APPEAL TO THE REGULATOR AGAINST
TIMETABLING COMMITTEE
DETERMINATION 132

Office of the Rail Regulator
1 Waterhouse Square
138-142 Holborn
London EC2

Friday 11th October, 2002

Chaired by:

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(The Rail Regulator)

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For Railtrack

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P R O C E E D I N G S

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10.05 am

THE REGULATOR: Mr Choo Choy?

MR CHOO CHOY: Good morning, Sir. As you know, I appear for Railtrack on this appeal, and my learned friend, Mr Herberg, appears for Eurostar UK Ltd.

Sir, can I check first whether you have received our skeleton arguments? I assume you have otherwise we would have presumably received a letter from your office saying you had not.

THE REGULATOR: I have received your skeleton argument by fax of Simmons & Simmons of 27th September. I have received one skeleton argument from Eurostar on 30th September. I assume there are no others.

MR CHOO CHOY: What I propose to do basically is to go through the contractual provisions which form the background to this appeal and then through the short facts that pertain to the appeal, and then briefly on to the determination against which Railtrack is appealing, and then complete my opening by summarising my main submissions in support of the appeal.

Sir, the main document we are dealing with is the 1994 TAA which incorporates the track access conditions. Can I first take you to page 2 of the 1994 TAA which was made on 1st April, and therefore a day before your powers under sections 17 and 18 of the 1993 Act became effective. It is common ground between the parties that the agreement is an unregulated agreement for that reason. In terms of the provisions of the agreement that I would like to call to your attention you will see on page 3 the definition of the access conditions at the top of page 3, which is the usual definition of access conditions in track access agreements.

Then, on page 6 you will see a definition of services, which is the Railway passenger services having the characteristics set out in schedule 5 and immediately below that specified equipment means in relation to each of the routes, the routes being defined at the top of the page, by reference to what is in schedule 2:

"In relation to each of the routes the railway vehicles to be used in the provision of services on that route as specified in schedule 5".

The point to note here is that different types of vehicles can be used for certain services and on certain routes but the agreement clearly contemplates that there may be limitations as to Eurostar's ability to use particular types of vehicles for particular types of services.

So far as the substantive provisions are concerned, you will see that on page 6, clause 1.2 contains the definition of permission to use the routes which means in 1.2.1 "To use the track comprised in the routes for the provision of the services using the specified equipment in accordance with the working timetable".

On page 8 the basic grant of permission to use the routes in clause 3, 3.1 the grant of permission to use the routes as previously defined in clause 1.2 and in 3.2 that permission being granted to enable provision of the services to a particular standard.

The next provision is clause 5 on page 9. That is about the incorporation of the access conditions into the track access agreement, as if the conditions have been set out in extenso in the agreement.

Then 6.3.2 Railtrack having to ensure that the network is maintained to a standard which will permit the provision of the services in accordance with the working timetable, and 6.4 "Subject to any requirement under the Act to obtain the approval of the Regulator, Railtrack shall ensure that all operators of trains having permission to use any track comprised in the network agree to comply with the access conditions".

Now, that appears to be an acknowledgement on the part of the parties at that point that because the Regulator's powers are not yet effective, and because it is the Regulator ultimately who would be able to dictate the imposition of a common set of track access conditions on

all operators, that it was felt that Railtrack itself should come under an obligation under this agreement to ensure that its subsequent agreements would indeed have that characteristic, namely the incorporation of the track access conditions. But I mention that simply in passing.

Clause 9.1 on page 11, the term of the agreement. It comes into effect on the commencement date which is defined in schedule 1 to be 1st April, 1994 and it is to continue in force until the earlier of termination pursuant to clause 9 or the expiry date. The expiry date is defined as some date in 2052, 29th July, 2052 on page 24, although as I understand it there is a later agreement entered into in October, 1998 between Railtrack and Eurostar under which all previous track access agreements which would include therefore the 1994 track access agreement will expire upon what is referred to in that later agreement as "the commencement date" which is effectively the date when the first section of the Channel Tunnel rail link will become operational.

I do have the relevant provisions of the 1998 agreement with me, but I suspect that this is an uncontentious point and that it simply reflects the reality of the situation which is whereas unless and until the rail link is completed Eurostar has got to use Railtrack's network, once section 1 of the rail link is completed that particular network of track not being the property of Railtrack PLC will therefore be the subject of an agreement between Eurostar and somebody else rather than the subject of the present grant in this 1994 agreement.

THE REGULATOR: I would like to see the 1998 agreement, if Mr Herberg has no objection - not necessarily now, but if it is available now I would like you to take me to the relevant provisions.

MR CHOO CHOY: I do have a spare copy of the whole agreement if anybody wants to look at it.

THE REGULATOR: I will have the spare copy of the whole agreement, please.

MR CHOO CHOY: Very well [same handed] The provision that deals with termination is page 32, clause 19.

THE REGULATOR: Just before we go there, Mr Choo Choy, this is a contract conferring fresh permission to use or amending the existing contract?

MR CHOO CHOY: Well on the assumption that clause 19 terminates the existing Track Acess Agreements, it must be the case that this agreement, the 1998 agreement is granting a fresh permission to use in accordance with its terms.

THE REGULATOR: Yes.

MR CHOO CHOY: As I say, it was not my intention to get too deeply into that Agreement. I simply make the point that from the commencement date, or from the opening effectively of section 1 of the CTRL, the position is going to be governed essentially by the 1998 Agreement to the extent modified by any subsequent Agreement, as to which I have simply no knowledge.

THE REGULATOR: What is the regulatory status of this contract of 6th October 1998?

MR CHOO CHOY: I do not know what the regulatory status of it is.

THE REGULATOR: I will let you come back to that. Please continue on the point of termination.

MR CHOO CHOY: The next provision is on page 19, which is the dispute resolution mechanism. I just draw it to your attention for the sake of completeness, in particular clause 11.4.

THE REGULATOR: Mr Choo Choy, you seem to have gone wrong. It is not page 19. The first provision I think you were drawing my attention to was on page 32.

MR CHOO CHOY: I am so sorry. I had reverted back to the 1994 Agreement.

THE REGULATOR: Let us just look at page 32 first, clause 19. You were saying that, from the commencement of this contract, which was some time in 1998 ----

MR CHOO CHOY: No, what I said was from the commencement date

as defined in the 1998 Agreement then the existing TAAs will cease to have effect. The commencement date in the 1998 Agreement is defined in schedule 1 of the 1998 Agreement. I do apologise that the more selective extracts that I have copied and have provided to the other side do not contain that provision, but you will see on page 45 that the commencement date is defined as the later of (a), (b), (c), (d).

Because I do not know enough about the 1998 Agreement, all I can say is that the layman's translation of these optional dates is essentially the date of opening of section 1 of the CTRL. I could be wrong about that, but I do not think that I am dramatically wrong about it in terms of when it is likely to be and, as I understand it, that is likely to be probably this time next year.

THE REGULATOR: So the 1994 Agreement is still the one with which we are concerned?

MR CHOO CHOY: Absolutely.

THE REGULATOR: But this contract will come and take its place and extend the expiry date by another 34 years when the time comes?

MR CHOO CHOY: Yes.

THE REGULATOR: We are still dealing with the 1994 Agreement which lasts for another 50 years?

MR CHOO CHOY: Correct, yes. There is one other provision which I might as well show you now whilst we are looking at the 1998 Agreement, which in fact deals with the question of surrender of passenger train slots by the train operator to Railtrack in accordance with the terms set out on page 74 of that Agreement. You will see that there is a procedure whereby the train operator gives notification to Railtrack of its wish to surrender particular rights and provision then for discussion between Railtrack and the train operator regarding whether Railtrack wishes to accept the surrender and, if so, on what terms. If the parties are able to agree the terms of the proposed surrender, then, subject to the consent of the Secretary of State, (a)

and then (b).

You will see in (b), for example, that, "To the extent that Railtrack is able to grant to one or more other operators a train slot or slots to replace all or any part of the passenger train slots so surrendered by the train operator, there shall be paid to the train operator by way of an abatement of the fixed charges ..."

I think it is right you ought to know this for the sake of completeness because, of course, one of the background points that is made by Eurostar is that we are being very hard done by here because we do not have the rolling stock to run the relevant services, although we have the right to and, because for that reason we cannot really intend to operate those services, nevertheless it cannot be right, they say, that we should continue to pay fixed charges in return for a bundle of rights which in reality we cannot exercise. They use that in support of their various arguments of construction.

I do not want to get into that at the moment. I just mention it as part of the background. It is not entirely right to say, as they say, that there is simply no provision in the relevant contracts between Eurostar and Railtrack for the question of surrender of rights. It is simply that, under the 1994 Agreement for as long as that lasts, that is indeed the case but, once the 1998 Agreement kicks in, there is a new regime in place as set out on page 74.

Coming back to the 1994 Agreement - and, incidentally, I do apologise for not raising that point beforehand, it is simply that I came upon it myself rather late in the day - I was about to go on to page 19. That is simply the dispute resolution mechanism and it is effectively the mechanism under which the parties had proceeded in relation to the first instance reference to the TTSC.

Clause 15 on page 20 is a provision headed "Non waiver" but, if one reads the provision, it is pretty clear that it is dealing with two separate circumstances. The

first circumstance it is dealing with in the first sentence is "No waiver by any party" (I think it ought to say) "of any default by another in the performance of any of the provisions of this Agreement shall operate or be construed as a waiver of any other or further default, whether of a like or different character". In a sense that is a statement of the obvious, but the sort of boiler plate provision that parties often like to have for the avoidance of doubt.

The second sentence deals with a slightly different situation which is where there is a failure to exercise a right or remedy under the contract, or a waiver of a right or remedy, in which case no single or partial exercise of any right or remedy under this Agreement shall prevent any further exercise of the right or the exercise of any other right or remedy.

In fact, I think I may have wrongly summarised the first part of the second sentence. What it actually says is, "The failure to exercise a right under the Agreement shall not constitute a waiver of that right". Again, a statement of what to a lawyer would be blindingly obvious but, again, a provision added for the avoidance of doubt.

I have made a point about that in my skeleton argument in relation to the proposition that the result of Railtrack's stance in relation to inclusion or non inclusion of the relevant train slots in the draft timetable is equivalent to a waiver or a negation of Eurostar's contractual rights to operate the relevant services, the point being that what has actually happened and has been happening over the last few years is that they have chosen not to exercise their rights. In commercial terms that is the same thing as not having it or having lost it, but legally they are two entirely different situations.

I can then move on to schedule 5, I think, which deals with the services and the specified equipment. The services we are dealing with in this case are the night services,

and you see references to "ENS trains" which I think mean European Night Services trains.

THE REGULATOR: Is that defined anywhere else in the contract or does one just assume it?

MR CHOO CHOY: I could not find a definition of it but on page 36 you will see there is a reference to European Night Services in the heading. I suspect that the page before page 39, which is unnumbered contains lists at the bottom, a number of night services, and in the heading, or in the table defining the relevant specified equipment, you see a reference to ENS coaches, and I think from that one can infer that ENS is being used as an abbreviation for European Night Services.

THE REGULATOR: Yes.

MR CHOO CHOY: And I am told also that on page 38 there is a list of rolling stock under paragraph 5.1.1 which says "European Night Services rolling stock", and then goes on to talk about sleeper and lounge cars and generator vans. Again, that ties in with the table I just showed you.

THE REGULATOR: In paragraph 5.1.1 on page 38, the second paragraph underneath is the one you referred to, European Night Services rolling stock and that refers us to which part - annex C?

MR CHOO CHOY: Annex C, I could not find the lettering in the annexes, but one can only deduce, assuming this is the complete agreement, that what is the last page of schedule 5, in other words, before you get to page 39, must be the relevant annex.

THE REGULATOR: On the grounds that it is the third one?

MR CHOO CHOY: Well on the grounds that there is no other document that actually describes the specified equipment. Well that is wrong actually, because there are another two pages, just before the last page which also describe the various types of specified equipment, but that table is in a slightly different format, but it seems to contain the same information.

THE REGULATOR: It is not entirely legible, is it?

MR CHOO CHOY: Nor is it entirely legible, you are absolutely right.

THE REGULATOR: How does one connect, because I think it is, may be highly relevant in this appeal, as I follow your argument, and as I follow the skeletons, Eurostar may only operate this specified equipment in the stated slots, and so I am anxious that you and Mr Herberg should give me some guidance as to how we determine without any doubt that we can be sure that it is only the European Night Service stock which is permitted to be operated in the train slots in question.

MR CHOO CHOY: Yes.

THE REGULATOR: How rigid a connection can you make for that proposition if it is one you wish to make?

MR CHOO CHOY: I think one can see that by reference to the second unnumbered page after page 38. I think that the true analysis is this, that annex C is the first two unnumbered pages which appear across the page immediately after page 38, that would tie in with paragraph 5.1.1 saying: "For the routes described in attached matrix, annex C", and the relevant rolling stock.

THE REGULATOR: So where are annexes A and B.

MR HERBERG: I also ask Mr Choo Choy in answering that to actually identify the pages rather than just doing it by the number after, because I suspect that at least the version of the same thing which is annexed to his own statement of case appears to be in a different order, confusingly, because there, certainly in my copy, page 38 is the very last page of the whole of schedule 5, there are no pages following it. So it may be quite important what order we have actually got the pages in.

MR CHOO CHOY: Yes. My understanding is that the schedule that was copied as part of the consolidated statement was not quite the right order. The agreement that I am working from is an exact copy of the original which I have had inserted in a separate bundle. I have not been working from the extracts of schedule 5 that are annexed to the

consolidated statement.

THE REGULATOR: Mr Herberg, what contract are you working from?

MR HERBERG: Well, I am afraid to say that on this provision I have been working from that extract primarily. I have them both here.

THE REGULATOR: Where in the consolidated statement do we find this extract?

MR HERBERG: We find this at annex 2 - I am sorry it is not actually to the consolidated statement, it is to Railtrack's own appeal document. Railtrack's document of appeal has a substantial number of annexes which is the first place that the Track Access Agreement, schedule 5 of it only, was set out.

THE REGULATOR: And this is beginning at page 1020?

MR CHOO CHOY: That is correct, yes.

MR HERBERG: I am not seeking to claim that one version is correct and the other is wrong at this stage. I just thought I ought to point out the discrepancy.

THE REGULATOR: Yes, my consolidated statement finishes at page 38 as well.

MR CHOO CHOY: That is why we suggested to both your office and the other side that it would be sensible to have a full copy of the actual agreement to work from today.

THE REGULATOR: Mr Herberg, do you have a full copy of the actual agreement?

MR HERBERG: Yes, I do.

THE REGULATOR: So, if we depart from the consolidated statement version to the actual version, are you in any difficulty then?

MR HERBERG: No, I am not, Sir.

THE REGULATOR: If we can all use the full copy, we are talking about three pages which appear between pages 38 and 39. Do you have such pages, Mr Herberg?

MR HERBERG: I have more than three pages between pages 38 and 39.

MR CHOO CHOY: Well, I only have three, I am afraid.

THE REGULATOR: What I suggest we do is I will adjourn this for

15 minutes for the instructing solicitors and counsel to establish that everyone is working off the same copy and it is a correct copy, and I will leave my copy here. So I shall return at 10 minutes to 11.

(Short break)

THE REGULATOR: Mr Choo Choy.

MR CHOO CHOY: We have been able to put schedule 5 in better semblance of order. We don't have an explanation for what is supposed to be annex A and annex B, but we think we have worked out what annex C and annex D are. We certainly have not seen references in the text to annexes A and B, so it is a slight aberration, but we have re-ordered your schedule 5 in the order in which we think it ought to be. Perhaps I can take it briefly.

THE REGULATOR: Before you do, Mr Herberg, are you content that we are all now looking at an identical document?

MR HERBERG: Sir, yes, I am. We have checked with each other and with your own copy, Sir, and I am happy on that.

MR CHOO CHOY: Thank you. I was looking at page 32, which is the very first page of schedule 5, where you start off with the service characteristics. In paragraph 1 on page 32 there is a reference to four trains per hour between 0600h to 2300h together with two ENS trains between 2300h and 0600h. I will come back later to the reference to two ENS trains. There is a provision then, "less two trains for which slots are not currently available but for which EPS" (Eurostar) "wishes to operate should they become available through the operation of a procedure set out in Part D of the Access Conditions", which in a sense illustrates the point that it will generally be important for train operators to have accurate information in the course of the operation of the Part D procedures to be able to decide whether or not they are able to bid for particular slots.

