism from the ORR, did not seem like a wise move in these circumstances. Network Rail responded that there was no clearly defined, national definition of performance modeling. Any performance modelling was time-consuming and it was not practicable to do it for every significant timetable change, only the very major ones. The Panel suggested that TRIP output was potentially a very major timetabling change for the industry and that if the ORR had previously said that it ought to be done and if the potential effects of concern to ASR might occur, then presumably performance modelling should be undertaken.
- 5.10 The Panel had gathered that Network Rail had produced a timetable impact assessment so asked what level of detail had gone into it. Network Rail advised that a remit had been drafted for Scotland and shared that with all operators. The initial draft remit was for Network Rail to assess three different time periods throughout the day, being a one hour morning peak, a one hour midday time period and a one hour afternoon peak slot. Based on the feedback received from ASR, the midday timeslot was extended to two hours. The rest of the remit was to look at the full impact of the changes to the TPRs and to look at platform workings. Network Rail considered interactions at every timing point and undertook a full validation of those timetable slots and all trains which interacted with those trains that were in the scope. An impact assessment was produced and a report shared with the operators. Additionally, on request, Network Rail shared a data file for ASR to input to their system as well. ASR informed the Panel that the assessment showed that Quantum would be maintained but it continued to feature failures within the current TPRs and continued to include them. ASR added that there was evidence to suggest that a change of values would lead to additional resource requirement given the frequency of the interchange of train crew at Dalmuir, Airdrie and Bathgate; in addition, the New TPRs might well introduce requirement for a turnover or standby unit to maintain current levels of capacity. However, importantly, the SLC in ASR's Franchise Agreement would be broken in relation to some journey times and some capacity obligations would not be met.
- 5.11 Regarding the timetable impact assessment and in response to the argument that ASR would not be able to meet its SLC, Network Rail advised that reducing dwell times at Bathgate and Airdrie had been a specific issue for ASR. No stops that currently provided opportunity for crew change at Bathgate were reduced below the current 90 seconds. At Airdrie, there was one morning service and one afternoon service affected. However, Network Rail had not been made aware as to whether there was direct impact on ASR's train crew arrangements.
- 5.12 The Panel noted the assertion made by Network Rail that some of the Claimants were dressing up complaints as though they were somehow evidence of a widespread failure on Network Rail's part but that it was presently unclear whether, and if so, how

any particular revision would impact the timetable. Network Rail was asked whether it should be concerned that some of its customers were not actually 100% sure how some of the SRT changes in Scotland might impact the timetable. Was there a major concern on a multi-TOC route, that when time comes to validate the schedules, they cannot be got to work at all? Network Rail responded that where TPR changes were being made in Scotland, it had no such concerns; impact assessment proved that there would be capacity for all operators to maintain their existing level of service. Network Rail had looked into the detail for every operator and articulated clearly what the impact would be upon journey times, for example. Network Rail was confident that all current operators could be accommodated.

- 5.13 ASR queried how confident Network Rail might be regarding how ASR would plan to utilise its rolling stock, particularly asking when Network Rail had carried out an impact assessment to establish whether ASR had sufficient rolling stock to meet current needs, with the extended journey times and impact on turnarounds. In particular, ASR was concerned about maintaining existing arrangements for attaching and detaching units. From this, the Panel questioned whether Network Rail was properly in a position to know the utilisation of ASR's rolling stock both currently and in the future.
- 5.14 The Panel expressed some surprise that the issues coming forward were arising where there was an Alliance arrangement between ASR and Network Rail. It was explained that the Alliance worked satisfactorily between ASR and the Route team within Scotland but there was no alliancing relationship with Network Rail's Capacity Planning organisation at Milton Keynes. This was a matter of policy on Network Rail's part, as capacity allocation was a function which should not be included within an alliance.
- 5.15 Having noted that Network Rail had asked for counter-proposals from ASR, which it claimed were not forthcoming, ASR was asked to confirm its assertion that these counter-proposals were provided to Network Rail in November 2016. ASR stated that counter-proposals were handed over at a meeting in Preston, clarifying that this amounted to values informed by GPS data. Due to staff holiday, ASR was currently not in a position to produce this documentation for the Panel. Network Rail confirmed that a document had been handed over at Preston but the ASR representative had indicated that there was no need to take much notice of it. From Network Rail's point of view it did not contain details sufficient to show that there was a counter argument for applying OTMR data: it was a list of the SRTs that were proposed for change. ASR assured the Panel that the document showed the values as ASR would have seen them; Network Rail responded by confirming that the document did contain values but it did not give any information about where those values had come from. Whilst ASR was confident that the values were sourced from GPS data, Network Rail countered that this was not stated on the document itself.
- 5.16 The Panel noted that GPS data was being suggested by ASR as balancing ODA data and that one of the concerns mooted by ASR was that ODA data was potentially missing the principles of operational delivery affecting the timetable. ASR was asked for clarification as to how GPS data would address that concern. ASR responded that GPS data is very specific and the locations of dwells could be extracted from it. On the other hand, OTMR data indicated the location of a dwell and you could additionally extract such information as how long it took for a door opening cycle to take place. So, in ASR's opinion, more granular detail could be obtained from both GPS and OTMR. Asked then if it was correctly understood from its submission that ODA is capable of analysing certainly dwell times or being able to determine when a train is moving and when it is not, Network Rail confirmed that ODA determined whether a train is moving or not based upon activation of signalling berths but it would not identify such activity as door opening times; it only gave, for example, a global value of a train stopped for a certain period of time at a station. ASR pointed out that the information in its enabled ASR to control dwells at stations much more effectively through efficient operation.