Further down, in paragraph 2 there is a reference to "four trains per hour 0830h to 2300h plus an additional four ENS trains", and you see another reference to ENS services under paragraph 3, Kensington to/from North of

London.

In paragraph 4, appendices, "Attached to this document is an appendix specifying services that will run in compliance with the requirements set out above".

Perhaps we ought just to glance briefly at that appendix which you will find after page 38. You can see on the first page of that appendix, which is in landscape form, that the very first service that is shown is an 0405h from Kensington Olympia to 0835 Swansea, and an 0250 to 0835 between Kensington Olympia and Plymouth and so on. Those are two examples of some of the night services that are identified in the appendix, although of course the appendix goes on to deal with far greater numbers of other types of services.

At page 33, paragraph 5 of schedule 5, you see reference to either party not being entitled but having the right to give notice seeking the consent of the other to vary from the dates specified in the notice any of the requirements set out in part 1 of schedule 5, and an obligation on the recipient of the notice to use its best endeavours to accommodate the proposed variation or any other variation that would also reflect that requirement.

Then at page 34 you will see a reference to inter-capital services. I do not think I need to go through that one and I can skip over page 35 as well which deals with North of London services.

THE REGULATOR: Are any of these inter-capital or North of London services night services?

MR CHOO CHOY: No. You then get to page 36 which deals with European night services sleeper trains. I do not propose to read it all out but you can see the relevant paragraphs, 3.1, 3.2 to 3.5.

THE REGULATOR: 3.4 does point to the proposition that a slot is to be used.

MR CHOO CHOY: Yes. I do not think there is anything material on page 37. Paragraph 38 is a description of the specified equipment, "European Passenger Services Limited", i.e.

Eurostar, “will operate the service with the following specified equipment as defined on the date of registration. For the routes described in attached annex C..." the first paragraph deals with inter capital and North of London units, and then relevant for present purposes: "European Night Services rolling stock, sleeper and lounge cars and generator vans", which is the relevant description we are dealing with, and I think that is agreed.

THE REGULATOR: Yes, I was a little puzzled by this, perhaps you can help me with this.” The routes described in attached annex C", which includes day services and night services as I follow it, we then have in paragraph 5.1.1 on page 38 a list of the possible rolling stock which can be used in those slots, and the class 373 1 and 2 are for the inter capital and North of London units, as you pointed out.

MR CHOO CHOY: Yes.

THE REGULATOR: Is it therefore your case that those units could not be used for services specified on page 36, but instead may only be used respectively for the services on page 34 inter capital, and page 35 North of London. Is it that rigid?

MR CHOO CHOY: Yes, well you can see that in fact from what is annex C.I can show you that very quickly.

THE REGULATOR: I would like to come back to page 38.

MR CHOO CHOY: Yes.

THE REGULATOR: Please proceed.

MR CHOO CHOY: If you go to annex C, it is the landscape document, you will see described in at the very bottom of the first page of the annex North of London day trains and night services, and you will see that---

THE REGULATOR: I am not with you.

MR CHOO CHOY: I am so sorry. Three pages from the end of tab 5 you should have a list of routes and the heading is European Passenger Services.

THE REGULATOR: Are you saying that is where annex C begins?

MR CHOO CHOY: Yes. That is what we have worked out between

ourselves, yes.

THE REGULATOR: Mr Herberg, are you content that that is so?

MR HERBERG: That this is annex C, yes.

THE REGULATOR: And this is where it begins?

MR HERBERG: Indeed, sir.

MR CHOO CHOY: You will see at the bottom there is a reference to North of London Day Trains and Night Services, and over the page you see a reference certainly in 6, 7 and 8 to West Coast/North West Overnight Trains, Great Western Night Trains, London to Swansea/Plymouth. Then 8: North London Line Night Trains. Indeed, I think in item 5 there is a reference to Scotland Night Services via East and West Coast routes, and those four categories are all categories in respect of which class 373/1 and class 373/2 are not shown as shaded, i.e. you cannot use them.

As I understand it the only locomotives you can use on those services are those described as either class 92, or class 37/5 but with the E&S coaches. There is also a reference to generator vans which, as I understand it you need for diesel locomotives.

It is agreed between the parties that that is the relevant description of the rolling stock for the services and issue on the appeal, and that is also reflected on the next annex, which is the next page, right at the bottom of that annex where you see a list of Night Services, and references to 7 ENS coaches, etc., and locomotives are identified as either class 37/5 or class 92 - in some instances with generator van, i.e. where there is class 37/5 these are locomotives involved.

Just to clarify the relevance, if any, of this information, I think it is common ground between the parties that Eurostar at the relevant time did not intend to operate the night services, there is no issue about that. The relevance of the particular type of rolling stock that would have been engaged by the operation of such services is that as Railtrack explains it is when one became aware of the fact through public sources that the

relevant rolling stock that would have had to be used for those Night Services had been disposed that it became clear to Railtrack that indeed it was the case that Eurostar was never going to operate the services. So in a sense it is a slight tangential issue, but it is one that has nevertheless to be dealt with, but I thought I should make it quite clear on this appeal, as I have set out in my skeleton argument, I think, there is no issue between the parties that at the relevant time, on or before the priority date, 27th June, 2001, Eurostar did not intend to exercise its rights to operate the night services.

THE REGULATOR: And the point that I am interested in is that even if they had intended to they could not have done so?

MR CHOO CHOY: They could not have done so, yes.

THE REGULATOR: Because on your analysis only the rolling stock specified in annex C was permissible to be used in these train slots, and that rolling stock was not available to Eurostar?

MR CHOO CHOY: Yes.

THE REGULATOR: There is a suggestion in Eurostar's skeleton that the rolling stock might have been used?

MR CHOO CHOY: Yes.

THE REGULATOR: Would you like to deal with that point?

MR CHOO CHOY: Yes, I saw that reference. There are two points to be made about that. First of all, it is not entirely clear to me what type of rolling stock is being referred to. There was certainly no evidence produced to the timetabling subcommittee that the rolling stock of the contractual type, of the permitted type could have been made available.

The second point is it is irrelevant, because on our case what is required by condition D2.1.2 is a declaration or notification by the train operator of its actual, i.e. real intention to operate the train services. So even if Eurostar had two warehouses full of the relevant rolling stock but did not intend to exercise those rights the correct legal position is they had to say "We do not intend

to exercise our rights to make the relevant train movements".

That is why I say, in a sense, the question of availability of rolling stock is only an evidential point. It does not actually influence the key legal test which is: Did they intend to do what they said they wanted to do, or was it simply, as we say was the case, a ploy to attain a collateral commercial advantage, which they may have seen as being perfectly legitimate which, in commercial terms, one may say is legitimate, but it does not detract from the question which arises on the appeal which is in terms of the timetabling process, and the compilation of the draft timetable whether what is required is a declaration or a notification of actual intent, as opposed to what they themselves call an "artificial" notice for the purposes of securing a particular commercial objective.

But you are right that they do make the point, we could have got alternative rolling stock, but equally, and somewhat inconsistently with that point they accept that the fact of the matter was they did not intend to operate the train services at the relevant time and, indeed, have never done so.

But just so that I can complete the overview of schedule 5, I think we were on page 38 and I have taken you to the specified equipment - in fact, I think that is all I need to show you on schedule 5, in fact, I think I have shown you everything in schedule 5. I can move on to the relevant provisions of the Track Access Conditions.

THE REGULATOR: As schedule 5s go it is, I think, the shortest I have ever seen.

MR CHOO CHOY: Yes, it is very good going, I have to say, yes.

THE REGULATOR: And is also the most difficult to interpret.

MR CHOO CHOY: Yes, well it may, of course give the lie to the proposition that the shorter the document is the better or clearer it is, but never mind.

The Track Access Conditions are relevant as to Part D and that begins on page D1 and I am looking at the Part D

that is applicable to the Summer 2000 timetable, and subsequent timetables. The version I am working from is that which was published on 9th June, 2001. Yours may be the next version which is 15th February, 2002.

THE REGULATOR: Yes.

MR CHOO CHOY: The only difference being if you are using 9th June, 2001 version first that was the version that was in fact in operation on the date when Railtrack took the decision to exclude, or refuse to include the Night Service train slots in the draft timetable.

I do not think anything turns on whether one looks at the 9th June, 01 version or the 15th February, 02 version. It is simply that in the 9th June, 01 version you can actually see the most recent amendments since 17th November, 2000 highlighted. One of the points that is apparent from my version is that condition D2.1.2 appears, and this may also be apparent on your version because the dates are at the bottom, to have been inserted in March, 1999, but mine is actually shown underlined, but I do not think much turns on that. It is not going to be apparent from your version.

THE REGULATOR: No, it is not. I think it would be useful, given that D2.1.2 is so crucial to the appeal if you were just to read it and we can just be sure, because I am working from 15th February, 02 version.

MR HERBERG: It might be convenient if I just indicate, sir, that I am working from the same version as you.

MR CHOO CHOY: Let me read out 2.1.2. It says:

"Declaration of rights to be exercised. Bidders shall, on or before the priority date, notify Railtrack in respect of the timetable development periods ending on the next following summer change date and the subsequent winter change date (a) those firm contractual rights that they intend to exercise, (b) those firm contractual rights that they do not intend to exercise, (c) any other rights which they intend to exercise or wish to negotiate; and (i) in the case of paragraphs (a) and (c) above, shall give an

indication of the train slots that will be bid for in exercising those rights and (2) in the case of paragraph (c) above shall distinguish between (A) train slots for which they would be seeking priority in the draft timetable in accordance with Condition D2.1.4(b) and (B) other train slots".

From what I can see, to the extent that there are no underlinings in the February 2002 version, that means that it corresponds to my version.

THE REGULATOR: There is only one difference between the version that Mr Herberg and I have from the one that you have, "the next two following", and I do not think that makes any difference, so let us proceed.

MR CHOO CHOY: Yes. Before I get to 2.1.2, may I just make a few preliminary observations or preliminary references to other provisions of Part D. We know that the explanatory note is not part of the Access Conditions but, equally, it is pretty plain and common sense that they express quite nicely the basic purpose of the relevant part.

What I would like to draw to your attention is the following. First, paragraph (a): Part D sets out the procedures by which the working timetable, rules of the route and rules of the plan may be changed [in respect of the timetables that will operate on or later than 28th May 2000]. Although changes may be made to the working timetables at any time, significant changes in the passenger timetable may be made only twice a year, namely at the dates when the summer and winter passenger timetables come into effect.

"(b) The development of a robust timetable demands dialogue between Railtrack and bidders, i.e. train operators and others entitled to take part in the process, between the bidders themselves and also between bidders and their customers or customers' representative bodies.

“(d) Railtrack has the role of managing the working timetable. It is responsible for accommodating within the timetable the contractual service specification of each

train operator. Such specification will normally allow a degree of flexibility to both Railtrack and the train operator, both in terms of the timing and other characteristics of the services. A passenger train operator's train slots are fully protected in so far as they are based on firm contractual rights which are not inconsistent with the applicable rules of the route and/or applicable rules of the plan provided that the firm contractual rights have been declared no later than the priority date. Any such flexibility will operate within the confines of the applicable rules of the route and the applicable rules of the plan which, like the service specification, will constrain Railtrack's ability to flex the timetable.

"(f) Each year at or before the start of the detailed process for development of the summer timetable there will be preliminary dialogue between Railtrack and bidders regarding the train services which the bidder aspires to run in that summer timetable or next succeeding winter timetable. Each bidder will make a formal declaration of those contractual rights (as set out in the bidder's Access Agreement with Railtrack) that the bidder will wish to exercise in support of these services and give an indication of the train slots which will be sought. This may be expressed in the form of variation to the services currently running. The declaration must be made on or before the priority date.

"(g) To facilitate the proper processes of dialogue and consultation Railtrack will convene an annual timetabling conference just before the priority date and invite all the bidders to attend to discuss openly the services which they seek to run in the following summer and succeeding winter timetable and to discuss any concerns that they may have regarding the preliminary rules of the route and of the plan and then, following the timetabling conference. . . Railtrack will lead a joint industry process with bidders to prepare and issue a draft timetable

taking account of the consultation held before, during and after the timetabling conference. Railtrack will also issue its final proposals for the rules of the plan and of the route, and all Railtrack's decisions must take account of the decision criteria in Access Condition D4."

So clearly the preparation of the draft timetable is seen as, first, a joint industry process and, secondly, a process that involves decisions being made by Railtrack.

"(h) On receipt of the draft timetable bidders will prepare their formal bids for train slots. These may confirm, amend or delete the slots shown in the draft timetable. It is not intended that the formal bidding stage should be used to effect significant service changes; however, to ensure appropriate discipline, it should be noted that rights which have not been declared by the priority date are protected only in respect of service quantum." That appears in the substantive conditions themselves. "Railtrack, in considering the relative claims of conflicting bids, will give precedence to those bids supported by rights which have been declared by no later than the priority date followed by bids supported by other rights where the existing quantum of services is not exceeded and thereafter will consider any other bids."

I do apologise for reading all of this out. Perhaps I should simply direct you to the relevant provision and not read it out as it can be quite tedious. The only other provision you may wish to look at is paragraph (l), which actually deals with the bid consideration process. Perhaps I can leave you to read it to yourself.

THE REGULATOR: I am familiar with it.

MR CHOO CHOY: Thank you. Page D4, just a few definitions to get things in context. ‘Bid’ means a bid made to Railtrack for one or more train slots"; "'bidding information' means the applicable rules of the route and of the plan and the draft timetable to be issued by Railtrack pursuant to Condition D3.1"; "'decision criteria' means those criteria set out in Condition D4"; "'development commencement date'

means the first day of a timetable development period"; "'draft timetable' means the most recent draft of the working timetable which Railtrack has drawn up in accordance with Condition D2.1"; and then a definition of "firm contractual right" which is important, "means in the case of a bidder a right under its Access Agreement in respect of the quantum, timing or any other characteristic of a train movement". (b) is irrelevant for present purposes, but then there is a further provision at the end, i.e. "[a right] which is not expressed to be subject to any contingency outside the control of the holder of the right, except in a case within paragraph (a) above, the applicable rules of the plan and of the route".

Of course, we saw earlier in the form of schedule 5 to the 1994 TAA what quantum, timings and other characteristics of train movements Eurostar is entitled to in relation to the night services.

Then there is a reference to priority date on page D6. It is the date occurring not more than four weeks after the development commencement date relating to the timetable development period ending on the summer change date, by which bidders, in accordance with Condition D2.1.2, must notify their right to Railtrack. I think it is common ground in this case that the priority date is 27th June 2001.

I am told quite rightly that page references may be different because I am working from an earlier version, but the next definition is "timetable development period", and it means in respect of any passenger date, change date, the period of development of the working timetable to be implemented on that date being a period of up to 50 weeks ending on that date and comprising in chronological order, etc. So it is quite a lengthy process, clearly, it is time consuming and no doubt extremely arduous for those actually undertaking the task, which is why there is this long development period and a series of stages that the parties have to go through to get to the point where they end up

with a working timetable for a relevant summer or winter timetable.

THE REGULATOR: In your account of the relevant definitions would you also say that it is important to look at the definition of "train slot", which speaks of a train movement?

MR CHOO CHOY: Yes. That is my next definition. "'Train slot' means a train movement", and indeed, interestingly, "a train movement or", those words were added I assume in July 1999 because previously it appears to have said only "a series of train movements". It is "a train movement or a series of train movements identified by arrival and departure times at each of the start, intermediate where appropriate and end point of each train movement".

Going on to Condition D1 itself, D1.1 is a reference to the establishment of systems and the management of systems necessary to implement the procedures described in Part D.

At paragraph 1.4, "Railtrack shall at least four weeks prior to the development commencement date and after consultation given notice to each bidder of the date of each of the cycles and periods comprised in the development period".

Then the working timetable at 1.5.1, "Railtrack shall draw up a timetable showing so far as reasonably practicable every train movement on the network including [(a), (b) and (c)], subject to any amendment pursuant to Part H."

Of course, it goes without saying that the working timetable is a timetable of real train movements, not fictitious ones.

Over the page we get to the provisions that are more directly relevant to the appeal. At 2.1 there is first a process of consultation which is part of the process for the establishment of the draft timetable. The two provisions I draw to your attention specifically are 2.1.1.1, "Railtrack shall consult with bidders before the

priority date to establish their aspirations for development of their services in the relevant timetable [development] period"; 2.1.1.2, Railtrack to facilitate the dialogue between the bidders to identify opportunities; and 2.1.1.3, “Railtrack shall use its reasonable endeavours to answer any enquiries made by any bidder in relation to the development of its services".

That is the consultation process. Once that has taken place, one then has in Condition D2.1.2 the declaration process and, critically, D2.1.2 provides that "bidders shall, on or before the priority date, notify Railtrack".

Pausing there, the first point is the word "shall" - i.e. it is the bidders who are obliged to do that which is described in Condition D2.1.2 and, secondly, they have to do so in the context of this Condition on or before the priority date - "shall notify Railtrack in respect of the [relevant] timetable development periods. . . (a) those firm contractual rights that they intend to exercise [and] (b) those firm contractual rights that they do not intend to exercise".

Clearly, (a) and (b) are mutually exclusive - that goes without saying - but they are also comprehensive in the sense that they rightly assume that either the bidder intends to operate certain services or does not, and there is no doubt, in my submission, that "intention" here means actual intention, not an artificial intention or an artificial declaration of intent designed to do something other than to disclose for real what the train operator wants to do about the relevant train services, and in particular whether those services are going to be operated.

That obvious point, in my submission, is only reinforced by later provisions, as we will see, the first of which is D2.1.2(c). In fact, the numbering is slightly confusing because you start off with normal lettering and then you move on to Roman numeral numbering which is intended to qualify all of the lettered sub-paragraphs rather than just sub-paragraph (c), which is a point I did

not immediately appreciate.

Critically, Roman numeral (i) under (c) provides, "In the case of paragraphs (a) and (c) above, shall give an indication of train slots that will be bid for in exercising those rights". The first point is that there is no reference in Roman numeral (i) to (b) because ex hypothesi in Case (b) there is no intention to exercise the rights and therefore pointless or irrelevant to give an indication of the train slots that are going to be bid for; but, in the case of (a), a requirement that the notice to Railtrack shall give an indication of the train slots, i.e. the actual train movements, that are going to be bid for in the exercise of the relevant rights.

2.1.3 Draft Timetable: "Railtrack, after consultation with bidders, will compile a draft timetable which is in accordance with condition D2.1.4 and which (a) in Railtrack's opinion is capable of being brought into operation, and (b) takes account of the need to achieve optimal balance between the declared aspirations of each bidder and the aspirations of Railtrack as expressed in the applicable rules of the route, and the applicable rules of the plan."

So there are three requirements here that are imposed on Railtrack, or duties. First, Railtrack must ensure that the draft timetable is in accordance with D2.1.4. Secondly, it has to ensure that the draft timetable is capable of being brought into operation; and thirdly, it has to achieve optimal balance between the declared aspirations of each bidder, and the aspirations of Railtrack set out in the rules of the route or the plan.

Clearly, that process involves, or will involve, Railtrack at various stages taking views on things or taking decisions. We will come to the significance of that later, because one of the points that is made by Eurostar is that there is simply nothing in this contract or Track Access Conditions to say that Railtrack can act as judge, as it were, in relation to the question whether or not

there has been a proper declaration of intent under condition D2.1.2 so that it is therefore said even though we admit on this appeal we had no intention as we declared, nevertheless because we have made the declaration Railtrack is stuck with that and must proceed as if it were a genuine declaration even though they accept it is not. So I will come back to the significance of what I may call "the decision point" later, but I simply outline at this stage that as a matter of commonsense what is contemplated in D2.1.3 because it is Railtrack's duty to ensure that certain things are achieved that clearly Railtrack will have to take certain decisions.

That becomes clearer in condition D2.1.4. "Priorities in compiling the draft timetable. Without prejudice to the operation of condition D3.4...." which deals with the bid consideration stage, which we do not have to worry about for the moment, "...or D3.6" which deals with flexing rights, without prejudice to those "Railtrack shall, in determining the order of priority for inclusion of train slots in the draft timetable, accord priority first, to the satisfaction of any firm contractual rights which are declared by the bidder on or prior to the priority date in accordance with condition D2.1.2(a) and which constitute firm contractual rights on the intended dates of the operation of those train slots."

Two points here. The first is that there is a very clear reference here to priority being accorded in relation to rights which have been declared in accordance with condition D2.1.2(a). Accordingly, if a particular declaration has not been made in accordance with condition D2.1.2(a) the relevant train operator cannot rely on condition D2.1.4(a) for priority of inclusion.

Secondly, the words at the end of subparagraph (i), which constitute firm contractual rights on the intended dates of the operation for those train slots, reinforced the point that firm contractual rights are rights to operate the relevant train movements or services.

After that first level of priority one then gets in descending order of priority, (b), second, "the satisfaction of any rights or expectations of rights..." and the reference to "rights" here is in contrast to the reference to "firm contractual rights" so that one infers that the rights being talked about in (b) are rights of a contingent nature, or indeed not rights at all, but simply expectations of rights which:

"(i) are declared by a bidder on or prior to the priority date in accordance with condition D2.1.2(c) and correspond to firm contractual rights held by the bidder at the priority date and an agreement in force on that date but which, at the priority date are prevented from constituting firm contractual rights only because any or all of the intended dates of operation of those train slots fall after the expiry of the agreement... or fall after the expiry of the firm contractual rights from which those train slots are derived..." etc.

(C), which is the lowest level of consideration, “having due regard to the decision criteria to the satisfaction of any other rights, or expectations of rights which a bidder (A) may have under an access agreement which is in force at the priority date or (B) may seek pursuant to condition D1.2 but which shall not have a priority date under an access agreement which is in force on that date..." etc.

Though I can jump to --

THE REGULATOR: Before you do, is it asserted or understood that if Eurostar cannot establish that their bid is for firm contractual rights, or higher priority under D2.1.4A that in some way their rights can get in lower down the order of priority rather than being ruled out of court altogether?

MR CHOO CHOY: That argument has never been advanced and as I understand it is not being pursued on appeal.

THE REGULATOR: I will expect Mr Herberg to address that point when he comes to make his submissions.

MR CHOO CHOY: Yes, if he takes a different line then I may have to come back to it. It is fair to say, however, from the case that they had expressly put forward to date, it is implicit from that case that they could not run that argument, or that that argument if they were to run it would not avail them, because they accept, and this is the slight paradox in their case, they accept that at the bid stage, or the bid consideration stage when Railtrack has to apply the decision criteria, it would be permissible for Railtrack to exclude the relevant train slots from their formal bid. I think they accept that in their---

MR HERBERG: No, that is not right, we do not accept that we could have been excluded, had we proceeded to the bid stage we could have been excluded.

MR CHOO CHOY: In that case I retract what I have said, I have probably misinterpreted what they said about what hypothetically might have happened if they had made a formal bid. In a sense it will not get to that because all that is in issue at the moment is the question of the draft timetable, and what goes in it.

I think I can skip over 2.4 and 2.5. 2.3 deals with major projects which are irrelevant. 2.4 is to do with the process through which Railtrack has to go in order to amend the rules of the route or rules of the plan. Then something to note in paragraph 2.4.5 that Railtrack has the right, having consulted affected bidders "to make further modifications to the applicable rules of the route and the applicable rules of the plan subject to the application of the decision criteria to facilitate optimisation of the draft timetable and Railtrack shall promptly notify the bidders thus affected."

It is the same theme, in a sense, as what one can deduce from condition D2.1.3(b) which is to do with the optimisation of the draft timetable.

Condition 3.1 "Bidding information". "Railtrack shall include in the bidding information relating to a passenger change date (1) the applicable rules of the route and the

plan, and (2) the relevant portion of the draft timetable".

So critically the relevant portion of the draft timetable for a particular bidder will be part of the bidding information, and under 3.1.2 "Railtrack must, prior to the bidding period, provide the bidding information to each bidder..", and then "each qualified person...." etc.

The significance of this point is plain, and that is that all bidders that are interested in a particular part of the network need to obtain the same or the relevant bidding information from Railtrack in order to enable them to decide what to bid at the formal stage. In the course of that process bidders will obviously rely on what they read in the relevant portions of the draft timetable.

Condition 3.2, "The making of bids. Every bidder shall have the right to make a bid in accordance with this Part D to confirm, change, delete or add to the train slots shown in a version of the draft timetable comprised within the bidding information." Although you may recall that in the context of that provision the contemplation, certainly in the explanatory note is that there will not be significant service changes between the time when declarations are made at the draft timetable stage and the formal bid stage. But one sees a recurrence of that idea later in Part D.

Condition 3.3 deals with the contents of a bid. I do not propose to read it all out. One of the items that is identified, for example, is the railway vehicles to be used, but it is more wide ranging than that.

Then 3.4, "Without prejudice to the operation of Condition D3.6", which is about flexing rights, "Railtrack shall, in determining the order of priority for accepting bids, apply the following procedure in relation to all bids other than spot bids by according priority (a) first to the satisfaction of any firm contractual rights which (i) a bidder may have, provided that the rights have been notified to Railtrack on or prior to the priority date in accordance with Condition D2.1.2(a)".

That is an important provision because, even at the

bid consideration stage, the order of priority of inclusion, or the order of priority of bid consideration, is being formulated by reference to the declaration of firm contractual rights made in accordance with Condition D2.1.2(a). That, in my submission, shows two things.

First, it shows the importance of the declaration or notice under Condition D2.1.2(a). It defines not simply the priority of inclusion in the draft timetable but it also drives the priority of consideration of bids at the formal bidding stage.

The second point is this. It highlights the assumption or the explanation in the explanatory note that significant service changes, certainly as regards firm contractual rights, are not actually intended or expected between the notification or declaration stage and the formal bidding stage. It buttresses that particular point.

Both points are inconsistent with the notion that one can simply use the device of a false or artificial declaration under Condition 2.1.2(a) in order to secure some commercial objective that is perceived by the relevant bidder to be a laudable objective.

Before I move on from paragraph 3.4.1, you will see in sub-paragraph (a)(i)B, "The rights were exercised in the corresponding summer or winter timetable prior to the timetable that is being prepared but have not been notified to Railtrack on or prior to the priority date in accordance with Condition 2.1.2(a). In such case only those rights which relate to quantum shall have force."

You may recall the reference in the explanatory note to the situation where the relevant bidder misses the boat, as it were, in terms of the declaration, in which case he gets priority in terms of the quantum of the rights, but no more.

THE REGULATOR: As long as he exercised them in the last timetable period.

MR CHOO CHOY: As long as those self-same rights had actually been exercised in the preceding timetable, absolutely.

THE REGULATOR: Which in this case is not so.

MR CHOO CHOY: Which is not so in this case.

Then you have, again, the same descending order of priority as in the case of the draft timetabling process in 3.4.1(b). In the case of rights or expectations of rights, which fall within the description set out in Condition D2.1.4(b), and then in (c) you have a reference once again to the decision criteria, and also another (d), again which refers to another potential sub-set of rights or lesser rights or expectations.

I can then go to 5.1, which is the appeal process - in fact, Condition D4, which is about the decision criteria. I do not think we will actually have to go through or that arguments will have to be focused on the detail of decision criteria, but you may wish to note that those criteria comprise, "(a) showing the capacity and securing the development of the network for carriage of passengers and goods in the most efficient and economical manner in the interests of all users of railway services ...; (h) ensuring that, where practicable, appropriate provision is made for the reservation of capacity to meet the needs of bidders whose businesses require short term flexibility where there is a reasonable likelihood that this capacity will be utilised during the currency of the timetable in question ...; (l) taking into account the commercial interests of Railtrack and existing or potential operators of trains in a manner compatible with the foregoing".

So quite a broad criteria.

THE REGULATOR: Just one moment, Mr Choo Choy. Do you say that D4 criteria are relevant in the determination which Railtrack has to make in responding to declarations under D2.2 so as to compile the draft timetable under D2.1.4?

MR CHOO CHOY: Would you give me a moment? (Pause) The decision criteria, in our submission, is not relevant in the context of D2.1.4(a)(i) which corresponds to D2.1.2(a). In other words, if a train operator makes a declaration or gives notification of an actual intention to exercise his

firm contractual rights, then under 2.1.4(a) those rights or slots must be accorded priority.

THE REGULATOR: Without reference to the decision criteria?

MR CHOO CHOY: Well, whether you put it in terms of without reference to the decision criteria or not, in practice, that question would only arise if there were a conflict, I suppose, between two sets of firm contractual rights.

THE REGULATOR: Perhaps, though, under D2.1.4(c), having been through (a) which does not refer to the decision criteria and (b) which does not, when you get to (c) the decision criteria do come in. So is it your submission that the decision criteria are not relevant under D2.1.4(a) and (b)?

MR CHOO CHOY: Yes. I think that seems to be the right construction because there is no mention of the decision criteria in (a) and (b) but an express mention of it in (c). The explanatory note does mention the fact that the decision criteria must be applied throughout. In explanatory note (g), for example, the last sentence refers to, "All Railtrack's decisions must take account of the decision criteria in Access Condition D4", but what is not clear entirely from that explanatory note, which in any event does not form part of the Access Conditions, is whether or not the reference to all Railtrack's decisions is simply talking about the decisions in the context of paragraph (g), or all potential decisions that Railtrack may take under Part D.

THE REGULATOR: Do the decision criteria therefore, if they have limited application under D2, the development of the draft timetable, have a greater impact on all the decisions, all the prioritisation decisions, which Railtrack makes under D3 when it is turning the applicable routes of the route, the applicable rules of the plan and the relevant portion of the draft timetable into the first cut of the working timetable? Do the decision criteria have more influence then, or are they applicable only to the same extent as they were under D2?

MR CHOO CHOY: I find it difficult to say that they have a

greater role to play at the formal bidding stage because, if you look at Condition D3.4, priorities in considering bids, again you have an express reference to the decision criteria in relation to the lesser categories of rights, but not so in relation to the high level of rights, the firm contractual rights.

What I think is unclear in the Track Access Conditions, which in practice, I suppose, is unlikely to happen, bearing in mind that the obligation of Railtrack when compiling the draft timetable or considering bids is simply to accord priority, is what happens, for example, if there is a clash of firm contractual rights such that effectively two bidders have equal priority ----

THE REGULATOR: And irreconcilably conflicting rights.

MR CHOO CHOY: Which collide head on. Now, in that situation, it is highly unlikely to arise in practice, I would have thought but, if that were to happen, it is rather unlikely that the intention underlying Part D is that Railtrack in that event would say, "Right, we are going to ignore the decision criteria in this context; we are either not going to do anything about it and tear our hair out or we are going to try and reach some agreement between the parties interested to take matters forward".

THE REGULATOR: I think in that case Railtrack may be facing a breach of at least one of its contracts.

MR CHOO CHOY: That may be so.

THE REGULATOR: I shall be interested to hear what Mr Herberg says when he comes to make his submissions. It may be that the last sentence of explanatory note (g) in Part D goes too far.

MR CHOO CHOY: Yes.

THE REGULATOR: If that is so, then what in your submission is the significance, because you have drawn my attention to it, of D4, the decision criteria?

MR CHOO CHOY: I prefaced my reference to D4 with a comment that I do not think that it is particularly relevant and that it does not bear on the arguments in this appeal.

Eurostar's case is not that they should have been included by the application of the decision criteria. It is very difficult for them to say that because the last thing that the decision criteria would require Railtrack to do is to include artificially in the draft timetable services which everybody knows are not going to be running. Therefore, it is a more fundamental one and it is a purely contractual one. They say, "We have firm contractual rights to the following services; we made our declaration that we intend to exercise the rights; therefore, you Railtrack had to give priority to those rights - period." That is their case.

You will have to hear from them as to what they say to the point that they concede that their declaration was not a declaration of a genuine intent, but simply a device that they see as useful for the purposes of securing visibility for those effectively unused rights of theirs. I will no doubt have to address that in reply.