- 5.17 Noting the passage of more than a year of conversation surrounding Network Rail's analysis and then the issue of a decision, the Parties were asked what might be the effect of delaying implementation of the New TPRs to May 2018. ASR thought that the dialogue that took place in the early part of the process for the core part of the route could be extended into all the other areas of ASR operation, which would hopefully enable agreement on revised TPRs. ASR did, however, recognise that deferring implementation might still fail to secure agreement regarding some values, but ASR thought that there would nevertheless be a step forward.
- 5.18 Moving to ASR's assertion that Network Rail had failed to observe the Decision Criteria in the whole process, it was explained that the Panel was struggling conceptually with that, because it seemed that the Decision Criteria came into play more in respect of each individual decision, rather than in relation to the TRIP project as a whole. The question therefore arose as to whether the Decision Criteria could inform the overall process.
- 5.19 ASR responded by saying that the Decision Criteria, according to the contractual documents, needed to be applied to every decision. There was a sense in which Network Rail's justification appeared to be that the Decision Criteria applied to the national decision to use TRIP, but that was not what ASR was talking about. ASR was saying that when the decision was taken to change the TPRs it needed to be justified – or at least assessed properly – against the Decision Criteria. ASR accepted that it was a group of changes which was proposed, but considered that whether that group, taken as a whole or taken individually, had the effect of being something that passed the Decision Criteria or not, should be subject to an assessment of that point. That assessment needed to take into account matters such as whether there would be change to an operator's ability to hit its SLCs, which were a rather important part of its business; and what the changes would do commercially to all the parties involved; so this required consideration of all of the different Decision Criteria. ASR would expect Network Rail to have actually looked at an overall change to the TPRs being produced for 3 February 2017 and ask itself, does that overall change pass the Decision Criteria? ASR emphasised that on 3 February 2017 there was a list of changes that were made and in its view the Decision Criteria should have been applied at that stage. Certainly not just at the stage of considering whether to bring in TRIP, whether to bring in ODA; or whether to use ODA at a strategic level. ASR thought that, arguably, that may have been a relevant decision as well. But that was not the subject of ASR's concern: ASR was talking about when the TPRs were applied in Scotland to its services, were the Decision Criteria applied to the effect of those new TPRs? The answer quite simply was that it was not, and ASR would say that it needed to be. And when that was done, you should be taking into account a lot of things that were not taken into account when those specific TPRs were issued.
- 5.20 Network Rail responded that it had to consider the Decision Criteria for every decision it makes in accordance with Part D but the Network Code did not really say when or how Network Rail should share its conclusions across the industry. But how the process worked was that Network Rail put its proposals out at D-59 to help it to apply the Decision Criteria correctly. Network Rail then relied on inputs from colleagues it was consulting with, covering such matters as impact on rolling stock utilisation. That allowed Network Rail to take a very balanced view, trying to understand which Considerations should have a higher weighting. Historically, more often than not, Timetabling Panels had reviewed Network Rail's weighting of the Decision Criteria in the context of re-thinking Network Rail's whole application of it. It was quite easy for ASR to say Network Rail had not used the Decision Criteria, but on the information available, the inputs to help achieve balance got stuck at quite high level. If ASR did not provide the material, saying, 'Oh, they are just disregarding the Decision Criteria', there was not much more that Network Rail could do.
- 5.21 ASR pointed out in relation to references regarding real data used for ODA, the timetables before and after the 20 week closure of Glasgow Queen Street station were entirely different from each other and, in fact, the routes used for capturing data had changed. The real data being talked about for ODA was not the real data of the actual

performing network so the ODA data was unreliable. It was explained to the Panel that whilst ODA data when taken from timing point location to timing point location or through a junction, for example, was not going to change as a result of the timetable, if you get two trains running on headway at four minutes apart then ODA was going to show the product of that. If the headway is four minutes but there is an interval in the timetable of six, seven or eight minutes, then when there is a perturbation or anything out of course, the same bunching of trains would not occur. Large parts of the former timetable had changed. Formerly there were Airdrie to Bathgate services departing from Queen Street around 24 and 28 minutes past the hour but now the trains were departing 15 minutes apart, so signal berth and line occupation and all data previously obtained through ODA would now be different. ASR thought this might be why Scotland was different from elsewhere in that the New TPRs were based on data which was not reliable. ASR regarded ODA data as being clean and reliable when being applied subject to other considerations. ASR was concentrating on Glasgow simply because it accounted for 23% of its services; Edinburgh, for example, was another pinch point but that area was not examined in the ODA process.

- 5.22 Network Rail sought to counter any inference that ODA was completely irrelevant in Scotland and also to address ASR's concern regarding the quality of data. Firstly, there was the sample size of what was obtained in terms of this information, and secondly the whole of the timetable does not run on a four minute gap between two trains all day. The analysis was looking at thousands of trains, not just a couple of hundred or even the 36 trains in a day that might be running just four minutes apart. That was one issue that balanced off the argument around the timetable on which ODA was based, whether it was a high performing one or a low performing one; and there was also the relevance of the wider timetable around it in terms of its impact on a value. Also, Network Rail was applying a 25th percentile, which meant that 'big data' was being used. It was not cleansed and Network Rail was open and honest about that, but by going to the 25th percentile it was found that the results were something very similar to outputs of cleansed data. Therefore, by using the big data and that 25th percentile, Network Rail was not going for the mean, which would be over-inflating the journey times and putting padding into the timetable - or softening it, as some would say. But equally Network Rail was not going for the optimistic, reflecting fast driving technique involving braking at the very last minute.
- 5.23 ASR expressed concern that modelling had not been undertaken by Network Rail to add additional robustness and resilience to the ODA proposals. There had not been a review of available GPS data or OTMR data, yet Network Rail had told the hearing that TRIP was really designed around both theoretical and actual data. In reality, Scotland was currently only looking at ODA data, and ASR had concerns about the quality of that ODA data. But as for tools such as Vision and Rail Assist and others which had been mentioned, how confident could Network Rail be that improvements to the proposed New TPRs would not emerge from undertaking that kind of modelling together with looking at cleaning up the ODA data which was based on the past; looking at the GPS data and looking at the OTMR data before actually introducing the New TPRs?
- 5.24 Network Rail considered that modelling would be another data source to put into the mix of inputs into a very detailed process in order to decide what is best. For the ODA work undertaken in Scotland, Network Rail was relatively comfortable that nothing better would probably emerge from modelling in Vision or Rail Assist to come up with values to influence the timetable and move it in a positive direction for performance. For some of the controversial items Network Rail had already carried out manual observations to give confidence that ODA was an accurate way to move forward. There were instances where Network Rail did not have two points of reference information for some of the values that were proposed for change, but Network Rail thought, nevertheless, that doing modelling with Vision or Rail Assist would only have limited value in terms of moving forward. TRIP was a series of tools. It used different tools for different jobs; and Network Rail had never said that it would use all available tools in one location to validate changes.