To the extent therefore that the argument is centring fairly and squarely on the operation of D2.1.2 and D2.1.4, I do not think that we really get into the decision criteria unless, I suppose, Mr Herberg were to seek to argue, which he has not done so far, that somehow those firm contractual rights are transformed into some lesser form of right such that he might then wish to rely on D2.1.4(c), which would then involve having regard to the decision criteria, but that is not an argument we have had to address so far.

THE REGULATOR: Thank you.

MR CHOO CHOY: The last provision is D5 and it deals with the grounds for making an appeal: "Without prejudice to Conditions D3.7.2 and D3.7.3, if any bidder is dissatisfied with any decision of Railtrack made pursuant to Condition D1.4, D2 or D3, other than in the circumstances prescribed in condition D2.3.4 including (a), (b), (c) and (d), it may refer the matter to the timetabling committee for determination."

Now, a number of points are to be noted. First, the reference is to "any decision of Railtrack made pursuant to condition D2". So clearly the contemplation here is that of course Railtrack has to take decisions in the context of complying with or implementing D2.

Secondly, although there is no express reference in (a), (b), (c), and (d) to decisions that Railtrack may take in relation to the inclusion or non-inclusion in the draft timetable of particular train slots we know that the word "including" under condition A1.1(f) on page A2, is to be construed without limitation.

So one is left therefore with an appeal procedure, which contemplates the taking or making of decisions by Railtrack under condition D2 as a whole.

Indeed, were that not the case, were it the case that in this instance there had been no relevant decision or facility for Railtrack to make a decision under condition D2, by definition Eurostar would not have been able to launch an appeal. Yet, when they launched their reference to the timetabling committee one of their very first points was that we are dissatisfied with the actions of Railtrack. They did not say "decision" of Railtrack, but they said that Railtrack had not acted appropriately, and we are making this reference pursuant to condition D5.1.1 of Part D.

Obviously, they could have got it wrong, if there was no real decision that had been taken here, and so the last point that I made is a bit of a jury point, but nevertheless it illustrates the commonsense of the situation which is that under D2 Railtrack, when deciding what to do about the draft timetable, has to take a whole series of decisions in relation to the declarations that may or may not be made. That concludes the overview of the contractual provisions.

The basic facts are, I think, common ground. I have told you about the priority date. The only other points in the chronology that I ought to draw to your attention are

these: First, there was an annual timetabling conference the day before the priority date, as explained in the explanatory note. You will find that in the consolidated statement bundle at tab 3 - the first tab 3 - on page 1041. You will see that the attendees included two Eurostar attendees, Neil Sutton and Graham Owen, and in the second table you will see under the reference "EU-1A" "Run Nightstar operations depending on availability of rolling stock", and over the page, 1042, "EU-2A" "Eurostar agreed not to bid for regional services. RT stated that they needed proof of availability of resources before night service aspirations were taken forward..." etc. That is on 26th June.

On the following day, 27th June, a letter from the timetable planning manager of Eurostar----

THE REGULATOR: Before you go any further, Mr Choo Choy, the document at pages 1041 and 1042, what is the status of this document?

MR CHOO CHOY: As I understand it, it is Railtrack's amalgamation of various TOC responses or summaries of their aspirations which are given as part of the consultation process under condition D2.1.

THE REGULATOR: And as a matter of fact, is it disputed by Eurostar that this is a fair summary of what did take place on that day?

MR HERBERG: Sir, it is not disputed.

MR CHOO CHOY: Thank you. On the following day you have the formal statement by Eurostar which purports to be the notification under condition D2.1.2(a). In paragraph 4, on page 1044: "Our aspirations described at the meeting on 16th March, 2001 remain our specification nationally for 2002/2003. We wish to roll forward the current summer services... etc. As discussed at the line of route meetings yesterday there are some further requirements to be added to that list."

Then paragraph 4: "Nightstar pathways will be bid as per the 1994 agreement. On Southern zone these pathways

will be useful for moving units for CTRL test trains. We note your comments at the meeting yesterday regarding the night train paths, but do not necessarily accept your position".

It is common ground that no evidence was in the event provided by Eurostar.

THE REGULATOR: What are "the comments at the meeting yesterday", which have been referred to? The one you referred to on pages 1042?

MR CHOO CHOY: Yes.

THE REGULATOR: "Railtrack need proof of availability of resources. Is that the comment to which reference is being made?

MR CHOO CHOY: Well those are the only comments that we have in writing, as it were. Whether or not other comments were made, but were not recorded, I am not sure, but I think those are the relevant comments for present purposes.

In response to that declaration, on 2nd August, Railtrack wrote back on page 1046, tab 4, and you can see the letter there, and the relevant paragraphs are the first four paragraphs on page 1. Paragraph 2: "This decision has been reached because Railtrack is aware that Eurostar no longer owns or has access to the rolling stock and other resources necessary to run such a super service between the Channel Tunnel and various parts of the UK." etc.

Then paragraph 4: "Such a decision of Railtrack in no way undermines EUKL contractual rights. We will continue to review the position regarding resources and Nightstar sleeper paths at each timetable iteration and any movement of the services into such Nightstar pathways will be strictly on a timetable to a timetable basis".

Over the page: "In summary, therefore, Nightstar sleeper paths will not be progressed in the Summer 2002 draft timetable..." etc.

It is fair to say that the penultimate paragraph of the letter refers to the decision criteria, but whether or not Mr Hall, the customer access manager had gone through

the process that we have been going through this morning, I very much doubt.

Following 2nd August letter, Eurostar made a reference to the timetabling subcommittee. I do not actually have a date for that, but it will be some time between 2nd August, and the next letter in the bundle which is 1048, 19th September. You will see that in paragraph 4 of that letter they made the point, which is the basic rationale for their challenge to Railtrack's decision. "I feel it is also important to highlight the fact that we were disappointed by your statement at the meeting that by including the night service train paths, which you are clearly not able to run at present, you wanted to create a market force that would mean other network users would put pressure on Railtrack to purchase these paths. We have made it quite clear that we do not intend to ever purchase these paths, which are included in the fixed track access charge."

That is the sort of commercial undercurrent in relation to the dispute.

The timetabling subcommittee delivered its determination on 30th, or shortly after 30th November - I am afraid I do not have a specific date on that, all I know, and you get that from page 1016, the heading is "Determination No. 132 following a hearing on 30th November". It is not clear to me whether the hearing took place on 30th or the determination is being given on 30th, but either way this is the determination. Sir, I do not propose to go through it in any detail. I am certainly not going to read it aloud to the extent that you have read it.

What I am going to do now is to summarise my submissions. I have made a number of submissions along the way whilst going through the various contractual provisions, but I can pick the point up---

THE REGULATOR: In your submissions, as you take us through them, will you be addressing or referring me to where in the consolidated documentation it is clear that Eurostar admit that they had no intention of running the trains in

these slots.

MR CHOO CHOY: Yes, I will show you that, but Mr Herberg has confirmed to me in any event that that is indeed the position, they did not intend to operate the train services. If that is not common ground it would be helpful if Mr Herberg could indicate that because if it is common ground it may save a lot of time.

MR HERBERG: Sir, as I indicated to my learned friend earlier, it is common ground.

MR CHOO CHOY: So it may be that I can short circuit that. Can I therefore take you to my skeleton argument? If you look at page 2. Having set out what the basic provision that we have to construe says, I just set out some of the basic facts. I do not think I need to elaborate on anything that is said on that page, certainly not and I do not have to go through the reference that I have given at footnote 3 on the question of intention.

In terms of the argument, and the relevant construction, we say as set out on page 5, paragraph 13: "Condition D2.1.2 imposes a duty or an obligation on train operators. On or before the Priority Date, to notify Railtrack of: (a) those Firm Contractual Rights that they intend to exercise; and (b) those Firm Contractual Rights that they do not intend to exercise". We say the rationale for that is clear. It is part of the pre-bidding consultation process for the establishment of the draft timetable. The draft timetable is a critical document. As we have seen earlier each bidder will have to rely on it, or the relevant portion of it for the purposes of putting forward its firm bid for the relevant services, and the proposition therefore, if it is advanced, and I am not sure if it is, that one ought to read D2.1.2 as referring to the mere piece of paper that contains the statement of intention even when, in fact, no such intention exists is, in my submission, an absurd one. Everybody contemplates in the context of Part D, which is a joint industry process, that people mean what they say, not that they will say one

thing when they privately intend something totally different so that they can achieve a particular purpose that they cannot contractually achieve.

Indeed, if all train operators were to operate on the basis that what Railtrack has to do is to put on a blindfold and follow to the letter whatever they declare their intention to be, even if it is known objectively that they have no such intention, or indeed as in this case it is admitted that there in fact no such intention, the idea that Railtrack in those circumstances nevertheless has to plough on and proceed as if the intention in fact existed is not simply absurd, but actually contrary to the terms of Part D, because it is very clear from condition D2.1.3 that Railtrack must compile a draft timetable which is in accordance with condition D2.1.4, and condition D2.1.4 requires a declaration or only requires consideration of priority to be given to a declaration which has been made in accordance with condition D2.1.2(a).

It is obvious that the word "intend" in D2.1.2(a) and (b) for that matter, means what it says, i.e. genuinely intend. Were that not the case it would have been totally irrational for the parties, or I should say for the Regulator to have directed, or for the industry to have agreed upon Track Access Conditions that contemplate that the intention will be one or the other, because if the reality is that they do not intend to exercise the rights, but their case is that does not really matter, all that matters is what we say we intend, not what we actually intend, it would have been irrational for D2.1.2(b) to be included as the antithesis effectively of D2.1.2(a) and that really is the short point. I am repeating myself, I think, on that issue. That, we say, is the beginning and end of the case and in the light of their admission, Railtrack was perfectly entitled to decide as it did not to include the train slots in the draft timetable.

The point that I ought to address now, because I think it is convenient to do so is the suggestion that there is

no mechanism in the contract that allows Railtrack to look behind what they concede to be an artificial declaration of intent. That submission, we say, is wrong for a number of reasons.

First of all, it overlooks the provision in condition D5.5.1 that contemplates the making or taking of decisions by Railtrack under condition D2.

Secondly, as a matter of commonsense, just reading condition D2.1.3 it is obvious that it is Railtrack, because it is its duty to ensure those things, has got to decide or take a view as to whether or not the draft timetable will be in accordance with condition 2.1.4.

Let me take two examples. Suppose a train operator is hopeless at identifying his firm contractual rights. He puts in his declaration: "I intend to exercise the following firm contractual rights", but in fact he does not have any such firm contractual rights, or not as extensive contractual rights. Can it seriously be suggested that because he has made a declaration or a statement to Railtrack that he has that intention, therefore Railtrack will have to turn a blind eye to the objective reality and nevertheless accord that particular train operator priority in relation to all such rights, all such train slots? Answer, in my submission, clearly not.

THE REGULATOR: Are you not in danger of overstating your case, Mr Choo Choy, because is it not obvious from D2.1.2 that in order to make a declaration the rights declared have to be objectively established to be firm contractual rights?

MR CHOO CHOY: Yes, that is indeed so, but that is simply saying that when you look at whether or not D2.1.2(a) has been satisfied, you have to look at each and every component of it to decide whether it is the complying declaration.

We have, so far, been focusing on the question of intent. What you are saying at the moment is that it is also relevant to consider or focus on the question of firm contractual rights. I entirely agree with that, but the

point of my example is whether or not Railtrack has to decide when it gets the declaration whether the rights in question, for example, are indeed firm contractual rights, and/or whether there is a genuine intent or an actual intent to exercise those rights during the relevant timetable period. So it is the decision point that I am addressing, but I quite agree that in my example the objective requirement which it is said has not been satisfied, or which Railtrack believes has not been satisfied, is not intent but firm contractual rights and what they may be.

It is a decision point that I am emphasising and I say that the idea that Railtrack goes through this process without ever taking any decision is just totally absurd, contrary to D5.1.1 and quite contrary to what anybody would expect in these circumstances.

There were a number of other points that have been made which I deal with in paragraph 21 of my skeleton argument.

One of the submissions that is made on behalf of Eurostar is that the failure by Railtrack to include the night service train slots in the draft timetable amounts to an overriding of Eurostar's rights. That I think is the high water mark of their case.

That submission, we say, is totally misconceived and has effectively been contrived because of the realisation that, simply in terms of timetabling process, Eurostar simply does not have a leg to stand on.

The same idea has been put in two slightly different ways. One, it is said, "Well, non inclusion means you are overriding our rights", to which the short answer is that we are not overriding any rights, nobody has rewritten the contract, but simply that, because of their own decision not to operate the services, the rights have not been used. To call that overriding the rights is just a misuse of language, quite apart from disclosing a total misunderstanding of basic legal concepts.

The second point they made, which is a slightly more sophisticated point, is this. They say, "Well, actually, because we have our firm contractual rights, when we are asking Railtrack to include train slots in the draft timetable, or when we are notifying Railtrack of what our artificial intention is, that is actually exercising our rights, and therefore for Railtrack to disregard that declaration or intimation does amount to a variation or an attempt to disregard their rights".

That too, we say, is based on a fundamental confusion between the subject matter of the firm contractual rights which, as we have seen, are rights to a particular quantum, timing or characteristic of train movements which are intended to be exercised not presently but during the relevant timetable period. That is totally different from the subject matter of Condition 2.1.2(a), or (b) for that matter, which is whether they have an intention, or rather which is their obligation to Railtrack, in terms of helping Railtrack as the manager of the working timetable, to state whether or not they are going to operate the relevant train services during the relevant timetable period.

That is a fundamental difference between two things. Once one grasps that particular distinction, it can readily be seen that there are effectively two quite separate sets of rights that one is looking at. On the one hand, we have the firm contractual rights to operate the trains. Because they have such rights, they are entitled to take part in the Part D procedure and are entitled or have certain procedural rights under that procedure to participate in the process which eventually results in the working timetable. But the specific rights they have under Part D are not firm contractual rights, they are rights of a different nature, albeit that those rights may only arise or derive from the fact that they hold firm contractual rights.

The rights can readily be discerned from Part D. For example, if you look at Condition D2.1, in particular

D2.1.1.1, "Railtrack shall consult with bidders before the priority date to establish their aspirations for development of their services in the relevant timetable period", what does that mean? That means, because the corollary of an obligation on the side of one party must be the right of the other party to the contract, train operators have a right to expect to be consulted. One can go on through the whole of Part D. There are various rights.

Therefore, on similar reasoning under Condition D2.1.4, Eurostar can say, "Well, we have a right to be accorded priority by Railtrack in the compilation of the draft timetable to the extent that we have made a declaration in accordance with Condition D2.1.2(a)".

That again is a right which is quite distinct from what is clearly defined as the firm contractual rights and, again, we say that to conflate the two, or to equate the two, whereas it helps them to characterise Railtrack's actions as somewhat non-contractual, is wrong.

I think I am going to repeat myself if I make the points in sub-paragraphs (c) and (d) on page 9 of my skeleton argument.

I think that Mr Herberg makes some submissions in relation to Railtrack's conduct in his skeleton argument. I am not quite sure what he says the relevance of Railtrack's conduct is to the issue of construction that arises on the appeal and what I propose to do is to come back to that issue depending upon how Mr Herberg puts it.

Those are my submissions and, if you accept them, we suggest that the relief or the directions that you ought to give, not least because it will clarify the position for other parties who may be interested in the outcome of this appeal, ought to be along the lines set out in paragraph 22 of my skeleton argument, although I of course accept that quite what form such directions ought to take depending upon your determination may have to be discussed further later.

I do not propose to say anything more at this stage and I do apologise for having gone on for rather longer than I expected.

THE REGULATOR: Thank you. Mr Herberg, how long do you think you are going to need for your submissions? I just want to be able to make a decision as to when would be a convenient time to break for lunch.

MR HERBERG: Sir, I hope to be able to be rather shorter than my learned friend. I will not obviously have to repeat a lot of the matters which he has addressed for both of us, but I would think I would be at least between an hour and an hour and a half in covering everything, within that region of time.

THE REGULATOR: In that case I think we should come back at half past one.

(The lunch adjournment)

THE REGULATOR: Yes. Mr Herberg.

MR CHOO CHOY: Sir, I ought to mention one point about the regulatory status of the 1998 Agreement and Mr Herberg has kindly indicated that he does not mind my making that point now.

It is simply that, as a result of my very brief enquiries about it, I understand that the 1998 Agreement is a regulated Agreement, not under the Railways Act regime but under the Railways Regulations, I am not quite sure which year. The position is that, under that regime, the 1998 Agreement, and very possibly also two other Agreements, were agreed between the parties to them and effectively executed, but then had to be submitted to the Regulator - I assume yourself, although I have seen references to the International Regulator; I assume it is the same person, although the office may be described differently - and that the purpose of such disclosure, as it were, is to allow the Regulator to advertise the terms of the arrangements for the whole world to see what the people object to, and it is only in the event that there are objections that the Regulator may give directions to

the parties which they would then have to comply with.

THE REGULATOR: That is what I expected because they are international services. Mr Herberg.

MR HERBERG: Sir, as you are aware, Eurostar contends that the timetabling committee rightly concluded that Railtrack was not entitled to decline to recognise or to override - and I do not shrink from that word in the alternative - Eurostar's firm contractual rights under the Track Access Agreement between Railtrack and Eurostar by declining to include paths in the draft timetable for summer 2002 in respect of the relevant night service slots.

Sir, we share the overall approach of my learned friend and Railtrack in that we agree that the appeal essentially turns on the respective contractual entitlements under the Track Access Agreement and including the Track Access Conditions incorporated into the Agreement. But we invite you to come to a very different conclusion on those provisions than that advanced by Railtrack.

Sir, can I start by indicating the overall shape of my submissions and the matters which I intend to address. In essence, I am following paragraph 3 of my outline argument. We start from the premise which is common ground that Eurostar's rights against Railtrack in respective timetabling derive from the Access Agreement - that is common ground - and that that incorporates the Track Access Conditions. I have set that out in footnote 5 and I do not think I need to revisit any of that material.

Sir, the second starting point, which again is common ground, is that the 1994 Agreement is an unregulated Agreement since it was signed before the Regulator received powers under the Railway Act 1993. More significantly, we say that it is in unusual form in that, first, we submit that it confers upon Eurostar by schedule 5 firm contractual rights to operate night services with specific journey times, protected journey times as they are sometimes referred to, and it does not give Railtrack any

effective right to adjust or flex those timings to accommodate other operators' services.

Sir, this is a matter which obviously I will come back to. It was put clearly in issue in the statements of case in the consolidated case. It has not featured in my learned friend's submissions but it is something which I intend to take you through briefly, Sir, because I do say that it makes a difference to the interpretation of the contractual provisions as to the nature of the rights with which you are dealing, the underlying substantive rights to run services.

Sir, the second reason for saying that the 1994 Track Access Agreement is unusual is that I think it is common ground that Eurostar has to pay a fixed Track Access charge and has no contractual right whatsoever to a rebate in respect of services or slots which it no longer wishes to operate or is not able to operate, and not able to surrender such slots for value. That is common ground but it does put Eurostar in an unusual position, as we understand it, compared to most Track Access Agreements in that it effectively can be left in the situation that it has rights which it is unable actually to operate and, if that is the contractual position, then it has to live with it. That is the background against which we assert that we are entitled to exercise certain rights short of actually running the trains.

Sir, the only aspect I think of the Track Access Agreement which my learned friend did not take you through - and I do not need to spend long on it - are the way the actual charges are applied under that Agreement. It might assist you just to go very briefly to those sections.

It is clause 6.2 of the Track Access Agreement, which is page 9. That simply states, "Each of the parties shall perform their respective obligations set out in schedule 7". Schedule 7 starts on page 40 of the Agreement and contains long and complex provisions as to track charges which I certainly do not intend to take you through, but

the effect of which is that Eurostar is required to pay a fixed Track Access charge for the bundle of rights which it has acquired from Railtrack and is not entitled to surrender certain services and obtain a reduction in the Track Access charge.

That is common ground so I will not take it further.

I should perhaps mention that the sum at stake in respect of the particular rights which are at issue in this appeal are in the region, I am instructed, of £5.5 million a year. That is not in evidence and I say that to give a general indication of the amount at stake and I am sure, if any issue is taken with that, it will be mentioned. We say that that is the amount that Eurostar is paying for these rights.

THE REGULATOR: Yes.

MR HERBERG: Sir, we do say that the unusual nature of this Track Access Agreement is a very important context to your decision, a context to your interpretation of the rights and entitlements of the parties under the Agreement. The fact is, Sir, Eurostar being obliged to pay for rights under the Agreement without any contractual entitlement to surrender them for value or obtain a rebate, in such circumstances, we submit, you should be particularly astute to ensure that Railtrack is not entitled to disregard or ignore some elements of Eurostar's rights, even if it does not wish to or is not capable of exercising its full rights by running trains.

Sir, we are primarily in the domain of contractual interpretation here, I accept that, but the surrounding circumstances, the background and the nature of the Agreement is part of the contractual matrix to which you can properly have regard.

The next stage in the submissions is that Eurostar's bundle of rights, we say, under the Access Agreement and Conditions includes rights in respect of the timetabling process, to participate in that process in accordance with the procedure laid down in the Track Access Conditions.

Sir, it is accepted by my learned friend that we have rights in respect of those Conditions and I will need to come back to the issue of whether those rights are separate or materially separate from the underlying rights to run the trains. We say, Sir, that the Conditions do not give Railtrack any right or power to decline to accept Eurostar's declaration of firm contractual rights by refusing to include the declaration in the draft timetable. This is a matter which my learned friend has challenged, but I will obviously deal with it in detail in the submissions. We say that neither the 1994 Agreement nor the Conditions give Railtrack any right to assess or decide whether it believes that the declaration of intention to exercise firm contractual rights is genuine or likely to be accurate, and/or to refuse to respect rights which it considers will not in fact be exercised.

In any event, and this is a separate submission, we do say that the exercise of an entitlement to declare, albeit it is an exercise of rights itself, we can therefore exercise and state we have an intention to exercise under the Agreement.

Sir, that is really the meat of the case and the central division between the parties. I will then briefly deal with Eurostar's reasons for wishing to exercise its rights in respect of the draft timetable. I will deal with that shortly, Sir, not least because it was, at least in part, a response to various points made in the case which have not really been pushed in detail today questioning Railtrack's reasons for doing so and asserting that there was really no good reason for this anyway. The dispute has not been put on that basis and so I will deal with that relatively quickly. We say that Eurostar properly and reasonably adopted the stance that it was appropriate to maintain the visibility of its firm contractual rights and that, if Railtrack wished to avoid the encumbrance of such rights, then its proper course is to negotiate with Eurostar to reach a satisfactory compromise and not to seek

to ignore them completely.

Finally, Sir, I will very shortly address the findings of the Timetabling Committee.

THE REGULATOR: When you come to deal with visibility, I take it that you will also deal with your point about the overriding of Eurostar's rights, which is the point you make in paragraph (f) on page 4 of your skeleton. You omitted that in your overview but I assume you are going to do that.

MR HERBERG: Sir, (f) of my skeleton deals with the Timetabling Committee and our submission that Railtrack was not entitled to override the rights. Indeed, Sir, I think there may be more emphasis being placed on the word "overriding" than I would intend. It is simply that if we are right in our submissions on the contract that we do have firm contractual rights, or rights which we can exercise which extend to rights to bid, and rights to declare, then it follows as a consequence that Railtrack have essentially overridden those rights in refusing - "ignored", I could almost use as a synonym for "overridden", ignored them in refusing to timetable us and therefore not respected our rights.

This was not intended to be a separate submission of substance, it is almost a logical consequence from the main contractual issue that divides us. If my learned friend is wrong, that we do not have the rights that we say we do, then in consequence in ignoring them, in refusing to accept our declaration I say he has overridden them, but there is no magic in that particular word. It is not seeking to set up a separate line of argument. I hope that clarifies matters on that point, sir.

Before I turn to Eurostar's rights under the access agreement, there is perhaps one point I should address, which is the interrelationship of the 1994 agreement with the 1998 agreement which my learned friend produced extracts from this morning.

Sir, it is not a matter which is, of course, for

determination by the appeal today, but I think there is common ground between the parties as to when that agreement will come into effect, namely, effectively at the stage of the CTRL section 1. I think it is actually at the fitness for purpose stage of that implementation, and there is no real dispute as to the overall nature of that agreement. But there is one point I should make in relation to it, which relates to the right to surrender slots, or firm contractual rights. In one sense with the impending introduction of this new agreement it might be thought that the present dispute is of very short time in terms of its implications - we are only looking at Summer 2002 but of course originally we are dealing with a very long agreement here that had a huge term, and I would not like it to be assumed, sir, that the point of issue in this appeal will not potentially be a point under the new agreement.

If I could just take you briefly back to clause 9 of the 1998 agreement, which is on page 74 of the extract which my learned friend handed up. That is the section dealing with surrender of passenger train slots by the train operator. There is no equivalent provision in the 1994 Track Access Agreement. The only point I wish to emphasise is that this section, on the face of it, appears to entitle a train operator to notify Railtrack that it wishes to surrender a right. If that happens the section mandates Railtrack to discuss with the train operator whether it wishes to accept surrender and if the parties were able to agree terms of the proposed surrender then, subject to the consent of the Secretary of State it can go ahead.

In other words, on the face of this section there appears to be no obligation on Railtrack to agree to accept the surrender of rights. On the face of this section, at least, there is nothing to stop Railtrack saying "We are perfectly happy ignoring your rights, and accepting payment for these rights as matters stand, so we do not wish to discuss surrender of rights with you, and we are certainly

not going to pay you anything, which is effectively the position under the present agreement".

The extent to which precisely the same issues will arise under the 1998 agreement will, of course, depend on analysis of the replacement sections for bidding for declaration, the whole process. That is not something that is before this appeal and it is not something I have even looked at, so I am not to be taken to be suggesting that the resolution of the present appeal will necessarily determine the parties' rights under the 1998 agreement. However, I do draw attention to the fact that, at least on the face of it, precisely the self-same issue of whether Railtrack can be forced to accept the surrender of rights, and the interest of Eurostar in seeking to maintain visibility or exercise of partial rights, so as to force effectively Railtrack to the bargaining table, may well be a continuing problem under the new agreement for the entire period of the new agreement, which is again of a huge length.

THE REGULATOR: So your point is that paragraph 9 on page 74 in the face of an uncooperative Railtrack gives you nothing.

MR HERBERG: Indeed, sir. Against that background, sir, can I turn to the 1994 Track Access Agreement? I can take the first part briefly because my learned friend has been through the relevant provisions. The definition section in Part D of the Track Access Conditions defines a firm contractual right. I have set that out in paragraph 4 of my skeleton, and it has already been referred to. I will need to come back to the definition in due course in addressing what bundle of rights are included in the definition of a firm contractual right. But first, sir, I wish to look at what rights to run trains Eurostar actually has. Railtrack submits, sir, that Eurostar has no guaranteed journey times under the 1994 Track Access Agreement at all, that there are no protected journey times, to put it another way. It also says, and this may be why it has not featured heavily in my learned friend's submissions this morning, that that

dispute is irrelevant anyway, because even if Eurostar does have protected journey times it has not got a bona fide intention to run these night services, so it simply has no right to declare albeit whether the protected journey times or whether no protected journey times. The issue, in other words, can be avoided in that way.

But, sir, whilst we agree that the primary question for you is a contractual one of whether Eurostar has a right to declare, or bid, to have a declaration or bid respected, we do say that it is a highly relevant part of the background that the contractual matrix for you to have regard to, as to whether or not Eurostar in fact has firm contractual rights with protected journey times. In looking at the nature of the rights to declare or bid it is important to know the nature of those rights, the strength of their diffusibility of the rights one is bidding for. Sir, as I say, Railtrack has, at least on paper, taken issue with entitlement to have protected journey times.

THE REGULATOR: Let me just interrupt you there, it may be that you are coming to this point, but why is it relevant in your submission that Eurostar does have protected journey times?

MR HERBERG: Well sir, one way in which it will be relevant is to later argument as to the visibility of Railtrack, what Railtrack wants to do, the motivation for wishing to exercise firm contractual rights by declaring and potentially by bidding. If there were no protected journey times at all, it might be said what on earth are you gaining by seeking to go through this process. They do not have to put you anywhere in particular in the timetable. They can put you anywhere to suit their other services. They can effectively ignore you and apart from the inconvenience of having to actually timetable you it makes no difference at all.

If we are right that we have protected journey times, then we submit we have an entitlement not only to go into the draft timetable but into the working timetable as

indeed we were placed every year until the Summer of 2002, with validated slots with Q paths and effectively Railtrack is prevented from selling our rights to another party to its own benefit, as it were, for a second time. We have the rights that we have bought, and if we wish effectively to assert those rights we say Railtrack cannot ignore the rights and either timetable simply engineering works in the space, or indeed sell the same rights to another operator on the basis that it is entitled to ignore our rights. So it is certainly relevant to that argument.

THE REGULATOR: I do not follow that. The essence of this particular point seems to me, or the most crucial thing to determine is what is the nature of the right in question before we get on to whether or not the rights have been taken away or sold a second time? As I understand it on Railtrack's submission the rights themselves are qualified; that they may only find their way into the draft timetable if there is a genuine intention to operate trains in those slots, and I expect you will be coming to that point?

MR HERBERG: Indeed, and I accept that that is the centre of the case. If I have failed to persuade you one way or another on that point, then it may be that these other points fall away, but they are relevant first, in the way that I have already described, and secondly, I do say they have some relevance to the contractual matrix. When you are considering the primary question, as you have rightly expressed it, which is whether we do indeed have rights to declare and to bid, I do say it is relevant at least to know what are the underlying rights that we are saying we have a right to declare or bid for. If those rights are firm, contractual rights with protected journey times to particular slots, they are in a sense stronger rights, more forceful rights, and that may colour the way one looks at whether you have a right to declare or bid for those rights. On that side of it I do not put it any higher than that.

I hope I can deal with the point quite briefly,

because as you say it is not the centre of the case, the protected journey times' point, but it is a point that both sides have joined issue with on the consolidated case and I hope I can deal with it quite briefly.

What we say, sir, is that the nature of the right appears from schedule 5 to the Track Access Agreement. I will just take you very briefly through the parts of schedule 5 that we rely on for this proposition. First, schedule 5 at page 32 in part 1 contains the service characteristics, specifies the number of trains and journey times, and at paragraph 4 states:

"Attached to this document is an appendix specifying services that will run in compliance with the requirements set out above." So the wording is expressed in unconditional terms. The appendix is to set out the services that will run in compliance with the requirements. When one turns to that appendix which is the ten pages of landscaped timings that we have already seen, the first page of which follows page 38, one sees precise timings for, inter alia the relevant night services, and my learned friend has already taken you to the first one - precise timings for those services. There is no suggestion here that these journey times are in any way targets or aspirations. They are, to quote the words that introduced that appendix "they are specified services that will run in compliance with this requirement".

THE REGULATOR: In railway terms they are known as "hard wired", there is no flexibility attaching to them.

MR HERBERG: Indeed.

THE REGULATOR: That is your point, is it not?

MR HERBERG: Indeed. The only extent to which they are not hard wired can be seen from page 33, section 5, headed "Changed requirements". That sets out a provision giving either party entitlement to try and seek the consent of the other party to vary with effect from a date specified any of the requirements set out in part 1 of schedule 5, which includes the requirements of journey times, which I have

just taken you to. We say that it is quite clear from the provisions requiring consent, and the procedure that has gone through there, that that must be against the background that absent that consent there is no way that one party can escape from these concrete requirements. It only makes sense against a background of rights which are not otherwise to be varied without consent.

Finally, sir, we say that our interpretation is consistent, indeed more than consistent, it is the only interpretation properly compatible with the business specification in respect of the relevant night services at page 36 which provides, at paragraph 3.2 that "trains will achieve an expected journey time of..." and then various figures are given.

We submit that the unconditional wording "will achieve" indicates the same conclusion in written submissions. Railtrack pointed to the word "expected" but we say that cannot be construed so as to subvert the entire structure of the protected journey times set out in the clauses which I have referred you to, it is merely a shorthand, we say, for projected, anticipated, i.e. the contractually expected journey times.