- 5.25 ASR noted earlier indications from Network Rail that it would welcome a collaborative approach. ASR had acknowledged that performance was currently very good in Scotland. ASR had said that there was conflicting data which had not been fully analysed. ASR therefore considered that it was appropriate to again ask for a stay of implementation until May 2018 to allow for such a collaborative exercise. ASR wondered what was Network Rail's objection to going through that collaborative review of the data?

Network Rail replied that a meeting had previously been diarised for examination of the data but their representatives then agreed that it was not appropriate to do the examination at that time. Since then there had been e-mails to ASR from Network Rail to request a meeting to discuss that data but there had not been response. ASR explained that to conduct that exercise it would have needed the proposed New TPRs to be deferred as it simply was not realistic to complete an exercise of that kind with the TPRs being introduced in December 2017. If Network Rail confirmed the intention to proceed and establish the New TPRs, it would have seemed rather perverse to be sitting there doing a review of the exercise when the conclusion had already been established. And also ASR was willing to fund independent analysis as part of that review.

- 5.26 In dialogue between Network Rail and ASR it was established that the proposals were issued for consultation (as Version 1) at D-59 and for D-55 ASR, "put a note in objecting to them." At that point there was no counter-proposal or suggestion of working together or bringing in a third party. Network Rail's subsequent requests for the opportunity to calibrate available information – such as ASR's GPS data – with the ODA output were not met. Network Rail explained that through engaging from September 2015, if this ASR data had been available, it should have been given to Network Rail much earlier in the process, as had been the case with other operators which operated in Scotland. Accordingly, Network Rail had discussed and agreed SRT changes with other operators based on the ODA data, whereas in the case of ASR that possibility had only come much later in the process despite Network Rail wanting it much earlier. This was why Network Rail would not accept a stay of implementation until May 2018 and that was what drew the hard line on the part of ASR.

- 5.27 Asked regarding the impact of the New TPRs upon other passenger operators in Scotland, Network Rail explained that generally in each hour there were two East Coast Main Line Company trains each way in or out of Scotland, one XC Trains service each way and one First Transpennine Express service each way; having looked at the complete picture of the impact of the New TPRs upon all passenger operators in Scotland, Network Rail felt that all those trains could continue to be accommodated.

- 5.28 Following adjournment to provide ASR and Network Rail an opportunity to see if they were able to agree a solution that allowed time to remedy what had clearly been unproductive discussions, the Parties reported that no agreement could be reached. Closing submissions summarized the Parties' positions. After the adjournment, the Panel arrived at its decision regarding how Dispute TTP1064 should be determined and the Parties were informed orally as to what could be expected.

6 Analysis and consideration of issues and submissions, guidance and other observations

6.1 Legal issues

Legal issues were to the fore in this claim (and the claims originally linked with it) to a greater extent than in any previous Timetabling Panel hearings. This is illustrated by the fact that Network Rail raised challenges to a Panel's power that are not thought to have been raised in earlier Timetabling Panel hearings.

Some of the submissions by Network Rail were challenged in pre-hearing Directions and in notes circulated by the Secretary. Network Rail went so far as to submit that in a binary decision a Timetabling Panel cannot overturn Network Rail unless exceptional circumstances exist. Network Rail also claims that exceptional circumstances must be pleaded by the Claimant, and that if the Claimant does not do so the Panel is not entitled to determine that exceptional circumstances do exist.

The Panel felt that there was little point in entering into legal arguments which were not required by any decisions made, but clearly live issues remain (at the stage of determining TTP1064) which Network Rail may (or may not) pursue in future. The section of this Determination devoted to guidance and observations deals more fully with the points in dispute.

One point emerging from these legal issues was referred to in my opening remarks; that whatever difficulties had been encountered in the period leading up to the hearing day, the Panel would not allow itself to be influenced by these problems and would reach its Determination solely on the basis of the Parties' legal entitlements.

In the context of this Timetabling Panel, however, the clear view of the Panel was that it was open to it to require Network Rail to revert to an earlier version of TPRs (so long as this decision was reached early enough in the timetable planning process), if the circumstances justify such a decision.

6.2 TPRs in principle

The role of TPRs was one of the issues rehearsed by the Panel before the hearing and referred to in my opening remarks. The Panel regards TPRs as a key building block in constructing the WTT. They need to be as accurate as possible: if too optimistic, the timetable is unachievable; if too pessimistic, capacity is restricted unnecessarily.

The Panel was conscious of the significance of the concerns expressed by ASR as to the possibility of it not being able to meet its SLCs once the New TPRs are introduced. The Panel questioned Network Rail closely on this point and accepted the assurance given by Network Rail that all current schedules can be made to work and that all current operators can be accommodated. The Panel did not, however, have sufficient evidence before it to conclude whether ASR's SLCs would in fact be unachievable (nor was it asked to reach such a conclusion).

As TPRs need to be as accurate as possible, those drafting and/or amending them need to use all available sources of information that will assist in achieving accuracy. The Panel accepts that professional judgment must be applied in assessing which inputs to the process are likely to be useful, which may vary from place to place, and in assessing how the outputs are to be applied.

The Panel is aware from its own expert knowledge that TRIP was created as a national initiative by the railway industry as a whole, but clearly being led (and funded) by Network Rail. The Panel is also aware of the fact that improved TPRs have been encouraged in earlier Timetabling Panel Determinations.

ODA is one of the inputs to TRIP, while clearly in Network Rail's evidence not being used on all routes of the Network. One main challenge (in this and other Timetabling Panels) is to the use of ODA, given perceived weaknesses in its output. Network Rail's point that only a minority of Timetable Participants were challenging TRIP/ODA was noted by the Panel.

The Panel notes the point made by ASR that the ODA was captured during a period of poor performance. It regards this as a relevant important factor, but it cannot be determinative in the light of all the other factors, including Network Rail's evidence as to how ODA data is handled.

A conceptual question arises as to whether it can be said that a new method of calculating TPRs can be regarded as either complying with the Decision Criteria, or of failing to do so. The aim of TRIP, to improve TPRs generally, was seen by the Panel as meeting the Objective set out in Condition D4.6.1 of the Network Code (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....'*). But the Panel felt that it is extremely difficult to see how a strategic concept such as this can engage the individual Considerations included within the Decision Criteria.

The view of the Panel on this question is that it is only when individual TPR adjustments emerge from the process that it can be asked whether the Considerations which are relevant in each case have been correctly identified and where any are in conflict, they have been weighed appropriately in each case. Thus it was the Panel's view that in appealing any individual amendment (at the level referred to in this Dispute TTP1064 as granular) it would be open to any Access Beneficiary to point to reasons why the use of ODA data in that particular amendment had led to an incorrect application of the Decision Criteria, but that a challenge to the use of ODA as a whole could not be sustained by arguing that ODA, as a constituent part of the TRIP process (in some but not all instances), or the TRIP process as a whole, failed to comply with Decision Criteria.

6.3 Consultation

As flagged up in advance, and again in my opening remarks, any Panel determining a claim on these lines must examine the extent of Network Rail's consultation with Timetable Participants. It would be open to a Panel to conclude that Network Rail had not conducted a consultation in good faith, and therefore it amounted to a sham, in which event the appropriate remedy would probably be to determine that Network Rail should revert to an earlier version of TPRs.

Even though it was accepted by Network Rail that there were some common issues between the Claims, the Panel accepted that it must not conflate issues between different Claims, and noted ASR's submission that the issues in Scotland did differ in some respects from those elsewhere.

Nonetheless, there is clear evidence of what the Panel accepted as being genuine consultation with ASR. It is unfortunate that ASR's GPS data appears not to have been fully utilised by Network Rail. While the Panel repeats its view that it expects all available and relevant sources of data to be used, it did not see any need to investigate this further for the same reasons that it did not investigate why ASR appears to have ceased to participate in further discussions with Network Rail from 2nd or 3rd February 2017.

If, however, a Timetable Participant ceases to engage with Network Rail at any stage of the development of new TPRs, as ASR did in this case, it is difficult to imagine how a Panel can then determine that the consultation process has failed because of any lapse on Network Rail's part.

Another point of principle set out in my introductory remarks is that the Panel considers that the duty to consult placed on Network Rail does not require Network Rail to accept every point made by a Timetable Participant. To the extent that it does not, that creates an individual appealable decision on a specific point, which a Timetabling Panel is eminently well qualified to determine, but any Timetabling Panel is only likely to require Network Rail to revert wholesale to an earlier version of TPRs if it had reached very different conclusions to those reached by this Panel.

6.4 Capacity v Performance

Again as I hope was made clear before the first hearing day, like most Timetabling Panels this one was acutely aware of the balance – and tension – between capacity

and performance. The Panel would have been unwilling to countenance any artificial increases in TPRs for which there was no justification, but had no evidence before it of any specific examples.

6.5 The response of Timetable Participants (can TPRs be challenged solely because of the effect on services?)

Another general point, which was relevant in this Timetabling Panel hearing but may also apply in some of the other TPRs initially linked with Dispute TTP1064, is the conceptual basis on which a Timetable Participant can and should challenge revised TPRs.

Of course any Timetable Participant will wish to understand the effect on its existing (and planned, see below) services of any revision to TPRs, but the Panel recognises Network Rail's duty to apply the Considerations set out within the Decision Criteria in the light of the interests of all Timetable Participants. (The Panel notes in this context that it is accepted within Part D that the application of the Considerations can lead to conflicting results). The commercial interests of any Timetable Participant and Network Rail are included within the Considerations, all of which are given equal status in Condition D4.6.2.

When applying the Considerations in any particular case, D4.6.3 requires Network Rail to identify those which it regards as relevant and apply those to achieve result which is fair and not unduly discriminatory. Only if two or more of the Considerations conflict will Network Rail then weigh the Considerations to arrive at an appropriate decision.

Having reminded itself of these factors, it is the Panel's view that an amendment to a TPR which is operationally necessary cannot be 'trumped' by any commercial interest. The fact that commercial interests are a consideration has been explained above, but once its weighting has been properly applied any consequential commercial issues, such as a failure to achieve SLCs under a Franchise Agreement, are not seen as a matter falling to be dealt with under Part D of the Network Code and, therefore, in a Timetabling Panel Determination.

6.6 The extent to which TPRs should look forward

While it is clearly desirable to incorporate into any WTT planning function, including TPRs, plans or aspirations for future services to the extent which this is possible, a Timetabling Panel determining any challenge to TPRs is only dealing with the construction of one specific WTT. It cannot require Network Rail to include in the TPRs for that WTT any planned or proposed enhancements to services which will not be introduced during the currency of the WTT in question.

6.7 Some points within the Claims by ASR cannot be examined in this TTP

Before and during the hearing ASR set out its view that the introduction of the revised TPRs would have a significant effect on its current and planned services, to an extent which would prejudice its ability to meet its SLCs. Our general approach to this issue is explained above. Although some examples were given in presenting ASR's case which were said to have this effect, none was pleaded within ASR's claim for relief on which the Panel could reach a Determination. Indeed at one point ASR appeared to be expecting Network Rail to understand the likely effect of changes on ASR's use of its fleet, which the Panel was not convinced was within Network Rail's knowledge.