So for those reasons we say Railtrack is incorrect to argue that Eurostar has no guaranteed journey times under the 1994 Track Access Agreements, and furthermore we point out that the agreement gives Railtrack no effective flexing rights in respect of the journey times set out.

I note in footnote 4 of my skeleton in paragraph 5 the detail to make good that submission on flexing. It has not been controverted by my learned friend either on paper or indeed in submission and I will not go through the detail of the flexing provisions unless you would like me to, but we say that D3.6.1 and D3.6.2 would not effectively give Railtrack a right to flex our services effectively to depart from the firm contractual rights and the protected journey times permitted.

THE REGULATOR: Yes. Just help me with this. In terms of the

actual slots in question, at least on page 36, paragraph 3.2, where you say we have hard-wired journey times and they are not even maximum journey times, they are completely hard-wired journey times, they are between various places, Plymouth and Swansea and Glasgow on the one hand and Kensington Olympia on another, is it actually possible for Eurostar to get into Kensington Olympia as things stand at the moment?

MR HERBERG: Obviously these calculations were done in 1993/94 at the time of the original Agreement, but my instructions are that yes, it is possible to get in there and indeed we go through it every day at the moment running our day services. Not on night services, of course.

THE REGULATOR: Thank you.

MR HERBERG: Sir, I will not go to the detail of the flexing rights point because I do not think the point is taken against me that that gives Railtrack any flexibility in relation to protected journey times that it would otherwise have.

Having set out Eurostar's rights in that regard, can I then turn to the right to be treated in accordance with the bidding procedure? This argument again proceeds from common ground, I believe, paragraphs 6 and 7 of my skeleton argument.

The first point is accepted by my learned friend that Eurostar has an entitlement under the Agreement to be treated in accordance with the bidding procedure set out in the Track Access Conditions as amended from time to time. That includes the right to bid and the right to make draft bids known as declarations there set out. In particular, we say, Railtrack thereby came under clear obligations, first of all Condition D2.1.3, to which you have been taken, to compile a draft timetable in accordance with D2.1.4, which sets out the order of priorities in compiling the timetable, and, secondly and more particularly, by condition 2.1.4(a) to accord the highest order of priority, including train slots in the draft timetable as there set

out.

We do say, Sir, the question that was raised earlier in my learned friend's submission, that we do pin our colours firmly to the mast of D2.4.1(a). We do not suggest that we in some way fall into one of the other categories, D2.1.4(b) or (c). It might be helpful to go briefly back to that.

THE REGULATOR: In order to get into D2.1.4(a) you still have to get through D2.1.2(a), do you not?

MR HERBERG: I do, and that is the point which I am, by slow train, possibly approaching, Sir. I am building up to that point. I of course accept that, but I was asked to clarify which paragraph we fall into. Assuming that it is accepted, of course, that we do have firm contractual rights to run the trains, and there has been no suggestion that we do not, then we must be within that highest category, if anywhere.

Sir, we say on the basis of D2.1.4(a) that Railtrack has no discretionary power to refuse to have regard to Eurostar's firm contractual rights in respect of the night services and was obliged toward corresponding train stocks, provided that a declaration was made. In other words, Sir, we say that Railtrack's obligation is simply triggered by a declaration in accordance with Condition D2.1.2(a) by the bidder.

My learned friend placed great stress on the words "in accordance with" and sought to construe that as meaning that there must be a bid where the declaration was a genuine declaration expressing a genuine intention to run trains. We say that that certainly cannot be derived from "in accordance with". I must come on to the question of whether Railtrack is entitled to make a declaration in this case or not, but the words "in accordance with" themselves in Condition D2.1.4(a) mean nothing more than the bidder, we say, must have made a declaration pursuant to that section but intends to exercise its firm contractual rights. We did that in terms, there is no dispute that we

did that, and therefore we say that the wording of 2.1.4(a) is satisfied. There has been a declaration in accordance with 2.1.2(a) and therefore Railtrack came under an obligation to insert us into the draft timetable.

The question really is not as to the meaning of "in accordance with". The central question is as to whether or not Railtrack was entitled to disregard the declaration under 2.1.2(a), as it submits it was, on the basis that it was satisfied that Eurostar did not in fact intend to exercise those rights by running trains in the slots bid for.

Our first answer to that, and I take first the point which is expressed at paragraph 9(b) of my skeleton argument at page 8 of the skeleton, is this. The first reason we submit that we in fact were entitled to make a declaration was that the exercise of a firm contractual right did not occur, we say, only on the actual running of a train in the train slot. That is not the only way in which a firm contractual right is exercised. I submit, Sir, that Eurostar can exercise a firm contractual right simply by taking part in the declaration process, and subsequently in the bidding process indeed, and establishing a validated Q path for the relevant service.

My learned friend's response to that, Sir, is at first sight a strong one. He points out, and it is expressed in paragraph 21(b) of his skeleton and indeed was further developed in oral submissions, that he says that firm contractual rights are rights to make train movements, so that on that basis the right to bid could not be the exercise of a firm contractual right.

Sir, when we turn to the actual definition of a firm contractual right, I submit that the position that actually one sees is rather different. Can I take you back to the definitions at page D5 of the Track Access Conditions? It defines "firm contractual right" as "in the case of a bidder a right under its Access Agreement in respect of the quantum, timing or any other characteristic of a train

movement". Pausing there, that is the operative part of the provision.

I suggest that the wording "in respect of" there is deliberately broad and it is capable of carrying with it bidding rights. Eurostar has a right to bid, and it applies equally to a declaration or a bid, a right to declare or a right to bid and a right to be timetabled, in respect of the train movements which are specified in its Access Agreement.

Sir, if a narrower formulation of what would be a right, a narrower formulation of what was intended in the definition of a "firm contractual right", one might express it as a right under its Access Agreement to a train movement. A "firm contractual right" could have been more narrowly defined as a right to a train movement, the right to actually assert that one can have the slot, one can have the train moving. But it is not phrased in those terms. It is phrased as a right in respect of the movement, etc, and we say therefore it could be seen to be deliberately wider than that narrow formulation.

We submit, Sir, that this is the natural interpretation of the phrase, and it is the one which should be favoured on broader principles of interpretation.

THE REGULATOR: Let me stop you there. How does it work in the context of D2.1.2(a)? You are saying a firm contractual right includes not just the right to make a train movement but also the right to make a declaration under D2.1.2 and, if that is your submission, then it seems to me to be rather odd. A firm contractual right includes a right to make a declaration, and yet you need to make a declaration as to the firm contractual right that you intend to exercise. Is this not a bit circular?

MR HERBERG: Expressed that way it is but, Sir, it depends at what stage you are looking at the declaration. What I would say is that you can intend to exercise a bidding right. If you look at it from the perspective of a declaration, then it is circular, but it is quite

compatible with my interpretation to say that what you intended to exercise is certainly the next stage. You want to remain in the bidding process, you will want in due course to exercise a right to bid - that can be part of a firm contractual right. My submission is that essentially the bidding process, or rights in the bidding process, can be capable of being part of Eurostar's firm contractual right. Obviously, when we are looking at 2.1.2(a), you cannot say that you intend to exercise a firm contractual right that you are already exercising, or indeed that you have already exercised. You certainly would not have a right at that stage to exercise a right - in the free consultation stage, for example, if there are rights at that stage - but there are still bidding rights at that stage which are relevant rights to exercise.

THE REGULATOR: All right. Let us assume that you are right about that, so you have got through the hurdle of D2.1.2. You then get to D2.1.4 and you are saying that in those circumstances the rights which are going into the draft timetable are those which have been declared by the bidder - that cannot be anything other than a train movement, I assume, at that stage?

MR HERBERG: Indeed.

THE REGULATOR: It has to be declared by the bidder in accordance with D2.1.2(a). That is the first requirement. The second requirement is that it must itself constitute a firm contractual right on a particular date, and the date is the intended date of the operation of the train slots. So the difficulty that I think you may have is that this is still pointing to an actual train actually running.

MR HERBERG: Sir, I accept your interpretation. It is quite clear that in D2.1.4(a)(i) it is linked into an actual train running, but I do say that one cannot artificially separate off rights to bid, which after all are always associated with particular trains running. My right to bid in respect of any particular slot which I want to obtain must be in respect of a firm contractual right which I have

for that train actually to run in due course on that line and, therefore, when one looks at the wording which constitutes firm contractual rights on the intended dates of the operation of those train slots, one is certainly seeing the section tying you into a particular right to exercise a right for that slot. But that does not mean that the section cannot also be protecting effectively one's rights to bid for that slot.

THE REGULATOR: What good does it do you, even if you have a firm contractual right to make a bid under 2.1.2 and you exercise it so as to get to 2.1.4, if at the end of the day you still cannot have a train actually to run because of the crucial words "on the intended dates of the operation of the train slots"? I think it is by admission on Eurostar's point that they did not, when they made their D2.1.2 declaration, actually intend to operate the train slots. Is that not correct?

MR HERBERG: It is correct that at the time of bidding we have always said - we have been quite open - that there was no intention indeed, and it is also accurate to say that we did not at that stage have all the rolling stock that would be necessary in any event. It has always been accepted that it was an artificial bid, effectively, that was made.

THE REGULATOR: So how do you get over the fact that, under D2.1.4, you have to intend to operate trains when, by your admission, you say you did not intend it?

MR HERBERG: Sir, my submission is effectively that you don't have to actually intend to operate the trains under 4. You put together the satisfaction of the firm contractual rights which are declared by the bidder on or prior to the priority date which constitute firm contractual rights on the intended dates for the operation of those train slots. Sir, one can effectively declare an intention - at the first stage one declares an intention to bid, a declaration to bid. At the second stage, which of course was not reached in this case, the working timetable stage, we say that we could still declare, if necessary, an intention to

bid.

THE REGULATOR: On my analysis, if I am right, whatever your rights under D2.1.2, the furthest you get is D2.1.4, and then you fall at the hurdle of having an intention to operate the train because you do not have an intention. So whether you get through 2.1.2 or not you fall at 2.1.4.

MR HERBERG: Sir, my submission is I depart company from you at the second stage. I do not accept that we have to have an actual intention to operate a train on that day in 2.1.4. I say that we can make a bid at that second stage under 2.1.4 in respect of a firm right, which we have, to exercise a right, even if there is no intention. I have to maintain that position, sir, because otherwise effectively - I see, sir, your analysis of 2.1.4, but I come back to the submission which I made in relation to 2.1.2, that we have firm contractual rights to operate train slots on particular days, and we can make a bid in relation to specifying the date which, effectively gives us the right to operate, to make a bid which should be respected under 2.1.4(a)(i).

THE REGULATOR: So in this context what exactly is the legal nature of the right you are declaring under 2.1.2(a)? I understood it to be accepted as common ground, but perhaps it is not, that the declaration under 2.1.2(a) is not the exercise of the firm contractual right to make a bid under 2.1.4, it is a firm contractual right to run a train under schedule 5 of the access contract.

MR HERBERG: Sir, effectively it can be both.

THE REGULATOR: Which is it in this case?

MR HERBERG: Sir, I do not say I have to elect between the two. What I say is that in declaring a firm contractual right to intend to exercise under 2.1.2(a) you can intend to exercise any rights which are still open to be exercised in the future. That can be an intention to exercise a right to bid under 2.1.4. Or, it could be an intention to actually operate the service.

Now, the second half of that, sir, goes to, as it

were, a separate submission which I have not come on to which is whether you can make such a declaration when you do not have a true intention. So that is a separate point, and if I am wrong on that then obviously you cannot have that intention at the first stage.

In other words, perhaps to put it simply, there are at least two different firm contractual rights you could intend to exercise at the declaration stage. It could be the actual right to exercise, to run the trains. That will depend on whether I can satisfy you that one can make such a declaration of intention, even if one does not have an intention, by way of an artificial declaration.

In the alternative one can state an intention to exercise other firm contractual rights which, we say, are the penumbra to the actual right to exercise to operate the trains, which includes the right actually to be timetabled in the draft time table. To gain inclusion in the draft timetable, to bid in due course to be included in the working timetable, and any other associated penumbra of rights under the Track Access Conditions.

THE REGULATOR: This does, if I may say so seem to be a highly artificial argument. Is it not the case that the whole scheme of Part D of the Track Access Conditions is to enable Railtrack to come up with a sensible timetable for the fair and efficient allocation of capacity in accordance with contractual rights, rather than permitting train operators to erect what may be regarded by some people as ransom strips in order to extract money from Railtrack when there is no real intention to use the capacity?

MR HERBERG: Sir, we certainly accept it is an artificial exercise, and we have accepted that openly from the beginning. I do not, sir, accept the analogy with a ransom strip. We say it is rather the other way round. We say that Railtrack is seeking to have the benefit of payment for our firm contractual rights. We would like nothing more than to be able to come to an agreement to give up the rights in respect for proper compensation and not to have

to continue with the rights. But we say that while we are placed in the position where we continue to have to pay for the rights, we are entitled to exercise those parts of the rights that we are able to exercise, and not simply to stand by and do nothing about it. I accept that the commercial purpose, which is not for your determination here today, but which is obviously motivated why both sides are here effectively arguing about what rights may be attached, what rights may be involved in a declaration of firm contractual rights, is precisely because if Eurostar is in a position where its rights can be completely ignored then Railtrack has simply no obligation to take account of those rights, it can sell competing rights to third parties, in theory, if it wants to take the risk that Eurostar will not acquire some coaches and decide to run services in the future. It can run engineering services, it can do anything in that period without having to pay for the privilege. Sir, we do not accept that we are effectively operating a ransom strip here. We say that by seeking to exercise the remainder of the rights that we can identify we are seeking to be able to, as it were, resolve the position, on a proper basis.

THE REGULATOR: The way you put it is that Railtrack can ignore the rights which you have. The essence of the point is what is the nature of the rights which you have---

MR HERBERG: Well indeed, sir.

THE REGULATOR: ---and on Mr Choo Choy's submission the rights are not rights to have the capacity come what may. The rights have an inherent qualification. They are rights to have the capacity reserved to you only if you have a genuine intention to run a train. I still have not heard from you much of an argument that even though you have no intention to run the train you ought to be able to sterilise the capacity merely because you are paying fixed track access charges for it, and the motivation is never to run the trains, is not to exercise your rights under the contract, but actually be paid for giving up the rights

under a contract, is that not so?

MR HERBERG: I accept that that is the issue, sir, and I accept that Mr Choo Choy would say that he is not ignoring the right, it is us who effectively do not want to exercise the rights because we are incapable of doing so for whatever reason.

THE REGULATOR: It may be that you do not have the rights at all because unless you can actually make a train movement the right itself diminishes in quality almost to being worthless.

MR HERBERG: Sir, that may be right, but whether or not we can exercise a train movement may be subtly different from the question of whether we have an intention to exercise it. We have quite frankly said that in respect of this process we had no intention to actually exercise to make the train movements. We accept that. I do not know whether one needs to get into the detail of the rolling stock argument, but we certainly say that we could put ourselves in the position where we could effectively decide to run services to assert our rights. We have retained the engines and the generating cars and all we would have to do would be to procure carriages that fall within the specifications of the rolling stock and we would then in effect be in a position to run such services. It is not a question of us never being in a position to run services, although I accept that we were not in relation to the relevant timetable. We might be able to put ourselves in a position where we were therefore able to run services, and at that stage we would certainly be able to legitimately say that even on Mr Choo Choy's analysis that we intend to run the service, and we would then be back in the position of being able to run the service.

THE REGULATOR: That is what Mr Choo Choy is looking for, a legitimate exercise, a statement that "we have the rolling stock and we intend to run a train". It seems to me a remarkable proposition that with no intention to run a train, nevertheless the capacity should be sterilised.

MR HERBERG: We say that that is not such a surprising conclusion moving away from the contractual analysis, in situations where we are paying for a very valuable right. We say that even without any direct intention to run the service, because of the penumbra of rights which we can exercise, we therefore have something valuable which we should not effectively have to give up without any compensation.

Sir, I accept that this relies on the central proposition of law which obviously clearly I have not satisfied you on thus far, which is that there is some contractual right aside from the right to run trains, the intention to run trains, which we intend to exercise. I accept that, and the first way I sought to make that good was by referring to the fact that there are firm contractual rights beyond actually the right to run trains.