While the Panel did form some concerns about possible effects on ASR's services, and ASR effectively sought leave to bring detailed claims before this Timetabling Panel (see paragraph 5.4 above), for the reasons explained above I concluded that it was beyond my powers to allow ASR to raise individual issues for which relief was sought without the consent of Network Rail, which was not forthcoming. These issues can therefore only be dealt with within our guidance and comments.

6.8 Guidance and recommendations regarding legal issues

- 6.8.1 There is a clear right for any party in any Access Dispute hearing to be represented by whomsoever it wishes. It is possible that the draftsman of the ADR Rules assumed that any external legal representatives instructed would understand the process of a Timetabling Panel and would both comprehend and be in sympathy with the Principles set out in Rules A5-A10; the need to reach a "Timely Determination" (Rule A15); and the requirements that a Timetabling Panel should provide expert knowledge, must endeavour to reach fair, rapid and inexpensive determinations of disputes and should, where appropriate, take the initiative in ascertaining the relevant facts and law (Rule H15).

Whether or not the solicitors instructed by Network Rail had any prior familiarity with the process, I regret that I find it necessary to observe that there was little apparent willingness to observe the Principles referred to above. Although this was denied, I can only conclude that this Dispute (and those initially listed with it) saw a high degree of procedural quibbling.

As I commented during the hearing, the Principles governing Timetabling Panel dispute hearings require us to reach timely and cost-effective decisions, based on the expert knowledge of the Panel. At various points in this Determination I have commented on our duty to reach decisions based on the legal entitlements of the Parties, and no other grounds. Nothing that I have said, or will say, undermines that duty, but as far as procedure is concerned I used the phrase that Timetabling Panels (and Access Dispute Adjudications) proceed on a basis that is 'legal, but not legalistic'. The Panel hopes that future Disputes will be conducted in this way.

While I am recommending that the Access Disputes Committee should review the format of Notices of Dispute and the procedures associated with them (and I understand that this recommendation has already been accepted), there is, in my view, no other way of describing a claim well into a Timetabling Panel process that rights were reserved as to whether some or all of the relevant Notices of Dispute were, '...valid...in various other respects', which was the position at one point. Nor, as I said in my Directions letter of 4 April 2017, is there the luxury of time within this process for a Dispute Party to 'reflect' on whether to take such procedural points.

- 6.8.2 It should also be noted that in a process which is required to reach a timely determination, case management decisions have to be made on the basis of initial impressions, with the obvious possibility of amending them as the matter unfolds (as happened in relation to all the Disputes originally conjoined with TTP1064). It is a misunderstanding to describe this process as pre-judging any point.

The background, which is understood by Timetable Participants, is that of the large number of decisions in constructing a WTT only a few lead to a referral being registered by the Secretary. Then, only a very small proportion of these lead to a Timetabling Panel hearing being convened, many of which are settled either before the hearing date or during the hearing itself. By the time that a hearing is listed both Network Rail and the TOC/FOC making the appeal will understand the issues at stake. Given this, it is difficult to understand how Network Rail could be prejudiced by not knowing the issue(s) at stake and therefore the case that it has to address in any Timetabling Panel hearing. In any event, in all Timetabling Panels which I have chaired, I have ordered that Sole Reference Documents should be served sequentially, so that Network Rail will also be replying to the case being advanced by the Claimant. (It is also my practice to seek clarification of any point in a Claimant's Sole Reference Documents which is not clear, not least to assist Network Rail in drafting its response).

Regardless of this, the time to raise any objection to a Notice of Dispute is before a Timetabling Panel has been convened. In my Directions of 4 April 2017 I suggested that any such challenge should be raised during the period in which the Secretary asks Network Rail whether it has any objection to a Dispute being registered as a Timetabling Dispute. Once again my recommendations to the Access Dispute Committee are intended to address this point.

- 6.8.3 Although I have observed that the rules about Costs do not require a party against whom such an order is to be made to be given a warning, in a jurisdiction in which costs have only just started to be awarded I think it good practice to give such a warning. I nearly did so at least twice in the period before the first hearing day; in the event of any future conduct of this kind, by any party, I shall have no hesitation in giving such a costs warning and ordering that unnecessary costs incurred by the Access Disputes Committee, and any Dispute Party if relevant, shall be paid by the party with responsibility for such behaviour.

I do wish to record, however, that the conduct of Network Rail's case at the first hearing day (and the second, although that did not deal with TTP1064) was in stark contrast to that criticised above and was beyond reproach.

- 6.8.4 It will be clear from the previous section that the Panel did not accept a number of Network Rail's submissions on legal issues, particularly in relation to the extent of the powers of a Timetabling Panel. In this Dispute the determination is to allow Network Rail's decision to stand, and not to grant any of the other remedies sought by ASR. The Panel, therefore, has clearly not gone beyond Network Rail's interpretation of the powers of a Timetabling Panel. Nonetheless, I do wish to record my disagreement with a number of the points made by Network Rail. The simplest way of doing so is by adopting – gratefully – ASR's submissions in response to the note on Issues of Law which I provided as required by Rule H18(c). These appear in Annex "D".

6.9 Guidance and recommendations regarding operational issues

I hope that it might be possible to deal with guidance on operational issues more shortly.

- 6.9.1 The Panel has a clear expectation that in the construction or amendment of TPRs all relevant sources of information should be used (while accepting that professional judgment will be needed to decide which sources are relevant and to consider the applicability and importance of the outputs).

The duty of consultation placed on Network Rail is important, and is a demanding duty. But this Panel has no hesitation in recording its view that the duty of consultation cannot require Network Rail to agree to all suggestions from TOCs/FOCs (which might anyway contradict each other). A Panel will wish to see evidence of a genuine consultation and a willingness to listen on Network Rail's part and that Network Rail has considered any such proposals by reference to the Decision Criteria, but the corollary is that for an appeal to be successful, the TOC/FOC concerned must have engaged with Network Rail constructively throughout. Any blanket dismissal of proposals from Network Rail, or any unwillingness to explain the TOC/FOC's reasons for disagreeing with such proposals, is unlikely to succeed in persuading a Panel that a decision by Network Rail should be overturned (by whatever means). It is, however, the Panel's view that a proposal to revert to a previous TPR (i.e. maintain the status quo) amounts to a counter-proposal, which could succeed subject to the points made above.

- 6.9.2 In this Dispute reference was made to the requirements of the ORR when examining the operational performance of ASR's services in Scotland. It was not necessary for the Panel to examine this issue in depth, but it clearly expects any requirements of the ORR to be acted upon to the extent that operational performance is expected to be affected by any changes to TPRs.
- 6.9.3 The Panel was impressed by the recent PPM figures claimed for ASR (97% according to Mr Price). It recognises and is concerned by the risk of any proposed changes to TPRs derived from any flawed data affecting both performance and capacity in Scotland. These concerns, however, did not overcome the countervailing reasons which led to the Determination, but in the event of references being registered in future against individual TPR amendments it trusts that the Timetabling Panel determining such future references will wish to be in a position to address these concerns.

7 Determination

7.1 I **determine** that the decision of Network Rail to introduce the New TPRs shall stand.

7.1.1 In the light of this decision I decline to make any of the declarations sought by ASR, although some of these points have been covered in the Panel's guidance and recommendations.

7.2 I confirm that, so far as I am aware, this determination and the process by which it has been reached are compliant in form and content with the requirements of the Access Dispute Resolution Rules.



Clive Fletcher-Wood
Hearing Chair

5 May 2017

Annex "A"

Interested Parties (and whether represented at the hearing of Dispute TTP1064)

For Arriva Rail London Ltd

Andy Roberts Senior Train Planning Manager

For Arriva Rail North Ltd

Georgia Ehrmann Track Access Manager
Leon Foster Service Development Manager

For DB Cargo (UK) Ltd

Stan Kitchin Timetable Strategy Manager

For East Coast Main Line Company Ltd

Phil Dawson Regulation & Track Access Manager
Andrew Long Timetable Development & Planning Manager

For First Greater Western Ltd

Robert Holder Network Access Manager
Matthew Cambourne Short Term Planning Manager

For First Transpennine Express Ltd

Not represented

For GB Railfreight Ltd

Jason Bird LTP Timetabling Manager

For Govia Thameslink Railway Ltd

Robert McCarthy Head of Train Planning

For MTR Corporation (Crossrail) Ltd

Not represented

For Stagecoach South Western Trains Ltd

Joanna Davey Train Planning Manager
Richard Hall Permanent Train Service Manager

For Transport for London

Paul Richardson Service Delivery Manager, Crossrail

For XC Trains Ltd

David Fletcher Timetable Strategy Manager

Annex "B" to Timetabling Panel determination of reference TTP1064

A SUMMARY OF THE HEARING CHAIR'S OPENING REMARKS TO THE HEARING

One of the reasons for my making longer opening remarks than usual is that we have representatives who I don't think have appeared in front of this Panel before. And indeed, against a background of my being appealed by Network Rail previously, unsuccessfully, for not asking a question that it was believed had been fully understood by everybody, Mr Henderson [Counsel for Network Rail], are you making a submission to ask me to recuse myself? [Mr Henderson indicated that this was not the case.]

What is somewhat unusual in the experience of this Panel is the degree of correspondence there was before the hearing. I've reminded Panel members, although I don't necessarily think they needed reminding, that none of that will influence our decisions. We are here today to determine these disputes on the basis of the legal entitlements of the Parties and no other grounds.

As I trust you all know, today we're concentrating on Heads "A" and "B"; if we have new people in on the later hearings I may have to repeat myself. The points which I'm making, I want to emphasise, are general points of principle that are likely to influence the Panel. They do not bear on any individual dispute. One of the benefits of Timetabling Panels, in my view, is that we have a facilitative role. And although, of course, we are here to determine disputes about regulated contracts, experience over the last few years has proved that case management can identify issues which leads to settlement, which has to be a good thing for everybody.

We have even ended up in this room dealing with disputes when the Parties agree across a table that actually they can agree on the issues, although occasionally they then ask us to record that agreement in the determination. And, indeed, we're going to come back to that in the later Heads. This of course can only function with mutual respect. I don't want to sound too dramatic, but I just want to mention the rule of law because in the later hearings we're coming on to a claim that Network Rail has failed to observe the outcome of a previous determination.

And as most of you probably will know, there is a current arbitration on foot over an Access Dispute Adjudication that was specifically dealing with a failure of Network Rail to observe a previous adjudication. And I'm talking about Clay Cross, of course. And of course what is relevant is whatever one thinks of government policy, if external funds are to be brought into the industry it has to be on the basis that contracts will be observed. And that of course is one of our jobs.

And this is why I have already raised the question, which, again, is not for today but for Heads "C" and "D," as to whether if – and of course it's a big if – the Panel were persuaded that Network Rail had failed to observe a previous determination, does that amount to exceptional circumstances under D5.3.1?

Turning to TPRs, it is the Panel's view that they are critically important in assisting in the continual effort to obtain the optimum balance between capacity and performance.

We as a Panel appreciate the difficulties of both operators and Network Rail in seeking to achieve that balance. They have to be as accurate as possible. If TPRs are too optimistic in any respect then performance suffers. If TPRs are too pessimistic, capacity will be reduced. And I've sat on a number of Timetabling Panels where I have always been assiduous to ensure that whether inadvertently or not we do not squeeze capacity unnecessarily.

Now, you go onto the concourse at a station and talk to a passenger and say, 'Half a minute difference in a TPR can have significant effect down the line', and they'll look at you as if you're completely mad. But of course we all understand the importance of the detail. But can it be correct to approach a proposed revision to TPRs by saying the decision to support or propose

one should be based solely on the effect on the WTT?