But, sir, to put it perhaps the other way, the second way of seeking to make good that submission is the submission which I make at paragraph 9(a) of the skeleton, that the conditions in the 1994 Track Access Agreement, do not give Railtrack any power or right to reject a declaration even where it believes that the rights will not or cannot be exercised. Sir - this is the simple point - under 2.1.4(a)(i) which we set out above, Railtrack is obliged to accord the highest priority to its representing firm contractual rights where there has been a necessary declaration. So this argument does not depend on firm contractual rights being anything other than rights to actually run train services. It is a separate point. But it does depend on the assertion I fully accept that we are entitled to make a declaration of intention even where we do not in fact have a declaration of intention.

THE REGULATOR: I am sorry, you mean you are entitled to make a declaration of intention even when you do not have the intention?

MR HERBERG: Yes, sir.

THE REGULATOR: Just satisfy me on that point because that is

pretty crucial.

MR HERBERG: The way I seek to do it is simply to say that Railtrack is not given any power to do what it did, which is to reject a declaration which is made, whether or not we had a declaration. In other words, I submit that 2.1.2(a) is simply a trigger mechanism for Railtrack respecting the rights. It is the form we fill in. If we fill in a form saying we have an intention to exercise the rights, we are effectively asserting our rights to a movement in, as we said, an artificial way, to assert our rights to ensure that they are timetabled by Railtrack.

THE REGULATOR: I would like to tarry on this point unless you have more to make, before I come back to you on this?

MR HERBERG: I was simply going to look at some of the provisions that Mr Choo Choy identified as being inconsistent with that submission to respond to them. Mr Choo Choy says, for example, that he relied on D5.1.1, the appeal point, his point put simply is that there is quite clearly a contemplation that there will be an appeal from decisions under D2. That appeal must, therefore, contemplate that Railtrack has some sort of choice to decide whether or not to accept declarations of firm contractual intention under 2.1.2 and that therefore that shows that Railtrack can, indeed, accept or reject contrary to my submission.

Sir, my response to that is that I do accept that there are certain circumstances where Railtrack will have a right to reject a firm contractual right, and that will be the situation identified by you, sir, in argument this morning which was that where there is indeed no firm contractual right at all. Someone says "Look at this agreement, I have a firm contractual right to run trains", and Railtrack on proper analysis says "No, there is no right here at all. You either do not have any right at all, or it falls into a different category, is not a firm, protected right, etc." Obviously, if someone walks in off the street and puts in a bid - to take a ludicrous example

- to exercise a firm contractual right, then Railtrack does not have to accept it, it can say "I reject this, there is no firm contractual right you intend to exercise." In that circumstance of course, that may well be the circumstances the appeal right is looking at, where there is a genuine dispute as to whether or not the operator, or the intending operator has a firm contractual right. In this case, sir, there is no question that underlying track access agreement we have firm contractual rights, so that issue, and the issue on which we say the appeal route is designed to cater for, is not an issue which arises. The issue is a separate issue which is "Ah, but have you got an intention actually to exercise your firm contractual rights on this occasion?" We say that that is not a matter where Railtrack is allowed effectively to surmise from our intention whether or not we effectively can exercise our rights under the agreement or not.

Sir, we also say in that regard that there is no question of the decision criteria in D4 becoming relevant I think that was a decision that was effectively reached in questions earlier.

THE REGULATOR: I think Mr Choo Choy was raising D4 to show the general scheme of Part D which is the economic and efficient use of capacity.

MR HERBERG: And I say in response to that that those sorts of general considerations cannot override the importance of a firm contractual right, just as, when there was speculation about what might happen if Railtrack was faced with two firm contractual rights that both had to be timetabled, the decision criteria clearly do not apply. I would say in that situation the answer is the one that you indicated, Sir, that effectively Railtrack would be in breach of contract in that situation.

Railtrack cannot appeal to more general obligations, whether in the explanatory memorandum or elsewhere, and its duty is to make a firm and efficient timetable as a reason for not respecting firm contractual rights.

The reason I say that that argument goes nowhere is because either my submission is accepted that we do have a firm contractual right we can exercise, in which case these further considerations do not come into play, or, against me, there is no firm contractual right I can exercise because we do not have an intention to exercise it, in which case again the further and more general considerations, if I can put them that way without denigrating their importance, again are not needed because we lose before we even get to that stage.

Sir, I say that effectively those types of considerations do not affect the argument either way.

To conclude on this section - I will take it briefly, Sir - although we say it might appear at first sight as an artificial exercise, we do say that it is not surprising or irrational to contemplate the exercise of bidding for rights short of an intention to operate a train service because this is a situation where Railtrack has sold the relevant slots to Eurostar with, we say, protected journey times. We are continuing to pay for them. We are entitled to assert those rights to the limited extent of inclusion in the draft and indeed the working timetable. It is right to note that up until this year we have been included not only in the draft timetable but actually in the working timetable with validated slots with proper paths. So it is not as if up to now there has been an artificial process going on of us going into the draft timetable and no further. We have actually been in the working timetable itself. It may be that it is because Railtrack effectively sees a use for these rights elsewhere that it has a particular interest in no longer catering for these rights.

That is not a submission that I need to make and I do not comment on their motivation for effectively changing their position, or whether it is simply that they have learned of the fact that the rolling stock is no longer available. Either way, we say that, if Railtrack wishes to

have the commercial freedom of movement as if those rights did not exist, then the proper course is for them to enter into negotiations with Eurostar for the surrender of those rights.

THE REGULATOR: You say that Railtrack does not have to provide you with slots which you acknowledge you cannot and have no intention of using. They could sell them to somebody else and make money a second time out of the same thing, sell the same thing twice I think is the way you put it. Be that as it may, has it not been made clear by Railtrack that they will, if they do use the capacity for some other purpose, do it on a timetable by timetable basis and, the moment that Eurostar has appropriate rolling stock to be able to use the slots in question, Eurostar will of course come to the top of the queue.

MR HERBERG: It has indeed made that clear, Sir, and that was in the letter which you were taken to earlier. I accept that and it would be of course prudent for Railtrack in its own commercial interest to adopt that position. Otherwise it could find itself in an uncomfortable position, if Eurostar does acquire rolling stock in the future, of having been committed in two different directions and being in breach of contract, if indeed it did it on more than a timetable by timetable basis to a third party.

Our simple point, Sir, is that, from timetable to timetable, it is deriving a double benefit from these slots. If my learned friend's submissions are accepted, that is a windfall to which it is entitled, but we say that it is a legitimate complaint and it is a legitimate reason for Eurostar wishing to exercise its contractual rights, and Railtrack should not be entitled, on a timetable by timetable basis, to sell the slots twice over effectively, or indeed use the slots for which we paid for engineering works or whatever reason it wished to use the slots.

THE REGULATOR: It comes down to the essential quality of the rights which Eurostar has. On your submission, it need only declare and bid and it must be given.

On Mr Choo Choy's submission, as I understood it, there is an inherent qualification of the nature of the right, the right is to run a train, if you do not have a train, you cannot use the right and the right is diminished to that extent. What do you say to that?

MR HERBERG: Sir, I accept that as a description of the two parties' contentions and I accept that Mr Choo Choy is saying that. For the reasons I have already given and I will not seek to rehearse my submissions again, we say that on two alternative bases effectively that is not right, firstly because firm contractual rights can be something less than actually the right to run a train, and I have made submissions on that. Secondly, Railtrack effectively cannot even get to the stage of arguing that we do not have a right to run a train in a sense, or should not be stating that we intend to exercise firm contractual rights under 2.1.2 because the structure of the Conditions, we say, is such that, if we choose to exercise what we say is a firm contractual right, we are entitled to do so by effectively artificially filling in the requisite declaration of intention and it is not for Railtrack then to go behind that declaration of intention and to assess whether it is genuine or not.

I have made my submissions on that in substance. In a sense, the point is there that the issue is clearly limited, Sir.

THE REGULATOR: Thank you. I would like to press you a little bit more on this D2.1.2. Mr Choo Choy*[1], you have admitted that the declarations which Eurostar has made under D2.1.2(a) are declarations that they intend to exercise rights when in fact there is no intention to run a train. How is it that Eurostar can make a declaration to that extent given that under D2.1.2(b), if Eurostar do not intend to exercise the rights, i.e. run a train, they should make a part B declaration and not a part A declaration? Your case seems to proceed on the basis that,

[1] * this is the correct transcript, although the question was directed at Mr Herberg.

when the facts are B, they can make a declaration of the type A.

MR HERBERG: My case is that, Sir. The way this argument proceeds is that the hurdle erected by 2.1.2 is not premised on whether we actually in fact intend to exercise or do not intend to exercise the relevant service. That is logically my submission on the point. Effectively, what the section does, we say, inform is to allow us to make an election as to whether or not we intend to exercise the rights in the sense of wanting to be in the timetable, wanting to be timetabled, and it does not actually tie us to whether or not we actually intend to exercise. Obviously, if the section is premised, if the division between 2.1.2(a) and (b) is actually premised on whether or not we intend to exercise a right to run a train and we have to answer accordingly, then Mr Choo Choy's submissions must prevail.

I seek to persuade you that the section can be viewed in a rather different way, namely not as requiring us to provide an accurate and genuine statement as to whether we do intend to exercise, but as effectively simply a gateway to the assertion of rights short of exercising a train.

THE REGULATOR: On the basis of the two conflicting interpretations which I am being offered, there is clearly a greater logic to that which is being offered by Mr Choo Choy. Let me put it this way. Is there not a reasonable expectation that, in making a declaration under 2.1.2(a), a train operator will make that declaration in good faith?

MR HERBERG: Sir, the question of good faith only arises, as it were, once one looks at what the section means. Obviously, if you have to, under 2.1.2(a) and (b), actually state what your genuine intention is, and that is all the section is requiring you to do, then clearly we could not in good faith state an intention contrary to what was our actual intention. What I seek to persuade you of, Sir, is that the section must be viewed in a different way.

I accept that at first sight, when one looks at the

words themselves, it is not the natural interpretation, but I do say that you have to interpret this against the background of long term specific rights which we hold, for which we are paying, which effectively we are not in a position to exercise. I accept that, if one looks at the natural interpretation of the wording of 2.1.2, it appears that, well, you cannot state that you genuinely intend to exercise, therefore you cannot make that declaration. For the reasons I have already given, Sir, that is not the way we submit the section must be worded.

THE REGULATOR: You say that D2.1.2 is a gateway only and it is a gateway to 2.1.4?

MR HERBERG: Sir, yes, in the first instance. That is the next stage, as it were.

THE REGULATOR: But then 2.1.4 trips you up, does it not, because you have to have an intended date of operation of train slots so, whatever the nature of your rights under 2.1.2, do you not run into a brick wall under 2.1.4?

MR HERBERG: Sir, if I get past 2.1.2, I say I do not because the construction of "intended dates of operation of the train slots" must be viewed in the same way as "an intention to exercise firm contractual rights" under the previous provision.

THE REGULATOR: That has to be a good faith intention, does it not?

MR HERBERG: In other words, I say in both cases that we are entitled to declare an artificial intention. It is not as though it is going to deceive anyone, it is effectively stating that we wish to assert our rights, we wish to go through the bidding process, we wish to be timetabled, even if we do not actually intend to operate the trains.

THE REGULATOR: I have difficulty with this. What about the point about good faith? How can you make a declaration of intention to do something when you have no intention to do that thing and still be in good faith? Or is it your submission that it is not necessary to act in good faith?

MR HERBERG: Sir, we say the question of good faith does not

arise because we are entitled to make a declaration, even if we do not have an actual intention to run trains. Obviously, if I am wrong on that and we do have an actual intention to run trains, then we cannot in good faith make the declaration and I accept that my case does not go anywhere on the point.

Sir, I would seek to side step the question. I certainly do not say we are entitled to act in bad faith.

THE REGULATOR: That is just as well. I direct you to part A1.5 of the Track Access Conditions at the very beginning, page A8: The access parties shall, in exercising their respective rights and complying with their respective obligations under these Access Conditions, at all times act in good faith, including when exercising any discretion under them. That is paraphrasing it, but that is what it says.

MR HERBERG: I fully accept that.

THE REGULATOR: Yes, it is there.

MR HERBERG: And I accept the obligation applies to us as a party exercising rights under that Agreement.

THE REGULATOR: I cannot quite see how that gels with a false declaration, as Mr Choo Choy puts it, under D2.1.2(a).

MR HERBERG: Sir, the only way I can put it, and I am repeating myself, is that the way I would invite you to construe the section is not that it requires an accurate expression of genuine intention to run the service, but that that section can be exercised in an artificial way to reflect the intention to exercise one's collective rights under one's Access Agreement even if one does not have an intention.

Sir, I have made my submissions. I have not at any stage sought to suggest either that Eurostar is saying that it can act in bad faith or indeed that it is in any way seeking to deceive. It has already been open with Railtrack as to the basis on which it is making its assertion. It notified Railtrack as long ago as 1997 that it did not intend to run these services for the foreseeable

future, and at the time of this particular declaration it was clear that the coaches were not there. So it is not a question of being in any way deceiving Railtrack as to what it intended to do, but it is simply a question of whether it can make an artificial bid effectively by expressing an intention.

Sir, I do say that it is not a question of bad faith. It is a question of whether or not the contract permits Eurostar to exercise its rights in the way I contend.

Sir, those are the submissions on effectively what is the burden of the case and I think I can wrap up very briefly on the remaining aspects.

There was a heading "Railtrack's conduct", under which my learned friend raised a query as to the framework of those submissions. Those were primarily submissions in response to points made by Railtrack in the argument on paper, but they have not been advanced in oral submission, and it may be that they are not going to be determinative in any event.

There was a point made at paragraph 12 as to the basis on which Railtrack became aware that Eurostar did not have the rolling stock, but I do not want to make a big issue of this because I think we agree it does not affect the contractual analysis. We merely point out that Railtrack was in fact informed as long ago as July 1997 that there were now no plans to operate the services and that the arrangements have continued until the summer 2002 timetable with Eurostar's rights being inserted. I am not seeking to make any sort of estoppel argument or suggest that, because they have acted that way in the past, therefore they are bound in the 2002 timetable. So I do not think the point really is going to affect your decision.

There are two subsidiary points that Railtrack made and, unless my learned friend indicates when I identify them that he is pushing them, I will not respond to them. First, there was a point made as to an alleged offer to reinstate the firm contractual rights into the draft

timetable after the event, and what appears to have been suggested is that effectively that any breach is cured because there was an offer to reinstate. The short answer is that the right to reinstate an offer made without any validation so it would be an entirely different right. It would not respect Eurostar's firm contractual rights if it had any.

Sir, the second subsidiary point, again not referred to by my learned friend is the suggestion that Eurostar did not submit a bid for the relevant night slots at the bidding stage despite having been omitted from the draft timetable.

Again we say we believe we did put in a bid for the working timetable, as indeed we had in previous years, and we had always been inserted into the working timetable. But I think we would both agree that it is not relevant to the question of entitlement at the draft timetable stage what may or may not have happened at the working timetable stage. Logically it is after the decision under appeal is made and therefore I will not pursue that point further.

Sir, paragraphs 18 and afterwards I dealt with, Eurostar's reasons for requiring the rights to be recognised. Effectively, in argument on the earlier points, sir, I have already adverted to Eurostar's reasons, the commercial dispute that effectively lies behind the argument as to the rights for which Eurostar is paying, and I do not think I need add to those submissions.

THE REGULATOR: I need to understand the submissions though. What is the point about visibility? You make the point in line 4 of paragraph 19, that Eurostar had a good reason to require recognition of the FCRs through the bidding process to ensure continuing visibility. What does that mean?

MR HERBERG: We say essentially that if Railtrack is entitled to decline to timetable Eurostar bids in this situation then it of course can to all intents and purposes act as though the rights did not exist, notwithstanding that Eurostar continues to pay for them. But if Railtrack is

obliged to continue to timetable the rights in accordance with Eurostar's declarations and/or indeed its bids in the working timetable, it will render these rights visible in the sense that it will oblige Railtrack to allot to Eurostar validated paths as it has done in the past, and it will thereby render transparent any non-compliance with Eurostar's firm contractual rights, and its protected journey times in particular. So that, for example, if Railtrack seeks to timetable conflicting rights that will be obvious because it will effectively not be able to timetable validated paths for Eurostar's rights, as well as someone else's rights.