There is also a question that we will have to come to deal with as to how far ahead TPRs should look. And however helpful it might be to develop TPRs to take account of known changes to the Network, to T&RS or whatever, we as a Panel of course are only dealing with a set of TPRs linked with one specific Timetable. We recognise the risk, for obvious reasons, of any TPR decision fossilising the TPRs, because it could have been a point at issue two and a half years ago and then bluntly everybody forgets it. That is a risk, but I'm afraid because we are only looking at one set of TPRs for one Timetable we have to take that risk.

Back to capacity against performance. Again, I'm re-emphasising we haven't prejudged anything; we're talking about general principles that are likely to influence us. And you're all familiar with the conflicted nature of the Decision Criteria, which is why we have to examine the weight placed by Network Rail on individual criteria in the decision-making process, and whether in our collective judgment this was correct. And this will depend on a case-by-case examination by reference to the Decision Criteria as to the effect of TPR proposals by Network Rail on a Timetable Participant's rights, because we cannot be blind to those either.

Any Timetable Participant's rights are subject to the TPRs and the Engineering Access Statement. If TPRs are properly changed through the formal process within Part D then those changes can trump anybody's rights, for obvious reasons. Because TPRs lead to the construction of the WTT: it's not the other way around. Sometimes a Panel may be in a position to decide by reference to the Decision Criteria whether the benefit of proposed changes outweigh hurt to a Timetable Participant, but I'm emphasising it's "*may*". For example, if a proposed TPR would result in a Timetable Participant either not being offered a train slot for the duration of the Timetable, or offered a train slot well outside its own rights, then the Panel might be inclined to lean towards keeping the status quo. But that is only in the cases where flexibility exists.

Consultation: any Panel is required to look at the degree of consultation, and were a Panel to decide the consultation was a sham then it would be forced to conclude that there hadn't been proper consultation and the duty of consultation had failed. Again, I'm emphasising I'm discussing principles, not specific cases. But if a Panel is satisfied that there has been a genuine consultation, then we proceed on the assumption that Network Rail can't be expected to agree to everything put up by every operator, not least because operators' suggestions may conflict with each other. Network Rail has to make a decision. That is then of course an appealable decision.

We also have a feeling that by the time you get to that level of development of TPRs you are going to have enough management effort concentrated on it that people will really have the Decision Criteria in mind, as opposed to the hundreds of thousands of decisions made every year by people of a level where, yes, they know what the Decision Criteria are, but they're doing it on gut instinct, and that gut instinct will often be right. And it's only the very, very, very odd case that ever gets into this room, and I think it's useful for a Panel sometimes to remember that.

Just a word about the Panel. A key task in these Disputes is to bring the collective skills and judgement of the Panel to decide whether the right balance has been struck. The spread of Panel members represents the industry, and as – well, in case people are not into the arcane nature of the way this Panel is made up, Network Rail appoints some Timetabling Panel representatives to the Pool and the other members in the Pool are elected to represent the different classes within the industry, but none of them is here for their own company or their own part of the industry. And I can say with absolute confidence that from my experience of Timetable Panels the Panel members leave their employer outside the door, but of course their experience and expertise is immensely helpful.

Annex "C" to Timetabling Panel determination of reference TTP1064

EXTRACT FROM THE NETWORK CODE, PART D (13 July 2015)

4.6 The Decision Criteria

- 4.6.1 Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services ("the Objective").
- 4.6.2 In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (the "Considerations") in accordance with Condition D4.6.3 below:
- (a) maintaining, developing and improving the capability of the Network;
 - (b) that the spread of services reflects demand;
 - (c) maintaining and improving train service performance;
 - (d) that journey times are as short as reasonably possible;
 - (e) maintaining and improving an integrated system of transport for passengers and goods;
 - (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
 - (g) seeking consistency with any relevant Route Utilisation Strategy;
 - (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
 - (i) mitigating the effect on the environment;
 - (j) enabling operators of trains to utilise their assets efficiently; and
 - (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates.
- 4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in the light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.
- 4.6.4 The Objective and the Considerations together form the Decision Criteria.

Annex "D" to Timetabling Panel determination of reference TTP1064

LEGAL POINTS PROVIDED BY ABELLIO SCOTRAIL IN CONNECTION WITH ITS OPENING STATEMENT

- 1.1 These are merely initial overview comments.

Extent of Power of a Timetabling Panel (general)

- 1.2 Timetabling Panels are industry panels to solve technical disputes using specialist knowledge (e.g. ADR Rule H14).
- 1.3 Their purpose is to determine disputes which arise out of or in connection with issues of timetabling, timetable change and the allocation of capacity. (ADR Rule H1).
- 1.4 Network Rail cannot be immune to breaches of Part D of the Network Code. Hence Timetabling Panels must have the power to determine disputes practically.

Note also that Timetabling Panels form the first stage of the regulatory review forum in the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, reg 32 [includes 32(2)(f) arrangements for access and 32(11) obligation to comply.

- 1.5 ADR Rules H49-54 deal with determinations. ADR Rules H53 and 54 confirm that parties are obliged to comply with such determinations (and enforcement will be through other mechanisms – ultimately ORR determination, arbitration or court). This is also confirmed by Condition D5.5.1.
- 1.6 ADR Rule H50 confirms the Chair's power to order a Dispute Party to take a specified action and to declare the meaning of a Dispute Party's obligations.
- 1.7 Condition D5.3.1 provides that in relation to Part D, the Timetabling Panel can:
- a) Give general directions to Network Rail about the result to be achieved but not the means of achieving it;
 - b) Direct that Network Rail's decision stands;
 - c) Substitute an alternative decision in exceptional circumstances.
- 1.8 These powers (in particular D5.3.1 (a) and (b)) necessarily confirm that the Timetabling Panel has the power to order that Network Rail's challenged decision does not stand. It provides the right to inform Network Rail of the result to be achieved. As such it must include the right to require Network Rail to withdraw a decision and reach it again according to the Chair's order. It cannot be right that the Timetabling Panel can only confirm a decision not reject it. That power cannot be constrained to merely advisory to Network Rail. Combined with ADR Rule H50, this power is, in any event, clear.
- 1.9 Condition D5.3.1(c) does however limit the Timetabling Panel's powers (which it would otherwise have under ADR Rule H50) to substitute an alternative decision. This can only be done where there are exceptional circumstances. This limitation applies when an 'alternative decision' is proposed (i.e. a different one). It clearly does not apply where the decision itself is rejected.
- 1.10 Note that in Network Rail's reference paragraph 50, Network Rail recognises that "it is of course open to the Timetabling Panel to require Network Rail to carry out further analysis in respect of... individual and identified complaints." Paragraph 58 acknowledges similar powers to direct Network Rail.

What amounts to 'exceptional circumstances' under Network Code Condition D5.3.1?

- 1.11 ORR's decision in TTP985 notes (43) *"there is discretion on the part of both the TTP and ORR to determine what may constitute exceptional circumstances in a particular case"*. ORR declined to give further guidance. In that case a request by Network Rail for a determination was (rightly) considered to amount to exceptional circumstances.
- 1.12 The purpose of this limitation appears to be to ensure that Network Rail (which has the duty to allocate capacity as Infrastructure Manager) is, as far as possible and in accordance with the needs of the operational railway, allowed to take decisions on allocation which may affect more than one operator (and Network Rail's own legitimate business).

Again this reflects the scheme of the Regulations.

- 1.13 Hence it is submitted that a purposive interpretation would be that circumstances are exceptional when (potentially among other circumstances) absent an alternative decision the operation of the railway would be impaired. This could apply, for example, to necessary safety decisions or to decisions which need to be taken to allow continuity of services.
- 1.14 Consequently it is submitted that any decision which needs to be taken urgently to ensure the implementation of the timetable (as required by ADR Rule H9(b) could amount to exceptional circumstances if Network Rail is otherwise not going to be able to take that decision in the necessary timescales.

Can a Timetabling Panel only decide that 'exceptional circumstances' exist if the Claimant has specified in its Sole Reference Document that it regards this as being the case?

- 1.15 Timetabling Panels are an industry process intended to allow proportionate determinations to be reached for the benefit of the industry (ADR Rule H16). As such parties are not usually penalised for incidental technical or procedural failings.
- 1.16 ADR Rule H14 confirms that the Panel shall where appropriate take the initiative in ascertaining the facts and law relating to the dispute. ADR Rule H18(b) confirms that the Hearing Chair is responsible for ensuring the Timetabling Panel is fair and effective.
- 1.17 In this respect the Timetabling Panel (and/or Chair) has the power to investigate and identify the relevant legal and factual case and may make findings based upon such investigation and identification of the relevant issues (regardless of whether they are formally pleaded by a party) provided that in doing so the Panel/Chair acts proportionately, fairly and effectively.

Is Network Rail submitting, in paragraph 59 of its general Defence document, that if a Timetabling Panel is faced with a binary decision it is not entitled to overturn Network Rail's decision in the absence of exceptional circumstances? If this is a correct interpretation of Network Rail's position, is it correct in law?

- 1.18 ASR cannot comment on Network Rail's intention in its submission. If the submission is as stated, then it is not correct. The Chair's powers are as set out above..

Can a Timetabling Panel make general declarations?

- 1.19 Yes – see ADR Rule H50 (in particular H50(b)).

From the above, the question arises as a question of law; it is difficult to distinguish this question from one asking whether there is any practical value in making declarations that Parties must observe the provisions of the Network Code or the AR R Rules

- 1.20 The Chair can make such orders as he considers necessary to resolve the dispute. ADR Rule H50. The declarations sought by ASR are not simply to comply with the Network Code or ADR Rules.

Is it within the power of a Timetabling Panel to order that sums paid to Network Rail by an Access Beneficiary to carry out modelling work, which are now claimed to be abortive as a result of the 2018 Timetable Planning Rules, are to be repaid to the Access Beneficiary? Or, as an alternative, can the Timetabling Panel order that any future modelling work is to be carried out by Network Rail at no further charge?

- 1.21 The Chair can make such orders as he considers necessary to resolve the dispute. ADR Rule H50.
- 2 This TTP Process
- 2.1 ASR is happy to participate in this Timetabling Panel and has made every effort to bring this hearing on in time for it to be factored into the timetabling process.
- 2.2 However, a Timetabling Panel is an industry mechanism. ADR Rule Rule H14 includes:
- a) Determination on the basis of relevant railway expertise;
 - b) Endeavour to reach fair, rapid and inexpensive determination
 - c) Take the initiative in ascertaining facts and law.
- 2.3 In relation to ASR, Network Rail has produced:
- a) 17 page reference;
 - b) 19 Page Witness statement
 - c) 21 page Annex dealing with ASR alone
 - d) Lever arch file of ASR only documentation
- 2.4 ASR has had three working days to consider this response.
- 2.5 ASR does not object to the process. However, the Timetabling Panel should take into account practicalities and proportionality in its approach (if necessary to refer to any provision – ADR Rule H16).
- 2.6 It is not realistic to dispute facts alleged line by line in the time available at this hearing.
- 2.7 In particular substantial material dealing with consultation process pre-D2.2 process.
- 2.8 ASR cannot sensibly engage with all such factual allegations in the time available. ASR nonetheless disagrees with much of it including spin put on e-mails.
- 2.9 ASR must therefore reserve its rights should such issues become important – ASR should not be taken to agree with Network Rail just because it does not specifically challenge Network Rail's allegations.
- 2.10 ASR can put questions to Mr Allen if the Chairman considers it necessary or appropriate. However, it may not be the best use of time. ASR does not accept all of Mr Allen's evidence.
- 2.11 If, after today, the Chair is considering making factual findings based on specific Network Rail submissions not dealt with in full today, ASR seeks opportunity to challenge such facts.

Some degree of proportionality is necessary. We need to be realistic about what can be achieved at today's hearing. We are however keen to engage further on the key points. We would be grateful for guidance from the Chair on how to take forward further submissions or discussion.