THE REGULATOR: What is the disadvantage of invisibility?

MR HERBERG: The disadvantage of invisibility to Eurostar is that it enables Railtrack to simply ignore Eurostar's rights.

THE REGULATOR: Eurostar has no ability to run the trains in those slots in the timetable period in question, but it may be that when Eurostar gets different rolling stock it could come back and indeed, Railtrack has acknowledged that it always can, but just because in a particular timetable period the slots contemplated in schedule 5 of Eurostar's access agreement, are actually being used for other purposes, does not mean to say that the rights under the contract have disappeared, they can always come back when Eurostar can make a compliant bid under D2.1.2 and D2.1.4. So just because for a particular timetable period or series of timetable periods, that capacity has been used for different purposes, it seems to me does not render the access rights of Eurostar invisible or unenforceable, or diminished in anyway. How could they be prejudiced?

MR HERBERG: Well sir, it certainly does not for the future, but the argument I make that therefore visibility is tied into the commercial significance of the dispute. It clearly does render the rights invisible, and entrenches on, we would say, on what are Eurostar's firm contractual rights for the timetable where competing rights are timetabled.

Of course, it is right that in fact Eurostar is not prevented in running any trains when it was not going to anyway if someone else writes a timetable. It is not in any sense prevented from actually carrying out any commercial operations which it would have otherwise carried out. The simple position that results is that if Railtrack is allowed to do that, and allowed to timetable the competing rights, then Railtrack is put in a position where it is able to ignore Eurostar's rights from time to time. I fully accept it was analysed this way in front of the timetabling committee, and when the timetabling committee accepted the strength of the submission the way in which Eurostar is damaged is that Railtrack is able simply to walk away from any negotiating table and say "we do not need to discuss with you on what terms this right might be surrendered, because we are fully entitled to ignore the rights and to timetable other services on top and to achieve payments for such services without any reference to you because we know you cannot actually run trains.

If your decision, sir, is that that is within their contractual entitlement then that is the end of it but if, as we say, we do have firm contractual rights which we can assert on the basis which I have argued then we say we are entitled to assert those rights even if we do not have a right to run the services, because the alternative is to be invisible, and effectively to be deprived of our bargaining position. That is the basis on which visibility is important.

THE REGULATOR: I see, well I understand the point. Let me put this point to you then. The visibility is there for the purposes of having a bargaining position. How can it affect my decision on the interpretation of this contract when there is a separate set of negotiations in relation to the change to the contract? I simply do not follow. You say that we need visibility, we need to have our rights respected and put in the timetable so that Railtrack have to listen to us and have to negotiate with us so as to

enable us to give up our rights under the contract and therefore change the contract. How can one party's wish to change the contract affect the question of the interpretation of the contract in the first place?

MR HERBERG: Sir, it should not do, and that was not the point of my submission. I fully accept that in a sense the contractual question comes first - that is the issue to be determined - and it should not be governed primarily by what the parties' objectives are in wanting to assert their rights. Either the rights are there or they are not, that logically precedes the intention for asserting the rights, and this section of my submission is partly perhaps a hangover from the way the case has been argued on paper, where Railtrack have made a point, why do you want to exercise these rights? There is no point in exercising these rights and this is effectively a response which shows what the objective is of exercising these rights, but I do accept that the primary question which you have to determine is whether or not there are any rights to be exercised.

THE REGULATOR: So the question of visibility and collateral negotiations appears to me to be irrelevant?

MR HERBERG: Sir, I think that is right. It is a response point on my part in the sense it has been put to us that in some way because we have no legitimate reason for wanting to exercise these rights that is, in some way, a defect of our case. I would accept that the primary question is the contractual one and that our reasons behind - as I say in my skeleton, sir, I say in paragraph 18 we say Eurostar was entitled to have its rights respected by the inclusion within the draft and/or working timetables, and then our reasons for requiring that its rights be respected are not legally relevant. We do not have to prove that its reasons for doing so are good or justified, still less that the public interest overall is in favour of Railtrack respecting its rights.

Sir, I am making the point, I think, there which you

are putting to me, which is that in a strict contractual sense the reasons for requiring the rights be respected are legally irrelevant, and it may be the reason I went on is because technically the point has been put against us. It may be that that is an issue which effectively does not need to arise on that basis. I accept what you are putting to me, sir, on that basis.

Finally, sir, there is the decision of the timetabling committee. You have seen, sir, the way the committee reasoned it. We say that although it is a fairly brief determination effectively the primary question was the contractual one and when it talked about negotiations between the parties what it was doing was drawing out the consequences of its decision rather than actually determining it on that basis. But since this decision is effectively a re-determination I do not see I need to detain you further by taking you through the actual wording of the decision.

Sir, unless I can assist you further, those are my submissions.

THE REGULATOR: Thank you. Mr Choo Choy.

MR CHOO CHOY: Sir, I hope fairly briefly. The point has been made by Mr Herberg that in construing the Track Access Conditions a number of the factual matrix ought to be taken into account, and he referred, for example, to the adverse financial consequences that would flow from Railtrack succeeding in its construction in relation to condition D2.1.2. He referred to the fact that the agreement is a very long one. He referred to the fact that but for acceptance of his construction Railtrack might be able to profit from post-contractual opportunities to do deals effectively with other train operators in relation to the slots they would in normal circumstances, perhaps, have been able to operate, and so on. None of those features, in my submission, is in any way relevant to the construction of Track Access Conditions.

The Track Access Conditions have to mean the same

thing in all the track access agreements, and that is why indeed it is expressly provided in the Track Access Conditions, condition A1.1(h) on page A2, that in the case of conflict between the track access agreement, and the Track Access Conditions the latter prevail. So the personal circumstances of Eurostar's position, or the particular level of the track charges that they have negotiated, or the fact that they have agreed to a contract under which they pay a fixed track charge per slot rather than a variable charge, all of these considerations are considerations which are in my submission not relevant, not helpful to the construction of what Part D is about.

Indeed the fact that if, for example, that had been the case that Eurostar would only have lost £10 a month, or nothing, even if we were right, could not have been prayed in aid by me for saying "You should accept my construction because the loss to them is absolutely minimal. Nor, would it have been relevant to my construction that Railtrack would have been totally incapable of profiting in any way from ad hoc deals, as it were, with train operators. All of these are collective matters which do not form part of the proper factual matrix that goes to the construction of the agreement.

The second point we want to make is that there is a distinction between the right to operate trains and the right to have something included in the draft timetable, or the right to have a train slot included in the draft timetable. The rights to operate trains are clearly defined in schedule 5, but the whole of the TAA, including therefore schedule 5, are subject to the Track Access Conditions, and therefore to state, as an a priori proposition that they have timetabling rights, they have rights to bid without looking at the Track Access Conditions, is putting the cart before the horse.

One has to look at the Track Access Conditions to see whether, on their natural construction, on their fair construction, the rights that are alleged to include not

simply rights to operate trains, but also to ask for timetabling are as Eurostar is effectively saying almost unqualified, because whatever restrictions are actually imposed in condition D2.1.2 their case is they can ignore those. All that they have to do is to say what they want. The moment they say what they want Railtrack has to put on blinkers and just do what they want.

That is what it boils down to. I will come back to condition D2.1.2 in a moment. They say effectively if (a) in 2.1.2 means in reality (b) it is not clear to me whether they would also say that (b) could mean (a). In other words, that if what is correct in relation to (a) that even though their private intention is not to operate trains they can nevertheless under (a) say that they do intend to operate trains.

If that reasoning is correct, presumably it could also mean that, in the context of (b), if they did not actually intend to operate trains, or rather if they did intend to operate trains, they could say, well, actually, we do not intend to operate trains and, if (a) means (b) and (b) means (a), the whole thing means nothing and it is a totally meaningless provision which cannot sensibly have been intended.

The whole analysis and approach to Condition D2.1.2 overlooks a fundamental point, which is that it is part of the process for the production of the draft timetable, which is itself a fundamental component, or one of the fundamental components of the bidding information. This document goes out to all bidders. Bidders in the light of that will assess what capacity there is on the network, will decide on the basis of that information what formal bids to make. It is not some totally artificial piece of paper which is only an advertising forum for all the rights in the world or all the rights that they can find in schedule 5, irrespective of whether they intend to exercise them.

So, quite apart from the fact that it is totally

absurd as a construction, it does ignore the purpose of the document which is a part of the bidding information.

Can I also address the question of circularity under Condition D2.1.2. I do not want to over-engineer the point because it was apparent from your comments that the circularity is plain for all to see. 2.1.2 can only make sense if the subject matter of the declaration is rights other than rights to make the declaration. Otherwise, ex hypothesi one would always intend to exercise the rights when operating under 2.1.2 and one would not have had 2.1.2(b).

Let us forget the expression "firm contractual rights" for a moment and let us simply talk in terms of rights because of the debate about the breadth of "firm contractual rights". Suppose 2.1.2 simply said "shall on or before the priority date notify Railtrack of those rights that they intend to exercise". Let us assume in their favour that that is all it says. The point I am making is that it can only be a right other than complying with the duty under 2.1.2. Otherwise, it would be wholly circular and would not make sense.

Now, if one accepts that, then one moves forward and asks oneself, OK, what is the content of those rights? What rights are being talked about here? The answer in my submission is plain and you get it from 2.1.2(i) over the page, which is, in the case of paragraph (a), the bidder must give an indication of the train slots that will be bid for in exercising those rights. So the rights are being defined by reference to the train slots.

One tests that further and one goes to Condition D2.1.4. Again, one finds that the rights that are being referred to in 2.1.4(a)(i) are rights on the intended dates of the operation of those train slots. Again, the answer is the same. It is rights to operate trains because ultimately the purpose of the draft timetable, and ultimately therefore the working timetable, is to show train movements. It is not to show the procedural steps

that have been taken by the parties in getting to the working timetable. It is actually to show the train movements, and that is why indeed the parties have not simply stated that the declaration ought to be in respect of simply rights that they wish to exercise. They have deliberately framed it by reference to the firm contractual rights which are themselves defined by reference to train movements.

As for Mr Herberg's suggestion that the words "in respect of" in the definition of "firm contractual rights" ought to be given a very wide meaning, effectively to include not just the actual rights under the Access Agreement, i.e. the TAA, but all rights whether to operate trains or to be consulted or to bid or to declare, that wide meaning just does not fit in with that definition. If the intention had been to include all of those rights, all the definition would have said would have been in the case of a bidder any right under the Access Agreement, not a right in respect of the quantum, timing or any other characteristic of a train movement.

It goes further than that because, if you look at the qualification in the definition of "firm contractual right", which is a right which is not expressed to be subject to any contingency outside the control of the holder of the right, that is a clear pointer to the distinction being made between a firm right or an entrenched right to operate a train, as opposed to what may be a contingent right to operate a train, or perhaps indeed some expectation of a right to operate a train. It is very difficult to tally that qualification, which is not expressed to be subject to any contingency outside the control of the holder of the right with a definition of "right" which is totally all-embracing in the way that Mr Herberg suggests.

So we do say that on its own the meaning of the expression "firm contractual rights" is obvious. But, quite apart from the definition, in the context of 2.1.2

and 2.1.4 there can be no doubt as to what rights are being talked about.

We do say that the correct construction of 2.1.2 is that it imposes an obligation on the bidder to make a declaration and that that limitation does constitute a limitation on the exercise of their firm contractual rights, but it is an interesting limitation because it is essentially self-imposed. It is one that does not derive in any way from what Railtrack does. It derives solely from the true intent of the train operator. So the contract is actually saying, "You have those rights but, if you do not intend to exercise them, we are not going to put you in the timetable".

The alternative argument is, well, if we Eurostar fail on all of these points, nevertheless we say that there is no mechanism here to allow Railtrack to decide to reject our non compliant declaration or our artificial declaration.

But there is an inconsistency in Eurostar's position on this point because on the one hand they say that they accept that Railtrack would have the power to decide whether or not a declaration of supposedly firm contractual rights was in truth a declaration of firm contractual rights, i.e. do those rights in fact exist? He accepts there is that power.

So the question then is, well, where is that power derived from? Answer, it can only be, in my submission, under D2.1.4, namely the requirement that priority is to be accorded to a declaration in accordance with Condition D2.1.2(a). There is nothing else in the contract that would allow one to find such a power.

Now, if that is the source of the power, then why is it limited to whether or not there are rights in respect of which the declaration is made but does not extend to whether or not there is a genuine intent as declared? The answer to that question, in my submission, is that there is no rational basis for limiting the power to one element of

the declaration but not to extend it to another. The short answer, surely, as a matter of common sense is that there is a power in relation to all elements of the declaration because it is the corollary of Railtrack's duty to ensure that the timetable is indeed prepared in accordance with the requirements of Condition D2.1.2.

That, in my submission, deals fairly conclusively with what Mr Herberg has put forward as his alternative argument.

Just by way of conclusion, I do make a point in relation to the repeated assertion that it is basically an awful deal for them because here they are with this bundle of rights that, either by reason of their own circumstances and for reasons totally unconnected with Railtrack they are unable to use, they find themselves in a position where they have to pay on their analysis in excess of £5.5 million a year for rights which they are not going to use.

The first point is that that is irrelevant as a matter of construction.

The second point is, if one is going to get into the economics of whether or not it is a good deal or a bad deal for Eurostar as opposed to Railtrack, it is an awfully complicated exercise. For all we know, the fixed track charges that Eurostar has managed to negotiate in respect of the slots that it does use could be thoroughly understated. But no-one is suggesting that we should all embark upon an analysis of whether one party as opposed to the other is getting more value out of the contract than the other. The reality is that the contract means what it says on an objective basis and, if it happens that Eurostar is, for reasons unconnected with Railtrack, unable to take advantage of certain rights, but entered into the contract on the basis that it would pay a fixed price for such rights, then in my submission it only has itself to blame. One can only assume that those who negotiated this contract had certain firm views as to which slots they wanted and which slots they were going to use and therefore

which slots they were prepared to pay a fixed price for. None of this commercial emphasis gets very far.

Sir, unless I can assist you further, those are my submissions in reply. I just want to check whether I have anything else on my learned friend's skeleton that I ought to come back on.

Just on paragraph 6 of his skeleton, where he says that Eurostar's entitlements under the 1994 TAA extend to the right to be treated in accordance with the bidding procedure set out in the Track Access Conditions, etc; this includes the right to bid and to make draft bids known as declarations as they are set out.

Well, quite. We accept that, but that begs the question as to what the procedures are and what conditions have to be satisfied before the right can be exercised. The point at which, in my submission, their stance really reaches the height of absurdity is in paragraph 10 of the skeleton argument where it is submitted towards the middle of that paragraph that Eurostar is entitled for its own reasons (discussed below) to assert these rights through inclusion in the draft and, if it wishes, working timetables, etc.

Indeed, that is the logical conclusion of Eurostar's argument, that, even in the working timetable, the timetable that is supposed to show actual train movements, they can insist on the inclusion of a set of bogus train movements simply for the purposes of satisfying what they perceive to be their totally unrestricted firm contractual rights, even in circumstances where they cannot make a genuine declaration of intent to exercise those rights. That, we say, is indeed the height of absurdity and cannot have been intended.

Just in passing, since the submission has been made against Railtrack in paragraph 12 on the point that Railtrack was informed as long ago as July 1997 that there were no plans to operate ENS services, etc, it is conceded that that is in itself irrelevant and that there is no

suggestion that there is any form of estoppel to alter what would otherwise be the construction of the Agreement.

But, just so there is no doubt about it, as you will have seen from the letter of 2nd August, the reason why Railtrack's stance changed in June 2001 was because at that stage it had become absolutely clear, by reason of their disposal of the rolling stock, that they were simply not going to operate the night services. You may say, well, from an evidential point of view, Railtrack's decision, if it were challenged before the Timetabling Committee under D5.1, would have been, or was felt at that point to be, pretty unassailable.

The second point on that is that one must also remember that the specific requirements of Condition 2.1.2 were only introduced in March 1999. The regime until then had been rather different.

Sir, unless I can assist you any further, these are my submissions.

THE REGULATOR: Thank you. I will issue my judgment in due course.

(The case concluded)